[2016] JMCA Civ 55

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 21/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**PAUL BLAKE**	**APPELLANT**
AND	**DONALD WILLIAMSON**	**1ST RESPONDENT**
AND	**FRANK DUNKLEY**	**2ND RESPONDENT**

Miss Audrey Clarke for the appellant

Mr Ewan Thompson for the respondents

15 July and 25 November 2016

BROOKS JA

[1] I have read in draft the judgment of my learned sister Edwards JA (Ag) and agree with her reasoning and conclusion. I have nothing that I can usefully add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of Edwards JA (Ag) and I agree.

EDWARDS JA (AG)

[3] This is an appeal from the judgment and orders of the learned Resident Magistrate (now termed Parish Judges) for the parish of Saint Elizabeth in an action brought by the appellant Mr Paul Blake against the respondents Mr Donald Williamson and Mr Frank Dunkley jointly and severally, for the tort of trespass. The defence stated in the court below was a joint defence and Mr Williamson took no part in the trial or in this appeal.

[4] The plaint filed by Mr Blake in November 2008, was for damages in the sum of $250,000.00 for trespass against the two respondents and an injunction restraining the respondents and/or their servants or agents from entering upon his land. It arose from the fact that Mr Dunkley owned lands adjoining to Mr Blake in Ridge Pen, Saint Elizabeth. Mr Dunkley bought the land from Mrs Ruby-Lynn Connell. Both Mrs Connell and Mr Blake obtained their individual parcels of land from Mr Cyril Dyer.

[5] Mrs Connell obtained a registered title for her parcel of land which she later sold to Mr Dunkley. Mr Blake, who owned the land with his now deceased mother Miss Icema DaCosta, was content to retain his common law conveyance given to them by Mr Dyer at the time of purchase. Though the land was divided and apportioned as stated above, no survey had been done by anyone and each parcel was established by estimation only.

[6] In March 2008 Mr Dunkley hired Mr Williamson to construct a road on the property he bought from Mrs Connell. This Mr Williamson did. Mr Blake alleged that a

section of the road encroached on his portion of the land. They both shared a boundary line on the western and southern side of Mr Blake's parcel of land. Mr Dunkley asserted that the road he built did not cross the boundary line. Mr Blake claimed it did. Mr Dunkley's assertion was based on a survey diagram that had been commissioned by his predecessor in title, Mrs Connell, prior to her sale to him but subsequent to her obtaining the registered title for the land. Mr Blake's claim was based on his and Miss Rosetta Powell's viva voce evidence of the existing boundaries prior to the road being built. Mr Blake had never done a survey of his parcel of land despite the fact that its size was by estimation only.

The evidence at trial

[7] The case went to trial without either side commissioning a survey to identify the true boundaries of their adjoining lands; and though it should have become clear to the learned Resident Magistrate very early in the case that the true essence of the complaint involved a boundary dispute, she did not refer the matter to a surveyor as she was empowered to do by virtue of sections 97 and 101 of the Judicature (Resident Magistrate Court) Act (now known as the Judicature (Parish Court) Act). The case therefore, went to trial in the hope that whichever party successfully showed the true boundary would get judgment, as the trespass alleged was said to have occurred on or near the boundaries of both properties.

[8] At the trial Mr Blake gave evidence that the land was purchased in 1983 from Mr Dyer who was his mother's stepfather and it was conveyed by way of a deed of indenture to the both of them. This common law title was admitted into evidence as

exhibit one and a Certificate of Payment of Taxes evidencing the payment of taxes in relation to their portion of the land was admitted as exhibit two.

[9] He also gave evidence regarding the adjoining property owners at the time of his conveyance. He stated that to the north of the property is the road from Malvern to Mountainside; to the south is Cyril Dyer, east is David Patrick and west is Cyril Dyer. Further, that when they purchased the land there were no buildings on it and the land was used for farming before he started erecting a building on it in 2009. He went on to tell the court that there is now an unfinished building and a board shop on the premises and that the shop had been on the property since 2008. This shop belongs to his witness Miss Powell.

[10] He also told the court that when the property was bought it had fencing around it and that he had to fix it on many occasions. In particular, he said that on the eastern boundary he and Mr and Mrs Patrick ran the fence together and that he shares the same corner post with them. The southern and western boundaries he said were also fenced up to 2008 when he came home and found the fence missing.

[11] In addition, he told the court that he lived in the United States of America and in March 2008 he received a call, as a result of which he came to Jamaica and went to the premises in Ridge Pen. When he arrived there he was shown a surveyor's peg on his side of the property and a road. He also noticed that the fence to that side was down. However, the fencing to Mr Patrick's side was intact and the two borders with Mr Dyer's properties were still intact. He said the fence to the western and southern boundaries of

his land was there when he bought the land and he has fixed it many times whilst visiting the island. He said however, that he did not know the length of the fence nor the cost to fix it.

[12] He called Miss Powell as his witness in support of his claim. The notes of evidence that were submitted to this court did not include a record of her examination-in-chief, and despite numerous requests, they were not made available to this court up to the time of preparing this judgment. As a result all references to her evidence-in-chief are as gleaned from the judge's findings of fact and from suggestions put to her in cross-examination regarding her evidence-in-chief.

[13] Miss Powell's evidence was that she operated a shop and had lived on the land owned by Mrs Connell, Mr Dunkley's predecessor in title, for 25 years. In relation to the boundaries, she said that between 2007 and up to the time the road was built, there were two log wood trees, a big one and a small one, a sweetsop tree and a fence in the boundary line between the two properties. She described the fence as being made of wire that was nailed to a number of posts. Her shop she said was also in the boundary line.

[14] It was also her evidence that prior to the land being sold to Mr Dunkley, Mrs Connell had the land surveyed. She said that at the time the survey was done the fence was in place between the two properties. She said further that she was not present when the land was surveyed but after it was surveyed she saw the steel pegs in the ground and those pegs are still there. She said also that she was given notice to

remove from Mrs Connell's house, which she was renting, and that she moved the night before the road was built and her shop was torn down. It was also her evidence that the house and shop were torn down in 2008 and that was the time that the road was built.

[15] She further said that the road was on both parcels of land and that the pegs placed by the surveyor commissioned by Mrs Connell, were on Mr Blake's land and not in the boundary line. In cross-examination she said that a fence had been there and that she had pulled the fence to make her board shop. She said there were water pipes beside the shop which went along the fence line.

[16] Mr Dunkley was the only witness for the defence. His evidence was that he lived in Mandeville and had owned the property in Ridge Pen, Saint Elizabeth since October, 2007. He was not familiar with the boundaries to the land before purchasing it from Mrs Connell. His evidence was that there was no fence between the two properties but he saw the surveyor's peg on the left hand side of his land. He told the court that he didn't cause them to be placed there and that they were still there today. He further told the court that although he bought 3 ½ acres of land, he had never had it surveyed but had divided the land into five lots for resale. He said he demolished the house which was on the property to facilitate the subdivision. He also exhibited his registered title and the surveyor's diagram in relation to the survey that had been commissioned by Mrs Connell.

[17] It was also his evidence that he hired Mr Williamson to drive the tractor that was used to cut the road on his land. He told the court that he was present when the road was being built and he took the necessary precaution to ensure that Mr Williamson saw the pegs and did not damage them while cutting the road. He also denied that the road encroached on Mr Blake's land. It was suggested to him that there had been trees in the line marking the boundary and his response was that there had been a sweetsop tree in the middle of the road beside the shop that had been there. He maintained however, that there was no fence there and the only indication of the boundary line was the surveyor's pegs. He also said in cross-examination that he relied on the survey diagram to determine the boundaries. He also admitted that there were discrepancies between the information on the survey diagram and the registered title in relation to the ownership of the adjoining properties.

The Resident Magistrate's decision

[18] The learned Resident Magistrate after examining all the evidence presented, determined that Mr Blake having alleged a trespass needed to prove on a balance of probabilities all the elements of that tort. She determined that he had to show that:

1. he was in possession of the land; and
2. the defendants had made an unlawful entry thereupon.

[19] The learned magistrate found that there was no dispute as to the ownership of the properties in question, and accepted that the parties shared a boundary line. She took account of the survey diagram relied on by Mr Dunkley, which she accepted

indicated the positions of the monuments and barbed wire fences on the ground, where they existed. She specifically found that no such barbed wire fence was indicated on the diagram where Mr Blake and Mr Dunkley's property butted.

[20] In assessing the evidence regarding the boundary line between the two properties, the learned magistrate also compared the evidence given with the actual state of the property, having visited the locus in quo. In the eyes of the learned magistrate the current state of the locus did not accord with the evidence on Mr Blake's case. At paragraph 15 of her findings she stated that:

> "I visited the locus in this case and saw no old fence, nor any indication that there used to be a fence where the plaintiff's witness said that her shop used to be. The monuments were in the ground, they were steel pegs painted red. There were no water pipes beside the shop which went along the fence line. There was no fence or evidence that there had been a barbed wire fence. I saw no logwood trees neither did I see a sweet sop [sic] tree where the road had been cut. Further, no sweet sop [sic] tree nor [sic] logwood trees grew in what should have been the fence line. There was no evidence of uprooted trees or partially destroyed trees as far as I could see. I could see the boundary, it was a straight line behind the steel pegs painted red to the main road. The road which had been cut was well inside this boundary on Mr Dunkley's side. The road did not encroach on the plaintiff's land."

Accordingly she gave judgment for Mr Williamson and Mr Dunkley jointly and severally.

Grounds of appeal

[21] The appellant being aggrieved by the learned magistrate's decision filed the following grounds of appeal:

> "1. That the learned Resident Magistrate's decision was not reasonable in keeping with the evidence adduced;
>
> 2. That the learned Resident Magistrate erred in her treatment of the evidence in respect of the survey diagram relied on by the Defendants/Respondents vis-a-vis his Registered Title."

Appellant's submissions

[22] It was submitted, on behalf of Mr Blake, that the integrity of the survey diagram has been called into question and so any reliance on it would be problematic. His counsel Miss Clarke, in her written submissions, argued that while there had been no direct challenge to the admission of the survey diagram there was a challenge to the extent to which it could be used.

[23] Counsel complained further, that neither Mr Blake nor anyone authorised to act on his behalf had been notified of the survey that had been commissioned by Mrs Connell. The effect of this irregularity, she argued, was that the survey was not done fairly, neither was it conducted in keeping with section 27 of the Land Surveyors Act.

[24] Counsel noted that Mr Blake's evidence was that prior to 2008 he was unaware of the surveyor's pegs which he found on his property after he purchased it. Counsel argued that Mr Blake and his mother should have been accounted for on the survey document and contended that the learned magistrate did not address this failure in the survey process.

[25] Counsel also pointed out that it was indisputable that the survey diagram was inconsistent with the certificate of title, as it did not indicate that Miss DaCosta is one of the owners of land with an adjoining boundary; the surveyor on his diagram had therefore not shown due regard to the owners as shown on the title.

[26] Counsel also complained that the appellant had sub-divided the land without taking the reasonable steps to confirm his boundaries. Further, that if the integrity of the survey on which he relied, was questionable, then in all the circumstances of the case the decision of the learned judge does not appear to be reasonable.

[27] Counsel further submitted that the learned magistrate's decision was therefore plainly wrong as apart from the boundaries described in the certificate of title there is no satisfactory basis on which they have otherwise been determined.

[28] Finally, counsel argued that the balance of probabilities did not favour the respondents because Mr Dunkley had no idea of the physical boundaries of the property he had purchased and that on the central issue to be determined, a reliable commissioned land surveyor would have reasonably assisted in determining the matter in the interests of justice.

Respondent's submissions

[29] In relation to ground one, counsel Mr Thompson submitted on behalf of Mr Dunkley, that the learned magistrate had correctly identified what Mr Blake needed to prove in order to succeed on the claim for trespass. Further, that Mr Blake failed to

prove that there was a trespass to his parcel of land and therefore, judgment of the learned magistrate was reasonable in all the circumstances.

[30] Counsel pointed out that the evidence presented to the court, in particular, that Mr Blake had never had his land surveyed; the pegs or monuments in the ground were the only identifiable marks indicating the boundary line between Mr Blake's and Mr Dunkley's property; and that the view of the locus did not support the evidence given by and on behalf of Mr Blake, was enough for the learned magistrate to arrive at the conclusion that she did.

[31] It was also submitted that if Mr Blake failed to prove his claim as alleged in his particulars of claim the learned magistrate was correct to reject his claim. In support of this counsel cited the case of **Rhesa Shipping Co SA v Edmunds and another The Popi M** [1985] 2 All ER 712, where Lord Brandon held that in addition to finding for either party the learned judge had a third alternative of concluding that the party who has the burden of proof had failed to discharge that burden.

[32] In relation to ground two, counsel submitted that the learned magistrate did not err in her treatment of the survey diagram. Counsel argued that the fact that there was a discrepancy between the adjoining land owners named on the survey diagram and the names on the certificate of title was not fatal, since the survey diagram was clearly in relation to Mr Dunkley's land. Counsel argued further, that what was at issue was whether the road had been cut on Mr Blake's land. Therefore, he argued, it did not matter that reliance was placed on the diagram in the cutting of the road and not on

the title, if the diagram was in relation to Mr Dunkley's land. It was submitted that once the learned magistrate was satisfied that the diagram was in respect of Mr Dunkley's land, the discrepancy with the named owners of the adjoining lands in the diagram and the certificate of title would not be enough for the learned magistrate to reject the survey diagram.

[33] Counsel also argued that the fact that Mr Blake had not received notice of the survey should not affect the outcome. Counsel pointed out that neither Mr Blake nor his mother lived in Jamaica at the time. In addition, counsel noted, the notice was served on Mr Dyer, who the survey diagram showed as occupying Mr Blake's premises at that time.

[34] Counsel submitted that this court should be very slow to disturb the judgment of the learned magistrate in circumstances where she had the advantage of seeing and hearing the witnesses, had visited the locus in quo and where it is clear that she had not misapplied some principle of law or misdirected herself on the facts or was guilty of an error of law. Counsel relied on the principles enunciated in **Watt v Thomas** [1947] 1 All ER 582 and **Industrial Chemical Co (Ja) Limited v Owen Ellis** (1986) 23 JLR 35.

[35] Counsel also submitted that once there was evidence upon which the learned magistrate could properly have come to the decision that she arrived at, this court should not disturb the judgment and it matters not that this court would have come to a different decision.

Analysis

[36] In a claim for trespass the main issue to be determined is whether or not there was unlawful or unjustifiable physical interference with the plaintiff's property. Mr Blake had the burden of proving all the elements of the tort alleged to the requisite standard, that is, on a balance of probabilities. In order to prove that the road had been built partly on his land and thereby prove the trespass, he needed to prove the limits of his property and by extension the all important issue of the boundary line that divided his and Mr Dunkley's property. In the light of the circumstances of this case the learned magistrate was called upon to settle, what in essence, was a boundary dispute.

[37] The learned magistrate's decision signified not only that she did not find the trespass sufficiently proved but she also found that the respondents had sufficiently defended the claim by establishing the boundary line in their favour so as to award them judgment. Even though there was no challenge to the orders made, counsel for Mr Dunkley had cited to this court the House of Lords decision in **Rhesa Shipping Co SA** as authority that the learned magistrate had the option of non-suiting Mr Blake. Indeed a Parish Court judge has the power by virtue of section 181 of the Parish Court Act to non-suit a plaintiff where the evidence adduced was not sufficient for a decision to be made in favour of either party. In a case where satisfactory proof was not given entitling either the plaintiff or the defendant to judgment a Parish Court judge ought to non-suit the plaintiff. The legal result of doing so is that there would be no judgment in favour of either of the parties and the plaintiff could renew his plaint, if he later attains better proof of the claim. In this case however, it is clear that the learned magistrate

found that the evidence tended on the side of a favourable decision for the respondents and no issue of non-suiting the plaintiff arises in this case.

The magistrate's reliance on the survey diagram

[38] In the light of the submissions by counsel for Mr Blake regarding the learned magistrate's reliance on the survey diagram, it is convenient to deal with the issues raised in ground two first.

[39] Mrs Connell, Mr Dunkley's predecessor in title, commissioned a survey of the land in June 2007 before she sold it to him. The survey was done by Mr Anthony Allison a commissioned land surveyor. The survey diagram was tendered into evidence by Mr Dunkley to show the boundary lines relied on by him when he built the road. Mr Blake made no objection to this document being tendered into evidence in the court below.

[40] Neither Mr Blake nor any one representing him or his mother was present at the time the survey was done. Both co-owners resided outside of the jurisdiction at the time. The notice regarding the survey had been served on Mr Dyer, the previous owner of the property, who was noted on the survey diagram as being the occupier at the time the survey was done. It is important to note that the survey was conducted after the registered title had been created for Mrs Connell's land. The certificate of title refers to Miss DaCosta as being the owner of the relevant adjoining parcel.

[41] There were a number of complaints in relation to the survey diagram. The main one being that the description as to the ownership of the adjoining properties did not accord with what was on the registered title. Further there was also the complaint that

the requirements in the Land Surveyors Act were not followed in relation to the service of the notice.

[42] Section 27(1) of the Land Surveyor's Act provides for the giving of notice to the owners or occupiers of all adjoining lands. In this case the appellant and his mother were absentee owners. The notice was served on the occupant Mr Dyer. Indeed there is no suggestion that he was not the occupant at the relevant time. There is nothing in the Act which states that the occupant or owner of adjoining premises must attend the survey, just that notice must be given. Mr Dyer having been notified did not attend. I do not agree with counsel for Mr Blake that this failure to notify the owners resulted in an irregularity in the survey process.

[43] As it relates to the issue that fell to be determined, the survey diagram would have been very helpful to the court based on its main purpose which is to identify and describe property, especially the boundary lines. It became even more significant because it was done before the construction of the road which was the reason for the complaint of trespass.

[44] The diagram was done in relation to the property now owned by Mr Dunkley and showed the adjoining lands which included the plaintiff's land. On the survey diagram, contrary to Mr Dunkley's evidence that there was a fence, there was no indication that a fence existed between the two properties at the time the survey was done. This is significant because in relation to the other adjoining lands the surveyor noted and described the fences that were present. The surveyor also noted on the diagram the

persons who attended the survey. These were the Patricks who shared a fenced boundary with both Mr Blake and Mr Dunkley and a representative of Miss Monica Dixon who shared a fenced boundary with Mr Dunkley. In his remarks the surveyor noted there were no objections to the survey and that it was carried out based on instructions and markings on the ground.

[45] It is also important to recall that neither Mr Blake's property nor Mr Dunkley's property had been surveyed previously despite the fact that both were cut from the same parcel of land. Each parcel was measured by estimation so that the surveyor would have been dependent on information given to him by the attendees; by the person who commissioned the survey, by any marks which he might have seen on the ground as to the boundaries and by the certificate of title to the relevant parcels. In the case of Mr Dunkley's parcel no diagram or plan was attached to the duplicate certificate of title registered at volume 1183 folio 252 and in the case of Mr Blake's parcel no boundary marks were indicated on his common law conveyance.

[46] Despite the discrepancy between the survey diagram and the certificate of title regarding the ownership of the adjoining lands, there was no error in relation to the description of the particular property, in that the survey concerned Mr Dunkley's land and as such identified the adjoining lands which included the property owned by Mr Blake. There are no discernible errors in relation to the purpose for which it was admitted in this case, that is, to determine the boundary line between the two properties. There is also no doubt that the survey diagram reflected both properties and

the boundary line between them. Mr Dunkley identified and marked the position of the respective properties on the diagram at the trial and no issue was taken with it by Mr Blake.

[47] Although Miss DaCosta bought the land from her step father Mr Dyer and it was never surveyed or brought under the Registration of Titles Act to secure a certificate of title, she was recognised as an adjoining owner on the certificate of title issued to Mrs Connell. Neither Miss DaCosta nor Mr Blake ever occupied their land and the survey document done subsequent to the registration by Mrs Connell of her parcel, not surprisingly recognised Mr Dyer, the original owner, as the occupier of the said land. It is also not unusual for the survey diagram to refer to an occupant rather than the owner, which is no doubt why the Land Surveyor's Act recognises the occupant as a person to be served with notice of the survey.

[48] Mr Blake's witness, Miss Powell, stated in her evidence that after the land now owned by Mr Dunkley was surveyed she saw the pegs. Further, and it is worth repeating, there was no assertion that the parcels of land depicted on the diagram do not represent the relevant parcels. In fact the survey document refers to the property to be surveyed as "part of Ridge Pen Volume 1183 Folio 252" and indicates that the survey was instigated by Ruby Lynn Morrison-Connell.

[49] The certificate of title registered at volume 1183 folio 252 describes the property as by estimation three acres more or less and butting northerly on the mountainside to Malvern main Road on lands belonging to David Patrick and Enid Russell, respectively-

easterly on lands belonging to Icema DaCosta and Nosworth Robinson respectively-southerly on lands belonging to the said Nosworth Robinson-westerly on lands belonging to Aaron Grindley and Leonard Braham, respectively. When compared with the survey diagram, some of the adjoining owners are differently described on the title and Mr Patrick's land is butting to the north rather than to the east.

[50] On Mr Blake's conveyance, his portion of the land is estimated at 4/3 square. The lands described in it as belonging to Mr Dyer butting and bounding to the west are the said lands sold to Mrs Connell and later bought by Mr Dunkley. The description on the conveyance of the adjoining owners is consistent as Mr Blake's portion was conveyed before the sale to Mrs Connell, so that the adjoining owners at the time of the conveyance would only have been Mr Dyer and the Patricks. With respect to the difference in the description on the certificate of title as to the other adjoining owners and what is stated on the survey it is possible that owners have changed over time. Perhaps only a surveyor could say for certain if that was the case but unfortunately, with Mr Allison being deceased, no other surveyor was called to give evidence. What is clear however, is that the position of the land owned by Mr Blake and his mother Miss DaCosta, where it butts and bounds Mr Dunkley's parcel, is the same on the title as it is on the survey diagram.

[51] Counsel for Mr Blake submitted that it was wrong for the learned magistrate to determine the matter on a balance of probabilities based on a survey diagram which was so inconsistent with the certificate of title. Counsel also argued that it was equally

wrong to attempt to make a determination by a visit to the locus. However, it seems to me that Mr Blake has no one to blame but himself. Not only did he not attempt to get a certificate of title under the Registration of Titles Act for his parcel of land all these years, he did not survey his land even up to the time he took Mr Dunkley to court and he did not object to the survey being tendered into evidence by Mr Dunkley. Mr Dunkley relied on the boundaries delineated by the survey diagram and there is no evidence that the diagram is incorrect. Both parties have identified their parcels on the diagram and there is no doubt that the lands depicted on the diagram are the parcels in issue. There was no basis for the learned Resident Magistrate to reject the survey diagram tendered by Mr Dunkley.

[52] There being no objection to the survey diagram being admitted into evidence, it was open to the learned magistrate to examine it and give it such weight as she thought fit. The diagram showed all the boundaries, including the placement of the surveyor's pegs identifying the boundary line between the two properties. The challenge to it now raised before this court does not affect its validity and the learned magistrate cannot be faulted for making such use of it as she thought necessary to assist her in coming to her decision.

Was the learned magistrate's decision unreasonable in light of the evidence?

[53] In determining whether or not the learned Resident Magistrate's decision was reasonable it is necessary to examine the evidence that was before her.

[54] As previously stated, Mr Blake's common law conveyance only gave an estimation of the size of the property and no survey was ever done by him or his mother. Mr Dunkley had his registered title but there was no diagram or plan annexed to that title. He however, had a surveyor's diagram which was done subsequent to the registration of the under the Registration of Titles Act. These two documents showed that his property was registered land and also showed its boundaries. Although his title said 3½ acres more or less, the actual land on the ground by survey was 6472.614 square meters or approximately 1.6 acres.

[55] Mr Blake in presenting his case mainly relied on viva voce evidence to support his claim. Mr Dunkley relied on his registered title and the survey diagram to defend the claim. The witness Miss Powell told the court that there were trees in the fence line where Mr Blake alleged the boundary line was and it was clear that she was very familiar with both properties for a number of years. But having visited the property the learned magistrate found that none of the markers indicated by Miss Powell and Mr Blake was present nor was there any sign that they had previously existed.

[56] Of course this should not have been surprising to the learned magistrate since the evidence was that these were destroyed when the road was being constructed. If their evidence of the position of the boundary line was accurate those trees would have been destroyed by the road construction along with the shop and pipes they claimed were in the boundary line. Mr Dunkley's evidence was that there had been a sweetsop tree in the middle of where the road was built beside the shop, before it was torn

down. It was therefore open to the learned magistrate to accept that evidence from Mr Dunkley as supportive of the evidence of Mr Blake and his witness that those markers had in fact existed and to accept that where they were positioned before the road was built was in fact the boundary line. In such a case when Mr Dunkley destroyed them and built his road he would have committed the act of trespass. However, having heard that evidence and having visited the locus, the learned magistrate refused to accept that evidence as factual or decisive of the case.

[57] The object of a visit to the *locus in quo* is to enable the learned magistrate, as the judge of the facts, to understand the issues which were raised in the case and to follow and apply the evidence. It is not a "substitution for such evidence", unless sworn evidence is taken at the locus (see **R v Warwar** (1969) 11 JLR 370 at 383, per Waddington, P). Of course, it was also open to the learned magistrate to have taken sworn evidence at the locus. This evidence could have included but not limited to the size of the disputed area of land and the relationship between where Mr Dunkley admitted that a sweetsop tree had been present beside the shop where the road was built and where Mr Blake and Miss Powell claim they had been. However, in light of the circumstances of the case, her failure to do so did not cause any injustice to the parties and in light of the plaint, it would have ultimately made no difference to the result.

[58] The decision to visit the locus is entirely a matter of discretion for the trial judge and if that discretion is judicially exercised this court will not interfere. Having visited the locus the learned magistrate was faced with the only remaining evidence of the

boundary line which was the pegs. She saw nothing which would contradict the correctness of their placement. In coming to her decision the learned magistrate clearly relied on all the evidence presented to her and her view of the present state of the locus. In the first paragraph of her reasons, she stated:

> "... I have had regard to the totality of the evidence, considered all material exhibited during the trial as well as the demeanour of the parties. The decision I have reached is on the balance of probabilities on the totality of the evidence."

[59] As it relates to her visit to the locus the learned magistrate made the following statement at paragraph 15 of her reasons:

> "I visited the locus in this case and saw no old fence, nor any indication that there used to be a fence where the witness said that her shop used to be. The monuments were in the ground, they were steel pegs painted red. There were no water pipes beside the shop which went along the fence line. There was no fence or evidence that there had been a barbed wire fence. I saw no logwood trees neither did I see a sweetsop tree where the road had been cut. Further, no sweet sop [sic] tree nor logwood trees grew in what should have been the fence line. There was no evidence of uprooted trees or partially destroyed trees as far as I could see."

[60] Her reliance on the current state of the locus was one of the criticisms levelled against her decision by counsel for Mr Blake, in that the visit was long after the incident of alleged trespass. The point being made in this submission was that the state of the locus prior to the construction of the road would be very crucial; that in order to resolve the dispute, the learned magistrate would have had to determine the boundary line prior to the road being built.

[61] Whilst there is some substance to this criticism because on Mr Blake's evidence his markers such as the fence, the sweetsop tree, logwood trees and Miss Powell's shop were destroyed when the road was built, it is clear that all these things, if they existed, should have been present when the survey was done. The survey was done before the road was built. However, the diagram tendered and admitted into evidence does not reflect these markers, in circumstances where it reflects the existence of the fences at other boundaries with other adjoining owners. In the case of Mr Blake's common law conveyance it makes no mention of any markers to identify the boundaries to the property conveyed. The learned magistrate resolved the issue by finding that on a balance of probabilities they never existed and I cannot fault her approach in this regard.

[62] Curiously, Mr Blake did not present any evidence as to how much land he lost as a result of the alleged trespass. Neither was he able to state the value of the fence or how much it cost each time he repaired it, although he claimed to have repaired it on several occasions. It is curious too that he claimed that the fence was there when the land was bought. He does not claim to have erected the original fence. He only spoke to having replaced it whenever it "popped" down. But the land purchased by his mother was a small portion of the land Mr Dyer owned; and the question that arises in my mind is why Mr Dyer would have fenced off his land from himself, bearing in mind that the larger portion was sold to Mrs Connell sometime after the smaller portion was sold to Mr Blake and Miss DaCosta. Based on that bit of evidence, it is clear that the fence could not have been erected by Mrs Connell and could only have been erected, if at all,

by Mr Dyer. No other evidence was given as to why the land would have been fenced before it was bought and divided. It was, therefore, open to the learned magistrate to reject the evidence that a fence existed at the boundary between the properties in question.

[63] Having visited the property, the learned magistrate not only observed the surveyor's pegs indicating the boundary line but also concluded from that observation that the road built by Mr Dunkley was well within the boundary line and that there was therefore no trespass on Mr Blake's land. With no fence or other marking on the ground, the learned magistrate was left with the only other evidence of the boundary which was the survey pegs. Though the pegs were placed there in 2008, Mr Blake was unable to show, on a balance of probabilities, that there was a boundary line existing elsewhere prior to the placement of those pegs.

[64] In the light of the circumstances of this case, Mr Blake was required to adduce evidence regarding the boundary line in order to establish that he was in possession of the land on which the alleged trespass took place. The burden of proof was on him to prove all the elements of the tort of trespass. The learned magistrate assessed all the evidence presented and concluded that not only had Mr Blake failed to prove his case, but Mr Dunkley had provided sufficient evidential material to show that he was not a trespasser, which resulted in her giving judgment in his favour.

[65] In any case where the challenge is to the judge's findings of fact this court will have to assess the evidence that was presented to determine if the trial judge's decision

and findings were plainly wrong. The applicable principles are set out in the two cases cited by counsel for Mr Dunkley. They are **Watt v Thomas** and **Industrial Chemical Co (Ja) Limited v Owen Ellis**.

[66] In **Watt v Thomas** Viscount Simon stated at pages 582-583 that:

> " ... Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law ... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. **If there is no evidence to support a particular conclusion (and this is usually a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.** This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given..." (Emphasis added)

[67] Lord Thankerton helpfully summarised the principles at page 586 as follows:

> "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.
>
> 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."

[68] In the **Industrial Chemical Co (Ja) Limited v Ellis** Lord Oliver in dealing with this issue stated at page 43 that:

> "... The question which the Court should have considered was whether there was evidence before the learned trial judge from which he could properly have reached the conclusion that he did or whether, on evidence the reliability of which it was for him to assess, he was plainly wrong.

[69] The evidence before the learned magistrate amounted to two competing options as to the boundary line between the parties' properties. One option was that it was where the fence, trees and shop had been before the road was built. However, there was no trace of those markers at the time the case came on for trial. The other option was that it was where the surveyor's pegs were placed, which were the only remaining markers on the ground. Based on the evidence presented it cannot properly be said that the learned magistrate's decision in favour of the respondents was plainly wrong. The claim was in trespass and the appellant Mr Blake failed to show on a balance of

probabilities that he had ever been in possession of the portion of land on which Mr Dunkley built the road.

Conclusion and disposition

[70] The undisputed evidence before the learned magistrate was that Mr Blake and his mother were the owners of a parcel of land part of Ridge Pen which was originally owned by Mr Dyer. There was no dispute that Mr Dyer also sold the larger parcel to Mrs Connell and both parcels abutted each other on the western boundary of Mr Blake's parcel (which was the eastern boundary of Mr Dunkley's parcel). However, the learned magistrate having rejected the oral evidence of Mr Blake and his witness as to the exact location of the boundary line, Mr Blake failed to prove his case that he was in possession of the disputed area of land on which the road was built. His claim to trespass could not, therefore succeed as trespass is an interference with possession.

[71] Having tendered in evidence his registered title to all that parcel of land part of Ridge Pen registered at volume 1183 folio 252 and the survey diagram indicating the boundary line of that parcel with the adjoining lands, Mr Dunkley was able to show that he had a right to possession of the disputed area when he, with the help of Mr Williamson, built a road on it. The learned magistrate was therefore entitled to give judgment in their favour.

[72] In those circumstances I find no basis on which this court can disturb the learned magistrate's decision. I would therefore dismiss the appeal with costs.

BROOKS JA

ORDER

1. The appeal is dismissed.

2. Costs in the sum of $50,000.00 to the 2nd respondent.