SAINT LUCIA

IN THE COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No 194 of 1996

BETWEEN:

1. **EDWARD FESSAL**
2. **HAYDEN FESSAL**
3. **LILY FESSAL by their attorney Stanislaus Fessal**

Plaintiffs

and

JILL VALERIE BACON

Defendant

Mr. O. Larcher for Plaintiffs
Mr. K. Monplaisir Q.C. and Miss H. Ali for Defendant

1996: June 5 and 19.

J U D G M E N T

MATTHEW J. (In Chambers).

On March 7, 1996 the Plaintiffs filed a writ of summons indorsed with statement of claim asking, among other things, for rectification of the Defendant's own parcel of land, Block 1455B parcel 108 and rectification of the Plaintiff's own parcel of land, Block 1455B parcel 109. The claim asked that the Defendant's acreage be lessened and that the Plaintiffs' acreage be increased.

Put shortly it is the Plaintiffs' contention that the Defendant's land certificate should state that they are owners of 1/2 of one carre of land and not 2.50 hectares and that the difference be added to their certificate which contains 5.5 hectares.

By their statement of claim the Plaintiffs alleged that the Defendant on March 12, 1965 bought only 1/2 of a carre of land and the excess land on her certificate, amounting to approximately 4 3/4 acres of land, rightly belongs to the Plaintiffs.

They allege that the excess land was erroneously and mistakenly surveyed for the Defendant by licensed land surveyor, Ornan Monplaisir, on December 10, 1975 and that before the Defendant purchased the land they were in possession of the excess lands.

They allege that during the survey the Plaintiffs were out of Saint Lucia and could not protect their interests. They allege also that during the demarcation process under the Land Adjudication Act of 1984 they duly claimed the excess land as being part of their property and that they demarcated the same by their agents.

They go on to state that the excess lands were erroneously and mistakenly entered in the name of the Defendant and that they were unable to appeal the error or to institute legal action against the Defendant because they were frustrated by a High Court action, Suit 321 of 1989 brought by Clifford Sylvester against them and so they had no alternative but to wait for the decision in that suit which was given on May 31, 1995 in their favour.

They allege that the Defendant has again employed Ornan Monplaisir to resurvey the property with a view to its disposal.

On the said March 7, 1996 the Plaintiffs took out a summons asking for an order to restrain the Defendants from surveying, subdividing, selling or disposing of the land registered in her name. The summons was supported by an affidavit by Stanislaus Fessal on behalf of the Plaintiffs which reiterated the matters mentioned in the statement of claim. I took note of paragraphs 2, 3, 4, 4(a), 7, 9 - 12, 14, 18 and 21 in particular.

Attached to this affidavit were several exhibits numbered 1 - 10; 12 - 13. I had a look at all of them and will refer to them if, when and where it is necessary so to do. Some of the exhibits in my view had no bearing on the case and here I refer to Exhibits 10, 12 and 13. I did not see Exhibit 11.

The Defendant filed an affidavit in opposition on March 28, 1996 and Ornan Monplaisir filed one on the same date in support of the Defendant's contention. Attached to the affidavit of the Defendant were certain exhibits some of which were already tendered by the Plaintiff. The Defendant alleged that she purchased her land from Johannes and Eugenis Joseph and she had enjoyed possession since then and she employed Ornan Monplaisir to survey for her in 1975 and on November 19, 1986 the land was duly entered on the land register in her name and it was only on December 1, 1993 when suit 321 of 1989 was instituted that she first became aware of any dispute to her title.

Ornan Monplaisir stated that when he surveyed the land in accordance with the boundaries stated in the Defendant's deed of sale Altenor Joseph was present representing the heirs of Paul Fessal. He said there were no objections to the survey and he recorded this in the memorandum to the plan of survey. This plan is Exhibit 4 of the Plaintiffs' list and JVB 2 of the Defendant's list.

The Plaintiffs filed three affidavits in reply to that of the Defendant on May 31, 1996. One was by Stanislaus Fessal in which he alleged that the Defendant was never in possession of the land and that during the Registration and Titling Project, Altenor Joseph claimed the excess land on behalf of the Plaintiffs. In yet another affidavit in reply the said Stanislaus Fessal deposed that he has always known Altenor Joseph to be in charge of the lands of Paul Fessal. The third affidavit was by Altenor Joseph who stated that he is presently 82 years old and that he categorically denies the allegation by Mr. Ornan Monplaisir that he was present and represented the heirs of Paul Fessal when Monplaisir was carrying out the survey for the Defendant on December 10, 1975.

During his submissions learned Counsel for the Plaintiffs relied on the Defendant's deed which said she purchased 1/2 of one carre of

land in 1965 but by 1975 she ended up with over six acres of land.

Counsel submitted that the excess property belongs to the Plaintiffs. Counsel further submitted that Altenor Joseph was in charge of the land for the Plaintiffs and he has denied being present when Ornan Monplaisir surveyed for the Defendant.

Counsel said the injunction was necessary to restrain the Defendant who is in her seventies and spends half of her time outside of Saint Lucia.

Counsel made reference to David Bean's sixth edition on Injunctions at pages 4, 29 and 30 and to the third edition of Halsbury's Laws of England, Volume 15, page 184, paragraphs 357 and 358 to urge that the matter was not res judicata.

In his reply, learned Senior Counsel for the Defendant referred to the fact that the Defendant is the registered proprietor of the land in question and he mentioned the American Cyanamid case, 1975 A.C. 396. Counsel submitted that the Plaintiffs have no legal right to protect and he based that proposition upon Section 23 of the Land Registration Act.

Counsel then submitted that under Article 2103 of the Civil Code the Defendant's rights are prescribed since she purchased in 1965 and the case against her was only filed in March of 1996.

Counsel then submitted that even if there is no prescription the matter is res judicata and in this context he referred to the cases:

1. ABUAkA v. ADANSE 1957 3 AER 559; 561;
2. SUSANA ISIDORE v. GEORGE, Civil Appeal, No. 20/1989 delivered May 28, 1990;
3. HALSTEAD v. A.G. Civil Appeal 10 of 1993, Page 13.

Counsel made mention of laches and gave the reference from Halsbury's Laws of England, Fourth edition, Volume 16, paragraph 1478.

Counsel finally submitted that there was no reasonable prospect of success for the Plaintiffs in this case.

I do not take too seriously the submission that if the Court were to grant the injunction it would be setting aside the Defendant's land certificate outside of the method for setting aside land certificates.

In BARBARA KIDDELL v. WINDJAMMER LANDING CO. LTD. decided on May 31, 1995, I referred to the American Cyanamid case and I asked the question at page 12:

"Has the Applicant established that she has an arguable claim to the right to put up an electric post on the land in question?" and I also referred to the case of SMITH v. INNER LONDON EDUCATION AUTHORITY 1978 1 AER 411 C.A. and to the decision of the Court that in the circumstances of the case there was no real project of the parents succeeding in their claim at the trial.

It is to these questions and/or findings that I should now direct my attention. Have the Fessals established that they have an arguable claim to the injunction they seek? Do they have a real project of succeeding in their claim at the trial of this action?

It seems to me that the Plaintiffs main attack or one of them is directed at the fact that according to the Defendant's deed she purchased 1/2 carre of land which is about 1.6 acres and she ends up with over 6 acres and therefore they contend the excess land belongs to them. But that is not necessarily so. There could very well be an error in quantum not only in the Defendant's deed but in the earlier deeds submitted by the Plaintiffs, that is, Exhibits 5, 6, 8 and 9. It is by no means uncommon in this country that the

boundaries in the deed do not match the acreage given.

The Plaintiffs are themselves admitting that Altenor Joseph was in charge of the lands for them but in their statement of claim and affidavit they make the excuse that when the Defendant's land was being surveyed they were out of the State and could not protect their interests. They cannot be truthful here.

I believe Altenor when he said in paragraph 9 of his affidavit that as agent for the Fessals he pointed out to Ornan Monplaisir the boundaries of the Fessal's land during the survey. The resultant survey is Exhibit 3, a plan for 13 acres 0 roods 39.57 perches drawn on May 23, 1983. In his memorandum Monplaisir states that the lines were run and as instructed jointly by Altenor and Johannes Joseph.

The Defendant's survey plan was already drawn about eight years previously on December 10, 1975 and I believe what is stated in the memorandum and confirmed by Ornan Monplaisir's affidavit that present at that survey besides Johannes Joseph, was Altenor Joseph representing the heirs of Paul Fessal.

I have not seen the Plaintiffs' land certificate but in my judgment in Suit 321 of 1989 it was pointed out at page 13 that on November 1986 the Fessals were awarded provisional title to 5.50 hectares of land. That seems to be in accordance with the acreage on the Plaintiffs' survey plan drawn on May 25, 1983.

I note that it was on the said November 19, 1986 that the Defendant was awarded absolute title to 2.50 hectares of land.

At paragraph 11 of their statement of claim the Plaintiffs allege that the excess lands were erroneously and mistakenly entered in the name of the Defendant. I would reject that contention from a legal stand point on the authority of SKELTON v. SKELTON (1986)

37 W.I.R. 177 which I mentioned at the end of page 13 of the judgment in Suit 321 of 1989.

I would reject the idea of mistake from a factual stand point based on paragraphs 9 and 10 of the statement of claim. The Plaintiffs state that they demarcated the excess lands and they claimed it. The land adjudicators must have rejected their claim and awarded the land to the Defendant with absolute title. There is no mistake about that.

On November 19, 1986 the Plaintiffs got provisional title to parcel 109 and they must have been aware that their claim to the excess lands was rejected and the land was awarded to the Defendant.

The Plaintiffs did not challenge the findings of the Land Adjudicator as they were entitled to do.

The excuse they gave for not appealing is stated in paragraphs 12 to 15 of their statement of claim. In short they are saying they had to await the outcome of a case instituted against them and their parcel of land by a third party. This is preposterous. The two matters are not connected at all.

On November 19, 1986 the Plaintiffs got provision title to parcel 109. On the same day the Defendant got absolute title to parcel 108. Three years later one Clifford sought to challenge the titles of both the Plaintiffs and the Defendant in Suit 321 of 1989. Before the hearing the suit against the Defendant and a couple others was stopped. So in effect the challenge was only against the Plaintiffs' title.

In any case why could not the Plaintiffs challenge the Defendant's title before suit 321 of 1989 was instituted on October 27, 1989?

In Suit 321 of 1989 the Fessals were successful partly on the strength of their title which the other side were seeking to challenge. In that case I stated the following:

"But I do not think it is my business to decide the question of ownership of the land or to adjudicate on the respective claims of the Parties. That was the function of the Adjudicating Officer who gave a ruling against which the Plaintiff should have appealed if he was dissatisfied.

. . . . . .

How can the Plaintiff in this suit ask me to give her title to land which the Adjudicating Officer gave to the Defendant because as she said the Adjudicating Officer did not consider her claim? She is in effect asking me to determine an issue which the Act put in the hands of the Adjudicating Officer, the Land Adjudication Tribunal and the Court of Appeal.

. . . . . .

The Plaintiff should have appealed to the relevant tribunals established by the Land Adjudication Act in accordance with the decision of SKELTON v. SKELTON (1986) 37 W.I.R. 1977. The action is dismissed with costs to the Defendant to be agreed or taxed."

The Plaintiffs are seeking to do in these proceedings just what their opponents in suit 321 of 1989 sought to do unsuccessfully.

David Bean in his work already referred to stated at page 4 the following:

> "There is one overriding requirement: the applicant must have a cause of action in law entitling him to substantive relief";
>
> "Putting it another way, the Plaintiff will fail if he cannot show that he has any real prospect of succeeding in his claim for a permanent injunction."

The action of the Plaintiffs is premised on a point of law which I have determined several times before and in Suit 321 of 1989 I referred to such a case where I had given a similar decision on the same day.

In my judgment the Plaintiffs have no real prospect of succeeding in their claim at the trial and I therefore refuse the grant of the interlocutory injunction with costs in the cause in favour of the Defendant.

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A.N.J. MATTHEW
Puisne Judge