

**JAMIACA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CIVIL APPEAL NO. 16/05**

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.  
THE HON. MR. JUSTICE SMITH, J.A.  
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)**

**BETWEEN WINFORD LEWIS  
ROSETTA LEWIS APPELLANTS**

**AND NATURAL RESOURCES  
CONSERVATION AUTHORITY RESPONDENT**

**Ms. Judith Clarke for the appellants**

**Ms. Thalia Francis and Stuart Stimpson, instructed by the  
Director of State Proceedings, for the respondent**

**June 8, July 14, 2006 & December 20, 2007**

**PANTON, P.**

1. On July 14, 2006, we dismissed the appeal herein, affirmed the order of the learned Resident Magistrate, and awarded costs to the respondent. We had given our brief reasons then, and we now place them formally on the record.

2. On March 26, 2002, the respondent filed a claim against the appellants for infringement of the public's right to use the Treasure Beach also known as Frenchman's Bay, in the parish of St. Elizabeth. The claim was made pursuant to section 14(1) of the Beach Control Act and section 9 of the Prescription Act.

3. On October 24, 2002, Her Hon. Ms. Marlene Malahoo entered judgment against the appellants in favour of the respondent, and ordered the following:

“ (1) ... an injunction restraining the defendants from stopping members of the public from using the aforesaid beach.

(2) ... a declaration establishing the Public's right to use that portion of land forming part of Treasure Beach also known as Frenchman's Bay which forms part of that property belonging to the defendants to the North, bordered on the South by the Caribbean Sea, on the East by Land held by the Taylor's and on the west by the road adjacent to the defendant's property for fishing and for purposes incident to fishing and for bathing and recreation.”

4. At the commencement of the trial before the Resident Magistrate, the defendants stated their defence as follows:

- “1. Defendants deny that they have ever stopped or are stopping members of the public from using Treasure Beach also known as French Man's Bay.
2. Defendants deny that the public have the right to use that portion of their private property as describe[d] in Plaintiff's Particulars of Claims and state that Plaintiff's (sic) are not entitled to the Declaration sought.
3. Members of the public have never been in the habit of using that part of Defendants (sic) property between high water mark and fence facing the sea for fishing and or purposes incident to fishing and or for bathing and or recreation.”

5. Given the nature of the claim and the defence, it is necessary to set out the provisions of the relevant legislation.

Section 14(1) of the Beach Control Act provides as follows:

“The Authority may, upon receipt of a petition from not less than five persons concerned in any dispute with respect to the right to use any beach, or any land, road, track or pathway to gain access to such beach, lodge a plaint in the appropriate Court pursuant to section 9 of the Prescription Act with a view to establishing such right; and the Authority shall for the purposes of that section be deemed to be a person concerned in the dispute.”

Section 9 of the Prescription Act provides:

“Where the public or any class of the public have used any beach, land, road, track or pathway in the manner specified in subsection (1) of section 4 for the period mentioned in the said subsection and such user is disputed, any person concerned in the dispute may lodge a plaint in the Resident Magistrate’s Court for the parish in which such beach, land, road, track or pathway is situated (hereafter in this Act referred to as “the Court”) under section 99 of the Judicature (Resident Magistrates) Act and the provisions of sections 99 to 104 (inclusive) of the said Act shall apply to the matter in dispute.”

And section 4(1) of the Prescription Act reads:

“When any beach has been used by the public or any class of the public for fishing, or for purposes incident to fishing, or for bathing or recreation, and any road, track or pathway passing over any land adjoining or adjacent to such beach has been used by the public or any class of the public as a means of access to such beach, without interruption for the full period of twenty years, the public shall, subject to the provisos hereinafter contained, have the absolute and indefeasible right to use such beach, land, road, track or pathway as aforesaid, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.”

6. It was clear from the beginning that the result of this case before the learned magistrate would depend substantially on what view she took of the evidence presented. In other words, it was going to be a question of fact. Having listened to the evidence, viewed the documentary exhibits, and visited the locus with the witnesses, she concluded as follows:

“ I reject the evidence of the Defence regarding the location of the fence and wall. Further, I find, on a balance of probabilities, that the disputed area formed part of the beach, as defined legally, as shown on the attached survey diagram and as represented on the ground; and that the public, including the fishermen, had used it for fishing, or purposes incident to fishing, bathing or recreation, without interruption for, the full period of twenty years, prior to the dispute. I also find that the user was not enjoyed by consent expressly made for that purpose by deed or writing.” (page 204 of the record)

7. The appellants challenged the judgment on the following grounds:

“1. The learned judge erred in finding that the act of driving onto the Appellants’ Property was, in all the circumstances a “purpose incident, to fishing” within the meaning of the Prescription Act.

2. The learned Resident Magistrate erred in finding that Plaintiff’s user of the disputed area and in any event, of part of the defendants’ property was such as to entitle them to a right of way under the Prescription Act.

3. The learned Resident Magistrate erred in refusing to accept the Appellants evidence to the effect that the Respondent only began to use the disputed area of the Appellants’ property since 1999.”

8. The grounds of appeal, the skeleton arguments and the oral submissions, when condensed, indicate that the challenge to the judgment was in respect of the nature of the user, and the length of time of such user. Miss Clarke submitted that there was no evidence that there was in existence any road, track, or pathway passing over any land adjoining or adjacent to the beach. What has emerged from the evidence, she said, is that over time fishermen would roam the property to access the beach. There is nothing, she contended, to show that any path had been created over the appellants' land to access the beach. Miss Clarke was very critical of the finding of the learned magistrate that driving is a purpose incidental to fishing. She submitted that there was no evidence that any of the fishermen or any person through whom they could be claiming, had been driving for twenty years prior to the action, without interruption. The law, she said, is predicated on continuous user and acquiescence. She said there was an important distinction to be made, in that the particular user must be perpetuated over a period of twenty years, and acquiescence must be in the thing that is the particular user. Section 4 of the Prescription Act, she said, is to be read so that the quality of the user at the time of claiming the right is that same user which has continued for twenty years prior to the bringing of the action.

9. In response, in relation to the nature of the user, Ms. Francis referred to paragraphs 22 and 23 of the Resident Magistrate's reasons for judgment at pages 200 to 201 of the record, which are reproduced hereunder:

"22. ...Mrs. Mattis-Davis [counsel in the court below] argued that while it might be true that the fishermen *themselves* did not always *drive* along the beach or

through Black Sand Lane, *the act of driving*, by them, ought not to be looked at in isolation, but rather as a '*purpose incident to fishing*'. So, the argument ran, in the same way that it has been established on the evidence, beyond dispute, that fishing, as a trade, had evolved over time, (with a move from dugout canoes to sail boats to motorized vessels etc.), in like manner it had been established that the acts, which were done as '*purposes incident to fishing*', had evolved over time, too. With the expansion of the fishing trade and the move from near shore to deep-sea fishing, there arose the need to transport fish pots and ice, for example, to the boats, to take to sea. The ice was used to preserve the catch as the fishermen travelled over long distances to and from sea. Driving, in that context therefore, was done to facilitate the fishermen's transportation of their fish pots, (from where they were made, to the boats), gas, ice and other things called 'sea grub'. The pots were used to catch the fish, the gas to fuel the boat engines, the ice to preserve the catch and the 'grub' to sustain the men while they were at sea. Given the location of the boats on shore, the distance from shore out to sea where the actual fishing took place, the sizes of the pots, the weights of the ice blocks and the amount of gas, it was just not possible for the fishermen to carry out their trade without *driving* between their source of supplies and where they off loaded the supplies on the beach, to then load up the boats and head out to sea. Therefore, the act of driving was to be regarded as a '*purpose incident to fishing*.'

23. Mrs. Mattis-Davis' argument was quite convincing and the Court was persuaded by it."

In addition, Ms Francis submitted that in any event section 4(1) of the Prescription Act does not limit access to non-vehicular access. She contended that the criteria set out in the subsection have been met.

10. A review of the evidence presented by the respondent shows overwhelming support for the finding that there was an established path which had been used for a considerable time by members of the public, including fishermen, for the

purpose of access to the beach. The evidence of Leta Falconer was telling. She is a sister of the female appellant, and was sixty-eight years old at the time of the trial. She has lived in Treasure Beach for her entire life, and said that she had decided to give evidence on behalf of the respondent because she loved her community and wanted to see the people live in "perfect peace". She said that her father was a fisherman, and so too was his father. They used to fish at the beach in question. The appellants, she said, were trying to prevent fishermen from having access to the beach by building a wall which would prevent access to the area where the boats are kept. She recalled that members of the public used to drive on the beach without having to ask anyone for permission. Mr. Lincoln Gordon, aged 65, Ms. Sheila Hamilton, a Justice of the Peace, aged 68, and Subrant James, aged 55, also gave evidence which supported that of Ms. Falconer.

11. The Resident Magistrate accepted the evidence of these witnesses, and we see no reason to hold that she should not have so done. It is clearly unacceptable to say that the fishermen were merely persons who roamed the beach from time to time. So far as the nature of the user is concerned, the important point is whether the path was being used for access for the purposes suggested; it is not whether the access was by bicycle, foot, or motor vehicle. The evidence of user was overwhelming. The fact that the users have over the years changed their method of passing over the property is of no moment. This is particularly so when it is considered that there was no evidence to suggest that

there had been any significant action taken or adjustment done by any fisherman or other member of the public to facilitate access by motor vehicles.

In the circumstances, we concluded that the decision of the learned Resident Magistrate ought not to be disturbed.

**SMITH, J.A.**

I agree.

**MARSH, J.A. (Ag.)**

I agree entirely with the reasoning and conclusion of Panton, P., and have nothing further to add.