

Clendon Louis

Appellant

v.

Andrew Smith

Respondent

FROM

**THE COURT OF APPEAL OF
ST LUCIA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 7th June 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell
Lord Mance

[Delivered by Lord Mance]

1. This is an appeal by Mr Clendon Louis against a judgment of the Court of Appeal delivered on 21st October 2003, dismissing his appeal against a final injunctive order made against him by Barrow J on 16th May 2001. The appeal has been presented with clarity and balance by Mr Thomas Roe of the English bar, who did not appear for Mr Louis below. The respondent, Mr Andrew Smith, who is Mr Louis's uncle, was not represented before the Board and did not appear in person, but has written to oppose the appeal. Both parties have in correspondence forwarded to the Board further affidavit evidence and documentation without making formal application for its admission. Much of the content of such

affidavits and documents is in any event irrelevant and the balance is not of a character which could determine the outcome of this appeal. Mr Roe showed the Board some photographs not adduced in the courts below, which offer some pictorial background to the issues before the Board.

2. The litigation concerns a private estate road which runs around Mr Louis's property on two sides and continues past further houses, the second belonging to Mr Smith. The estate was parcelled out in the mid-1970s and houses constructed on the various parcels. An estate plan GI 933, dated 15th June 1976, lodged with the Survey Office shows the width of the road as 24 feet. Each property owner received an easement over the road, the ownership of which is presumably vested in an unidentified successor to the original estate owner. Mr Smith in April 1999 commenced the present proceedings, claiming that Mr Louis was, despite Mr Smith's objections, encroaching on the 24 foot estate road adjacent to his property with a hedge and derelict vehicles and had caused his electricity supplier to erect a pole thereon. In consequence, there was, Mr Smith alleged, no more than 8 feet of (usable) roadway left around Mr Louis's house, causing much annoyance and inconvenience.

3. Mr Louis defended the proceedings, instructing for the purpose Messrs. Foster, Foster and Foster. A hearing took place on 31st March 2000, when he was represented by "I. Shillingford holding papers for Mr K. Foster QC of Counsel". On Mr Smith's cross-undertaking as to damages, an interim order was then made restraining Mr Louis from allowing his fence (an obvious mistake for hedge) and derelict vehicles and any other encumbrance to remain on the area marked out on the estate plan for the road. This injunction was continued in force from time to time, without Mr Louis taking any steps to comply with its terms, other than to give reasons for being unable to move a derelict vehicle. On 15th December 2000 (when Mr Louis was again represented by I. Shillingford holding papers for Mr K. Foster) the matter was further adjourned to 21st March 2001. No record or order exists on the court file or otherwise in relation to any hearing which occurred on that date. The next order is dated 16th May 2001, when the interim order was simply made final (and Mr Louis is recorded as represented by Mr Collin Foster holding papers for Mr K. Foster). A notice of appeal was on 25th May 2001 submitted on Mr Louis' behalf, upon the terms of which Mr Roe relies for information about what happened on 21st March 2001.

4. The notice gave as Grounds of Appeal:

"(1)(i) Matter proceeded with, contrary to Judge's Order on 21st day of March 2001, which requested Counsel for the Petitioner to file papers against the allegations 'that an

injunction restraining the Appellant/Respondent [sic] from allowing his fence thereupon over a period of 20 years and the derelict vehicles and any other encumbrances on the area marked out for the access road' should not be granted, there being no urgency. This was a mistake, which seriously prejudiced the Appellant.

(ii) In any event, there was no fence on the property in issue. There is a flower hedge, one carambola tree and one grapefruit tree watered and nurtured over 20 years. Also, there are two walkways forming part of the front entrance to the Respondent's [sic] building, for over 27 years. Although the Petitioner, as an heir of Sebastian Smith, is in possession of Plan No. GI 933, which makes planning permission for a road of 24 ft width, by his acquiescence for over 24 years, it is submitted that there was no urgency, and therefore an injunction should not have been granted.

(2) Contrary to a Court Order dated 12th May 2000 'that the Licensed Land Surveyor Mr Allan Hippolyte do report to Court on 28th June 2000', there has been no survey prepared and presented to the Court in order to determine whether or not the Defendant had in fact encroached on the said property.

(3) The final Order of the Learned Judge did not properly consider the aforementioned pre-requisites.'

5. Mr Roe submits that Grounds (1)(i) and (ii) raised issues with which it was incumbent on the Court of Appeal to grapple, but that the Court failed to do so. He recognises that the complaints regarding acquiescence and lack of urgency in Grounds (1)(i) and (ii) suggest an objection to the grant of an interim injunction rather than reasons for refusing any injunction. But the appeal being against a final order (as Ground (3) made clear), the Court of Appeal was, he submits, obliged to consider Grounds (1)(i) and (ii) in that context and as reasons why the court in its discretion should have refused any injunction.

6. By affidavit on 11th September 2001 Mr Louis applied for a stay, summarising his Grounds of Appeal and claiming that without a stay he would "suffer great damage to his immoveable property". The outcome of the application is not clear, but, whether or not pursuant to a stay, any encroachment continued in place. On 28th January 2002, when Mr Kenneth Foster QC himself represented Mr Louis, the Court of Appeal ordered the appointment of Mr Foche Modeste, a registered land surveyor, to establish by survey and report his findings and recommendations on the right of way. On 3rd May 2002 the Court ordered

that another registered land surveyor, Mr Rufinus Baptiste, replace Mr Modeste in this task.

7. The Court of Appeal's later judgment dated 21st October 2003 makes further statements about events during this period not apparent from the record or from the account already given. First, after recording Mr Modeste's appointment as surveyor on 28th January 2002, the judgment states that "The parties agreed to be bound by the report of the Surveyor". Second, the judgment goes on to state that Mr Baptiste (as Mr Modeste's replacement)

"duly presented his report to the Court on 10th June, 2002 and notwithstanding the undertaking by the parties that they would abide by the report of the Surveyor, when the matter came back to the Court of Appeal for report Clendon Louis raised objections to the report."

Mr Baptiste's report is dated 5th July 2002, so there may be an error (perhaps of one month) in the date of 10th June 2002. The report and accompanying plan show a hedge or hedges encroaching for over 30 metres in length on the 24 foot road area around Mr Louis's property, and reducing the road width at one point to less than half. It also shows two concrete walkways extending out into the road area to the hedge from the two houses on Mr Louis's property.

8. On 17th February 2003, with Mr K. Foster appearing for Mr Louis, the Court referred the matter to mediation, and on 12th May, with Mr K. Foster again appearing, the Court, by consent, rescheduled the mediation for 21st May 2003 and ordered:

"2. Provided that, if either party fails to attend the Mediation Session as scheduled, the Survey Plan as prepared by . . . Mr Rufinus Baptiste establishing the Right of Way in accordance with Plan of Survey No. G1933 [sic] dated 15th June 1976 is to stand as fully determining the issues between the parties and an order issued by the Court to that effect.

3. Where an order is issued under paragraph 2, the party who has failed to comply, shall pay to the other side costs to be assessed by the Chief Registrar.

3. Where the Mediation Session under paragraph 1 is unsuccessful, the appeal is to be listed before a Single Judge of the Court of Appeal on June 10th 2003 for directions."

9. The mediation session, postponed apparently to 28th May 2003, failed and the matter was under paragraph 3 of the consent order duly listed before a single judge on 10th June 2003. The Court of Appeal in its judgment dated 21st October 2003 records that, at the hearing on 10th June, the single judge (Redhead J) was told that Mr K. Foster QC “had withdrawn from the case” and further that:

“[Mr] Louis urged the Court to visit the disputed area and undertook to abide by any decision reached by the Court after such visit.”

Redhead J, visited the area and, giving the Court’s reasons for dismissing the appeal, said:

“[1] It is in the interest of the people of any country that litigation is brought to an end.

[2] The case is coming before this Court for the fourth time for a resolution of the same issue, i.e. the determination of the access road which adjoins the properties of the parties.

.....

[10] On 12th June 2003 the Court visited the disputed area. Having visited the disputed area, I am satisfied with the accuracy of the Surveyor’s report and that there is an encroachment of the fence [sic] and the vehicles on the right of way.

[11] I am of the view having regard to the history of this matter that there is a stubborn refusal by the parties to this dispute, particularly the Appellant to accept decisions of the Court. The Court cannot be a party to this conduct.”

10. After the appeal, Messrs. Foster, Foster and Foster re-appeared on Mr Louis’s behalf, and sought leave to appeal to the Board on 16th November 2003 on the ground that the Court of Appeal erred had (a) in failing to find that the surveyor’s report favoured Mr Louis’s case and in not finding for Mr Louis, and (b) on the ground that

“A generally defective right of way was used by the Appellant and the majority of inhabitants over a period of 24 years, and could therefore mount legal reasons [sic] for an injunction Order against the Appellant”.

Also in November 2003 Foster, Foster and Foster sought a stay of execution on the grounds that the order “doth stultify” in that (a) there was no practical convenience or domestic space for widening a road path to 24 feet, (b) Mr Smith “acquiesced or did not complain until some 24 years later, and, therefore, there are no grounds for an Injunctive Order”

and (c) the Court relied on the surveyor's report, which favoured Mr Louis, "and, therefore, there was no contempt". A stay was granted on 1st December 2003. On 12th February 2004 Foster, Foster and Foster sought final leave to appeal on the simple ground that "the decision was against the weight of the evidence". Final leave was given on 26th April 2004.

11. Mr Roe in his written case and oral submissions in support of the appeal now submits that the final order dated 16th May 2001 should be set aside and that Mr Smith's claim to injunctive relief should either be dismissed outright or remitted to the Court of Appeal for reconsideration on its merits. The Court of Appeal failed, he submits, to address or give any reasons relating to the propriety of Barrow J making a final order on the material before him, or relating to the issue of acquiescence, which should have led to the refusal of an injunction as a matter of discretion. Mr Roe puts the issue of acquiescence no higher than that before the Board. But he reserves the possibility, if the matter is remitted, that Mr Louis might then seek leave to argue that the alleged acquiescence extinguished Mr Smith's easement and/or barred his substantive claim. He recognises that, under article 2074 of the Civil Code, the prescription period is 30 years, and that Mr Louis cannot have acquired title, or extinguished Mr Smith's easement, by adverse possession. But he points out that (under the Treaty of Paris 1814) French civil law remains the law of St Lucia, and he submits that the law of Quebec, and probably therefore also that of St Lucia, has "a disguised form of estoppel in property law, shaped as the implicit concession of a real right making the encroachment licit" (Debruche, *Judicial Fairness in the Realm of Strict Law: Comparative Insights around a Classic Encroachment Case* (2005) 9 Electronic Journal of Comparative Law 1, 6). This line of argument he would wish to reserve in the event of a remission.

12. The first question is however whether there is any basis for setting aside the Court of Appeal's judgment, in the light of the way the case has been argued to date and put before the Board. It is correct that the Court of Appeal in its judgment dated 21st October 2003 nowhere expressly addressed Grounds (1)(i) and (ii) contained in the notice of appeal dated 25th May 2001. On the other hand, it clearly perceived the matter as one where the only issue remaining by 12th June 2003 was that arising under Ground (2). It recited a course of events which focused on the resolution of that issue, starting with the appointment of a surveyor on 28th January 2002, continuing with the orders for mediation of the issues arising on Mr Baptiste's survey report made on 17th February and 12th May 2003 and further continuing at the hearing on 10th June 2003. At that hearing, according to the Court, Mr Louis expressly "undertook to abide by any decision reached by the Court" after the visit to the area which he was urging. The proviso in the consent order of 12th May 2003, whereby the

parties agreed that, in default of either party's attendance at the mediation session, the report should "stand as fully determining the issues between the parties" and an order issued and costs paid by the defaulter, is odd, so far as it suggests that one party could, by defaulting, achieve a result whereby the other was bound by the report. But it was made by consent and it does point to a conclusion that the only issue which anyone considered was live by that stage was the issue of the accuracy, effect and implications of Mr Baptiste's survey report dated 5th July 2002. Mr Louis was at that stage and until 10th June 2003 represented by counsel.

13. Mr Roe points to the paucity of information, and in some instances absence of any record or order, in relation to the hearings before both the courts at first instance and the Court of Appeal. That is regrettable. But, to succeed on this appeal, he has to invite the Board to reach conclusions about events and further alleged shortcomings which involve what is essentially speculation. Further, it is speculation on matters about which Mr Louis and those who acted for him before the courts below should know and would ordinarily be expected to have kept some form of record. But no evidential or documentary material which assists has been put before the Board. It appears that a very late attempt was made to obtain assistance from Mr Kenneth Foster QC, but his extremely brief affidavit sworn 2nd May 2007 is inaccurate, largely irrelevant and cannot have been the result of any systematic direction of his attention to either the record or the issues before the Board. In consequence, the Board has no direct assistance (beyond the statements in the Grounds of Appeal to the Court of Appeal) as to what was said or happened at first instance on 21st March 2001 and 16th May 2001, and no assistance as to what was said or happened in the Court of Appeal at any stage other than that given by the Court's orders and judgment.

14. The Board does not think it right in these circumstances to conclude that the Court of Appeal simply overlooked issues under Grounds (1)(i) and (ii) of the notice of appeal which were in any realistic sense live on 12th June and 21st October 2003. It is not uncommon for issues to be narrowed quite informally during the course of an appeal. It is of course desirable that this should be recorded. But here it is clear that by the time the Court gave judgment the only live issue in its view related to Mr Baptiste's survey report and plan, and there are orders and uncontradicted statements by the Court itself which on their face support the view that this was indeed so. The Board does not regard it as implausible that Mr Louis and those representing him before the Court of Appeal should either not have pursued at all or have pursued at the most faintly any issues which might have been suggested under Grounds (1)(i) and (ii), or that the Court of Appeal should effectively have discounted such issues.

15. By the time the matter was before the Court of Appeal, the complaint made in 1999 that there was no “urgency” was irrelevant. Any suggestion of “serious prejudice” or “great damage to his immovable property” if the injunction was ordered must also have evaporated. The Court had ordered and obtained Mr Baptiste’s survey and plan and it also inspected the disputed area for itself. The survey and plan (and the visual picture presented by the photographs which Mr Roe showed before the Board) demonstrate that the removal of the hedge and concrete walkways and any other obstruction could not at any time have presented difficulty. No doubt, Mr Louis would at all times have liked to continue to enjoy the larger area which he presently occupies. His property would be larger and perhaps more valuable with the encroachment. But (in the absence of any prescriptive right and of any claim before the Board of any form of proprietary estoppel) he had no right to any increase in size or value. Mr Roe frankly and rightly accepted that there could be no particular or substantial hardship in removing the hedge or in shortening the walkway. In these circumstances, whenever it was that Mr Smith became aware of or began to request its removal (a request which had certainly given rise to tension by early 1999), the Board thinks that the suggestion that Mr Louis should in 2003 have been allowed to continue the encroachment indefinitely, confining Mr Smith presumably to a claim to damages, would have been likely to strike the Court of Appeal, and those representing Mr Louis, as quite unrealistic.

16. In the result the Board is not satisfied that there was any misunderstanding or oversight on the Court of Appeal’s part, or that any potential injustice can have been caused by its failure to address Grounds (1)(i) and (ii) specifically in its final judgment. Further, in the light of the factors summarised in the previous paragraph, the Board does not regard this as a case where, even if there was any misunderstanding or oversight justifying remission, there would on the facts be any real prospect of a court to which the matter was remitted deciding the issue of discretion favourably to the appellant.

17. For these reasons, the Board will humbly advise Her Majesty that this appeal should be dismissed with costs to be assessed if not agreed.