[2011] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 47/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**BERNARD HOILETT**	**APPELLANT**
AND	**HERBERT PHILLIPPS**	**1ST RESPONDENT**
AND	**CANDACE MIRON**	**2ND RESPONDENT**

Barrington Frankson and Miss Kedia DelaHaye instructed by Frankson and Richmond for the appellant

Maurice Manning and Mrs Kerry-Ann Sewell instructed by Nunes, Scholefield, Deleon and Company for the respondents

6, 7 and 29 July 2011

HARRIS JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] This is an appeal from the decision of Beckford J made on 19 March 2009 wherein she ordered that:

" i. The Claimants have a right to use the foreshore adjoining Lot 271 South Sea Park in the parish of Westmoreland.

ii. The Claimants have a right of way along the southern boundary of Lot 335 South Sea Park in the parish of Westmoreland in order to access the foreshore adjoining Lot 271.

iii. That the Defendant within *twenty-one (21) days* of today's date remove the concrete wall that he constructed along the southern boundary of Lot 335 being the land comprised in Certificate of Title registered at Volume 1415 Folio 391 of the Register Book of Titles.

iv. Costs to the Claimants to be taxed agreed."

[3] The appellant appealed this order on two grounds, viz:

"(a) The learned Judge erred in law when she made the finding that the Claimants have a right of way along the southern boundary of Lot 335 South Sea Park, in the Parish of Westmoreland in order to access the foreshore adjoining Lot 271.

(b) The learned Judge fell into error when she failed to come to the view that the Claimants had no legal and/or equitable interest in Lot 271. In the absence of a legal and/or equitable interest the Claimants had no right of way over Lot 271."

As a consequence, the appellant requested that the orders made by the learned judge be set aside with costs.

The proceedings below

[4] How did this come about? The chronology of events, which is captured in the pleadings filed in the Supreme Court, is rather interesting. The claimants/respondents filed a fixed date claim form on 29 February 2008, asking the court for several

declarations, which as indicated above were granted by the court, with minor adjustments, save one which requested that the appellant be restrained from carrying on any commercial enterprise on the beach adjoining the said lots 334 and 335 of South Sea Park.

[5] The affidavit of the 1st respondent is instructive. He indicated that since November 2007, he and the 2nd respondent have been joint owners of lot 335, registered at Volume 1330 Folio 540 of the Register Book of Titles, consequent on an agreement for sale dated 27 June 2007. They had purchased the lot from Marjorie Bell and June Anderson, which was a part of a residential gated community called "South Sea Park". They also had interests in lots reserved for the common areas in the development. It was their view that they had paid a premium price for the lot as it was beach front property. The appellant owned the adjoining lot 334 and had displayed a hostile attitude towards the respondents which commenced with him preventing a survey of their lot being undertaken, and his digging trenches along their southern boundary. The appellant's response when asked about the latter activity was simply to say that he had dumped up the land along the back of their lot, as he intended to construct a commercial marina to house nine boats. He claimed that he had a licence to pursue these activities and he was going to build a wall at the back of the respondents' property to service his equipment and boats.

[6] Needless to say this caused the 1st respondent some concern, firstly, because the area was zoned for residential use and any construction along their boundary had the

potential to interfere with the use and enjoyment of lot 335. Additionally, there were several restrictive covenants on the title for lot 335 preserving the community and the environment. The appellant constructed the said wall along their boundary which was just outside the high water mark. The 1st respondent objected to this as, being unlawful, affecting their use and enjoyment of the property and their right to use the beach adjoining their property for private and domestic purposes pursuant to the Beach Control Act (the Act). It also increased the potential of flooding on the lot, caused the lot to be land-locked, and resulted in the respondents having no direct access to the foreshore and to the sea. It was also the respondents' contention that the construction of the wall would devalue their lot.

[7] The 1st respondent exhibited to his affidavit copies of the two licences which had been granted to the appellant which he had obtained through the industry of his attorneys. The licences were granted under the Act to permit the appellant the use of the floor of the sea at lot 272 South Sea Park:

(a) for the construction and maintenance of a rock armoured groyne; and

(b) to carry out capital dredging by removing 750 cubic metres of material from the floor of the sea.

[8] The certificate of title for lot 335 was also attached, and the preamble to the title read as follows:

> "HERBERT PHILLIPS and CANDACE MIRON both of 314-10 Queens Quay West, Toronto, Ontario M5J 2R9, Canada, Businessman and Bank Executive respectively are now the proprietors of an estate joint tenants in fee simple subject to

the incumbrances notified hereunder FIRSTLY in ALL THAT parcel of land part of BRUCES HILL, COVE PEN, WHITEHOUSE and FUSTIC GROVE now called SOUTH SEA PARK in the parish of WESTMORELAND being the Lot numbered THREE HUNDRED AND THIRTY-FIVE on the plan of part of Bruces Hill, Cove Pen Whitehouse and Fustic Grove now called Sea Park aforesaid deposited in the Office of Titles on the 24th day of March, 2006 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 1330 Folio 540 AND

SECONDLY as to one undivided 1/66th share and interest in ALL THOSE parcels of land parts of BRUCES HILL, COVE PEN, WHITEHOUSE and FUSTIC GROVE now called SOUTH SEA PARK in the aforesaid parish being the Lots numbered TWO HUNDRED AND SEVENTY, TWO HUNDRED AND SEVENTY-FOUR, and THREE HUNDRED AND SIXTEEN on the plans deposited on the 14th day of January, 2000 and 3rd day of May, 2000 respectively and being part of the land comprised in Certificate of Title registered at Volume 1330 Folio 540.

DATED this 1st day of November Two Thousand and Seven.

Registrar of Titles"

There were 31 restrictive covenants endorsed thereon. Covenants 21 and 31 read thus:

"21. Lot 274 and 316 shall be used for community recreational purposes only.

31. The area between the high water mark and the boundaries of the said land shall be reserved for community recreational purposes."

[9] There was a title diagram prepared by the survey department attached to the certificate of title for lot 335 which showed the positions of lots 334 and 335 being adjacent to each other, and there being lot 271 adjoining the southern boundaries of both lots, positioned between the said lots and the Caribbean Sea.

There was also exhibited to the affidavit of the 1st respondent (at page 30 A of the record), a surveyor's diagram prepared by Andrew Bromfield, Commissioned Land Surveyor dated 20 February 2008, showing the construction of the wall on lot 335, compared to the high water mark and also the Caribbean Sea, with the intervening distance represented, although not identified as lot 271, but it is not in dispute between the parties that lot 271 is situated there.

[10] The appellant filed an affidavit in response and indicated that the said lot 335 was the subject of other proceedings before the Supreme Court in Claim No. 2007 HCV 04669, wherein he was the claimant and the defendants were Mar-Bell Construction and Development Company Limited, and Marjorie Bell. In his affidavit in the proceedings below, he claimed that the respondents had induced the vendors to sell them lot 335, and the respondents had become the registered proprietors by "a trick and/or deception and/or by conspiracy". In HCV 04669 he did not make this claim but asked the court for orders of specific performance in respect of lots 334 and 335, which he said he had paid for. The defendants denied that assertion and stated instead that he had overpaid in respect of lot 334, but had paid nothing on lot 335. They were prepared to refund him such sums due to him and as the execution of the agreement of sale was conditional on payment of the purchase price, they were prepared to submit and sign the agreement of sale in respect of lot 334. With regard to lot 335, the failure to pay the sums due had triggered a notice making time of the essence to complete the sale and this having not occurred, the sale fell through.

[11] Of importance, as it bears heavily in relation to the issues on this appeal, the appellant made it clear in paragraph [6] of his affidavit, that he denied that the respondents had the right to use the beach or to access the foreshore directly from lot 335.

[12] The learned judge in the hearing below made no findings on the allegation of the trick or deception or conspiracy, quite correctly so, and as there are no grounds of appeal in relation thereto, those averments made by the appellant in his affidavit perhaps only provide background information and explanation for the actions taken by the appellant and some submissions made on his behalf, with regard to the wall constructed by him along the boundary of lot 335.

[13] An affidavit had been filed by one of the attorneys representing the respondents which exhibited the certificate of title in respect of lot 271, registered at Volume 1343 Folio 343 of the Register Book of Titles. That title had 32 restrictive covenants endorsed thereon, a few, viz 12, 16, 17, 30 and 32 that appear relevant, read as follows:

> "12. Not in any manner to impede or restrict access by the public over, through or along lot 270 to the adjoining beach and sea for the purpose of recreation including swimming, boating fishing in the sea and all activities related thereto.
>
> 16. Not to deposit or allow to remain any building material of any kind whatsoever on the roadways or on Lots 270, 274 and 316 or any part thereof save and except materials necessary for the purposes of construction or maintenance of the roadways or construction or maintenance of the said Lots 270, 274, and 316.
>
> 17. Save and except for Lots 270,274 and 316, not to use the said land or any part thereof for other than residential purposes.

30. No building or structure shall be erected within Thirty (30) metres of the highwater mark, other than structures specifically permitted by the Natural Resources Conservation Authority (NRCA).

32. The boundaries of the said land shall be set back a minimum of Fourteen Metres from the high water mark and the space between the high water mark and the Lot boundaries shall be reserved for community recreational purposes."

[14] The appellant had also filed a further affidavit exhibiting a survey report prepared for him by the said Andrew Bromfield at a later date, viz 2 January 2009, showing, that lots 334 and 335 are adjacent to each other, the boundaries of lots 335, and 271 where the wall had been constructed, and the position of the high water mark and the Caribbean Sea.

Reasons for the decision of Beckford J

[15] The learned trial judge referred to sections 3 and 4 of the Act, then posed the question, "what is the foreshore?" and said, "the answer is the part of the shore between the high and low water marks". She indicated that lots 334 and 335 do not adjoin the foreshore; they adjoin lot 271, which, in relation to the former lots, adjoin the foreshore. She also indicated that pursuant to section 11 of the Act, the Natural Resources Conservation Authority (the Authority), had the power "to grant licences for the use of the foreshore or the floor of the sea to any person, upon such conditions and in such form as they may think fit", and, "Accordingly on the 28/10/04 the Defendant was granted a licence for the construction and maintenance of a rock armoured groyne on the foreshore and the floor of the sea adjoining Lot 272 South

Sea Park". The learned judge gave the definition of "groyne" as taken from the Oxford English Dictionary as "a stone or concrete wall built at right angles to the cost (sic) to check beach erosion". The Authority, she said, could not give any person permission to build on registered land. She stated that lot 272 was also registered land and subject to benefits and restrictions, one of which was that "the owners of lands adjoining this lot are permitted to use the land "as a means of access to the sea for private domestic purposes as envisioned by section 4 of the Act".

[16] The learned trial judge made several findings of fact and law and, bearing in mind the function of this court, being one of review only, I thought it prudent to set them out *in extenso.* They are as follows:

> "1. The Claimants are the registered proprietors of Lot 335 South Sea Parke [sic].
>
> 2. The [sic] became registered proprietors on 1/11/2007.
>
> 3. In December 2007 the Defendant [sic] started to build a wall just beyond the high water mark along Lot 335.
>
> 4. The Defendant by licence granted in 2004 constructed a rock armoured groyne in the foreshore and the floor of the sea adjoining Lot 272. (the Surveyor's diagram exhibited).
>
> 5. Between the Claimants' land boundary and the sea is a part of Lot 271.
>
> 6. The surveyor's report shows the groyne jutting 801 square metres into the Caribbean Sea - properly and clearly at a right angle to the sea.
>
> 7. The restrictive covenant # 32 on the Claimants' title provides inter alia 'the area between the high water mark and the boundaries of the said land shall be reserved for community recreational purposes'.

8. The Defendant in December 2007 built a concrete wall just beyond the high water mark along the southern boundary of Lot 335.

9. Clearly this wall is built in the area "reserved for community recreational purposes.

10. Are the Claimants entitled to redress for this breach of a restrictive covenant which attaches to the title to Lot 335. I hold that they are.

11. The Defendant says the wall was built to protect the groyn[e]. I do not accept that.

12. The groyn[e] by the very nature is a protection against erosion hence the angle at which [it] is constructed. It runs perpendicular to the sea and not parallel as does the wall.

13. The wall construed [sic] in December 2007 by the Defendant interferes (without good reason- given) with the rights of the Claimants for which they are entitled to seek enforcement.

14. The Defendant, apart from a conversation with the 1st Claimant has taken no steps toward carrying out any commercial enterprise on the beach adjoining Lots 334 and 335. Accordingly an injunction will not be granted to restrain what is in effect an as yet mere word."

Having made these findings, the learned judge granted the declarations as prayed and made the order, as set out in paragraph [1] herein.

The appeal

[17] Based on the above findings the appellant and the respondents submitted certain agreed facts in respect of the hearing of the appeal which included inter alia: that the appellant was in possession of lot 334, which adjoins the respondents' property, both of which adjoin lot 271, which adjoins the foreshore. The appellant by licence obtained in 2004 from the National Environment and Planning Agency erected a rock groyne, and

erected or caused to be erected a wall just beyond the high water mark and immediately on the southern boundary of the respondents' property. The appellant and the respondents also agreed that there were three issues before this court on appeal viz:

(i) Whether the appellant has a legal or equitable right to build a boundary wall on the boundary between lot 271 and lot 335?

(ii) Whether the respondents have a right of way over lot 271 so as to gain access to the foreshore adjoining lot 271?

(iii) Whether the respondents have an equitable or legal interest in lot 271?

The appellant's submissions

Grounds one and two

[18] It is the appellant's contention that the rights given to the respondents are set out within the "four (4) corners" of the Certificate of Title in relation to lot 335 and they are not entitled to any other rights. He referred the court to the description of the property protected in the title, with specific reference to the undivided 1/66 share in lots 270, 274 and 316. Counsel for the appellant, Mr Frankson, submitted that in the absence of any easement, the respondents cannot claim any other interest, and the building of the groyne did not interfere with lots 270, 274 and 316 in which the respondents have an interest. The existence of restrictive covenants on the respective titles for lots 335 and 271, he argued, does not establish "any reciprocity of interest passing from one property to the other". Additionally, he contended that, in the absence of any legal and/or equitable interest in lot 271, which the respondents do not

have, they have no right of way and or entitlement to access the foreshore adjoining lot 271.

[19] Counsel argued further, that section 3(1) of the Act, vested all rights in and/or over the foreshore in the Crown, save and except other rights acquired under the Registration of Titles Act, or any express grant or licence from the Crown existing at the time of the commencement of the Act (1 June 1956), and which were specifically preserved, for example in the case of many fishermen who would have acquired their rights by prescription. The respondents, it was submitted, did not fall under any category, exception or class of persons referred to in the statute. Counsel also submitted that the restrictive covenant numbered 31 could not override the specific provisions of the statute. Counsel also in referring to sections 3(4) and 4 of the Act, which he submitted were clear and unambiguous, stated that the definition of "adjoining" was pertinent to the appellant's clear position of the rights of the respondents. He used the English Oxford Dictionary definition of "adjoining" viz, "To join or unite to; to be in contact with; to attach; to append; situated next to or touching something", to submit that the provisions of the Act indicate that owners of private property adjoining the foreshore may pass over and use the Crown's property for private domestic purposes, but the respondents did not fall into that category as owners of and/or occupiers of land adjoining any part of the foreshore, as it was an undisputed fact, acknowledged by the court below, that lot 335 did not adjoin the foreshore, but adjoined lot 271. Neighbouring lands did not fall within the provisions, and the respondents' lots therefore, were not entitled to any protection. The

respondents had also not shown, by evidence or otherwise, that they were entitled to traverse other lands to get to the foreshore. In any event, counsel argued, it was the Crown which had the *locus standi*, by virtue of section 19 of the Act, to bring any claim, and the respondents were therefore not the proper parties.

[20] Counsel also contended that the respondents had never pleaded reliance on the restrictive covenants endorsed on the titles as their entitlement to traverse the foreshore, and ought not to be able to rely on that position. He submitted that in any event there was no evidence that the wall had not been constructed within the 14 metres limitation as indicated. Further, the appellant had constructed the wall on lot 271, not lot 335, and it is only the registered proprietors of that lot who could complain about, or interfere with, anything along their boundary, and/or ask for its removal. The respondents had no such right. Counsel submitted that, in the absence of any statutory right to traverse lot 271, or to access the foreshore, such rights which the respondents would wish to claim could only relate to the other lots referred to on the title for lot 335, which may have access to the foreshore.

[21] Counsel however could not direct the court to any provision in the statute enjoining the respondents from having access to or from the foreshore, and could not show that the appellant had at any time a licence to construct a wall on lot 335 or at all, or that there was any evidence to show that the wall which he had constructed had been constructed to protect the groyne. Counsel therefore submitted that as the respondents could not claim any rights, to the foreshore, or to traverse lot 271, to

access the foreshore, or lot 271 itself, by way of the Beach Control Act or the Prescription Act, or pursuant to their certificate of title, their claims ought to have failed in the court below, and the appeal should succeed.

The respondents' submissions

[22] Counsel for the respondents, Mr Manning, referred to restrictive covenants numbers 31 and 32 on the certificates of title for lots 335 and 271 respectively, and submitted that these covenants conferred certain rights on the registered proprietors, that is, that the area between the high water mark and the boundaries of the properties described in the certificate of title are to be used for community recreational purposes. He submitted that no individual owner could bar any other owner from that area or from the use or enjoyment of that area. It is clear from the definition section of the Act that "the foreshore" is different from lot 271. The erection of the wall was in breach of the restrictive covenants endorsed on the titles, and the appellant could not show that he had any legitimate right or interest to erect a wall along the boundary of the two properties, that is, lot 335 and lot 271. He was not the registered proprietor in respect of either lot, and was not authorized or permitted to do so by law.

[23] The appellant could not rely on a licence to construct a groyne as a basis for the construction of a wall, and certainly not a wall which had the effect of precluding the respondents' proprietary rights of access to areas between their boundary and the high water mark. Counsel argued that the appellant had no permission or legitimate basis to construct the wall whether the wall had been constructed on lot 335 or lot 271, and in

either case it was a breach of restrictive covenant number 31 endorsed on the certificate of title for lot 335, which was a benefit preserving the community. Additionally, in paragraph 14 of the 1st respondent's affidavit he had referred to the appellant constructing the wall on his lot, and there had been no objection to that statement, so that fact could be taken to have been admitted. The covenants, he submitted, did not offend the Act. He referred to specific provisions of the Act, particularly section 2, including the definitions of "foreshore" and "adjoining land" and sections 3 and 4.

[24] Counsel argued further that there was no evidence to show that the groyne required protection by the construction of a wall or otherwise. He referred to paragraph 9 of the 1st respondent's affidavit wherein he deponed that the appellant's position to him was that having built the marina to house the boats, he was going to construct a wall to secure his equipment and the boats. It was not, at that time, to secure the groyne. In any event, the groyne was built in 2004 and the wall in 2007, Counsel contended. Counsel suggested that the wall could only have been built to frustrate the purchase by the respondents which had taken place in 2007, and submitted that both grounds were entirely without merit and the appeal ought to be dismissed with costs to the respondents.

Discussion and analysis

This appeal is far from complex and can be disposed of with some dispatch.

[25] It may be germane to set out in detail the definitions of "adjoining land" and "foreshore" in section 2, and also sections 3 and 4 of the Act.

> "2. In this Act, unless the context otherwise requires --
> 'adjoining land means land adjoining the foreshore of this Island and extending not more than one hundred yards beyond the landward limit of the foreshore;
>
> "foreshore" means that portion of land, adjacent to the sea, that lies between the ordinary high and low water marks, being alternately covered and uncovered as the tide ebbs and flows;
>
> Rights in the Foreshore on a Floor of the Sea.
>
> 3. (1) Subject to the provisions of this section, all rights in and over the foreshore of this Island and the floor of the sea are hereby declared to be vested in the Crown.
>
> (2) All rights in or over the foreshore of this Island or the floor of the sea derive from, or acquired under or by virtue of the Registration of Titles Act or any express grant or licence from the crown subsisting immediately before the commencement of this Act are hereby expressly preserved.
>
> (3) Except as provided in section 7 nothing in this Act contained shall be deemed to affect –
>
> (a) any rights enjoyed by fishermen engaged in fishing as a trade, where such rights existed immediately before the 1st June,1956, in or over any beach or adjoining land; or
>
> (b) the enjoyment by such fishermen of the use of any part of the foreshore adjoining any beach or land in or over which any rights have been enjoyed by them up to the 1st June, 1956.
>
> (4) No person shall be deemed to have any rights in or over the foreshore of this Island or the floor of the sea save such as are derived from or acquired or preserved under or by virtue of this Act.
>
> 4. Any person who is the owner or occupier of any land adjoining any part of the foreshore and any member of his

> family and any private guest of his shall be entitled to use that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing, and other like forms of recreation and as a means of access to the sea for such purposes:
> Provided that where any land as aforesaid is let, the letting of which is in pursuance of a commercial enterprise, the right to the use of the foreshore for private domestic purposes shall only be by virtue of a licence granted to the lessor under the Act."

[26] Cumulatively, on a straightforward and literal interpretation, these provisions mean that in respect of this case, the land adjoining the foreshore (extending to not more than 100 yards beyond the landward limit), would include land part of lot 271, and part of lot 335. On perusal of the three survey diagrams submitted, and using the approximate distance given between lots, and the high watermark and the sea, by reference to scaled measurement, the respondents would therefore be owners or occupiers of land adjoining the foreshore, and thus be entitled to use that part of the foreshore adjoining their land for private recreational purposes, and as a means of access to the sea for such purposes.

[27] It is very clear that the appellant had been given two licences which were issued under section 11 of the Act. One was a licence to dredge and remove 750 cubic metres of material from the floor of the sea adjoining lot 272 South Sea Park, and the other was for the construction and maintenance of a rock armoured groyne on the foreshore and the floor of the sea also adjoining lot 272 South Sea Park. The licence did not permit the construction of a wall, either along the boundary of lots 335 or 271 or anywhere else. There was not even a scintilla of evidence that the groyne required any

protection, and certainly not by the building of a wall which would have the effect of precluding the use and enjoyment of the lot along which it was constructed. Neither could it provide potential harm by flooding, or cause lot 335 to become landlocked. Indeed, I agree with counsel for the respondents that the evidence with regard to the construction of the wall does not relate to the groyne at all, but on the 1st respondent's recounting of his conversation with the appellant, the erection of the wall was for the protection of "equipment and boats". In any event, neither the groyne nor the wall could be constructed to prevent the user of, and access by the respondents, to lot 271 and thereafter to the foreshore and to the sea.

[28] The appellant had no legitimate basis to construct a wall on the boundary of lot 335. He was neither the owner nor the occupier and had no permission to do so. His claim against the former owners of the property cannot avail him, as the respondents had been the registered proprietors of the lot since November 2007, with all the rights and incidents of ownership vested in them.

[29] In this case the restrictive covenants, number 31 and number 32 on the titles for lots 335 and 271 respectively, do indicate that there shall be an area between the boundaries and the high water mark reserved for community recreational purposes. On the face of it, it does appear that there was a laid out scheme for all the lots to have reciprocity of obligations and benefits. The incumbrances on the title for lot 335 are stated to run with the land and to bind the registered proprietors and their heirs and successors, and to enure to the benefit of, and be enforceable by the registered

proprietor for the time being of any land or portion thereof comprised in certificate of title registered at Volume 1140 Folio 954. The certificate of title for lot 271 carries that same endorsement. Both owners of lot 335 and 271 are clearly bound by the covenants endorsed on their respective titles to protect the area and the environment.

[30] What is evident is that the respondents do have a right to use the foreshore adjoining lot 271, South Sea Park, Westmoreland, and a right of way along their southern boundary to access the foreshore. The respondents were entitled to bring an action to protect the use of their property and for an order for the appellant to remove the offending wall constructed along their southern boundary.

Conclusion

[31] In the light of the above, I would dismiss the appeal with costs to the respondents to be taxed if not agreed.

McINTOSH JA

[32] I too agree with the reasoning and conclusion of Phillips JA and I have nothing to add.

HARRIS JA

ORDER

Appeal dismissed. Costs to the respondents to be taxed if not agreed.