

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1996/21

In the matter of :-

Siwah Vellin Bhurtun

Appellant

v/s

District Council of Pamplemousses

Respondent

IPO

Jean Pierre Thomas

Co-respondent

DETERMINATION

1. This is an appeal against the decision of the District Council of Pamplemousses [‘the Council’] for having refused the Appellant the granting of a Building and Land Use Permit [‘BLUP’] for the conversion of an existing ground floor building to be used as diving centre off Pointe Aux Piments-Mon Choisy Coastal Road B38, Trou aux Biches. The sole ground of refusal as per letter dated 22nd September 2020 under the signature of Mrs. V. Busgeeth, Head of Land Use Planning Department of the Council is
“CONSENT AND NIC OF OWNERS OF THE PROPERTY (OVER WHICH THE APPLICANT HAS A 0.9M WIDE RIGHT OF WAY) HAS NOT BEEN SUBMITTED.”

2. The Appellant was *inops consilli*. The Appellant has lodged 5 grounds of appeal which are reproduced hereunder:

1) *Prior to the decision of conversion of my house into a diving center I have asked the owner Mr. Jean Pierre Thomas about the use of the right of way for my diving clients and there was no objection on his side. He even put an advertising notice on the gate for us.*

2) *Our house which is, part of Trou aux Biches fishing village, existed long before he bought the land where he built his house. And part of this land was our passage, approximately 4 meters wide, to the sea and the main road to transfer our fishing equipment from the sea to our house and storing our boat in safer place during cyclone. When he bought the land he declared our house enclave and only when we insist for a passage that he give us a right of way of only 0.9 meters wide.*

3) *The district council should have made provision for my right of way before giving the permit to build his house and the right to open two giant windows on my passage. Has he not been given the right to build his house and open the said windows on passage there would have been no problem. The district council should review this decision.*

4) *The objections made by the Co-respondent are all frivolous, for example making noise when my clients walk, looking through the windows, wearing swimming trunks. We work only from 830 am till 4pm and very rare till 8pm. I have more than 200 neighbors and the dive center and the passage have never been a source of nuisance to anybody.*

5) *I, too, have got the right use my property and to earn my living as any honest person. My house is within 40 meters from the sea. Eventually my embarkation point and my diving sites are very here. The work of diving is not being done in the premises but in the ocean. My house is just a place to keep my equipment safe and to meet my clients who are very few, ten maximum daily. For the last twenty five years I have been operational in the area, we never had any complaints from the Authority, local community and from our clients.*

The Respondent and Co-respondent were legally represented. We have duly considered all evidence before us as well as the submissions of both counsel.

I. CONTEXT ANALYSIS

3. The undisputed facts are that Mr. Bhurtun's property lies right behind that of Mr. Thomas whose frontage is bordered by the Coastal Road of Trou Aux Biches, which is the main road, as per plans produced. The only access to the main road from the house of Mr. Bhurtun is through a right of way of 0.9 metres found on the property of Mr. Thomas. Mr. Thomas' property obtained its development permit in 1989 and the house was built in 1991. On the 11th November 1991, Mr. Thomas' parents entered into an agreement before the notary to give one Mr. Lareinté, the previous owner of the Appellant's property, a right of way of 90cm to the Coastal Road of Trou aux Biches "à titre perpétuelle et gratuit" on the basis that Mr. Lareinté's plot of land was "enclavé". The property of Mr. Lareinté passed hands and subsequently, on the 23rd June 2015, Mr. Bhurtun bought the plot of land in question from one Mrs. Marie Josée Mardiapoullé as evidenced by his title deed, Doc D. The title deed of Mr. Bhurtun states that the property is "enclavé" and that the property "n'a pas de chemin de sortie sur la voie publique", hence the right of way granted.

II. THE GROUNDS OF APPEAL

4. It is the contention of the Appellant, under ground 1, that he had obtained the verbal consent of the Co-respondent prior to converting his house into a diving centre and that the latter had even put an advertising notice on the gate for the diving centre. This is denied by the Co-respondent. The Appellant was not consistent in his testimony on the issue of consent. At first, he stated that he had obtained the verbal consent of the Co-respondent but later he stated that since his title deed mentions that he has a right of way through the property of the co-respondent, there is no need for him to seek the consent of the ~~Appellant~~ ^{Co-Respondent}. He also agreed he did not have the written consent of the Co-respondent. Whether or not an advertising notice was placed on the gate of the Co-respondent by the latter, is besides the point. The fact of the matter remains, as the evidence reveals, that at the time the Appellant made the application for a BLUP, no consent was given by the neighbour, that is, the Co-respondent, for the Appellant's diving clients to use the right of way.

5. True it is that as per the Appellant's title deed, Doc D, there is a provision for a right of way from his property to the Coastal Road of Trou aux Biches through the residential property of the Co-respondent but that was inserted so that the Appellant's property is not "enclavé". When a right of way is granted for residents, it is meant for use by those living on the premises and their invitees but cannot extend to the public at large or third parties who make use of it for commercial purposes. The Appellant stated that his business extends to clients who come from abroad but that it is also open to locals. He wants to have this commercial enterprise on the subject site whereby his business will be open to the public at large including tourists. The Co-respondent supported his refusal to give consent to the Appellant on the basis that he already had firsthand experience of the nuisance caused to him with having the Appellant operate the business till date without a permit. Conversely, the Appellant claimed he had ceased operating his business following a Judge's order against the operation of his diving centre without a proper licence. The Co-respondent also stated that he objected to the Council against the proposed development. Therefore, we are of the view that at the time that the application was made by the Appellant the Co-respondent did not consent to it and his stand has not changed since. This ground therefore fails.
6. Ground 2 of the grounds of appeal amounts to no ground of appeal in as much as it does not set out what the Appellant's grievance is against the decision-maker and is therefore disregarded.
7. Under ground 3, it is the contention of the Appellant that the Council failed to consider the presence of the right of way before granting the Co-respondent a permit to build his house with the right to have two windows opening onto the passage which is the root cause of the problem and that the Council should review its decision. We are unable to consider this as a valid ground of appeal in that the Appellant seems to be harbouring under the misapprehension as regards the impugned decision. The case at hand is a challenge of the Council's decision for not granting a BLUP to the Appellant for conversion of his residential property into one of commercial use. We are not here to judge the decision of the Council or the building plans in granting a permit to the

Co-respondent in 1989 to build his residential property as per his development permit, Doc E. This ground is therefore set aside for being frivolous.

8. Under ground 4, it is the contention of the Appellant that the objections made by the Co-respondent are all frivolous. The Appellant's case is that he has never received any complaints for nuisance from any of the neighbours, some 200 of them, living in the area, as regards the operation of his business or usage of the right of way except from the Co-respondent. He testified to the effect that he stopped working since 2017 following the Judge's order and that he used to work only from 830am till 4 pm and that his work is mostly done at sea and that normally his business involves some 10 people daily including himself and a worker. The Co-respondent, for his part, testified as to the fact that he objected to the Council to the proposed development from the very beginning due to the nuisance that is being caused to him and his family with Mr. Bhurtun's business operation. He complained about the fact that all of Mr. Bhurtun's clients use the 90 cm right of way to have access to the beach through his property, they talk loudly and make a lot of noise, his children cannot sleep nor can they open the windows in the children's room because those using the access of 90 cm can see inside his house and that clients wear inappropriate clothing. He also stated that his children cannot play in their compound because of all the heavy equipment for diving which is carried through his premises for Mr. Bhurtun's diving centre. Mr. Bhurtun denied these averments and stated that his clients wear beachwear and diving gear.
9. The main problem for the Co-respondent stems from the location of his house, which is right in between of the Appellant's house and the main road such that both parties would be affected by each other's daily activities to some extent. But the issues seem to arise mostly because of the goings and comings of members of the public through the Co-respondent's premises, the moreso as the access is limited to a width of 90 cm which takes them very close to the Co-respondent's house leading to visual intrusion as well as invasion of privacy.

10. We believe having so to say unfamiliar faces going through one's property everyday, infringes the Co-respondent's and his family's right to enjoy their property. As stated earlier, a right of way can be used by the one who has the right to use it and by extrapolation it can be extended to family members and guests but it cannot be open to the public at large more so for commercial purposes. What one has to bear in mind is that the right of way is still part of the property of the Co-respondent upon which the Appellant has, agreeably, been granted an easement to have a "droit d'usage". That does not render the access, the Appellant's property. But with the issue being the operation a diving centre, allowing the Appellant to carry on with such a development would mean depriving the Co-respondent and his family of the peaceful enjoyment of their property. We could not agree more with Justice Domah when he said "*One cannot put a price to the peace and quiet enjoyment of citizens in their homes.*": Suhootoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273. Besides it is a right enshrined under *section 4 of our constitution* under the right to life, which also means quality of life.

11. The Co-respondent has explained the invasion to his privacy which can be seen from the set of photographs produced, marked Doc J to J7. These photos show how close to the Co-respondent's house the Appellant's clients have to come in order to walk from the house of the Appellant and the coastal road and back. Docs J, J1 and J7 taken from inside the Co-respondent's house clearly show how close people on the access are to the bedroom windows of his house. Docs J2, J5, J6 and L show people using the right of way dressed in swimming trunks. Docs J4 and J6 show the engine of a boat being carried through the access of 90 cm on the premises of the Co-respondent. We do believe that the nuisance experienced by the Co-respondent and his family is valid and not farfetched. The proximity at which the clients of Mr. Bhurtun need to come to the premises of the Co-respondent is bound to cause nuisance when they talk loudly, or when they peer in the direction of the latter's house and that Mr. Thomas cannot open his windows since it may hinder those using the access. The prejudice that is being caused to the Co-respondent and his family through these daily nuisances associated with the usage of the right of way by members of the public is likely to have

a serious impact not just on the Co-respondent's enjoyment of his property but also his lifestyle.

12. With the fact that some windows of the Co-respondent's house have to be kept closed and that his children cannot move freely in the compound for their own safety whilst boat engines are regularly moved through the premises and new people walk through their compound everyday, the Council was right to ask for evidence of consent Mr. Thomas. It is only fair that if the use of a narrow access providing a right of way on Mr. Thomas' property is going to be used by members of the public, that his consent is obtained in writing so that the Council cannot be taxed for not having assessed the impact of the proposed development on neighbours. It is the Council's duty to make an assessment of any nuisance being caused to those who are likely to be impacted by any new development. This ground therefore fails.

13. Ground 5 of the grounds of appeal amounts to no ground of appeal. The fact that he is trying to make a decent living and that his property is close to the sea has nothing to do with the assessment of the Council, which is based purely on planning grounds to have the consent of the owner on whose property the right of way lies. This ground is therefore disregarded.

14. We note that the Appellant made 3 "declarations" in his Statement of Case which have been taken to be grounds of appeal by the Counsel appearing for Co-respondent. We do not agree with this proposition. The grounds of appeal were clearly set out in the Appellant's Notice of Appeal and in any event these so-called declarations made in the Statement of Case do not amount to grounds of appeal as they seek to challenge issues which do not relate to the decision of the Council in refusing the present application for BLUP. For all the reasons set out above, we find that the Council was right in its decision. The appeal is set aside. No order as to costs.

Determination delivered on the 23rd December 2021

Mrs. J. RAMFUL-JHOWRY
Vice Chairperson

Mr. R. ACHEMOOTOO
Member

Mr. SUFFEE
Member