

Bill Wallace Enterprises Ltd.

Appellant

v.

Stanley Rolle and Catherine Rolle

Respondents

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH
OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY 1985

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD WILBERFORCE

LORD KEITH OF KINKEL

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

[Delivered by Lord Fraser of Tullybelton]

This appeal relates to a dispute as to the ownership of a plot of land in Grand Bahama. The trial judge (Blake J.) decided in favour of the appellant (the original plaintiff), hereinafter referred to as "the plaintiff company". The Court of Appeal of the Commonwealth of the Bahamas (Blair-Kerr P., Jasmin and Georges JJ.A.) took the view that the trial judge had misdirected himself as to the burden of proof, and, for that reason, they reconsidered the evidence, decided in favour of the respondents (the original defendants), hereinafter referred to as "the defendants", and reversed the judge's decision. The crucial issue for this Board is whether the Court of Appeal were entitled to reverse the judge's decision, and particularly whether they were correct in thinking that he had misdirected himself as to the onus of proof.

In 1964, and for some years before that, the late Rufus Grant was the owner in fee simple of two parcels of land in Grand Bahama in the area of Eight Mile Rock known as Hanna Hill. Rufus Grant died on 4th February 1966. One of these parcels was south of the main public road from West End to Freetown and it

has no direct relevance to this appeal. The other parcel was on the north of the public road along which it ran for 250 feet. The public road formed its southern boundary. Rufus Grant's title was based on long possession, as is common in the Bahamas, but on 6th June 1979 an Abstract of Title of his land was recorded in the Registry of Records, with three supporting affidavits all dated 26th October 1959 certifying that he had been in uninterrupted possession since 1904 of the land described in the schedule. The schedule to the Abstract contained a description of the land, referring in detail to the boundaries of each of the two parcels. But the only physical feature on the ground that was mentioned in the schedule was the public road, and there was no indication of exactly which part of the road was referred to.

In 1964 Rufus Grant sold two adjoining parcels of his land to the plaintiff company and he granted conveyances relating to these parcels dated respectively 13th June 1964 and 18th September 1964. The description of the subjects conveyed in the deed of 13th June 1964 was as follows:-

"All that piece parcel or lot of land situate at Eight Mile Rock in the Island of Grand Bahama being bounded on the north by land the property of the vendor [Rufus Grant] and running thereon one hundred (100) feet and on the east by land the property of the vendor and running thereon one hundred (100) feet on the south by the main public road and running thereon one hundred (100) feet and on the west by land the property of the vendor and running thereon one hundred (100) feet."

The description of the subjects conveyed in the deed of 18th September was as follows:-

"All that piece parcel or lot of land situate at Eight Mile Rock in the said Island of Grand Bahama being bounded on the north by land the property of the vendor and running thereon fifty (50) feet on the east by land the property of the vendor and running thereon one hundred (100) feet on the south by the public road and running thereon fifty (50) feet on the west by land the property of the purchaser and running thereon one hundred (100) feet." (emphasis added)

These conveyances were registered in the Registry of Records. The descriptions, like that in the Abstract, do not enable the reader to identify the parcels of land on the ground, except that they show that both parcels were on the north side of the public road. As the Court of Appeal rightly observed, the descriptions do not even make clear that the two parcels are contiguous, but, if they were, then the parcel bought in September lay to the east of that

bought in June. (See the words emphasised above in the excerpt from the deed of 18th September). On the evidence there is no doubt that the parcels were in fact contiguous.

The purchase of the plots was negotiated on behalf of the plaintiff company by William Alfred Wallace, who was the beneficial owner of the company. The plaintiff company did not occupy the ground it had bought, nor did it put down any form of markers to identify its property. After the death of Rufus Grant, Letters of Administration of his estate were granted to his widow, Mrs. Emmie Grant, on 27th July 1966. She was apparently not aware that Rufus Grant had sold any land to the plaintiff company, and in 1976 she sold a parcel of land forming part of Rufus Grant's estate to the defendants. This parcel was conveyed by a deed dated 19th November 1976 in which it was described thus:-

"All that piece, parcel or lot of land coloured pink on the attached plan, being a portion of land belonging to the estate of Rufus Grant, deceased, and bounded as follows:

On the north and running thereon 80 feet by land the property of the said estate on the east and running thereon 70 feet by land the property of the said estate on the south and running thereon 80 feet by the main Eight Mile Rock road leading to Freeport on the west and running thereon 70 feet by a 25 foot wide pathway also situate on land the property of the said estate."

This deed had attached to it a plan (Exhibit 2) which showed not only the parcel of land coloured pink which was being conveyed to the defendants, but also a general delineation of a much larger area of land on both sides of the public road and surrounding the block that was conveyed. The defendants immediately entered into possession of the piece of land therein conveyed to them, and they erected on it a reinforced concrete steel structure, from which they conducted a retail shop. The price paid by the defendants for the land is shown in the conveyance as \$4,500 and they say that the concrete shop building cost \$70,000 to erect.

By February 1978 the defendants were in occupation of the parcel of land described in the conveyance to them of 19th November 1976, that parcel being sufficiently identified by the description in the conveyance and by the plan, and nobody has suggested that they were occupying any land other than that referred to in that deed. In February 1978 William Alfred Wallace, who had stopped living in Grand Bahama in 1973, visited the land for the first time since 1973, and saw the concrete building which the defendants had erected. He told them that they had

erected it on part of the land which the plaintiff company had purchased from Rufus Grant in 1964. The assertion was repeated in a letter dated 17th February 1978 from Wallace's solicitors to the defendants. Wallace had a survey made of the land which he claimed to be that described in the conveyances of June and September 1964. Exhibit 1 is a plan prepared by the surveyors from that survey. It shows the land conveyed to the defendants lying approximately in the middle of the land which had been previously conveyed to the plaintiff company, but that is, of course, because it is based entirely on information given to the surveyor by Wallace. It is not drawn accurately to scale. In July 1978, Wallace raised the proceedings which have given rise to this appeal. By that time Mrs. Emmie Grant had died.

The dispute between the parties is on the question whether the land described in the conveyance of 19th November 1976 to the defendants is (as shown in Exhibit 1) part of the same land as had been described in the conveyances of June and September 1964 in favour of the plaintiff company. That is purely a question of fact. The answer to it depends largely upon an assessment of the reliability of the witnesses, especially of William Alfred Wallace, who gave evidence at the trial before Blake J. That trial took place in 1979 and related largely to events which had occurred at or about the time of the plaintiff company's purchases in 1964, that is fifteen years earlier. In these circumstances the decision of the trial judge, who had the advantage of seeing and hearing the witnesses, and of assessing the accuracy of their recollection, must receive great weight and can only be disturbed by an appellate court if it is satisfied that he has clearly gone wrong, either by misdirecting himself or in some other way. The general rule to that effect was not in dispute and it is now so well known that it hardly needs to be supported by authority. It is enough for their Lordships to refer to Lord Thankerton's well known statement in *Thomas v. Thomas* 1947 S.C. (H.L.), also reported *sub nomine Watt* or *Thomas v. Thomas* at [1947] A.C. 484 at page 487, of the circumstances in which an appellate court is entitled to come to a different conclusion on the printed evidence from that reached by the trial judge. The advantages enjoyed by the trial judge were fully recognised in this case by P.T. Georges J.A., with whose opinion the other members of the Court of Appeal agreed, but that Court felt themselves entitled to differ from the trial judge's conclusion because he had, in their view, inverted the onus of proof. Their Lordships therefore turn to consider whether the judge had erred in that respect.

The view of the Court of Appeal was based on certain passages in the trial judge's judgment which they read as indicating that he had placed the onus on the defendants. If he did so, there is of course no doubt that he erred. In order to appreciate the significance of the passages in his judgment it is necessary for their Lordships to refer to the manner in which the defendants pleaded and conducted their defence.

The plaintiff company maintained in its statement of claim that the land occupied by the defendants, and on which their shop had been erected, formed part of the land which had been conveyed to the plaintiff company by Rufus Grant in 1964.

The defence, as pleaded, consisted simply of a denial of the plaintiff company's averments. The defendants denied that the land described in the 1964 conveyances was the land on which they had entered and erected their building, and, to put it the other way round, they denied that the land described in the conveyance of 1976 had belonged to the plaintiff company. The defence as pleaded was therefore purely negative and it left the plaintiff company with the onus of proving its averments. It did not include any specific averments the onus of proving which would have lain on the defendants. But during the trial the defendants' counsel suggested that the land conveyed to the plaintiff company was further to the west than the plaintiff company had suggested, and that it did not overlap the defendants' land at all. This suggestion was first made to William Alfred Wallace, the principal witness for the defendants, at the end of his cross-examination. The evidential burden of proving this positive suggestion was clearly on the defendants. If they succeeded in proving it, the plaintiff's case would be destroyed and the whole matter would be disposed of. But if they failed to prove it, their original negative defence would still stand and the plaintiff company would still have the burden of proving its pleaded case. The trial judge held that the defendants had failed to prove their positive suggestion that the 1964 land lay further to the west, and certain passages in his judgment dealing with that matter led the Court of Appeal to conclude that he had inverted the onus of proof. It will be convenient to set out here the passages, five in number, from the trial judge's judgment which led the Court of Appeal to that conclusion. They are as follows:-

1. "It is of some significance that when the defendants filed their statement of defence on the 9th May 1978, they were unable to give any indication as to the location of the land that the plaintiff company acquired in 1964, and which acquisition they did not deny. In fact, it was not

- until the 11th of July 1979, (after the case had been part heard on the 18th and 19th of April 1979), that the defendants were able to suggest for the first time where the land bought by the plaintiff company was supposed to be found."
2. "Wallace denied the suggestion put forward for the first time by counsel on the third day of the trial, and not specifically alleged in the statement of defence, that two lots purchased by the plaintiff in 1964 constituted the area hatched in red in Exhibit 2."
 3. After referring to evidence given by the first defendant to the effect that, shortly after he had received the letter of 17th February 1978 from the plaintiff company's solicitors alleging that his shop was on the plaintiff company's land, he had been told by Mrs. Emmie Grant that the plaintiff company's land was further to the west the judge said this "If this be true, then one wonders why this was not alleged in the statement of defence which was filed in May of 1978. After all, at that time Emmie Grant was still alive and there was no reason to suppose that she would not have been available to give evidence on behalf of the defendants at the trial."
 4. "After the most careful examination and consideration of the evidence and the submissions made by counsel for the parties, I find myself quite unable to accept the case for the defendants."
 5. Later the learned judge referred to "the case which the defendants had belatedly put forward".

Their Lordships recognise that those passages, particularly those numbered 4 and 5, are capable of being read as indicating that the judge considered himself to be dealing only with a "case for the defendants" and that his rejection of that case was the end of the whole matter. But the passages are at least equally capable of being read, even in isolation, as referring merely to the positive case which had been suggested to Wallace in cross-examination, to the effect that the plaintiff company's land lay further west. Indeed the passages which their Lordships have numbered 1 to 3 evidently do refer to that suggestion. In the context of the trial judge's opinion read as a whole their Lordships are of opinion that the expression "the case for the defendants" is most naturally to be read as referring only to that positive case rather than to their whole defence. But if there were any doubt whether that is what the judge meant, the doubt would in the opinion of their Lordships be resolved by considering the way in which the judge proceeded to deal with the case as

a whole after he had declined to accept the "case for the defendants". He first gave his reasons for rejecting the evidence called in support of the defendants' "case". He then said that he accepted the evidence of the plaintiff company's witnesses, and made a number of findings of fact based on their evidence, one of which, that marked (e), is conclusive in favour of the plaintiff company. Finally he said this: "For all of the aforementioned reasons, the plaintiff has satisfied me on the balance of probabilities, that the land which it bought from Rufus Grant in 1964 is the land described by William Alfred Wallace and depicted in Exhibit 1". The statement that the plaintiff had satisfied him shows that the learned judge did not fall into the error of misdirecting himself as to the onus of proof and that he was fully aware that the onus lay on the plaintiff company.

Having accepted that the onus was on the plaintiff company, the judge accepted the evidence of their witnesses, and held that they had discharged the onus. There can be no doubt that there was evidence, principally from William Alfred Wallace, but also from the other witnesses whose evidence the judge said he accepted, on which he was entitled to reach the conclusion that he did. Their Lordships find it unnecessary to refer in any detail to that evidence. It is enough to say that Wallace gave evidence, without objection from the defendants, to the effect that the eastern boundary of the land conveyed to the plaintiff company in 1964 had been pointed out to him by Rufus Grant as being very close to a building known as the family residence, which is still on the ground and which therefore establishes the eastern boundary of the land. It is shown on Exhibit 1 just to the west of the family residence. If the eastern boundary is correctly shown there is no doubt that the land conveyed to the plaintiff company in 1964 overlaps the land subsequently purported to be conveyed to the defendants is as shown on Exhibit 1. The evidence of Wallace, accepted by the trial judge, is that that is indeed the position.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed with costs here and in the Courts below.

