

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ON MONTSERRAT
CASE MNIHCV2018/0006
BETWEEN

JOSEPH MOLYNEAUX Claimant
AND
DWAYNE HIXON Defendant

APPEARANCES:

Mr Kenroy Hyman for the Claimant.

Mr. Fitzroy Buffonge for the Defendant.

2022: DECEMBER 15

JUDGEMENT

On ownership of land sliver enclosed by fence at purchase

- 1 **Morley J:** In 2006, Joseph Molyneaux purchased land shown to his eye enclosed inside a chainlink fence. In 2015, the adjacent plot was purchased by Dwyane Hixon; survey then showed a sliver of land to be his, about 8ft wide along the boundary, measuring in sum 1536ftsq, but within the fenced area. So, who owns it? Molyneaux thought he had bought it as it was within the fencing; Hixon¹ says the survey shows the land belongs to him. Each makes claim and seeks various reliefs.

- 2 This case has had a long history, largely owing to covid delay. Claim was filed by Molyneaux on 02.02.18. It was finally tried on 05.12.22, receiving evidence from Molyneaux, his gardener Beresford Allen, and then from Hixon. There have been 39 appearances: 27.03.18, 14.06.18, 27.06.18, 10.12.18, 08.03.19, 21.03.19, 22.03.19, 11.10.19, 25.10.19, 02.12.19,

¹ The parties will be referred to by their surnames for ease of reading, and no disrespect is intended by not writing out each time full titles, or names, or the legalese of whether claimant or defendant.

09.12.19, 18.12.19, 13.01.20, 14.01.20, 11.05.20, 29.05.20, 10.07.20, 07.09.20, 09.09.20, 10.09.20, 02.11.20, 19.11.20, 02.03.21, 12.04.21, 07.05.21, 02.07.21, 01.10.21, 02.11.21, 19.11.21, 26.11.21, 30.11.21, 07.12.21, 11.03.22, 12.07.22, 15.07.22, 18.11.22, 01.12.22, 05.12.22 and today 15.12.22.

- a. The reasons for the delay were attempts at settling matters by referring to the Land Registry, or to a new survey, where neither happened, changes in counsel, covid suspending court work, and Molyneaux being in Canada during covid and seeming 'uncontactable'.
- b. There have been 2 views of the locus, on 22.03.19 and 05.12.22.
- c. There have been 6 failed trial listings owing to covid and Molyneaux being absent, on 13.07.18, 01.05.20, 09.09.20, 05.03.21, 11.03.22, and 18.11.22.
- d. The lawyer representing Molyneaux began as Counsel David Brandt, on 18.12.19 became Counsel Warren Cassell, both later jailed, and on 18.11.22 became Counsel Kenroy Hyman.

3 The evidence at trial showed:

- a. On 16.12.92, Edward and Barbara Gough bought parcel 12/1/181 on which there was a house.
- b. On 05.06.97, they then bought the adjacent plot 12/1/182, which was scrub land.
- c. They, or a Ms Platt, erected a chainlink fence during the 1990s to mark out the Goughs' living area around the house on 181, but it seems did not pay attention to the boundary between 181 and 182, as the Goughs owned both. The fence included the sliver from 182.
- d. Molyneaux was shown the land visually within the fenced area and purported to buy it as plot 181 on 19.04.06.
- e. He told the court he used the same lawyer as the Goughs, Kenneth Allen KC. There was no survey done to show Molyneaux where precisely the boundary of 181 lay. He was therefore unaware there was a sliver within 182.
- f. Molyneaux did not offer as trial evidence the deed of conveyance which he said was kept by the bank to secure a loan on 14.10.05 from Bank of Montserrat of EC\$110800 to pay the purchase price of US\$185000, though saying the deed may have embraced 182, as the loan letter hints, shown to the court at trial. It followed, if not producing the deed, and not even being aware of what was actually in it, but instead guessing, insofar

as he sought to prove on balance the purchase therefore embraced the sliver in 182, on this point his case failed.

- g. Molyneaux lives mostly in Montreal, Canada, where he is a carpenter, having bought one property in 1980, and has not bought any other land elsewhere except for plot 181 on Montserrat. He is inexperienced in realty.
- h. On the other hand, Hixon is a realtor, running on Montserrat the estate agency Emerald Isles properties.
- i. He purchased plot 182 from the Goughs on 16.07.15. From experience he is aware fences where adjacent plots are co-owned are often anywhere, as the boundary is not thought important by the owners. He obtained a survey on 31.12.15 to establish the correct boundary between 181 and 182. It was then apparent the Goughs had extended the fence into 182 up to a parallel dip in the ground, as creating a natural divide between 181 and 182, though it was not the registered boundary.
- j. While Molyneaux was in Canada, Hixon explained the correct boundary to Len Greenaway and Charlie Farrell who he believed looked after Molyneaux's property while off island, and in July 2016 he then took down the chain link fence, understandably upsetting Molyneaux, placing the poles and wire under Molyneaux's house, then erecting a series of poles to mark the survey boundary.
- k. There is no legal or factual dispute raised by counsel that the survey boundary as marked by Hixon is correct. Instead, Molyneaux through his counsel has sought to make a case for acquiring the sliver from 182 as an 'overriding interest' because he occupied it.
- l. However, by contrast to his counsel's filed argument on overriding interest, being originally Counsel Brandt, it should be noted Molyneaux during trial has shown no clear understanding the sliver is on plot 182; he simply thinks he bought all the land within the fencing, claiming he was not even aware of the adjacent plot being number 182 until two months ago. This assertion is not accepted by the court as, when dispute arose, he commissioned a survey dated 10.01.17 by Licensed Surveyor George Skerit, put in evidence, fully setting out the history of the two plots and their precise boundary, which must therefore have been known to him long before he so asserted.
- m. In concluding the case, Counsel Buffonge for Hixon filed written submissions on 12.12.22 as directed; Counsel Hyman for Molyneaux did not.

- 4 It is trite law on Montserrat when you buy a plot, you purport to buy the land within the survey logged at the Land Registry. No one should ever buy land simply by looking at it.

- 5 The boundaries of plots 181 and 182 are meticulously demarcated on plans at the Land Registry, and there are discreet markers on the land, in concrete, to mark the survey pegs, which usually get hidden by plant growth. Hixon found the markers doing debrush, being formally pegs IP119 and IP120. As stated, there is no dispute raised by Counsel Hyman the survey boundary erected by Hixon is factually correct.
- 6 It is important to note it was the job of Molyneaux's conveyancing lawyer, said by Molyneaux in this case to be Counsel Allen, to establish where is the boundary by reference to the survey at the Land Registry, and not to rely merely on what can be seen within fencing. This is a large part of why a conveyancing lawyer is paid, so a purchaser knows exactly what is acquired. It is also the reason a purchaser should have a different lawyer than the seller, which Molyneaux says did not occur here. He ought to have had a formal survey before purchase, which would have shown the fence had extended into plot 182, embracing the sliver, and he could not expect automatically to own it, to then discuss this with the seller, requiring rectification at the Land Registry and mutation of the plots, to move the sliver from 182 to 181, possibly at shared expense, or at the expense of the seller owning both plots, thereby formerly recording new boundaries.
- 7 The only way Molyneaux may have acquired the sliver is if an overriding interest has been established against Hixon under **s28 Registered Land Act** cap 8.01.

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted in the register:...

(g) the rights of a person in actual occupation of land...save where inquiry is made of such person and the rights are not disclosed

According to **Cheshire & Burn on Modern Law of Real Property**, 18th Ed at p145, '*such a right is discoverable by, but only by, the purchaser's inspection of [the land to be purchased] and by inquires he must make without the assistance from the register*'.

- 8 It follows Hixon was under an obligation to inspect the land before purchase to see if there was any interest on 182 not registered at the Land Registry, specifically the sliver. It is clear from the evidence Hixon was aware of the fence, though from his realtor experience he positively did not rely on it. Though he purchased plot 182 on 16.07.15, having begun

debrush from August 2015, which at one point knocked over some fence poles while extracting tree roots, which he refixed, nevertheless he then got a formal survey on 31.12.15 establishing as he had surmised the fence was on his land.

9 In sum, this court is satisfied Hixon properly set about establishing the boundary, believing the fence wrong, though the survey ought in practice to have been earlier, pre-purchase, and it was bad manners to take down the fence without talking to Molyneaux personally, instead relying on supposed proxies.

10 There is no doubt Molyneaux was in occupation of the sliver, and he called his gardener Allen to speak of tending to the boundary, where Molyneaux planted hibiscus, lime, palm and flowers. The question begged is, does his actual occupation give him an overriding interest so as to have acquired the sliver, where Hixon, though seeing the fence boundary, has never accepted it.

11 There is a relevant case, named **Ulina George v Hilary Charlemagne 2003** Civil Appeal 24 of 2001 where in 1994 Hilary Charlemagne bought on St Lucia an acre from Charles Dolor, being an imperial measurement, from within registered parcel 0232B6, which in sum was 0.9 hectares. The sale was not formally registered. In 1996, Dolor sold the remaining 0.5 carreau within parcel 0232B6 to Ulina George, being a Haitian metric measurement, whose mother acted in the purchase, but Charlemagne was in occupation of it, having ploughed the land, had made charcoal, and harvested tomatoes, peppers, cabbages and cucumbers. Ultimately Charlemagne was said to have an overriding interest, under identical legislation on St Lucia, as a person in occupation but whose rights were not registered, where Byron CJ as he then was said at para 16:

The clear intent of s28(g) of the Act is to give legal effect to the rights that people have if they are in actual occupation of the land but their rights are not registered. I would think that the effect of this statutory provision is to impose an additional duty on the purchasers of the registered land. It is not enough to search the land register. They must carry out a search of the land itself to determine whether there is anyone in actual possession. The title that they get will be subject to the rights of the person in actual possession. The Judge's finding of fact indicate that George knew, at least through her mother, of Charlemagne's occupation, but it is possible that the legal effect was missed because he did not have a registered interest in the land...In this case the learned trial judge applied the law appropriately. He determined that Charlemagne was in actual occupation as a purchaser whose purchase was not registered.

- 12 What distinguishes the George case from the Hixon case, is the purchase by George in 1996 was wholly within the same plot 0232B6 as the Charlemagne purchase of 1994, which had not been registered, when the Hixon purchase of plot 182 in 2015 is of land on a separate plot to Molyneaux, whose purchase in 2006 of plot 181 was fully registered, including as to its precise boundary. The short point is Molyneaux's registered boundary is different to what in fact he occupied, whereas there was no boundary registered by Charlemagne.
- 13 No issue of acquiring the sliver by prescription under **s135 Registered Land Act** arises as Molyneaux would have to be in uninterrupted adverse possession of the land for 12 years, and up to Hixon bringing down the fence in July 2016, Molyneaux can only claim 10 years.
- 14 What is left is Molyneaux claims the land because it was within the fencing and did gardening. Is that enough? This court thinks not. As said in **Barnsley on Conveyancing Law and Practice**, 3rd Ed at page 50, '*actual occupation is not a right or interest in itself...there must be a combination of an interest which justifies continuing occupation plus actual occupation*'. This begs what is the interest which justifies continuing occupation, if actual occupation simpliciter is not enough?
- 15 There is good reason to ask this question in an island community like Montserrat, where folk own land and yet live often mostly overseas. This court must be careful not to give a green light to folk fencing slivers of land in their neighbor's long absence, where there is rapid overgrowth obscuring survey pegs, thereby creating a supposed overriding interest if either the neighbor's land is sold remotely with the neighbor not knowing of the sliver, or sold by the fencer with the fence *in situ*, saying visually 'what you see is what you get', when the absent neighbor does not know the fencer is giving away some of the neighbor's land.
- 16 What is protected by **s28 Registered Land Act** are the rights created by actual occupation, not the actual occupation of itself. Here, this court considers no rights arose. Molyneaux was misled, probably mistakenly, when shown the fencing marked what he was buying, contrary to what was recorded at the Land Registry. And insofar as proprietary estoppel might ever have arisen from what he was shown, it was not pleaded as such, if ever it might have succeeded. More, where at para 3 of his statement of claim he pleads there was a specific sale to him of the sliver from 182, this has not been proved as there is no record of mutation.

- 17 The nub of this case is, per the evidence offered, Molyneaux did not have a survey in 2006 to tell him where his boundary was, when this ought to have been standard conveyancing practice by his lawyer, where there should not have been the same one representing both parties as Molyneaux describes, assuming this true. More, he has never had a survey, until 2017 when dispute arose. What he owned was registered at the Land Registry and he never sought to find out what that was.
- 18 The ratio in this case is folk must get a survey when making a purchase, as Hixon did, and Molyneaux did not. While Molyneaux may have an action against his conveyancing lawyer for loss of the sliver he thought was his, regrettably it is not his, and never was, and he should have been made aware of this by a survey in 2006. So, for wider understanding on Montserrat, if buying property, please:
1. Always check your boundary at the Land Registry; it is the point of its existence to tell you what you own;
 2. Have a separate conveyancing lawyer; and
 3. Get a survey to match the boundary you see to the boundary at the Land Registry.
- 19 In the circumstances I will dismiss Molyneaux's application for various reliefs, with a declaration the sliver belongs to Hixon, as reflected at the Land Registry, and the boundary erected by Hixon, with the implication Molyneaux would be a trespasser on the sliver, while no damages arise as Hixon has already, pushily, fully set the boundary.
- 20 Concerning costs, in my discretion I will make no order, as Hixon upset Molyneaux by taking down the fence without telling him directly, in an act of apparent poor neighborliness, exacerbating this litigation, to an extent bringing it on himself as difficult after to settle, while at the same time the court has sympathy for Molyneaux who it is accepted did think he owned the sliver as being within the fencing shown.
- 21 However, an earlier costs order of 11.03.22 of EC\$1250 payable by Molyneaux to Hixon stands, for not being ready for trial that day, leading to wasted trial preparation, and is to be paid within 28 days.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

15 December 2022