SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 OF 1995

BETWEEN:

CECILIA FRANCIS

Appellant

v

LOUIS BORIEL

Respondent

Before:

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| The Hon. Mr. C.M. Dennis Byron | Chief Justice [Ag.] |
| The Hon. Mr. Satrohan Singh | Justice of Appeal |
| The Hon. Mr. Albert Redhead | Justice of Appeal [Ag.] |

Appearances:

Mr. Allan Alexander, S.C. & Mr. Hilford Deterville for the Appellant
Mr. Anthony McNamara for the Respondent

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1996: October 29;
1997: January 20.

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*Land Law* - Declaration of ownership - Whether appellant bound by consent order executed by her lawyer - Whether counsel was in fact retained and/or had the authority to act on appellant's behalf - Shepherd v Robinson (1919) K.B. 474 considered - Matthews v Munster (1887) H.L., Waugh v H.B. Clifford & Sons (1982) 1 All E.R. 1095 considered - Whether, in any event, the Land Register ought to be rectified by virtue of the Land Registration Act - General principle governing assessment of questions of fact by an appellate court - Watt v Thomas (1947) H.L. cited in support - Whether trial judge was properly directed on the facts. Appeal dismissed.

JUDGMENT

BYRON, J.A.

The appellant sought a declaration of ownership, and other ancillary relief, over part of the parcel of land registered in the name of

the respondent with absolute title in the Registration Quarter of Micoud, as Block 1622B parcel 11 as a result of the decision of the Land Adjudication Officer made on 20th February 1987 declaring that the respondent was entitled to be registered as the absolute owner with the consent of Mr. Henry Giraudy, the appellant's Counsel. Matthew J. concluded that the appellant was bound by the consent order and dismissed the action on 12th November 1995.

## The Appeal

The appeal challenges the learned Judge's finding of fact that the appellant retained Mr. Henry Giraudy to act for her and his conclusion that the appellant was bound by the consent order.

The appellant also contended that the learned Judge erred in finding that there was no error that would occasion the court to rectify the Land Register by virtue of section 98 of the Land Registration Act, and that the appellant had acquiesced in the decision of the Land Adjudication.

## The Background Facts

Dispute proceedings between three parties, the appellant, Martina Giffard and the respondent, were initiated in accordance with the provisions of the Land Adjudication Act 1984 by a Dispute Form dated 5th September 1986 and signed by K.J. Maddoc the Recording Officer. The dispute form recorded there was no dispute between Martina Giffard and the appellant.

When the matter came on for hearing the appellant was not present. Mr. Giraudy of counsel was present and so was the respondent and his counsel Mr. Trevor Cozier. The matter proceeded and judgment was given. The written decision of the Adjudication Officer Mr. D.W. Tomkins was headed with a notation that Mr. E. H. Giraudy of Counsel represented the appellant and Martina Giffard. After reviewing the documentary titles of the parties to the dispute the decision continued:

> "Following further examination of the relevant documents, Counsel Giraudy and Cozier agreed that Louis Boriel was the owner of the disputed land. Furthermore, Louis Boriel and Mr. Giraudy, for Martina Giffard, reached agreement that the portion of land claimed by Martina should be re-

> located as follows: .... Mr. Giraudy undertook to draw up the necessary document transferring ownership."

The learned trial Judge had before him an affidavit sworn by Mr. Giraudy just about five months before his funeral service on 29th May 1993 in which he denied receiving any instructions to act on behalf of the appellant in this dispute. He said he was present because he was instructed by Martina Giffard and intervened on behalf of the appellant purely because of his long acquaintance with the Dalphinis family and because none of them was present. Mr. Boriel swore to an affidavit in opposition in which he stated that Mr. Giraudy entered an appearance on behalf of the appellant and Martina Giffard at the hearing and discussed and consented on their behalf to the order that he be declared absolute owner of the disputed land.

At the hearing oral testimony was given. In her evidence the appellant said:

> " I did not authorize Mr. Giraudy to go there and consent on my behalf in the matter. I did not authorize him to go in there and deal with the matter for me.."

In cross-examination she said:

> "When I filed my claim I gave as the persons to be notified, my cousin Troy and the firm of Floissac and Giraudy..... I gave the name of Floissac and Giraudy because my address is outside of St. Lucia..... Mr. Giraudy was not instructed to represent me and did so."

The learned trial Judge also had the evidence of Troy Dalphinis who said in cross-examination:

> "Mr. Giraudy was our lawyer in the matter.....I planned to go to the dispute with Mr. Giraudy along with Mrs. Francis.....Mr. Giraudy was well acquainted with our lands in the area."

Louis Boriel gave evidence. He said:

> "When they called the case Mr. Giraudy stood up to defend Cecilia Francis. When they called I showed them my papers and what not. Between the Englishman and Mr. Giraudy and Mr. Cozier they went to the plan. Mr. Giraudy had his papers and Mr. Cozier had his papers. They then decided it was Louis Boriel land. I was given a land certificate."

On this evidence the learned trial Judge found as follows:

> "I do not believe that the Plaintiff did not retain Mr. Henry Giraudy to act for her in the dispute between herself and Louis Boriel. I believe that Henry Giraudy did appear at the adjudication on behalf of the plaintiff and did in fact consent to the order as the Land Adjudicator has recorded it and as supported by Louis Boriel."

## The Question of fact

The appellant contends that the learned trial Judge was wrong to find that Henry Giraudy was retained to act for her. This is a case where the learned trial Judge had the advantage of seeing the witnesses, an advantage which this court did not enjoy. It has well been settled that in such cases an appeal court usually is, and should be, slow to reverse any finding of fact which appears to be based on the judge's assessment of the credibility of the witnesses.

The general principle is explained in the well known and often quoted passage from Watt v Thomas (1947) 1 All E.R. 582 in which Lord Thankerton said at 587:

> " I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court."

These principles have been shown to be more important when an

appellate court is relying on the judge's notes, as we are, and not on a verbatim transcript of the evidence. In Industrial Chemicals v Ellis (1986) 36 WIR 303 Lord Oliver of Aylmerton said at 306:

> "there should be borne in mind also the following passage from the opinion of this Board delivered by Lord Fraser of Tullybelton in Chow Yee Wah v Choo Ah Pat (1978) 2 MLJ 41 at page 42:
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> "When Lord Thankerton referred in paragraph [I] to 'the printed evidence' he was referring to a transcript of a verbatim shorthand record of the evidence, such as was available in that case. But in the instant appeal all that the Federal Court had before it was the judge's notes of the evidence, perhaps augmented in places by a transcript of shorthand notes, and it is obvious that the disadvantages under which an appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it was a verbatim transcript."

On the other hand in cases where a trial Judge misdirects himself and draws erroneous inferences from the facts it is well established that an appeal court is in as good a position as the trial judge to evaluate the evidence. This is explained in the equally well known passage from Benmax v Austin Motor Co. Ltd. (1955) 1 All E.R.326 where Lord Reid said at 328:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is general in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

Counsel for the appellant invited us to find that this decision was not based solely on the credibility of witnesses but that the learned trial Judge drew a number of wrong inferences and misdirected himself on important issues in finding that the appellant had retained Henry Giraudy. He submitted that the learned trial Judge attached undue weight to the dispute form which could have been held to indicate that the Recording Officer noted Henry Giraudy in a capacity that was not that of counsel and the Summons which could have been held to show no more than addresses for service. The learned trial judge did not explain what

importance, if any, he attached to these documents. But even if he did find that they supported his conclusion that Henry Giraudy was retained there would be justification for that view because when a litigant gives a firm of solicitors as an address for service the probabilities are high that the solicitor is in fact retained to represent that litigant.

Counsel submitted that the learned trial Judge misdirected himself in considering the appellant's evidence that she was awarded an adjoining parcel No. B 14. But I thought that was irrelevant to the

question of whether the appellant retained Mr. Giraudy as the learned trial Judge considered that in connection with another issue namely whether the appellant would have known the date of the publication of the notice of the completion of the adjudication record.

Counsel also submitted that the judge wrongly applied the Adjudication Officer's comment that Mr. Giraudy undertook to draw up the necessary document transferring ownership to the consent on behalf of the appellant. Whereas it is clear that the comment referred to the consent in relation to Martina Giffard it is not clear that the learned trial Judge misunderstood that as he merely repeated it without expressing any opinion.

Counsel submitted that the learned trial Judge failed to pay sufficient regard to the inconsistences between the respondent's affidavit and his oral testimony. In the first place I was not persuaded that the matters to which our attention was drawn by counsel amounted to inconsistencies but more importantly these are issues which go to the credibility of the witness who appeared before the learned trial Judge.

In my view these were peripheral matters. I would say that the Judge's finding was based on his rejection of the evidence of the appellant and his acceptance of the evidence of the respondent and the record of the Adjudication Officers decision. The crucial finding of the learned trial Judge was that he simply did not believe the explanation of the appellant that Mr. Giraudy was used merely as a postal address. He said:

> "The Plaintiff is in effect telling the Court that the name of Floissac and Giraudy was given only for postal services and she did not in fact retain the firm. Is it credible to believe that a person who lives abroad goes to a lawyer's chambers and tells that lawyer "I am not employing you in the matter but your only duty is to inform me and tell me when the matter is due to be heard. When you have told me of the date I will come down to deal with the matter myself or I shall then employ a lawyer to represent me?"

Counsel submitted that this passage indicated that the learned trial Judge had found that the appellant had gone to Mr. Giraudy's chambers when there was no evidence of that. I reject that interpretation. In my view the learned trial Judge was attempting to convey the extent of his absolute disbelief for the appellant's description of the limited role Mr.

Giraudy was to play in the matter. In addition the Judge stated that he believed that the Adjudication Officer's decision accurately recorded the conduct of Mr. Giraudy at the hearing as supported by the testimony of the respondent whom he believed. The learned trial Judge had the advantage of seeing and hearing the witnesses which would have assisted him in determining where the truth lies. His conclusion could have been informed by his observation and other material not available to an appeal court. I am not satisfied that the learned trial Judge failed to take proper advantage of seeing and hearing the witnesses or that he reached a wrong decision when he concluded that the appellant retained Mr. Giraudy as Counsel.

The Consent Order

Counsel for the appellant submitted that the consent order was not effective or binding on the appellant.

The legal principles to be applied are not in dispute as this branch of the law has been settled for a long time. A consent order is binding on the parties to it but it is not the less a contract, because there is added to it the command of the court, and as such it is subject to the incidents of a contract including the liability to be set aside. The point is succinctly stated in Huddersfield Banking Company, Limited v Henry Lister & Son, Limited (1895) 2 Ch. 273 by Lindley L.J. at 280:

> " A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good as an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual."

However, the appellant did not seek to have the consent order set aside. The question which is highlighted in this case is how to resolve a dispute when the consent order was not made by the party to be bound by it but by that person's lawyer. The law is well settled that solicitors and counsel have authority to compromise existing cases on behalf of their clients without reference to them on terms which do not involve extraneous matters, but where the consent was given under a mistake which is discovered before the order is drawn up the court will give relief.

These principles are explained in Shepherd v Robinson (1919) K.B. 474 by Bankes L.J. at 477:

> "There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The first is that represented by Strauss v Francis; Matthews v Munster and Welsh v Roe. In all those cases the question was whether the act of the counsel had been within the scope of his authority. It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.
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> But there is a second and different line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This line is represented by Holt v Jesse and by Neale v Gordon-Lennox."

In this case the second line of cases does not arise at all because the consent judgment was perfected and the respondent was entered on the Land Register as Proprietor with absolute title on 30th June 1987. These proceedings were commenced in 1991.

Our attention was drawn to the dissenting judgment of Denning L.J. in Griffiths v Evans [1953] 2 All E.R. 1364 where he considered the liabilities of a solicitor to his own client. This was not helpful in this case because it is necessary to draw a distinction between the liability of a solicitor or counsel to his own client and the liability of the client to the other party to the consent order, when there is a dispute as to the existence of authority to compromise litigation. The authorities seem to indicate that once the client has requested counsel to act as his advocate he represents to the other side that counsel is to act for him in

the usual course and he must be bound by that representation so long as it continues. From a different angle this principle could support the learned trial Judge's incredulity of an arrangement whereby a firm of solicitors is alleged to have been given a limited authority to act only as a sort of postal service. This point was addressed in Matthews v Munster (1887) 20 QBD 141 by Lord Esher M.R. at 143:

> "I have said that the relation of an advocate to his client can be put to an end at any moment, but that the withdrawing of the authority must be made known to the other side, and this shows that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so."

In Waugh v H.B. Clifford & Sons (1982) 1 All E.R.1095 Brightman L.J. had to consider the situation where the client had expressly forbidden their solicitors to enter into the particular terms of compromise proposed although by inadvertence the prohibition had not reached the ears of the member of the firm dealing with the matter, and the prohibition was unknown to the other side. He said at 1104:

> "The law thus became well established that the solicitor or counsel retained in an action has an *implied* authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter 'collateral to the action'; and *ostensible* authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action.....It follows in my view that a solicitor (or counsel ) may in a particular case have ostensible authority vis-a vis the opposing litigant where he has no implied authority vis-s vis his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matter 'collateral to the suit'. The magnitude of the compromise, or the burden which its terms impose on the other party is irrelevant. But much more than that question may need to be asked by a solicitor when deciding whether he can safely compromise without reference to his client."

In my judgment the findings of the learned trial Judge as supported by the evidence indicate that Mr. Giraudy had ostensible or apparent authority to compromise the claim without reference to the appellant. This was not a collateral matter because the actual dispute as to the ownership of the land was resolved in favour of the respondent by the consent order. As a result of this finding the other grounds of appeal become merely academic, as the confirmation of the learned Trial Judge's finding that the appellant is bound by the consent makes it unnecessary to determine whether the court could rectify the register under section 98 of the Registered Land Act on the ground that the registration was based on a mistaken or invalid consent order. Similarly, the issues of knowledge and acquiescence can have no effect on the decision.

In the premises I would dismiss the appeal with costs.

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal [Ag.]