[2012] JMCA Civ 59

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 26/2009

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**CECIL ROY JULY**	**APPELLANT**
AND	**AUSTIN WILBERFORCE LEVY**	**RESPONDENT**

Mrs Janet Taylor and Miss Kadia Wilson instructed by Taylor Deacon & James for the appellant

Miss Judith Clarke instructed by Judith M Clarke & Co for the respondent

24, 25 September and 20 December 2012

PANTON P

[1] I have read, in draft, the judgment of Brooks JA and agree with his reasoning and conclusion. The learned trial judge's acceptance of the evidence of Mr Desmond Rowe places the judgment above challenge.

MORRISON JA

[2] I too have read the draft judgment of Brooks JA. I entirely agree with his reasoning and conclusion.

BROOKS JA

[3] In 1979, Messrs Cecil July, Austin Levy, Reginald Bennett and Stanford Bennett, also called "Domingo", pooled their resources to purchase the fee simple interest in a tract of land comprising approximately 731 acres and situated at Thatchfield in the parish of Saint Elizabeth. Messrs July and Levy each contributed one-third of the purchase price while the Bennetts, who are brothers, each contributed one-sixth thereof.

[4] By mutual agreement, each man was allotted a section of the land. The acreage allotted to each was roughly according to his contribution to the purchase price. Each man took possession of his portion. They erected boundary fences in many areas, dividing one parcel from the next. There was, however, an exception to the allocation to individuals. The men agreed to hold in common, between themselves, a sand bank situated at a section of the land. They intended to exploit the sandbank for their common benefit. In pursuance of that agreement, a mining operation was established and thousands of truckloads of sand were removed therefrom over the course of several years.

[5] The supply of sand in that common area is now said to be almost exhausted and a dispute has since developed between the men. The essence of the dispute is whether sand, located on parcels previously reserved for Mr Levy and Mr Reginald Bennett, respectively, is the sole property of each of these two men, or is to be exploited for the benefit of all four co-owners.

[6] The four men were unable to resolve the dispute themselves. Mr Levy brought the matter to a head on 10 May 2006, by filing a fixed date claim seeking partition of the land. In the claim, he also sought declarations as to ownership of various portions of the land, as to the mining rights in respect of those portions and as to the area reserved as common property.

[7] Campbell J heard the matter in chambers and on 6 June 2008 handed down a written judgment in favour of Mr Levy. Mr July is aggrieved by the decision and has appealed against it. The main question raised by this appeal is whether Campbell J properly relied on the evidence, including survey plans, proffered on behalf of Mr Levy, and rejected that, again including documentary evidence, produced on Mr July's behalf. An outline of the proceedings below will first be given.

The proceedings in the court below

[8] Mr Levy gave notice of the claim to the remaining co-owners. Mr Reginald Bennett sided with him, while Mr July, with whom Mr Stanford Bennett sided, resisted the claim. Mr July sought to have the court make orders dividing the land differently from the manner prayed for by Mr Levy. Importantly, Mr July also sought declarations that he was entitled to an interest in all sand located on the entire 731 acres. Affidavits were filed in support of each faction.

[9] The difference in principle between the two factions is whether the common entitlement to sand was restricted to the reserved sandbank, or was at large, wherever

sand existed on the Thatchfield property. An important, if not the central, aspect of the dispute between the two sides, is a subdivision plan for the land. It had been prepared by commissioned land surveyor Mr Desmond Rowe, and was approved by the Saint Elizabeth Parish Council on 7 December 2005. The plan portrayed the land as divided up into lots. The Levy faction advocated for acceptance of the plan, while the opposition denied any previous knowledge of it and denied that it had had any part in commissioning it.

[10] Also in dispute during the hearing, were the acreage of the sandbank and the acreage of an area around an old property house on the land. Mr Levy had agreed to surrender, from one of his portions of the land, the space around the old property house. He contended that the acreage ceded was five acres. Mr July asserted that it was 10. The issues in dispute were largely questions of fact.

[11] In delivering his judgment, Campbell J made the following orders:

> "1. That the Claimant [Mr Levy] is entitled to exclusive possession and occupation of the lots numbered **1, 2, & 4** as identified by pre checked plans bearing Survey Department examination numbers **206742, 258368 and 251828**.
>
> 2. That the Defendant Cecil Roy July has no mining rights or other rights over the said lots.
>
> 3. That subject to the requirements of the relevant authorities the approved subdivision plan bearing **205-12-07** [sic] be amended so that the lots numbered **1, 2, & 4** are shown and demarcated as they appear on the pre checked plans mentioned in paragraph 1 above.
>
> 4. That the area around the old house reserved as common property be and is hereby determined to be approximately **five areas**.

5. That there be a survey of this area to determine the precise boundaries and acreage thereof. The said survey is to be done on the basis that the boundaries of lot 4 as demarcated on the **pre checked plan numbered 251828** are correct.

6. That there be a further survey of the lot numbered **five on the approved subdivision plan** to delineate the boundaries of the land which has been allocated to Reginald and Stanford Bennett and the said survey shall be along such lines as they now occupy and shall have regard for and accept the boundary lines previously erected by Reginald Bennett to separate his allocation from the common sand mining area.

7. That the said further survey of the lot numbered five is to be done on the basis that the boundaries of **lot 2** as demarcated on the **pre checked plan numbered 258368 ("AL/DR 3")** are correct.

8. That in delineating the boundaries of the land which has been allocated to Reginald and Stanford Bennett, the acreages ascribed to [them] jointly shall not be less than 232 acres.

9. That the land remaining after the survey of the lands to be held by Reginald and Stanford Bennett shall be held in common ownership as tenants in common by all the co owners in the proportions of their entitlements as reflected on the duplicate certificate of title registered at volume 794 folio 90 of the Register Book of Titles.

10. That the cost of the further surveys and or subdivision herein shall be borne by all the parties in equal shares.

11. That the surveys shall be conducted by Mr. Desmond Rowe, commissioned land surveyor.

12. That subject to the requirements of the relevant authorities [Mr Levy] shall be entitled to apply for titles to his said lots.

13. That all the orders herein shall be subject to the requirements of the relevant planning authorities and other relevant authorities.

14. That the costs of this action be borne by [Mr July].

15. Liberty to apply." (Emphasis as in the original)

[12] Mr July's appeal against the decision is restricted to three aspects of Campbell J's order. In his notice of appeal, Mr July has not faithfully quoted from the order but has identified the areas of his discontent. The notice of appeal states, in part:

> "The details of the order appealed are:
>
> a. The Defendant Cecil Roy July has no mining rights or other rights over the lots numbered 1, 2, & 4 as identified by pre-checked plan bearing Survey Department Examination No. 206742, 258368 and 251828.
>
> b. That the Claimant Austin Levy is entitled to exclusive possession and occupation of the said land.
>
> c. That the area around the old house reserved as common property be and is hereby determined to be approximately five (5) acres."

The grounds of appeal

[13] Based on the issues in dispute, an analysis of the relevant evidence will be required. It may be helpful, before embarking on that analysis, to set out, for context, the grounds of appeal. Four grounds of appeal were filed. They are:

> "1. Having found that the sand deposit spreads over 54 acres of the land the Learned Trial Judge erred:
>
> a. in concluding that no weight should be attached to the documents referred to as Re: Thatchfield Property and the subsequent affidavit produced from it.
> b. in concluding that the Respondent was entitled to exclusive occupation and possession of lots 1, 2 and 4.
> d. [in] relegating the common area located around the old house to 5 acres.
> e. [in] failing to determine the common sand mining area.

f. [in] failing to conclude that the "portion of property which has sand on it" indicated at paragraph 3 of the Declaration of Understanding dated the 30th December, 1997 is referable only to the 54 acres of the sand.

g. [in] failing to conclude that references in the Declaration of Understanding to "sale of the sand", "sale of any sand" and "sand bed plot" are referable only to the 54 acres.

2. The Learned Trial Judge erred in law:

a. in failing to apply the principle of *non est factum*, and

b. [in] failing to consider the Claimant's previous admission by sworn affidavit.

c. in construing the undated document entitled Re: Thatchfield Property, the document entitled Declaration of understanding dated the 30th December, 1997 and the untitled document agreement dated the 19th day of August, 1990 and by so doing accepting oral testimony of the Claimant/Respondent instead of the written documents.

d. by instructing the Surveyor to carry out amendments to the surveyed plans which are in breach of the legislation, specifically Land Surveyor Regulation 16 (c.).

3. The Learned Trial Judge erred in failing to construe the Declaration of Understanding dated the 30th day of December, 1997 so as to give effect to the ownership of the land and sand deposits to accord with the respective shares of the co-owners in the property and with the result that the appellant's share is reduced to substantially less than his 1/3 interest, the Respondent received substantially more than his 1/3 interest and the sand bed is unequally distributed.

4. The decision of the Learned Trial Judge is against the weight of the evidence."

Additional information

[14] There are some additional facts that will assist understanding of the analysis to follow. The first element of those facts surrounds agreements made by the men after they had acquired the property. There are two documents which were admitted into evidence by Mr July which he asserted represented the agreement by the men. He had prepared both documents for signature by the co-owners.

[15] The first document is one dated 19 August 1990. According to Mr July, by that document, he confirmed that he gave up exclusive right to a portion of his allocation. This portion had sand deposits. He asserts that he "received compensation[,] for the land lost[,] from Mr. Levy who gave [Mr July] an interest in Lot 1 which was exclusively held by [Mr Levy]". The document, which is at page 37 of the record, is in Mr July's handwriting, is signed by all four co-owners and states:

> "(1) 16 acres of land to July from Levy below Old House
>
> (2) 10 [the figure presents as having been altered but there is no initialling of the change] acres with large old [property] house and water tank for all three of us
>
> (3) 20 acres for Sandbed for all of us
>
> (4) Reggie [Reginald]/Domingo [Stanford] to give Mr Levy land to make Mr Levy's amount (231) Two Hundred & Thirty one acres"

[16] The second document, which is at page 39 of the record, is dated 30 December 1997. It is typewritten and is entitled "DECLARATION OF UNDERSTANDING". It states as follows:

"WE, AUSTIN LEVY, CECIL ROY JULY, REGINALD BENNETT AND STANFORD BENNETT declare as follows:-

1. That we are the owners of Thatchfield property in Parrottee, St Elizabeth.

2. That we own **the property** in the following proportions:-
   Austin Levy – one third (1/3)
   Cecil Roy July - one third (1/3)
   Reginald Bennett – one sixth (1/6)
   Stanford Bennett – one sixth (1/6)

3. That we have agreed that **a portion of the said property** which has sand on it should be kept and operated as a sand bed.

4. That the sale of the sand from **this property** should be divided in the proportion of our respective shares of the property, as stated at paragraph 2 above.

5. That the sale of any sand from **the said property** should be divided, as stated at paragraph 2.

6. That to perfect **the ownership of the property** we have agreed to subdivide the said property and that each person is now in possession of the portion of property which belongs to him.

7. That the house plot and the sand bed plot would be held in common ownership by all the partners and that the title for both the house plot and the sand bed plot would be placed in the names of all the partners as tenants in common according to their respective shares.

8. That we undertake to do everything possible to speed up the subdivision of the said property so as to get the titles for our respective shares transferred into our names." (Emphasis supplied)

The document bears the signatures of all four men. The question, of which "property" is referred to in paragraphs 3 and 4 therein, is relevant to the larger question of fact that Campbell J had to decide.

[17] The second element of additional information surrounds the input of professional land surveyors. The co-owners had first commissioned surveyor, Mr Hemmings, to prepare the subdivision plan for the land. It appears that they had a disagreement with Mr Hemmings before his task was completed. Mr Hemmings did, however, submit a plan of the entire land, to Mr July.

[18] After Mr Hemmings' departure, a subdivision plan was prepared by Mr Rowe. It divided the land into five lots and showed access roads thereon. According to that plan lots one, two and four were allocated to Mr Levy, lot three was assigned to Mr July and lot five included the allocation to the Bennett brothers as well as the sandbank. Mr Rowe also prepared survey plans for each of Mr Levy's lots. These individual plans were eventually checked and approved by the survey department in 1989.

[19] Some time after preparing those plans, Mr Rowe again prepared individual plans for lots two and four. The plan for lot two was approved by the survey department in 2000, while that for lot four was approved in 2003. Controversy surrounds Mr Rowe's work.

[20] Also of importance, for the context, is the occupation of each of the co-owners. Mr July was then, and remains, a practising attorney-at-law while the other purchasers

were farmers. Mr Levy is still a farmer but Mr Reginald Bennett now describes himself as a businessman. Mr Levy asserts that Mr July acted in a professional capacity for all the co-owners at some stage of their joint enterprise. Mr July denies the assertion.

The evidence

a. Mr Levy's evidence

[21] Mr Levy swore to three separate affidavits and, like all the other witnesses, he was cross-examined extensively. The thrust of his evidence was that having purchased the property, the aim was to use it for farming. He said that Mr July requested that his allotment be in one single plot and that Mr July wanted only arable land. Mr Levy says that he and the Bennetts agreed to Mr July's request as Mr July had acted as their lawyer in the acquisition. Apart from Mr July, the remaining three co-owners each received land which had some swamp area and some arable land. The co-owners laid out access roads on the property and each man went into possession of his allotted parcel. They agreed, he said, that the sandbank, which they had estimated as consisting of 21 acres, would be common property for exploitation by all the men. It would be for their common benefit, according to their financial input in the purchase price.

[22] Mr Levy deposed that, after Mr Hemmings' departure, that is, in or about 1988, they commissioned Mr Rowe to prepare a subdivision plan for the land. Mr Rowe prepared the plan, Mr Levy said, with the input of all the co-owners and sought to formalise the division that they had already effected by way of their mutual agreement.

The plan divided the land up into five lots as was mentioned above. Mr Reginald Bennett's portion of lot five was adjacent to the sandbank. Fences were established according to Mr Rowe's identification of the relevant boundaries.

[23] The plan was eventually approved by the Saint Elizabeth Parish Council in 2005. The approval process took as long as it did because the parties had disagreements along the way. It was Mr Levy's strident assertion that all the co-owners interacted with Mr Rowe and instructed Mr Rowe as to the division of the land and the preparation of the subdivision plan.

[24] Between 1988 and 2005, Mr Levy states, he had Mr Rowe survey his lots and prepare survey plans for each. Over the course of those years, however, Mr Levy and Mr July had further discussions over their respective allocations. As a result, Mr Levy had Mr Rowe prepare new survey plans for two of his lots, namely lots two and four. Lot four was adjusted in two ways. The first adjustment was to cut off 16 acres from one section. That section was adjacent to Mr July's lot three and the adjustment resulted in those 16 acres being added to lot three. A dividing fence was put in place to formalise the agreement. The second adjustment was to cut off the land that the property house occupied as well as five acres surrounding the property house. Mr Levy deposed that these adjustments were done after the subdivision plan had been prepared, but before the plan had been approved by the parish council.

[25] As far as the sand-mining is concerned, Mr Levy said that the Bennetts had carried out some limited mining after the land was acquired. It was not, however, until

about 1991 after Mr July had secured a quarry licence for the mining of sand that the men really started sand-mining in an organised fashion, taking out sand on a daily basis by the truckload. It was after the subdivision plan had been prepared, said Mr Levy, that the mining of sand was commercialised.

[26] In cross-examination, Mr Levy asserted that his position was that there was one area identified for sand-mining by all the co-owners. He insisted that there was no agreement of common entitlement to sand wherever it existed on the Thatchfield property. He was tackled as to his signing of the documents mentioned above. He acknowledged that the signature on the handwritten document appeared to be his but said that his recollection was that the document, which he had signed, had lines on it.

[27] Mr Levy was also cross-examined as to two further documents said to have been signed by him. He acknowledged that he had signed them. These documents concerned a dispute between Mr July and himself on the one hand, and Mr Stanford Bennett on the other hand. The documents were used in connection with a claim filed against Mr Stanford Bennett in 2003, whereby Messrs July and Levy were seeking the Supreme Court's assistance to have Mr Stanford Bennett remove a tractor which was blocking the entrance to the sandbed. There was then a dispute as to the frequency with which the Bennetts were entitled to remove sand.

[28] One of the documents purported to be the instructions given by Messrs July and Levy to attorneys-at-law Taylor Deacon and James to support the filing of the claim

against Mr Stanford Bennett. The second, was an affidavit purporting to have been sworn to by Mr Levy on 23 July 2003, in support of that claim [2003 HCV 1352].

[29] Mr Levy testified that he had agreed with Mr July to sue Mr Stanford Bennett for blocking the road. He stated, however, that the parties had subsequently met and resolved the matter and he, Mr Levy, was not aware that the case had actually gone to court and that a court order had been made. At paragraph 25 of his affidavit sworn to on 3 November 2006, Mr Levy deposed that he had signed a statement, which Mr July had prepared, to send to the attorney-at-law who was to sue for the injunction to stop Mr Stanford Bennett from blocking the road. In cross-examination (page 34 of the record of appeal), he said that he had signed the affidavit but that he had signed it before 2003. Despite that bit of evidence, he later stated in cross-examination (page 35 of the record of appeal), that he had never seen the documents before.

(b) Mr Reginald Bennett's evidence

[30] Mr Reginald Bennett's affidavit evidence agreed with Mr Levy's position in large measure. Although he stated that he was not aware of Mr Hemmings doing any work in relation to the property, it was Mr Reginald Bennett's evidence that the lots were allocated after a survey had been done. Thereafter, he said, he erected his fence separating his lot from the commonly held sandbank area. This area, he deposed, had been agreed to be 21 acres. He said in cross-examination that the allocation was done in either 1978 or 1979.

[31] Mr Reginald Bennett testified in cross-examination that it was five acres, and not 10, that were to have been reserved for common ownership along with the property house. He denied Mr July's assertion that the agreement between the co-owners was that all the co-owners were to be entitled to all the sand on the property, wherever that sand was located. He denied that the sandbank had been divided into three 20-acre sections.

(c) Mr Rowe's evidence

[32] Mr Rowe was emphatic that Mr July was one of the persons who gave him instructions concerning the survey. He swore to an affidavit to that effect on 8 December 2006. He testified in cross-examination that it was Mr Levy who had initiated the contact with him, but that he first met with both Mr Levy and Mr July at Mr July's office. It was there and then that he received the instructions to survey the land. That was not the only occasion on which he met with Mr July. He deposed that he met with all four men, on more than one occasion. Mr Rowe also stated:

> "That Mr July was the main person who instructed me as to the details of this survey. We spoke about it in his office and we discussed in details [sic] the proportions in which the [land] was to be divided to reflect the parties' entitlement." (paragraph 6)

[33] Mr Rowe deposed that it was Mr July who gave him a boundary plan of the entire property. That plan had been prepared, Mr Rowe said, by Mr Hemmings. Mr Rowe said that that plan was the only plan that he received from Mr July. It was based on that plan and the instructions that he received from the co-owners, Mr Rowe said,

that he prepared the subdivision plan, which was eventually approved by the parish council.

[34] Subsequent to the preparation of the subdivision plan, deposed Mr Rowe, he met with Mr July and Mr Levy and they instructed him that "an old house...and an area of land around it was to be reserved as common property" (paragraph [11]). On that occasion, said Mr Rowe, Mr July also "pointed out the boundaries for cutting off approximately sixteen additional acres to be taken off lot four and added to [Mr July's] lot". Mr Levy confirmed those instructions and said that he wished to be compensated, by an allocation out of lot five, for having given up the 16 acres. Mr Rowe states that he indicated these instructions by drawing appropriate lines on the subdivision plan.

[35] Mr Rowe deposed that based on his survey of the land, the area of the sand and morass was 54 acres. From his work, he prepared survey plans for each of Mr Levy's lots. These plans, which bore survey department examination numbers 206742 (lot one), 258368 (lot two) and 251828 (lot four), respectively, along with the subdivision plan were put into evidence.

[36] It should be noted that the plans for lots two and four were the plans prepared and approved some time after their original counterparts. Mr Rowe was tested in cross-examination in respect of the two sets of plans. The thrust of the cross-examination seemed to be that, with two sets of approved plans, someone could dishonestly use the earlier plans, which gave Mr Levy a larger acreage, than the later ones. Mr Rowe dismissed those suggestions as being improbable. He gave reasons for his position,

including the fact that the plans were all statute-barred and that a fresh declaration as to their accuracy would have been required. He would not, he said, sign a declaration ratifying a plan that did not accord with the changes that had been made to the superceded plans. Neither the counsel conducting the cross-examination, nor Mr Rowe, mentioned the fact that no transfer of land to Mr Levy, in his sole name, could properly be effected without the input of the other co-owners. Any such transfer would have included a specific reference to the plan, if any, which would have been used to describe the land.

(d) Mr July's evidence

[37] Mr July swore to four affidavits. The thrust of his evidence concerning the principle governing the division of the Thatchfield property was that the arable land would have been divided into three equal acreages and the sand bed divided into three equal parts. The Bennetts were to have further divided their one-third between themselves. Mr July deposed that they instructed Mr Hemmings according to that principle and Mr Hemmings divided the land according to those instructions. At paragraph 6 of his affidavit filed on 19 July 2006, Mr July said:

> "That Mr. S. O. Hemmings having surveyed the property divided the arable lands and the sand bed into eight (8) lots as follows:
>
> (a) Lot 1 – for Austin Levy – arable land
> (b) Lot 2 – was mine – arable land
> (c) Lot 3 – for Austin Levy – arable land
> (d) Lot 4 – for Austin Levy – arable land
> (e) Lot 5 – for Austin Levy – sand bed
> (f) Lot 6 – was mine – sand bed

(g) Lot 7 – Reginald and Standford [sic] Bennett – sand bed
(h) Lot 8 – Reginald and Standford [sic] Bennett – arable land"

He alluded to this division consistently throughout his evidence, but produced no document or survey plan that set out a division of the land into eight lots. He testified in cross-examination, that Mr Hemmings had marked out the land but had not produced any survey plans (page 62 of the record). Neither did Mr Hemmings produce a written report (page 69 of the record).

[38] Mr July deposed that each man took possession of his allocation according to that survey, said to have been done by Mr Hemmings. There was, however, Mr July said, a variation of the agreement. That variation resulted in his relinquishing his exclusive holding of lot six. He stated at paragraphs 11 and 12 of his said affidavit:

"11. That the [sic] shortly after the property was surveyed it became evident that because of the location of lot 6 which was the portion of the sand bed to which I was entitled and the fact that there already existed a road which lead directly to my lot (which had been mined before our purchasing same) that it would be to the other owner's [sic] benefit if only one quarry was operated as to operate three (3) separate quarries would prove a logistical problem.

12. That having discussed the matter all four of us came to an agreement to operate only one quarry on the property and that this quarry would encompass all the sand on the property which included lots 5, 6 and 7 as this was the area which the sand bed covered."

His ceding his exclusive right to lot six, he said, was compensated by Mr Levy giving him a portion of the land in lot one.

[39] Mr July's evidence put the following matters in issue:

a. He asserted, contrary to Mr Levy's testimony, that sand mining had been undertaken by the previous owner of Thatchfield and that the new co-owners went into that endeavour very soon after taking possession of the property. It is of significance, however, that in cross-examination, Mr July spoke of the mining activity being "minor", for about four to five years before he applied for a mining licence (page 60 of the record). He testified that commercial activity began in 1986 – 1987 (page 61).

b. He denied, contrary to the evidence of Messrs Levy, Rowe and Reginald Bennett, that he instructed Mr Rowe to prepare a subdivision plan, and that he had any knowledge, prior to being served with Mr Levy's affidavit in the instant claim, of the preparation of a subdivision plan or an application for subdivision approval having been submitted to the parish council. He stated that he only met with Mr Rowe once. It was then to have the 16 acres cut from Mr Levy's allotment and added to his (Mr July's) allotment. He did not give Mr Rowe any plan of the boundaries of Thatchfield, nor did he have any "plan, outline or detailed plan" of the land.

c. He insisted that it was 60 acres and not 21, as Mr Levy had suggested, that had been reserved for sand mining.

d. He contended that it was 10 acres which had been reserved around the old property house as opposed to the five acres asserted by Mr Levy.

e. He maintained that it was mainly his one-third of the sandbank that had been so far exploited. That exploitation had been for the benefit of all the co-owners and so it was unfair for Mr Levy and Mr Reginald Bennett to now, seek to have sole dominion over the areas of the sandbank that had been allocated to them.

f. He denied that he had acted in the capacity of attorney-at-law, in respect of Thatchfield, for Mr Levy or any of the other co-owners.

[40] With respect to the alteration appearing on the handwritten agreement between the men, Mr July testified in cross-examination that he had made the alteration. He said, at page 63 of the supplemental record:

> "I had written 16 acres of land, and on.....[sic] then I corrected the 6 to a zero to get 10 rather than 16. If I had crossed it out, I would have initialled it."

[41] He accepted in cross-examination that there was no reference to a 60 acre plot of sandbank being divided into three 20-acre parcels (page 69 of the supplemental record).

[42] Other matters were placed in dispute, such as whether the old property house had been demolished by a storm or had been scrapped by Mr Levy. Those other matters were relatively minor issues and need not be analysed here.

(e) Mr Stanford Bennett's evidence

[43] Mr Stanford Bennett, in supporting Mr July's affidavit evidence, deposed that when the co-owners realised the logistical difficulty of operating three separate mines, they got together, discussed the problem and put their agreement into writing. Their agreement was that they would operate the entire sandbank, as one sand-mine, for their common benefit. He then stated, at paragraph 8 of his affidavit, "That as Cecil July's original portion of the sand bed was the one which could be accessed using the road on the property we started to mine his portion of the sand bed first." It must be

noted, however, that the agreement to which Mr Stanford Bennett refers, is the typewritten "Declaration of Understanding" dated 30 December 1997.

[44] This witness testified that Mr Hemmings had divided Thatchfield into lots. He said that Mr Hemmings prepared a diagram for the land when he was sharing it between them. He said that he saw that diagram.

[45] He denied receiving any notice of any survey for the purpose of preparing a subdivision plan. He similarly denied that he was involved in any application for subdivision of Thatchfield. He stated that Mr Reginald Bennett had commissioned Mr Rowe to survey their lot for the purpose of subdivision, but that other than for that exercise, he (Stanford) had had no other dealing with Mr Rowe.

Campbell J's decision

[46] That was the evidence that was before Campbell J. In his judgment, he set out the case for each party, identified the issues that fell to be determined and analysed each issue in turn. The learned judge then considered, in turn, each of the documents that Mr July had put in evidence. Finally, he specifically considered Mr Rowe's evidence.

[47] The learned judge identified that the "main area of divergence between the parties concerned the agreements for the ownership and size of the sand-beds (paragraph 19 of the judgment). He addressed the major areas of dispute as follows:

a. "I find that the evidence is unchallenged that July's lot is the 'most arable' and did not contain 'one inch' of

swamp, as Levy has testified" (paragraph 15 of the judgment).

b. "I find that the substantial reason for the acquisition of the property was the rearing of cattle. The respective lots were fenced immediately..." (paragraph 16 of the judgment).

c. "I accept Reginald Bennett's testimony that July raised cattle from day 1" (paragraph 21 of the judgment).

d. "I find it difficult to accept that July entered into an arrangement that caused him to surrender his legal estate in Lot 6 for the right to mine sand collectively, whilst the other persons (except Sanford [sic]) retained their interest in the land but earned the right to mine sand collectively" (paragraph 23 of the judgment).

e. In respect of the handwritten agreement, the learned judge found "that on a true construction of paragraph, [sic] 3 reflects the parties' intention that '20 acres of sand land for all of us.' Or that 20 acres were to be held for all the parties. Not sixty acres as is being urged by [Mr July]" (paragraph 29 of the judgement).

f. The learned judge found, at paragraph 31 of the judgment that the typewritten "Declaration of Understanding" dated 30 December 1997, did "not reflect the agreement that was reached between the co-owners". His reasoning seemed to be that the document was vague, imprecise, ambiguous and unclear.

g. In assessing Mr Levy as a witness, the learned judge found that Mr Levy was "forthright frank, who perhaps understandably [because of his 81 years] experience [sic] the occasional difficulty in recalling certain events" (paragraph 31 of the judgment).

h. On the issue of the documents signed in respect of the claim against Mr Stanford Bennett, the learned judge accepted Mr Levy "as a creditable [sic] witness when he says" that he signed the documents after only a cursory reading, because he was relying on Mr July who had presented them to him (paragraph 31 of the judgment).

He preferred Mr Levy's evidence to the contents of the documents, in so far as they in conflict (paragraph 31).

i. The learned judge accepted Mr Desmond Rowe as an independent, impartial witness. He found that "Mr Rowe's testimony was pivotal [to] the determination of the issues". He was "impressed" by Mr Rowe's apparent professionalism and knowledge and the fact that he remained "unshaken throughout a strenuous cross-examination". The learned judge, in respect of Mr Rowe's testimony said at paragraph 31:

> "I accept his testimony that he was instructed by July, in respect of his preparation of the subdivision plan....I find that July and Levy instructed him to cut off the acres of land from Lot 4 to be added to July's lot. I find that Rowe produced a second diagram to accord to Mr. July's wishes for 16 acres to be added to his land. I find that Rowe surveyed the area of morass and sand, a part of Lot 5 and that area is 54 acres. I find that July and Levy gave those instructions to cut off 5 acres around the old house."

All these findings reflected an implicit, if not specific, rejection of the relevant portions of Mr July's evidence.

[48] The effect of the orders made by Campbell J show that he accepted the following:

a. that Mr Rowe's subdivision plan was as a result of consensus on the part of the co-owners;

b. that, subsequent to the subdivision plan being prepared, adjustments were required to be made to it, resulting from discussions between Mr Levy and Mr July;

c. that the second set of plans for lots two and four respectively and the original for lot one accurately reflected

Mr Levy's entitlement according to the consensus between the co-owners;

d. that the portion cut from lot four to accommodate common ownership, by all the co-owners, of the property house and its environs, had been agreed at five acres;

e. that the area reserved for the common ownership of the sand bank was 54 acres;

f. that each co-owner was in occupation of his allocation as agreed by consensus;

g. that each co-owner had sole dominion over his allocation.

These are all findings of fact and there was evidence to support each finding.

The analysis

[49] In analysing the decision of Campbell J, this court will bear in mind, that an appellate court will not lightly disturb a finding of fact by the tribunal entrusted with that authority. That is because the tribunal of fact has had the advantage of seeing and hearing the witnesses, whereas the appellate court only has the written record of the witnesses' answers to the various questions posed. The difference is exacerbated when there is no transcript of the shorthand notes but only the judge's notes of the evidence (see **Chow Yee Wah v Choo Ah Pat** [1978] 2 MLJ 41 at page 42).

[50] **Chow Yee Wah v Choo Ah Pat** was cited with approval by their Lordships in the Privy Council decision of **Industrial Chemical Co. (Ja.) Ltd v Ellis** (1986) 23 JLR 35 at page 40E, which was an appeal from this court. Their Lordships approved the principle that it is only in the absence of oral examination of the witnesses at first

instance, that the tribunal of fact has no such advantage over the appellate court. They said, in part, at pages 39G – 40C:

> "The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar, but it is worth stressing yet again what has been said both by the House of Lords and by this Board.
>
> The matter is summed up in the well known passage from the speech of Lord Thankerton in **Watt or Thomas v Thomas** [1947] AC 484 at pages 487 and 488: -
>
> > '(i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (ii) the appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because, it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
>
> ...The importance, in these circumstances, of the advantage enjoyed by the judge who heard and saw the witnesses at first hand can, therefore, hardly be over-estimated, and it is

appropriate to bear in mind the caution uttered by Lord Shaw in ***Clarke v Edinburgh Tramways Co.*** (1919) SC (H.L.) 35 at page 36: -

> 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'"

[51] In applying these principles to the instant case, it should be noted that we have not been provided with a transcript of shorthand notes but instead, the learned judge's notes of the proceedings. The various grounds of appeal will now be considered.

a. Ground One

[52] The principles are particularly relevant to ground one of the grounds of appeal as they address findings of fact. In ground one Mr July complains that "[h]aving found that the sand deposit spreads over 54 acres of the land the Learned Trial Judge erred" in making a number of findings of fact.

[53] It is not immediately clear from the manner in which the ground is formulated, what is the connection between the accepted premise and the individual findings. Having heard Mrs Janet Taylor's submissions on behalf of Mr July, it is apparent that the complaint is that the finding that it was an area of 54 acres meant that the learned

judge ought to have found Mr Levy to have been an unreliable witness and ought to have rejected his evidence in respect of these individual issues.

[54] As a global answer to this complaint, it may be observed that a tribunal of fact is entitled to reject some aspects of a witness' testimony and accept others. It is important to note, however, that the learned trial judge was not faced with a denial by Mr Levy that the area of the sandbank was 54 acres. What Mr Levy had deposed was that Mr July had told the other co-owners, including him, that the area of the sandbank was 21 acres and that they accepted Mr July's estimate (paragraph 5 of Mr Levy's affidavit filed on 6 November 2006). Mr Levy underscored that reliance in his oral testimony that is recorded at pages 22 - 23 of the record. He was, he also said, prepared to accept Mr Rowe's assessment that the sandbank was in fact 54 acres. In this regard, he said, at page 24 of the record:

> "Mr. Rowe is saying the acres with sand and morass is about 54 acres. Fifty four acres is there now, I now accept that it is now 54 acres."

The learned judge was entitled to find, as Mr Levy testified at page 23 of the record, that Mr Levy was not claiming a part of the sandbank. The impression that Mr Levy gave was that the area agreed upon as being the sandbank, whatever was the acreage, was one of the areas that he wished to be separated for the purposes of subdivision of Thatchfield. In those circumstances, the learned judge would be entitled to find that the issue of the size of the sandbank did not negatively affect Mr Levy's credibility.

[55] Although that analysis seriously erodes the premise upon which the ground of appeal rests, it would be of assistance to examine, individually, the impugned findings. The first of those is the learned judge's finding that he "attach[ed] no weight to the contents of the documents [signed by Mr Levy in respect of the joint claim with Mr July against Mr Stanford Bennett], in so far as it is inconsistent with Mr Levy's evidence".

[56] Undoubtedly, this is a surprising statement by Campbell J. The context in which he made it, however, is that he found that the documents were signed by Mr Levy when they were presented to him by Mr July, "who he [Levy] thought was acting to protect his interest". It may also be fairly stated, that neither of the documents addressed the issue of the size of the sandbank. The contents of the relevant affidavit, sworn to on 23 July 2003, bore a close relationship to the instructions signed by both Mr July and Mr Levy. Both mostly spoke to the principle of the division and the method by which the exploitation of the sand would have been achieved.

[57] The most relevant paragraphs of that affidavit, for these purposes, are paragraphs 3 through 6:

> "3. That after the purchase [of Thatchfield] we the co-owners met and it was agreed that some parts of the property would be taken off as common areas to be held by all four of us with ownership right in proportion to our individual shares, that is 1/3 share for Cecil July, 1/3 share for me, 1/6 share for Reginald Bennett and 1/6 share for Stanford Bennett. The common areas included the roadways, the property house, surroundings and the sand bed.
>
> 4. That in 1997 we the co-owners all met and executed a Declaration of Understanding as to the proportions in

which ownership of the property would be held and how the sand bed was to be operated. A copy of the Declaration is attached hereto as Annex 1.

5. That the property has a large deposit of sand which we all agreed to sell and to divide the monies from the sale of the sand in the same proportion as the shares in the property....

6. That during the period 1978-1980 the sand was at first loaded on to trucks by men with spades, and the truck men would pay the men to load them. Then Reginald Bennett acquired a front end loader and he loaded all the trucks for a fee. All four of us agreed to this."

The succeeding paragraphs of the affidavit then dealt with the cause of the disagreement with Mr Stanford Bennett.

[58] As was mentioned above, the affidavit followed, very closely, the terms of the document containing the instructions to the attorneys-at-law, then appearing for Messrs July and Levy and now appear for Mr July in these proceedings, both here and below. The relevant part of those instructions bear this out:

> "...After the purchase we met and decided on which areas of the property were taken off as common areas to be held by all four (4) of us, with ownership right in proportion to our respective shares, ie 1/3: 1/3: 1/6: 1/6. These common areas included the roadways, the property house surroundings and the sand bed. This property has a very large deposit of sand. We have also been selling sand, and we divide the monies from the sand in the same proportion as our shares...."

[59] What is noteworthy about the instructions is that they are crafted in the first person singular and that person is Mr July. This is amply demonstrated by the concluding paragraphs. They state:

"Could you therefore, on behalf of Mr Levy and myself, file action against Stanford Bennett for **Wrongful Obstruction of Right of Way** and seek to get an Interim Order restraining him from continuing his action, ie continuing blocking the road – and include in your Special Damages the loss we have suffered.

Please also seek a Declaration determining our respective shares in the property.

Please let me have your bill.

I thank you." (Emphasis as in the original)

[60] In his affidavit filed on 6 November 2006, Mr Levy admitted, at paragraph 25 thereof, to having signed the statement. He explained the context:

> "...Subsequently, Mr July told me that he would require me to sign a statement which he had prepared to forward to [the attorney-at-law Mr July had retained]. He presented this statement to me and I signed it. I did not read it in detail as I verily believed that he was protecting my interest and all we were seeking to do was to restrain Stanford Bennett from exceeding his entitlement aforesaid...."

[61] When he was cross-examined in respect of his execution of these documents Mr Levy said that he did not remember them. He did however remember the incident with Stanford and the intention to sue Stanford. He was of the view, however, that the dispute had been settled before a claim was filed (see pages 34 and 39 of the record).

[62] Whereas it may seem surprising that the learned judge would have stated that he would have preferred Mr Levy's evidence to the contents of the documents, he has given a satisfactory explanation for his position. It is more important, however, to note that there is nothing in the documents that really affected the issue of Mr Levy's

credibility, except, perhaps, the discrepancy concerning the time at which sand mining started.

[63] It may also be stated that this finding does not conflict with the principle of evidence that "[w]hen a transaction has been reduced to, or recorded, in, writing neither by requirement of law, or agreement of the parties, extrinsic evidence is, in general terms, inadmissible to contradict, vary, add to or subtract from the terms of the document" (Phipson on Evidence 14th Ed – paragraph 37-11). These documents were not agreements between Mr July and Mr Levy and as such did not constitute evidence that could not be contradicted by parol evidence. They were tendered into evidence in an attempt to contradict Mr Levy. The result, at worst, is that there would be contradictory evidence from the same individual, and the tribunal of fact has to determine, which version, if any, to believe. The use of such documentary evidence is demonstrated by the learned authors of Phipson, who, at paragraph 34-13 opine that "[a]ffidavits in former trials...are also frequently receivable as admissions, or to contradict the same witness on the second trial...".

[64] In respect of the second finding by Campbell J, which was impugned by Mr July, the evidence from all the witnesses confirms that each co-owner was given exclusive possession of his allotment. There was, therefore, ample evidence from which the learned judge could find that Mr Levy did and should have exclusive occupation and possession of lots one, two and four.

[65] In respect of the third finding mentioned in ground one, again, there was evidence from Mr Levy and Mr Rowe supporting the finding that the area that had been reserved around the property house was five acres. The learned judge specifically referred to Mr Rowe's independence and reliability in this aspect of the dispute.

[66] For the fourth, fifth and sixth complaints by Mr July in ground one, it may be observed that the learned judge has made sufficient orders to enable the common sand mining area to be identified and separated from the rest of the Thatchfield lands. Mr Rowe had given evidence that there was an area of sand between Mr Levy's allocation and Mr Bennett's allocation. He said that area was a part of lot five and consisted of 54 acres. There was no evidence before the learned judge as to the boundaries of that area and so it would have been improper for him to have attempted to "determine the common sand mining area", as Mr July contends that he ought to have done. Undoubtedly, however, it was the common area that the co-owners had agreed upon, and the area to which their "Declaration of Understanding" referred.

[67] Nothing in these areas of complaint against the learned trial judge's findings allows an appellate court to disturb those findings. These points also completely address ground of appeal four which complains that the learned judge's findings were against the weight of the evidence.

b. Ground two

[68] In ground two, Mr July relied more on issues of law. Some of the aspects overlapped with the complaints concerning, what Mr July said were, discrepancies between the 2003 affidavit and Mr Levy's evidence in the instant matter.

[69] On the issue of law, the grounds of appeal complained that the learned judge failed "to apply the principle of *non est factum*". Mrs Taylor, in her written submissions, clarified the ground. She argued that the learned judge "erred in applying the principle of *non est factum*". Learned counsel submitted, at paragraph 40, as follows:

> "Though not explicitly stated the Learned Trial Judge appears to have applied the principle of *non est factum* as he has clearly refused and/or failed to accept that the Respondent [Mr Levy] had acknowledge[d] the content of several documents which he signed. In doing so the Court has given the Respondent a defence to the Appellant's claim as the Respondent has been afforded the opportunity of denying the content of documents which support the Appellant's position. The Judge has clearly stated that he gives no weight to the documents in his Judgment."

[70] Learned counsel relied on the relevant dictum in **Saunders v Anglia Building Society** [1971] AC 1004. She concluded that Mr Levy was "not someone who ought to have been permitted to deny the content of the documents".

[71] The principle of *non est factum* [it is not his deed] applies if a person signs one kind of document when he thinks he is signing another. Miss Clarke, appearing for Mr Levy, has correctly pointed out that nowhere in his judgment has Campbell J stated that he did not accept that the document was Mr Levy's. What the learned judge found was

that the context in which the instructions and affidavit were signed in 2003, allowed him to accept Mr Levy's current testimony, where the other evidence, contained in those documents, conflicted with that testimony. That, with respect to Mrs Taylor's submission, the learned judge was entitled, as the tribunal of fact, to do. The doctrine of *non est factum* did not arise in this claim.

[72] The other issue of law raised by Mr July concerns the accuracy of the survey plans for Mr Levy's lots when contrasted with the approved subdivision plan. The complaint seems to be that the second set of survey plans for lots two and four reflected acreages and shapes for these lots that were so different from that shown by the subdivision plan that the margins of error exceeded that allowed by regulation 16(c) of the Land Surveyor's Regulations 1971.

[73] The complaint is ill-founded for at least two reasons, firstly, the regulation does not speak, for the purposes of margin of error, to comparisons between a subdivision plan and a survey plan for a plot in that subdivision. The fact that these plans were approved would clearly mean that they were in accordance with the requirements of the relevant regulations, including those relating to accuracy.

[74] The second reason is that the learned judge made it clear that what was to be done was to be "subject to the requirements of the relevant authorities". His order was to the effect that the respective surveys of lots four and five were to be carried out "on the basis that the boundaries [of those lots] as demarcated on the [relevant pre-

checked plan] are correct". Certainly, the learned judge was entitled to rely, for the purposes of accuracy, on the fact that the survey plans had been approved. In addition to that point, it must be observed that, in making his order, the learned trial judge was not seeking to supersede the statutory provisions concerning the period for which the survey plans were valid.

[75] For those reasons, ground two must also fail.

c. Ground three

[76] In ground three, Mr July complains that the result of the learned judge's findings, is that Mr July's share of Thatchfield would be reduced to substantially less than his one-third interest and that Mr Levy would receive substantially more than his one-third interest. Furthermore, the sandbank would be unequally distributed. This also turns on the principle of findings of fact. The findings of the learned judge were based on evidence before him and he specifically rejected Mr July's evidence on several points.

[77] It is also to be observed that the document entitled the "Declaration of Understanding" did not set out boundaries for the respective parties. Mr Rowe's evidence was that he set out the boundaries on the subdivision plan and later on the individual survey plans, based on instructions from the relevant parties. The learned judge accepted Mr Rowe's evidence in that regard. There is nothing to support Mr July's complaint that he will end up with less than his one-third entitlement because his land has not been surveyed. On the contrary, the evidence is that Mr Levy will not have more than a third of the acreage. Based on the revised plans, he would have in

round numbers, 41 acres in lot one, 150 acres in lot two and 27 acres in lot four. These total 218 acres, which is less than one third of Thatchfield, after the removal of the 59 (54 + 5) or so acres of common property (731 – 59 = 672 ÷ 3 = 224). This ground also fails.

Conclusion

[78] The issues which Campbell J had to decide were issues of fact. There was evidence upon which he could make the findings that he did. He particularly relied on the evidence of the commissioned land surveyor Mr Desmond Rowe, whom he found to be independent, impartial and impressive. The findings of fact could be grounded in Mr Rowe's evidence. This court should, therefore, not disturb them.

[79] In the circumstances, the appeal should be dismissed with costs, to be taxed if not agreed, awarded to Mr Levy.

PANTON P

ORDER

1) The appeal is dismissed.

2) The judgment of Campbell J is affirmed.

3) Costs to the respondent to be taxed if not agreed.