BACKWARDNESS! Portmore, toll road and the lawsuit

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- RUDOLPH BROWN/CHIEF PHOTOGRAPHER
Workmen continue to work on the Causeway section of High Way 2000 during the ruling by the court on the toll road, on Tuesday.

The following article was written by the Current Affairs Committee, The Law Academy.

THERE SHOULD be introduced at the primary level in our schools (with follow-on at the secondary level), a course on logical/philosophical reasoning, for it seems that notwithstanding our many advances, there are many sections of the Jamaican society which remain backward when it comes to matters of reasoning and problem solving. We speak specifically in this instance of the lawsuits brought against the government of Jamaica by the citizens of Portmore.

In the suits filed in the Supreme Court of Jamaica by the various interest groups of Portmore, we see yet again some of the more undesirable effects of globalisation on our population. The undesirable effects of which we speak here, is the tendency found in the United States to bring to the court, every frivolous and unmeritorious claim. With the opening up of telecommunications we have come to believe that we can go to the courts for any and all things. This we may certainly do it is a prerogative. Be warned, however, that you will not succeed if the claim has no merit.

Judge Judy, a programme filled with more drama and 'cas-cas' than legal reasoning, is among the favourites on daytime television in Jamaica and with the advent of cable and satellite television, there can be little doubt that such programmes have influenced the behaviour of the Jamaican populace.

SIMPLISTIC AND NARROW

That said, let us start first with the suit brought by the Portmore Citizen's Advisory Council seeking Judicial Review. The motions alleged that the Minister acted unlawfully in declaring the Portmore Causeway a Toll Road because there was no suitable alternative road.

With the greatest of respect to the citizens of Portmore and to their learned counsel, such an argument in the circumstances is simplistic and narrow. For years the citizens of Portmore have used the Mandela Highway as an alternate route for entry into their communities because the Causeway is inadequate. It is therefore astonishing that in the face of development, these very citizens would seek to narrowly interpret the provisions of the Toll Roads Act by claiming that the alternative route is not in the same area as the Causeway. The Toll Roads Act requires that in designating a particular road to be a Toll Road, the Minister must designate also an alternate route in the same area as the road designated as a toll road.

What does "in the same area mean?" Does it mean (as the Judicial Review suit seems to suggest) that the alternative road must run side by side with the Toll Road? Such an interpretation is extremely narrow and the finding of Miss Justice Gloria Smith in this regard is a triumph of good sense.

It is our opinion that if the citizens of Portmore were required to traverse an area so out of bounds and having no geographic connection with Portmore (say having to go to Port Royal and then to Portmore), there could be no question about the unsuitability of the alternative route. However, this is not the case as regards the Mandela Highway. No reasonable person can conclude in good conscience that the Portmore Causeway and Mandela Highway are not in the same area. The Mandela Highway is more than suitable. It allows vehicular and other traffic as required

under the Toll Roads Act, but we suspect that the tendency of the Jamaican people towards freeness prevents the citizens of Portmore from appreciating this.

BREACH OF CONSTITUTIONAL RIGHTS?

As regards the second suit brought by another citizen of Portmore alleging that her constitutional rights to property have been infringed, we believe that good sense will also prevail upon the hearing of this suit and that it too will suffer a fate similar to the suit for Judicial Review.

Let us examine the nature of the claim: in the first instance, it is claimed that the designation of the Causeway as a Toll Road infringes certain constitutional rights to property. However, Section 19(2)(a) of the Jamaica (Constitution) Order in Council 1962 provides:

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required-"

(a) in the interests of town and country planning or the development and utilisation of any property in such a manner as to promote the public benefit"

This section of the constitution is clear. Nothing done under any law shall be inconsistent with the section so long as the thing done is in the interest of those matters listed in paragraph 2(a), done so as to promote the public benefit. Thus, the question to be answered is this: Is the designation of the Causeway as a Toll Road in the interest of development and utilisation of property for public benefit? Even to the blind, the matter falls squarely within the ambit of section 19(2)(a).

CAUSEWAY AS PROPERTY

The residents also seek to rely on Section 18 of the constitution which provides that no property or interest in property shall be compulsorily taken.

The causeway is not 'property' belonging to the residents and, therefore, to have a claim under Section 18, they must show that they have a right or interest in the property. The residents allege that they have a right in the causeway as a result of an easement (i.e. a legal right to traverse or use property belonging to another), acquired by prescription (long use); they having used the causeway continuously without interruption for 20 years.

To get an easement by prescription, the law requires that the person claiming that the right exists proves three things: That use of the land was (i) *nec vi* (without force); (ii) *nec clam* (without secrecy); and (iii) *nec precario* (without permission).

We doubt seriously whether the residents would be able to satisfy the third requirement. However, let us suppose that a judge finds that the residents of Portmore had such an easement, there remains a further question about the continued existence of the easement down to the present time.

In law, an easement may be extinguished by frustration where as a result of a change of circumstances since the original grant, it has become obsolete. In the UK case of Huckvale v Aegean Hotels Ltd (1989) Slade LJ noted that:

"In the absence of evidence of proof of abandonment, the court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change in circumstances since the date of the original grant there is no practical possibility of its ever again benefiting the dominant tenement in the manner contemplated by that grant."

The causeway is, in 2005, clearly inadequate to accommodate the vehicular and other needs of the population of Portmore. In this regard, even if they had acquired the easement claimed, the easement cannot now benefit the residents in the manner contemplated at the time they acquired

it. Developments in the municipality and the population have clearly rendered the easement inadequate and it is submitted that even if an easement existed, the same has been extinguished through frustration.

ECONOMICALLY AND SOCIALLY WASTEFUL

In addition, public policy dictates that the residents of Portmore should not be allowed to succeed with this claim. If the easement exists, one cannot ignore the fact that the government and/or the operators of the highway have carried out extensive construction works, expended moneys and have entered into contracts regarding the operation of the new highway. To prevent the highway would be economically and socially wasteful.

If the residents succeed, then policy factors should also influence the choice of remedy granted to the residents. In cases where the grant of a mandatory injunction would cause substantial loss, the courts may be prepared to exercise discretion in awarding damages instead of an injunction.

In deciding whether to grant damages or an injunction for interference with an easement, the courts generally apply the following principles:

(1) If the injury to the plaintiff's legal rights is small, (2) And is one which can be estimated in money, (3) And is one which could be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:- then damages in substitution for an injunction may be given.

In determining the appropriate remedy the court is also entitled to take into account the behaviour of the defendant. Even though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

In this case, the Government of Jamaica graciously abandoned their plans regarding the causeway, pending hearing of the Resident's claims. As such, their conduct is beyond reproach, making it likely that an injunction will not be granted to the plaintiffs in the second suit.

For our part, we find that the claims are not motivated by any genuine need to preserve or protect the interest claimed and on this basis, hope that the courts will not entertain the second claim.

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