IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1980/G-075

BETWEEN	ALLAN GUNNING	1ST CLAIMANT
	EDNA GUNNING	2ND CLAIMANT
A N D	ASTON VIRGO	DEFENDANT

Heard: October 18, & December 19, 2006

Appearances

Mr. C. Kelman instructed by Myers, Fletcher and Gordon for the claimants.

Mr. D. Foote for the defendant.

Williams, J.

It is to be regarded as almost tragic that a matter filed in these Courts from the 1st of July, 1980 should some twenty-six years later still be before the court. What makes it even more tragic is that a consent order entered on the 8th March, 1995 has not been complied with.

It is clear that some resolution must be achieved to put an end to this matter, justly, for both sides.

The claimants, Mr. and Mrs. Gunning have paid for their land but say they have not got what they paid for.

The defendant Mr. Virgo disagrees. The sale agreement they entered, describes the land as property located at Goodens River, Savanna-la-mar, six square chains fronting

The defendant Mr. Virgo disagrees. The sale agreement they entered, describes the land as property located at Goodens River, Savanna-la-mar, six square chains fronting on the main road. The purchase price was three thousand ($3000.00) and the deposit was the full purchase price. There is no dispute that this money was in fact paid. It is significant to note that in this agreement there was no mention of any other vendor, and therefore other owner of the land other than the defendant Mr. Aston Virgo.

The fact that there was disagreement as to the actual frontage on the main road that was the subject of the agreement is borne out by an action commenced in 1995 after the consent order.

The claimants were thereby asserting that the defendant commenced construction of a building which was encroaching on their land. Hence they applied for a permanent injunction to stop this encroachment.

It is significant to note that all efforts 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.

Hence we are now in this position where some thirty-three years after the agreement for sale, the parties seem unable to say what was actually sold and what was bought.

The claimants are still awaiting their title.

The consent order of 1995 before Mr. Justice Chester Orr expressly provided at order 2 as follows:-

The defendant provides the plaintiff with a registered title in the name of the plaintiffs.

and at 3.....

> An agreed pre-check plan of the land prepared and be submitted for sub-division approval of the registered title to the plaintiff's parcel of land.

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.

Neither side sought any consequential order to clarify what is now the bone of contention..... what are the boundaries to the land sold.

It is to be noted that in an affidavit of July 5, 1995, Mr. Virgo asserted that it was with reluctance that he unwillingly consented to the plaintiff's 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.

The claimants are today seeking the following order:-

> "The agreement for sale in writing between the claimant and the defendant be construed to determine the exact boundaries and dimensions of the land sold to the claimants by the defendant pursuant to the sale agreement and the exact boundaries and dimensions be declared."

Mr. Foote 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.

The principle of issue estoppel was recently considered by Mr. Justice Sykes in the case **S. and T. Distributors Ltd. And S. and T. Limited vs. CIBC Jamaica Ltd. and Royal and Sun Alliance (Formerly know as West Indies Insurance Company) Suit No. C.L. S-222 of 1999.**

In his judgment Mr. Justice Sykes acknowledged the words of Dixon, J. in the case of **Blair v. Curran {1939-40] 62 CLR** which he describes as stating "with great clarity the law relating to res judicata and issue estoppel." He quoted Dixon, J. extensively. For our purpose the following quote proves useful:-

> "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 justification for its conclusion.....
>
> In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.....
>
> In the phraseology of Coleridge J. in R v. Inhabitants of the Township of Hartington Middle Quarter, the judicial determination concludes, not merely as to the point actually decided but as to matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if

to raise them is necessarily to assert that the former decision was erroneous."

The decision of Mr. Justice Walker, as he the was, dismissing the application has been exhibited in the form of the notes taken by Mr. Foote of the oral judgment delivered, which was confirmed by the defendant as correct in his affidavit.

The decision was never appealed, the accuracy of the notes has never been challenged. Further these notes were apparently accepted by Miss Justice Beckford when on the 16th of November, 2004 she dismissed another application for permanent injunction. The judge made reference to the fact that Mr. Justice Walker has previously dismissed the first application.

Mr. Justice Walker is quoted as saying the application for permanent injunction was misconceived. He recognized there was no consensus on a fundamental term of the contract i.e. what the term fronting on the main road meant. He concluded it was too late for him to construe that contract and give judgment for what it means. He also went on to indicate that there was inexcusable delay and delay defeats equity. He did acknowledge that the judgment of the 8th March, 1995 had not been implemented and the plaintiffs were not in possession of a registered title. He also recognized that the land had not been surveyed. However, the notes do not to my mind reflect any pronouncement on these matters.

Mr. Kelman argued that what Mr. Justice Walker said was obiter, and is not final and conclusive on the merits of matters raised here.

The grant of a permanent injunction based on the claimants assertion that their land had been encroached upon would have, of necessity involved a determination of the

boundaries of that land. This would have been part of "the ground work" of Mr. Justice Walker's decision itself though not then directly the point at issue. Mr. Justice Walker refused to construe the boundaries.

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

I cannot however, end the matter here as no court could recognize 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 ago has yet to be complied with must be addressed.

The consent order was for an agreed pre-check plan of the land to be prepared and submitted to facilitate issuing of a registered title.

Mr. Foote had indicated that a subdivision application along with a plan has in fact been submitted for subdivision approval to the Westmoreland Parish Council in 2004.

He further argued that the claimants in 2004 had applied for a court order that "an agreed pre-check plan or some other plan" be submitted to facilitate the obtaining of the registered title. This, he said, in effect gave the defendant a choice which he exercised. The claimants, he submitted, have either waived their right to insist upon an agreed pre-check plan or have conceded the vendors right or obligation to submit a plan.

This argument has no merit. The claimants may have sought those orders but they were never granted. It is the consent order of 1995 that must be complied with. The claimants cannot be seen to have waived their right to insist upon an agreed pre-checked

On the 28th of March, 2006 when the matter was before Mr. Justice R. Jones, he ordered that an independent commissioned land surveyor be approached to prepare an

expert witness report touching the land. This order, to my mind, was made in recognition of the near impossibility for an agreement being arrived at between the parties.

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. The Court of Appeal in **Western Broadcasting Services Ltd. V. Edward Seaga SCCA 88 of 2003** considered this section of the rules.

Mr. Justice K. Harrison J.A. (Ag.) as he then was said:-

> "Judges are therefore expected to exercise the wide powers of discretion which they have fairly and justly in all the circumstances, while recognizing their responsibility to litigants in general not to allow the same defaults to occur in the future as have occurred in the past."

It is with this in mind that I consider the affidavit of Mr. Rupert McDonald and the evidence of Mr. Ainsworth Dick, the independent commissioned land surveyor selected by Mr. Justice Jones and agreed to by the parties.

It is recognized that Mr. McDonald who acted as the attorney for both sides in the sale had died prior to the hearing. In his affidavit he asserted he understood the frontage purchased to be one chain wide along the main road by six chains long and that was what was meant when he inserted the description of six (6) square chains fronting on the main road.

Although Mr. Foote indicated that he was not fully in agreement with the report of Mr. Dick being sought, it was prepared and is highly relevant in an ultimate determination of this matter. 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 a Mr. Anderson with the approval of the defendant had no such features to assist in construing the boundaries.

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.

It is therefore ordered that:-

1. The claimant's application dated the 9th of May, 2005 is dismissed.
2. The plan submitted in the report prepared by Mr. 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 the registered title for the claimants.
3. This plan is to be submitted within ninety (90) days of today's date.
4. Each party to bear their own cost.
5. Leave to apply granted
6. Liberty to apply.