NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 56 OF 2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag).

BETWEEN	EURTIS MORRISON	DEFENDANT/APPELLANT
AND	ERALD WIGGAN HYACINTH WIGGAN	PLAINTIFFS/RESPONDENTS

Mr. Huntley Martin instructed by Clough Long & Co. for the Appellant.

Mr. David Batts & Pamela Shoucair-Gayle instructed by Messrs. Pollard, Lee Clarke & Associates for the Respondents.

May 30, 31 & November 3, 2005

FORTE, P.

I have read in draft the judgment of K. Harrison, J.A., and I agree with the reasons and conclusions therein and have nothing further to add.

K HARRISON, J.A:

Introduction

This is an appeal from the judgment of Mrs. Justice Marva McIntosh, delivered on the 18th day of February 2000. The plaintiffs ("the respondents") brought an action against the defendant ("the appellant") for negligence arising out of certain representations that were made by the appellant to them with

respect to the survey of a lot of land. The respondents succeeded and were awarded damages in the sum of $5,400,000.00 with interest thereon, and costs to be taxed, if not agreed.

The case for the respondents

The respondents, Mr. and Mrs. Erald Wiggan are Jamaicans who lived in England for many years. They had purchased from Mr. Roy Meikle, Lot 90 part of land situate at Greenwich Park in the Parish of St. Ann and registered at Volume 1183 Folio 697 of the Register Book of Titles.

The respondents returned to Jamaica in 1994 in order to commence construction of their dwelling house on the said Lot 90. An architect was consulted and was taken to the lot by Mr. Wiggan. He showed him where he wished to build. Mr. Wiggan decided however, to seek confirmation of the exact location of the lot before they began construction. Mr. Roy Meikle was contacted and he referred them to the appellant, since he was the commissioned land surveyor, who had done the subdivision of Greenwich Park.

The respondents held discussions with the appellant at his office in or around May 1994, and requested him to identify Lot 90. They visited the land and the appellant searched for the survey pegs and took measurements.

The respondents contend that their lot was pointed out to them by the appellant and as a consequence of his advice to them, they began construction of the dwelling house in 1994.

In 1995, Mr. Wiggan discovered that he was constructing the house on Lot 91 instead of Lot 90. He promptly returned to the office of the appellant,

explained his dilemma to him and requested that he re-visit the lot in order to reconfirm the boundaries.

On the appellant's return to the land he realized that Mr. Wiggan was indeed building on the wrong lot. The appellant promised Mr. Wiggan however, that the error would be "sorted out" with the owners of Lot 91 but his promise never materialized.

The building which was 40% completed had to be demolished and this resulted in considerable loss to the respondents.

On the 21st August 1996, the respondents filed a claim in negligence in the Supreme Court against the appellant. They sought damages for the loss suffered.

The defence

The appellant contended on the other hand, that he was not negligent. He said that he met the respondents when they visited his office in May 1994. He agreed that they told him of the lot they had purchased at Greenwich Park and that they wanted him to do a survey of the land. He made arrangements with the respondents to do the survey. He visited the land, found pegs, and took measurements of the boundary along the roadway.

Whilst they were still on the premises, a dispute arose between Mrs. Wiggan and him about the survey pegs at the back of the premises so he did not complete the survey. He said he told Mr. Wiggan to have the premises "bushed" and that he would return another day to "straighten" out the problem.

The appellant further contended that he did not see the Wiggans again until one year later when Mr. Wiggan came to his office and told him that someone who lives in the subdivision had informed him that he was building on the wrong lot. Mr. Wiggan requested him to return to the land. He was paid one half of his fees by Mr. Wiggan in order for him to do a relocation or redefinition of the boundaries. They returned to the lot and after carrying out a further examination of the boundaries he confirmed that the building was constructed on Lot Number 91.

The appellant said he asked Mr. Wiggan why he "jumped the gun" but he told him that he would try and help him. He promised to ascertain the name of the owners of Lot 91 and to see if they would sell him (the appellant) the lot. He wrote several letters to the owners of Lot 91. They eventually informed him that they were not interested in selling the lot and demanded that the respondents vacate the land.

The grounds of appeal and submissions

Two grounds of appeal were originally filed. Ground 1 complained that the learned trial judge erred in finding on the evidence that what the respondents commissioned the appellant to do was to survey and identify the boundaries of Lot 90, and not to carry out the more detailed process of re-establishing the boundaries as outlined by the respondents' expert witness.

Ground 2 further complained that the learned trial judge also erred in finding that the procedures set out by the respondents' expert witness were the proper procedures to be employed under the circumstances.

Both grounds were argued together by Mr. Martin. He submitted that the learned trial judge erred in holding that because the appellant did not carry out the re-establishment/re-definition of boundaries procedure in 1994, he was negligent and this caused him to identify the lot incorrectly. Furthermore, he submitted that it was not pleaded in the Statement of Claim or stated by the respondent Erald Wiggan in his evidence, that the respondents had requested the Appellant to carry out a survey to re-establish the boundaries.

Mr. Batts submitted however, that the distinction between re-establishment of the boundary and identification of boundaries is quite irrelevant. It is common ground he said, that this was a subdivision which was pegged by the appellant and when he was contacted by the respondents to point out Lot 90 to them he did so. He submitted that whether or not the appellant did so by identifying or establishing the boundaries, this was not germane to the issues to be decided.

Mr. Batts further submitted that the appellant did not challenge the evidence of the respondents' expert witness, hence the learned trial judge's findings of fact were correct when she stated:

> "Mr. Spencer a Commissioned Land Surveyor in his evidence related the proper procedures that should have been followed in carrying out a survey of the type requested by the plaintiffs – it is clear that these procedures were not the ones employed by the first defendant and that resulted in the wrong lot being identified. I accept Mr. Spencer as being an expert in his field and accept his evidence which was unchallenged by the defendant."

The supplementary grounds of appeal

Five supplemental grounds of appeal were filed by the Appellant and they are set out hereunder.

Supplemental ground 1 complained that the learned trial judge erred in finding that the appellant had completed the survey work and had given his professional opinion as to the location of the lot boundaries, pointing them out on his first visit to the property, solely on the basis of the uncorroborated testimony of Mr. Wiggan.

Mr. Martin submitted both orally and in his skeleton arguments, in respect of this ground that in the absence of a letter or report referred to by the respondents' expert witness, that the balance of probabilities rested in favour of the Appellant that he had not pointed out the boundaries. He further submitted that since there were no discussions about fees, there was also the probability that the Appellant had not completed the survey.

Mr. Batts submitted on the other hand, that the learned trial judge's finding that the appellant had given his professional opinion and pointed out the boundaries in 1994 was correct and was amply supported by the evidence for the following reasons:

(a) The absence of a written report or letter was consistent with the waiver of fees and the Appellant's failure to give this report or letter is further evidence of his less than professional approach to the matter.

(b) The non-payment of a fee was adequately explained by the first respondent who stated that in 1994 when he wanted to pay, the appellant declined to collect because the pegs were already in place. Furthermore, the appellant admitted that it was not unusual for him not to collect a fee "up front".

(c) There was evidence that the respondent in 1994 asked how much was owed but that fee was waived.

The appellant complained in supplemental ground 2 that the learned trial judge also erred in rejecting the appellant's evidence that he told the respondents on his first visit to the property that "something was wrong", and that he would return to the land another day after it was cleared in order to complete the survey of the lot.

Mr. Batts submitted however, that the trial judge's rejection of the appellant's evidence that in 1994 he told the respondent something was "wrong" is perfectly understandable and correct because:

(a) Counsel for the respondent had put to the appellant that he did not say something was wrong. The question asked was: "It wasn't true that it was finding no peg that you advised the plaintiff that something was not correct". The answer given was: "It is true." The first respondent's evidence is that the "something is wrong" statement occurred in 1995 when the appellant returned to the land. Furthermore the respondent had denied that such a statement was made in 1994.

(b) The bushing of the lot is normal, prior to any construction and therefore the fact of bushing in 1994 is not by itself a basis to challenge the learned trial judge's factual finding.

(c) The return of the appellant to do the survey a second time is explained by the respondent who said having commenced construction he was informed by a neighbour that he was building on the wrong lot. He

> therefore went back to the appellant who told him this time he would have to pay as he was wasting his time.

The appellant complained in supplemental ground 3 that the learned trial judge erred in failing to draw the correct inferences from the evidence of the first respondent that a year after he claimed that the appellant had completed the survey and had given his professional advice he returned to the appellant's office seeking a survey of the same property and only then was he charged a fee and given a receipt.

Mr. Martin submitted that the payment of $1,500.00 (part of the fees) charged by the appellant puts it beyond doubt that the appellant had returned to complete the survey with more detailed procedures or relocating and/or re-establishing the boundaries of lot 90. Mr. Batts submitted however, that the first respondent's evidence of what he was told by the appellant's secretary when he returned in 1995 is not inconsistent with the respondent's case. Mr. Batts contended that it was as a result of what the first respondent had been told by a neighbour that in fact raised a doubt in the mind of the first respondent why he returned to the appellant in order for him to confirm his representation formally. In the circumstances, Mr. Batts submitted that the first respondent was prepared to pay for the confirmation even if the appellant considered it a "waste of time."

Supplemental ground 4 complained that the learned trial judge failed to draw the correct inferences from the evidence that the respondents commenced building on the property before obtaining the requisite planning approval to do so.

It was contended by Mr. Martin that the respondents' having commenced building without the approval of the Parish Council constituted a "reckless act" on the part of the respondents. He submitted that this recklessness was the unwillingness to wait and that this demonstrates to the Court the "pattern of the first respondent's behaviour".

Mr. Batts submitted however, that the fact that construction may have commenced before the formal planning approval was obtained, is entirely irrelevant to the question whether the respondent took the precaution of having a professional surveyor identify the lot before building. He argued that in any event, the evidence from the Parish Council was that a recommendation for approval" was given prior to formal approval and that this recommendation coincided with the commencement of construction.

Supplemental ground 5 complained that the learned trial judge did not deal with the root issue of contention between the parties, namely, whether the survey had been completed, and prematurely applied the Headley Bryne case before carefully weighing the evidence (independent of mere assertions) on whether or not the survey was completed.

Mr. Martin submitted that the learned trial judge erred in not looking for independent pieces of evidence particularly in the area of disputed facts. Furthermore, by not resolving most of the disputed facts by findings or the application of appropriate inferences, a balanced analysis was not brought to bear on the case. He further submitted that this Court is in as good a position as the trial judge, to draw these inferences. He referred us to the case of ***Central***

Mining and Excavating Ltd. v Croswell and Others (1993) 30 JLR 503 in support of this submission.

Mr. Batts argued however, that the root issue in this case was not whether the survey had been completed as alleged in this ground. The issue he said is: did the appellant represent to the respondents the location of lot 90? He submitted that the evidence supports the learned trial judge's finding that he did make such a representation. Furthermore, it is irrelevant whether he made the representation before the survey was completed or not. In any event, he submitted that the learned trial judge carefully reviewed the evidence and correctly rejected the appellant's contention that he was awaiting the bushing of the lot before doing the survey and that he told the respondents something was wrong and had not identified lot 90 to them in 1994.

Mr. Batts further submitted that this Court ought to be very reluctant to disturb the trial judge's findings of fact. He referred us to the following cases: ***Edwards v Buxton*** [1982] 30 WIR 82; ***Benmax v Austin Motor Co. Ltd.*** [1955] 1 All E.R 326; ***Breen v Amalgamated Engineering Union (now Amalgamated Engineering Foundry & Others)*** [1971] 1 All ER 1148 and submitted that:

1. There was abundant evidence to support the findings of fact of the learned trial judge. He argued that the first respondent remained unshaken under cross-examination and there was no significant inconsistency or inaccuracy demonstrated.
2. There was corroboration of the respondents' evidence in the following respects:

(a) There was the evidence of Roy Meikle from whom the respondents purchased the lots. He said he sold one of his three lots to Mr. Wiggan and he was not sure of the boundary so he told Wiggan to check with the appellant, who was the surveyor for the area, before building on it.

(b) The appellant admits that he knew the respondents intended to build. At page 162 of the Record he said:

> "I knew of no question of any mortgage – so in this case the purpose for survey as far as the Wiggans were concerned was either for fencing or putting up a building -The impression I had was that they wanted to put up a building. I don't know the exact words but it would have been in the vein that they wanted to put up a building soon. It could be that they wanted to start construction soon – same effect."

What is important he said is, if the respondents took the trouble to get a surveyor's advice as to the location of the boundaries prior to commencing construction, why would they commence construction after the surveyor failed to identify the boundary and had told them "something was wrong".

(c) The appellant at first denies that the respondents pointed out a peg to him but later admitted they did. This corroboration is important he says, because one year later the appellant remarked "oh this is the point your wife was speaking about". Mr. Batts submitted that this statement amounts in the context, to an admission of error.

(d) Earl Spencer (the independent expert) said that when a surveyor was familiar with a scheme he may not take the careful approach. The appellant in the circumstances, might not have taken reasonable care and therefore fell into error.

(e) The appellant's evidence that he saw it as his "duty" to find the owner of lot 91 corroborates the respondents account by pointing to a mind that saw itself as culpable.

(f) The admission also that he had told the respondents of a previous error he made which was sorted out corroborates their account.

(g) The letter dated 22nd May 1995 which was prepared on the appellant's instructions and issued by his office, corroborates the respondents account. The appellant would have had no reason to offer to buy lot 91 except to correct his own error.

(h) The appellant's evidence about his disagreement with the wife corroborates the respondents evidence of what transpired on the first visit.

Mr. Batts submitted that when all the above facts are taken into consideration, there was ample evidence to corroborate the respondents' evidence which supported the trial judge's findings of fact. He finally submitted that the learned trial judge was correct in arriving at the conclusion which she did, and that the appeal ought to be dismissed with costs to the respondents.

The role of the Court of Appeal

The issues which the learned judge faced at the trial were largely factual. The trial judge had to determine whether or not the respondents had approached the appellant in order to ascertain the boundaries of lot 90 and whether the appellant had given his professional opinion as to those boundaries in 1994 or on a later occasion in 1995.

The question now for determination, is whether or not this court should disturb the findings of fact of the learned trial judge. It is quite settled that an appellate court will not readily interfere with findings of fact by a trial judge.

In ***Green v Green*** Privy Council Appeal No. 4 of 2002 delivered on the 20th May 2003 (a decision from this jurisdiction) Lord Hope of Craighead delivering the judgment of the Board stated:

> "There is another principle which must be taken into account in this case. It applies where the decision of the judge at first instance is taken to appeal and the appellate court is asked to consider whether the judge's decision was justified by the evidence. In *Watt v Thomas* [1947] AC 484, 487-488 Lord Thankerton said that where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, 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 the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses. Lord Macmillan developed the same point at pp 490-491. He said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He added these words at p 491:

> So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong."

In ***Central Mining and Excavating Ltd v Croswell and Others*** (supra),

Wolfe J.A (as he then was) stated at pages 518 and 519 of the judgment:

> "The principles on which an appellate court will interfere with a finding of fact by a trial judge are well settled. The court will only do so if the judge has misdirected himself or if 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 the judge's conclusion. 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. In such circumstances, the matter will then become at large for the appellate court. See *Watt (or Thomas) v. Thomas* [1947] 1 All E.R. 582. However, where it is not so much a question of the credibility of the witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in a good position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge. See *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326; *Hicks v. British Transport Commission* [1958] 2 All E.R. 39".

In ***Edwards v Buxton*** (supra) a decision from the Eastern Caribbean States Court of Appeal, Berridge J.A stated at page 87:

> "The trial judge had an advantage which this court does not have and, while the trial judge is not infallible and may, on occasions, go wrong on a question of fact, this court will only disturb a judge's decision on facts where there is no evidence at all, or only a scintilla of evidence, to support it. The invariable practice of a court of review is to act on the principle that the judge was in a better position than the court to assess the credibility of the witnesses and the value of their evidence, as to which see *Powell v Streatham Manor Nursing Home* ([1935] AC 243) ([1935] AC 243 per Viscount Sankey LC at p 251)".

The principles derived from the cases can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.

In the instant matter, the learned judge found as a fact, that the appellant had completed the survey for Lot 90 in 1994 and had given his professional opinion on the boundaries of that lot. She also found that the respondents had relied on this representation to their detriment.

A heavy burden therefore rests upon the appellant to establish that the learned trial judge had misdirected herself and that her findings are erroneous and cannot be supported by the evidence.

Analysis of the judgment below

I turn now to examine the evidence presented at the trial and to see whether it supports the learned trial judge's findings of fact.

The first respondent who was the only plaintiff testifying was exhaustively cross-examined. The learned judge found his evidence quite credible, clear and unequivocal. At page 8 of her judgment (page 63 of the Record), the learned judge states as follows:

> "Looking first at the representation made, the court has to consider whether the first defendant did in fact point out boundaries of Lot 90 after doing the survey. The evidence of the first plaintiff, Mr. Wiggan is clear – that he attended upon Mr. Morrison requested him to do a survey and identify Lot 90, that Mr. Morrison did visit the site, take measurements, pointed out pegs, identify a lot as being Lot 90 and told Mr. Morrison this is your lot."

Although there were some inconsistencies in the evidence of the first respondent, the learned judge found them slight and concluded that this did not affect the credit worthiness of the witness. She stated:

> "I accept the evidence of the first plaintiff and find that although there are some inconsistencies in it they are slight and do not affect the credit of this witness. He impressed me as a careful person who wanted to be sure about the lot before commencing construction and on arriving in Jamaica wishing to build he sought the services of a Commissioned Land Surveyor to identify the boundaries of Lot 90 which he purchased the previous year."

In rejecting the evidence of the appellant she said:

> "I reject the first defendant's evidence that he told Mr. Wiggan something was wrong, that he would come back another day and that Mr. Wiggan should bush the lot and call him and that in spite of this Mr.

> Wiggan went ahead spending substantial sums to commence constructing a house on a "lot" which turned out to be Lot 91 and not Lot 90".

On examining the further amended defence, it was pleaded at paragraph 4 as follows:

> "4....First Defendant will say that whilst the Plaintiffs had requested an identification of their said lot, at no time at all did the Plaintiffs advise the First Defendant that they had intended to commence construction on their lot soon or at all."

Under cross-examination, the appellant admitted that the respondents had informed him that they wanted him to do a survey in order to identify their boundaries on the land. In addition he also admitted that he got the impression that the respondents wanted to "put up a building soon". This is what he said at page 162 of the Record:

> "I heard Mr. Spencer yesterday – he said you need to know what survey for building, mortgage. I would have need to know what they wanted survey for.
>
> I agree with you that in 1994 the Wiggans had already purchased the lot from the Meikles.
>
> I knew of no question of any mortgage – so in this case the purpose for survey as far as the Wiggans were concerned was either for fencing or putting up a building – The impression I had was that they wanted to put up a building. I don't know the exact words but it could have been in the vein that they wanted to put up a building soon. It could be that they said they wanted to start construction soon – same effect."

I do agree with Mr. Batts when he submitted that the evidence of the appellant begs the question that if the respondents took the trouble to get a surveyor's advice as to the location of the boundaries prior to the commencement of building the house, why would they commence construction

after the surveyor failed to identify the boundary and had told them "something was wrong"?

There is also another aspect of the case that is worthwhile mentioning. At paragraph 4A of the further amended defence it was pleaded as follows:

> "4A – This Defendant does not admit that he represented to the plaintiffs or either of them that he had been the surveyor who laid out the lots."

The learned judge found however, that by reason of the appellant's admission to the respondents that he was a Commissioned Land Surveyor, it was clear from the evidence that there was a special relationship between the parties. This finding is supported by the evidence. At page 162 of the Record, the appellant stated under cross-examination:

> "I would agree that when the Wiggans came to see me they were seeking my services because I was a Commissioned Land Surveyor."

Albeit, that he did not admit in the pleadings that he had represented to the respondents that he had laid out the lots, he did say during the trial that he was the surveyor who had laid out the lots. This is what he said:

> "...in fact, I myself had laid out the lots in that subdivision. In fact I am rather proud of that subdivision. I regard myself as the father of that particular subdivision."

It is also clear from the evidence that the respondents did not pay a fee to the appellant in respect of his first visit to the lot. In 1995 however, the appellant requested and had received a deposit of $1500.00 from Mr. Wiggan for the second visit. The evidence further reveals that Mr. Wiggan had attended upon

the appellant to pay him for the survey he had done but the appellant declined to collect, because he said that the pegs were already in place. In commenting on the absence of a payment in 1994, the learned judge stated:

> "In any event even if the services rendered by the first defendant were gratuitous a special relationship existed because the first defendant was consulted and gave advice in his professional capacity."

There is the evidence also of Mr. Roy Meikle from whom the respondents purchased the lots. He testified that he had sold Lot 90 to the respondents. He said that when Mr. Wiggan approached him regarding the boundaries for lot 90, he was not a hundred percent sure, so he told him to check with the appellant who was the surveyor for the subdivision, before he commenced building on it. This evidence would certainly have corroborated the evidence of the first respondent.

In respect of the witness Earl Spencer, the learned trial judge found that his evidence was unchallenged. He is a Commissioned Land Surveyor and had testified that the appellant did not follow the proper procedures in carrying out a survey of the type requested by the respondents and that this resulted in the wrong lot being identified. The learned judge regarded him as an expert in his field and had accepted his evidence.

She further stated at page 9 of the judgment:

> "There is evidence that the first defendant was well aware that his advice would be relied on by the plaintiffs. I believe the first plaintiff when he said in evidence that he told the first defendant that "we intended to build on the lot so we wanted a survey done – we wanted to show the correct boundaries The first defendant actually visited the property, measured and

> pointed out a lot saying "this is your lot you have a nice piece of land here. You can go ahead and build. Call me and let me have a look when you finish."

At page 10 of the judgment the learned judge stated further:

> "I find that the plaintiffs consulted the first defendant in his professional capacity and engaged his services as a Commissioned Land Surveyor to identify the boundaries and point them out to them Lot 90 Greenwich Park, St. Ann. That the first defendant was well aware of the purpose for which his services were engaged and the desire and intention of the plaintiffs to construct a house on Lot 90.
>
> The plaintiffs on the strength of this identification by the first defendant commenced construction of a building on the lot identified, that is Lot 91, in the belief that it was in fact Lot 90 which was their property. As a result when the error was discovered the building which was 40% completed had to be demolished causing considerable loss to the plaintiffs ...."

In deciding what legal principles were to be applied to the facts of the case, the learned judge referred to and relied upon the cases of ***Headley Bryne & Co. Ltd. v Heller Partners Ltd***. [1964] AC 465 and ***Baxter v F.W Gapp and Co. Ltd***. [1983] 4 All E.R 457. She recognized that the respondents had to prove on a balance of probabilities that:

1. the representation, whether by word or deed was made by the appellant;
2. a special relationship "equivalent to contract" existed between the parties and that the appellant held himself out in his profession to give the opinion or advice on which the respondents relied;
3. the appellant was aware that the respondents would rely on the representation;
4. the respondents did rely on the representation;

5. the representation was made negligently;

as a result, the respondents suffered damage.

Drawing inferences

It was submitted by Counsel for the appellant that if a survey was done and was completed in 1994 there would have been documentation to that effect. But it is ironical that the appellant made no documentation of the survey in 1995 which he admitted had been completed. It is also quite interesting to note that Mr. Martin argued on the strength of the respondents' expert witness evidence that a documentation of the survey would have been done. At no time however, in 1994 or in 1995, did the appellant act in accordance with the procedure outlined in the evidence of Mr. Spencer, although he seeks to rely on that evidence to ground the inference which he wishes the court to make.

The appellant has claimed that because he had returned to the lot in 1995 in order to survey it, that this grounds the inference that the appellant had not completed the survey in 1994. The appellant admitted however, under cross-examination that he was told that the respondents had intended to build on the land and that he was asked to point out the boundaries of Lot 90. He said he had the impression that the respondents wished to put up a building and that they wanted to start construction soon. He also said that Mrs. Wiggan told him in 1994, when he went to do the survey, that she felt that an ackee tree had something to do with the respondents' boundaries, that he disagreed with her and on returning to the property in 1995, he agreed that Mrs. Wiggan had been correct about the ackee tree. He further stated that he had attempted to solve the

problem by contacting the owners of lot 91; that he did so in his own name, and not in the name of the respondents. When these facts are taken into consideration, it is obvious that this evidence could lead to the inference being drawn that the appellant had conducted a survey in 1994 and had done so negligently.

It was further contended on behalf of the appellant that, since the respondents begun building without authorization from the Parish Council, the inference could be drawn that they had commenced building without waiting for completion of the survey. I do not really believe that there is any merit at all in this submission. The evidence revealed that the respondents had submitted the building plans to the Parish Council and they were recommended by the Superintendent of Roads and Works on the 26th July 1994. All that was left to be done was for the plans to be forwarded to the building committee for approval. This approval was given on the 18th August 1994. The respondents had commenced construction however, in either June or July 1994. It would seem therefore, that the recommendation and construction began in July 1994 but the commencement of building without first obtaining the necessary approval would not warrant any adverse inference being drawn in relation to the respondents' action.

Conclusion

The trial judge had the advantage in this case of seeing and hearing the witnesses. The learned judge had the opportunity also of observing the demeanour of the witnesses and was therefore in a position to assess their

credibility. In the end, she found Erald Wiggan to be a credible witness. I can find no reason to differ. The finding of the judge turned solely on the credibility of the witness and it was open to her to find as she did on the facts before her.

I do agree with Mr. Batts that it would be immaterial and/or irrelevant for the court below to have been concerned with the method adopted for the work to be done once it was accepted that Mr. Wiggan had approached the appellant, a qualified surveyor, to have the boundaries of Lot 90 pointed out to him in 1994. The learned trial judge found that the appellant did point out the boundaries in 1994 and that they were incorrect. It was as a result of his negligence why the respondents sustained major losses.

I am further of the view that the learned trial judge made full use of the advantage of seeing and hearing the witnesses. Her judgment contains a reasoned analysis of the evidence.

I am therefore of the opinion, that this appeal should be dismissed with costs of the appeal and below to the respondents.

HARRIS, J.A. (Ag.):

I agree.

FORTE, P.

ORDER:

Appeal dismissed. Costs of the appeal and below to the respondents to be taxed if not agreed.