

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1986

BETWEEN:

OLIVE PHILLIP - Appellant

and

ALBEAR PHILLIP
(For the Heirs of
Helena Augusta Phillip - Respondent

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

Appearances: Mr. F. Kelsick for the Appellant
Miss M. Walwyn for the Respondent

1988; April 26,
1989 *April 26*

JUDGMENT

MOE, J.A.

This appeal concerns a common boundary line between lands of the appellant, Lot 19, and the respondent, Lot 20, that is the Eastern boundary of the appellant's lot or Western boundary of the respondent's. In a decision given on the 30th June 1976, the Adjudicating Officer found that the boundary is a 6 foot path which appears on the land and runs Northward and found during a Cadastral survey. On an appeal therefrom to the High Court, the learned Judge set that decision aside having found that the common boundary line is a road now covered in bushes and lying to the West of the said 6 foot path.

In a written Judgment the learned Judge pointed out "it is accepted by the respondent (Olive Phillip) that the boundaries of the land owned by the appellant (Albear Phillip) is described in the Deed, Exhibit "A.P.1" and it is on the description of the Western boundary in the said deed that the Adjudicating Officer came to his decision". On consideration of the deed the learned Judge referred to its date of execution "1889" and the statement as to the Western boundary of the lot concerned which is "a right of way road West of the Water Ground Bottom leading to Shoal Bay which then goes East with the range". She took the view that when that statement as to the right of way road was made in 1889 when the land was being sold to the predecessor of the respondent, reference was being made to a right of way road then in existence. It could not have been to the 6 foot path which was

made only after the respondent's predecessor acquired the lot and made the path for his own convenience. She expressed herself this way: "As I said before this deed was executed in 1889. The appellant (Albear) knew that his father built a road and that is the road respondent (Olive) is saying is the Western boundary. The Western boundary according to the deed was there in 1889 and it must have been there before the 6 foot path was built. There is no evidence to the contrary. The Right of Way road at that time could only be the road dividing Water Ground and New Ground which must be assumed was being used by both owners and therefore became a Right of Way and in my view must be the disputed line shown on Exhibit "C1" and is "the bound West" that is, the Western boundary, and cannot be the track or 6 foot path".

The burden of the six grounds of appeal filed against the decision is that it is totally unsupported by the evidence or as Counsel for the appellant put it during argument there is no evidence to support the decision.

Counsel for the appellant contended this way: The appellant Albear's case was based on the deed made in 1889 in which the relevant boundary is set out. As the learned Judge said the Court's duty was to find from the evidence before it "where this Public Right of Way was in 1889". The burden was on Albear to show where the road was. Counsel pointed to two strictures levelled by the Judge against the appellant. She stated: "I accept the appellant was of very little assistance in the boundaries he gave and it was indeed very difficult to obtain the boundaries from the mouth of the appellant". Counsel submitted that if there was a main road as claimed by the respondent Albear and such as found by the learned Judge, when the surveyor went on the lands the main road would have been shown on the survey plan. He referred to the surveyor's plan on which Xs are marked on a line indicating the Western boundary or Right of Way road claimed by the respondent Albear and the evidence from the surveyor that (i) "No foot-path going North at the line where Xs are"; (ii) "What plaintiff (Albear) claims on Exhibit A.P.2" is considerably West of what is marked as the disputed area in Exhibit "CN.1". Before the learned Judge Albear had indicated by markings in Red the land which he claims lies between the 6 foot path and the main road and belongs to him. Counsel at the close of his submission strenuously contended that the effect of the learned Judge's decision is to move a boundary established by the Adjudicating Officer to an illusory boundary not pointed out to the surveyor nor in respect of which there were no marks on the ground and gives Albear what he did not claim. He urged that the matter be sent back for retrial and that the surveyor should find where the Public Road was.

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Was the learned Judge in such grave error as to come to a conclusion on which there was no evidence to do so? Counsel for the respondent submitted there was abundant evidence on which the learned Judge could have come to the conclusion reached.

Counsel meticulously pointed to the following evidence: (1) On a plan produced by the surveyor showing the lots 19 and 20 there was a line marked with XXXs indicating the disputed line or the line claimed by the respondent Albear to be his Western boundary. (2) In his oral testimony, the surveyor said: "There is a 6 foot wide footpath - line to the West of the footpath, represents the dispute line and the common line when the parcels were 12 and 15. Bad Cox is to the South. Shoal Bay is both the Bay and the name of the Village. The dispute line is marked with Xs. To the East is a 6 foot path. If it were a main road it would have been labelled a public road and shown as two parallel unbroken lines".

(3) The surveyor pointed out to the Judge on the survey plan boundary marks found at the time of the survey. He pointed out a boundary mark at the top of the disputed line (i.e. marked with Xs on the boundary claimed by Albear). No boundary marks or distinguishing feature found along the 6 foot path.

(4) To this evidence of the surveyor was related or compared the evidence of Albear that "At the Northern end of the shaded area (shown above as area he claims) there is a bound set there, concrete with initials on it. The initials are O.P. I know olive Phillip the respondent put that bound there. Where the bound is, is in the correct spot". This portion of evidence was neither challenged nor denied.

(5) Counsel directed attention to Albear's evidence as to his Western boundary. "Western bound has two tracks. Respondent lives West of road. There is a road leading from Bad Cox going North, North West. Dispute came about this West road going to Shoal Bay. There is a road leading from Bad Cox to Shoal Bay in respect of my father building, building his home. It was inconvenient for him to get his material to the spot where his house now stands. So he branch from this main road going to his house with his material. So this dispute came about where this lot of land between the two tracks - the one to Shoal Bay and the one my father made, that cause the confusion. The road from main road is going North to his house". He also said "The main road is a bush road..... Main road where bound is is my Western bound. The track my father made is East of that main road.... The main road was in a terrible condition at time of survey, bushes

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growing over it because no one pass frequently through that road since respondent and other folks that live in that direction leave that spot. They pass mostly on my father's track".

Counsel then compared Albear's evidence with that of Emily Carty that "There was a road between New Ground and Water Ground. This road began from the Spring and goes to Shoal Bay. That is a main road. When you reach a certain spot you have different roads that is, road going West, road going East". She also said "To the West of the road (main road) was Olive Phillip and Rosalind" and "The road to carry you to Olive's house is covered with bushes".

Reference was made finally to Olive Phillip's own evidence that "My land is bounded on the East by a road. The road is still there. Jovan Phillip has land above the road that is the Eastern side of the road. That road leads to Shoal Bay in the North and to Bad Cox in the South. Albear inherited his land from his father Jovan..... Albear Phillip's family land is on the East of the main road and mine on the West. There is a track East of the main road going to Jovan and Albear's house".

It is evident from the above that the learned Judge had in evidence that Albear Phillip claimed as his Western boundary a road covered with bushes at the time of the surveys. That where he claimed that boundary line was indicated on a survey plan by XXs. At the Northern end of that line was shown by the surveyor where he found a boundary mark. Corresponding to that mark is Albear's evidence that in that spot is a bound which he knows Olive Phillip set in the correct spot. There was evidence supporting that of Albear that there is a road covered with bushes to the West of which is Olive Phillip and to the East of which is Jovan Phillip or Albear Phillip.

Now was this road covered with bushes and shown as line of XXs on the surveyor's plan the right of way road referred to in the Deed of 1889 or was it the 6 foot track claimed by the appellant Olive? Two points are most pertinent. Firstly Counsel for the appellant Olive submitted that all Albear said about the 6 foot track was that it was built by his father. The learned Judge stated "There has been no evidence as to when that road was built nor was the appellant (Albear) cross-examined) with regard to that. Since the appellant (Albear) has said his father built that road because "it was convenient for him to get his materials to the spot where his hoise now stands" seems to indicate that the appellant knew this of his own knowledge and he was never challenged on that. It must be noted that Exhibit A.P.1 (Deed of Sale to Albear's father) was executed in 1889 long before the appellant was born". The implication being that a path built long after 1889 could not be the right of way road referred to in the

1889 Deed. Secondly Olive Phillip herself said as set out above, there is a track East of the main road going to Jovan and Albear's house. If the 6 foot track is the main road which forms the Western boundary line of Albear's land as contended for by Counsel for Olive, to what track is Olive referring when she said there is a track East of that main road. The truth in her words does not help Counsel's contentions and the learned Judge adverted to this by asking "Can it be that she (Olive) is saying the main road is the road which the appellant (Albear) is contending all along is the Western Boundary? And can it be that the track going east is the one leading off the main road at bottom of New Ground and Water Ground and which appellant Albear is saying is the road his father built"? In my view that bit of evidence given by Olive when tested in cross-examination strengthened the case for Albear.

There was ample evidence on which the learned Judge could have come to her conclusions. She indicated clearly on what evidence she acted and gave sound reasons for the conclusions she drew from that evidence. There can be no possible justification for interfering with her decision. I would therefore dismiss the appeal with costs to the respondent.

G.C.R. MOE,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of appeal.