

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. C. 189 OF 2002

IN CHAMBERS

BETWEEN	OWEN COSTLEY	1 ST CLAIMANT/ APPLICANT
AND	PATRICK PHIPPS	2 ND CLAIMANT/ APPLICANT
AND	ASTORIA DEVELOPMENT (JAMAICA) LIMITED	1 ST DEFENDANT/ RESPONDENT
AND	LESLIE MAE	2 ND DEFENDANT/ RESPONDENT
AND	THE REGISTRAR OF TITLES	3 RD RESPONDENT
AND	GLENDON NEWSOME	4 TH RESPONDENT
AND	THE DIRECTOR OF SURVEYS	5 TH RESPONDENT

Mrs. M. Gibson-Henlin instructed by Henlin Gibson-Henlin for the Claimants.

Mr. K. Brooks for the Defendants.

Miss S. Orr for the 3rd and 5th Respondents.

4th Respondent present in person but unrepresented

**Land – Boundary Dispute - Dual Registration of Lands – Giving effect
to court’s order for rectification of title – *ad medium filum* rule –
Registration of Titles Act, s. 55 and 70
Civil Procedure – order for liberty to apply – principles governing an
application made pursuant to such an order – court’s jurisdiction to
make further orders**

Heard: 11th August, 11th, 14th September & 27th October 2009

BROOKS, J.

The nature of this judgment is one of clarification of the way that a judgment of this court in 2007, in this case, should be enforced. The issue arose for determination because the execution of the order then made by the court has been thwarted by events and revelations occurring thereafter. Whether the court is permitted to make any further order so as to resolve the dispute is also a live issue at this time.

The factual background

The finding of the court on January 4, 2007 was that certain portions of land were dually registered under the Registration of Titles Act. The parties affected were, for this aspect of the case, on the one hand, Messrs. Owen Costley and Patrick Phipps and on the other hand, Mr. Leslie Mae. For consistency with the previous judgment I shall refer only to Mr. Costley as the owner of the first parcel. No slight to Mr. Phipps is intended.

The relevant part of the dispute, for these purposes, centres on a roadway which physically divides Mr. Mae's land from Mr. Costley's. It is largely the lands comprising or surrounding the roadway which were found to have been dually registered. The 2007 judgment ordered that the dually registered lands should be removed from the relevant titles and that lands

which were held to have been surrendered by Mr. Costley should also be removed from his title. The resolution envisaged by the judgment was that the Registrar of Titles (“the Registrar”) would have identified the location of a reserved roadway which should have run between the two parcels and that that reserved roadway (which would then have included the surrendered land), would have been declared by the Registrar, to have been owned up to its mid point, by the respective owners of the contiguous parcels. This was by way of the application of a rule of law named the *ad medium filum* rule.

In giving effect to the judgment, a land surveyor, Mr. Glendon Newsome, was identified and commissioned to carry out the task of identifying the location of the reserved roadway and he attempted to do so. Here, however, things went awry. Mr. Mae objected to the survey and although, despite the objection, the surveyor did produce a survey plan, it was rejected by the Director of Surveys (“the Director”). The Director explained, in oral testimony before this court, that he was obliged to do so by virtue of the provisions of the Land Surveyors Act. This is because the plan did not contain a statement explaining how the objection had been resolved. The objection had, in fact, not been resolved.

The Registrar could not have acted without an approved survey plan and so the matter was at a standstill. The parties were unable to resolve the

impasse themselves and Messrs. Costley and Phipps have applied to have it resolved by the court. They have named, as respondents, the defendants to the original claim, as well as the Registrar, Mr. Newsome and the Director.

The application

The notice of application for court orders states that the applicants seek the following orders:

“1. An order that the Respondents comply with the Judgment of the Honourable Mr. Justice Brooks made in this Claim on the 4th day of January 2007 whereby it was ordered as follows:

“[It is hereby declared that]:

a....

b. there is a portion of land belonging or formerly belonging to Owen Costley and comprised, or formerly comprised in Certificate of Title registered at Volume 1327 Folio 373 of the Register Book of Titles, which is dually registered with lands comprised or formerly comprised in Certificate of Title registered at Volume 1241 Folio 538 of the Register Book of Titles.

c. The land comprised in a reserved roadway running between the lands mentioned and referred to at paragraph b. hereof, to the extent that it is not presently comprised in a Certificate of Title, is owned *ad medium filum viae* by the registered proprietor from time to time of the lands comprised in the Certificates of Title mentioned paragraph b. above.

It is hereby ordered [that]:

- i. The Registrar of Titles shall cause to be ascertained, by survey, the precise area and location of the roadway mentioned at c. above.
- ii. The Registrar of Titles shall forthwith cause the survey plans annexed to the Certificate of Title registered at Volume 1327 Folio 373 and Certificate of Title registered at Volume 1241 Folio 538 of the Register Book of Titles or the successor titles to them or either of them, to be amended to remove therefrom the lands herein declared as dually registered and the lands surrendered as indicated by survey plan prepared by Patrick G. Curtis and checked by the Survey Mapping Division on 14th June, 2005.
- iii. The Registrar of Titles shall amend the certificate of title for the lands comprised or formerly comprised in Certificate of Title registered at Volume 1327 Folio 373 and Certificate of Title registered at Volume 1241 Folio 538 of the Register Book of Titles or the successor titles to them or either of them, to insert in the description of the respective lands as part of that description, a statement showing that the presumption of ownership of the soil *ad medium filum* applies to the reserved roadway running between those lands.
- iv. The registered proprietors respectively of the lands comprised, or formerly comprised in Certificate of Title registered at Volume 1327 Folio 373 and Certificate of Title registered at Volume 1241 Folio 538 of the Register Book of Titles shall submit their respective certificates of title to the Registrar of Titles for amendment as aforementioned.
- v. Each party shall have liberty to apply.
- vi. Each party is to bear its own costs.”

2. That the Respondents do comply with the said Order within 14 days of the date hereof.

3. If necessary an injunction to restrain the [original Defendants] from interfering with [the Registrar, Mr. Newsome and the Director] in

carrying out the terms of the said Judgment of the Honourable Mr. Justice Brooks.

4. Costs of this Application to be the Applicant's to be paid by the Respondents.

5. The costs are to be taxed and paid forthwith.

6. Such Further (sic) and/or other relief as this honourable court deems just.”

I shall set out the factual revelations since the date of that order, apply those latter facts to the order and thereafter determine whether any further order may, or ought to be made.

The subsequent factual revelations

The first relevant development subsequent to the delivery of the judgment is the impact of Mr. Newsome's actions. The relevant information revealed *post-judgment* has mainly been set out in the oral evidence of and two survey plans prepared by, Mr. Newsome. The first plan was in accordance with his original commission and the second was as a result of directions given by this court after the present application was filed.

Mr. Newsome's evidence may be assessed against the background of a paved roadway which had, before the trial, been constructed by Mr. Mae. That road, named Astoria Drive, physically divides Mr. Mae's land from Mr. Costley's and it is a convenient reference point for perceiving the location of the reserved roadway which the Registrar had been ordered to identify.

The second plan will be the focus of my findings of the facts emanating from the survey exercise. It should be pointed out that there was no real challenge to the accuracy of this plan. Mr. Brooks, appearing for Mr. Mae, did seek an explanation from Mr. Newsome concerning the absence, from the second survey plan, of a specific concrete wall and Mr. Newsome sought to explain its absence, pointing out that the wall had been shown on his original plan. That query does not greatly affect the present exercise.

The second plan shows that approximately one half of Astoria Drive is comprised in Mr. Costley's title. Additionally, apart from two small unregistered areas, the remainder of Astoria Drive is shown by the survey plan to be owned by Mr. Mae.

Out of completeness I should also comment that:

- a. the two small areas of unregistered land mentioned above belong to Mr. Costley by virtue of the *ad medium filum* rule. They are within his half of the reserved roadway described in the plan annexed to his certificate of title.
- b. a reserved road identified on the survey plan attached to Mr. Mae's registered title is in fact comprised in Mr. Costley's registered title. The relevant land was already comprised in Mr. Costley's title at the time that the plan of Mr. Mae's land

was drawn and therefore that reserved road was not accurately displayed as being, ostensibly, unregistered land. It was part of Mr. Costley's land.

- c. all the dually registered land, on the basis of the previous judgment, belongs to Mr. Costley by virtue of the earlier registration of his title.
- d. the reserved road indentified on the survey plan attached to Mr. Costley's registered title which was not then comprised in a registered title, is now (except for the aforementioned unregistered portions), comprised in Mr. Mae's registered title. Section 70 of the Registration of Titles Act firmly establishes his entitlement.

I have accepted Mr. Newsome's survey plan as accurate for these purposes. This finding does not prejudice any position that the Director of Surveys may take in respect of it on technical or other grounds, raised pursuant to the Land Surveyors Act.

Another important development occurring after the delivery of the judgment is that new information has also come to the attention of the court, of which Mr. Mae was aware before the judgment was delivered in 2007 but which he concealed from the court and from his counsel, Mr. Brooks. Mr.

Mae had in fact, partially surrendered his title and secured a new title for the portion of his land which forms a part of Astoria Drive. This was done two months before the commencement of the trial of the case. During the course of the trial, Mr. Mae granted rights of way to the owners of nearby lands, over the land comprised in the newly created title.

Applying the findings of the surveyor to the order

I find that, once provided with the survey plan, the Registrar would have some difficulty in carrying out two of the three orders contained in the judgment, namely the first and the third. The first order requires the Registrar to identify the reserved roadway. Although Mr. Newsome has been able to identify by his survey, the location of the two reserved roadways mentioned above, neither one, for the most part, comprises any unregistered land. For the reasons mentioned above, except for the two small unregistered portions, which would belong to Mr. Costley, neither roadway is capable of having the rule applied to it.

The second order is, however, capable of being performed. It requires the Registrar to remove from Mr. Costley's title and from Mr. Mae's title, lands which have been identified by Mr. Newsome as being dually registered. The reach of this order extends beyond the current dispute as it also requires the removal of other lands comprised in Mr. Costley's title.

This concerns the portion of the land abutting lands owned by Astoria Development (Jamaica) Ltd. There is no evidence of any difficulty giving effect to that portion of the order.

The second order reaches still further. It also requires the Registrar to remove from Mr. Costley's title the land which he had surrendered, presumably to facilitate the construction of Astoria Drive. The relevant land, which seems to be the portion of Mr. Costley's land which is comprised in Astoria Drive, should be identified by reference to a survey plan prepared by a Mr. Patrick G. Curtis, another commissioned land surveyor. That survey plan was specified in the second order as the reference plan for the purposes of that exercise. No difficulty in executing that task has been brought to the attention of the court.

I must, however, comment on the status of the land which would be removed from Mr. Costley's title. I had opined in the 2007 judgment (at page 25) that the surrendered land would become unregistered. I am now satisfied that that view is not correct. It seems to me, on further reflection (though I have not been able to find any decided case on the point), that the land so removed should be comprised in a new certificate of title with Mr. Costley as the registered proprietor thereof. Since, as I stated at page 24 of the judgment, Mr. Costley remains, despite his surrender of land for the

purposes of creating the roadway, the owner of the soil on which the roadway is built, and since the land is already under the auspices of the Registration of Titles Act, then there is no real basis, either in law or in practicality, for the title to revert to being an unregistered one. Indeed, what documentary evidence would there be of Mr. Costley's ownership? Whereas he would have previously had an indefeasible title recognized and protected by the relevant legislation, there would now be no documentary evidence of his title, if that previously conceived course were followed.

I now turn to the third order. The Registrar is required by this order to amend the relevant certificates of title by inserting a statement showing that the reserved roadway between the two parcels, was owned by the respective parties *ad medium filum*. This third order contemplated that that reserved roadway would have been contiguous to both parcels and would have comprised unregistered land. Neither of those contemplations has been supported by the situation on the ground. This third order could, therefore, not be enforced. Although lands would be removed from both Mr. Costley's title (by virtue of his surrender) as well as Mr. Mae's title, those lands would (as reasoned above) remain registered lands and comprised in a registered title, in the previous respective owner's name.

The 2007 judgment did anticipate that that third order may not have been the most apposite in the circumstances and for that reason, liberty to apply was granted to allow the parties to approach the court for an order which would have been more appropriate. The question now is whether the court may make an order which will solve the conundrum revealed by the new information.

What is required for resolution?

In order to resolve the issue between the parties in the context of the 2007 judgment, the Registrar would have to be empowered to (a) designate Astoria Drive as the reserved roadway and (b) determine how the legal interests therein should be held.

Since the land forming Astoria Drive is not, for the most part, unregistered, it is no longer possible to declare it to be owned *ad medium filum* by the owners of the relevant adjoining parcels. Section 55 of the Registration of Titles Act (the Act) stipulates that land is brought under the operation of the Act when the Registrar certifies that a **person** is the proprietor of that land. The section states, in part:

“Land shall be brought under the operation of this Act by the Registrar registering a certificate certifying, under his hand and the seal of the Office, that a person therein named is the proprietor of the land therein described or identified, either with an absolute title or with such qualified title as may have been directed and approved by the Referee, as the case may be...”

That provision contradicts the jurisprudential basis of the *ad medium filum* rule, which is based on a **presumption** that the owners of land adjoining (in this case) a road, had given up a portion of their land in order to constitute the road. The rule can only, therefore, apply where the land, comprising the roadway, is unregistered, or at least not specifically included in a registered title.

Astoria Drive could, however, be constituted into a single registered title and stipulated to be owned by Messrs. Costley and Mae as tenants in common in proportion to the land which they will each surrender to create the road. Alternatively, Astoria Drive could be comprised of two separate registered titles, one belonging to Mr. Costley and the other to Mr. Mae. Whether either action would designate Astoria Drive a private roadway or a reserved roadway, (if there is in fact a difference as was submitted by Mrs. Gibson-Henlin for Mr. Costley), I need not answer. It is sufficient to observe that the roadway would be comprised in a registered title or titles.

It is perhaps convenient that Mr. Mae has, on his own accord, removed from his registered title, that portion of his land which forms part of Astoria Drive. His action indicates an intention to create a roadway divorced from the parcel he occupies. It is, nonetheless, land comprised in a

registered title in his name. There is however the complication that Mr. Mae has granted the right of way mentioned above.

Resulting from the situation described above, there is a question of whether the court may make the requisite orders to achieve this solution. Is the jurisdiction of the court spent with regard to these issues, having already given its judgment? I now examine the principles governing this question.

The principles guiding the court on the application

It has been long and well established that a judge at first instance may not, generally speaking, set aside a final order of the court, “without some special reason, usually involving a material change of circumstances”. This is so, whether or not liberty to apply had been granted and whether or not that order was made by the judge who made the original order, or by another judge of co-ordinate jurisdiction. This principle was reiterated by their Lordships in the Privy Council decision of *Walker v Lundborg* (PCA 79 of 2006 (delivered 6/3/2008)). At paragraph 61 of the judgment in that case, their Lordships also authorized a degree of flexibility in the interpretation of what constitutes “change of circumstances”. They said:

“But a change of circumstances is not, in this context, to be interpreted narrowly. It can include the discovery of new information, even if that information was, in a sense, always available (see for instance *Jordan v Norfolk County Council* [1994] 4 All ER 218, 223-224).”

I shall examine the instant circumstances to determine if flexibility is allowed and whether it can assist in preventing further litigation.

Application of the principles to the instant case

It should be noted that the 2007 judgment has long been perfected (that is, the formal order has been signed by the Registrar). This puts in place the usual restrictions on its susceptibility to be changed. In that judgment liberty to apply was granted to allow the parties to secure an order which would enforce the declared rights of each while establishing the most appropriate method of designing the method of dealing with the ownership of the reserved roadway. As has been explained above, resolution of the differences between these parties involves the creation of either one or two certificates of title which would comprise Astoria Drive.

The situation described *post*-judgment does not constitute a material change in circumstances since the judgment. It is the *pre*-judgment situation which has, however, been brought to the attention of the court by virtue of new information; primarily provided by Mr. Newsome's survey plan. It seems that the principle set out in *Walker v Lundborg* allows for some flexibility in approaching the question of what new orders may be made.

In my view, that division of his land by Mr. Mae indicates his intention to separate the title for Astoria Drive from the title to his land. The

new certificate of title created by his action is registered at Volume 1398 Folio 459 of the Register Book of Titles. The action, though carried out in advance of the judgment is consistent with the portion of the judgment, at page 25 which states:

“In order to avoid future litigation concerning ownership and use, Mr. Mae should also submit his title for the plan to be also adjusted to have the portion representing the roadway removed therefrom.”

Although that was written in the context of creating the reserved roadway, it seems to me that it allows the Registrar of Titles to incorporate that land, separated by Mr. Mae, into the area of land designated as Astoria Drive. The Registrar has already been expressly authorized to take that step in respect of the land surrendered by Mr. Costley.

The combination of the two parcels should not, however, be by way of joinder in a single title, as that would force the two parties to be co-owners when that is unnecessary. The same effect may be achieved by each being the proprietor of the title for his portion of Astoria Drive.

Insofar as the unregistered lands are concerned, those should be allocated to Mr. Costley by virtue of the *ad medium filum* rule.

Supplemental Questions

The right of way granted by Mr. Mae

I am firmly of the view that Mr. Mae acted improperly in incumbering his title with the grant of a right of way while the land comprised in the title was the subject of litigation. I am however not minded to take any step to set aside the instrument granting the right of way, as that step has not been made the subject of any formal application and did not fall to be determined in the claim before the court.

The objection to the survey and the costs of this application

Mrs. Gibson-Henlin submitted that Mr. Mae should bear the costs of this application as it is his, in her view, unreasonable objection to Mr. Newsome's survey which has forced Messrs. Costley and Phipps to bring this application. Mr. Brooks, for Mr. Mae, submitted that the objection was properly made because Mr. Newsome was not attempting to identify the reserved roadway as the 2007 judgment required. There is merit in Mr. Brooks' submission. The survey plan which Mr. Newsome originally produced did not identify the reserved roadways which his second plan pointed out. I also find that the issues which have been raised would have required clarification by the court, if the parties were unable to reach

agreement on them. In the circumstances each party must bear its own costs in respect of this application.

Conclusion

Due to revelations made subsequent to the judgment handed down on 4th January 2007, certain aspects of that judgment could not have been given effect. The resolution of the issues would have required agreement by the parties or further orders by the court.

Although the court is restricted in the further orders it may make subsequent to handing down its judgment, the production of new information does give the court some flexibility in that regard. The information contained in the survey plan prepared by Mr. Newsome and the fact that liberty to apply was given specifically for this purpose, did allow the court that flexibility.

Orders may therefore be made for the Registrar to create a roadway between the lands respectively owned by Mr. Costley and Mr. Mae. The said roadway shall be created by taking the following steps:

- a. the dually registered lands are to be restored to the appropriate title.
- b. All unregistered lands along Astoria Drive are to be annexed to Mr. Costley's title.

- c. the relevant lands, forming part of Astoria Drive, shall be removed from Mr. Costley's title and a new certificate of title therefor, created

Astoria Drive shall, in the result, comprise of two certificates of title, one with Mr. Costley as the registered proprietor and the other with Mr. Mae as the registered proprietor thereof.

Based on the above it is ordered that:

1. The Registrar of Titles shall, for the purposes of giving effect to the judgment delivered herein on 4th January 2007, treat the roadway designated Astoria Drive, situated at Stanmore and Pleasant Valley in the parish of Saint Andrew, and being the land depicted in a survey plan prepared by Newsome, McCook and Associates on 14th August, 2009 (subject to the said plan being approved by the Director of Surveys), as being the reserved roadway.
2. The lands removed from the lands comprised in Certificate of Title registered at Volume 1327 Folio 373 of the Register Book of Titles (in accordance with the aforementioned judgment) for the purpose of creating the aforesaid reserved roadway and all lands identified as being unregistered on the plan mentioned at

order 1 above, shall be comprised in a single certificate of title and registered in the name of the current proprietor of Certificate of title registered at Volume 1327 Folio 373 or its successor title.

3. For the avoidance of all doubt it is intended by this order that Astoria Drive shall be comprised in two certificates of title, the first as described in order 2 above and the second being Certificate of Title registered at Volume 1398 Folio 459 of the Register Book of Titles after the removal from it of all lands dually registered with Certificate of Title registered at Volume 1327 Folio 373. Each title shall continue to be subject to all encumbrances endorsed on the title from which it is derived.
4. These orders are complementary to and explanatory of the judgment delivered on 4th January 2007.
5. Each party shall bear its own costs.