

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 0087 of 2015

BETWEEN:

LAURIE BLYDEN

Claimant

And

THE REGISTRAR OF LANDS

Defendant

And

ROOSEVELT DONOVAN

As Administrator for the estate of Wilfred Alfred Donovan (deceased)

Interested Party

Appearances: Mrs. Marie Lou Creque, Counsel for the Claimant
Ms. Maya Barry and Hakim Creque, Counsel for the Defendant
Mr. John Carrington, QC, and Corinne George, Counsel for the Interested Party

2016: December

JUDGMENT

- [1] The Claimant is the proprietor of Parcel 8, Block 2336B, Mount Sage Registration Section, and has been engaged in a boundary dispute with the proprietor of the neighbouring Parcel 9 Block 2336B who is represented in these proceedings by the Interested Party.
- [2] The dispute between the said Parties gave rise to an application to the Defendant ("The Registrar") pursuant to section 17 and 18 of the Registered Land Act (Cap. 229) of the Laws of the Virgin Islands Revised Edition 1991 ("the Act") in order to ascertain and fix the boundary between Parcels 8 and 9.

- [3] In exercise of powers conferred under the Registered Land Ordinance, the Registrar contends that he visited the site and heard representations from the Parties relative to where they knew their boundary to be located. Further, he contends that the Survey Department was asked to conduct an investigation with regard the disputed boundary. On 8th January 2014, the Chief Surveyor submitted a report on his investigation which contained his findings and recommendations. The said Report attached as appendices, aerial photographs of 1959, 1969, 1966, 1981/85 and Cadastral Index and Data maps – 2336B, Mount Sage (1973 – 74); and DOS Topographical Map Series 046 of 1973, 1984 – 84, which formed the basis of the Chief Surveyor’s research.
- [4] The Chief Surveyor in his findings and recommendations found that a house existed on the site prior to the adjudication and registration of the Cadastral Index Map dated 7th May 1974, and that the boundary line alignment should not have been mapped over or through the house. He found that the line should have followed the “outlined fenced pasture” which was approximately from the Rain Drop Tree to the Kapai Tree Stump and then continued to the road bypassing the existing occupation. A Survey Plan CA-2336B-098T was drawn up by the Chief Surveyor describing and pointing out his recommendation for the position of the boundary between the Parcels.
- [5] On 11th March 2015, the Registrar of Lands issued a Boundary Determination and Declaration (BDD) Order pursuant to Registered Land Ordinance (Cap. 229), as depicted on Plan CA-2336B-098T.
- [6] The BDD Order issued by the Registrar of Lands provides that the said Order was issued after considering the evidence obtained at site visits and after careful review of the expert findings and recommendations of the Chief Surveyor, and Survey Plan CA-2336B-098-T dated 9th day of September 2013.
- [7] This current claim was filed on 10th April 2015 pursuant to Section 147 of the Act which provides for appeals against decisions of the Registrar. The claim included several grounds of challenge including the failure to supply the Parties with the 8th January 2014 memorandum from the Chief Surveyor to the Chief Registrar of Lands. The said memorandum was subsequently provided to the Claimant.

- [8] Moreover, during the course of the trial it became clear to the Court that the Registrar had determined this boundary on two different occasions:-
- a. Initially by decision dated 30th April 2003¹ and then;
 - b. Subsequently by decision dated 11th March 2015².
- [9] The determinations and conclusions were the same on both occasions; namely that the boundary line between the Parcels runs from the spike in the Raindrop Tree to the spike in the Kapai tree and then follows points 2NS7-2NS6-2NS5 as disclosed in Plans CA-2336-098-T.
- [10] The Claimant did not appeal the 2003 decision but, having succeeding in persuading the Registrar to entertain the same dispute 12 years later, he now seeks to appeal the 2015 decision.
- [11] It is common ground between the Parties that the Registrar's determination was based in part on the report from the Chief Surveyor's department which was identical in both 2003³ and 2014⁴. The Chief Surveyor's critical findings were that:
- a. the house in the "disputed area" was in existence prior to 1966 and undergoing further construction before the completed demarcation, adjudication and registration of the cadastral map in 1974, on which the Claimant relies;
 - b. the examination of successive aerial photographs and topographical maps shows that extensions to the house were completed since 1984-85;
 - c. there was a fence in existence and it appeared that the owners of Parcel 9 relied on this fence as their boundary;
 - d. this fence had been erected by Mr. Blyden in and around 2000⁵
- [12] The information presented to the Court is that on 30th April 2003, the Land Registrar determined pursuant to Section 17 of the Registered Land Ordinance that the boundary between Parcels 8 and 9 of Block 2336B Mount Sage Registration Section be determined as shown on Plan CA-2336B-098-T following points 2DS8, 2DS7, 2DS6 and ending at 2DS5.

¹ See exhibit to affidavit of RD pages 5 and 6

² Exhibit to affidavit of RD page 7

³ Exhibit to affidavit of RD

⁴ Exhibit to affidavit of Winston Donovan

⁵ See report from Chief Surveyor dated 30th April 2003 exhibited to affidavit of RD pages 5-6

- [13] This determination was made upon the application by the proprietors of Parcel 9 and after 1. a site visit by the Registrar on 17th May 2000 at which the proprietor of Parcel 8 was present, 2. a further meeting on site on 8th January 2003 at which both proprietors were present, and 3. the receipt of communication by the legal representative of the proprietor of Parcel 8. The decision further refers to a fence constructed by the proprietor of Parcel 8 which location it appears was not disputed by the proprietors of Parcel 9.
- [14] The Registrar concedes however that he failed to comply with his statutory obligation under Section 17(3) of the Ordinance file a note of his determination in the relevant register.
- [15] Notwithstanding this earlier decision, the Land Registrar embarked upon a second determination of the boundaries in respect of the same parcels and made the same decision in April 2015. It is this later decision that is the subject of the present appeal by the Claimant.
- [16] Having acknowledged that multiplicity of BDD orders in the matter, at the end of the first day of trial in this matter on 26th January 2016, the Court requested all Parties to file further submissions on the effect of:
- a. The decision by the Registrar determining the boundaries between Parcels 8 and 9 in 2003; and
 - b. His failure to note such decision in the relevant registers.

CLAIMANT'S SUBMISSIONS

- [17] Counsel for the Claimant relied on Section 17(2) and (3) of the Registered Land Ordinance which provides that:
- “(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.
 - (3) Where the Registrar exercises the power conferred by sub-section (2), he shall make a note to that effect on the Registry Map and in the register and shall file such plan or description as may be necessary to record his decision.

- [18] Counsel submitted that in the previous proceedings before the Registrar, he heard the Parties and caused a survey to be done but failed to do what was mandated by Section 17(3) that is he failed to make a note in the Registry Map, or in the register and failed to file such plan. This failure meant that the Registrar did not legally fix the boundaries.
- [19] In fact, Counsel argued there was no application to fix the boundaries. She submitted that it is clear from the 2003 Order, that application was made to the Registrar by the Interested Party to intervene in a boundary dispute. At paragraph 1 of the 2003 Order, the Registrar stated as follows:
- “By letter dated February 12, 2000, Messrs. Roosevelt, Godfrey and Frederick Donovan, Heirs of the estate of the late William Alfred Donovan, registered proprietor of parcel 9, applied to the Registrar of Lands to intervene in a boundary dispute with the registered proprietor of parcel 8.”
- [20] Counsel submitted that while it is clear from the 2015 Determination, that the Defendant’s decision was based on an application made by both Parties, what is not clear, is what was the nature of the application, whether it was an application to fix the boundaries or otherwise. However, assuming that the application was to fix boundaries, pursuant to Section 18(1), she concedes that the Registrar did what he was required to do, for example, give notice to all affected persons of an intention to fix the boundaries.
- [21] The Claimant accepts that no appeal was filed in respect of the 2003 Order and that in the normal course, the Claimant would be barred from making any further applications in relation to same, in much the same manner as parties would now be time barred from making claims on the location of cadastral boundary lines – **Louisen v Jacob**⁶ as quoted in **St Torrence Matty et al v Alicia Francois**⁷.
- [22] However, Counsel submitted that the fact that the Claimant and the Interested Party continued in settlement discussions suggests that neither Party considered the 2003 Order as a final one as they both “ignored” it and continued to engage in discussions. In support of this, Counsel pointed to the exchange of correspondence between the Defendant’s Counsel and the Claimant’s Counsel and she contends that the Claimant is entitled to rely on the continued settlement discussions

⁶ [2009] UKKPC 3

⁷ SLUHCVP 2011/0025 & 2012/0037

between his attorney and that of the Interested Party which evidences that the matter was still under review and open for discussion.

[23] Alternatively, the Claimant submits that the Defendant was not revisiting his 2003 decision. The issue of mistake arises for there can be no other logical reason for all of the Parties to conduct a repeat of the earlier investigation unless they were all operating under the same mistake that the matter had not been finalized. Counsel for the Claimant pointed out that the Defendant himself, in his Statement of Case filed 1st October 2015, agreed that there were “several attempts over many years to resolve the dispute.” Counsel submitted that in light of the fact that the Registrar appears to have acted against his own 2003 Order, it is open to the Court to infer that the 2003 Order was not in fact a final determination.

[24] If the foregoing is accepted, Counsel for the Claimant argued that section 18 of the Act would definitely not apply and section 17(3) would not yet be applicable as no ultimate decision was reached until the 2015 Determination. Thus, the boundaries having neither been determined nor fixed, there was, in fact, no finality to the 2003 Decision.

THE DEFENDANT’S SUBMISSIONS

[25] Counsel for the Registrar of Lands responded with the following in unequivocal concession:

“We are constrained to concede that the determination of the boundary was *res judicata* at the time of the 2015 BDD Order.”

[26] Counsel submitted that the earlier 2003 determination (made pursuant to section 17(2) of the Act) was a decision which was final and on the merits as between the parties to that determination. This position is not affected by the failure of the Registrar to record the said decision in accordance with section 17(3), particularly given that section 17(3) simply provides for the proper recording the decision made under section 17(2). Accordingly, Counsel submitted that the earlier determination would be binding as between the parties to the 2003 Order, unless the said determination was appealed in accordance with section 147 of the Act.

[27] Counsel further submitted that the principle of finality prevents the launch of collateral or subsequent attacks on issues which were previously determined by a competent court or authority.

This principle is known as *res judicata* and it is applicable not only to courts of law but also to other statutory tribunals within the public law arena. Lord Bridge of Harwich in **Thrasivoulou v Secretary of State for the Environment**⁸ described the principle in the following terms:-

“The doctrine of res judicata rests on the twin principles which cannot be better expressed that in terms of the two Latin maxims interest reipublicae ut sit finis litium and nemodebetbisverari pro una et eadem causa. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute had created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.” [emphasis mines]

[28] This exposition of the law was recently affirmed by the UK Supreme Court in **R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales**⁹ which also held that *res judicata* is a generic term of which “cause of action estoppels” and “issue estoppels” are two species¹⁰.

[29] Counsel for the Registrar submitted that since the 2003 Order conclusively determined the boundary between Parcels 8 and 9 Block 2336B Mount Sage Registration Section as shown on Plan No. CA-2336B-098-T, following along the points 2DS8 at the Kapar Tree and to 2DS5, 2DS6 ending at 2DS5, that issue was finally and conclusively decided as between those parties, and is now *res judicata* based on issue estoppel and/or cause of action estoppel. Accordingly, that issue ought not to have been re-litigated, absent an appeal, by the same parties to the 2003 Order.

[30] Finally, counsel referred the Court to the judgment in **Elizabeth Beach Resort v The Registrar of Lands**¹¹ where in response to the claimant’s challenge that the Registrar erred by not re-opening

⁸ [1990] 2PLR 69 at pages 74 - 75

⁹ [2011] UKSC 1

¹⁰ [2011] UKSC 1 paragraph 26

¹¹ Claim No. BVIHCV 2006/0317 at paragraph 23

his “decision” in order to consider evidence which had come to light subsequent to his “decision”, on this issue, Joseph-Olivetti J held, consistent with the principles of *res judicata*, that ***“the Registrar had no jurisdiction to re-visit his ruling after it had been delivered”***.

THE INTERESTED PARTY’S SUBMISSIONS

- [31] Counsel for the Interested Party commenced his submissions with the review of the relevant legislative provisions. He submitted that section 17(2) of the Ordinance empowers the Registrar, on the application of an interested party and on such evidence as he considers relevant, to determine and indicate the position of an uncertain or disputed boundary. Section 17(3) provides that when he has exercised the power under sub-section (2), he shall make a note to that effect on the Registry Map and in the register and shall file such plan or description as may be necessary to record his decision.
- [32] Counsel for the Interested Party concluded that the statutory formula appears to be clear. There is first an application, then a determination, then a statutory duty on the part of the Registrar to file a note of his determination with respect to the boundaries. Such a determination has the effect of determining rights of parcel owners subject to an appeal. It conclusively determines the boundaries of parcels and therefore the extent of the property of registered proprietors of such parcels.
- [33] Counsel also referred the Court to the case of **Thrasyvoulou v Secretary of State**¹², in which the English House of Lords held that the principle of *res judicata* can apply to decisions of a statutory tribunal subject to a comprehensive self-contained statutory code, unless the intention to exclude this principle can be inferred as a matter of construction of the relevant statutory provisions.
- [34] The Interested Party submitted that no such statutory intention can be inferred in the case at bar because the purpose of the Registered Land Ordinance is to enact a complete system of land law in which the Land Registrar has the jurisdiction to determine the extent of all property rights including but not limited to boundary disputes. As a result, Counsel submitted that the determination of 30th April 2003 was binding on the parties to that dispute and that the location of the boundaries was *res judicata* as a result of that determination. He argued that it was therefore

¹² [1990] 2 AC 273, 289C-D

abuse of process for the Claimant to seek to reopen the same dispute again in 2014. On that basis alone, Counsel submitted that this appeal should be dismissed.

- [35] The Interested Party further submitted that the Registrar's failure to note the determination in the register does not affect the foregoing. According to Counsel, the statutory obligation to note is that of the Registrar and arises only after he has made a determination; it is an independent step which merely publicizes the determination that had been made.
- [36] He asked the Court to note that it is the determination that is appealable and not the noting. This confirms that the determination of rights occurs upon the determination. It follows that the only import of the failure to note is that it merely entitles either of the parties to the dispute to seek an order of mandamus to compel the Registrar to comply with that duty under section 17(3).
- [37] Turning to the impact of section 17(5) of the Registered Land Ordinance which provides that except where it is noted in the register that the boundaries have been fixed, the court or the Registrar may in proceedings concerning the parcel receive such evidence as to its boundaries and situation as it or he thinks fit, the Interested Party submitted that this does not derogate from the estoppel created by a determination that has been made as this remains a judgment *in personam* against the disputing parties. To find otherwise would mean that the mere failure of the Registrar to note could result in repeated applications by an unsuccessful party in breach of the principle of finality of litigation which underlines *res judicata*.
- [38] According to the Interested Party, section 17(5) of the legislation, should be read as meaning that unless there has been a notation on the register, subsequent proprietors of the parcel are not bound by the determination as they would have been if there was a judgment in rem. The notation has the effect of converting the *in personam* judgment into one that binds the world by its entry in the register, i.e. a status analogous to a judgment in rem. Counsel submitted that this is consistent with the identification of the system in **Frazer v Walker**¹³ as one conferring indefeasibility of title by registration.

¹³ [1966] UKPC 27

Preliminary Issue- Analysis and Conclusion

- [39] Having considered the Parties' submissions, the Court is persuaded that the Registered Land Ordinance contemplates a simple boundary determination procedure. The legislation prescribes that following receipt of an application made by any interested party, the Registrar shall on such evidence as he considers relevant, make a determination which would indicate the position of the uncertain or disputed boundary. The legislation then imposes a statutory duty on the part of the Registrar to file a note of his determination with respect to the boundaries in the registers and file such plan or description as may be necessary to record his decision. There can be no doubt that such a determination has the effect of determining rights of parcel owners because, subject to an appeal, it conclusively determines the boundaries of parcels and therefore the extent of the property owned by the registered proprietors of such parcels.
- [40] Having considered the previous proceedings before the Registrar, the Court is satisfied that save for his failure to perform the statutory duty prescribed at section 17(3) of the Ordinance, there was valid determination made by the Registrar of Lands in 2003 in respect to the very same uncertain or disputed boundary which is the subject of this Appeal. It is not disputed that on 30th April 2003, the Land Registrar determined pursuant to section 17 of the Registered Land Act that the boundary between Parcels 8 and 9 of Block 2336B Mount Sage Registration Section be determined as shown on Plan CA-2336B-098-T following points 2DS8, 2DS7, 2DS6 and ending at 2DS5.
- [41] Having arrived at this determination, the Court is satisfied that the Registrar would have had no jurisdiction to re-visit his ruling after it had been rendered. This Court therefore concurs with the conclusion drawn by Olivetti J in **Elizabeth Beach Resort v The Registrar of Lands**. In arriving at this conclusion Court has no doubt that the learned Judge considered the legal factors relative to legal principle of *functus officio*.¹⁴
- [42] Within the context of administrative tribunals, this legal principle has generally been applied on the basis that where an individual has been granted or denied a benefit of a ruling, that decision should be final and binding and its substance should not be reopened, otherwise uncertainty would arise. Indeed, finality in proceedings, legal security and the integrity of the judicial system based on due administration of justice form the underlying rationale for this doctrine. If a tribunal is permitted to

¹⁴ See: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88

continually revisit or reconsider final decisions made simply because it has changed its mind or wished to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.

- [43] In considering the application of this doctrine to administrative tribunals, the Court was assisted by the following dicta of Sopinka J writing for a majority of the Supreme Court of Canada, in **Chandler v. Alberta Association of Architects** [1989] 2 SCR 848;

“As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tribunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic.”

- [44] Ultimately however, the majority in **Chandler** found that Practice Review Board intended to make a final disposition but that disposition was a nullity and amounted to no disposition at all in law. Since the Practice Review Board acted *ultra vires*, it failed to dispose of the matter before it in a manner permitted by the Act. The Court therefore concluded that the Board was not *functus officio*. The Court determined that where a tribunal, which makes a determination which is a nullity, it is permitted to reconsider the matter afresh and render a valid decision.¹⁵ There can be no doubt that the principle of *functus officio* is bound up with the doctrine of *res judicata* which in the absence of statutory authority, prevents the re-opening of a matter before the same court, tribunal or other statutory actor which rendered the final decision. The critical difference however is that “*res judicata*” refers to the end of a case while “*functus officio*” refers to the expiration of an office. In the Court’s view the principle of *res judicata* equally applies in this case.

¹⁵ In *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.)

[45] Having thoroughly reviewed the full text of the Registrar's decision of 30th April 2003, this Court is satisfied that it was unequivocally intended to determine the position of a disputed boundary between parcels 8 and 9 of Block 2336B Mount Sage Registration Section. The Court finds that the same Parties were before the Registrar and had an opportunity to make representations before him. Site meetings and field investigations were conducted and it became clear that there was an impasse which would require that the Registrar should fix the boundary. In doing so, the Registrar was at pains to detail his reasoning at paragraphs 11 – 12 of the decision;

“11. As there were no marks or other identifying features that either party could indicate as the boundary, the existing fence constructed by Mr. Blyden some three years before is taken as a reference point. There seemed to be no formal complaint of the fence being in the location as Mr. Blyden constructed, until the owners/occupiers of the house on parcel 9 proposed to further develop the building on the parcel.

12. The argument by the attorney for Mr. Blyden stating that the boundaries were fixed during the cadastral exercise cannot be supported. Section 17(1) of the registered Land Act states, “Except where under Section 18 it is noted in the register that the boundaries of a parcel have been fixed, the Registry Map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.” Therefore the boundary lines shown on the cadastral map are only an approximate location and are therefore defined as a general boundary location.”

[46] The **Order** which follows this reasoning was clear and unambiguous and it is not disputed that this decision and the Order was reduced into writing and communicated to the Parties. In the Court's view, this finally and conclusively decided the boundary dispute as between the Parties. The Court finds that this decision and its attendant Order is binding on the Parties and that the location of the boundaries is *res judicata* as a result of that determination.

[47] The Court is not persuaded that it was open to the Parties to then conduct themselves as if that Order was merely suggestive as opposed to determinative. Having failed to launch an appropriate statutory appeal, the Claimant herein could not have essentially invited the Registrar to reconsider his earlier decision by commencing fresh proceedings.

- [48] While the Court is concerned that the Registrar then failed to comply with his statutory duty under section 17(3) of the Ordinance, such failure would not in the Court's view impact the finality of his decision. The Court is persuaded on the submissions made by Counsel for the Interested Party that this statutory obligation arises only after the Registrar has already made a determination. It is an important step which publicizes to the world that the relevant boundary has been fixed and that there exists a plan which accurately defines the boundaries of the particular parcel.
- [49] While it was open to any party with the requisite *locus standi* to apply for an order for mandamus compel the Registrar to comply with that duty under section 17(3), such failure would not in the Court's judgment entitle the Parties to reopen proceedings. The Court is satisfied that the administrative act of entering a note to that effect on the registry map and in the register and the filing of such plan or description is intended to formally record his decision in a manner which gives notice to the world and would not invalidate the determination made in 2003.
- [50] The Court is also satisfied that having reached this final decision with respect to the boundary between Parcels 8 and 9 in 2003, in accordance with the provisions of the Registered Land Ordinance, this decision could not be revisited in fresh proceedings on the bases relied on by this Claimant. As it was a valid and subsisting decision, it could only be revisited if the statute permitted it or if there was a slip or error within the exception which have been judicially prescribed.¹⁶
- [51] The Court therefore finds that this Appeal should be dismissed on the basis that issues raised on this Appeal were the subject of a previous proceedings before the Registrar of Lands in 2003 which were not appealed within the time prescribed. Having failed to launch an appeal from that final decision, it was not open to the Claimant to commence fresh proceedings seeking to determine the same issues a second time and thereafter seek to appeal that decision.
- [52] In the event that the Court is wrong on the preliminary point, the Court has gone on to consider the matters raised on the substantive appeal. The Court will do so by considering the grounds of Appeal advanced by the Claimant.

¹⁶ Paper Machinery Ltd. v. J. O. Ross Engineering Corp [1934] SCR 186; cf Chandler v. Alberta Association of Architects

SUBSTANTIVE APPEAL

[53] It is readily apparent that this Appeal arises from a long standing boundary dispute between the owners of Block 2336B Parcel 8 (owned by the Claimant) and Block 2336B Parcel 9 (owned by the estate of the Wilfred Alfred Donovan and represented by the Interested Party). The Claimant is aggrieved with the decision of the Registrar of Lands made 11th March 2015 in which he fixed the boundary between the parcels in accordance with **Plan MI 2336B-022-T**.

[54] Before the Court considers the several grounds of appeal which have been levied, the Court must first consider the general principles which a tribunal must consider on a boundary dispute determination.

GENERAL PRINCIPLES

[55] It has become increasingly apparent that the root of much of the litigation which involves boundary disputes originates from a complete failure to appreciate the “**General Boundaries Rule**, which operates in this Territory and which is statutorily prescribed at section 17(1) of the Registered Land Ordinance. This Section provides that:

“Except where, under section 18, it is noted in the register that the boundaries of a parcel have been fixed, the Registry Map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.”

[56] The general import of this rule is that filed plans at the Land Registry are usually and largely irrelevant for the purposes of ascertaining the location of a legal boundary. So, for most of the registered land in Territory, the boundaries as shown for the purposes of the register are general boundaries in the Registry Map does not determine the exact line of the boundary unless following an application by the owner of a parcel, the exact line of boundary has been determined by the Registrar of Lands. It follows that the only correct approach for determining a legal boundary is that prescribed at section 17(2) – (3) and section 18 of the Registered Land Ordinance. This contemplates an application to the Registrar supported by such evidence as the Registrar may prescribe which may include a description of the exact boundary, a plan or oral evidence. The normal practice and procedure also involves notification to adjoining landowners of the proposed application allowing for representations and/or objections.

- [57] In practice such disputes are generally resolved by reference to the relevant facts including the description of the property in the parcels clause in a conveyance, and any relevant plan and the physical features on the ground. In certain cases the Registrar may also consider certain common law presumptions and extrinsic evidence such as building plans, topography and boundary features and the use of the land.
- [58] In an attempt to clarify the law on what can be tricky and involved litigation, Lord Hoffman in **Alan Wibberly Ltd. v Insley**¹⁷ set out the following principles to be applied by the tribunal considering a boundary dispute. The learned Judge held that the first task in the construction process is to review the relevant title deeds. In particular, the adjudicator must review the conveyance or transfer which contains the relevant parcels clause describing the land. In the event that an attached plan is referenced and incorporated, it is important for an adjudicator to recognize that plans based on ordnance surveys¹⁸ do not fix precise boundaries nor will they always show every physical feature of the land. It follows that in order to fix a precise boundary, the conveyance or transfer will almost always have to be supplemented by inferences drawn from topographical features which existed at the time of execution of the conveyance or transfer or from other evidence. Ultimately, there is really nothing which can substitute for a proper physical inspection of the land in question.
- [59] Lord Hoffman also observed that there are certain rebuttable presumptions that assist the inferences that may be drawn from topographical features. On the facts of that case, the English House of Lords considered the presumption relating to hedges and ditches which prescribes that the boundary lies along the edge of the ditch on the far side from the hedge. The basis of this presumption was explained by Lawrence J. in **Vowles v. Miller** (1810) 3 Taunt. 137, 138:
- "The rule about ditching is this: No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it"

¹⁷ [1999] UKHL 15; [1999] 1 WLR 894

¹⁸ "In English cadastral survey is related to ordnance survey an official survey for a territory for ordnance or military supply and storage. Today the terms ordnance survey and cadastral survey are relatively interchangeable." per **Recharting the Caribbean: Land, Law, and Citizenship in the British Virgin Islands** by Bill Maurer, first edition at page 215

- [60] However, the critical conclusion drawn in that case is that there is in principle no reason for preferring a line drawn on a plan based on the ordnance survey as evidence of the boundary to the other relevant evidence that may lead the court to reject the plan as evidence of the boundary.¹⁹
- [61] The recent case of **Drake v Fripp**²⁰ also illustrates the court's approach when determining boundary disputes. In that case Mr. Drake argued that the boundary line between his and Mr. Fripp's properties followed the line of a hedge, while Mr. Fripp argued that it followed the line of a fence. The total area of land involved amounted to 1.5 acres, as the width between the hedge and fence was 4 to 5 metres. The dispute arose out of a 1996 transfer and a plan which was expressed to be for identification purposes only. The Court therefore not only looked at the plan (which had been derived from an old Ordnance survey map which showed the boundary to be the stone wall), but at the document and the land itself.
- [62] The court held (in agreement with the Land Registry) that, upon consideration of the evidence, including physical features on the ground at the time the land was transferred, the boundary followed the line of the fence. The court's approach to determining a legal boundary therefore included an interpretation of the transfer and transfer plan, examination of physical features on the ground at the time of transfer, and consideration of any maintenance obligations contained within the transfer.
- [63] With these principles in mind, the Court will now consider the Claimant's grounds of appeal. The Claimant's Fixed Date Claim Form sets out his **Grounds A – C** in the following terms:
- a. The appeal is against the Decision of the Registrar of Lands as contained in the BDD
 - b. The appeal is made pursuant to the registered Land Ordinance Cap. 229 section 147.
 - c. The appeal is made against the registrar of Lands, Kelvin Dawson.
- [64] Counsel for the Defendant submitted that these grounds do not in any way challenge the Registrar's decision and accordingly do not require a response. This Court agrees with that conclusion and will not address the same in this judgment.

¹⁹ Pennock v Hodgson [2010] EWCA Civ. 873; Cameron v Boggiano [2012] EWCA Civ. 157

²⁰ [2011] EWCA Civ 1279

- [65] **Grounds D – G** challenges the fact the Registrar sought to rely on the information contained in the Memorandum dated 8th January 2014 which was referred to in his Decision but which was not attached and which he refused to provide to the Claimant. The Claimant contended that the Registrar erred in determining that the memorandum was for internal purposes only and not for public consumption. As a result, he contends that he was unable to properly examine the basis upon which the boundary determination was made.
- [66] Within the context of a boundary dispute there can be no doubt the assistance of a qualified surveyor can be invaluable. The Chief Surveyor is able to examine the dispute objectively and has access to historical and legal documents which may well be inimical to a determination. Moreover, his technical qualifications and experience make him best placed to examine the physical features on the land and to analyze any maps or plans presented by the parties. It is therefore not unreasonable that the Registrar would solicit the reasoned opinion of the Chief Surveyor. Indeed, in the case at bar it appears that his findings were heavily relied on by the Registrar and so the Court has no reservations in concluding that his failure to provide a copy of the same to the Parties was wholly inconsistent with the procedural fairness and the principles of natural justice.
- [67] Fortunately, Counsel for the Defendant was quick to concede the point and it is not disputed that the relevant memorandum along with its appendices were provided to the Claimant on 23rd September 2015. That memorandum sets out the details of a site visit conducted by the Chief Surveyor along with his historical research. It also provides his analysis of the respective claims, his findings and his recommendations.
- [68] In **Ground H**, the Claimant contends that the Registrar paid no regard nor referred to the existence of the hitherto settled boundary as previously existed on the cadastral map. Counsel for the Registrar submitted to the Court that the Registrar's decision clearly reflects that it was taken after a careful review of the Chief Surveyor's memorandum of 8th January 2014. That memorandum clearly shows that the Chief Surveyor considered the disputed boundary as it existed at the time of the adjudication and registration of the cadastral index and data maps for Block 2336B. Indeed the latter formed part of the appendices of that memorandum which was provided to the Registrar and which was clearly reviewed and considered. In addition there is a thorough topographical analysis of the position prior to and as at the time of the cadastral survey carried out by the Chief Surveyor

which appeared to have been wholly adopted by the Registrar and which clearly informed his finding.

[69] The Court is therefore unable to conclude that the Registrar paid no regard to the boundaries indicated on the cadastral map.

[70] Counsel for the Claimant further submitted that in the event that the boundaries were not fixed her client would have had only a provisional title. She submitted to the Court that in circumstances where a proprietor such as her client is granted absolute title to property, this presumes that the property's boundary lines have been fixed and would entitle a proprietor to rely on the boundaries long prescribed by the cadastral index map. This Court disagrees. In applying the now trite legal principles relative to boundary determinations; this Court cannot accept the Counsel for the Claimant's contention that the boundaries lines reflected in the cadastral map are fixed boundary lines which could be relied on by the Claimant.

[71] Counsel also submitted that in ruling as he did, the Registrar had in fact unjustifiably adjusted the boundary between the relevant Parcels to the detriment of her client. In the Court's judgment these submissions are wholly inconsistent with the provisions of the Registered Land Ordinance and run contrary to the now accepted legal principles apply in such disputes. It bears repeating that the boundaries registered at the Land Registry are general boundaries unless shown to have been determined. A general boundary does not determine the exact line of the boundary or who owns the boundary feature. This means that it is possible for an area of land to be within a registered title, even though it falls outside the red edging on a title plan. Conversely, it is possible for an area of land not to be included within the registered title, even though it is within the red edging on a title plan.

[72] Ignoring for the sake of argument, that there was a valid and subsisting boundary determination which fixed the boundaries between Parcel 8 and 9 in 2003, this Court has no reservation in finding that the cadastral index map could only have prescribed a general or approximate boundary which could only be fixed in accordance with section 17 and 18 of the Registered Land Ordinance. It follows that in arriving at his determination, the Registrar could not be said to have adjusted the fixed boundary between these Parcels.

- [73] Under **Ground I** of the Appeal, the Claimant contends that the Registrar gave no reasons for his acceptance of the new boundary line in defiance of a settled previously existing cadastral boundary line which was established prior to the construction of the building which the new boundary line seeks to encompass. The Claimant reiterated that the location of the boundary markers for Parcel 8 were never in doubt as they were fixed during the cadastral exercise. He accepts that the Rain Drop Tree and the Kapar Tree are appropriate boundary markers but he contends that the line should continue from the Kapar Tree runs north towards the road **through** the building constructed on Parcel 9. On this basis he contends that the building owned by the Interested Party encroaches on his property. Counsel went on to submit that such encroachment was exacerbated by a later extension of the building. Counsel argued that in deciding that the boundary line should go around the building, the Registrar has acted arbitrarily and capriciously because the determination of the location of the boundary has no basis other than mere convenience, which is not a proper basis in law.
- [74] Counsel further argued that it is not open to the Registrar to suggest that the boundaries prescribed in the cadastral are incorrect. She reiterated that the cadastral boundaries were fixed boundaries and that the Registrar has posited no proper basis for contradicting that survey.
- [75] In considering this ground of appeal, the Court is obliged to consider the terms of the Registrar's Decision in 2015. In recitals which preface his decision, it is readily apparent that the Registrar would have been fully cognizant of the details of the history of this dispute. He clearly states that he considered:
- i. The evidence from the initial site visit on 17th May 2001 and the subsequent site visits.
 - ii. The findings of the Chief Surveyor in a memorandum referenced Job No 39 of 2001 dated 8th January 2014.
 - iii. Survey plan CA-2336B-098-T dated 9th September 2013.
- [76] It is also apparent that the Registrar also considered survey plan MI-2336B -022-T.
- [77] It is therefore apparent that the Registrar's determination was largely based on the identical reports from the Chief Surveyor prepared in 2003 and 2014 and it is clear that he adopted the reasoned and expert findings and recommendations. In the Court's judgment, these recitals give a sufficient indication of the reasons of the Registrar. He was clearly entitled to have the benefit of the

objective assistance of the Chief Surveyor whose qualifications and experience in compiling technical evidence relative to a boundary dispute make him an invaluable resource. Like Olivetti J in **Elizabeth Beach Resort Limited v The Registrar of Lands**,²¹ this Court finds that in doing so, the Registrar properly exercised his functions under the legislation.

[78] It follows that the Registrar was entitled to rely on and adopt the critical findings of the Chief Surveyor that:

- i. The building on the disputed area was in existence prior to 1966 and was undergoing further construction before the completed demarcation, adjudication and registration of the Cadastral Index Map in 1974.
- ii. The examination of successive aerial photographs and topographical maps shows that extensions to the house were completed since 1984 – 1985.
- iii. There was a fence in existence which the owners of Parcel 9 appeared to rely on as their boundary.

[79] From all accounts it appears that the Parties are *ad idem* that the Rain Drop Tree and the Kapai Tree Stump are appropriate boundary markers. The point of divergence arises from the Kapai Tree stump running north towards the public road. The only physical boundary marker which obtains from that point appears to be the fence constructed by the Claimant in and around the year 2000 and it is clear that the Registrar relied on the presence and location of that feature in determining the boundary.

[80] There can be no doubt that the evidence about the location of fences and other boundary features is always admissible in boundary disputes and will often play a decisive role in the ascertainment of legal boundaries²². This is especially so where (as in the case at bar)²³, the description of the

²¹ BVIHCV2006/0317 at paragraph 14 – 17 of the Judgment

²² *Chadwick v Abbotswood Properties Ltd.* 2004 EWHC 1058; and see *Drake v Fripp* where neither the parcels clause to the land transfer nor the attached plan provided a clear answer as to where the boundary fell. However, the rest of the land transfer instrument required, inter alia, the vendor to put the fence between two points in stockproof condition. That strongly indicated that the fence, not the Cornish hedge, was the boundary. Checking that provisional conclusion against the actual position on the ground, the Court concluded that the construction that the fence had been the boundary made better sense than the one that preferred the Cornish hedge. Accordingly, the disputed land had not been transferred under the transfer (see [8], [10], [11], [13] of the judgment).

parcels clause in the relevant title deeds, conveyance or transfer is hopelessly imprecise. Bearing in mind that the cadastral index map would have only presented general boundaries, the Court is unable to conclude that the Registrar wrongly exercised his powers under the Section 17 of the Registered Land Ordinance.

[81] In **Ground J** the Claimant contends that the Registrar had no regard for the required legal setbacks of buildings and of drainage issues. Counsel for the Claimant posited that under planning law and the building ordinance, the required setback for a building is 12 feet. According to Counsel, such setbacks are measured in relation to the position of the relevant boundary lines and so the planning laws and the registered land laws must work in tandem. She argued that the Registrar could therefore not determine the boundary without taking into account the required setbacks especially where such determination could affect an existing building. She submitted that the Registrar's decision must be set aside for that reason.

[82] This ground of appeal was trenchantly opposed by Counsel for the Defendant and Interested Party. Counsel for the Defendant argued strongly that there are no required setbacks of buildings under the laws of the Virgin Islands. Instead the reference to setbacks is found in the **Land Development Control Guidelines 1972** issued by the Town and Country Planning Department to guide applications for the grant of permission to develop land. The said guidelines are neither primary nor secondary legislation and are only relevant insofar as applications for planning permission are concerned.

[83] Counsel then pointed to the glaring absence of any evidence which supports the Claimant's contentions. In light of the Claimant's failure to put forward any evidence in support of his appeal, Counsel argued that it is unclear to what extent the alleged legal setbacks from boundaries and drainage issues could constitute evidence which could properly be considered by the Registrar in the boundary determination carried out pursuant to section 17 or section 18 of the Registered Land Ordinance. She concluded that the Claimant had failed to empirically demonstrate how these issues amounted to relevant considerations which ought to have been taken into account.

²³ As gleaned from the Adjudication Record which was provided to the Court in Supplemental Affidavit evidence

- [84] Counsel for the Interested Party wholly adopted the Registrar's submissions. He concurred that the issues of setbacks and drainage concerns the development of land and not the positioning of boundaries. In oral submissions he argued that the Claimant is in fact putting "the cart before the horse" because the planning guidelines could only prescribe setbacks from an existing fixed boundary. He pointed out that in the case at bar the relevant boundary had not been legal defined but is in fact general or approximate and so these planning considerations would be irrelevant.
- [85] In land use and development, a **setback** is the distance which a building or other structure is set back from a street or road, a river or other stream, a shore or flood plain, or any other place which is deemed to need protection. Residential Homes would usually have a setback from the property boundary, so that they cannot be placed too closely together. Setbacks and buffer zones are recognized and relevant considerations which a planning authority would consider in determining whether a particular development should be approved. However, the Claimant was unable to persuade the Court that the Registrar would be obliged as a matter of law to prescribe a boundary line on the basis of such planning guidelines.
- [86] It seems to the Court that the Claimant's argument is premised on his misconceived view that the boundaries set out in the Registry Map are in fact fixed boundaries upon which an owner with absolute title is entitled to rely. For the reasons which have already been set out, this is clearly not the case. Courts have for some time prescribed that appropriate approach to be adopted by adjudicator in a boundary dispute.²⁴ The Court has no doubt that it is appropriate for a Registrar to consider evidence which is extrinsic to the conveyance in arriving at his determination. He may for example consider the location of any topographical features and he may bring into play any relevant historic including any previous planning permissions. However, this is not the proposal here. Instead, the Claimant demands that the Registrar settle the boundary lines on the basis planning considerations which are wholly unsupported by cogent evidence.
- [87] In the Court's judgment a registrar must bear in mind that his task is to determine the legal boundary line and not to confirm planning decisions. A Registrar must therefore follow the approach established by enabling statute and by the relevant case law and in doing so he must consider the factors that are factually and legal relevant to the dispute.

²⁴ See: paras 61 – 65

- [88] **Grounds K and L** centre on the purported failure of the Registrar to have regard to the loss that the Claimant would sustain as a result of his decision. In oral submissions Counsel for the Claimant argued that in *adjusting* what was in fact a fixed boundary line between the Parcels, the Registrar is obliged to consider the consequences to each party. Counsel submitted that this decision took away part of her client's land and for that he is entitled to be compensated. Counsel was however unable to point to any evidence at the hearing before the Registrar dealing with his expected loss arising from the determination of the boundary it is apparent that no application for indemnity had been submitted to the Registrar. Moreover, the Claimant failed to traverse the Interested Party's submission that no loss could be proved because the Claimant's own valuation report shows that the "disputed area" had been occupied as part of Parcel 9 since 1977 and that the Claimant had constructed a fence along the now determined boundary.
- [89] Moreover, Counsel was unable to point out any statutory support for this contention.
- [90] Again, these grounds of appeal are based on the misconceived premise that the boundaries were in fact legal and fixed boundaries in the absence of a statutory determination by the Registrar under section 17 or 18. It is this failure to fully appreciate the general boundaries rule which has caused the rapid increase in boundary dispute litigation in recent times. Parties are always at liberty to negotiate an agreement as to their boundary lines. However, where any uncertainty or dispute arises, the only recourse is to have the matter resolved under the prescribed legislative regime. In doing so it is entirely possible that the Registrar may find in certain cases that the legal boundaries are larger than the occupied area. In such a case the applicant has a choice between relinquishing the unoccupied area or claiming it. There is also the possibility that the legal boundaries are smaller than the area actually occupied. In such a case the applicant will get no title to the additional area given that he has no right to it. The courts have made this position clear.
- [91] In **Drake and Fripp**, a disgruntled Mr. Drake argued that he should be compensated for the loss of land. However, the court held that as the area concerned fell within the general boundary, the land was never his to have lost in the first place. In light of this, the Court found that Mr. Drake was not entitled to any compensation.

[92] Where it would be a mistake for land within the scope of the general rule to be in the registered title, then the registered title will be treated as not extending to this land. So, in **Drake v Fripp** Lewison LJ stated (at paragraph [20]) that the registration of the proprietor “left the position of the precise boundary undetermined. Once the position of the precise boundary had been determined by the adjudicator and the judge, it could be seen that the proprietor never had title to the disputed strip. The court concluded that proposition that the proprietor had ‘lost’ 1½ acres of land was thus either “*question begging or wrong.*”

[93] In the Court’s judgment this reasoning provides the obvious answer to these grounds of appeal. The Court therefore concurs with the submissions advanced by the Registrar and the Interested Party and finds that this ground of appeal is not maintainable.

CONCLUSION

[94] The Court finds that the challenge raised in grounds D – G was clearly made out. The early concession of the Registrar is therefore laudable as it permitted the substantive appeal to progress on a fully informed basis. While these grounds of appeal were conceded, the Court is nevertheless satisfied that the relevant boundaries had been fixed in a boundary determination decision taken by the Registrar of Lands in 2003. This determination was validly rendered and was not appealed. It follows that the second boundary determination which was rendered by the Registrar of Lands in 2015 and which informed this Appeal is redundant. In the event that the Court is wrong on this issue, the Court also finds that notwithstanding the early success achieved in respect of Grounds D – G the Registrar’s 2015 boundary determination should be affirmed for the reasons set out herein.

[95] It is readily apparent that this appeal arose out of proceedings which were mistakenly and wrongly conducted by the Registrar of Lands in 2015 further to an application by the Claimant and the Interested Party to have position of the purported uncertain or disputed boundary between Block 2336B Parcels 9 and 8 determined. The erroneous nature of these proceedings were only acknowledged and conceded by the Registrar during the course of the trial. No doubt in recognition of this, Counsel for the Registrar properly conceded that no costs would be sought in the event that the Registrar’s decision was upheld. In light of this background, the Court is satisfied that no award of costs should be made.

[96] The Court's order is therefore as follows:

- i. **The Claimant's appeal is dismissed.**
- ii. **The Registrar's boundary determination as between Block 2336B Parcels 8 and 9 is affirmed and he is directed to immediately comply with his statutory obligations under section 17(3) of the Registered Land Ordinance.**
- iii. **There is no order as to costs.**

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Vicki Ann Ellis
High Court Judge