JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 8/07

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	**ASTON VIRGO**	**APPELLANT**
AND	**ALLAN GUNNING**	**1ST RESPONDENT**
AND	**EDNA GUNNING**	**2ND RESPONDENT**

Don Foote and William Hines for the appellant

Christopher Kelman, instructed by Myers, Fletcher and Gordon for the respondents

February 18, 19, 2008 & July 17, 2009

PANTON, P.

1. This appeal is against a decision of Paulette Williams, J., made on December 19, 2006 on an application for Court Orders. In that application the respondents, who had purchased land from the appellant vendor, sought orders that:

> "1. The Agreement for Sale in writing between the Claimants and Defendant dated April 7, 1973, be construed to determine the exact boundaries and dimensions of the land sold to the Claimants by the Defendant pursuant to the said Agreement and the exact boundaries and dimensions established be declared; and

> 2. The Registrar of the Supreme Court be empowered to execute any document necessary to facilitate the obtaining of Registered title by the Claimants for the land deemed to be sold to them by the Defendant should he refuse to do so within 90 days of the date of any Order made herein."

2. The learned judge dismissed the respondents' application, but ordered as follows -

> "2. The Plan submitted in the Report by Ainsworth Dick identified as Annexure 'B' is accepted as the Plan to be submitted for subdivision approval to the Westmoreland Parish Council in order to facilitate the obtaining of registered Titles for the Claimants.
>
> 3. This Plan is to be submitted within ninety (90) days of today's date.
>
> 4. Each party is to bear their own costs.
>
> 5. Leave to Appeal granted.
>
> 6. Liberty to apply."

3. Subsequent to this Order that is, on February 6, 2007, the learned judge after holding a telephone conference with counsel, varied her earlier order by deleting paragraph 2 thereof and substituting the following:

> "A Plan be prepared by Ainsworth Dick with configurations as shown in the plan attached as Annexure 'B' to the Expert Report of Ainsworth Dick to facilitate the obtaining of registered Title for the Claimants. This plan is to be submitted to the Westmoreland Parish Council."

It is this particular paragraph of the Order that has earned the displeasure of the appellant who has asked for it to be set aside.

4. A brief history is necessary for the understanding of the impugned order. The parties entered into a written agreement for the sale of land on the 7th April, 1973. Differences developed between them, delaying the provision of title. Eventually, in July 1980, the respondents filed an action for specific performance. In 1990 the appellant commenced construction of a building on what the respondents claim to be a portion of the property bought by them. On 8th March, 1995, the senior puisne judge, Chester Orr, J., made an order "agreed by consent of the parties," for the specific performance of the agreement. He also ordered the appellant to provide the respondent with a registered title, and that "an agreed pre-check plan of the land" be prepared and submitted for subdivision approval in order to facilitate the obtaining of the registered title to the respondents' parcel of land.

5. The parties continued to have differences which militated against the execution of the order of Chester Orr, J. The respondents filed a summons seeking a permanent injunction. Walker, J. (as he then was) dismissed the summons on 11th July 1995 describing it as misconceived as in the process he was being asked to construe an agreement in a situation in which the parties are in disagreement as to a fundamental term. Walker, J. said that the proper

proceedings, given the allegation of an encroachment, were for the respondents to sue in trespass. The agreed note of what Walker, J. said reads thus:

> "... the parties entered into a contract for the sale of land on the 7th day of April 1973; the land was described in the contract as 6 sq. chain fronting on the main road. The parties do not agree as to what the term fronting on the main road means. According to the plaintiff the term means a frontage of 66 feet. According to the Defendant it means no more than a frontage of 15 to 20 ft. So there is no consensus on this fundamental term of the contract. I think it is too late for me to construe that contract and give Judgment for what it means. For that reason it would be wrong for any Court to grant a Permanent Injunction to the Plaintiff. The contract is vague as to that term. That there has been inexcusable delay is also true in my view."

6. There was no appeal against the decision of Walker, J. The position remained in this state for the better part of a decade. On November 16, 2004, another application was made before Beckford, J. in the same suit for a permanent injunction. She dismissed it. There was also no appeal. Then, on May 9, 2005, the respondents filed the notice of application for court orders, referred to above, which was adjudicated on by Williams, J. However, prior to the hearing by Williams, J. there was an order made by Jones, J. on March 28, 2006, which reads in part:

> "1. The hearing in this claim is adjourned to the 18th day of October, 2006, for 1 day.
>
> 2. Ainsworth Dick, Commissioned Land Surveyor, is instructed to prepare an expert witness report within 90 days from the day hereof."

It is order no. 2 of the Order of Jones, J. that formed the base for the order that Williams, J. made on December 19, 2006.

7. In dismissing the application, the learned judge at page 18 of the record said:

> "The argument of Mr. D. Foote is to my mind therefore well founded. Issue estoppel does apply and the order cannot be granted."

However, she reasoned that the matter could not end there as "no court could recognize a need for resolution and not attempt to find one." She added:

> "The fact that an order consented to in these Courts some twenty-three (23) years ago has yet to be complied with must be addressed."

She proceeded to explain that the order of Jones, J. for Mr. Ainsworth Dick, commissioned land surveyor, to prepare an expert witness report was in recognition of what she termed "the near impossibility for an agreement" between the parties. The order of Jones, J. she said, recognizes the power of the court, under the new civil procedure rules, to make an order of its own initiative. The learned judge went on to point out that at the hearing before her both sides were allowed to address the court "on these matters which were not directly raised in the application before the court." The issue was further addressed by both sides, she said, in the final written submissions.

The grounds of appeal

8. The appellant filed the following grounds of appeal:

"1. Having delivered judgment for the Appellant/Defendant against the Respondent/Claimant (dismissing fully the Claimant's application to the Court dated 19th May 2005 the learned judge erred in proceeding to review/revisit the matter on the basis that she 'cannot however end the matter here' when he had no jurisdiction so to do.

2. Having given judgment against the Respondent/Claimant the learned judge erred in delivering herself of a further judgment, which is contrary and contradicting to the effect of her judgment not to construe, determine and declare the exact boundaries of the land sold to the Claimant by the Defendant pursuant to the sales agreement because she became functus of the matter, and her subsequent review and purported 'attempt to find a resolution' was outside her province, assumed power she never had and took upon herself appellate jurisdiction.

3. The learned judge erred in law in ordering that 'the plan that not fully submitted in the report prepared by ..... in order to facilitate ..... title for Claimant' when no such application had been made to the Court and no permission was sought of/or had been granted by the court.

4. The Honourable Ms. Justice Paulette Williams erred in law in holding that the requirements of the CPR 26.2 has been substantially complied with for the following reasons that:

   (a) the first time the Defendant became aware that the Court would act on its own initiative to accept a recommended boundary Plan submitted in the report prepared by Ainsworth Dick identified as annexure 'B' was when the judgment was being read out by Ms. Justice Williams on the morning of December 19th 2006.

Indeed no one knew the recommended plan submitted by Ainsworth Dick since same was sealed to the Court and was only opened at Court during the hearing on the morning of October 18th 2006.

(b) No Notice or Grounds of such an application was ever made to the Court nor served on the Defendant to accept the recommended plan in the report prepared by Ainsworth Dick identified as Annexure 'B' to be submitted for subdivision approval to the Westmoreland Parish Council in order to facilitate the obtaining of the registered title for the Claimant.

5. The learned judge was wrong in law in holding that:

'at this stage the Court is compelled to act. A plan has to be submitted. ... It is therefore felt that the report of Ainsworth Dick be accepted and used in facilitating the obtaining of a registered title' whereby she failed to take into consideration the fact that a plan had already been submitted which satisfy (sic) the contract, containing '6 sq chain footing on the main road'; so confirmed by the Court appointed surveyor.

6. That the learned judge erred in law in holding that there is no merit to the argument that 'the Claimant/Respondent ... have conceded the vendors right or obligation to submit a plan'."

Counter-notice of appeal

9. The respondents have also appealed against the order of Williams, J. so far as she said that issue estoppel applies to the question of the construction of the sale agreement, and that each party is to bear their own costs. The following are the grounds filed by the respondents:

"3 (a) The learned judge in Chambers fell into error by failing to appreciate that issue Estoppel did not apply to the issue of the exact boundaries and dimensions of the land sold to the Respondents by the Appellant as at no time during the Claim was that issue distinctly determined between the parties and the well-settled requirements of issue estoppel were not met therefore.

(b) The alleged notes submitted by the Appellant's Attorney of the Reasons for Order of Justice Walker (as he then was) does not amount to a final and conclusive distinct determination of the issue of the exact boundaries and dimensions of the land sold for the purposes of the principle of Issue Estoppel and the learned judge in Chambers fell into error in dismissing the Respondent's application on that basis. There was nothing therefore to prevent the learned judge in Chambers from construing the Sale Agreement since parol evidence was admissible and before her showing what was the exact boundaries and dimensions of the land sold.

(c) The learned Judge in Chambers wrongfully exercised her discretion for awarding costs in making the Order as to costs that she did, as same was unjustifiable having regard to the conduct of the Appellant described and noted by the learned Judge as follows:

(i) A Consent Order entered on March 8, 1995 has not been complied with up to the time of application before her.

(ii) The Respondents' are still awaiting their title that the Appellant agreed to provide in 1972.

(iii) The Appellant asserted that it was with reluctance that he unwilling (sic) consented to the Respondents' attorney to enter judgment, it is hoped that this

statement is not in any way contributing to the protracted delay in complying with the Order.

(d) The Appellant submitted a plan for sub-division approval that was not agreed, in clear breach of the terms of the Consent judgment.

The learned Judge failed to appreciate that there was no material before her that justified her in depriving the Respondents of their costs in seeking to enforce their right to have the Consent Judgment enforced.

4. The learned Judge in Chambers failed to appreciate that:

(a) Since the Appellant agreed to provide the Respondents with a registered title, all costs associated with obtaining same, including the sub-division approval ought properly to be for his account and sole expense.

(b) In light of the Appellant's breach of the Agreement for Sale and his intransigence both before and after the Consent Judgment, all penalties and interest that will be incurred in specifically enforcing the Agreement as ordered by Consent, ought properly to be for the account and at the sole expense of the Appellant."

The Issues

10. On the basis of the grounds of appeal filed by the parties, the following questions require determination. First, did issue estopel apply – as found by the learned judge? Second, she having dismissed the application, was Williams, J. correct in ordering the acceptance of Ainsworth Dick's report as the Plan to be submitted to the Parish Council? Third, was the learned judge empowered to

amend that order to read that Ainsworth Dick was to prepare a Plan in keeping with his report for submission to the Parish Council?

Issue Estoppel

11. The appellant contended that there had been a judicial determination in respect of this matter which ought to have prevented Williams, J. from entertaining the proceedings that were before her. In the notice of application for court orders, she was asked to construe the agreement for sale with a view to determine the exact boundaries and dimensions of the land sold by the appellant to the respondents. The appellant contended that the decisions of Walker, J. on July 11, 1995 and Beckford, J. on November 16, 2004, conclusively decided against construing the agreement for sale to stipulate the exact boundary, frontage or otherwise. Hence, he argued, there could be no further determination in the matter.

The respondents contended that this was not a matter to which issue estoppel applies, and so the learned judge was correct to have adjudicated on the matter.

12. Issue estoppel arises "where the first determination was a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties": Halsbury's Laws of England, 4th ed., Vol. 6, paragraph 1503.

According to Lord Guest in ***Carl-Zeiss-Stiftung v Rayner*** (1966) 2 All E R 536 at 565G, "the requirements of issue estoppel still remain (i) that the same

question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

13. In the instant case, it is my view that the appellant has not shown that the "same question" has been decided. Walker, J. decided that he was not in a position to construe the contract to determine its boundaries as it was vague as to the term "fronting on the main road." He had been required to say whether there had been an encroachment for the purpose of granting an injunction. The learned judge's refusal to grant an injunction cannot be taken as determining in those proceedings that the contract cannot be construed. For the limited request that was before him, he had limited evidence and so declined to grant an injunction. Furthermore, he treated the matter as one wherein he ought not to have exercised his discretion in favour of the respondents due to their tardiness in invoking the aid of equity.

14. Having decided that the application before her had to be dismissed, the learned judge nevertheless proceeded to invoke Rule 26.2(1) of the Civil Procedure Rules which she said Jones, J. had applied in making the order for the expert witness report to be prepared by Ainsworth Dick. The learned judge then considered the affidavit of the late Rupert McDonald, attorney-at-law, who had acted in the transaction, along with the evidence of Mr. Dick, and made the

order which she eventually amended to read that the report was accepted as the plan to be submitted to the Parish Council for subdivision approval.

15. Rule 26.2(1) reads:

> "Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative."

It is to be observed that Part 26, under which this rule falls, relates to the management of a case, and the powers that the Court has in managing cases. Rule 26.1 lists the Court's general powers of management in relation to matters such as adjournments, order of trial of issues, requiring attendance at court, hearing and receiving evidence by telephone, separating proceedings for trial, or even dispensing with compliance with the rules.

16. In the circumstances of the case, Jones, J. may well have been right in ordering as he did. It is not necessary for me to be definitive on this point, given the view that I take of the proceedings, which view will shortly be stated.

17. When the learned judge ruled that the application sought cannot be granted, and followed up with an order dismissing the said application, it seems to me that the fate of the application had been determined, and the judge was no longer in a position to make an order which in effect sought to revive the application. In fact, the subsequent actions of the judge were in direct opposition to and totally inconsistent with the dismissal of the application. In my

view, she was in error in making the orders she made following the order of dismissal of the application.

18. When Chester Orr, J. entered the consent judgment in March 1995, in respect of the claim, the parties were represented by counsel and it is reasonable to assume that for judgment to have been entered, the parties would have been fully in agreement on the terms of the contract, especially as to the area and boundaries of the property which was the subject of the contract of sale. The assumption seems logical as "specific performance of a contract is its actual execution according to its stipulations and terms": Fry on Specific Performance (6th ed. p. 2, para. 3). There can be no execution, however, if there is a lack of clarity as to the stipulations and terms.

19. Chester Orr, J's order also called for the appellant to provide the respondents with a registered title in the latter's names; and for an agreed pre-checked plan of the land to be prepared and submitted for subdivision approval in order to facilitate the obtaining of the registered title to the respondents' parcel of land. The stipulation for the pre-checked plan to be agreed by the parties has presented more problems than might have been contemplated. That has been so because of the parties' failure to demonstrate that they are agreed on the boundaries. The attempts by the respondents at securing an injunction to prevent what they regard as an encroachment by the appellant have been unsuccessful partly due to the lack of agreement on the boundaries. The

suggestion by Walker, J. that a suit for trespass was one means of resolving the issue did not find favour with the respondents. Hence, the filing of this application for court orders in the same 1980 suit.

20. Williams, J said this at page 15 of the record, in respect of the order made by Chester Orr, J.

> "It is noted however there was no usual order for liberty to apply thus to enable matters to be dealt with in the actual working out of the order. However, it was a consent order and there is an acceptance of the argument that this liberty is implied without being expressly reserved."

I agree with the view of the learned judge on this point. However, I fail to see how it is possible to properly determine the application without hearing evidence from the parties to the agreement for sale. The application was for the written agreement for sale to be construed so that the exact boundaries and dimensions of the land sold be determined. This in my view requires that the parties to the agreement be cross-examined for there to be judicial determination in respect of their credibility and reliability. The work of Mr. Dick or any other commissioned land surveyor seems to me to be secondary to what the parties have in fact contracted for.

21. I would allow the appeal, set aside the order of Williams, J. and remit the matter to the Supreme Court for another judge to hear evidence under cross-examination from the parties to the agreement, as well as to hear any other relevant evidence.

COOKE, J.A. (DISSENTING)

22. By an agreement for sale executed on the 7th April, 1973 the respondents purchased from the appellant "six square chains fronting on the main road". This property was situated at the Gordons River, Savannah-La-Mar in Westmoreland. The issue between the parties is as to the extent of the frontage on the main road to which the respondent/purchasers are entitled. It is indeed very startling, that an issue such as this, which is not beset by any objective difficulty, should be still occupying the resources of the court. Perhaps, a contributing factor to this undesirable state of affairs is that the respondents have changed their attorneys-at-law three times over the period. Further during this period, as now, the respondents reside in England. Apparently, also, the file in the Supreme Court was "lost".

23. The respondents contended that they built a dwelling house on the purchased land and enjoyed undisturbed possession until "some time between 1990 – 1992, the defendant (appellant) started to construct a building which we believe to be a Guesthouse" which encroached on their land. It was the respondents' understanding that as between them and the appellant at the time of the purchase, the frontage to the main road was one chain. This perceived encroachment led to litigation by the respondents seeking specific performance of the agreement for sale of 7th April, 1973. On the 8th March, 1995 there was a hearing before Chester Orr, J. at which the appellant represented himself. The

formal order consequent upon that hearing shows that it was agreed by consent of the parties that:

> "The agreement in writing dated the 7th day of April, 1973, be specifically performed. The Defendant provide the Plaintiffs with a registered Title in the names of the Plaintiffs. An agreed pre-check plan of the land be prepared and submitted for sub-division approval in order to facilitate the obtaining of the registered Title to the plaintiffs parcel of land.
> Costs to the Plaintiff be agreed or taxed."

24. After the consent order, the next significant judicial intervention in resolving the dispute between the parties was the order of Jones, J. made on the 28th March, 2006. Before the learned judge was an application by the respondents dated 9th May, 2005 for the agreement of sale to be construed to determine the exact boundaries and dimensions of the land sold to the respondents by the appellant. This order is as follows:

> "1. The hearing in this Claim is adjourned to the **18th** day of **October, 2006** for 1 day.
>
> 2. Ainsworth Dick, Commissioned Land Surveyor, is instructed to prepare an expert witness report within 90 days from the date hereof.
>
> 3. That Pursuant to part 32.10(1) of the **Civil Procedure Rules, 2002** both parties shall give instructions to the expert witness within 21 days from the date hereof.
>
> 4. That each parties' (sic) instructions given to the expert witness shall be exchanged within 5 days of the giving of the instructions.

5. Each party shall pay one-half of the fees and expenses of the expert witness to the expert within 14 days of the survey being performed.

6. The parties make themselves available for cross-examination on the 18th day of October, 2006. Rupert McDonald is to attend the hearing for cross-examination.

7. Claimant's Attorneys to prepare, file and serve the Formal Order contained herein."

25. The hearing as stipulated by the order of Jones, J. did take place on the 18th October, 2006 before Paulette Williams, J. At that time the respondents sought the following orders:

"1. The Agreement for Sale in writing between the Claimants and Defendant dated April 7, 1973 be construed to determine the exact boundaries and dimensions of the land sold to the Claimants by the Defendant pursuant to the said Agreement and the exact boundaries and dimensions established be declared; and

2. The Registrar of the Supreme Court be empowered to execute any document necessary to facilitate the obtaining of Registered title by the Claimants for the land deemed to be sold to them by the defendant should he refuse to do so within 90 days of the date of any Order made herein."

26. On the 19th December, 2006 the court delivered its written judgment. The formal order was as follows:

"1. Claimants' Application dated the 9th day of May 2005 is dismissed.

2. The Plan Submitted in the Report by Ainsworth Dick identified as Annexure "**B**" is accepted as the Plan to be submitted for subdivision approval to the Westmoreland Parish Council in order to facilitate the obtaining of registered Titles for the Claimants.

3. This Plan is to be submitted within ninety (90) days of today's date.

4. Each party is to bear their own costs.

5. Leave to Appeal granted.

6. Liberty to apply."

27. On the 6th February, 2007 the formal order of the 19th December was varied. This is now reproduced in extenso.

> "**UPON THE CLAIMANTS** applying pursuant to liberty to apply on this day, and after hearing by telephone conference Mr. Christopher Kelman, instructed by Myers, Fletcher & Gordon, Attorney-at-Law for and on behalf of the Claimants and after hearing Mr. Don Foote, Attorneys-at-Law for and on behalf of the Defendant, it is **HEREBY ORDERED THAT**:
>
> - The Order made by the Court on December 19, 2006 is hereby varied as follows:
>
> Paragraph 2 is deleted and the following words are inserted **in lieu** thereof:
>
> - A Plan be prepared by Ainsworth Dick with configurations as shown in the plan attached as Annexure "**B**" to the Expert Report of Ainsworth Dick to facilitate the obtaining of registered Title for the Claimants. This plan is to be submitted to the Westmoreland Parish Council."

28. I will now turn to the written judgment of Paulette Williams, J. She said:

> "Mr. Foote (Attorney-at-Law for the defendant) by way of a preliminary objection raised the question of issue estoppel. He asserted that in the decision of Mr. Justice Walker, as he then was, in 1995 when the application for the permanent injunction was dismissed, there was a conclusive decision against the construction of the sale agreement."

She held that "issue estoppel does apply and the order sought cannot be granted". Then she continued:

> "I cannot, however, end the matter here as no court could recognise a need for resolution and not attempt to find one. The fact that an order consented to in these Courts some twenty-three (23) years has yet to be complied with must be addressed."

The learned judge then considered the following factors:

(a) The consent order was for an agreed pre-check plan to be prepared and submitted to facilitate the issuing of a registered title. It was this consent order to which there must be compliance. Although the learned judge did not so specifically state she may well have had in mind that the appellant had submitted for sub-division approval to the Westmoreland Parish Council a sub-division application along with a plan for the proposed sub-division prepared by R. H. Anderson, Commissioned Land Surveyor upon the 10th February, 2004. This plan would have provided the respondents with a frontage on the main road of between 15 to 20 feet. It is clear that this was unilateral action on the part of the appellant and quite contrary to the consent order which mandated "an agreed pre-check plan".

(b) The order of Jones, J. made on the 29th March, 2006. This she said to her mind "was made in recognition of the near impossibility for an agreement between the parties". I note that there was no challenge to the order of Jones, J.

(c) She considered the evidence of Mr. Ainsworth Dick. She considered this evidence "highly relevant in the ultimate determination of this matter". She further said:

> "It was of particular note that Mr. Dick could point to actual physical features on the ground that appeared to be boundary lines. These features assisted him in determining the boundaries. From the affidavits before the court it is apparent that the plan submitted by Mr. Anderson with the approval of the defendant had no such features to assist in construing the boundaries."

(d) She also considered the affidavit of Mr. Rupert McDonald who died before the hearing. He was the attorney-at-law who acted for both parties. It was his understanding that the frontage to the respondents' land was one chain along the main road.

(e) The judgment was concluded in this way:

> "At this stage the court is compelled to act. A plan has to be submitted – it is unlikely any plan will be agreed between the parties. It is therefore felt that the report of Mr. Ainsworth Dick be accepted and used in facilitating the obtaining of a registered title."

29. I will now deal with the aspect of issue estoppel. The appellant here, as in the court below, has placed great reliance on this principle. It was the foundation for grounds 1 and 2 of his appeal. These were:

> "1. Having delivered judgment for the Appellant/Defendant against the Respondent/ Claimant (dismissing fully the Claimant's application to the Court dated 19th [sic] May 2005 the learned judge erred in proceeding to review/revisit the matter on the basis that she "cannot however end the matter here" when she had no jurisdiction so to do.

> 2. Having given judgment against the Respondent/Claimant the learned judge erred in delivering herself of a further judgment, which is contrary and contradicting to the effect of her judgment not to construe, determine and declare the exact boundaries of the land sold to the Claimant by the Defendant pursuant to the sales agreement because she became functus of the matter, and her subsequent review and purported "attempt to find a resolution" was outside her province, assumed power she never had and took upon herself appellate jurisdiction."

The respondent by a counter notice of appeal has challenged the learned judge's determination that issue estoppel was operative. In her judgment the learned trial judge accepted as correct the exposition of Dixon, J. as to issue estoppel in **Blair and Others v. Curran and Others** etc. [1939 – 40] 62 C.L.R. 404 at page 531 which reads:

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment decree or order necessarily established at the legal foundation or jurisdiction for its conclusion ..."

The stark question is whether or not before the hearing on the 18th October, 2006 there had been a judicial determination pertaining to the construction of the sale agreement of 7th April, 1973? In para. (7) above, the learned judge recounted the preliminary objection of Mr. Foote that "there was a conclusive decision against the construction of the sale agreement". She upheld the

objection. I find it quite incomprehensible to appreciate how "a conclusive decision against the construction of the sale agreement" can be interpreted to mean that there has been a prior construction of the sale agreement. On the 11th July, 1995 Walker, J. (as he then was) refused an application of the respondents for a permanent injunction against the appellant for the "encroachment". The appellant has exhibited his note of the oral judgment of Walker, J. It was not an agreed note as between the respective attorneys-at-law who were present at the hearing. Further this note does not bear the approval of the learned judge. From a perusal of this note it is certain that the court did not construe the sale agreement. In this note there is this sentence:

> "I think it is too late after [sic] for one to construe that contract and give judgment for what it means"

This unquestionably demonstrates that Walker, J. in refusing the application did not construe the sale agreement. Accordingly the learned trial judge was in error in upholding the preliminary objection of the appellant.

30. This is a most unusual judgment in that in substance and effect the learned trial judge adjudicated on the very application which she had erroneously dismissed on the basis that issue estoppel was a bar. In the end, she in fact addressed para. 1 of the application for Court Orders (see para. 4 above). Ultimately, the real issue before the court, a boundary dispute between the parties was subject to the resolution of the court. In such a circumstance as this, where a court within the context of a fair trial, pursues a path which can be

justifiably criticised but nonetheless, arrives at the correct destination, I would be loath, without more, to upset the decision of that court, as the learned trial judge observed twenty-three years had elapsed since the consent order before Chester Orr J. I am therefore of the view that the complaints in grounds 1 and 2 of this appeal ought not to disturb the determination of the court below.

31. Ground 3 of the appeal was that the learned judge erred in making the order in para. 2 of the first formal order of the 19th December, 2006 as varied by the second formal order of 8th February, 2007 "when no such application had made to the court and no permission was sought of/or had been granted by the court". This ground is misconceived. The order of Jones, J. of the 28th was that Ainsworth Dick was to prepare an expert witness report. The purpose of that report was, as must have been well known to the appellant, to assist the trial judge to resolve the boundary dispute between the parties. It was never envisaged that the trial court would have been bound to accept this report as conclusive of the resolution of the dispute. Such a report, as indeed with any expert report, had to be subjected to judicial scrutiny – as was done in this case. Any application that Dick's report should be determinative of the dispute would have been quite wrong and impermissible.

32. At this juncture, it is convenient to deal with the supplemental ground of appeal which reads:

> "That the Learned Judge erred in Law in altering her Previous judgment against which an appeal was filed

> by deleting The offending paragraph 2 against which an appeal was now Pending and substituting in lien [sic] thereof different words, which undermine, remove and deprive the Appellant of aspects of his Grounds of Appeal without due process of Law."

My first comment in respect of this supplemental ground is that the variation in respect of para. (2) did not change in import or design what was calculated to be achieved. This was the resolution of the boundary dispute. This variation was not an alteration (in substance) of the learned judge's "previous judgment" as is stated in this ground of appeal. Secondly, it is impossible to discern how this variation has undermined, removed or deprived the "appellant of aspects of his grounds of appeal without due process of law". As to this, there were neither oral nor written submissions in support of this untenable assertion. This I think is sufficient to dispose of this ground of appeal. As such, in the circumstances of this case it is unnecessary for me to examine the relevant Civil Procedure Rules 2002 which the appellant claims were breached in respect of telephonic conferences. En passant I note that para. 6 of the formal order of the 19th December, 2006 provides for "liberty to apply". This ground fails.

33. Ground 4 of the appeal is as follows:

> "(a) the first time the Defendant became aware that the Court would act on its own initiative to accept a recommended boundary Plan submitted in the report prepared by Ainsworth Dick identified as annexure "**B**" was when the judgment was being read out by Ms. Justice Williams on the morning of December 19th 2006. Indeed no one knew the recommended plan submitted by Ainsworth Dick since same

was sealed to the Court and was only opened at Court during the hearing on the morning of October 18th 2006.

(b) No Notice or Grounds of such an application was ever made to the Court nor served on the Defendant to accept the recommended plan in the report prepared by Ainsworth Dick identified as Annexure "**B**" to be submitted for subdivision approval to the Westmoreland Parish Council in order to facilitate the obtaining of the registered title for the Claimant."

34. Ground 4(b) of the appeal is in substance a repetition of ground 3 which has already been addressed. I will now set out rule 26.2 of the Civil Procedure Rules 2002 (C.P.R.).

"26.2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

(3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.

(4) Where the court proposes –

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to do so,

> the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing."

In 2.4 of the CPR "order" includes a judgment decree direction, award or declaration.

35. The learned trial judge was of the view that in arriving at her decision she had utilized the provisions of rule 26.2 to employ the initiative of the court. She said:

> "This order recognizes the power of the court under the new Civil Procedure Rule to make an order in its own initiative; see CPR 26.2 (1). The fact is that at the hearing before me both sides were allowed to address the court on these matters which were not directly raised in the application before the court. In the final written submissions this issue was further addressed by both sides. The other requirements of CPR 26.2 has been substantially complied with."

I would think that the court acts on its own initiative when the approach of that court is to embark on a course which was not envisaged by the respective cases presented by the contending parties. This was not so in this case. Both parties were well aware that the issue before the court was that of a boundary dispute. The decision of the court was a direct resolution of this dispute. The court's decision was within the parameter of para. 1 of the application before it. It would appear that the court found itself in difficulty in that, having erroneously upheld the preliminary objection, it recognised that the task at hand as yet had to be accomplished. Hence, the learned trial judge had recourse to rule 26.2.

36. The court did not act "on its own initiative to accept a recommended boundary plan submitted in the report prepared by Ainsworth Dick". This plan was part of the evidence which was considered by the court. In addition to his affidavit, Dick gave oral evidence. There is no record of that evidence. However, this court was informed, and I accept that he was examined by Mr. Foote on behalf of the appellant. Ironically, the specific power this court was asked to exercise was to declare that:

> "The Plan already submitted to the Westmoreland Parish Council satisfies the Appellant's contractual obligation under the Agreement for Sale of "6 sq Chain fronting on the main road" be used to facilitate the obtaining of the registered title for the Respondent/Claimant."

37. Before Dick prepared his report he received instructions from both parties. The appellant's instructions were in these terms:

> "**TO USE (the attached copies)**
>
> 1. **Diagram** of survey done by R. H. Anderson Commissioned Land Surveyor on the 15th August 1995, and
>
> 2. **Proposed Subdivision** of part of Kingswood in the parish of Westmoreland registered at Vol. 509 Folio 27 done by R. H. Anderson dated 23rd December 2003
>
> You are to **attend** and **check** to **confirm** or **deny** that the abovementioned survey and diagram of the Area marked lot 1 (in 2 above) does contain:
>
> **"6 sq. chains fronting on the main road"** "

The respondents' instructions were affidavits of the respondents, Cleveland Keddo and Rupert McDonald. Keddo was the agent of the respondents. He claimed familiarity with the land purchased by the respondents. I now reproduce paras. 6 — 10 of Dick's expert report.

> "6. Aston Virgo stated, that the concrete house indicated on the site plan, was built by him in mid 1970 for Allan and Edna Gunning.
>
> 7. It was pointed out to Aston Virgo that the garage, the concrete culvert and the unpaved driveway were in exact alignment (see Annexure B1) to allow vehicular access from the main road to the Gunning's home via a portion of the land being now claimed by him. He indicated that he built it that way, when the relation between himself and the Gunnings were more amicable and not because they were defacto owners of that portion of the land.
>
> 8. There was indication of old wire fence posts and growing stakes (See Annexure B) which would suggest that a boundary existed along that alignment for over 15 years. When questioned about it, Aston Virgo explained that the fence that previously existed was for dividing the land into cow pasture and not for the boundary between the 2 parcels of land. However Cleveland Keddo insisted that it was the position of the common boundary between the land.
>
> 9. There is an electric pole with a Jamaica Public Service (JPS) meter No.185582 (see Annexure B) which has existed there for over 20 years. This pole and the power lines leading to the Gunning's house is located near to the old boundary line between the property which existed previously.

> 10. Because of the facts highlighted in sections 6 to 9 I found no evidence that the boundary of the Gunning's portion of land had a road frontage of 66 feet as being claimed by Allan and Edna Gunning or 15 feet as claimed by Aston Virgo, and indicated on plan prepared by R.H. Anderson (Annexure C)."

I consider this a comprehensive report and it is not surprising that the court below was impressed by it. Although there was no ground of appeal which sought to criticize the conclusion in this report, I considered it useful to set it out as it goes to the issue of a fair trial to which I had earlier mentioned.

38. Ground 5 of the appeal was thus couched:

> "The learned judge was wrong in law in holding that: "at this stage the Court is compelled to act. A plan has to be submitted ... It is therefore felt that the report of Ainsworth Dick be accepted and used in facilitating the obtaining of a registered title" whereby she failed to take into consideration the fact that a plan had already been submitted which satisfy [sic] the contract, containing "6 sq chain footing on the main road"; So confirmed by the Court appointed surveyor."

This ground can be disposed of shortly. The fact that a plan had been unilaterally prepared and had already been submitted was not decisive of the boundary dispute. As already pointed out that plan did not accord with the consent order. Further that plan did not "satisfy the contract". This was an unfounded assertion. In any event, with good reason the learned trial judge rejected that plan. I tend to the view that the submission of that plan to the

Westmoreland Parish Council was a ploy to preclude the respondents from obtaining what they thought was the frontal footage to the main road which they had purchased.

39. Ground 6 was as follows:

> "That the learned Judge erred in law in holding that there is no merit to the argument that the "the Claimant/Respondent ... have conceded the vendor right or obligation to submit a plan."

The appellant in respect of this ground, in his oral submission changed tactics somewhat. The position advanced by the appellant was that since there was uncertainty as to the extent of the boundary to the main road the vendor i.e. appellant had the right to determine that issue. **Kirby and Silversky v. Cameron** 29 D.L.R. (2d) 497 a decision of the Ontario Court of Appeal was cited in support. The headnote stated inter-alia that:

> "where an accepted option to purchase provided for the sale of all the vendor's interest in certain lands "comprising approximately 690 acres, less house, 2 acres land", *held*, on appeal, it was wrong to deny specific performance to the purchaser on the ground of uncertainty as to the description and location of the two acres to be retained by the vendor. Rather, the case fell to be decided on the line of authorities holding that uncertainty of description may be resolved by holding one of the parties to have the right of selection of the land to be retained or that to be conveyed as the case may be. The subject of sale here was clearly identifiable, with an excepted portion of less than one-third of 1%, and on the evidence and conduct of the parties there was a common intention that the vendor exercise the right of selection. Even

> if there was nothing in the contract or otherwise to warrant a finding as to who should be the selector, the right would belong to the vendor as the party obliged to perform the first act under the contract, i.e. execute a deed."

That case does not support the contention of the appellant. There was no common intention that any uncertainty as to the boundary to the main road was to be determined by the vendor. **Kirby** spoke to quite a different set of circumstances as here obtains. In this case there is a mechanism for resolving the dispute. If the appellant was correct he could have determined that the frontage was 10ft and the respondents would have had to have accepted his "selection" without any means of recourse.

40. In the judgment in the court below there was an order that "each party to bear their own cost". This order has been challenged by the respondents' counter notice of appeal. Let me state forthwith that the court was being asked in effect to settle a boundary dispute. The appellant said the frontage was some twenty feet while the respondents claimed it was sixty-six feet. The order of the court will result in the frontage being forty-four feet. As such there was no successful party. This apart, there is a more fundamental factor. It is that para. 1 of the respondents application which was heard by the court called for a construction of the sale agreement. This was not strictly speaking an adversarial combat in the usual sense. Further, it was the finding of the learned trial judge:

> "... that all effort to have a survey done of the land was met with objections. The plan done on behalf of

> the claimants was objected to by the defendant and vice versa."

I would not disturb this order.

41. The respondents sought an order of this court that all the costs associated with obtaining registered title including costs for applying for subdivision approval are to be borne by the appellant. The respondents placed reliance on rule 2.15(b) (b) of the Court of Appeal Rules 2002 which gives this court the power to:

> "give any judgment or make any order which, in its opinion, ought to have been made by the court below;"

An order such as this is unnecessary. The agreement for sale specifically provided that the appellant should provide the respondents with a registered title. This must mean that <u>all</u> costs pertinent to that exercise must be borne by the appellant.

42. Finally for the reasons given above I would make the following orders:

(1) The appeal is dismissed.

(2) The costs of the appeal are to be the respondents to be agreed or taxed.

(3) The order of the court below that "each party has to bear their own costs" in respect of that hearing is affirmed.

(4) The respondents shall have half-costs of the counter notice of appeal.

DUKHARAN, J.A.

43. I have read the draft judgment of my brother Panton, P and I agree with his reasoning and conclusion. However, I wish to add a few comments.

44. In a written agreement for sale dated 7th of April, 1973 the respondents purchased land from the appellant situated at Gordon's River in Westmoreland. After some thirty six (36) years the exact boundaries and dimensions of the land remain to be determined.

45. The respondents having built a dwelling house on the purchased land enjoyed undisturbed possession until sometime in about 1992 when the appellant began construction of a building which the respondents say encroached on their land. At the time of purchase in 1973 it was the understanding of the respondents that the frontage to the main road was one chain. This led to an action for specific performance in the Supreme Court.

46. The matter came before Chester Orr, J. on the 8th of March, 1995. However by a consent order agreed by the parties it was agreed that:

> "The agreement in writing dated the 7th day of April, 1973, be specifically performed.
>
> The Defendant provide the Plaintiffs with a registered title in the names of the Plaintiffs. An agreed pre-check plan of the land be prepared and submitted for sub-division approval in order to facilitate the obtaining of the registered Title to the Plaintiffs parcel of land.

Costs to the Plaintiffs to be agreed or taxed".

47. The consent order before Chester Orr, J. was clearly not the end of the matter as on the 11th of July, 1995 it came back before Walker, J. with the respondents seeking a permanent injunction. Walker, J. dismissed the summons by saying;

> "the parties entered into a contract for the sale of land on the 7th April, 1973; the land was described in the contract as 6 sq. chains fronting on the main road. The parties do not agree as to what the term fronting on the main road means. According to the Plaintiff the term means a frontage of 66 feet. According to the Defendant it means no more than a frontage of 15 to 20 ft. So there is no consensus on this fundamental term of the contract. I think it is too late for me to construe that contract and give judgment for what it means. For that reason it would be wrong for any Court to grant a permanent injunction to the Plaintiff. The contract is vague as to that term. That there has been inexcusable delay is also true in my view".

48. Almost ten (10) years later on the 16th of November, 2004 the matter came back before Beckford, J. for a permanent injunction which was dismissed. It is to be noted that there was no appeal against the decision of Walker, J. or Beckford, J.

49. The matter again came before Jones, J. on the 28th of March, 2006. This was an application by the respondents for the agreement of sale to be construed to determine the exact boundaries and dimensions of the land sold to the respondents by the appellant. Jones, J. made an order inter alia that Ainsworth

Dick, Commissioned Land Surveyor, be instructed to prepare an expert witness report within ninety (90) days from the date thereof.

50. On the 18th of October, 2006 the hearing as ordered by Jones, J. took place before Paulette Williams, J. The respondents sought the following orders:

> (1) The Agreement for Sale in writing between the Claimants and Defendant dated April 7, 1973 be construed to determine the exact boundaries and dimension of the land sold to the Claimants by the Defendant pursuant to the said Agreement and the exact boundaries and dimensions established be declared; and
>
> (2) The Registrar of the Supreme Court be empowered to execute any document necessary to facilitate the obtaining of the Registered Title by the Claimant's for the land deemed to be sold to them by the Defendant should he refuse to do so within 90 days of the date of any Order made herein.

51. On the 19th of December, 2006 Paulette Williams, J. dismissed the respondents application and ordered that the Plan submitted in the report by Ainsworth Dick is accepted as the Plan to be submitted for subdivision approval to the Westmoreland Parish Council in order to facilitate the obtaining of registered titles for the claimants.

52. The Order of Williams, J. has not determined the exact boundaries and dimensions of the land. I agree with my brother Panton, P. that the parties to the agreement ought to be cross examined for there to be judicial determination in respect of their credibility and reliability.

53. I too, would allow the appeal, set aside the Order of Williams, J. and remit the matter to the Supreme Court for another judge to hear evidence under cross-examination from the parties to the agreement.

ORDER:

PANTON, P:

By a majority (Panton, P., and Dukharan, J.A.; Cooke, J.A. dissenting) appeal allowed. The order of Williams, J. is set aside and the matter is remitted to the Supreme Court for another judge to hear evidence under cross-examination from the parties to the agreement, and to receive any other relevant evidence. Costs of the appeal awarded to the appellant, such costs to be agreed or taxed.