IN THE COURT OF APPEAL

DOMINICA

Civil Appeal No. 6 of 1968

Between:

ANGELO BELLOT — Caveator/ Claimant

and

ALFRED WALTER THEODORE YANKEY — Caveatee/ Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice Gordon
The Honourable Mr. Justice St. Bernard (Ag.)

Claimant in person
Vanya Dupigny and J.M.B. Armour for respondent

1970, March 18, 19

JUDGMENT

LEWIS, C.J.

This is a claim under section 170 of the Title by Registration Ordinance, Cap. 222, for the decision of the trial judge in a matter of a caveat to be reviewed by this Court. I say by this Court though really the claim was made to the High Court and this Court has now assumed this particular jurisdiction to review such decisions.

The matter arises in connection with an application of Alfred Walter Yankey as personal representative of the Estate of Caffyn Alexander Walsh for the issue of a first certificate of title in respect of a portion of land forming part of Mount Pleasant Estate in the parish of St. Paul in the State of Dominica, containing 38.065 acres. That application was accompanied by a plan by surveyor Winski showing the portion of land applied for and by affidavits setting out the facts on which the applicant claimed that he was owner in fee simple of the land by virtue of long possession - over 30 years.

After due advertisement, the claimant Bellot put in a caveat and this matter eventually reached the High Court. The caveat follows Form 2 and the Forms at the back of the Ordinance, which is the form to be used where there has been no

-certificate-

certificate of title issued in respect of a portion of land and the person who is cautioning the Registrar says that he intends himself to apply for a certificate of title to the portion of land because he claims to be the legal owner of it. This was not applicable to the present situation because the true objection made by the claimant was not that the whole of the land which was applied for belonged to him, but that there had been some encroachment by the surveyor on his adjoining land, so that a portion of land which is contained in his certificate of title to the adjoining lands is now included by Winski as part of the land in respect of which the application for a new certificate is made.

I would like to say here that it is important that the High Court, before it proceeds to hear a matter in connection with a caveat, should ensure that the caveator defines precisely what it is that he is alleging and the grounds on which he opposes the issue of the certificate, and narrows the issues of fact which the Court has to decide. This is particularly important in this case because as a result of the very loose way in which the caveat was worded and the evidence was presented, the learned judge seems to have fallen into a certain degree of error; and also because on the hearing of this claim for review the caveator has attempted to persuade this Court that even if the land in respect of which he claims now falls outside his certificate of title he is nevertheless entitled to it. Now the only issue really between the parties was whether a portion of the land shown on Winski's survey fell within the land covered by the claimant's certificate of title.

The Court has looked at the claimant's certificate of title and the plan attached to it, to which he became entitled in 1947. It appears that the first certificate for his land was issued some time in 1918, and to that certificate was attached a plan made by one Pinard. The southern boundary of the claimant's land at that date was clearly shown as the top of a ridge, and a little distance from the south-western boundary is shown a waterfall which falls over what is marked as steep land. At the southern end of the line which marks the cliff over which the waterfall drops there is marked a rock and a white cedar. Towards the eastern end of that southern boundary there is marked a road.

-There should-

There should really not be too much difficulty in finding the top of the ridge which has at its western end a cliff or steep land with a waterfall over it, and near the eastern end a road.

When the applicants for certificate of title wanted to make their application they approached Winski to make a survey of the land that they were claiming. He in turn approached the claimant, Bellot, who lent him his certificate of title and plan from which we are told that he made copies. He then went on the land, all parties were present and the claimant then - this is agreed in the evidence by both sides - pointed out a rock which he said was on his boundary. The question then arose as to whether that rock was the rock which is marked on his plan on the southern boundary of his land, to which I have referred. Winski made his survey, and came to the conclusion that that rock was not the rock marked on the southern boundary line on the claimant's plan. He ran his boundary line some 7 chains north of that rock.

Winski said in his evidence that neither party knew the real boundary, so he attempted to reconstruct it in accordance with the claimant's plan. The claimant did not himself make any attempt to establish his boundary, but when he came before the judge in Chambers, he was able to raise some doubt in the mind of the judge as to whether Winski's plan was correct or not in so far as that boundary was concerned, and the judge made an order that there should be a survey of the whole of the claimant's land in order to discover whether he had been deprived of any part of the land covered by his certificate of title as a result of Winski's survey.

Before this Court the claimant has urged that that order was wrong; that since the applicant for a new certificate of title bases his claim upon long possession it is up to him to establish that he does not fall within the land shown on the claimant's certificate of title. He was not quite certain as to what ought to have been done; I tried to obtain from him exactly what he felt the judge ought to have done, but the Court was not able to get any clear answer on that point, but no doubt what he feels ought to have been done was that the caveat should have been maintained.

This raises the question of the burden of proof. Counsel for the respondent caveatee has submitted that on the issue between the caveator and the caveatee that burden falls on the caveator because he is the one who is affirming that part of the land in respect of which the application is made falls within the land shown on his certificate of title and therefore he must establish that fact.

I think that the submission of learned counsel for the respondent is correct. The issue between the caveator (claimant) and the caveatee in this case is, does a certain portion of land, a triangular portion marked out on Winski's plan, fall within the land shown on the plan attached to the claimant's certificate of title? The claimant challenged the accuracy of the survey and the burden falls on him to establish what he affirms. That does not mean that even if he fails the duty of the judge to decide whether the applicant is entitled to a certificate of title is discharged. It will still be his duty to decide whether a case of long possession has been made out which is sufficient to found a certificate of title.

However, in my view, the learned judge was not right in ordering a survey of the whole of the claimant's land. There is no dispute between the parties as to any other boundary than that which forms the southern boundary of the claimant's land and the northern boundary of the respondent's land. Therefore, if he had a doubt in his mind, it seems to me that in order to resolve that doubt, he required further evidence in order to show whether or not that line as drawn by Winski was correct. The claimant has quite properly stressed that Winski was a surveyor employed by the applicants and that therefore the Court is entitled, if it is in doubt, to have further evidence on the matter, and no doubt this is what was in the mind of the learned judge.

In my view, it would be sufficient to order that a surveyor be appointed by the Court chosen either by agreement between the parties, or, if they cannot agree, then to be appointed by the Court in its own right. The surveyor should make a re-survey of the line shown on the claimant's plan as his southern boundary. As I said, one knows that Dominica is a mountainous country, with difficult terrain, but the boundaries seem to be natural boundaries and there should not

really be great difficulty in finding them. So that if we have either a surveyor, who would have to be someone other than Winski, appointed by agreement between the parties, or else appointed by the Court in its own right, the learned judge would have further evidence before him about where the line falls and should then be able to decide the matter.

Now I should vary the order of the learned judge by ordering that a surveyor to be agreed upon between the parties, or failing such agreement, to be appointed by the Court in its own right, should be appointed to survey the southern boundary of the claimant's line and report to the Court. It is not possible for this Court to appoint a surveyor and therefore the matter will have to go back to the High Court so that a surveyor may be appointed, and this should be done with promptitude. It is not necessary that the same judge should make the appointment, it can be made by the resident Puisne Judge.

With regard to the costs, the learned judge ordered that the cost of the survey should be costs in the cause. The claimant found fault with this, but I see nothing wrong with that order. After all, he is the one to establish that the survey does in fact wrongly include a portion of land and if he is wrong, the cost ought to be paid by him; if he is right the cost should be paid by the other side, so that it is only right that the cost of the survey should be costs in the cause.

The claimant has succeeded to the extent that he has had this order varied, and therefore he should have the costs of this claim.

There was a point which was raised by learned counsel for the respondent on the construction of section 170 of the Title by Registration Ordinance, and that was that the word "decision" in that section does not include an interlocutory order such as that made by the judge. This really is not a very fitting case in which this matter should be decided because, admittedly, the learned judge's order is in some respects vague and does not clearly establish that he intended it to be merely an interlocutory order. He added to his order the words 'if the caveator's land has not increased then the reconstructed boundary would be correct.' This seems to suggest that if that was the result, the caveat would be

discharged. However, it is not necessary to determine whether that was what he meant. The Court thought it right to hear the case, and I for one would not give any final view on the meaning of the word "decision" in the section.

(Allen Lewis)
Chief Justice

GORDON, J.A.

In this matter the issue is really narrowed down to the boundary on the southern portion of the caveator's lands on the Pinard plan of these lands. On the south-western side there is reference to the stone and a cedar tree. The caveator made strong reference to a stone which he said formed part of his boundary line. That stone has not in any way been related to the plan before this Court. It seems to me that the obvious thing would be to correct that boundary line on the south of his holding.

I agree with the President when he says that the boundaries are such that they can be clearly defined on the south side, and I would agree with the proposed order which he suggested.

(K.L. Gordon)
Justice of Appeal

ST. BERNARD, J.A. (Ag.)

In my view the onus of establishing the boundary was on the caveator and I concur with the judgment delivered by the learned President, and also in the proposed order.

(E.L. St. Bernard)
Justice of Appeal (Ag.)

LEWIS, C.J.

The direction which this Court gives is that the order of the Court below be varied and the Court orders that the survey of the claimant's southern boundary only be made by a surveyor to be appointed by the Court below, either after agreement between the parties, or if they cannot agree, then by right of the Court below itself. The surveyor to report within a time to be fixed by the Court below. Costs of the survey to be costs in the cause. The claimant to have the taxed costs of this appeal.

(Allen Lewis)
Chief Justice.