[2016] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

RESIDENT MAGISTRATES CIVIL APPEAL NO 12/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**COLLIE TOWNSEND**	**APPELLANT**
AND	**SANDRA GRAFFINE**	**RESPONDENT**

Michael Erskine instructed by Michael B P Erskine & Co for the appellant

Don Foote for the respondent

10, 11 December 2015 and 24 June 2016

MORRISON P (AG)

[1] This is an appeal from a judgment given on 2 February 2015 by Her Honour Miss Sheron Barnes, Resident Magistrate for the parish of Westmoreland. In the action before the Resident Magistrate, the appellant (Mr Townsend) claimed against the respondent (Ms Graffine) for damages for inducing breach of contract and/or specific performance. The Resident Magistrate found for Ms Graffine and then, somewhat curiously, made an order that "the parties are non-suited and ... there is no order as to costs".

[2] The background to the matter may be briefly stated. Mr Townsend is the executor of the estate of the late Agnes McDonald (Mrs McDonald), who died on 14 April 1995. Mrs McDonald was a resident of Hopewell District, Darliston in the parish of Westmoreland. On 8 December 2003, the Supreme Court granted probate of Mrs McDonald's will dated 19 November 1994 (the will) to Mr Townsend and Miss Ruby Mitchener. Miss Mitchener, who was one of Mrs McDonald's two daughters, has since died.

[3] Ms Graffine is one of Mrs McDonald's granddaughters and a named beneficiary under the will. Mrs McDonald died leaving approximately 5 acres of land in Hopewell District (the property), which she dealt with, among other things, in the will as follows:

> "I give and bequeath to my daughter Ruby Mitchener (2) two acres of land from the road taking in her dwelling house. The hall of my dwelling house is hers too.
>
> I give and bequeath to Sandra Graffine one (1) acre of land behind Ruby's own. The small room on the dwelling house is hers too.
>
> I give and bequeath to Louise my daughter who lives in Kingston two (2) acres of land that ajoins [sic] Sandra's in the east. The room on my dwelling house is hers too.
>
> Ruby is to sell or take the land at Lundie for herself and help with the funeral expense. Ruby and Collie Townsend is to pay up my outstanding expense and to see that each person get [sic] their share.
>
> I give and bequeath to Georgia one thousand dollars ($1000.00) and two of the fowls. The money should come from the money Mr. Fletcher owed me on the land I sold him.

> Everybody should occupy their own land and don't molest each other."

[4] Ms Graffine and, it appears, other members of Mrs McDonald's family, are in possession of the property. In order to put himself in a position to give effect to the bequests in the will, Mr Townsend made arrangements for the property to be surveyed by a commissioned land surveyor, Mr Andrew Bromfield (the surveyor). On 30 May 2008, notice of the intended survey having been duly given to Ms Graffine, the surveyor visited the property, accompanied by Mr Townsend, with the intention of conducting the survey. However, upon the surveyor's enquiry, Ms Graffine objected to the survey by signing the formal notice of objection prepared by him in the following terms:

> "On this the 30th day of May 2008 I Sandra Graffine do hereby object to the survey of land part of Darliston in the parish of Westmoreland.
>
> The survey is being carried out at the instance of Collie Townsend by Andrew A. Bromfield Commissioned Land Surveyor of Savanna-la-Mar – Westmoreland.
>
> The grounds of my objection is [sic] that Collie Townsend has no claim to the property and therefore has no right to conduct any survey of this land."

[5] So, as a consequence of Ms Graffine's objection, the surveyor was unable to conduct the survey which Mr Townsend had contracted him to do. Mr Townsend therefore brought an action against Ms Graffine in the Resident Magistrate's Court for the parish of Westmoreland. His claim was set out in his particulars of claim as follows:

> "The Plaintiff claims against the Defendant to recover the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) the said sum being damages for Inducing Breach of Contract and or Specific Performance which the Plaintiff lawfully entered into with Andrew A Bromfield Commissioned Land Surveyor of Savanna-la-mar in the parish of Westmoreland his services was [sic] retained to survey land at Darliston in the parish of Westmoreland the said Andrew Bromfield in conformity to the aforesaid contract attended at the Plaintiff's land on the 30th May, 2008 to conduct the said survey, the Defendant without any just cause or excuse objected to the said survey which was being carried out on behalf of [sic] the Plaintiff's premises causing the Plaintiff to suffer loss and damages.
>
> AND the Plaintiff prays that this Honourable Court will see it fit to grant an Injunction restraining the Defendant from objecting to the said survey.
>
> AND the Plaintiff claims costs and Attorneys cost which to date of filing is Two Thousand Five Hundred Dollars ($250,000.00) [sic]."

[6] When the matter came on for trial before the Resident Magistrate on 6 January 2014, Ms Graffine's counsel stated her defence to be the following:

> "Defendant denies the assertion of inducing Breach of Contract as made out in Particulars of Claim.
>
> Further, Defendant asserts that she's in no position to carry out specific performance of this alleged contract asserted in particulars.
>
> Further, the Defendant asserts that this matter is *res judicata* in that Defendant was already brought before this court in a similar suit on Pl.#294/05 in which Judgment was granted for Defendant on 8/2/08 with cost $7,000.00, which Judgment the plaintiff has not appealed.

> Further, there was no agreement between the Plaintiff and the Defendant with respect to a particular Surveyor to conduct any survey on the property in question."

[7] In evidence before the Resident Magistrate, Ms Graffine confirmed that she knew that the property, which comprised 5 acres, belonged to the late Mrs McDonald. She described the property as "family land", stating that she was the person who controlled it. She stopped the surveyor from conducting the survey, she said, "on the basis [that] he has no claim ... [i]t is family land". When it was suggested to her in cross-examination that she had no lawful right to stop the survey, her response was, "[i]f me don't stop it the rest a family them won't stop it. Is not me one".

[8] The Resident Magistrate also heard evidence which confirmed that Mr Townsend had in fact previously brought an action against Ms Graffine for inducing breach of contract and/or specific performance (plaint no 294/05) (the previous action). The previous action arose out of an earlier attempt by Mr Townsend (on 12 May 2005) to have the property surveyed by a commissioned land surveyor (not the surveyor involved in the instant case), an effort which had also been blocked by an objection by Ms Graffine. Judgment in the previous action was given in Ms Graffine's favour on 8 February 2008 by His Honour Mr Collymore Gordon, another Resident Magistrate for the parish and Mr Townsend was ordered to pay costs of $7,000.00 to Ms Graffine as a result. However, beyond this, no details of the trial of previous action were placed before the court. In particular, the Resident Magistrate did not have the benefit of

either the notes of the evidence given at that trial or any reasons for judgment given by His Honour Mr Gordon.

[9] In the result, the Resident Magistrate, albeit that she did not formally enter judgment in these terms, also gave judgment for Miss Graffine in the instant case. The Resident Magistrate considered that (i) specific performance "can only be claimed by parties engaged in a contract" and that, in the absence of any contract between Mr Townsend and Ms Graffine, the claim for specific performance must fail; (ii) as regards the claim based on inducing breach of contract, the evidence showed that Ms Graffine, a beneficiary under the will and a person with an interest in the property, had exercised a legal right of objection to the survey, so no question of her having induced a breach of the surveyor's contract with Mr Townsend could arise; and (iii) because "the matter now being tried involves the same parties, the same cause (s) of action and the same issue (s)" determined in the previous action, the matter was *res judicata*.

[10] In his notice of appeal filed on 16 February 2015, Mr Townsend challenged the Resident Magistrate's decision on the single ground that she erred in law in concluding that the court was bound by the principle of *res judicata* in this case, having regard to the findings in the previous action. Mr Michael Erskine, for Mr Townsend, amplified this complaint in his written and oral submissions before us. He submitted that, for the principle of *res judicata* to apply, the issue which was before the Resident Magistrate in the instant case would have had to be the same as that which was tried and determined by His Honour Mr Gordon in the previous action. Taking but one example to

demonstrate that this was not so, Mr Erskine pointed out that the date of the attempted survey was different in each case (12 May 2005 versus 30 May 2008).

[11] Mr Erskine also referred us to the decision of the Privy Council in **Broken Hill Proprietary Co Ltd v Broken Hill Municipal Council** [1925] All ER Rep 672. In that case, it was contended that a decision of the High Court of Australia, as regards the valuation of a lead and silver mine for rating purposes in a particular year, compelled the court, in subsequent proceedings relating to a different year, to decide in the same way as the earlier court had. In a judgment delivered by Lord Carson, the Board rejected this contention (at page 675):

> "The decision of the High Court related to a valuation and a liability to tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, viz., the valuation for a different year and the liability for that year. It is not eadem questio, and therefor [sic] the principle of res judicata cannot apply."

[12] In my view, as Mr Don Foote, who has appeared for Ms Graffine at all stages of these proceedings, quite properly conceded, Mr Erskine is plainly right on this point. While subsequent proceedings between the same parties, arising from the same failed attempt by Mr Townsend to have the property surveyed in 2005, would obviously have attracted the principle of *res judicata*, the principle can have no application to the instant proceedings, which, albeit between the same parties and involving the same property, have to do with the attempted survey in 2008.

[13] But success on this point does not, of course, get Mr Townsend where he wants to go on this appeal. For it is clear that, as the surviving executor of Mrs McDonald's estate, with no personal interest in its disposition, Mr Townsend's sole objective is, as the Resident Magistrate put it in her reasons for judgment, "to distribute the estate as per the terms of said probated Will". Readily recognising this, Mr Erskine therefore sought and was given permission by the court to argue, as his second ground of appeal, that the Resident Magistrate erred in finding that Ms Graffine, by objecting to the survey, did not commit the tort of inducing breach of contract.

[14] Mr Erskine submitted that, by intentionally preventing the surveyor from conducting the survey on 30 May 2008, Ms Graffine had induced a breach of contract between the surveyor and Mr Townsend. In this regard, it was submitted, the important question was not whether Ms Graffine had a legal right of objection to the survey, but whether she had a valid and good reason for the objection. Further, it was submitted, not only did Ms Graffine have no valid or good reason to object to the survey, but the reason she gave was "completely unjustified, frivolous, obstructive and without substance whatever, and the objection was made for the sole purpose of preventing the Executor from distributing the estate in accordance with the wishes of the testator". In support of these submissions, Mr Erskine referred us to the decisions of this court in **Samuel Marshall v Isaac Jacks and Minette Wilson** (1972) 12 JLR 708 and **Gurzel Buchanan v Eustace Irving** (1972) 12 JLR 1036, to which I will come in a moment.

[15] Mr Foote for his part took us back to basics on the ingredients of the tort of inducing breach of contract. He cited the well-known case of **DC Thomson & Co. Ltd v Deakin And Others** [1952] 2 All ER 361, 378, in which Jenkins LJ observed, after referring to some of the older cases on the subject –

> "... that in all these cases there is something amounting to a direct invasion by the third party of the rights of one of the parties to the contract, by prevailing on the other party to do, or doing in concert with him, or doing without reference to either party, that which is inconsistent with the contract, or by preventing, by means of actual physical restraint one of the parties from being where he should be or doing what he should do under the contract."

[16] Before looking at Mr Erskine's cases, I should first mention some of the relevant sections of the Land Surveyors' Act (the Act). Firstly, there is section 27(1), which provides for the giving to the owners or occupiers of all adjoining lands which may be affected by the survey of at least 10 days notice by any surveyor intending to enter any land for the purpose of surveying it.

[17] Next, there is section 29, which provides for notices of objection in the following terms:

> "Where the survey is undertaken by appointment of the owner of any land then every owner of any land upon whom notice has been served, and any person interested in and affected by the survey of such land, may cause to be served upon the surveyor, prior to the completion of the survey, notice of objection, in the prescribed form, to such survey. Upon service of such notice of objection the surveyor shall not proceed with the survey in so far as it affects the land in

> respect of which notice was given until notice of withdrawal, in the prescribed form, is served upon such surveyor."

[18] And lastly, I will mention section 41, which makes it an offence for any person to cause to be served on any surveyor a notice of objection "... which, to the knowledge of that person, is not founded upon any interest, or a *bona fide* claim to any interest, in any land affected by the survey ..."

[19] Coming now to the cases, I must first refer to two earlier cases which, though not specifically referred to by Mr Erskine, were also discussed in the cases cited by him. The earliest of them is **Stokesfield Limited v Taylor and Bennett** (1928) Clark's Reports 287, in which the plaintiffs succeeded in their claim for trespass to land against the defendants before a Resident Magistrate. The trespass complained of in the particulars of claim consisted of breaking and entering the plaintiffs' close, stopping a survey and trampling the soil and herbage, among other wrongs. Dismissing the appeal, the Full Court of the Supreme Court held that –

> "It is sufficient to support the judgment that the Resident Magistrate has found that the lands on which the defendants entered are part of Stokesfield and are comprised in the plan attached to the plaintiffs' certificate of title.
>
> The defendants were not persons 'interested in and to be affected by' the survey within the meaning of sec. 20 of Law 31 of 1894 ..."

[20] The second case is **Perry and Rodgers v Senior** (1969) 11 JLR 416. In that case, the respondent arranged to have a 4 acre parcel of land, part of a larger tract of 25 acres, surveyed. The respondent had previously bought this parcel from the first appellant, who retained his interest in the remaining portion of the land. In compliance with the Act, the surveyor caused the first appellant, as an owner of adjoining lands which might be affected by the proposed survey, to be served with a notice of intended survey in the prescribed form. The notice invited the first appellant to attend at the stated time "by yourself or agent as you may think fit" and to "bring all diagrams and other papers referring to your land in order to protect your interest therein".

[21] The first appellant was at that time serving a sentence of imprisonment, so he accordingly sent the second appellant as his agent to give notice of objection to the proposed survey being proceeded with. The second appellant duly went upon the respondent's land at the time stated in the notice of intended survey and, on behalf of the first appellant, served a notice of objection to the survey, specifying three grounds: (1) that the respondent had on a previous occasion objected to the first appellant's attempt to cut off his 4 acre piece land; (2) that the respondent had refused to produce the receipt he got for the land when he was asked to produce it; and (3) that the first appellant was "now incarcerated and unable to get the necessary documents re survey". Once the objection was made, the surveyor, in compliance with section 29, declined to proceed with the survey.

[22] The respondent filed a Resident Magistrate's court claim against the appellants for damages in trespass. The Resident Magistrate considered that the grounds of objection stated in the notice of objection were frivolous, obstructive and without substance. It was therefore held that the second appellant's entry upon the respondent's land, as agent for the first appellant, was unlawful and constituted a trespass. He accordingly entered judgment for Senior against Perry and Rodgers.

[23] The appellants succeeded on appeal, this court holding that the grounds of objection were not frivolous, obstructive or without substance, but were founded upon an interest in land which might be affected by the proposed survey. Further, that entry upon land, admittedly lawful in its inception by virtue of the surveyor's notice given pursuant to the statutory provision, is not rendered unlawful by relation back by a frivolous or a *bona fide*, though erroneous, objection being made resulting in the survey not being proceeded with. Delivering the judgment of the court, Luckhoo JA explained the decision in this way (at page 419):

> "In the first place it cannot fairly be said that in the light of the evidence adduced grounds (2) and (3) in the notice of objection were frivolous, obstructive, or without substance. And indeed, ground (1) properly understood in the context of the events which occurred shows, as the other grounds do, that [the first appellant's] concern was that the survey should not take place without proper safeguard for his rights in adjoining lands which were in his ownership. Perhaps he may have taken other measures to safeguard those rights, but that does not detract from the true reasons for his objection. What is to be regarded as frivolous in the context of [the Act] is to be seen from an examination of the provisions of s. 41 ...

> It could hardly be said that the notice of objection served in the instant case was not founded upon any interest or *bona fide* claim to any interest in land affected by the survey. In the second place we do not think that an entry upon the plaintiff's land admittedly lawful in its inception by virtue of the surveyor's notice given under statutory provision is rendered unlawful by relation back by a frivolous or a *bona fide* though erroneous objection being given resulting in the survey not being proceeded with."

[24] **Perry and Rodgers v Senior** was distinguished in **Marshall v Jacks and Wilson**, the first of Mr Erskine's cases. The respondents in that case brought an action against the appellant alleging trespass to their land and, alternatively, inducing a breach of a contract of survey made between the respondents and a commissioned land surveyor. The facts were that, the respondents having engaged the surveyor to conduct a survey on land owned by them, the appellant, who had served a notice of objection to the survey on the surveyor, came upon the land and stopped it. The basis of the objection was that the land was family land. However, the appellant himself did not own, nor was he in possession of, any land sharing a boundary with the respondents' land. No notice of the intended survey had therefore been served on him. On these facts, the Resident Magistrate gave judgment for the respondents on the claim for trespass, awarding $31.50 as special damages (the surveyor's fee) and $18.50 for general damages.

[25] On appeal, the appellant contended that, given the undisputed evidence that the land in question and other surrounding lands had once been owned by a common ancestor of his and the respondents' predecessor in title, he was "a person interested in

and affected by the survey of such lands" within the meaning of section 29. Delivering the leading judgment of a strong court (Smith JA, as he then was, and Graham-Perkins JA), Fox JA considered (at page 709) that the appellant's reliance on **Perry and Rodgers v Senior** in these circumstances was "entirely misconceived":

> "The position is altogether different here. The [appellant] was neither the owner nor the occupier of any adjoining land which may be affected by the survey. The magistrate rejected his evidence to this effect. In addition no notice in the prescribed form was served upon him, consequently, unlike Perry, he did not come within the ambit of the category of persons described in the first part of s.29."

[26] Accordingly, Fox JA regarded the case as being on all fours with **Stokesfield Ltd v Taylor and Bennett**, on the authority of which he considered (at page 710) that the appellant was "excluded from the category of persons entitled to object to a survey which is described in the second limb of s.29". The entry on the respondents' land by the appellant and his stopping of the survey "were therefore not authorised by [the Act] and the magistrate was right in holding that the [appellant] had trespassed".

[27] Smith and Graham-Perkins JJA agreed with Fox JA, Smith JA observing (at page 710) that "[a] person not being an adjoining owner on whom a notice has been served under ... [the Act], who enters upon land and objects to and stops a survey on the ground of being a person 'interested in and affected by the survey', runs the risk of being found liable in trespass if it turns out that he is not found to be an interested person by the court of trial".

[28] And finally, there is **Buchanan v Irving**. The respondent in that case alleged that the appellant trespassed on his land and wrongfully and unlawfully stopped a survey of the land then in progress at his instance. The respondent's claim to ownership of the land derived through the estate of his late father, while the appellant, who resided on the land as the *de facto* adopted daughter of the respondent's mother, claimed an interest in the land by reason of dispositions contained in the respondent's mother's will. The Resident Magistrate found for the respondent, making separate awards of damages for the trespass and the unlawful interruption of the survey.

[29] On appeal, the respondent's counsel conceded that the finding of trespass against the appellant could not be supported, given the appellant's longstanding occupation of a portion of the land. As regards the question of damages for interrupting the survey, Luckhoo JA (speaking for the court) said this (at page 1038):

> "We come now to the question whether in obstructing the survey the appellant was liable in damages to the respondent. It is clear that the appellant's act in obstructing the survey proceeded on the basis that the lands being surveyed were in her ownership by reason of the dispositions contained in the last will of the respondent's mother. It is not disputed that her claim to the lands, based as it was on the respondent's mother's last will, was made *bona fide* that is with a genuine belief that she was entitled thereto under the respondent's mother's will. However, Mr. McFarlane submitted that even though her claim to the lands may be held *bona fide* it must have some basis in fact and in law. By that we understand him to be saying that an objection based on a claim which is honestly made would not avail the claimant as a defence to a claim for damages for obstructing a survey unless it turns out that the claim is well founded in fact as well as in point of law. In support of that contention he cited the cases of *Marshall v. Jacks &*

> *Wilson* 1972 12 JLR 708 and *Stokesfield Ltd v Taylor & Bennett* Clark's Reports 287*.* The former case is easily distinguishable from the instant case in that the objector in the former case was neither the owner nor occupier of adjoining lands which might have been affected by the survey and also no notice of intended survey was served upon the objector, whereas in the instant case the appellant was in occupation of part of the land to be surveyed and further it was a part of the respondent's case that a notice of intended survey was served on the appellant. The report of the latter case is scanty and does not state whether or not a notice of intended survey was served on the objector. That case appears to have turned on a question of fact as to whether or not the defendant was in possession of the land to be surveyed. A finding that he was not is tantamount to a finding of a lack of *bona fides* on the part of the defendant. In our view once the objector who has been served with a notice under s. 27 of Cap. 212 *bona fide* claims to have, i.e. genuinely believes himself on reasonable grounds to have, an interest in the land to be surveyed it matters not that such a claim is later proved to be unfounded in law. So that although the respondent in the instant case as heir-at-law was entitled to succeed to his father's land on the latter's death and those lands might have remained at all times in his ownership, it is apparent that the appellant *bona fide* claimed to be entitled under the respondent's mother's will. In such circumstance she was entitled on being served with a notice of intended survey, as the respondent asserted she was, to make her objection as contemplated by s. 29 of Cap. 212 and cannot be held liable in damages when by operation of law the survey is stopped. In this connection see *Perry & Rodgers v. Senior*."

[30] In my view, these cases support at least the following propositions:

(a) A person who is neither the owner nor occupier of adjoining lands which might be affected by a survey, and who has not been served with notice of an intended survey pursuant to section 27, but who nevertheless enters upon the land of another and interrupts a

survey being, or to be, conducted on behalf of the owner of the land, may be liable to the owner for damages for trespass to the land (**Stokesfield Ltd v Taylor and Bennett**; **Marshall v Jacks and Wilson**).

(b) If a person who, having been served with a notice of an intended survey under section 27 and having given notice of objection to a survey under section 29, *bona fide* claims to have, i.e. genuinely believes himself on reasonable grounds to have, an interest in the land to be surveyed, such a person will not be held liable in damages to the landowner when, by operation of law, the survey is stopped; and it matters not that that person's claim later proves to be unfounded in law (**Buchanan v Irving**).

(c) Where a person enters upon land lawfully by virtue of having been served with a notice of intended survey under section 27, his presence on the land is not thereafter rendered unlawful by reason of the fact that the survey was not proceeded with as a result of an objection by that person or on his behalf which ultimately proves, though *bona fide*, to be erroneous (**Perry and Rodgers v Senior**).

[31] It seems clear that, in the light of this analysis, it would plainly have been impossible for Mr Townsend to maintain that Ms Graffine's position on the property was that of a trespasser. Not only was she in actual occupation of the property, or at least a

substantial part of it, at the material time, but she was also specifically notified of the intended survey and as such fully entitled to be on the property on 30 May 2008.

[32] It is no doubt in recognition of this reality that Mr Townsend chose to frame his action against Ms Graffine in terms of the tort of inducing breach of contract. But in order to establish commission of the tort, as Mr Foote submitted, in my view correctly, it is necessary to show that the defendant was guilty of a direct invasion of the rights of one of the parties to the contract, by prevailing on the other party, to do something. Or, as it is put by the learned editors of Clerk & Lindsell on Torts (17th edn, para 23-10), "[t]he plaintiff must show that there was an intentional invasion of his contractual rights and not merely that the breach of contract was the natural consequence of the defendant's conduct".

[33] So in this case, it was necessary for Mr Townsend to show from the evidence that Ms Graffine intentionally invaded his contractual rights with the surveyor by prevailing on him not to perform his obligations under the contract of survey. But, as has been seen, once Ms Graffine exercised her legal right of objection to the survey, the surveyor had no option but to call a halt to the exercise. As the authorities demonstrate, it matters not for these purposes whether Ms Graffine's objection is well founded or based on good sense: what is required is that she should have acted in good faith. There was absolutely no evidence before the Resident Magistrate to suggest that Ms Graffine acted out of anything but a sincerely held belief that the property was family land and that it fell to her, as a matter of duty almost ("If me don't stop it the

rest a family them won't stop it"), to secure the family's interest in the land. In common with the Resident Magistrate, therefore, I have come to the clear conclusion that the claim against Ms Graffine based on the tort of inducing breach of contract cannot succeed. In these circumstances, I cannot improve on the way in which the Resident Magistrate stated her conclusion on the point:

> "With respect to **Inducing Breach of Contract**, it is well known that this occurs when one party intentionally induces or procures another to breach a contract and damage is caused. The Plaintiff is asserting that this occurred when the Defendant objected to the Survey.
>
> The evidence adduced shows that the Defendant exercised a **legal** right to objection. This was an option put to her by the Surveyor and she took it ...
>
> On the Plaintiff's case, it was they who put the option to the Defendant and prepared the Objection to Survey which the Defendant signed, - she being a person with interest in the property as she lived there and is also named in the Will as one of the beneficiaries. Her deed has **induced** no Breach of Contract." (Emphases in the original)

[34] This result, I am bound to say, gives me absolutely no pleasure. For it is quite clear that, by repeatedly obstructing Mr Townsend's well-meaning and conscientious efforts to carry out his duties as executor of Mrs McDonald's estate, Ms Graffine has achieved nothing more than to deny herself and other members of the family of the benefit of legal ownership of such portions of the property as Mrs McDonald intended that they should have. It is true that this court does have the power under section 251 of the Judicature (Resident Magistrates) Act to decline to interfere with a judgment, decree or order of a Resident Magistrate where it considers that "the effect of the

judgment shall be to do substantial justice between the parties to the cause". But, in my view, the court does not have the converse power, in a case in which it is satisfied that the Resident Magistrate's decision was fully justified by the law and the facts, to substitute in its place such other decision, or grant such remedy, as might seem to it to meet the justice of the case.

[35] So, it seems to me, this court can only express the fervent hope, as it did during the hearing of the appeal, that good sense will prevail. Further, that Mr Townsend will be allowed to bring the administration of Mrs McDonald's estate, in which he has absolutely no personal interest, to a satisfactory conclusion. Should this not prove possible, then it will be left to Mr Townsend and his legal advisors to determine what further steps may be open to them in the matter.

[36] I would therefore dismiss the appeal and, given the peculiar circumstances of the case, make no order as to the costs. However, it is clear that, in the light of the provisions of section 181 of the Judicature (Resident Magistrates) Act the Resident Magistrate's order nonsuiting the parties was inappropriate in this case. Under that section, the Resident Magistrate is given power to nonsuit the plaintiff (only), "in every case in which satisfactory proof shall not be given … entitling either the plaintiff or the defendant to the judgment of the Court". In this case, Ms Graffine, who was the defendant, was clearly entitled to judgment on the findings of the Resident Magistrate, so judgment ought properly to have been entered for her accordingly. I would therefore

set aside the order of the Resident Magistrate as being erroneous in law and substitute therefor an order entering judgment for Ms Graffine.

PHILLIPS JA

[37] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and have nothing add.

MCDONALD-BISHOP JA

[38] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion. There is nothing I can usefully add.

MORRISON P (AG)

ORDER

Appeal dismissed. Order of the Resident Magistrate nonsuiting the parties set aside. Judgment entered for the respondent. No order as to costs.