CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 10/71

BEFORE: The Hon. Mr. Justice Smith - presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Graham-Perkins

LOVICE B. WATLER - Plaintiff/Appellant

v.

HEBE CONNORS &)
ADRIAN BRIGGS) - Defendants/Respondents

K.R. Brandon, for Plaintiff/Appellant
W.B. Frankson, for Defendants/Respondents.

MARCH 15, 1973

SMITH, J.A.:

This is an appeal from the judgment of the learned judge of the Grand Court in an action brought by the plaintiff for trespass on her land by the first defendant, who is an adjoining owner, and her son, the second defendant. The action boils down to a question of what is the correct boundary line between the plaintiff's and first defendant's land. The evidence indicates that there were acts of trespass committed by the first defendant by her having placed an old refrigerator on the plaintiff's land and by her throwing or causing rubbish to be thrown on the plaintiff's land, but the real trespass of which the plaintiff complains is the building of a duplex building on the first defendant's land, which the plaintiff claims encroached on to her land. So, the simple question of fact for decision was whether or not this building did encroach as the plaintiff claims.

It is common ground that if the boundary line between the plaintiff's and the first defendant's land is a straight line, the building encroached. If it is a curved line, as the defendants claim, the building did not encroach. Evidence was called on both siedes. Included in the witnesses called by the plaintiff was a qualified surveyor who visited the site and made a survey. This surveyor (Mr. Slack) said in evidence that his survey was an incomplete survey. He marked on a plan, which he drew, the extremities of the boundary line running east to west and which were marked 'X' and 'Y' on his plan, but it is quite clear from what he said in evidence that he did not survey along that line from 'X' to 'Y'. He expressly said that his plan, exhibit A, is not a complete survey; he said it is a traverse prior to survey and it appears from what he said that because there was a dispute he did not do a complete survey; he said he would not do so until ordered by court.

The defendants called a Mr. Thompson who at one time did surveys in these islands. He was not a professionally qualified surveyor. Apparently, at the time, he was permitted to do surveying and he was engaged from time to time to do surveys, there being at the time no professionally qualified surveyor in the islands. He dis surveys on the authority of the Government of the Cayman Islands in those days. He was engaged in 1956 to do a survey of lands owned by Jane Eden and Laurel Bird, which lands were being conveyed to Dr. Haas. The conveyance was produced in evidence and attached to it was a diagram which purported to indicate the boundary line which is in dispute in this case. According to Mr. Thompson that boundary line was not a straight line. The highest Mr. Slack could put the matter is that if a straight line were drawn from 'X' to 'Y', the building on the first defendant's land encroached on the plaintiff's land. It therefore became a question of pure fact for the learned judge to decide what was the proper

boundary line.

The defendants claimed that the boundary line at the time when the action was tried was marked by aurelia trees which admittedly had been planted at some time prior to the first defendant owning the land between the posts of the wire fence which then marked the boundary between the two pieces of land. Admittedly there is evidence of aurelia trees in the area of this boundary line, and the aurelia trees as they existed at the time of the trial of the action, and apparently at the time when it is claimed there was this trespass, were not in a straight line. The building which it is claimed encroached on the plaintiff's land was within those aurelia trees. It was sought on behalf of the plaintiff to show that the aurelia trees which it was claimed were originally planted along the straight line of the fence had been cut down from time to time and had put shoots out which put them out of position some 2½ ft to 3 ft. away from the original line, and it is in this way it was claimed that the aurelia trees came to be in a curved line or a partially curved line between the two pieces of land.

A witness, one of the main witnesses for the plaintiff, a Mr. Charles Norris Jackson, who apparently of all the witnesses seemed to know more about this fence, gave evidence about the aurelia trees, which evidence distinctly supported the contention of the defendants that the present position of the aurelia trees is the true boundary line. Having said during examination-in-chief that the boundary was a straight line, in cross-examination he said that the duplex, that is to say the building which it is claimed encroached on the plaintiff's land, is wholly within Mrs. Connors' land - that is on -p. 48 of the record - and he continued;

> "I know an aurelia tree. I saw it there. Mrs. Myota Eden planted them along the boundary line. She was the original owner of 'Sunset House'." Sunset House is the house or building now owned by the first defendant.

"The fence was the boundary. Trees were planted between the posts forming the fence. I regarded the trees as the boundary. Extensions are within Trees put out side shoots from roots. aurelia trees as they exist today./ I have known land for 44 years. Aurelia trees are on Hewitson's property today." (Hewitson's property is the property now owned by the plaintiff.) "They are 2½ ft to 3 ft. inside the boundary towards the end of the extension of the main building. Trees are in line with the main building from birch tree going west."

Further on in his evidence he said that the barbed wire fence ran through the arelia trees. In re-examination he said that in 1955 the whole boundary had aurelia trees. He said further that -

"In 1961 they had been cut down and were sprouting again", he did not think that they are the same aurelias; the present aurelias, he thinks, are off-shoots of the original plants which were cut down in March, last. They have sprouted again, he said, and he claimed that the extension on the north side of the line would cause the aurelias to shoot in the other direction. It is on this latter part of Mr. Jackson's evidence that it is claimed that the aurelia plants were pushed out of position.

Dr. McTaggart, who owned lands adjoining, was called as a witness for the plaintiff and asked about the line between the plaintiff's and the first defendant's land. He said in examination-in-chief that it was practically straight as far as he knew. In cross-examination he said that he could not swear whether the line was straight or not. In re-examination he said that the boundary between the two - 'X' to 'Y' - is practically straight. Another witness for the plaintiff, Ennis Forbes, in cross-examination said that he saw a lot of ornamental bushes along the line; he did not know if they were aurelia trees, and, significantly, he said that some old wire was attached to these

ornamental trees. In re-examination he said that he could not see where the line existed because of the trees along the line and the building very close.

So that is the state of the evidence. The fence marked by the wire and the posts disappeared or rotted away because Mr. Jackson said that in 1964 there was nothing to mark the boundary line; there was no fence, there were no posts to be seen. Mr. Brandon, for the plaintiff, contends that on a balance of probabilities wherever there is a boundary the boundary line between the two extremities is a straight line. We understood this contention to be in the nature of a presumption; that where there are two points marking the extremities of a boundary line, there is a presumption that the boundary line between the extremities is a straight line. Needless to say, there is no such presumption and it is purely a question of fact what is the true boundary line.

The ground of appeal which was argued is that the judgment is unreasonable and cannot be supported having regard to the evidence. There is a right of appeal given to a party upon the question of the sufficiency of the facts found to support a judgment which is adverse to that party and the only matter for consideration, as it seems to me, is whether there was evidence sufficient to support the judgment which was given in favour of the defendants and against the plaintiff. In his judgment the learned judge of the Grand Court referred to the evidence given by Mr. Jackson and he found that, unqualified as he was, Mr. Thompson genuinely sought to lay down or to survey the boundary line in 1956, and he found as a fact that the duplex is situated within Mr. Thompson's line of boundary. He did not accept the accuracy of Mr. Jackson's recollection that the fence was in a straight line. For myself, I can see no justification for holding that there was not sufficient evidence to support the finding of the learned judge of the Grand Court. I would dismiss

the appeal.

EDUN, J.A.:

Throughout the long argument addressed to us by learned attorney for the appellant, the appellant has been unable to show that there was an insufficiency of the facts upon which the judgment of the learned judge of the Grand Court was based, or to establish, as stated in the grounds of appeal, that the judgment was unreasonable and cannot be supported having regard to the evidence. In the circumstances, the appellant had no right of appeal as the decision of the learned judge of the Grand Court is supported and reasonably based upon the acceptance of the evidence for the respondents which was in conflict with the evidence led for the appellant, see s. 210 of the Judicature (Administration of Justice) Law, Chapter 74.

I agree with the dismissal of the appeal.

GRAHAM-PERKINS, J.A.:

I agree.

SMITH, J.A.:

The order of the Court is that the appeal is dismissed and the judgment affirmed. The defendants are to have the costs of the appeal, to be taxed or agreed.