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SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1987

BETWEEN:

ANGELA VETA HINKSON - Appellant

and

JAMES FITZALLEN MITCHELL - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr Justice Moe

Appearances: Mr. S.K. John for the Appellant
Mr. O.R. Sylvester, Q.C., and Mr. M. Williams for the Respondent.

1987; Dec. 14, 15;
1988; March 21.

JUDGMENT

BISHOP, J.A.

An action brought by James Fitzallen Mitchell succeeded against Angela Veta Hinkson, when, on the 21st January 1987, Singh J. granted the following declarations:-

(1) That the defendant is not entitled to an area of land exceeding 58 feet by 120 feet by virtue of deed 171/1979;

(2) that the defendant is only entitled to a right of way 10 feet in width and entering the defendant's land at its south easterly boundary and commencing from the public road running along the boundary of the plaintiff's adjoining land; and

(3) that the defendant is not entitled to a triangular piece of land now occupied by her and shown on Alexander's plan, and contained within points A-A1-B-A on the said plan or such portion thereof or such other portion of the plaintiff's land over which the defendant purports to exercise ownership.

The trial Judge also granted the following injunctions:-

(a) An injunction to restrain the defendant, her servants or agents or otherwise howsoever from

/occupying......

occupying and/or building and/or exercising acts of ownership on the disputed land or any such portion thereof, or such other portion of the plaintiff's land over which the defendant purports to exercise ownership;

(b) an injunction to restrain the defendant whether by herself or her servants or agents or otherwise howsoever from exercising a right of way over the plaintiff's land save and except as given by deed 171 of 1979 and delineated on plan GR2/164.

In addition to the aforementioned declarations and injunctions the learned Judge ordered Angela Hinkson to pull down and remove forthwith the wall built on the plaintiff's land, and to pay to the plaintiff $100.00 damages for trespass.

Angela Hinkson's counterclaim was dismissed and she was ordered to pay to James Mitchell his costs on the claim and counterclaim, to be taxed.

Being dissatisfied with the decision of the Judge, Angela Hinkson appealed on the following grounds:-

"(1) The learned trial Judge erred in law in refusing to admit as evidence at the trial an Order of the Court in ....suit No. 151 of 1967 dated 25th day of March 1968 and Judgment dated 15th day of February 1969;

(ii) the learned trial Judge erred in law in refusing to admit as evidence at the trial the following documents;

(a) Letter dated 27th June 1981 from Dr. Lee to the defendant/appellant;

(b) letter dated 21st October 1979 from Dr. Lee addressed to the defendant and her husband;

(iii) the learned trial Judge erred in law in that he failed to address himself adequately or at all to the principle of estoppel in relation to the terms of the judgment of the Court in suit 164 of 1981;

(iv) the learned trial Judge erred in law in holding that the doctrine of accretion applies in determining what are the true boundaries to the disputed land;

(v) the learned trial Judge erred in that he failed to take into consideration adequately or at all the contents of deeds No. 449 of 1970 and 517 of 1970 and of the admissions made therein by the plaintiff/respondent.

(vi) having regard to the evidence the decision of the learned trial Judge is unreasonable and cannot be supported by the evidence."

At the outset of the hearing of the appeal Counsel abandoned the

/second.....

second ground of appeal and the Court did not allow him to pursue the first ground, there being no indication on the Record that an application was made (and/or refused) to admit as evidence the documents mentioned in the ground.

The facts pertinent to the appeal follow.

Eulalie Mitchell Lee, a doctor of medicine, was the owner of a parcel of land comprising 1 acre, 2 roods, 5.7 poles, situated in Belmont in the island of Bequia in the parish of the Grenadines in the State of St. Vincent (as it was then known), and known as LOT number 2 on a plan dated 4th May 1968, drawn by Clifford Ernest Williams, licensed land surveyor. This plan was lodged in the Surveys Office and bore the number Gr 121.

Dr. Lee agreed to sell to Angela Veta Colleeen Hinkson (also called herein Angela Hinkson) part of the said Lot number 2.

On the 30th January 1979, Deed of Conveyance 171 of 1979 was executed, and Angela Hinkson entered into possession of the land. The schedule of the deed showed the area that was sold, in these words:-

> "All that LOT piece or parcel of land.... part of a lot numbered 2 on a plan of three (3) percels of land dated the 4th day of May 1968.........which said lot piece or parcel of land is bounded North-Easterly where it measures 120 feet by lands of the Frangipani Hotel South-Easterly where it measures 58 feet by remaining lands of the Vendor South-Westerly where it measures 120 feet by remaining lands of the Vendor and North-Westerly where it measures 58 feet by the sea......."

In March 1979, at the request of the purchaser and her husband, David Frederick a licensed land surveyor carried out a survey of the land she bought, using the deed 171 of 1979. In his report dated 8th March 1979, he wrote, among other things:-

> "According to Deed of Conveyance No. 171/79 the lot surveyed should be approximately 58 feet x 120 feet.......... After Dr. Lee signed the Deed.......she planted or caused to be planted some iron pipes and wood posts in positions she thought would satisfy the agreement in the Deed.
>
> She apparently assumed that the wall at the seafront was her boundary and had this been so Dr. Lee's marks could have been acceptable, but along the boundary between herself and Mr. J. Mitchell the wall goes beyond their common boundary from M1 toward the sea for an approximate distance of 12 feet.
>
> Using as reference the marks M1 and M2 that were found (M1-M2 =104.7 ft); the direction M2-M7 was obtained and A1 put on line at a distance of 15.2 feet from M2 in an effort to make the approximate 120 feet inward from M1."

Dr. Lee.....

On his plan of survey, David Frederick provided two figures: (1) the area as marked out by Dr. Lee's irons comprising 6746 square feet; and (2) the area when A1 was used as a point instead of Dr. Lee's L1, comprising 7249 square feet.

The Deed of Conveyance described approximately 6960 square feet.

Although it may be said that in the report the surveyor wrote "apparently" because Dr. Lee was out of the island when the survey was done, it was not made clear why the surveyor concluded that Dr. Lee made an assumption.

In January 1980, James Fitzallen Mitchell (also called herein James Mitchell) purchased the remainder of LOT number 2 from Dr. Lee. He entered into possession in 1980 though it was not until 3rd October 1984, as a result of a Court order made on 21st June 1984, that the Deed of Conveyance 784 of 1984 was executed. The schedule of the deed set out the land that was sold, and it read in part as follows:-

> "ALL THAT LOT piece or parcel of land situate at Belmont in the island of Bequia.....being LOT numbered 2 on a plan of three parcels of land dated 4th May 1968..........which said parcel of land contains by admeasurement one acre two roods and five point seven poles (1A.2R.5.7P) and is abutted and bounded on the North-East by LOT numbered 1 .... on the East by the Public Road on the South-West by LOT number 3.........and on the North-West by the sea........ SAVE and EXCEPT that piece or parcel of land described and conveyed by Deed of Conveyance dated 30th January 1979 and made between the Owner of the One part and Angela Veta Colleen Hinkson of the Other part and recorded at the Registry of Deeds......as Deed No. 171 of 1979."

Before James Mitchell received his Deed, a dispute arose between the parties and as a result they went to Court (suit 156 of 1983) where they consented to an order by the said Court, that Sebastian Alexander, licensed land surveyor, be appointed to establish the true boundaries by reference to the relevant deed, of a parcel of land conveyed by deed 171 of 179, and the driveway referred to in the said deed.

In his report dated 17th November 1983, Sebastian Alexander pointed out that in addition to the Deed of Conveyance 171 of 1979, he used, as his data source, information given during interviews of James Mitchell, Angela Hinkson, Albert Hinkson, and Counsel for the parties to the dispute. He also studied plans of survey Gr 121 and Gr 2/164, and photographs of the beach front around the surveyed area. He explained that his plan of survey showed:-

/"(i) the property.....

"(i) The property enclosed by a concrete wall which the Hinksons now occupy i.e. from station W-M1-M2-A1-L2-L3-W. These dimensions are in excess of the deed's;

(ii) a parcel of land bordered in green ink with dimensions in accordance with the deed (58' x 120') and using the line M1-L20 which the Hinksons claim to be their north westerly boundary (by the sea) as shown to them by Dr. Lee in 1979;

(iii) a third parcel bordered in red ink with dimensions in accordance with the deed (58' x 120') using for the north-western boundary the line W-L along the wall. This is Mitchell's argument; in other words Mr. Mitchell is claiming a triangular shaped piece of land at the south-eastern section of Hinkson's area i.e. from A-A1-B-A."

I digress here to stress that the successful claim of James Fitzallen Mitchell was, among other things, in respect of the triangular area of land south east of Hinkson's land.

Alexander had very little doubt that "the north western corner of Hinkson's land where the wall has been built five (5) feet inwards represented the natural boundary". However he entertained some doubt that ".......the north eastern corner of Hinkson's land where the wall was built twelve (12) feet out to sea represented the natural boundary".

In view of his uncertainty Alexander did not express a firm and final opinion or make a positive finding of fact.

On the 19th and 20th January 1987 the action filed in February 1986 was heard. Singh J. received evidence on oath from James Mitchell on one side, and from Angela Hinkson, her husband Albert and land surveyors David Frederick and Sebastian Alexander on the other side.

In his judgment the learned Judge expressed a preference for the testimony of James Mitchell over that of Angela Hinkson and her husband, wherever there was a conflict. He referred to the demeanour of each of them and stated that while James Mitchell demonstrated "honesty, with the sole purpose of assisting the Court to arrive at a just conclusion", Angela Hinkson chose, "instead of giving quality evidence, to testify under the guise of guile and cunning", and Albert Kinkson was not "frank with the Court". Of the surveyors the Judge said:-

"Having seen and heard them I would accept the evidence of Alexander in preference to those of Frederick. Whilst Alexander impressed me as a witness whose sole purpose in testifying was to assist the Court, Frederick gave the impression of someone who came to do battle with the plaintiff; and this demeanour manifested itself when it changed from what it was in examination

/in chief.....

> in chief to one of stuborn aggressiveness in cross examination. He so wanted to discredit the plaintiff's case that by way of expert evidence he attempted to advise this Court that if by way of erosion the sea takes property away from the owner then that part of the sea becomes the property of the owner whose property was eroded."

The Judge also recalled that David Frederick conceded, in effect, that his plan may have led to confusion rather than clarity in seeking to ascertain the merit of the claim by James Mitchell or the counterclaim by Angela Hinkson.

Using Alexander's plan of survey, which he accepted, the trial Judge found that the area bordered in red ink was "more in conformity with the boundaries as disclosed in the defendant's deed No. 171/79" than the area bordered in green ink. The Judge found too that the disputed area of land, namely, the triangular portion shown within points A-A1-B-A, was not the property of Angela Hinkson since it fell outside of the 6960 square feet described in her deed. Then the judgment continued:-

> "I therefore find it to be the property of the plaintiff. The plaintiff's evidence throughout this case was that Dr. Lee's property was always bounded by the sea and deed 449/1970 supports this evidence; and I make it as a finding of fact."

Singh J. was satisfied on a balance of probabilities:-

> "That from 1937 up to the time of the building of the sea wall on the defendant's property in the 1970s substantial erosion had taken place and as a result the sea wall is the defendant's natural boundary."

When the pleadings and the evidence adduced are carefully perused, this appeal is revealed as relatively simple; and indeed in presenting his submissions and arguments on behalf of the appellant, Counsel, quite properly, in my view, did not address us on the third ground of appeal. It had no bearing on the real issue between the parties.

Counsel conceded also that the doctrine of accretion was not raised in any way by the pleadings; and indeed as the evidence unfolded it became clear that far from there being any testimony that land imperceptibly accreted to land so that it acquired the legal characteristics of the land to which it was added, there was testimony to the effect that sea erosion altered part of the lands adjoining the foreshore. It would therefore be true to say, as Counsel for the appellant said, that the doctrine of accretion did not apply in this case. In my view Singh J. did not apply that doctrine in order to reach his decision on the dispute. The declaration (see above) was made by him in respect of the triangular portion of land occupied by Angela Hinkson, and shown within points A-A1-B-A on

/Alexander's.......

Alexander's plan; it was far removed from the seashore. The reference in the judgment to the law governing ownership of land when erosion occurs or when there was accretion, was nothing more than obiter dicta.

The ground of appeal which was seriously urged was the final ground. Learned Counsel reviewed much of the evidence including the plans Gr 121, Gr 2/164 and Alexander's plan. He admitted that the last mentioned plan reflected truly and accurately the propositions of each of the disputing parties.

Counsel submitted that there was good and sufficient cause for the trial Judge to reject the evidence of Sebastian Alexander and the proposition of James Mitchell as revealed by Alexander's plan. In Counsel's view, since it was plan Gr 121 from which the deeds 171 of 1979 and 784 of 1984 were drafted, then this plan should be accepted showing as it did the seaward boundary of LOT number 2.

Counsel for the respondent submitted that Frederick's plan created confusion and led to the dispute. It was shown to be wrong and from the evidence at the trial it was clear that David Frederick had altered the direction and position of boundaries of the land. He had measured 120 feet from M1, in a southerly direction when land north of M1 ought to have been taken into consideration as was done by Dr. Lee and by Alexander.

Counsel submitted further that Alexander was an expert appointed by the Court after the parties had agreed on his selection, and that his testimony, given on behalf of Angela Hinkson, justified the decision of the trial Judge. It ought not to be disturbed since there was no ground for so doing.

In deciding this ground of appeal it will be of assistance to refer in some detail to the evidence of the experts, in particular. In my view the interpretations and opinions of the plans of survey, by the parties to the dispute and by Albert Hinkson must have less value than the interpretations and opinions of the makers of those plans.

First it must be recalled that in January 1979 Dr. Lee went on the land she proposed to sell to Angela Hinkson, and, in the latter's presence, measured it with a tape and put down boundary markers of iron and wood to indicate where it was and that it was 58 feet by 120 feet (or 6960 square feet).

Then it must not be forgotten that Angela Hinkson admitted that when she bought the land there was a wall in front and a wall between her land and that occupied by the Frangipani Hotel. There was evidence that the wall extended towards the sea, beyond point M1, for a distance of 12 feet or so.

/Now under.....

Now under cross-examination Frederick admitted that:-

> "......the defendant assumed the wall in front was her boundary, and if she was right then the dimensions in the deed would fit with the factual description. That wall connecting with wall at Frangipani and marks would have fitted in with description; and there would have been no need to go to A1."

Again, Frederick testified that Angella Hinkson "assumed". It is unclear why he said so; but it is clear that he realised that the assumption might be correct, in which case it would be in accord with deed 171 of 1978. He also explained that he felt he ought not to include the area beyond M1 going towards the sea since he regarded it as "an encroachment". Significantly, in my view, he could not say "who encroached on whom" and he did not give an explanation that served to justify his feelings.

David Frederick conceded under cross-examination that:-

> "If the wall by the sea was the boundary then that would more adequately represent the area - better than the two areas I have in my plan."

(Perhaps the word should have been "accurately" rather than "adequately"). In my opinion this concession went to support the claim of James Mitchell in that it lent appreciable support to Alexander's testimony which the trial Judge accepted.

It was the following evidence of David Frederick which earned the condemnation of the Judge, who regarded it as an insult to the intelligence of the Court:-

> "I agree you lose land by sea erosion and that the sea comes in nearer to you. I say you can still claim that land that is covered by the sea. I now say I don't know. I now say I would re-establish my boundary and claim it and fill it."

For my part, I found it singularly unusual that when he was shown Alexander's plan (during his evidence in chief) and asked to comment on it, Frederick told the Court that he preferred not to give any opinion on it. This answer may have merited the feeling on the part of the Court that he could not make any comment that would assist the Court in deciding not to be guided by it, and he was not prepared to concede that it ought to be accepted.

Sebastian Alexander, also a witness for the defence, said that when he went there in 1983 he met definite points, including A1 which was put down by Frederick. He explained that he re-established the boundary line along the seashore and showed it in his plan which also indicated two areas - a red one with boundaries that Mitchell claimed and a green one with boundaries

/claimed......

claimed by Hinkson. Under cross-examination he explained how he arrived at his points and obtained 120 feet from point W. The witness also said that if the assertions of the Hinksons were examined on the plan, then the frontage of the property "would in no way be bounded by sea i.e. the north western boundary; in their deed the north western boundary is defined as the sea". He agreed that the area bordered by green indicated by the Hinksons did not conform with deed 171 of 1979.

It is also of significance that Albert Hinkson told the Court below that when Dr. Lee took them over the property "the frontage of the property was the sea"; and between the sea and where he was standing there was a retaining wall in which there was a gate leading on to the beach.

The answer to the dispute in this case was to be found in the interpretation of the deed 171 of 1979; and the ordinary canons of construction of deeds were to be followed without resort to extrinsic evidence, there being no ambiguity,uncertainty or contradiction that called for clarification or explanation.

Sebastian Alexander used the deed 171 of 1979 and he produced a plan and report. It was his evidence, on oath, that the proposition of James Mitchell was in accord with the said deed conveying land to Angela Hinkson. The trial Judge accepted Alexander's evidence.

What attitude should this Court have towards the judgment, in the circumstances?

In POWELL v. STREATHAM MANOR NURSING HOME (1935) All E.R. Rep. 58, Lord Sankey L.C. reminded that "the Court of Appeal does not re-hear the witnesses. It only reads the evidence and re-hears the Counsel. Neither is it a re-seeing Court". He also cited a passage from CLARKE v. EDINBURGH and DISTRICT TRAMWAYS CO. per Lord Shaw 1919 S.C. (H.L.) at page 36, from which I now quote the following question that Lord Shaw suggested each Judge of the Court of Appeal has a duty to put to himself:-

> "Am I - who sit here without those advantages,somtimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

In the Australian case THE FEDERAL COMMISSIONER OF TAXATION v. CLARKE (1927) 40 C.L.R. 246 (on appeal from the Supreme Court of Victoria), Isaaca A.C.J. said this, at page 264:-

> "But upon questions of fact an appeal Court will not interfere with the decisions of the Judge who has seen the witnesses and has been able,

/with the......

> with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

Isaacs A.C.J. was there citing what was said by Lord Buckmaster L.C. in RUDDY v. TORONTO EASTERN RAILWAY CO. (1917) 33 D.L.R. 193.

in BENMAX v. AUSTIN MOTOR CO. LTD. (1955) A.C. 370, Lord Morton of Henryton said this:-

> "......An appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact, or a finding involving both law and fact. But the trial Judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantages of seeing and hearing a witness goes beyond that; the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the Judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations."

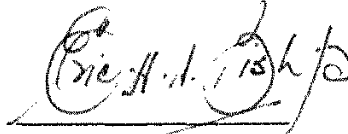
A number of other well known cases set out the same principles by which a Court of Appeal ought to be guided in circumstances such as those now confronting us; but no useful purpose will be achieved by citing further passages.

Having regard to the facts contained in the evidence I am unable to say that I am satisfied in my own mind that the trial Judge made a decision which was wrong, or unreasonable or unsupported by the evidence.

There was no quarrel with the decision insofar as it dealt with the right of way.

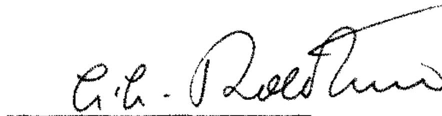
/This appeal.....

This appeal fails. It must be dismissed and I would so order, with costs to the respondent.



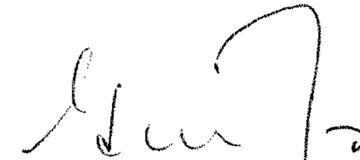
E.H.A. BISHOP,
Justice of Appeal

I agree.



L.L. ROBOTHAM,
Chief Justice

I agree.



G.C.R. MOE,
Justice ofAppeal.