

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA**

PARISH COURT CIVIL APPEAL NO COA2021PCCV00012

BETWEEN	RALSTON MCNISH (PERSONAL REPRESENTATIVE IN THE ESTATE OF JEMITA PRYCE)	1ST APPELLANT
AND	FLOYD MORRIS	2ND APPELLANT
AND	GLASMINE MCNISH	3RD APPELLANT
AND	MARVIN CARTER	RESPONDENT

Arnaldo Brown instructed by Arnaldo Brown & Co for the appellants

Lorne Dwyer instructed by Ms Kerona Spence for the respondent

14 January 2025 and 31 July 2026

Land – Whether there was an interference with an easement, a right of way or a reserved road – Reference of dispute to surveyor – Whether learned Parish Judge’s findings failed to give requisite consideration to the surveyor’s report to determine the matter in controversy – Whether the learned Parish Judge’s findings of fact ought to be disturbed – Judicature (Parish Courts) Act, sections 98, 101 and 251

Civil procedure – Powers of amendment of a Judge of the Parish Court – Whether the learned Parish Judge erred in refusing to amend the plaint to reflect the appellants’ cause of action concerning interference with access over the reserved road – Judicature (Parish Courts) Act, section 190

MCDONALD-BISHOP P

[1] By an amended notice of appeal filed on 26 May 2021, Jemita Pryce, then named as 1st appellant, along with Floyd Morris (‘the 2nd appellant’) and Glasmine McNish (‘the

3rd appellant') appeal against the decision of His Honour Mr A Smith, Judge of the Parish Court for the parish of Saint Mary ('the learned Parish Judge'), made on 18 February 2021, whereby he ordered as follows:

- "I. **Trespass to Land:** Judgment for the Defendant
- II. **Nuisance:** Judgment for the Defendant
- III. **Interference with Easement:** Judgment for the Defendant
- IV. **Costs to the Defendant,** to be agreed or taxed.
- V. **Interim Injunction** ordered on the 29th day of July 2020 is hereby discharged." (Bold as in the original)

[2] Jemita Pryce passed away in January 2022. By formal order of the Supreme Court dated 10 January 2024, Ralston McNish was appointed as the personal representative of her estate and substituted as the 1st appellant to represent the estate in the appeal. As a result, a further amended notice of appeal was filed on 19 April 2024, reflecting the action brought by Ralston McNish as being "In the estate of Jemita Pryce". This court permitted it to be amended to read "RALSTON MCNISH, personal representative in the estate of Jemita Pryce". From this point onward, Ralston McNish and the 2nd and 3rd appellants are collectively referred to as "the appellants".

The proceedings in the Parish Court

[3] Given the outcome of the proceedings in the court below, the fact that there was no trial of the action in which evidence was given by the parties, and the issues raised for resolution in the appeal, it is considered necessary to provide a detailed background to the judge's decision and the challenge to it in this court.

The pleadings

[4] On 28 July 2020, the appellants initiated legal proceedings against Marvin Carter, the respondent, by filing a plaint note with particulars of claim claiming damages for

trespass, nuisance and interference with easement. They also sought injunctive relief, costs and attorney's costs.

[5] In their particulars of claim, the appellants asserted that over 60 years ago, Austin Pryce, deceased, purchased a parcel of land in the Bailey's Vale community ('the property') from Ivan Smith ('the vendor'). Exhibited to the particulars of claim was the certificate of title for the property, which was registered at Volume 974 Folio 275 of the Register Book of Titles. It was asserted that to access the property, the vendor provided Austin Pryce with an easement, which was used as an access road and which runs from the Bailey's Vale Main Road for approximately 300 feet to the property.

[6] For consistency and to avoid confusion, I will refer to this route as 'the reserved road', although the appellants described it in the pleadings by several terms, including "access road", "right of way" and "easement".

[7] The appellants stated that Austin Pryce died in 1985, and that the property was devised to his children, including Jemita Pryce, who became a legitimate user of the reserved road. Jemita Pryce was 91 years old at the time of the filing of the plaint. The 2nd appellant is a beneficiary of the estate of Jemita Pryce, his mother, and a user of the reserved road. The 3rd appellant, Jemita Pryce's daughter, occupies the property and also uses the reserved road.

[8] The appellants alleged that the respondent constructed a perimeter wall at the entrance of his property, which encroached upon the reserved road. Further, it was also claimed that this encroachment deprived them of their right of way and disrupted their quiet enjoyment of their property.

[9] The appellants stated that to prevent further encroachment on the reserved road, the 2nd appellant installed a chain-link fence along what he thought was the boundary of the reserved road. In July 2020, he also paved the reserved road, which he said was to facilitate easier movement for Jemita Pryce, who was then wheelchair-bound. The appellants claimed that the paved portion is in alignment with the measurements of the

reserved road as granted by the vendor, which enabled vehicular access throughout the entire reserved road.

[10] The appellants also asserted in their particulars of claim that on 22 July 2020, the respondent, through his agents, tore down the chain-link fence and began building a concrete wall, which further encroached on the reserved road and impeded the right of way. The appellants provided the original measurements of the reserved road as 6 feet wide at the entrance, narrowing to about 4 feet at its narrowest point, and increasing to 9 feet at its widest point where it meets the property.

The injunction and related proceedings

[11] On 28 July 2020, there was a hearing of what the learned Parish Judge noted to be a “Without Notice Hearing - Interlocutory Injunction”. The 2nd appellant gave evidence on behalf of the appellants. In essence, he repeated the central portions of the particulars of claim. However, he added one material element regarding the reserved road when he stated that:

“Based on my knowledge, it was of such that a motor vehicle would travel up the easement. So the easement could be anywhere over 6 feet based on the fact that a motor vehicle could travel up the pathway, not a large SUV...”.

[12] Although the heading of the learned Parish Judge’s notes of evidence records “Ms [K]erona Spence for the [respondent]”, there is no additional notation to suggest that she was present and participated in the hearing by cross-examining the 2nd appellant or making any submissions in opposition to the application. After hearing the evidence of the 2nd appellant and the submissions of Mr Arnaldo Brown, counsel who appeared for the appellants, the learned Parish Judge granted an interim injunction to stop the construction of the perimeter wall.

[13] On 11 August 2020, both Mr Brown and Ms Spence appeared before the court. The 2nd appellant was present. Ms Spence at that hearing challenged the jurisdiction of the court in granting the injunction and applied for the injunction to be discharged. In

advancing that application, she maintained that there was no easement involved as what the appellants were describing as an easement was, in fact, a reserved road that was owned by no one. Mr Brown disagreed, maintaining that what exists as the right of way to the property was an easement. The learned Parish Judge, after considering counsel's arguments, refused to discharge the injunction. He concluded, among other things, that there was a serious issue to be tried and so the injunction should remain in place.

[14] To address the disputed issue, the parties asked the learned Parish Judge to refer the matter to a commissioned land surveyor for resolution. Consequently, the learned Parish Judge, with the parties' consent, by a formal order dated 29 July 2020, referred the dispute to a commissioned land surveyor, Andrew I Gracey ('Mr Gracey' or 'the surveyor'). The matter was adjourned to await the report.

[15] A surveyor's report prepared by Mr Gracey was subsequently filed with the court on 24 September 2020.

The proceedings following the submission of the surveyor's report

[16] Adhering to the statutory procedural framework for dealing with a surveyor's reference, the learned Parish Judge, on 5 October 2020, set 13 October 2020 as the date for exception to be taken to the report by the parties. Of critical note is that a trial date had not yet been set. On 13 October 2020, counsel for the parties explicitly indicated that they took no exception to the report, and it was admitted into evidence without objection.

[17] The report confirmed a violation of the boundary line of the respondent's land *vis-à-vis* the reserved road and encroachment on the reserved road by the respondent's wall and excavation works.

[18] Despite no exception having been taken to the report, Mr Gracey was called on 13 October 2020 to give *viva voce* evidence. In answers to questions put to him, he stated, among other things, that the reserved road was 6 feet wide at the entrance and, in some places as wide as 9.6 feet. He reconfirmed that there had been an encroachment on the

reserved road by the concrete wall and excavated foundation erected by the respondent. This had reduced the width of the reserved road, with 4½ feet being the narrowest encroachment. He stated that he could not speak to the reserved road being used for vehicular traffic because he did not see any tracks or vehicles when he was there. However, he opined that any vehicle smaller than 6 feet could have used the reserved road, based on what was originally reserved. He testified that no area of the reserved road is now greater than 6 feet wide following the encroachment. In fact, the reserved road, he said, is far less than 6 feet wide due to the encroachment.

[19] Mr Gracey amplified the contents of his report and confirmed that the encroachment was on the reserved road and not on the appellants' property. Primarily as a result of this conclusion, Ms Spence submitted that the appellants did not have standing to pursue the suit as the encroachment was on the reserved road which did not belong to either party. She relied on **Noranda Jamaica Bauxite Partners v Mannasseh Thomas (Administrator of the Estate of Gerald Thomas) and another** [2020] JMCA Civ 1 and **Pamela Davis v McQuiney Card and others** [2012] JMCA Civ 39 (**'Pamela Davis'**).

[20] Both counsel then "urged" the learned Parish Judge to visit the *locus in quo* (the location of the dispute or the place in which the cause of action arose), to which the learned Parish Judge acceded.

[21] On 9 November 2020, there was a visit to the *locus in quo*, and Mr Gracey gave sworn evidence at the scene. He was questioned by both counsel and the learned Parish Judge. Only the 2nd appellant was present as a party to the action, but there is nothing on the record to show that he was required or invited to give any evidence.

[22] The case was adjourned to 23 November 2020, on which date both counsel made brief submissions. Again, the 2nd appellant was the only party present. For the respondent, Ms Spence submitted that a reserved road is not a right of way, without more, and argued that this was not a boundary dispute. She accepted, however, that it

was not disputed that the appellants (with their predecessor-in-title) had been on the property and using the reserved road for over 20 years. Mr Brown, for his part, insisted that the right of way is a type of easement and that the case is one of a boundary dispute.

[23] Subsequently, on 17 December 2020, counsel were invited by the learned Parish Judge to make submissions, in accordance with section 190 of the Judicature (Parish Courts) Act ('JPCA'), regarding an amendment to the cause of action from "interference with easement" to "interference with reserved road" ('the proposed amendment').

[24] Ms Spence objected to the proposed amendment arguing that the respondent was asserting from the outset that an easement did not exist and that the access was a reserved road. She submitted that, on the evidence of Mr Gracey, there was a minor breach of the reserved road that could be remedied, but it would be unfair to allow the appellants to amend their plaint to assert a breach of the reserved road. She further argued, relying on **Pamela Davis**, that the appellants did not own the reserved road. Counsel conceded that the access to the property created by the reserved road would be a right but submitted that **Pamela Davis** was distinguishable on its facts because, in that case, there was hindrance to access which is not the same in this case. She admitted the interference with the appellants' right to access the reserved road but maintained that it was not of the effect or degree for the appellants to "come and claim for damages". She further submitted that if the plaint was to be amended, then leave should be given to the respondent to file a defence and counterclaim.

[25] In response, Mr Brown argued that the proposed amendment under section 190 was appropriate in the interests of justice. What was important was the substance of the pleading and not the form, and there was no prejudice to the respondent. Counsel argued that the central issue of the action was whether there was an interference with a right of way in whatever form. He argued that it would be fair and just to the parties for the proposed amendment to be made.

[26] After considering the submissions from counsel, the learned Parish Judge delivered his ruling in the judgment handed down on 18 February 2021, from which this appeal arises. In that judgment, he found that the contemplated amendment would be one of substance and not form. He noted that the appellants were alerted at the first opportunity (the interlocutory injunction *inter partes* hearing with both counsel present), that the respondent's position was that the access road was a reserved road, but stridently maintained that it was an easement. The learned Parish Judge found that the proposed amendment, coming after the receipt of evidence and submissions, would create unintended consequences and unfairness to the respondent.

[27] Consequently, he proceeded to make the orders set out in para. [1] above backed by written reasons.

The appeal

[28] The appellants advanced five grounds of appeal in their further amended notice of appeal, which are:

- "1. The learned trial judge erred in law by not exercising his discretion to amend the plaint to take cognizance of the encroachment and any remedy thereby causing injustice to the [appellants].
2. The learned Parish Judge erroneously and wrongly concluded that the width of the access road was 4ft and gave rise to only pedestrian traffic on the part of the Appellants.
3. The learned Parish Judge wrongly made findings of fact concerning issues in dispute that no vehicular traffic could traverse the reserve[d] road.
4. Denial of reasonable accommodation, the ruling was received without it being accessible to 2nd Appellant who is blind.
5. Fresh evidence having regards [sic] to the status of the 1st and 2nd Appellants as joint proprietors in fee simple." (Underlining as in original)

[29] In broad terms, the grounds of appeal and submissions for the appellants mounted four heads of challenge to the learned Parish Judge's decision and orders, concerning: (i) the learned Parish Judge's refusal to permit amendments to the plaint (ground 1); (ii) the learned Parish Judge's factual findings and his approach to arriving at them (grounds 2 and 3); (iii) the accessibility of the learned Parish Judge's judgment to the 2nd appellant who is blind (ground 4); and (iv) fresh evidence as to the joint ownership of the property (ground 5).

[30] During his oral submissions, Mr Brown conceded the issues arising from the grounds of appeal relative to nuisance and trespass. Given those concessions, counsel directed his oral submissions primarily to the action for interference with an easement. Although the concession narrowed the relief available on appeal, the legal principles concerning nuisance remained relevant to the extent that interference with a right of way is treated as a form of private nuisance, as demonstrated in the analysis below.

[31] Before addressing the complaints raised under the grounds of appeal, it is necessary to identify the remit of this court on a civil appeal from the Parish Court.

The remit of this court and the standard of review

[32] The appellate powers of this court are conferred by section 251 of the JPCA. The section grants this court wide powers in treating with an appeal from the Parish Court, including the power to affirm, reverse or amend the judgment, order or decree; to enter judgment for either party as the case may require; and generally to make any order which ought to have been made by the Parish Court. The court may also remit the case to the Parish Court for rehearing and make such order for costs in the Parish Court, and on appeal, as deemed appropriate.

[33] The proviso to section 251 of the JPCA prescribes the standard of review in civil appeals. The relevant portion of the proviso is in these terms:

"Provided always that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect

of the judgment shall be to do substantial justice between the parties to the cause:

Provided also that an appeal shall not be granted on the ground of the improper admission or rejection of evidence...unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage of justice affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties."

[34] In essence, the proviso means that an appellate court should not interfere with the lower court's decision merely because there was some error, if the decision still achieved substantial justice between the parties. However, if an evidential error or procedural irregularity caused a substantial wrong or miscarriage of justice, the appellate court may intervene and tailor its relief to the affected part of the case or the affected parties.

[35] That statutory remit in reviewing an appeal in civil cases from the Parish Courts also operates alongside the settled principles governing appellate review of the exercise of discretion and findings of fact.

[36] As regards the exercise of discretion, the starting point remains the well-known statement of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and another** [1983] 1 AC 191. An appellate court is not entitled to interfere and exercise the discretion afresh merely because it would itself have reached a different conclusion. Interference is justified only where the lower court misdirected itself in law, misunderstood the evidence, took account of irrelevant matters, failed to take account of relevant matters, proceeded on a plainly wrong inference, or reached a decision so aberrant that no reasonable judge, properly directing himself, could have reached it. These principles have been repeatedly applied in this court, including in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, and remain the governing

approach where the complaint is that the court below wrongly exercised or failed to exercise a discretion.

[37] Where findings of fact are concerned, this court will interfere only if satisfied that the judge was plainly wrong. The well-known principles in **Watt or Thomas v Thomas** [1947] AC 484, **Industrial Chemical Co (Jamaica) Ltd v Owen Ellis** (1986) 23 JLR 35, and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, and the relevant cases cited by Mr Lorne Dwyer for the respondent, all point in that direction. The question is whether there was evidence upon which the learned Parish Judge could properly have reached the conclusions he did, or whether he materially misapprehended the evidence or proceeded on a wrong approach.

[38] When section 251 is considered alongside the common law principles regulating the court's review of exercises of discretion and findings of fact, the central and overarching focus of this court is whether the judgment below, in its effect, did substantial justice between the parties, or whether any error, irregularity or evidential misstep occasioned a substantial wrong or miscarriage of justice warranting appellate intervention. Thus, a finding that the lower court wrongly exercised its discretion or made erroneous factual findings may not suffice as a basis for reversing its decision unless a substantial miscarriage was occasioned.

Ground 1: "The learned trial judge erred in law by not exercising his discretion to amend the plaint to take cognizance of the encroachment and any remedy thereby causing injustice to the [appellants]"

[39] Mr Brown, on behalf of the appellants, contended, in short, that the learned Parish Judge erred in concluding that no easement existed and that given the intended purpose and the nature of the reserved road, an easement had been established. Counsel posited that a reserved road, in essence, constitutes a right of way, which qualifies as an easement.

[40] Counsel further argued that even if an easement did not exist, the JPCA nevertheless recognises rights of way, including those over reserved roads. Based on this,

he submitted that the learned Parish Judge was wrong to refuse the amendment to the plaint note to reflect this right, as acknowledged under the JPCA. In support of his submission, he relied on sections 190, 97, 98 and 101 of the JPCA.

[41] In his reply, counsel for the respondent, Mr Dwyer, accepted that an amendment to the plaint would be necessary to reflect the true nature of the appellants' claim. However, he maintained that the learned Parish Judge rightly exercised his discretion in refusing the amendment for the reasons stated in his judgment, including that allowing the amendment at the conclusion of the trial, after all submissions and evidence had been received, would be unjust, unfair, and prejudicial to the respondent. This would be so especially because the respondent had indicated from the outset that the dispute concerned a reserved road, not an easement. Mr Dwyer contended that permitting the amendment at such a late stage would introduce a new claim at the end of the proceedings, requiring different factual and legal considerations. He argued that if the claim were filed in terms of the proposed amendment, that would have impacted how the respondent presented his case, including his reliance on the surveyor's report without reserving any issues for determination by evidence, and further, may have warranted the filing of a defence or counterclaim. Therefore, he concluded that granting the amendment at a late stage would have placed the respondent at an unfair disadvantage.

[42] Although counsel did not specify the precise defence that the respondent would have deployed if the amendment had been allowed to replace the word "easement" with the word "reserved road", he emphasised the substantive legal difference between an easement and a reserved road. He explained that an easement requires the existence of a dominant and servient tenement and runs with the land. In contrast, a reserved road refers to a portion of land not owned or possessed by any individual but used to access surrounding properties, with no one able to claim ownership. He submitted that the land in question did not constitute an easement in the proper legal sense, as there was no dominant or servient tenement running with the lands.

Analysis and conclusion

The refusal to amend

[43] The challenge embodied in ground 1 partly relates to the learned Parish Judge's refusal to exercise the amendment power conferred by section 190 of the JPCA, which reads:

"190. The Judge of the Parish Court may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Judge of the Parish Court may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."

[44] At para. [37] of his decision, the learned Parish Judge gave detailed reasons for declining to allow the contemplated amendment. In short, he refused the amendment because the appellants had been alerted from the outset that the access was a reserved road but persisted in advancing the claim as one concerning an easement. He considered that amending the claim after the evidence and submissions had been completed would introduce different factual and legal issues, unfairly prejudice the respondent, and undermine the fairness of the proceedings as it would have introduced an amendment of substance and not just form.

[45] The courts have decided that this power under section 190 of the JPCA applies to defects or errors in form, but not to defects which are matters of substance (see **Powell v Spence** [2021] UKPC 5, para. 13 and **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6, para. [38]).

[46] In **Sydney Rowe v Michael Levy** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 31/2000, judgment delivered 16 May 2002, the

court confirmed that the power is not to be used to present an opposing party with an entirely new claim. The court reasoned:

“The circumstances of this case do not fit within the intendment of section 190 which is of relevance when there are defects or errors in form rather than substance. In the instant situation, the entire case of the respondent is defective. This is not a mere matter of form; it is a matter of substance. The respondent put forward a claim that has not been proven. To amend the particulars of claim by deleting the entire description of the property and its boundaries would be to present the appellant with an entirely new claim. That would not serve the ends of justice.”

[47] Therefore, the authorities have established the governing distinction. Section 190 is not to be used to cure a substantive defect by presenting the opposing party with an entirely new claim. Its purpose is to permit amendments necessary to determine the real question in controversy where the amendment does not alter the essential nature of the case. The character of the amendment in this case must therefore be assessed by reference to the pleadings, the evidence, the procedural course adopted, and the issue which the parties in fact litigated, to determine whether the proposed amendment was one of substance over form as concluded by the learned Parish Judge.

[48] The plaint states that the claim was for trespass, nuisance and interference with easement for breach of quiet enjoyment of land described in the particulars of claim. The particulars of claim then set out the substance of the plaint. It shows that the appellants asserted their right of access over an access road leading from the Bailey's Vale Main Road to their property. At paras. 5, 6 and 7, the appellants averred:

“5. That over 60 years ago, the late Mr Austin Pryce the father of the 1st [appellant] and the grandfather of the 2nd and 3rd [appellants] purchase a parcel of land from Mr. Ivan Smith in the community of Bailey's Vale St. Mary. A copy of the registered title volume 974 folio 275 is attached and marked exhibit 'JP2.'

6. The parcel of land purchased by Mr. Austin Pryce was to the back of the property owned by Ivan Smith and to access the acquired parcel of land, Mr. Ivan Smith gave Mr Austin Pryce an access road to take him to the property. A copy of the diagram illustrating the access road is attached and marked exhibit 'JP3.'

7. The access road runs from the Bailey's Vale Main Road for approximately 300 ft. to the parcel of land purchased by my grandfather."

[49] The access route was described at different points in the particulars of claim as an "access road", "pathway", "easement", "right of way" and "right of access". Those descriptions varied in legal precision, but they all pointed to the same physical route to the appellants' property. The complaint in the particulars of claim was that the respondent's wall encroached upon that route and impeded the appellants' access to their land. The following pleaded particulars make that plain:

"15. On July 22, 2020 the [respondent] through his agents **tore down the chain link fence and is proceeding to build a concrete wall which is encroaching on the access road and impeding the right of way to our property** there by [sic] trespassing **on our right of access to our land**, disturbing our quiet enjoyment and generally creating a nuisance.

16. In the premises we are seeking the intervention of the Court by exercising its injunctive powers to place a stop order on the construction of this wall in **violation of our right to access**.

17. We are seeking the declaratory power of the Court to declare that **we do in fact have the right to access our land and to declare the dimension of the said access consequent upon the relevant diagrams** placed before this Honourable Court or via whatever means the inherent jurisdiction of the court permits as reasonable." (Emphasis added).

[50] Then at the end of the particulars of claim (that I would call the 'prayer'), after detailing the nature of the claim, the appellants stated, in part:

“And the [appellant] claims against the [respondent]:

1. Trespass against property

2.. Nuisance

3. **Interference with easement**

4. Injunctive relief...”. (Emphasis added)

[51] The pleadings show that although the prayer referred to “interference with easement”, the complaint was about the respondent’s interference with the appellants’ only access road to their property.

[52] Furthermore, the documents filed with the plaint note include the pre-checked diagram bearing Survey Department Examination Number 151396, which shows an access road labelled as “Reserved Road” running from the Bailey’s Vale Main Road to the land bearing the name Austin Pryce (exhibits JP2 and JP3). Even on the basis of the documentary material accompanying the plaint and particulars of claim, it would have been clear to the respondent from the outset that what the appellants were referring to as an “easement” was the only access to their property reflected on the diagrams relating to the property – the reserved road.

[53] The same understanding that the appellants’ reference to easement is to the reserved road is reflected in the learned Parish Judge’s grant of the interim injunction on 11 August 2020.

[54] The learned Parish Judge granted the interim injunction and subsequently referred the matter to the commissioned land surveyor, Mr Gracey, on the footing that the complaint concerned an access route, described in varying terms in the pleadings. In making that reference, the learned Parish Judge used the compound description “access road” and “easement”. The material parts of the reference required the surveyor to ascertain the relevant boundary lines and to–

“...ascertain the original boundary of any access road/easement touching and concerning the lands and the extent to which that boundary has been modified and if so, in what manner and to what extent.”

[55] The surveyor was also to assess–

“...the practical extent to which any access road/easement enables the respective land owners to enjoy their properties in terms of access and enjoyment of lands. Further, the manner, if any, in which any action on the part of either party, has denied or limited this access/benefit.”

[56] That formulation demonstrates that, before Mr Gracey’s report was obtained, the court itself was treating the language of access road and easement as descriptions of the same subject matter: the only road that gave the appellants access to their land.

[57] The surveyor’s report obtained pursuant to the reference is equally instructive. It began by identifying the subject of the survey as “the reserved road represented and described in registered title at Volume 974 Folio 275 in the name of Austin Pryce for lands at Bailey’s Vale, St Mary”. The surveyor’s report then described the varying width of the reserved road in terms matching the appellants’ pleaded description and stated that the road runs between lands held or possessed by other persons, including the respondent, and terminates on lands in the name of Austin Pryce. It also recorded that the reserved road provides direct access to lands held by or in the possession of Jemita Pryce and to the lands registered in the name of Austin Pryce. Those findings correspond exactly with the factual route pleaded by the appellants.

[58] The report then addressed the location of the respondent’s perimeter wall and excavation in relation to that reserved road. It confirmed that the complaint concerned the same access route which the appellants had pleaded as their access road, right of way, easement or right of access.

[59] Indeed, the learned Parish Judge's own opening description of the case in his written judgment confirms the same point. The learned Parish Judge began his judgment by identifying the central feature of the dispute in these terms:

"This case concerns a dispute by neighbours of the Bailey's Vale community... **Central to this dispute, is a piece of land, later described by the Commissioned Land Surveyor, Mr Andrew Gracey and accepted by the parties during the trial as a 'reserved road'. This reserved road runs between the lands of the parties.**"
(Emphasis added)

[60] The learned Parish Judge acknowledged that it was accepted by all parties that central to the dispute was the "piece of land" that runs between the parties' land, giving access to the appellants' land and which the surveyor had described as a reserved road (consistent with the classification given in exhibits JP2 and JP3 attached to the plaint note).

[61] The learned Parish Judge also accepted, on the surveyor's report and the respondent's own admission, that the respondent's structure encroached upon the reserved road. The later description in the surveyor's report of the access road as a reserved road did not transform the complaint into a different cause of action or case to be answered by the respondent.

[62] Given all the above, there was no reasonable basis for mistaking the subject matter of the plaint and the substance of the action from even a cursory reading of the pleadings.

[63] In those circumstances, I am satisfied that the learned Parish Judge attached undue weight to the legal label "easement" used in the prayer, as distinct from the contextual and factual use of the term in the text of the particulars of claim, and insufficient weight to the substance of the pleadings, the supporting documents, the surveyor's reference and the evidence.

[64] Accordingly, the proposed amendment in this case did not have the prohibited effect identified in **Sydney Rowe v Michael Levy**. It would not have substituted different land, introduced a different encroachment, or required proof of a different set of facts. From all indications, the proposed amendment required no additional factual inquiry and would not have changed the basis of the claim. It concerned the same access route, the same encroachment and the same asserted right of access. It did not shift the dispute to different property or introduce a new allegation; it merely aligned the prayer with the pleaded facts, the documentary evidence and the uncontroverted surveyor's evidence.

[65] The appellants had interchangeably used the terms "easement", "access road", "right of way" and "right of access" as some of the descriptions of the same physical means of access from the Bailey's Vale Main Road to their land. The only term not used in the plaint to describe that access was "reserved road", but that was not fatal because, by the end of the case when the matter of the amendment was raised by the learned Parish Judge, there was ample evidentiary material before the court to show that the access road is the same as the reserved road.

[66] The distinction between an easement and a reserved road was not, by itself, determinative of whether the proposed amendment was one of form or substance. The relevant question was whether the amendment would alter the factual substratum of the claim or merely clarify the legal description of the same access route. It is not necessary, for present purposes, finally to characterise the reserved road as an easement. It is sufficient that the pleadings, supporting documents, reference, surveyor's report and submissions all concerned the same physical route, the same asserted right of access and the same alleged encroachment. On that footing, substituting "reserved road" for "easement", or adding "or reserved road" to the prayer, would have aligned the prayer with the facts already in issue. The learned Parish Judge was, therefore, wrong to treat the appellants' complaint as a new case once it was accepted that the access route in

dispute was the same route described by the appellants as an easement and by the surveyor as a reserved road.

[67] Nor was any material prejudice demonstrated. Although counsel for the respondent submitted that a defence or counterclaim might have been filed had the claim been framed as one concerning a reserved road, there is nothing to demonstrate that any available defence would have been lost by a change from “easement” to “reserved road”. The respondent’s position, even before the dispute was referred to the surveyor, was that the route in dispute was a reserved road and not an easement. The amendment would therefore simply have adopted the respondent’s own description of the access road as the reserved road.

[68] The learned Parish Judge therefore erred in treating the amendment as one of substance rather than form, contrary to the purpose and language of section 190.

The propriety of the distinction drawn between easement and reserved road

[69] The learned Parish Judge’s error did not end with the refusal of the amendment. The distinction he drew between an easement and a reserved road ultimately resulted in the finding that the appellants had not proved their case of interference with an easement or any cause of action, at all. Speaking specifically of the cause of action relating to an easement, at para. [32] of the judgment, he reasoned:

“... The law is clear: An easement is a right over the land of another. There is no evidence that the reserved road is owned by either party. Further, there is no evidence that this reserved road passes over the land of any of the parties. Whilst the reserved road adjoins the lands of the parties, it does not provide a right of way over their land. I accept the submission of the [respondent] and I find that that [sic] none of the accepted essential requirements for a valid easement are present. Accordingly, the [appellants] have failed to prove this cause of action.”

[70] Having examined this finding in light of the applicable law, I am of the view that the learned Parish Judge erred, in any event, when he rejected the appellants’ contention

that the reserved road operated as an easement, or at least as a right of way with similar characteristics.

[71] I accept that an easement ordinarily requires a dominant tenement and a servient tenement, in different ownership, and that the right must accommodate the dominant land (see **Re Ellenborough Park** [1956] Ch 131). I also accept that a reserved road, without more, is not automatically an easement merely because it is used for access. Those propositions were not in dispute before the learned Parish Judge. The difficulty lies in treating them as conclusive of the appellants' case without considering the facts pleaded and proved concerning the creation, location and function of this particular access route.

[72] On the uncontroverted facts, the reserved road bore the practical and legal characteristics of a right of way, as the appellants maintained throughout the proceedings. Mr Ivan Smith, the vendor from whom Mr Austin Pryce purchased the appellants' land, had set aside the road to give Austin Pryce access to the land sold to him, and it is so reflected in the documents relating to Austin Pryce's title as a reserved road. On that analysis, the reserved road, formerly owned by Mr Ivan Smith, was capable of functioning as the servient tenement, while Austin Pryce's land was the dominant tenement. Although the respondent's land may also enjoy the benefit of the reserved road, that did not negate the appellants' asserted right of access. Nor was it determinative that neither party to this action owned the road, since the pleaded case was that the access had been created by the original grantor who was the vendor of the appellants' land. The fact that the land was reserved by the vendor for access by the purchaser supports the formation of an easement and does not oust it.

[73] Additionally, the law has long recognised that an easement may arise by implication of law where both dominant and servient tenements have been in the common ownership of one person and one or other of the tenements has been disposed of by the owner (Halsbury's Laws of England, Third Edition, Volume 12, Part 4 para. 1245). Such rights of way are either reasonably necessary for the comfortable occupation of the

dominant tenement, or rights of way of necessity (see **Wheeldon v Burrows** (1879) 12 Ch D 31). The rule recognises that, on the grant of part of a tenement, there may pass by implication continuous and apparent quasi-easements necessary for the reasonable enjoyment of the part granted and used with it during unity of ownership. The broader principle was explained in **Pwllbach Colliery Company Limited v Woodman** [1915] AC 634, where Lord Parker recognised that easements may be implied where necessary to give effect to the common intention of the parties as to the manner or purpose for which the land granted or retained is to be used. A right of way of necessity may also be implied where, without it, the dominant land cannot be used at all, although such a right exists only where there is no other means of access, however inconvenient: see **Nickerson v Barraclough** [1981] Ch 426, cited in Halsbury's Laws of England, Third Edition, Vol 12, paras. 1245 and 1246. Rights of way of necessity are easements without which it is impossible to make any use of the dominant tenement.

[74] This court applied these principles in **Everad Crooks and another v Charles Browne and another** (1986) 23 JLR 475 (CA). In that case, the court held that a route identified as a reserved road on a subdivision plan was held to give rise to a right of way, in circumstances where a grantor disposed of part of commonly-owned land so as to leave a parcel landlocked. The court implied an easement of necessity. The dominant tenement was not identified from an express grant but from the surrounding facts, and neither the omission to record the easement on the certificate of title nor the fact that neither party owned the road was held to defeat the right.

[75] What matters in the present case is that the road served as the appellants' only access to their land. Mr Gracey confirmed that, of all the landowners using the reserved road, the appellants' land was the only one with no other means of access. Therefore, on the uncontroverted facts, it was not legally fanciful to treat the reserved road as giving rise to, or evidencing, a right of way capable of protection by the court. The description of the reserved road as an easement was not so legally untenable as to defeat their claim, nor was it so incorrect as to make the proposed amendment a new cause of action. The

claim could properly have been framed as interference with a right of way or easement within the land jurisdiction of the Parish Court under section 98 of the JPCA. In those circumstances, the amendment would merely have corrected the legal description of the same factual complaint; the substance of the cause of action would have remained the same.

[76] But, even if the final legal classification of the reserved road were left open, and even if it were not finally proved to be an easement, the learned Parish Judge was still required under section 190 of the JPCA to determine the real controversy between the parties and to make any amendment necessary for that purpose. That controversy was whether the respondent's established encroachment interfered with the appellants' asserted right of access to their property so as to entitle them to relief. On that basis, the proposed amendment was one of form, not substance. Section 190 was intended to operate in such circumstances and to prevent such a controversy from going unresolved because of what was, at most, a misdescription in the prayer of the plaint.

Conclusion on ground 1

[77] In the premises, I conclude that the learned Parish Judge erred in treating the proposed amendment as a departure from the plaint and as the introduction of a new cause of action. The substance of the appellants' complaint was interference with the only access route to their property. To deny relief because the plaint used the word "easement" to describe the reserved road, while the evidence established interference with the very route described as a reserved road, would allow form to defeat substance. Section 190 exists to avoid that result.

[78] By refusing the amendment, the learned Parish Judge prevented the court from addressing the appellants' real case against the respondent and failed to give proper effect to the purpose of section 190 of the JPCA. The respondent would not have been exposed to material injustice by that correction, whether by substituting "reserved road" for "easement" or by adding "or reserved road" to the existing formulation in the prayer

of particulars of claim because the factual basis of the complaint was clear to all parties and to the court from the outset.

[79] The learned Parish Judge's approach regrettably elevated form over substance and produced a result that prejudiced the appellants without corresponding prejudice to the respondent. As a result, the learned Parish Judge's decision on this aspect of the case failed to do substantial justice between the parties and on that basis is subject to interference by this court. Accordingly, ground 1 has merit.

[80] Grounds 2 and 3 will now be taken together as they concern findings made by the learned Parish Judge that led him to conclude that the appellants were not entitled to the remedy they sought.

Ground 2: "The learned Parish Judge erroneously and wrongly concluded that the width of the access road was 4ft and gave rise to only pedestrian traffic on the part of the appellants"

Ground 3: "The learned Parish Judge wrongly made findings of fact concerning issues in dispute that no vehicular traffic could traverse the reserve[d] road"

Appellants' submissions

[81] Mr Brown submitted that the learned Parish Judge erred in concluding that the original width of the reserved road was 4 feet. This conclusion, he argued, was incorrectly based on the width of the pavement built on the reserved road. Counsel contended that in doing so, the learned Parish Judge had failed to appreciate and understand the surveyor's report, which indicated that the current width of 4 feet was the result of the encroachment and was not the width of the original reserved road.

[82] Mr Brown further submitted that the learned Parish Judge misdirected himself by finding that the reserved road was being used for only pedestrian traffic, thereby ignoring the sworn evidence of the surveyor, who stated that the reserved road could facilitate vehicular traffic based on its originally reserved width. However, the learned Parish Judge noted that the surveyor could not confirm it had ever been used for that purpose, based on his own observation and knowledge. Therefore, counsel argued that on the evidence

before the court, it was not open to the learned Parish Judge to conclude that the reserved road was historically, solely for pedestrian use and could not have accommodated vehicular traffic.

[83] Counsel further challenged the learned Parish Judge's conclusion that the encroachment was inconsequential. While he accepted that this conclusion was made in the context of the learned Parish Judge's discussion on nuisance, counsel advanced the position that substantial interference is not required to establish an interference with a right over a reserved road. He nonetheless maintained that this finding by the learned Parish Judge that the encroachment was inconsequential was erroneous and contrary to the weight of the evidence. Counsel referred to evidence indicating that the original width of the reserved road was almost 10 feet at its widest and 6 feet at its narrowest. Given these measurements and the extent of the encroachment identified in the surveyor's report, he contended that there was a significant reduction in the width of the reserved road.

[84] It was also Mr Brown's submission that the learned Parish Judge had failed to adhere to the procedural requirements prescribed by section 97 of the JPCA, following the reference to the surveyor. He posited that the court was required to determine and fix the boundary in the settlement of the dispute based on the surveyor's findings. Mr Brown contended that the learned Parish Judge failed to address the issue of the encroachment and made findings that were inconsistent with the surveyor's report.

Respondent's submissions

[85] In response, Mr Dwyer submitted that the learned Parish Judge reasonably concluded that the reserved road was used solely for pedestrian traffic. He noted that the learned Parish Judge relied on the evidence of the surveyor, which indicated there was no sign of vehicular tracks, as well as his observation of the reserved road during his site visit. The learned Parish Judge found a well-defined dirt footpath that could comfortably accommodate two to three persons walking side by side down the pathway to the

properties of the appellants. On these bases, he submitted that the totality of the evidence supported the learned Parish Judge's conclusion.

[86] Addressing the complaint that the learned Parish Judge concluded that the width of the reserved road was 4 feet, counsel submitted that no such definitive finding was made. He contended that the learned Parish Judge relied wholly on the evidence of the surveyor on the width of the reserved road and accepted that its width varied along the path. Further, the learned Parish Judge clarified that the concrete pavement, a part of the reserved road, was estimated to be approximately 4 feet wide. Accordingly, counsel submitted that there was no factual or evidential basis for the claim that the learned Parish Judge erroneously and wrongly concluded that the width of the reserved road was 4 feet.

[87] Regarding the appellants' claim that the learned Parish Judge found that no vehicular traffic could traverse the reserved road, Mr Dwyer also argued that the learned Parish Judge made no such finding. He submitted that there was no evidence to support the assertion that the learned Parish Judge made such a finding. Counsel highlighted that the learned Parish Judge expressly declined to speculate or make inferences without evidential support. Counsel maintained that the learned Parish Judge concluded that there was no evidence that the road was intended to be used, was used or is being used to accommodate vehicular traffic, and this was arrived at based on the evidence provided by the surveyor.

[88] Mr Dwyer also contended that the appellants misstated the learned Parish Judge's findings and, consequently, failed to challenge the actual findings of fact of the learned Parish Judge. On that basis, he contended that no valid ground had been established for this court to interfere with the learned Parish Judge's findings of fact. He referred the court to what he posited were some relevant authorities, including the local cases of **Clarence Royes v Carlton Campbell** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005, and **Eurtis**

Morrison v Erald Wiggan (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005.

[89] Finally, concerning the severity of the encroachment, counsel accepted that there was some interference with the reserved road but maintained it was not so serious as to prevent the appellants from adequately enjoying or using it. He urged this court to weigh the relative prejudice to the parties when considering whether to grant the relief sought by the appellants.

[90] Counsel, however, did not address in any material way the argument that the proper procedure was not adopted by the learned Parish Judge.

Analysis and conclusions on grounds 2 and 3

[91] The starting point is the real controversy between the parties. Once the access route was accepted to be the reserved road, the question was whether the respondent had encroached upon that road and, if so, what was the extent and effect of that encroachment. The respondent did not state a defence to the claim in the court below. However, from the submissions of Ms Spence in the proceedings below, it seems that the respondent's position is that the existence of the encroachment was accepted and the sole question was the extent or degree of the resulting interference with the appellants' asserted right of way.

[92] The law treats an interference with an easement or right of way as a form of nuisance. In Halsbury's Laws of England, Third Edition, Volume 12, Part 4 at para. 1258, the following statement of principle is recorded, based on several authorities there cited:

"What amounts to disturbance. Any wrongful interference with a right of way constitutes a nuisance. As, however, a right of way never entitles a grantee, or those lawfully using the way under the grant, to the exclusive use of the land over which the way exists, it is not every obstruction of the way which amounts to an unlawful interference. No action will lie unless there is substantial interference with the easement granted. The effect of the grant of a right of way differs in

respect from a grant of the soil of the way, for in the latter case the slightest interference is a trespass.” (Bolding as in the original)

[93] The appellants, in pleading interference with their right of way or easement, were therefore required to establish substantial interference, just as proof of nuisance would require. The two causes of action were, to that extent, intertwined in this case. To that extent, I would not accept the submission of Mr Brown that substantial interference was unnecessary.

[94] The surveyor’s report was central to that inquiry, as its purpose was to ascertain the boundary of the reserved road, and the extent to which the right of way it created had been interfered with by the respondent’s erection of the wall. The report was obtained pursuant to a statutory reference under sections 98 and 101 of the JPCA, with the consent of the parties, and before the trial of the plaint had commenced.

[95] In the premises, it is evident that although the complaints advanced under grounds 2 and 3 are expressed as challenges to findings of fact, they do not merely invite this court to arrive at a different factual conclusion from that reached by the learned Parish Judge. They raise more fundamental questions as to the learned Parish Judge’s treatment of the surveyor’s report bearing in mind section 101 of the JPCA, the statutory procedure that followed the reference, and the evidence bearing on the width, use and obstruction of the reserved road.

[96] The questions are as follows. First, where the report was obtained by consent and admitted without exception, was the learned Parish Judge required to treat the surveyor’s findings on the existence, location and extent of the encroachment as settling the referred controversy? Secondly, did he err in relying on his own observations at the *locus in quo*, and on the absence of further evidence from the appellants, in a manner that diminished the effect of those findings? Thirdly, did he apply the wrong legal test by focusing on present pedestrian access and proof of actual vehicular use, rather than on whether the

respondent's works materially encroached upon, and reduced, the reserved access route to the appellants' detriment, including their future use of that route?

[97] Those questions determine whether the challenged findings were ordinary factual conclusions attracting appellate deference, or whether they were conclusions affected by misdirection in law and a misapprehension of the statutory procedure. They must also be considered in light of section 251 of the JPCA, for if the learned Parish Judge's approach to the evidence occasioned a substantial wrong or miscarriage of justice, the decision cannot stand.

[98] Accordingly, the question for this court is whether the learned Parish Judge's treatment of that report, its contents and all the related evidence, produced a result that accorded with the substantial justice of the case, consistently with the statutory remit governing appellate intervention.

The statutory procedure following the surveyor's report

[99] The surveyor's reference was made before the commencement of any trial, by virtue of the statutory procedure created by section 101 of the JPCA for resolving certain land disputes. Section 101 provides:

"101. In any suit under sections 97, **98** and 99 or in any other suit where it may be desirable for the purpose of determining the matter in issue, the Magistrate, if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor, or, with the consent of both parties, to some other fit person or persons whom he shall nominate; and the person or persons so appointed shall, under the control and direction of the Court, **make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands, or the right of way or other easement in dispute**, or such other matter at issue as aforesaid, and shall ascertain and settle the said boundary line or **right of way, or other easement** or matter as aforesaid, and shall, if necessary, make a plan or diagram of the said lands, indicating the boundary line, or the

right of way, or other easement or matter as aforesaid, and shall make report thereof to the Court, and shall file the report in Court; and the Court shall, on a day to be appointed for that purpose, take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear argument upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require: a Provided, that the Court may refer back the report to the persons who made it, or to any other surveyor or person nominated as aforesaid, for a further report, with such instructions as the Court may think fit to give, and on the making of such further report the Court may proceed as it might have proceeded on the first report.” (Emphasis added)

[100] At the stage at which the statutory reference procedure was invoked, no defence had been asserted by the respondent, either orally as required by section 184 of the JPCA or in writing under section 150 in the case of a special defence - the usual course of events at the substantive trial of a plaint.

[101] The record of the proceedings does not state the section of the JPCA under which the learned Parish Judge considered the matter when he made the reference to the surveyor. The learned Parish Judge, however, stated in his judgment that “section 97 is not relevant to the case at bar” because “this is not a dispute as to a boundary line” (see para. [13] of the judgment). Mr Brown maintained, to the contrary, that section 97 of the JPCA is applicable to the matter in dispute because it is a boundary dispute. It is, however, clear that the reference more suitably falls under section 98 of the JPCA, which applies to disputes as to “rights of way” or “any other rights or easements affecting any lands or tenements”.

[102] In any event, whether made under section 97 or 98, the terms of the reference brought section 101 squarely into operation. Section 101 was material not only to the terms of the reference but also to the manner in which the report was to be treated and to the scope of the inquiry thereafter open to the court.

[103] The foundation of the appellants' claim was the alleged encroachment on the reserved road. The surveyor's report addressed that matter directly. At paras. 4 to 7, Mr Gracey stated:

"4. The concrete wall along the northern portion of the north eastern boundary of lands held by or in the possession of Marvin Carter is not in accordance with the said boundary and is encroaching on the reserved road. The concrete wall is under construction.

5. The excavation for the foundation for the concrete wall along the north eastern boundary of lands held by or in the possession of Marvin Carter is also encroaching on the reserved road.

6. The eastern section of the concrete building located on lands held by or in the possession of Marvin Carter is encroaching on the reserved road along the northern portion of the north eastern boundary of the said lands.

7. The encroachment of the concrete wall and the excavated foundation on the reserved road has reduced the width of the reserved road."

[104] Once the report was filed, section 101 required the court to take it into consideration on the appointed day. Either party could take exception to it, and the court was then required to hear argument on any such exception and allow it, disallow it or confirm the report, as the justice of the case required. In this case, no exception was taken following the order made for that to be done. The report was then admitted into evidence without objection. In those circumstances, and in the absence of any reserved issue requiring further ventilation, the report ought to have been confirmed and treated as determinative of the matters of fact referred to the surveyor, although the legal consequences of those facts and the appropriate relief to be granted on the plaint remained for the court at the end of the hearing.

[105] The learned Parish Judge, nevertheless, proceeded to receive further evidence from the surveyor and later conducted a visit to the *locus in quo*, where the surveyor

again testified and was questioned by the court and the parties' legal representatives. None of the parties was called to give evidence in keeping with the procedural framework within which the matter was being addressed.

[106] Mr Gracey's *viva voce* evidence was also clear as to the varying width of the reserved road and the effect of the encroachment. The following evidence at page 26 of the record is material in assessing the learned Parish Judge's decision against the background of Mr Gracey's evidence regarding the encroachment:

"Question [Ms K Spence]: Is there any evidence that the road was used or is being used for vehicular traffic?

Answer: The indicators I would use are vehicular tracks. I didn't see any tracks or vehicles. I saw no evidence when I was there that the road was used for vehicular traffic."

Then, in response to the learned Parish Judge regarding use for vehicular traffic, Mr Gracey said:

"I cannot speak to it never being used for that. A small vehicle could traffic that road. Any vehicle smaller than 6 feet could use it based on the original reserve.

The encroachment now has reduced the width in some instances far less than 6 feet. The smallest distance that this encroachment has caused on the reserved road is 1.368m. Converting metres to feet by dividing by .3048 and that will work out to 4½ feet. That is the narrowest encroachment."

[107] The effect of this evidence is that, before the encroachment, the reserved road was capable of accommodating a small vehicle less than 6 feet wide. The respondent's encroachment reduced parts of it to approximately 4½ feet and, in some areas, substantially less than 6 feet. At the locus visit, Mr Gracey stated that a 9-foot section had been reduced by 5 feet, leaving approximately 4 feet available for passage. No part of the reserved road measured more than 6 feet after the encroachment; in fact, the evidence was that it was reduced to "far less" than 6 feet. Therefore, on any fair

assessment of the surveyor's report and evidence, the encroachment materially reduced the usable width of the reserved road.

[108] It must also be noted, in considering the surveyor's evidence, that there was no trial of the plaintiff, and no evidence was taken from the parties, for use in the proceedings, on past or current vehicular use, inconvenience, or the practical effect of the encroachment on their access. Within this context, the evidence given by the 2nd appellant, in support of the without notice application for the interim injunction, was not evidence that could properly be used in the section 101 statutory procedure hearing. In those circumstances, the learned Parish Judge was required to take care not to convert the statutory procedure under section 101 into a trial of issues which had not been reserved and in respect of which the parties had not been called to give evidence.

[109] The learned Parish Judge was cognisant of this limitation in the procedure he had deployed. This is evident because in treating with the case after the submission of the surveyor's report, he quite appropriately relied on this court's decisions in **Charles Swaby v Gerald Lyn** [2010] JMCA Civ 23 ('**Swaby v Lyn**') and **Lionel Golaub v Amos Walker et al** (1992) 29 JLR 238 ('**Golaub v Walker**') to deny the respondent's application to file a defence. In this regard, he stated at para. [6] of his judgment:

"[6]... The terms of the order of reference were agreed by the parties and no questions were reserved for determination by evidence. Accordingly, the law suggests that the parties were impliedly undertaking to be totally bound by the findings of Mr Gracey. To this end I disallowed the request of the defendant, who, on realizing the findings of Mr Gracey, requested time to file a defence. The strict process of an order for reference does not countenance the unsuccessful party offering contrary evidence, unless the order of reference specially reserved this question." (Emphasis added)

[110] Again, at para. [24] of his judgment, the learned Parish Judge himself rightly had regard to the governing principle in proceedings under section 101. There, he was treating with the respondent's challenge to the 2nd and 3rd appellants' legal standing in

the case. He expressly stated, demonstrating an awareness of the core principle from **Golaub v Walker**:

“[24]... I think the principle concerning ‘beneficiary under a will’, should wane in its applicability in this case, given the clear position of the parties, that the [appellants] are in actual possession of the land. **Further, the case authorities of Golaub and Whitelock v Campbell [n14: (1970) 12 JLR 67] inform me that I should not countenance these arguments once the [respondent] agreed to a surveyor’s report and reserved no questions for determination.**” (Emphasis added)

He correctly noted that there “are clear and settled principles as to the strictures of a surveyor’s reference” and so evidence from the parties was not permissible in the absence of a reserved issue for determination contained in the order of reference.

[111] In **Swaby v Lyn**, the reference to the surveyor was not made by consent in the same procedural framework deployed in this case, and there was an objection by the defendant to the surveyor’s report. Evidence had also already been taken before the reference was made. By contrast, in this case, the reference was made by consent before trial, no exception was taken to the report, and no evidence was taken from the parties before the reference or after the report was filed within the context of a trial in which evidence from the parties was received.

[112] **Golaub v Walker** closely bears on the present case. There, the appellant sued in trespass and sought injunctive relief. The respondents disputed his claim to the land. By consent, the matter was referred to a commissioned land surveyor to determine the boundary between the parties’ properties and to report on the position of the existing fence. The surveyor submitted a report. No question concerning a right of way or easement had been reserved in the order of reference. When the matter later resumed, the respondents sought to rely on a claimed right of way by prescription. The Resident Magistrate (as then-titled) accepted that new issue and found for the respondents.

[113] On appeal, this court held that the procedure adopted was erroneous. Rowe P, delivering the judgment of the court, treated sections 97 to 101 of the JPCA as central to the analysis. Relying on **Whitelock v Campbell** (1970) 12 JLR 67, he emphasised that, under section 101, it is the “matter in controversy” that is referred to the surveyor and that the purpose of the reference is to settle that dispute. Where the parties consent to the reference, they impliedly accept that the controversy between them was to be determined by the surveyor. This was subject only to any proper exception to the report or any issue expressly reserved for evidence.

[114] The same principle is reflected in **Cox v Shields** (1909) S C J B Vol 9, 89 Stephens Report 354, to which Rowe P referred. There, it was held that, after the surveyor had made his report, it was too late for an unsuccessful party to adduce evidence of a boundary acquiesced in, or of possession for the statutory period, unless the order of reference had specially reserved that question. The court will not permit a party, after an adverse report, to avoid the consequences of a statutory reference by raising evidence or issues that were not reserved. The court stated:

“Both the defendant and the solicitor then acting for him consented to the dispute being referred for determination under the provision of section 101. In my judgment, in doing so, they did not only admit that the sole matter in issue was the question of what was the correct boundary line according to the plan and diagram referred to in the order of reference but impliedly undertook to be bound by the findings of the surveyor, subject to any exceptions to the report as may be properly raised.”

[115] The material principles from these cases may be stated shortly. Where a dispute concerning a boundary, right of way, easement or other land-related issue is referred to a surveyor under section 101, the matter referred is the controversy to be resolved. A consensual reference ordinarily means that the parties accept the surveyor’s determination of that matter, subject to any proper exception to the report or any issue expressly reserved for evidence. If no exception is taken and no issue is reserved, the report is not merely another piece of evidence; it supplies the factual basis on which the

Parish Court is to proceed. A party may not thereafter avoid the consequences of the surveyor's report by raising a new or contradictory issue. If a legitimate matter arises outside the reference, the proper course is to refer the matter back or obtain a further report as the justice of the case requires.

In the present case, the reference was made by consent before any trial of the plaint had commenced. The controversy between the parties was whether the respondent's construction works had encroached upon the appellants' access route to their property and, if so, the effect of that encroachment. By consenting to the reference, the parties accepted that the surveyor's findings on those matters would provide the factual basis for the court's decision, subject only to a proper exception or a reserved issue. The scope of the reference was sufficient to encompass that dispute. Although the route was described by different labels, the physical subject matter remained the same: the access route to the appellants' property and the extent to which the respondent's works intruded upon it.

[116] Mr Gracey's report answered that question directly. He identified the route as the reserved road, confirmed that the respondent's concrete wall, excavated foundation and building works encroached upon it, and stated that the encroachment had reduced its width. Those findings went to the heart of the controversy and supplied the factual foundation for determining the appellants' complaint within the context of the applicable law.

[117] The respondent did not take exception to the surveyor's identification of the reserved road, his location of the wall and excavation, or his conclusion that those works encroached on and reduced the width of the road. Nor was any issue expressly reserved for later determination by evidence from the parties. In those circumstances, the case falls squarely within the principle stated in **Golaub v Walker** and the authorities there considered. The parties, having consented to the reference and having taken no exception to the report, were, according to the authorities (and the learned Parish Judge himself), impliedly bound by the surveyor's findings on the matters referred.

[118] The learned Parish Judge, therefore, ought to have proceeded on the basis that the encroachment and the reduction in the width of the reserved road were established as factual matters referred to the surveyor. The remaining task was not to retry those facts, or to require the appellants to prove them afresh by additional testimony. Rather, the court was required to consider the report, determine whether there was any proper basis for rejecting or referring it back, and then decide the legal consequences and make such order as the justice of the case required. Since there was no exception, no reservation in the order of reference, and no basis shown for rejecting the report, it should have been confirmed and treated as settling the referred factual dispute as contemplated by section 101. The learned Parish Judge did not follow the procedure required by section 101, having correctly identified the applicable principles from **Golaub v Walker** in para. [6] of his judgment.

[119] Instead, the learned Parish Judge ultimately based his decision on the following pronouncements:

"[26] At the time of my visit, this reserved road by its bushing, the clear dirt foot path (in part), amongst other observations, appeared as though it was being used for pedestrian traffic. The road has been reduced to a well-defined, two-three person, 'side by side' walkway and this assessment is independent of the accepted areas of encroachment identified by Mr. Gracey. Further, this finding is supported by a concrete pavement, seen just on the approach of the Plaintiff's property. This pavement is approximately 4 feet in width and was constructed by the Plaintiffs. **From all the evidence, this reserved road has, in part been reduced to a '2-3 person' unobstructed footpath.**

[27] There is no other way for the [appellants] to access their property, but for this reserved road. However, whilst I do not mean in any way to sanction the behaviour of the [respondent] with respect to this reserved road, **unfortunately in keeping with the usual course, the [appellants] opted not to give evidence in this matter, hence, there is no evidence that the access or**

egress of the [appellants] have been interfered with in any way, by the [respondent's] encroachment on this reserved road. There is no evidence as to when this encroachment commenced and neither is there any evidence as to its true effect on the right of the [appellants]. Further, the [appellants] represented by experienced Counsel, opted not to lead any evidence as to the inconvenience caused by this encroachment, more so, any evidence to substantiate a finding that this inconvenience interfered with their use of the land." (Emphasis added)

At para. [28], he continued:

"[28] I restrain myself from speculating or drawing inferences without evidence. Further, I find that all parties to the locus visit had a comfortable, unrestricted walk to and from the [appellants'] property. The surface of this road varied throughout and was in parts, rocky, gravelled, grassed over, paved and soggy. There was not one iota of evidence from observation that this road was being used for vehicle traffic or is being used for vehicular traffic. Neither was there any evidence that the past, present or intended use of the road was interfered with by this encroachment. On assessment, the road provides comfortable unrestricted pedestrian access to and from the property of the [appellants]. In light of the [appellants'] failure to lead any other evidence and based upon my assessment, I find in context to the cause of action claimed and the accepted encroachment on the reserved road is inconsequential. Accordingly, for the purposes of this cause of action, I am left without evidence to find otherwise: the [appellants] have failed to prove this cause of action."

[120] One main difficulty with the learned Parish Judge's reasoning is that it required the appellants to prove, independently of and in addition to the unexcepted surveyor's report, that the encroachment prevented vehicular passage or caused separate inconvenience. That approach was inconsistent with the statutory procedure adopted. Once the matter in controversy had been referred to the surveyor by consent, and the report established that the respondent's works encroached upon the reserved road and materially reduced its width, the court was not at liberty to treat those findings as provisional or inconclusive.

[121] The reliance on the absence of further evidence to deny the appellants relief also imposed a burden on them which the law did not require them to bear. Under section 184 of the JPCA, a civil trial begins with the defendant shortly stating his defence, after which the Parish Judge proceeds summarily to try the cause. That course was not followed. Accordingly, just as the respondent was not permitted to file a defence after the report, as the learned Parish Judge himself noted, the appellants could not properly be expected to lead further evidence under the same procedure. They should not have been placed at a disadvantage for failing to do so.

[122] Therefore, although the learned Parish Judge recognised the governing principles at paras. [6] and [24] of his judgment, regrettably, he failed to apply them when deciding the case.

[123] It should be noted too that a dispute concerning a right of way or other easement receives specific statutory treatment under the Parish Court's land jurisdiction, not merely as a common law tort. Under section 98 of the JPCA, it is explicitly stated that a plaintiff who proves the right of access and its unlawful interference is entitled to judgment. The statutory framework therefore required the court to determine that controversy relating to a right of way or easement directly.

[124] Regrettably, the learned Parish Judge approached the matter by reference to the wrong question. Since no issue was reserved for evidence, the question was not whether pedestrians could still walk comfortably along the road, or whether the appellants had led additional evidence of inconvenience. It was whether the respondent's works extended beyond the boundary of his land, encroached upon the reserved road and materially reduced the route over which the appellants had the lawful right of access. The surveyor's report answered that question in the affirmative. There was no pleading or evidence that the reserved road, when granted to the appellants' predecessor-in-title, was limited to pedestrian traffic, or to a footpath capable only of accommodating up to three persons walking side by side. Therefore, the absence of proof of prior use for vehicular traffic should not be used to confine the appellants to pedestrian access only.

The road was reserved as their only means of access, and nothing in the pleadings, documentary evidence or surveyor's report restricted their use to whatever portion remained after the encroachment.

[125] **Sketchley v Berger** (1893) 69 LT 754 supports that conclusion. There, the court treated building on part of a right of way as an unlawful interference because the grantee was entitled to the substantial enjoyment of the way as granted, not merely to the unobstructed portion that remained. The principle is that continued passage does not fully answer a complaint that the way itself has been materially narrowed or obstructed.

[126] In that case, the encroachment reduced the right of way from 10 feet to 3 feet. The court noted:

"If the plaintiff's mode of access to the piece of land at the back of the cottages were limited to the gate which has ever since the date of the conveyance been used by him, he could not have had much to complain of, but I do not think his mode of access is so limited. The right of way granted is not to the gate, but to the piece of land. The plan shows a frontage of the land in question to the extent of ten feet to the way or passage coloured blue, and in my opinion he is entitled to pass from his own land to the way at whatever point of his frontage that is most convenient to him."

[127] The point is therefore not whether some access remained, but whether the reserved way had been materially impaired.

[128] Applying that principle, the appellants were entitled to the substantial enjoyment of the route as reserved, not to the diminished passage left after the encroachment. Since their right was one of general access, and the reserved road was their only access to the land, they were entitled to use it in any convenient manner, subject to the rights of others. The material question was whether the unexcepted report established a material narrowing of that route, and in my view, it did.

[129] The learned Parish Judge therefore erred by shifting the inquiry to historic or actual vehicular use and present convenience for pedestrian use, rather than applying section 101 to the accepted findings of encroachment and reduction in the width of the road.

[130] That error was compounded by the treatment of the visit to the *locus in quo*. The visit could assist the court in understanding the report and the physical layout, but it could not displace or diminish the unexcepted findings of the surveyor. Comfortable pedestrian access did not answer the complaint that the respondent had built into the reserved road and materially reduced the width available for general access. Nor could the judge's observations substitute for evidence from the parties, where no issue had been reserved for trial. In the premises, the finding that the encroachment was inconsequential cannot stand.

[131] In any event, even if the learned Parish Judge could rely on his observations, they could not reduce the appellants' right to a residual footpath when they were granted an access route that could have facilitated vehicular traffic on the original reserved road. On the surveyor's evidence, the interference was sufficiently material to sustain the claim for unlawful interference with the reserved road.

[132] It follows that the learned Parish Judge's conclusion that the encroachment was "inconsequential" rested on a legal misdirection and a plainly wrong assessment of the surveyor's evidence. I, therefore, accept Mr Brown's submission that the learned Parish Judge erred in treating the interference as inconsequential. He treated what he viewed as the continued possibility of pedestrian passage as defeating the claim, instead of giving effect to the established encroachment on the reserved road. The result was inconsistent with the statutory procedure and the authorities he had recognised. **Golaub v Walker** makes clear that, absent an exception or reserved issue, the report supplies the factual basis for the court's decision. The learned Parish Judge, therefore, erred in failing to treat Mr Gracey's report as determinative of the encroachment and the material reduction in the width of the reserved road, and in substituting his own assessment at the *locus in quo*.

[133] I accept, however, that ground 2 somewhat overstates the learned Parish Judge's finding if read as alleging that he found the entire reserved road to be only 4 feet wide. His reference to 4 feet concerned the pavement constructed by the appellants. To that extent, the appellants attribute to him a finding he did not make. Even so, his broader analysis treated the continued availability of pedestrian access as diminishing the legal significance of the encroachment. That approach cannot be accepted. The critical measurement was the original width of the reserved road and the extent to which the respondent's encroachment reduced that width according to the surveyor's report. To that extent, there is merit in the complaint within the scope of ground 2 that the learned Parish Judge misapprehended and inappropriately treated with the surveyor's evidence.

[134] Ground 3 also has merit, though it must be approached with care because it does not precisely reflect the learned Parish Judge's finding. He did not find that the road had never been used for vehicular traffic. Rather, he accepted that there was an encroachment on the reserved road, but considered it inconsequential because pedestrian access remained comfortable, there was no observed evidence of vehicular use, and the appellants had not led further evidence showing that the encroachment interfered with their access or use of the road.

[135] For the reasons already given, however, further evidence from the appellants was not required once the statutory procedure under section 101 had been invoked to resolve the dispute under section 98. Furthermore, as already indicated, there was nothing to suggest that the road was only reserved for pedestrian use and not vehicular or other use.

[136] The pleaded case is important. The particulars stated in so far as the use of the reserved road for vehicular traffic is concerned:

“... The width of the pavement [built for wheelchair use] is in alignment with the measurement and **the path of the existing and longstanding right of way granted over the said parcels of land by the original owner which**

enabled motor vehicle[s] to travel through the easement." (Emphasis added)

[137] The pleading was that the reserved road enabled motor vehicles to travel through it. In the context where no evidence was taken from the appellants confirmatory of this averment, the important fact is that the surveyor's report and subsequent evidence supported the pleaded case that before the encroachment, a vehicle less than 6 feet wide could have used the reserved road.

[138] The learned Parish Judge, therefore, erred in treating the absence of evidence of historical, current or intended vehicular use as decisive. That was not the controversy referred to the surveyor. The real issue was the established encroachment upon the reserved road and the resulting material reduction in its width. That reduction affected the appellants' general right of access over the reserved road and could not properly be characterised as inconsequential merely because pedestrian access remained possible.

Conclusion on grounds 2 and 3

[139] I would, therefore, hold that ground 2 succeeds to the extent that the learned Parish Judge misapprehended the effect of the surveyor's evidence concerning the width of the reserved road and the significance of the reduction caused by the respondent's encroachment. Ground 3 also succeeds to the extent that the learned Parish Judge treated the absence of proof of actual or intended vehicular use as decisive, when the real issue was the established and admitted encroachment upon the reserved road and the consequences of the reduction in its width. The grounds, therefore, succeed, in part, because the learned Parish Judge's treatment of the evidence, and of the absence of further evidence from the appellants, failed to do justice between the parties.

Ground 4: "Denial of reasonable accommodation, the ruling was received without it being accessible to 2nd appellant who is blind"

Ground 5: "Fresh evidence having [regard] to the status of the 1st and 2nd appellants as joint proprietors in fee simple"

[140] I do not minimise the importance of reasonable accommodation in court proceedings to facilitate court users who are visually or otherwise physically challenged. However, ground 4 does not identify any error in the learned Parish Judge's reasoning or any way in which the alleged lack of accessibility of the ruling to the 2nd appellant affected the determination of the plaint or the orders made. No material has been placed before this court to show that the alleged procedural disadvantage occasioned a substantial wrong or miscarriage of justice within the meaning of section 251 of the JPCA. Ground 4 therefore provides no basis for the intervention of this court.

[141] Ground 5 is equally incapable of affecting the outcome of the appeal. The proposed fresh evidence concerning the status of the 1st and 2nd appellants as joint proprietors in fee simple does not bear on the decisive issues that arose on the appeal. Those issues concern the respondent's encroachment on the reserved road, the learned Parish Judge's refusal to permit the amendment necessary to determine the real controversy, and the proper treatment of the surveyor's report. The proposed evidence does not undermine or materially alter those matters and so has no bearing on the appeal.

[142] Grounds 4 and 5, therefore, do not advance the appellants' case and disclose no basis for concluding that the learned Parish Judge's orders occasioned a substantial miscarriage of justice. These grounds fail.

Disposition of the appeal

[143] The conclusions on grounds 1, 2 and 3 are dispositive of the appeal.

[144] It follows from the foregoing conclusions that the judgment entered for the respondent on the claim concerning interference with the appellants' access over the reserved road cannot stand. The learned Parish Judge ought to have permitted the amendment necessary to determine the real controversy between the parties. His approach elevated form over substance and prevented the real controversy from being determined. Accordingly, the refusal to amend did not do justice between the parties to insulate his decision from appellate intervention.

[145] Additionally, on the strength of the accepted surveyor's report, the learned Parish Judge ought to have treated the respondent's encroachment and the material reduction in the width of the reserved road as established. It would not be just to leave the respondent to benefit from building outside the boundaries of the land he occupied and onto a reserved road intended to provide general access to the appellants, who had no other means of access. The fact that pedestrian access was still possible was not determinative of the extent and lawfulness of the interference. Accordingly, the failure to give effect to the unexcepted surveyor's report, which was amplified by the evidence from the surveyor, failed to do justice between the parties. This court is, therefore, justified in interfering with the decision in accordance with section 251 of the JPCA.

[146] I should add that this conclusion does not disturb the learned Parish Judge's dismissal of the claims in trespass to land and nuisance. Those claims were not pursued on appeal in any substantive way, as counsel for the appellants expressly conceded the grounds relating to them. The appeal should, therefore, be allowed only to the extent necessary to correct the learned Parish Judge's refusal to amend the plaint and his treatment of the claim concerning interference with the appellants' right of access over the reserved road. The orders dismissing trespass and nuisance should accordingly be left undisturbed, notwithstanding the highlighted overlap in principle between nuisance and unlawful interference with a right of way.

[147] For the preceding reasons, I would allow the appeal and set aside the orders made by the learned Parish Judge in so far as they relate to the claim for interference with the appellants' right of access over the reserved road, the consequential discharge of the injunction, and costs. I would allow the amendment that should have been granted and make the orders necessary to give effect to the finding that the respondent's wall and building works encroached upon the reserved road, materially reduced its width, and ought to be removed. Accordingly, I propose that the following orders be made the final orders of the court:

1. The appeal is allowed, in part.

2. Considering the concession of the appellants, paragraphs I and II of the orders made by His Honour Mr A Smith in the Parish Court for the Parish of Saint Mary on 18 February 2021, entering judgment for the respondent on the claims for trespass to land and nuisance, are undisturbed.
3. Paragraphs III, IV and V of the said orders regarding the claim for interference with the appellants' right of access over the reserved road, costs and the discharge of the injunction, are set aside.
4. Paragraphs III, IV and V of the Parish Court's orders are substituted as follows:

"III. The boundaries of the parties' respective lands in relation to each other and the reserved road, the subject matter of the plaint, are as established and shown by the sketch plan and pre-checked survey diagrams prepared and submitted by commissioned land surveyor, Andrew I Gracey, pursuant to the order of the Parish Court made on 29 July 2020.

IV. Judgment is entered for the plaintiffs on the plaint for interference with their right of access over the reserved road, the plaint being amended accordingly.

V. A mandatory injunction is granted to the plaintiffs ordering the defendant to remove the concrete wall, excavated foundation and any part of the concrete building found by the surveyor to encroach upon the reserved road, within 60 days of the date of this order.

VI. A perpetual injunction is granted restraining the defendant, whether by himself, his servants or agents, from interfering with the plaintiffs' access over the reserved road, except to the extent necessary to remove the existing encroachment within the time specified above.

VII. Costs of the plaint are awarded to the plaintiffs, to be agreed or taxed."

5. Costs of the appeal to the appellants in the sum of \$100,000.00.

FOSTER-PUSEY JA

[148] I have read, in draft, the judgment of McDonald-Bishop P and agree with her conclusions and orders. I have nothing to add.

LAING JA

[149] I, too, have read the draft judgment of McDonald-Bishop P and agree. I have nothing to add.

MCDONALD-BISHOP P

ORDER

1. The appeal is allowed, in part.
2. Considering the concession of the appellants, paragraphs I and II of the orders made by His Honour Mr A Smith in the Parish Court for the Parish of Saint Mary on 18 February 2021, entering judgment for the defendant on the claims for trespass to land and nuisance, are undisturbed.
3. Paragraphs III, IV and V of the said orders regarding the claim for interference with the appellants' right of access over the reserved road, costs and the discharge of the injunction, are set aside.
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IV. Judgment is entered for the plaintiffs on the plaint for interference with their right of access over the reserved road, the plaint being amended accordingly.

V. A mandatory injunction is granted to the plaintiffs ordering the defendant to remove the concrete wall, excavated foundation and any part of the concrete building found by the surveyor to encroach upon the reserved road, within 60 days of the date of this order.

VI. A perpetual injunction is granted restraining the defendant, whether by himself, his servants or agents, from interfering with the plaintiffs' access over the reserved road, except to the extent necessary to remove the existing encroachment within the time specified above.

VII. Costs in the Parish Court are awarded to the plaintiffs, to be agreed or taxed."

5. Costs of the appeal to the appellants in the sum of \$100,000.00.