

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, IN THE PARISH OF HANOVER

PARISH COURT CIVIL APPEAL NO 6/2018

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA**

BETWEEN MICHAEL MURDOCK APPELLANT

AND MELFORD HENRY RESPONDENT

Ronald Paris instructed by Paris & Co for the appellant

**George Traile and Mrs Dianne Phillip Traile instructed by Phillip Traile & Co
for the respondent**

22 June and 7 December 2018

MORRISON P

[1] I have read in draft the reasons for judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft reasons for judgment of F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

Background

[3] This matter came before us as an appeal from a decision of a judge of the Saint James Parish Court (“the judge”). On 3 October 2017, the judge confirmed the contents of a surveyor’s report which the court had ordered with the consent of the attorneys-at-law for the parties and gave judgment for the respondent (the plaintiff below) in an action for trespass against the appellant (the defendant below).

[4] On 22 June 2018, when we heard this appeal, we made the following orders:

“By consent, it is hereby ordered:

i. The appeal is allowed.

ii. The judgment of the Parish Court Judge is hereby set aside.

iii. The respondent's claim is hereby remitted to the Saint James Parish Court for a judge of that court to decide how to proceed in order to determine the issues between the parties.

iv. No order as to costs.”

[5] This judgment fulfils our promise to give brief reasons for having allowed the appeal.

History of the matter below

[6] By plaint number 682/2015, dated 2 March 2015, the respondent had sued the appellant for trespass in respect of “all that parcel of land comprising 4047 square meters more or less and situated at Johns Hall in the parish of Saint James”. The allegation of trespass concerned an incident on 20 January 2015, in which the appellant

is said to have entered onto the respondent's land and objected to a survey of the land. The respondent had also sought an injunction to restrain further trespass, as well as the cost of the survey which had to be aborted, general damages and costs.

[7] The matter came up in the court below on a number of occasions and on 23 July 2015, when both parties were represented by their attorneys-at-law, the following orders were made by consent:

- "(1) That BRIAN M. ALEXANDER, Commissioned Land Surveyor shall make a survey of the lands of the Plaintiff and the Defendant to reflect the boundaries on earth,
- (2) That all surveyor's costs and fees be borne equally by both parties with the Plaintiff's half being paid into Court before the final reference is completed;
- (3) That the Plaintiff abandons the claim against the Defendant for Special Damages in the sum of J\$50,000.00 and General Damages;
- (4) That there be no order as to costs." (Emphasis added)

[8] This represented a variation of an earlier consent order made on 14 May 2015, in respect of paragraph (2) which dealt with the apportionment or payment of the costs of commissioning the survey.

[9] By letter dated 7 September 2015, the surveyor was duly appointed and both parties, in keeping with the later consent order, paid the required fees. The survey was conducted on 30 May 2017, in the presence of both parties and a relative of the appellant. A report dated 31 July 2017, was submitted to the court.

[10] On 28 September 2017, the report came up for the consideration of the court below. Both counsel representing the parties were present.

[11] In her reasons for judgment, the judge indicated that counsel on both sides had accepted the contents of the report; and that neither counsel had raised any objection. The judge stated, however, that counsel for the appellant had informed her that the appellant was not happy with the contents of the report. The judge stated that, accordingly, she set the matter for mention on 3 October 2017, to allow the appellant's attorney-at-law a further opportunity to explain the contents of the report and its effect to the appellant, he being outside the courtroom on account of not being properly attired for court.

[12] The judge further indicated that on 3 October 2017, counsel for the appellant informed her that her client had communicated a particular concern to her that morning, for the very first time. The appellant's counsel requested that the appellant himself be permitted to communicate his concern to the court. The appellant did so, indicating that the surveyor had told him that he had used the "wrong pegs" and that "he [the surveyor] wanted to do another survey". He also stated that the surveyor had so informed him on 30 May 2017. The judge, having considered that bit of new information, proceeded to confirm the report and enter judgment for the respondent.

[13] The only order that was originally sought on the hearing of the appeal was this:

"The setting aside of the Order of the Parish Court Judge to accept the survey of the Commissioned Land Surveyor as determining the issues before the Court when the surveyor

himself said that the survey contained mistakes with the boundary pegs.”

[14] This, therefore, was the sole basis on which the appeal was originally filed: that the surveyor himself had stated that the survey contained mistakes with regard to the boundary pegs.

The hearing in this court

[15] When the matter came on for hearing before us, however, the appellant sought and was permitted to rely, *inter alia*, on the following supplemental grounds of appeal:

“1. The Learned Parish Judge fell into error when she formed the view that ‘since’ the matter in question was solely a dispute as to boundaries hence the reference to the surveyor had been made pursuant to section 101 of the Judicature (Resident Magistrates) Act which meant that the Court’s ‘*jurisdiction*’ in the matter had then been ousted by that of the commissioned land surveyor when in fact the Report of the Commissioned Land Surveyor *prima facie* established that the dispute was not one of boundaries but as to the Appellant/Defendant’s title to the land occupied by him and claimed by the Respondent/ Plaintiff as clearly shown on the said Survey Report.

2. The Learned Parish Judge as well as Counsel for the Appellant/Defendant failed to appreciate that the Commissioned Land Surveyor’s Report and Sketch Plan aptly demonstrated that the Respondent/Plaintiff was in fact laying claim to ...ownership of the land occupied by the Appellant/Defendant so that in essence the dispute between the parties *ab initio* was a dispute as to title hence the Respondent/Plaintiff’s claim was a dispute as to title hence the Respondent/Plaintiff’s claim for special damages of \$50,000.00 against the Appellant/Defendant ...”

[16] The main submission made on behalf of the appellant when the appeal came on for hearing was that the surveyor's report did not address the issue of the ownership of the land; but only illustrated the boundaries that each party was claiming.

[17] It became apparent that the alleged trespass revolved around the question of ownership of land on which a concrete building occupied by the appellant is located. If the boundary line that was pointed out to the surveyor by the appellant is the true boundary, then the building would fall on the appellant's land. On the other hand, if the boundary line that was pointed out to the surveyor by the respondent is the true boundary, then the building would fall on the respondent's land.

The surveyor's report

[18] The surveyor's report speaks to the fact of the survey being done and the documents by which it was informed. It also exhibits a sketch plan of part of Johns Hall, in the parish of Saint James and concludes with the following note:

"Note:-

I found old Iron Pegs (old I.P) and sword trees along the boundary line pointed out and claimed by Mr. Melford Henry.
(See sketch plan)"

[19] A perusal of the sketch plan and the surveyor's report to which it was attached makes it clear that the report does not, as the consent order required, "reflect the boundaries on earth". Instead, all that the report does is to indicate the boundary claimed by the appellant and that claimed by the respondent. It does not indicate where the true boundary lies, which was the objective of the exercise. So that, although

a surveyor's report has been provided, regrettably it does not help in resolving the issue. It might, on a cursory look, give the impression that it supports the respondent's claim, with its reference to the iron pegs and sword trees along the boundary line pointed out by the respondent. That reference, along with the fact that no exceptions were taken, is perhaps what led to the confirmation of the report. However, a close look at the sketch plan shows that those markers fall along an undisputed part of the boundary line and that there appear to be no similar markers along the disputed part of the boundary. It emerged from these considerations that the issue that led to the referral to the surveyor has not been resolved by the report. A confirmation of the report, therefore, would in reality not serve the practical and desired purpose of resolving the issue of ownership, (or even a boundary dispute).

[20] The judge stated that the referral was made pursuant to section 101 of the Judicature (Parish Court) Act. If so, it appears that the surveyor fell short of what that section requires, which is to:

“...make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands...or such other matter at issue..., and shall ascertain and settle the said boundary line...and shall, if necessary, make a plan or diagram of the said lands, indicating the boundary line...” (Emphasis added)

[21] The surveyor's report in this matter did not meet the requirements of this section. In these circumstances, therefore, the matter could not have been determined by reference to the surveyor's report that was submitted to the court and so the report ought properly not to have been confirmed.

[22] A question also arose as to whether the judge who will eventually hear the matter (assuming that it will not be resolved through discussion) should proceed pursuant to section 97(2) of the Act, and consider evidence in addition to the surveyor's report, in the court's determination of where the boundary truly lies. That section, so far as is relevant, requires the parish court judge to:

“...take all the evidence offered; and shall have power if he thinks desirable and without the consent of the parties to refer the matter to a surveyor or surveyors to make such survey or surveys and lay down such boundary line as the evidence and the law shall justify and in his final judgment shall lay down and determine the boundary in settlement of such dispute.”

[23] It is not, however, necessary in the instant appeal to determine this issue in light of the parties' consent to have the matter remitted to the court below and for a judge of that court, with, of course, the assistance of counsel on both sides, to determine the appropriate procedure.

[24] As it turned out, therefore, because of the deficiency in the surveyor's report and the highlighting of facts not previously highlighted, the hearing took a different turn from that originally envisaged. At the end of the day, we found it appropriate by the consent of the parties to make the orders indicated at paragraph [4] of this judgment.