

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV2006/0317

BETWEEN:

ELIZABETH BEACH RESORT LIMITED

Applicant/Claimant

and

**THE REGISTRAR OF LANDS
JOSEPH LETTSOME
CLARITA LETTSOME
LILLY BELLE CHANDLER**

Respondents/Defendants

Appearances:

Mrs. Dionne Boreland-Fearon of Harney Westwood and Reigels for the Appellant
Ms. Shona Griffith, Senior Crown Counsel, Attorney General's Chambers for the First Respondent

2008: March 7th, 28th, April 4th, 11th
May 26

JUDGMENT IN CHAMBERS

(Appeal from the Registrar of Lands under section 147 of the Registered Land Act, Cap. 229 – boundary dispute – whether Registrar failed to take into account all the circumstances and facts relevant in ascertaining precise position of boundaries – whether Registrar failed to give consideration to certain public documents brought to his attention after judgment)

[1] **JOSEPH-OLIVETTI, J.:** This matter comes by way of appeal from a decision of the Registrar of Lands which was delivered on 23rd May 2006. It is brought under the provisions of Section 147(1) of the Registered Land Act Cap. 229 ("the RLA"). In substance, the Appellant is aggrieved at the Registrar's decision on a boundary dispute.

The Facts

- [2] The appellant, Elizabeth Beach Resort Limited is the registered owner of Parcel 22 of Block 3240A Long Look Registration Section. Parcel 22 shares a common boundary with Parcel 4 which is owned by Respondents 2, 3 and 4. In September 2005 the Appellant applied to the Registrar for the common boundary to be fixed pursuant to section 17 of the RLA.
- [3] The Registrar conducted a site visit on 19th October 2005. Present were the Registrar of Lands, representatives of the Appellant and their solicitor and representatives from the Survey Department. The second, third and fourth Respondents did not attend. It appears from the Survey Report that the second Respondent received notice of the site visit after the scheduled date and therefore was unable to attend. A representative of the Appellant pointed out the area of dispute and the Registrar instructed the Survey Department to carry out field investigations and in so doing to notify the Respondents to give them an opportunity to make representations.
- [4] The Survey Department carried out their field investigations which included a site visit on 31st October 2005. On that date the second Respondent attended on behalf of all the Respondents.
- [5] The Survey Department subsequently presented its written report with a plan to the Registrar. This plan (**MI-3240A-009-T**) was based on their investigations. It was their opinion that the boundaries were as depicted on the said survey plan. That finding was based on a cadastral survey of the area done in 1972 and on the existence of markers found on the ground, the contour of a natural boundary in the form of a ghut which matched the markers found on the ground and the existence of an old fence (partial) along the line of the natural boundary and boundary markers, remarks of which were seen at certain points in the area of some of the boundary markers.
- [6] The Registrar conducted a final site visit on 10th February 2006 to show the surveyor's findings on the ground to the parties. Both parties were represented and the Registrar and Mr. Albert Jacobus, the surveyor were present. The Registrar and parties did not walk the length of the common boundary. The Registrar in his decision stated that he observed a dry ghut which in his view corresponded to the one mentioned in the surveyor's report.

- [7] The Registrar delivered his decision on 23rd May 2006 and ruled that the common boundary between the properties was as depicted on Plan No. **MI-3240A-009-T**.
- [8] The Appellant was aggrieved and filed its appeal on 29th December 2006 together with an application to extend time to serve the claim form and grounds of appeal. This application was granted by Charles J on 15th January 2007. I note section s147 (1) which stipulates that notice of intention to appeal in the prescribed form must be lodged within 30 days of the decision of the Registrar. The prescribed form which is found at Vol. VII of the Laws of the Virgin Islands (Registered Land Rules) indicates that the grounds of appeal must be contained in the notice. The RLA appears to make no provisions for extending the time to file a notice of appeal. However, this point was never taken and I mention it only to remark the seeming anomaly.
- [9] There were several hearings¹ culminating in the appearance of the Appellant and the Registrar on 7th March 2008 before me. The second, third and fourth Respondents did not defend. At that hearing an order was made for the Appellant to file written submissions on 28th March, the Registrar to respond on 4th April with the Appellant's reply on 11th April. The matter was to be dealt with on paper. This order was duly complied with.

Grounds of Appeal

- [10] The Appellant relies on the following grounds:-
- a. The Registrar, in arriving at his decision, failed to take into account all the circumstances and facts that were relevant and required to ascertain and fix the precise position of the boundaries between the subject properties.
 - b. The Registrar, in arriving at his decision, failed to give any consideration to certain public documents prepared in respect of the said properties, in particular diagram CA-3240-8-T which was prepared in June 1968 and kept in the offices of the

¹ There was an application to serve the second, third and fourth defendants out of the jurisdiction. Service was acknowledged but they did not defend the claim as their counsel had applied to be removed from the record as their solicitors. Other orders were made in relation to filing of documents which were not complied with. I note that the Registrar provided a statement as mandated by s.147 (2) on 6th March 2008 which he was ordered to file by 30th November 2007.

Survey Department, which contradicts to a certain degree, the findings of the Registrar.

The Order Sought

- [11] That the Registrar's ruling be reversed and the Registrar be directed to conduct a new boundary inspection with regard to the properties.

Court's Analysis

Ground 1

- [12] First I note that by virtue of section 147 of the RLA an appeal from the decision of the Registrar is by way of re-hearing. I now turn to consider the first ground. In relation to this ground Mrs. Boreland-Fearon appearing for the Appellant submitted that the methodology employed by the Registrar in arriving at his decision was incorrect and that there was no evidence of any person indicating to the Registrar or the Survey Department that a dry ghut ran along the boundary of the properties and that the Registrar did not walk the entire boundary.
- [13] Counsel for the Registrar submitted that the Registrar's decision would have been incorrectly derived if based solely upon the existence of the ghut but that the Registrar based his findings not only on his site visits but on the report of the Survey Department.
- [14] I have considered the Registrar's written ruling and in my judgment this ground of appeal has no merit as it is clear from the ruling that he did not base his decision solely on the existence of the dry ghut. It is obvious that the Registrar relied on the findings of the Survey Department as contained in the report as well as on his own observations which propelled him to accept that report. The Registrar is not himself a surveyor I believe and is entitled to rely on expert evidence if he finds that evidence convincing. The RLA in fact gives the Registrar the authority to consider such evidence as he sees fit in determining a boundary dispute. See section 17 (2) which reads:- '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'.

- [15] It is not unreasonable for him to obtain a report from the Survey Department. The Registrar clearly found that the report tallied with his own observations on the ground and the Registrar cannot be faulted.
- [16] The Registrar, in arriving at his decision stated that 'although on the site visit of February 10, the parties did not walk the length of the common boundary, the dry ghut could be seen on the ground and it relates with the surveyor's report that the ghut can be classed as a natural boundary between the properties. Having seen the ghut on the ground and direction it follows to the northern end towards the sea, I concur that the ghut form a natural boundary between the disputed parcels. There is also evidence of an old fence which runs along the ghut.'
- [17] In arriving at his decision I find that the Registrar properly exercised his powers under s17(2) of the RLA by not only relying on his physical examination of the dispute area but also on representations made at the site visits, the expert findings of the survey department. The Registrar clearly stated in his decision that 'having examined the findings of the Survey Department, and representations made by the property owners at the two site visits, the common boundary line between parcels 4 and 32 [sic] is determined as depicted on plan **MI-3240A-141-T**.' Accordingly, I find that the Registrar employed the correct methodology in arriving at his decision and his decision is supported by the evidence which was before him.

Ground 2

- [18] This ground is based on evidence which was not before the Registrar when he delivered his decision. Therefore, the question of whether he should have re-opened his decision arises and whether had he done so he would have ruled in favour of the appellant.
- [19] Mr. Arduini, the Director of the Appellant in his affidavit dated 29th December 2006 stated that a plan/diagram **CA-3240-8-T** was discovered subsequent to the decision of the Registrar, that this diagram was brought to the attention of the Registrar and that the Registrar took no action in revising his decision based on this new evidence.
- [20] Counsel for the Appellant submitted that the boundary lines represented on this diagram corresponds very closely with the common boundary lines shown on plan **MI-3240A-009-T**

save that the boundary line now angles to the left and the Registrar has given no scientific explanation for this.

[21] Counsel for the Registrar submits that the Registrar can only consider the information/evidence given to him by the Survey Department and the parties. They would have been bound to supply all pertinent information to the Registrar during the investigations and prior to a ruling.

[22] The Appellant's case seems to be that the Registrar rendered a decision which was based on incomplete and inaccurate information and that had the Registrar had sight of diagram **CA-3240-8-T** he would have ruled differently.

[23] As this is a statutory appeal the court is limited to reviewing the decision of the Registrar. However, in appropriate cases the court has a discretion whether or not to admit new evidence but that discretion is to be sparingly exercised. See Civil Procedure Vol. 1, 2001 paras. 52.11.2 – 5. I take into account that the diagram was in the possession of the Survey Department and not the Appellant's and that therefore the Appellant cannot be faulted for not producing it at the time of the hearing before the Registrar. The court will therefore consider it. However, in my view, Registrar has no jurisdiction to re-visit his ruling after it has been delivered.

[24] What is the effect of diagram **CA-3240-8-T**? The court had sight of diagram **CA-3240-8-T**. It is a survey dated 17th May 1968 done by Mr. Brian A. Hunt of J. A. Story & Partners (BVI). Section 2 of the Land Surveyors' Act (the LSA) states that a plan 'includes a map, plot, diagram, aerial photograph or a mosaic compiled from aerial photographs approved by the Chief Surveyor for survey purposes'.

[25] And section 25 of the LSA provides:-

'(1) No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been **authenticated by the signature of the Chief Surveyor**.

(2) Every plan authenticated by the Chief Surveyor under subsection (1) shall in any court of law or in any proceeding of a legal or quasi-legal nature be conclusive evidence of the matters stated or depicted therein unless and until such plan is cancelled by the Chief Surveyor by virtue of section 26.

(2) Every plan purporting to bear the signature of the Chief Surveyor for the purpose of subsection (1) shall be deemed to be properly authenticated unless and until the contrary is proved.'

- [26] Diagram **CA-3240-8-T** on its face has not been authenticated by the Chief Surveyor. It follows therefore if diagram **CA-3240-8-T** had been brought to the attention of the Registrar at the time of determining the boundary dispute or he had the power to admit further evidence after he gave his ruling and admitted the diagram that he could attach little weight to it without more and certainly could not regard it as conclusive. The Registrar accepted the surveyor's report which we have had sight of. According to the surveyor's report dated 23rd November 2005 the records at the Survey Department revealed that the original survey notes of the 1972 registration show a Turpentine tree marking the southeastern corner of Parcel 22 which is the northeastern corner of Parcel 23 and that the common boundary between parcels 22 and 4 commences from this turpentine tree and proceeds in a northerly direction along a fence to the Caribbean Sea. The surveyors carried out a field check on 13th October 2005 to verify the common boundaries. Mr. Lettsome was present and pointed out certain markers which Mr. Lettsome claimed to be boundary markers. They were of the view that the markers shown to them by Mr. Lettsome followed the general direction of the fence line. They were also satisfied that there was still a small portion of the old fence at the point E and that the fence followed a dry ghut which was clearly visible as a natural boundary. They concluded that the common boundary is as shown on plan **MI-3240A-009-T**.
- [27] Having regard to the foregoing I am satisfied that the common boundary between parcels 22 and 4 is as depicted on plan **MI-3240A-009-T**.

Conclusion

(1) For the foregoing reasons the appeal is dismissed.

- (2) We note Counsel for the First Respondent's magnanimous submissions that if the Crown is successful they will not be seeking costs. Therefore, I make no order as to costs.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands