Privy Council Appeal No. 22 of 1987

Hubert Volney *Appellant*

v.

Allan Brammer *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Oliver of Aylmerton**]*

The appellant and respondent are the owners of adjoining building plots on a building estate in the ward of Diego Martin in the island of Trinidad known as the Moka Estate. Each of them has built a house on his plot and the appellant has surrounded his house with a concrete wall, the north-western arm of which, the respondent claims, is built upon his, the respondent's, land.

On 7th October 1983 the respondent commenced proceedings in the High Court of Justice of Trinidad and Tobago claiming an order that the appellant forthwith remove the wall and damages for trespass. The appellant delivered a defence denying trespass and alleging, in effect, that the boundary between the two plots was constituted by an interlot drain and that his wall was built to the East of that feature and was therefore entirely upon his own land. He counterclaimed for damages for nuisance as a result of the interference by the respondent with the drain which, he claimed, had caused his land to become waterlogged in time of rain from the adjoining properties on the North East. The action was tried before Mr. Justice Collymore who on 29th April 1985 gave judgment in favour of the appellant, awarded him damages for nuisance and ordered the respondent to

restore that part of the drain which had been removed by him.

The extent of the land in dispute - a strip some 105 feet long and a maximum of 3 feet wide and possibly less - is out of all proportion both to the importance which the parties have attached to it and to the investment of the parties in the substantial costs of these proceedings. Unfortunately, as is so often the case in disputes of this nature, the hostility engendered by litigation has transcended reason and common sense with the result that it has now fallen to their Lordships to determine a dispute which, given even a modicum of goodwill on both sides, ought never to have arisen.

The respondent having appealed to the Court of Appeal of Trinidad and Tobago, that court (des Iles, Narine and Persaud JJ.A.) reversed the trial judge, ordered that the wall should be removed forthwith and the land upon which it stood restored to its previous condition and awarded a sum of $5,000 general damages for trespass to be paid by the appellant to the respondent.

Leave to appeal to the Privy Council was granted on 9th April 1987.

The issues raised by the appeal, which are purely issues of fact, necessitate a recital of the conveyancing history of the plots owned by the parties respectively; but before embarking upon that it will be convenient to mention certain provisions of the local legislation which have a bearing upon the construction of the deeds under which the parties hold their properties. What this legislation establishes is the great importance attached by the legislature to the proper preparation by licensed surveyors of the maps and plans used for identification of properties for the purposes of conveyancing. Section 16 of the Registration of Deeds Ordinance provides in subsection (1) that:-

> "Every deed whereby any lands in the Colony may be in any way affected at law or in equity shall be registered under this Ordinance and every such deed duly registered shall be good and effectual both at law and in equity, according to the priority of time of registering such deed, according to the right, title, and interest of the person conveying such lands against every other deed, conveyance, or disposition of the same lands or any part thereof...."

By an amending Ordinance passed in 1952 it was provided that:-

> "2. No deed which purports to grant, transfer or affect the title to any land, or any interest in any land, and to which any map, plan or diagram of

> such land is attached shall be registered under the Registration of Deeds Ordinance unless such map, plan or diagram is certified by a licensed Surveyor within the meaning of the Land Surveyors Ordinance 1952."

That Ordinance contains stringent provisions governing the qualifications and licensing of surveyors and provides by section 8 that:-

> "Every map, plan or diagram of any land attached to any document which purports to grant, transfer or affect the title to any land or any interest in any land, shall be certified by a licensed Surveyor".

Section 7 contains a prohibition against the carrying out by any person other than a licensed surveyor of any survey or any similar act " affecting or calculated or purporting to affect the delimitation of the boundaries or the location of the beacons or marks on any land, the boundaries of which have been or are to be described in any deed or in any instrument dealing with the transfer of land or any estate or interest therein". There are set out in the Second Schedule to the Ordinance a series of rules containing more or less elaborate provisions about how a survey for the purpose of delimiting boundaries is to be carried out. It is, no doubt, with these provisions in mind that the Court of Appeal came to attach, as they did (rightly in their Lordships' opinion) great importance and weight to the surveying evidence which had been given before the judge at the trial and to which he had, it appears, paid very little regard.

Both the appellant and the respondent derived their respective titles from a common vendor, Fairington Limited, which had purchased the estate some years before. The total area of the land owned by Fairington Limited consisted, it appears, of some 38 acres which sloped generally from north to south. Fairington Limited had, in about 1980 or 1981, caused the estate to be laid out in plots and set about providing the necessary infrastructure for building in the form of roads, service roads, sewers, and land drains which appear to have taken the form of open concrete gulleys.

For the purpose of laying out the estate the vendors had a full survey carried out by a Mr. Farrell who had prepared a general plan of the estate and this, in accordance with what their Lordships have been given to understand is the usual conveyancing practice in Trinidad, had been registered on the occasion of the sale of the first plot on the estate which appears to have taken place on 4th June 1981. The appellant's plot adjoins a service road on its south-eastern boundary and was acquired by him from his father-in-law, one Lionel Bridgeman, to whom it was conveyed on 5th August 1981. The conveyance recites that the

vendors had laid out the estate in lots as shown on the general plan drawn by Mr. Farrell annexed to a deed registered as No.13569 of 1981 and that they had thereon contructed "certain roads and drains for the convenience of persons erecting houses on such Building Estate". The parcels to the conveyance were contained in a schedule and were as follows as far as material:-

> "ALL AND SINGULAR that parcel of land situate in the Ward of Diego Martin in Trinidad comprising 7,910 square feet.... bounded on the North partly by lots 42, 43 and 45 on the South by a road reserve 33 feet wide and partly by a road reserve 25 feet wide on the East partly by Lot 43 and partly by a road reserve 25 feet wide and on the West partly by Lot No. 45 and partly by a road reserve 33 feet wide which said parcel of land is shown coloured pink and numbered 44 on the plan hereto annexed and marked 'A'."

The plan annexed to the deed, which was certified by Mr. Farrell, is in fact a blown-up version of the appellant's plot taken from the general plan and showing by means of small circles the marking irons which had been put down by Mr. Farrell in the course of his survey to delimit the various plots on the estate. It is a little more elaborate than the general plan itself inasmuch as it contains a depiction of the building line and the words "Ir put" against each of the little circles indicating the iron put by Mr. Farrell, a signification which does not in fact appear upon the general plan. It shows the extent of each boundary of the land in feet and also the appropriate bearing for it to be identified. Between the south-eastern edge of plot 44 and the next building plot to the east (No. 34) there lies a space containing the legend "road 3" and indicating a distance of 25 feet from the Appellant's eastern boundary to the boundary of plot 34. What is not clear is whether, at the time of this conveyance, there was in fact any metalled carriageway within this space and, if so, its width and where it ran in relation to the Eastern and Western boundaries of the two adjoining plots.

The respondent derives his title from a Mr. and Mrs. Aqui to whom plot 45, which, it will be remembered, was described in the conveyance to Mr. Bridgeman as constituting part of his northern and western boundaries, was conveyed by a deed dated 11th December 1981. This conveyance was in virtually identical terms to that to Mr. Bridgeman and it is necessary only to refer to the recitals which describe the plot as "comprising 9,188 superficial feet and abutting on the North partly upon Lot 46 and partly upon Lot 42 on the South partly upon Lot 44 and partly upon street 'A3' 22 feet wide, on the East partly upon Lot 42 partly upon Lot 43 and partly upon Lot 44 and on the West partly upon Lot 46 and partly upon the

said street 'A' 33 feet wide". The conveyance was again by reference to a plan but in fact no plan appears to have been annexed to the deed.

It is, of course, axiomatic that Mr. and Mrs. Aqui could not have obtained title to any land which had already been conveyed by the vendors to Mr. Bridgeman. Accordingly, the critical question is the extent of the land which was comprised in the conveyance to Mr. Bridgeman and, certainly in theory, there should not have been the slightest difficulty in determining that question. The plan attached to the deed was simply a blown-up version of the General Plan prepared by Mr. Farrell on laying out the estate and that plan was the result of what had obviously been a most careful and exact survey. Had the appellant taken the trouble before embarking upon the construction of his wall to have his boundaries established by survey these protracted and expensive proceedings would have been entirely unnecessary. Most regrettably he deliberately abstained from doing that, pinning his faith instead to an assumption that the concrete drain running from north-east to south-west on the respondent's land constituted the boundary between the two plots and upon some measurements which he himself took from a point on the south-eastern side of his property selected by reference to the metalled carriageway laid in the road reserve. The defendant in an action for trespass to land is, of course, entitled boldly to take his stand on the inability of his opponent to prove a better title to his land than his own, but when the title of both parties derives from a detailed and recent survey capable of simple verification from existing and easily identifiable land-marks such a course invites the risk that the plaintiff who takes the elementary precaution of having his land professionally surveyed and measured may not encounter any insuperable difficulty in establishing, on a reasonable balance of probability, that which the defendant declines to prove for himself.

In the instant case, the respondent took the only course open to him. He engaged the services of a competent, licensed land surveyor, a Mr. Ramon-Fortune, who carried out a full survey of plot 45, the land described in Mr. and Mrs. Aqui's conveyance, by reference to the General Plan referred to in the deed. Mr. Fortune was called as a witness at the trial and his evidence may be summarised as follows. He found no identifying marks on the western side of the plot but had no difficulty in identifying the boundary on that side of the property. As is indicated on the plan attached to the appellant's conveyance, Mr. Farrell's practice in laying out the plots on the estate was to mark them by planting surveyor's iron stakes at the corners. On the General Plan and on the blown-up versions attached to the individual conveyances, each arm of the boundary was identified both by a

measurement between the irons and by a bearing representing the angle of the line of the boundary from grid north. On the plots to the north-west and north of plot 45 (plots 41, 46 and 47) Mr. Fortune found the original marking irons left by Mr. Farrell during his survey, which he was able to identify from the General Plan as being on the ground in the precise position shown on the plan and standing in relation to one another on the exact bearings shown. From these he was able to identify with total accuracy the north-eastern and south-western extremities of the western boundary of plot 45. He was able to cross check these, again with accuracy, by reference to marker irons established by Mr. Farrell on the southern boundary of the estate. To establish the eastern boundary of the plot and thus the western boundary of the appellant's land, was a simple matter of measurement from the ascertained landmarks and Mr. Fortune was able thus to testify, by reference to a survey plan which he had prepared, that the boundary ran some 3 feet to the east of the drain which had previously existed and part of which was still identifiable and to the east of the line of the wall erected by the appellant. This was convincing evidence but it could, of course, have been displaced if the appellant had been able to show, by evidence carrying equal conviction, that the extent of the northern and southern boundaries of plot 45 was in fact three feet shorter than the measurements shown on the General Plan because the additional area represented by those three feet had, at the date of Mr. and Mrs. Aqui's conveyance, already been conveyed by the common vendor to Mr. Bridgeman. It was Mr. Fortune's view that the difference was to be accounted for by the fact that the appellant had taken his measurement from the metalled carriageway constructed in the road reserve of 25 feet on the east of his property and that the appellant had erroneously assumed, without checking, that the carriageway had been constructed precisely in the centre of the reserve, with the result that the wall that the Appellant had built to mark his eastern boundary was three feet more to the west that it need have been, the actual boundary of the land being in what the appellant claimed to be the road reserve. The appellant was in fact invited to instruct a surveyor to check and to agree his boundaries in the same way as Mr. Fortune had done for the respondent. He declined to do so and his reason is revealing. In the course of his evidence he is recorded as saying "I objected to the surveyor because he might come up with something different".

Despite the (it might be thought) fairly cogent evidence identifying the appellant's and the respondent's plots on the General Plan, the trial judge dismissed the claim and found for the appellant on his counterclaim. It is, therefore, necessary to consider with some care the evidence upon which he felt able to do this. The

conveyance to Mr. Bridgeman, of course, contained a detailed plan certified by Mr. Farrell, but that was quite useless evidentially unless and until it was related to some identifiable feature on the ground and it is one of the curiosities of the case that, from first to last, the appellant and his witnesses made no serious attempt whatever to identify and to relate the plan to what might be supposed to be the most easily identifiable feature on the ground, the metalled carriageway contained somewhere in the road reserve. There was not even evidence of the width of this carriageway, let alone of its position within the reserve or the situation of the boundaries of the reserve itself. Instead the plaintiff directed the main thrust of his evidence to seeking to establish the one thing that could not on any analysis be correct, namely his assumption that the concrete drain on the west of his property not only marked, but was itself, the boundary between lots 44 and 45. Mr. Bridgeman, himself the original purchaser of lot 44, was of no assistance at all. All that he could say was that when he took his conveyance there was a drain to the west and some unidentified number of iron pickets to the east of the drain. That, by itself, did no more than fix the site of the drain firmly on the respondent's land. The appellant himself was little more helpful. Mr. Bridgeman, he said, had shown him three iron pickets at Christmas 1982 - a date subsequently corrected to 1981. Two of these were "almost touching the drain on the east and one to the North of that lot". Presumably this was intended to mean that the pickets were to the east of the drain. He had, he said, built his wall about one foot "to the east of where I had known the drain to have been at lot 45": it was common ground that by this time the drain itself had been in part removed and part covered in by the respondent. His evidence was that the drain had stood proud of the surface of lot 44 by about 4 inches so that the one thing that was perfectly clear was that it could never have been intended to act as a common drain for the surface water from lots 44 and 45. It appears simply to have been a conduit from a surface drainage system for the lots to the North and to have had the function of conducting water from a lateral drain running along or north of the northern boundary of lots 44 and 45. As evidence in favour of the appellant's contention that the drain itself constituted the western boundary of his land, this carried the matter no further. The only evidence by the appellant that went anywhere to support his case was a statement that the third iron shown to him by Mr. Bridgeman was one shown on the conveyance plan as marking the north-eastern point of his boundary adjoining the road reserve. That, he said, was the point of the north-east corner of his wall. In cross-examination he identified this point to being four feet from the kerb - presumably meaning by this the edge of the metalled carriageway - but although he said that he had sought to establish where the road reserve

should fall he admitted that he had taken no bearings and he made no attempt to provide the court with any evidence about where it should be. A curious feature of this evidence is that the suggestion that there was an existing iron on the north-eastern corner of lot 44 was never put to the respondent in cross-examination and emerged only on the last day of the trial. The respondent's unchallenged evidence was that the appellant, in his presence, had taken his measurement with a tape from the centre of the road and although he was cross-examined about the situation of the road reserve, the notes of his cross-examination reflect no hint at all that it was ever put to him that there was an existing iron picket in the precise position of the north-eastern corner of the appellant's wall.

The appellant's expert evidence was scarcely more impressive. A Mr. Bartholomew, a public health inspector, testified that he had been responsible for approving the plans for the infrastructure when the estate was laid out between 1980 and 1981 and he produced a plan showing a drain to the north of lots 44 and 45 and a drain running from north to south along the boundary of lots 45 and 46 but none between lots 44 and 45. His evidence was that in fact no drain was constructed in lots 45 and 46 and that the drain on the east side of lot 45 was substituted for it. That drain was constructed at the time when he first saw the land. There were then no surveyor's marks and he presumed that it was an interlot drain because that was the normal practice. He admitted, however, that he had no idea where the common boundary was between the two lots so that his evidence carried the matter no further at all.

The appellant's second witness was a Mr. Gonzales who had managed the development of the estate. His evidence was that when a drain fell between two parcels it would normally be the boundary between the two. The value of his evidence, however, was seriously weakened by his statement that the land which carried the drains was not conveyed to purchasers but remained with the vendors. In so far as this was intended to relate to lots 44 and 45, however, it was palpably inaccurate. He also testified that the infrastructure in the form of roads and drains was put down before Mr. Farrell did his survey but he contradicted this in cross-examination when he indicated the possibility that two surveys were done by Mr. Farrell, one before and one after the construction of the infrastructure. He was, however, adamant that the General Plan was prepared after the drains were put in and he averred, first, that no drain was put in after the General Plan had been drawn, and secondly, that any interlot drain should have been shown on the plan. So far as this evidence went, therefore, it indicated only the probability that a metalled road had been constructed before the

conveyance to Mr. Bridgeman but without any indication of its width or of where it lay within the road reserve. It also negatived conclusively the notion that the drain on lot 45, which was nowhere shown on the General Plan, was an interlot drain marking the boundary.

The appellant's third expert was a Mr. Haynes who was a licensed surveyor who, it seems, was instructed in the course of the trial. He was, however, neither instructed to, nor did he, carry out a survey but merely measured the area of the land enclosed by the appellant's wall. This he did on 18th December, 1984 and on the same day he prepared a plan, which he produced, showing that the wall enclosed an area of 7927 square feet, an insignificant variation from the area of 7910 square feet shown on Mr. Bridgeman's conveyance plan. The trial judge made admirably full notes of this evidence but the task of interpreting it is not made easier by the absence of the verbatim transcript and Mr. Haynes' evidence is far from clear. What is clear, however, is that Mr. Haynes was purporting only to measure what was enclosed within the walls, that he made no attempt to ascertain where the boundaries of lots 44 and 45 ought to be and that he had no means at all of determining where the road reserve, which constituted the eastern boundary of lot 44, ought to fall.

Finally, the appellant called a Mr. Rosales, the Secretary to the Local Authority, whose evidence was that there was a local authority policy that drains ought to run between adjoining properties so that the local authority would not have to pass over private property in order to clean them. Since it was common ground that the drain with which this appeal is concerned ran over lot 45, and since the only question was the distance between the eastern edge of this drain and the boundary of lot 44, this evidence was entirely beside the point.

That was the sum total of the evidence before the trial judge. He decided on the basis of Mr. Bartholomew's evidence that the drain constituted a common boundary between the two lots because it was an interlot drain and accordingly he dismissed the respondent's claim and found for the appellant on his counterclaim. The Court of Appeal was unanimous in reversing this and although it seems, at first, surprising to find an appellate court reversing a trial judge's finding on a pure question of fact their Lordships are quite unable to conclude that, in this instance, they were wrong to do so. The judge's finding was entirely conditioned by his view regarding the status of the drain which was unsupported by any evidence of any value and contradicted by a detailed and accurate survey of the land. The only evidence called by the appellant which actually supported his case was his own

unsupported statement regarding the iron picket claimed to have been seen by him at the north-eastern corner of his property but removed, so he says, when the wall was built. Doctor Ramsahoye, who has presented the appellant's case with great skill, has gallantly sought to support it by concentrating on this as justifying the trial judge's conclusion. Their Lordships, however, remain in the end entirely unpersuaded that this almost throw-away addition to the appellant's case could justify the judge's conclusion, which he seems to have regarded as reinforced by the fact that the conveyances, both to Mr. Bridgeman and to Mr. and Mrs. Aqui, recited that the purchasers would be entitled to use the roads and drains constructed on the estate. The one thing that clearly emerged from the evidence on both sides was that the drain on lot 45, whatever other purpose it may be intended to serve, was not constructed to take the water from lot 44, so that nothing can be made to turn on this recital.

It is, in their Lordships' opinion, quite clear that the trial judge misdirected himself in his approach and that the Court of Appeal was accordingly entitled to form its own view on the available evidence. It might, their Lordships suppose, if the appellant had commissioned a full and proper survey of his land conducted by Mr. Haynes or some other licensed surveyor, have been possible to establish the precise boundaries of the road reserve and that, in some way, the vendors had purported to convey to Mr. and Mrs. Aqui a strip of land which they had already conveyed away, but the appellant has to be bound by the evidence which he chose to adduce to the court. The Court of Appeal was unanimous in preferring to accept the evidence of Mr. Fortune and, in the light of the importance attached to survey plans in conveyancing transactions in Trinidad, their Lordships find this unsurprising. They would certainly not feel justified, on the inconclusive evidence which, with his eyes open, the appellant deliberately chose to tender to the court of first instance, to interfere with the unanimous conclusion of a Court of Appeal familiar with local conveyancing practice and conditions.

Their Lordships accordingly dismiss the appeal with costs.