[2025] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P (AG)
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO 20/2018

BETWEEN	**CONROY WHITELOCK**	**APPELLANT**
AND	**NELDA CROOKS**	**RESPONDENT**

Conroy Whitelock in person

Canute Brown instructed by Brown, Godfrey & Morgan for the respondent

Miss Jaavonne Taylor instructed by Nunes, Scholefield, Deleon and Co watching proceedings for the beneficiaries

21 March 2022 and 17 October 2025

Land law – Trespass to Land – Title by description – Referral to surveyor- Expert evidence –Terms of reference not complied with – Whether surveyor complied with the Land Surveyors Act, section 32(1) – Land Surveyors Regulations, part iv and part 32 of the Civil Procedure Rules, 2002 – Whether the Expert's report was admissible – Whether the expert's evidence could be relied on

MCDONALD-BISHOP P (AG)

[1] I have read, in draft, the judgment of Simmons JA. I agree with her reasoning and conclusion, and there is nothing I can usefully add.

SIMMONS JA

[2] This is an appeal from the judgment of Laing J (as he then was) ('the learned judge'), who, on 9 February 2018, made the following declarations and orders:

> "1. The land at Belmont Settlement in the parish of St James registered at Volume 1094 Folio 740 of the Register Book of Titles in the name of Linda Crooks includes the area of land identified as section 1 shown on the survey plan prepared by T. B. Casserly bearing examination number 276230 ("the Property").
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> 2. The Defendant, his servants and/or agents are restrained from entering upon the Property to construct a building or for any other purpose.
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> 3. Costs of the Claim are awarded to the Claimant to be taxed if not agreed."

Background

[3] On 13 December 1999, the respondent, Nelda Crooks, filed a claim by way of writ of summons against the appellant, Conroy Whitelock, for damages for trespass to land registered at Volume 1094 Folio 740 of the Register Book of Titles, situated at Belmont Settlement in the parish of Saint James ('the property'). The respondent also sought the following orders:

> "(i) A declaration that the [appellant] was not entitled to either enter upon the [appellant's] land and construct a building [on the property].
>
> (iii) An injunction to restrain the [appellant] whether by himself or by his servant or agent or otherwise howsoever from continuing the said acts of trespass in particular constructing a building on the [respondent's] land.
>
> iii) An order that the [appellant] do forthwith pull down and remove the foundation and walls built on the [respondent's] land."

[4] The respondent, in her statement of claim, asserted that she is an owner in possession of the property. Her evidence, as contained in her witness statement, was that her mother, Linda Crooks, who is the registered proprietor of the property, died on 8 August 1976 (a copy of her death certificate was exhibited to said witness statement),

leaving a will. However, the executors did not apply for a grant of probate and have since died. The respondent is one of Linda Crooks' four children. The respondent alleged that the appellant and/or his agent wrongfully entered upon a portion of the property ('Section 1') and commenced construction of a building thereon.

[5] The appellant, in his amended defence filed on 30 December 2009, admitted that in 1997, he and his brother commenced the construction of a building on Section 1, which adjoins the property. He stated that Section 1 is not a part of the property and that it was previously owned by his grandfather (David Whitelock) and is now owned by his father (George Whitelock). Alternatively, the appellant set out in para. 4 of his amended defence that:

> "If, which is not admitted, [the respondent] is found to be the owner in possession of any part of [Section 1] and if, which is denied, the building being constructed by [the appellant], is found to be part of [Section 1], [the appellant] avers that the portion of land the said building is being constructed on has been in the possession of [the appellant], [the appellant's] father, George Whitelock and his predecessors for over sixty years."

Proceedings in the court below

[6] At the commencement of the trial, the appellant indicated to the learned judge that he was not pursuing the claim for adverse possession. He stated at page 5, lines 13-25 and page 6, lines 1-2 of the notes of evidence:

> "Your Honour, what I am trying to say I am not claiming adverse possession, nowhere have I said I am claiming adverse possession. The matter went to the Court of Appeal, and the Court of Appeal ruled that the matter before this court should be whether or not I am trespassing on land registered to the claimant's mother, that's what I came here today to defend, it's not about adverse possession. I have never claimed, I have never claimed adverse possession, your Honour, and that is not the matter, as far as I understand it, according to the Court of Appeal before this court. That is what I am objecting to."

[7] The respondent's attorney, Mr Canute Brown, did, however, point out to the learned judge that adverse possession was pleaded in the alternative, as per the appellant's amended defence.

[8] At the trial, both parties relied on the evidence in their witness statements. Evidence was also given by the court-certified expert, Mr Grantley Kindness, a Commissioned Land Surveyor ('Mr Kindness'). His expert report ('the Kindness report') and the answers to questions posed to him by the appellant were admitted into evidence. The case management orders, made on 25 May 2011, reveal that Mr Brian Alexander, Commissioned Land Surveyor, was certified as an expert witness, and the appellant was permitted to call him as a witness at the trial. He was, however, not called by the appellant to give evidence.

The appellant's evidence

[9] In the court below, the parties relied on the description of the property in the certificate of title, as no sketch diagram or plan was appended to it setting out the boundaries of the property. The description of the property is as follows:

> "ALL THAT parcel of land part of **BELMONT SETTLEMENT** in the Parish of **SAINT JAMES** containing by estimation Seven Acres Two Roods and Sixteen Perches more or less and butting Northerly partly on lands belonging to Benjamin Gordon and partly on lands belonging to Daniel Gordon Southerly partly on lands belonging to Daniel Gordon Southerly partly on lands belonging to Kenneth Thorpe and partly on lands belonging to David Whitelock Easterly on lands belonging to Michael Lester and Westerly on lands belonging to Nessilda Jarrett **SAVE and EXCEPT a Parochial Road leading from Belmont to Spring Garden running throughout from East to West on the Southern Boundary**." (Emphasis supplied)

[10] The appellant, in his witness statement, which was accepted as his evidence in chief, stated that on 20 March 1997, T B Casserly, Commissioned Land Surveyor, surveyed a parcel of land that had been handed down from his great-grandfather, David Whitelock, through to his father, George Whitelock. That survey bears examination no

257720 ('Casserly survey plan no 2'). In October 1997, the appellant commenced construction of a building on that parcel of land. In August 1999, he received a letter from the respondent claiming that the construction was being carried out on a part of the property. This culminated in a claim being filed against the appellant in December 1999. He also stated that the respondent obtained an injunction against him.

[11] The appellant indicated that the survey diagram no 276230 ('Casserly survey plan no 1'), which was relied on by the respondent, was not pre-checked by the Survey Department. As such, its validity was not verified. He also stated that the diagram is inconsistent with the description of the property in the certificate of title, registered at Volume 1094 Folio 740 of the Register Book of Titles.

[12] The appellant also challenged the Kindness report on the basis that it did not conform with the terms of reference. He stated that no survey was done and that the sketch plan presented with the said report contains no field data, measurements, or other technical data. He also took issue with Mr Kindness' interpretation that the word "throughout" in the description of the southern boundary of the property in the certificate of title means that the parochial road cuts "through" the southern section of the property.

[13] He stated that Section 1 is described in the Casserly Survey plan no 2, which was pre-checked. That diagram, he said, does not show that Section 1 is a part of the property.

[14] It was the appellant's evidence that he had a longstanding relationship with Section 1, having known the land and the parochial road since about 1972. He stated that both his grandfather and uncle are buried on this area of the property. However, he was unable to identify their burial sites as they were never marked.

[15] The appellant, in his supplemental witness statement, filed on 22 July 2014, placed emphasis on the description of the property as set out in the certificate of title. He explained that therein, the property is described in terms of "[metes and bounds]".

He said that metes "refers to **the direction** of the boundary line" (bold as in original) and bounds "refers to the neighbours [sic] adjoining the corresponding boundary line". It was his understanding that:

(i) the property has a northerly boundary line with two adjoining neighbours- Benjamin Gordon and Daniel Gordon.

(ii) there is also a "southerly" boundary line which is in the form of a semi-circle. Kenneth Thorpe and David Whitelock are the owners of the parcels of land along this boundary line.

(iii) the parochial road runs from east to west on the southern boundary.

(iv) there is a "westerly" boundary line with one adjoining neighbour- Nessilda Jarrett.

(v) the neighbour on the "easterly" boundary line is Cornerstone Investment and Finance Co Ltd ('Cornerstone Investment') on land previously owned by Diana Chapman. The land owned by Cornerstone Investment shares a common boundary line with the property.

(vi) a comparison of the Casserly survey no 1 with the Chapman survey diagram shows that the respondent's eastern boundary encroaches on land owned by Cornerstone Investment. Further, there is no evidence that notice was served on the owner/occupier of that land prior to the survey being carried out; only Michael Lester was served, and his association with the land ended in 1973.

(vii) Mr Casserly, in his survey diagram, erroneously included the appellant's land as being part of the property.

(viii) Mr Kindness, in error, stated that David Whitelock and Kenneth Thorpe were two neighbours to the south instead of correctly noting that

> they were on the southern boundary. This distinction was said to be "significant" as the diagram produced by Mr Kindness "(to the untrained eye)" shows that Michael Lester (Cornerstone Investments) has land to the south, whereas the title states that his property is on the eastern boundary of the property. Additionally, land owned by Benjamin Gordon and Daniel Gordon was incorrectly referred to as being on the northern boundary when, in fact, it was situated on the eastern boundary. The natural conclusion was that the boundaries identified by Mr Kindness were incorrect.

The respondent's evidence

[16] In her witness statement, filed on 10 February 2012, the respondent stated that the property was bequeathed to her mother by her grandfather and is part of a larger estate known as Perry Land. She indicated that she took possession of the property before the death of her mother, who had been ailing for some time. The respondent and her siblings, she said, are the beneficiaries of their mother's estate.

[17] The respondent also stated that she had employed a caretaker to maintain a physical presence on the property to ward off squatters. In 1998, the caretaker reported to her that persons were putting up a structure on the land. She subsequently discovered that the appellant was responsible for the construction.

[18] The respondent detailed her familiarity with the property, having visited it extensively as a child, especially during the periods when they reaped pimento. She was aware of the layout of the land and knew when the parochial road was cut and subsequently constructed. At para. 8 of her witness statement, she explained, "[t]he road runs through the land from where it enters to where the land ends on its southern boundary. The land is then cut by the road into, from my estimation, 1/5 to 4/5 portions".

[19] She stated that she had never been greeted with any claim by any person claiming to be entitled to either the whole or part of the property. It was her position that no one had ever carried out any acts of possession or ownership of the land. The neighbouring land, she said, was previously owned by the Whitelock family but is now owned by the Spences and is registered at Volume 1089 Folio 523 of the Register Book of Titles. Section 1 is situated above the land owned by Kenneth Thorpe.

[20] The respondent indicated that she had commissioned Mr T B Casserly, a registered land surveyor (deceased), to survey the property. The results of that survey are contained in the Casserly survey plan no 1. By consent, that plan was admitted into evidence.

Mr Kindness' evidence

[21] Mr Kindness, in his report that was admitted into evidence, stated that:

> "**The title registered at Volume 1094 Folio 740 is by description**. The description shows that Kenneth Thorpe is the neighbour to the south and the parochial road cuts through the southern section of the property showing that the house being constructed by [the appellant] is in fact on the said property registered at Volume 1094 Folio 740.
>
> The survey diagram of one of the adjoining property [sic] bearing Survey Department Examination No. 148920 dated June 7, 1977, for Kenneth Thorpe by H.W.R. Dear (Commissioned Land Surveyor) suggest[s] that Linda Crooks was acknowledged by the said H.W.R. Dear and Kenneth Thorpe as being the owner of the disputed [property]". (Emphasis supplied)

[22] Mr Kindness referred to two surveys, one which was commissioned by the respondent's mother and the other by the appellant. He stated that he did not rely on those reports, as neither party had been served by the other when the surveys were being conducted. He concluded, based on the description of the property in the registered title for the property, and the survey done at the instance of Mr Kenneth Thorpe, that Section 1 was a part of the property.

The learned judge's decision

[23] The learned judge's appreciation of the issue that the court was being asked to resolve is evident from the following paragraphs of the judgment:

> "[6] …. The Plan represents the Property as being irregular in shape but with a discernable [sic], eastern, western, northern and southern boundary. The southern boundary is represented on the Plan by a relatively straight line running from east to west (or vice versa) but angled between iron peg (IP) 28 and IP 27. **It is the limit of the southern boundary of the Property which is at issue in this case**.
>
> [7] The Plan shows a parochial road (the 'Road') as entering the Property (from Spring Garden) on its southern boundary, almost at the point where the southern boundary touches its western boundary (marked by IP 11 and IP 7). The Road forms a partial loop or as described in the proceedings, a horseshoe shape, the other side of which (from Belmont), enters the Property, before the half-way point of the southern boundary (marked by IP old 2 and IP 1). The apex of the cure in the Road occurs before an imaginary line which forms the midpoint between the southern and northern boundaries as indicated on the Plan. The effect of the Road having a horse-shoe is the creation of a semi circular shaped area of land which is described in the Plan as 'Section 1'.
>
> [8] **The [respondent's] case is that Section 1 is a part of the Property which is separated from the other portion of the Property by the Road**. **The [appellant] on the other hand claims that Section 1 is not a part of the Property and that the Road represents a portion of the southern limit of the Property, in other words, the [appellant] asserted that the Property does not continue beyond the Road to the other side as the [respondent] asserted**. (Emphasis supplied)

[24] Where the issue of whether the respondent was an owner in possession is concerned, the learned judge accepted the respondent's evidence that she took possession of the property before the death of her mother and that she always visited the property and had employed someone as a caretaker for the primary purpose of

preventing squatting. He found that a claim in trespass was, therefore, maintainable by her.

[25] On the issue of trespass, the learned judge accepted the evidence of Mr Kindness that Section 1 is a part of the property and made the orders set out at para. [1] above.

The appeal

[26] The appellant, aggrieved by that decision, filed an amended notice and grounds of appeal, on 24 July 2020, seeking the following orders:

a) A declaration that George Whitelock is the owner of the land referred to in the registered title for the property as being owned by David Whitelock.

b) Costs.

c) Any other relief.

[27] The grounds of appeal contain numerous averments and submissions. I have managed to distill them into the following issues:

1. Issue 1 – Whether the expert's report complied with the Land Surveyors Act, the Land Surveyors Regulations ('the Regulations'), and rule 32 of the Civil Procedure Rules, 2002 ('CPR'). (Ground of Appeal No. 1)

2. Issue 2 – Whether the learned judge erred when he stated that Mr Kindness' report was admitted into evidence by consent. (Ground of Appeal No. 2)

3. Issue 3 – Whether the learned judge impeached the title for the property when he increased the size of the property to include Section 1. (Ground of Appeal No. 3)

4. Issue 4 – Whether the southern boundary of the property was wrongly identified by the learned judge. (Ground of Appeal No. 4)

5. Issue 5 – Whether there was a wrong characterisation of the parochial road on the plan with respect to the description provided by the title. (Ground of Appeal No. 5)

6. Issue 6 – Whether the learned judge erred when he accepted the expert's evidence that there was ambiguity in the description of the parochial road in the certificate of title for the property. (Ground of Appeal No. 6)

7. Issue 7 – Whether the learned judge erred when he accepted the evidence of the expert regarding defacement of the Diana Chapman Title (Volume 1089 Folio 523-Exhibit 3). (Ground of Appeal No. 7)

8. Issue 8 – Whether the Judge erred in concluding that the land described in the 'Diana Chapman Title' is not part of the disputed area, contrary to his own findings of fact, and in concluding that there was insufficient evidence to establish a connection between that land and the disputed area. (Ground of Appeal No. 8)

9. Issue 9 – Whether the learned judge "erred in accepting the expert's conclusion derived from assumptions where the conclusion could have been derived from a more reliable source, the facts". (Ground of Appeal No. 9)

[28] The key findings of fact challenged by the appellant are as follows:

(1) The learned judge's acceptance of the expert's evidence that the writing "K. Whitelock" on the certified copy of the certificate of title registered at Volume 1089 Folio 523 in respect of property owned by Diana Chapman was not part of the original title as it was hearsay.

(2) That the appellant said that he had never seen his father on [Section 1].

General law

[29] Before commencing any discourse on this case, it is imperative that the yardstick for this court to intervene with the learned judge's decision be re-enunciated. The appellant is challenging a number of the learned judge's findings of fact. In **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 Brooks JA (as he then was) stated:

> "[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21. The Board stated, in part, at paragraph 12:
>
> '...It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.** Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence:

Choo KokBeng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.' (Emphasis as in original)

[8] A comprehensive review of the various principles involved in this court's assessment of findings of fact, was made in two separate decisions of this court, which were handed down on 3 November 2005. The cases are **Clarence Royes v Carlton Campbell and Another** SCCA No 133/2002 and **Eurtis Morrison v Erald Wiggan and Another** SCCA No 56/2000.

[9] In the former case, Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

> '...The authorities seem to establish the following principles:
>
> 1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was 'plainly wrong'. - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No. 133/98 delivered December 20, 1999 among others.
>
> 2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge- See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra)."

[30] It is also important to note that where expert evidence is given, a trial judge is not bound to accept that evidence. The judge has the discretion to accept or reject that evidence, either in whole or in part having considered all the evidence in the matter. In **Cherry Dixon-Hall v Jamaica Grande Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 18/2007, judgment delivered 13 March 2008, Panton P stated at paras. 39-40:

> "39. Where experts are appointed by the court their duty is to the court and not to the party calling them. ***Armstrong***

& Anor (supra) held that **there is no rule of law that the uncontroverted evidence of an expert in an unusual field should be dispositive of a claim. Rather, it was for the trial judge to determine the case on all different types of evidence before the Court. The case also held that the judge's conclusion that the claimants were telling the truth may be a sufficient reason in itself for rejecting the evidence of an expert.**

40. ***Coopers Payen Ltd v Southampton Containers Terminal Ltd*** [2003] EWCA Civ. 1223 dealt with the approach to the evidence of a single expert. The case decided inter alia, that a judge should very rarely disregard the evidence of a single joint expert; the judge must evaluate such evidence and reach appropriate conclusions with regard to it and that appropriate reasons should be given for any conclusions reached. Clarke LJ stated at paragraph 42 of the judgment:

> ‘42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will only be part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate’." (Emphasis supplied)

[31] The learned judge was also permitted to draw reasonable inferences from the proved facts in arriving at his decision (see **Louis Campbell v Ambiance Resorts Properties Inc and Ambiance Resorts Properties Inc v Alex Oostenbrink and anor** [2022] JMCA Civ 4).

[32] Considering that there is considerable overlap of subject matter and counsel's submissions, issues 1 and 2 (grounds of appeal 1 and 2) will be considered together.

Issue 1: Whether the expert's report complied with the Land Surveyors Act and Regulations and rule 32 of the Civil Procedure Rules (Ground of Appeal No. 1)

Issue 2: Whether the learned judge erred when he stated that Mr Kindness' report was admitted into evidence by consent (Ground of Appeal No. 2)

The appellant's submissions

[33] The appellant submitted that the Kindness report did not comply with the requirements as set out in section 32(1) of the Land Surveyors Act, Part IV of the Regulations, and Part 32 of the CPR. He submitted that the use of the word "shall" in section 32(1) of the Land Surveyors Act meant that compliance with the section was mandatory. Further, the appellant explained that the report failed to include the field data as required by the Regulations, including:

(i) the measurement of the length of boundary lines and angles to determine the direction of boundary lines;

(ii) the measurements of angles to determine direction of boundary lines; and

(iii) measurement relating to the location of parochial roads.

[34] It was further submitted that the surveyor failed to provide field notes as prescribed by Part IV-30 of the Regulations. This information was necessary to resolve the issue of the location of the parochial road relative to Section 1. Additionally, it was said that Mr Kindness failed to properly describe the boundaries of the property. One such instance was where a boundary line, which runs from west to east, was described

as southerly in direction. The appellant concluded that in the absence of these particulars, Mr Kindness relied on his subjective observations.

[35] Where the alleged non-compliance with the CPR is concerned, the appellant submitted that Mr Kindness was required to make his findings based on the provisions of the Registration of Titles Act and had failed to do so. The appellant submitted that rule 32.4(3) of the CPR requires an expert to state the facts or assumptions that inform his report, and Mr Kindness did not do so. He relied on **Rowan Mullings v Joan Allen and Louise Thompson** [2012] JMSC Civ. 167 in support of that submission.

[36] Regarding the admission of the Kindness report into evidence, the appellant submitted that prior to the commencement of the trial, an application had been made to strike out the report. However, the application was refused. At the trial, the appellant also challenged the Kindness report during cross-examination. It was, therefore, submitted that it was incorrect for the learned judge to have stated that the Kindness report was admitted into evidence by and with the consent of the parties.

The respondent's submissions

[37] Mr Brown submitted that the appellant appears to be contending that the evidence of Mr Kindness ought to have been rejected on the basis that the plan he prepared did not satisfy the requirements of the Land Surveyors Act and Regulations. Counsel submitted that the ultimate question was whether Section 1 is a part of the property. He stated that since the appellant in his defence claimed that Section 1 was wrongfully included in the plan of the property, it was impossible for another plan to be generated.

[38] Counsel submitted further that in providing solutions for the dispute, Mr Kindness was entitled to carry out research and investigations "above the mere taking of measurements". He stated that the appellant was present when Mr Kindness visited the location and did not point to any monuments or landmarks to assist him in determining

how the plan should be drawn. In the circumstances, it was a matter for the learned judge to determine the weight to be attached to that evidence.

Discussion

[39] Grounds 1 and 2 raise the overarching issue of whether the learned judge erred in admitting the Kindness report into evidence. It is noted that the appellant had made an application prior to trial for the Kindness report to be struck out. That application was refused by Pusey J, on 9 June 2007, on the basis that the matters raised in the application could be dealt with at the trial by cross-examination.

[40] The appellant's arguments before us were, firstly, that the learned judge ought not to have admitted the Kindness report into evidence as Mr Kindness failed to comply with the terms of reference. Secondly, the said report did not comply with the Land Surveyors Act, the Regulations and the CPR. Additionally, the appellant took issue with the learned judge's statement that the Kindness report had been admitted into evidence by consent.

[41] In an effort to assess whether the learned judge's reliance on Mr Kindness' evidence was misplaced, I have found it useful to examine some of the orders that were made at the case management conferences and the pre-trial review.

[42] Based on the minute of order dated 21 July 2004, the parties were attempting to settle the matter. The case management conference was adjourned on that date to facilitate their discussions. The minute of order dated 7 May 2009 states, in part:

> "(2) Order for reference to surveyor to be agreed on by the parties, where the parties cannot agree, one is to be decided by the court on the application of either party.
>
> (3) Claimant's Attorney-at-law to settle the terms of reference…"

[43] On 17 July 2009, when the hearing was adjourned to 18 December 2009, it was again noted that the terms of reference were to be settled.

[44] On 25 May 2011, when the matter was again scheduled for a case management conference, the court ordered in part:

> "5. Mr Grantley Kindness of Grantley, Kindness & Associates to attend the hearing of this matter as [sic] expert witness.
>
> 6. Mr Brian Alexander, Commissioned Land Surveyor certified as an expert witness and defendant is permitted to call him at trial."

[45] On 19 January 2012, at the pre-trial review, Beckford J ordered:

> "1. Expert report of Mr Brian Alexander to be filed and served in accordance with part 32 of the Civil Procedure Rules, 2002, on or before the 31st January 2012." The Terms of Reference that were agreed by both parties and dated 28 September 2010 state:
>
> 'WHEREAS
>
> A. By virtue of the claim herein, the [respondent] contends that the [appellant] is engaging in construction on property registered at Volume 1094 Folio 740 of the Register Book of Titles;
>
> B. The [respondent] contends that he is not engaging in construction on property registered at Volume 1094 Folio 740 of the Register Book of Titles but on property adjoining the aforesaid property and belonging to David Whitlock.
>
> C. By order of the court made on the 7th day of May 2009, the matter was referred to a Commissioned Land Surveyor to conduct a survey and to settle the issues between the parties.
>
> **IT IS HEREBY AGREED AS FOLLOWS:**
>
> 1. Grantley, Kindness & Associates be appointed as the Surveyor for the purposes of the Order of May 7, 2009;
>
> 2. Grantley, Kindness & Associates is to conduct a **survey** to determine the following:

(a) Whether the construction being undertaken by the [appellant] is being effected on the property registered at Volume 1094 Folio 740;
(b) The boundaries and location of the property owned by David Whitelock and referred to in the Certificate of Title registered at Volume 1094 Folio 740 in relation to the property registered at Volume 1094 Folio 740, only.

3. Grantley, Kindness & Associates is to submit a report containing the results of his survey to the Court within thirty (30) days of payment of required deposit and/or letter of instruction to proceed, and to submit a copy of same to **Brown, Godfrey & Morgan,** Attention Mr. Canute Brown, 14 Park Crescent, Mandeville in the Parish of Manchester, Attorneys-at-law with conduct for the Claimant and **Nunes, Scholefield, Deleon & Co**, Attention Ms. Catherine Minto, 6a Holborn Road, Kingston 10 in the Parish of Saint Andrew, Attorneys-at-law with conduct for the Defendant.

4. The Surveyor's Report is to include a **plan or diagram** indicating [:]
(a) the location of land owned by David Whitelock in relation to land owned by Linda Crooks, and
(b) where the aforesaid construction is being effected."

(Emphasis supplied)

[46] Each party was permitted to submit questions to the surveyor and the cost of the survey was to be borne equally.

[47] Section 32(1) of the Land Surveyors Act states:

> "Every survey, and every plan made as a result of such survey, which is made for the purpose of every conveyance, deed or document of transfer, or for the registration of any title, or by order of any court, shall be made by a surveyor and in accordance with the regulations under this Act."

[48] The definition of the word "survey" is contained in regulation 2 of the Regulations:

> " 'survey' means the taking of measurements and the setting of survey marks for the purpose of defining any boundary of land, but does not include-
>
> (a) the bushing of lines between established survey marks; or
>
> (b) a preliminary lay-out preparatory to a survey;"

[49] Part IV of the Regulations specifies the actions to be taken by a surveyor when carrying out a survey, including what is to be done and the accuracy required. It also prescribes how the plan is to be prepared.

[50] There is no indication that Mr Kindness conducted a survey of the land within the meaning of the Land Surveyors Act and Regulations. In this regard, he deviated from the terms of reference agreed by the parties. Instead, he examined the relevant data touching and concerning the property and Section 1 and arrived at an opinion regarding paragraph 2(a) of the terms of reference and implicitly 2(b) based on the determination of 2(a). Based on the contents of the Kindness report, it appears that Mr Kindness compared the description of the property in the registered title with the survey done by H W R Dear that was commissioned by Mr Thorpe ('the Dear survey'). The sketch plan that Mr Kindness prepared, which is appended to his report, seems to have been an attempt to bring clarity to the matter.

[51] The crux of the appellant's complaint is that the learned judge ought not to have relied on the Kindness report, as Mr Kindness, by not conducting a survey of the property, as agreed, deviated from the Terms of Reference in a material way. In such a situation, the parties are not bound by the expert's findings. On this point, I have found the cases of **Macro & ors v Thompson & ors (No 2)** [1997] 1 BCLC 626 ('**Macro**'), **Veba Oil Supply & Trading GmbH v Petrotrade Inc** [2001] EWCA Civ 1832 ('**Veba Oil**') and **Leo Taddeo v Benedetto Persichilli and anor** [2023] JMCA App 30 ('**Taddeo**'), to be particularly helpful.

[52] In **Macro**, the court, in an effort to resolve the disputes that had arisen between the shareholders in two family companies (Macro and Earliba), made various orders for the sale of their shares. To facilitate the sale, an order was made for the valuation of the shares using a particular method. It was discovered that the valuation of shares in a report submitted to the court by consent had not been done in accordance with the relevant instructions, and a dispute arose as to whether the transfer of the shares ought to proceed. The plaintiffs filed a claim seeking to set aside the valuation and transfer of the shares on the ground of mistake. The first defendant and Earliba applied to strike out the pleading and were successful. The plaintiff appealed and was successful. The issue was whether the report was binding on the parties. Staughton LJ stated at page 636i:

> "If a valuer merely makes a mistake in doing what he was authorised to do, the valuation is still binding. The parties have no remedy in that respect. But if instead of doing what he is authorised to do he does something quite different, the parties are not bound by his conclusion. That seems to me to emerge from the passage which Aldous LJ has read in *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 179…"

[53] In **Jones v Sherwood Computer Services plc** [1992] 2 All ER 170 at 179, Dillon LJ stated:

> "On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning Mr. said in *Campbell v Edwards*, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect …. either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."

[54] In **Veba Oil**, the issue for the court's determination was in these terms:

> "[1] If an independent expert departs from his instructions in a **material** respect his determination is not binding. What

> for these purposes is a material respect?" (Emphasis supplied)

In that case, pursuant to a contract entered into in August 1999, the defendant sold 25,000 tons of gas oil to the claimant. Clause 10 of that contract provided as follows:

> "10. QUANTITY/QUALITY
>
> **Quantity and quality to be determined by a mutually agreed independent inspector at the loading installation**, in the manner customary at such installation. **Such determination shall be final and binding for both parties save fraud or manifest error**. Inspector to be appointed by seller. Costs to be shared equally between buyer and seller."

The contract also provided as follows:

> "4. Product/Quality Gasoil meeting the following guaranteed specifications:
>
> | Test | Limit | Method ASTM |
> |---|---|---|
> | Density at 15 degC | 0.876 kg/l max | D 1298" |

[55] On 20 August 1999, 34,000 metric tons of cargo were loaded onto a vessel at Antwerp. Caleb Brett, the mutually agreed inspectors who were tasked with carrying out the determination under clause 10, produced a report of their findings. That report became the subject of litigation, in which the claimant disputed Caleb Brett's determination on the basis that the wrong testing method was used. It was asserted that, in the circumstances, the report was not final and binding on the parties.

[56] Simon Brown LJ, who delivered the judgment of the court, stated:

> "[10] …**Clause 4** does not require that the cargo must be a cargo the specification of which is such that, if it were to be tested by the specified method D 1298, it would meet the density specification but that it need not be so tested. On the contrary, it **provides that this test method must be used. And, indeed, why else would the test method be specified? Why should the parties care whether**

> **the cargo is theoretically capable of satisfying a given test unless that particular test is to be used?** Mr Nolan submits that test D 1298 is specified merely as a standard or benchmark test and that any better test would suffice. If his reasoning is sound, however, a less accurate test (provided always it was 'customary' at the installation) would also suffice so long as it could be shown that it would have produced the same result—as, indeed, it would have done here (if one postulates the specification of test D 4052 and the use of D 1298)." (Emphasis supplied)

And further at para. [12]:

> "[12] In short, I share the view expressed by the judge below that cl 10 is not to be read on its own. Clause 4 identifies both the standard and the method for assessing whether the standard has been reached. What was required was a test conducted by the stipulated method and none other. Clause 10 deals with the 'manner' of carrying out the required tests. This would, of course, include the method where that was not otherwise specified (as was so in the case of some tests under cl 4)."

[57] The court proceeded to consider whether Caleb Brett had departed from their instructions in a material respect. Having reviewed numerous authorities, the court stated at para. [26]:

> "(vi) **Once a material departure from instructions is established, the court is not concerned with its effect on the result**. The position is accurately stated in para 98 of Lloyd J's judgment in [**Shell UK v Enterprise Oil [**1999] 2 All ER (Comm) 87 at 108–109]: **the determination in those circumstances is simply not binding on the parties**. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place**. Rather I would hold any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party.**" (Emphasis supplied)

[58] That principle informed this court's decision in **Taddeo**. That case was an application for permission to appeal from the decision of Batts J, who refused Mr Taddeo's application to set aside a valuation report prepared by Messrs Allison Pitter & Co, who had been appointed as valuers by and with the consent of the parties. The background to the litigation was set out in paras. [2] and [3] of the judgment of Brooks P as follows:

> "[2] Mr Taddeo and his business partner, Mr Benedetto Persichilli, are equal shareholders and the only directors of New Era Homes 2000 Limited ('the company'). They entered into a separation agreement, which included among its terms, the division of the company's assets between them. They had disagreements about the implementation of the separation. The disagreements led to litigation and an order of the Supreme Court, made with their consent.
>
> [3] The valuers were appointed under the consent order and instructed to appraise various real estate holdings of the company. They produced a valuation report, but Mr Taddeo is dissatisfied with it. He asserts, among other complaints, that the valuers departed from their instructions. He applied to the Supreme Court for the report to be rejected. Batts J disagreed. He held that the valuers had not materially departed from the instructions or departed from it at all (see para. [67] of Batts J's judgment). The learned judge held that Mr Taddeo was bound by the report."

[59] This court, in granting permission to appeal Batts J's decision, relied on the statement of principle that where the expert appointed under a consent order departs from his instructions in a material way, the parties are not bound by the report. In this regard, Brooks P referred to **Veba Oil** and **Jones and Others v Sherwood Computer Services PLC** [1992] 1 WLR 277 ('**Jones**'). The learned President stated that, based on **Jones,** the following steps are to be followed by a court when examining a complaint regarding an expert's report:

> "[12] …
>
> 1. see what the parties have agreed to remit to the expert;

2. see what the nature of the mistake was, if there is evidence of this; and

3. if the expert departed from his instructions in a material way then either party can say it is not binding because the expert has failed to do what he was appointed to do."

[60] Brooks P noted that there did not appear to be any "express agreement" that the valuer's report would be final and binding and expressed the view that, based on **Campbell v Edwards** [1976] 1 All ER 785 ('**Campbell**'), that stipulation did not appear to be mandatory. In that case, Lord Denning MR stated at page 788d:

> "…It is simply the law of contract. **If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it**. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything. It may be that, if a valuer gives a speaking valuation—if he gives his reasons or his calculations—and you can show on the face of them that they are wrong, it might be upset."

[61] In his oral submissions before this court, the appellant relied on the Supreme Court's decision of Anderson J in **Rowan Mullings v Joan Allen and Louise Thompson** [2012] JMSC Civ. 167 (specifically paras. 36-42) to advance his position that no data was provided by the expert; only a sketch plan.

[62] In that case, an application for the appointment of an expert was made during the trial (after the close of the claimant's case), as the jointly appointed expert, Mr Easton Douglas, who was a Chartered Surveyor, as distinct from a Commissioned Land Surveyor, could not assist the court to determine whether there was an encroachment on the defendant's land. Neither the parties' counsel nor the judge who ordered that expert evidence be given by Mr Douglas was aware that there is an important distinction between a Chartered Surveyor and a Commissioned Land Surveyor. The application was refused as the appointment of an expert at that stage would necessitate the re-

opening of the claimant's case, which would prolong the trial. Additionally, the court was of the view that the proposed expert's objectivity may have been questionable as he had previously provided one of the defendants with an opinion on the matter.

[63] This case does not take the matter any further. In any event, the decision was overturned on appeal (see **Joan Allen & anor v Rowan Mullings** [2013] JMCA App 22).

[64] In the instant case, Mr Kindness departed from his instructions in a material respect. In such circumstances, if his role was that of a joint expert, his report would not have been binding on the parties. It is, however, my view that the circumstances of this case can be distinguished from those in **Macro**, **Veba Oil**, **Jones** and **Taddeo.** Whilst it was evident at the outset that Mr Kindness was appointed as a joint expert and that the parties intended to be bound by his findings, that intention was, in my view, overtaken by the appointment of Mr Alexander as the appellant's expert. That application was made after the terms of reference had been settled and was, in my view, incompatible with the earlier appointment of Mr Kindness as a joint expert. In those circumstances, Mr Kindness's failure to adhere to the terms of reference was not fatal. The learned judge was therefore free to utilise the information in the Kindness report as he deemed fit. The appellant had requested his own expert, and his failure to provide a report from Mr Alexander and to call him as a witness was his cross to bear. Had he done so, the learned judge would have been required to assess Mr Alexander's evidence as well as that given by Mr Kindness before making his determination.

[65] The weight to be given to the Kindness report and the evidence of Mr Kindness were matters entirely within the learned judge's discretion. This was not a matter of whether the parties were bound by the said report. Mr Kindness, in my view, utilised his expertise based on the data available to him to address the terms of reference. In addition, the Kindness report was admitted into evidence by consent.

[66] The question of whether the parties are bound by the findings in the Kindness report was not raised by the appellant. He has sought to impugn the learned judge's treatment of Mr Kindness' evidence.

[67] The learned judge demonstrated that he was cognisant of the principles that guide the court when dealing with expert evidence. He stated at para. [21]:

> "[21] This is a case in which it was not simply a matter of construing the description of the Property in the Registered Title that construction had to be performed while also considering the evidence relating to the physical layout of the disputed property. The evidence of the Expert was helpful in demonstrating the nexus between the descriptive words and the physical space as represented on the Plan. **I remind myself that the Court is entitled to reject the evidence of an expert witness**. However, I accept the analysis of the Expert Mr Kindness which I have referred to in the preceding paragraph and **I wholly accept his conclusion that Section 1 forms a part of the Property. I find that conclusion is reasonable having regard to the ownership of lands immediately to the south of Section 1 by Mr Kenneth Thorpe, in the context of the description in the Registered Title of the Property as butting southerly '…partly on lands belonging to Kenneth Thorpe…'**". (Emphasis supplied)

[68] Regarding the issue of non-compliance with part 32 of the CPR, the general rule is that expert evidence is to be given in a written report unless the court directs otherwise. At the case management conference held on 25 May 2011, the court ordered that Mr Kindness attend the trial as an expert witness. Mr Alexander was certified as an expert witness, and the appellant was permitted to call him at the trial as a witness.

[69] Written questions were put to Mr Kindness by the appellant pursuant to rule 32.8 of the CPR.

[70] Rules 32.12 and 32.13 deal with the format and the contents of an expert's report. Firstly, the report must be addressed to the court. The report must also state the expert's qualifications and state at the end that he or she understands his or her duty to the court, has complied with that duty, and has included all relevant information, including any matters that may affect the validity of the report. Copies of written instructions and notes of any oral instructions to the expert must also be appended to the report.

[71] The report was addressed to the court. It shows Mr Kindness' qualifications and contains a statement of his understanding of his duty to the court.

[72] It was also the appellant's position that Mr Kindness' opinion regarding the southern boundary of the property was not in keeping with rule 32.4(3) of the CPR, which required Mr Kindness to make his findings in keeping with the Registration of Titles Act. Rule 32.4(3) states:

> "An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to consider material facts which could detract from his or her concluded view."

[73] Based on the contents of the Kindness report, Mr Kindness was guided by the description of the property in the registered title and the Dear survey. The above complaint by the appellant is, in my view, baseless.

[74] Although Mr Kindness did not survey the property, he sought to address the objectives of the terms of reference and his report satisfied Part 32 of the CPR. The appellant is, however, correct that the Kindness report did not comply with the Terms of Reference, the Land Surveyor's Act and Regulations. That failure, did not make it inadmissible. In **Macro**, **Veba Oil** and **Taddeo** there was a joint expert. That expert was appointed with the consent of the parties. That is not the situation in this case, as an additional expert was also appointed on the application of the appellant. The treatment of Mr Kindness' evidence was a matter for the learned judge. Therefore, the learned judge was entitled to give such weight as he deemed fit. Based on the above, there is no merit in issue one. Ground of appeal no. 1, therefore, fails.

[75] Ground two seeks to challenge the learned judge's statement at para. [16] of the judgment that the Kindness report and the answers to the questions posed by the appellant were admitted into evidence by consent. In this regard, the transcript of the proceedings, at page 51 lines 22-25 and page 52 lines 1-13, is relevant. Mr Kindness, having been sworn, was asked to identify certain documents, including his expert report,

the terms of reference, the questions put to him by the appellant and the answers to those questions. Mr Brown, counsel for the respondent, asked for those documents to be admitted in evidence as Mr Kindness' evidence in chief. The learned judge asked the appellant if he had any objection, and his response was "no, m'Lord". The appellant's assertion that he did not consent to the admission of the documents into evidence is not supported by the transcript of the proceedings. In the circumstances, ground of appeal 2 also has no merit and therefore fails.

Issue 3: Whether the learned judge impeached the title for the property when he increased the property to include Section 1 (Ground of Appeal No. 3)

The appellant's submissions

[76] The appellant submitted that the inference of the learned judge that the parcel of land owned by David Whitelock is the same land owned by Michael Lester resulted in the impeachment of Miss Crooks' registered title, contrary to section 68 of the Registration of Titles Act. He explained that based on the description of the property in the registered title, there are six neighbouring parcels of land that are not owned by Miss Crooks. However, the above inference of the learned judge reduced that number to five. It was submitted that the effect of this incorrect finding was to increase the size of the property beyond what is represented on the certificate of title and leaves the appellant without any parcel of land. This, he said, was an impeachment of the title.

The respondent's submissions

[77] Mr Brown submitted that the appellant was raising a collateral attack on the registered title of Miss Crooks, which, by virtue of section 68 of the Registration of Titles Act, is indefeasible. He stated that even if Miss Crooks was a squatter, she had been in possession since 1973 and would, therefore, have a better title than the appellant. Counsel stated that the appellant's entry on the land in 1997, some 24 years after Miss Crooks was registered as the owner, would not be sufficient to defeat her title. Reference was made to **Chisolm v Hall** (1959) 7 JLR 164, in support of that submission. In

addition, counsel submitted that any action would have been barred by virtue of section 45 of the Limitation of Actions Act.

Discussion

[78] The appellant has raised the issue of the indefeasibility of title as enshrined in section 68 of the Registration of Titles Act. This section states:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

[79] It is trite that this principle, which is one of the hallmarks of the Torrens System of land registration, protects the registered proprietor. In **Miguel Thomas and another (Executors Est. Ethline Dayes) v William Johnson and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 85/1994, judgment delivered 19 June 1995, Carey JA described the principle in the following terms:

> "The doctrine of the indefeasibility of title which is enshrined in the Torrens system of registration is a fundamental principle. **It describes the immunity from attack** by adverse claims to land or the interest in respect of which the proprietor is registered." (Emphasis supplied)

[80] A registered title may only be defeated in certain circumstances. For example, where the registered proprietor has been registered by fraud or there is a misdescription

of the land or its boundaries (see section 161 of the Registration of Titles Act) or by adverse possession. There are no such allegations in this case.

[81] The appellant's argument that the learned judge's finding that Section 1 is included in the title for the property violates the principle of the indefeasibility of registered title appears to be grounded in a misunderstanding of the said principle. The respondent's claim is based on a registered title for the property that has been in existence since 1 May 1973. The appellant has no registered title in his name or anyone else's under whose estate he is entitled. The description of the property is by metes and bounds. The evidence of Mr Kindness, which the learned judge accepted, is that Section 1 is a part of the property. This cannot be characterised as an "attack" on the respondent's title. The appellant is the one challenging the respondent's title, and he is not doing so on the basis of adverse possession as he had indicated. Therefore, he would have had to allege and prove that the respondent's title was obtained by fraud or that there was a misdescription of the land on the certificate of title. That was not done. In the circumstances, ground of appeal no. 3 also fails.

Issue 4: Whether the southern boundary of the property was wrongly identified by the learned judge (Ground of Appeal No. 4)

Issue 5: Whether there was a wrong characterisation of the parochial road on the plan with respect to the description provided by the certificate of title (Ground of Appeal No. 5)

Issue 6: Whether the learned judge erred when he accepted the expert's evidence that there was ambiguity in the description of the parochial road in the certificate of title for property (Ground of Appeal No. 5)

Issue 9: Whether the learned judge erred in accepting the expert's conclusion derived from assumptions where the conclusion could have been derived from a more reliable source, the facts (Ground of Appeal No. 9)

[82] These grounds challenge the learned judge's reliance on the evidence of Mr Kindness, who was certified as an expert witness by the court.

The appellant's submissions

[83] The appellant submitted that the learned judge, in identifying the southern boundary, erroneously relied on the Dear survey and not the description of the land in the registered title for the property. It was submitted that deference must be given to the certificate of title, which bears the legal description, which ought to be used to identify its boundaries as opposed to the Dear survey, which is the subjective opinion of the surveyor as to what is physically on the ground. The appellant stated that the Dear survey shows that the parochial road runs on the southern boundary. As such, wherever the road is shown on the plan represents the southern boundary.

[84] Regarding Mr Kindness' statement that there was some ambiguity in the description of the location of the parochial road, the appellant submitted that any alleged ambiguity raised by Mr Kindness in respect of the description of the property in the certificate of title was a creation of his misunderstanding. It is the appellant's position that this was not an initial observation made by Mr Kindness in his report. Rather, this issue was raised for the first time in his written answers to the questions that were asked of him by the appellant.

[85] It was further submitted that the certificate of title did not state that "the parochial road runs throughout the property and at the same time that it … passes on the southern boundary". It was said that Mr Kindness' finding of ambiguity was caused by his: (i) paraphrasing the wording on the certificate of title; (ii) omitting the word "on" when speaking to the description of where the road runs; and (iii) omitting the name David Whitelock from the description provided on the certificate of title. The appellant submitted that, in any event, Mr Kindness failed to provide proper reasons for his finding of ambiguity. That failure resulted in the breach of rule 32.4(3) of the CPR.

[86] The appellant submitted that the learned judge erred by making findings based upon Mr Kindness' assumptions, where the facts ought to have been relied upon as a more credible source. He stated that rule 32.4(3) of the CPR requires an expert to state the facts or assumptions upon which his or her opinion is based. The rationale being,

that where possible, an expert should provide the court with the best and most reliable information available. In this regard, the appellant referred to para. [20] of the judgment.

[87] It was submitted further that had Mr Kindness relied on facts in the certificate of title for the property, he would have concluded:

> "1. that the [Dear survey] shows section 1 and Kenneth Thorpe located on the same side of the parochial road.
>
> 2. the title identified David Whitelock and Kenneth Thorpe as two distinct parcels of land.
>
> 3. the [Dear survey] shows no parochial road between section 1 and Kenneth Thorpe.
>
> 4. that the southern boundary of the land owned by the respondent must have the parochial road running on it."

The appellant maintained that, based on those factors, Mr Kindness would have concluded that Section 1 is the same parcel of land referred to in the certificate of title for the property as being owned by David Whitelock.

Discussion

[88] In order to address the respondent's claim for trespass, the learned judge had to determine whether Section 1 was included in the respondent's certificate of title. There is no plan attached to the title. It is by description. The controversy in this matter concerned the location of the southern boundary of the property. This required the learned judge's interpretation of the following sentence in the description of the property in the certificate of title :

> "…SAVE and EXCEPT a parochial road leading from Belmont to Spring Garden running **throughout** from east to west on the southern boundary". (Emphasis supplied)

[89] At para. [7] of the judgment, the learned judge referred to Casserly survey no 1. He stated:

> "[7] [Casserly survey no 1] shows a parochial road (the "Road") as entering the Property (from Spring Garden) on its southern boundary, almost at the point where the southern boundary touches its western boundary (marked by IP 11 and IP 7). The Road forms a partial loop or as described in the proceedings, a horseshoe shape, the other side of which (from Belmont), enters the Property, before the half-way point of the southern boundary (marked by IP old 2 and IP 1). The apex of the curve in the Road occurs before an imaginary line which forms the midpoint between the southern and northern boundaries as indicated on the Plan. The effect of the Road having a horse-shoe is the creation of a semi-circular shaped area of land which is described in the Plan as 'Section 1'."

[90] That plan, which bears Examination No 276230, was described in the Kindness Report as not being pre-checked. However, the plan that was admitted into evidence as exhibit two, having been identified by Mr Kindness, was pre-checked. He stated at page 54 of the transcript:

> "This is a pre-checked plan that was done from a boundary survey by T.B. Casserly and was prechecked at the Government Survey department that prechecks the information shown on the registered title…".

[91] The learned judge, at para. [19] of his judgment, referred to Mr Kindness' evidence in which he stated that there was an ambiguity in the description of the property in the registered title, surrounding the location of the parochial road. The learned judge stated:

> "[19] **It was the opinion of the Expert that there is an ambiguity created by the description in the statement that the Road runs 'throughout from East to West on the Southern Boundary'. He opined that the description of the Property and the observation on the ground makes it clear that the description refers to the fact that the Road actually passes throughout the Property.** When cross examined by the [the appellant] as to how he reconciles his evidence on this point with the rest of the statement that the Road runs '**on** the Southern Boundary', the Expert explained that the entire

description has to be taken together including the description of the Property as butting '...Southerly partly on lands belonging to Kenneth Thorpe and partly on lands belonging to David Whitelock ...'." (Emphasis supplied)

[92] This issue was addressed by the appellant in questions 2 and 3 of his written questions that were put to Mr Kindness. Those questions and the answers thereto are set out below:

"Question 2

With reference to the Title registered at Volume 1094 Folio 740, what does the term 'SAVE and EXCEPT A parochial road leading from Belmont to Spring Garden Or throughout from east to West on the southern boundary' means (sic)?

ANSWER 2

THE TERM SAVE AND EXCEPT A PAROCHIAL ROAD LEADING FROM BELMONT TO SPRING GARDEN RUNNING THROUGHOUT FROM EAST TO WEST ON THE SOUTHERN BOUNDARY MEANS THAT THE PAROCHIAL ROAD IS NOT PART OF THE ESTATE INDICATED IN THE REGISTERED TITLE AND IS NOT OWNED BY LINDA CROOKS OR HER ESTATE.

Question 3

With reference to the Title registered at Volume 1094 Folio 740, what does the term 'throughout from east to west on the southern boundary' means [sic]?

ANSWER 3

THROUGHOUT MEANS THAT THERE IS [SIC] LANDS ON BOTH SIDES OF THE PAROCHIAL ROAD PERTAINING TO THE REGISTERED TITLE. EAST TO WEST REFERS TO THE DIRECTION WHICH THE PAROCHIAL ROAD FOLLOWS. "ON THE SOUTHERN BOUNDARY" IN THE CONTEXT OF THIS DESCRIPTION MEANS WITHIN THE SOUTHERN BOUNDARY OF THE PROPERTY NEARER TO THE SOUTHERN BOUNDARY." (Emphasis supplied) (caps as in original)

[93] Question 9 and the answer to it are also relevant. They are:

> "Question 9
>
> With reference to paragraph 2 of your report, how does the legal description contained in the Title registered at Volume 1094 Folio 740 shows [sic] that Kenneth Thorpe is the (only) neighbour to the south?
>
> ANSWER 9
>
> THIS SERVES TO CLARIFY THAT WHAT WAS MEANT IN PARAGRAPH 2 IS THAT KENNETH THORPE IS THE ONLY NEIGHBOUR TO THE SOUTH THAT TOUCHES THE PROPERTY BEING CONTENDED.
>
> THE TITLE REGISTERED AT VOLUME 1094 FOLIO 740 MENTIONED TWO NEIGHBOURS TO THE SOUTH NAMELY KENNETH THORPE AND DAVID WHITELOCK. I HAVE VERIFIED THAT KENNETH THORPE OWNS THE ENTIRE SOUTHERN SECTION THAT TOUCHES THE CONTENDED PROPERTY.
>
> THE OTHER EXISTING NEIGHBOUR TO THE SOUTH HAS NOW BEEN IDENTIFIED AS CORNERSTONE INVESTMENTS & FINANCE COMPANY LTD. (SEE CORRECTION TWO SKETCH DIAGRAM) IN THE CARE OF BRUCE SPENCER. MY CONVERSATION WITH A NUMBER OF RESIDENTS WITHIN THE COMMUNITY REVEALS THAT THIS NEIGHBORING PROPERTY IN THE NAME OF CORNERSTONE INVESTMENT & FINANCE COMPANY LTD WAS IN THE PAST OWNED BY DAVID WHITLOCKE AND THEREFORE APPEARS TO BE THE LAND AND THE NEIGHBOR REFERRED TO IN VOLUME 1094 FOLIO 740."

[94] In addition, when cross-examined, Mr Kindness maintained that the parochial road runs through the property. Of note is the following part of his evidence on page 77 lines 9-14 of the transcript:

> "…we have the word "throughout" the property, coupled with the information of Kenneth Thorpe's location, would be contradicting or contradictory to reference of the parochial road running on the southern boundary".

[95] The description of the property in the registered title states that it is butting "…Southerly partly on lands belonging to Kenneth Thorpe and partly on lands belonging to David Whitelock…". Mr Kindness explained at page 69 of the transcript:

> "This title is by word; no diagram attached to it, and no diagram referenced on this title; so this is by description.
>
> There are titles by plan, but this is not one of them. If you are making reference to this title, then we have to speak to what this title says. It is an estimation. It gives you enough information from which you may use this information, which is descriptive, to verify where the property lies."

He continued at pages 70 and 71:

> "The examination of the title, Your Honour, as it relates to that section of the property. It says that there is a parochial road, save and except a parochial road leaving from Belmont to Spring Garden running throughout, from east to west, on the southern boundary…
>
> So, here it says, running throughout means it goes through the property; that is one. And it also says Kenneth Thorpe is a neighbour, is the owner of the neighbouring property, to the south of the [property]."

[96] Mr Kindness, in his report, stated that based on the Dear survey, it was suggested that Linda Crooks was acknowledged by both the surveyor, H W R. Dear, and Mr Kenneth Thorpe, as the owner of Section 1. It is indicated in the survey document that the interested persons were Godfrey Gordon, Excel Gordon and Linda Crooks.

[97] The learned judge's treatment of Mr Kindness' evidence is set out in paras. [18] and [20] of his judgment as follows:

> "[18] The Expert's evidence was helpful in clarifying a misunderstanding that, based on his questions, it appears that the [appellant] had about some of the terminology employed in the description contained in the Registered Title when the description is applied to the [Casserly no. 1 survey]. He explained that the direction of a line on the Plan is different from the location of the line. The direction, as the

name suggests relates to whether the line is running east to west or north to south (or the various other directional permutations thereof). The location of the line relates to where it lies in relation to the boundary of the Property. By way of example the line shown on the [Casserly no. 1 survey] at the bottom of the Property, is the line located to the south of the property, however, the direction of that line is east to west (or west to east depending on how one chooses to express it)…

[20] **The Expert explained that the [Casserly no. 1 survey] shows, and he has independently verified, the lands immediately below and touching Section 1 as being owned by Kenneth Thorpe**. The Plan shows the lands to the right of Mr Thorpe's land which are adjacent to the Property as being owned by Michael Lester. He said that those lands shown on the [Casserly no. 1 survey] as belonging to Michael Lester are currently owned by Cornerstone Investments & Finance Company Ltd in care of Bruce Spencer. His evidence as to what he was told about the ownership of that parcel of land in the past is hearsay and has been disregarded by the Court. However his evidence (exclusive of what he was told) was that if Section 1 is treated as a part of the Property, then the [Casserly no. 1 survey] would reflect it as butting, southerly partly on lands belonging to Kenneth Thorpe and partly on lands belonging to Michael Lester (instead of [David] Whitelock as described in the Title). The reasonable inference would then be that the lands shown on the [Casserly no. 1 survey] as being owned by Michael Lester, (or at least a portion of those lands which are adjacent to the property on the southern boundary) at the time the Title was prepared in 1973, belonged to David Whitelock." (Emphasis supplied)

The learned judge concluded:

"[21] …I wholly accept [Mr Kindness'] conclusion that Section 1 forms a part of the Property. I find that conclusion is reasonable having regard to the ownership of lands immediately to the south of Section 1 by Mr Kenneth Thorpe, in the context of the description in the Registered Title of the Property as butting southerly '...partly on lands belonging to Kenneth Thorpe...'.

> [22] **I am fortified in my conclusion because there was no evidence presented to the Court of Mr Kenneth Thorpe having owned any other land butting the Property southerly. In the absence of any evidence that he owned other such lands then the inescapable conclusion is that Section 1 is a part of the Property.** As it relates to the description in the Registered Title of lands butting the Property southerly and owned by David Whitelock, the reasonable inference is that those lands are the lands shown on the Plan as being owned by Michael Lester and that they were previously owned by David Whitelock at the time that the Registered Title was produced." (Emphasis supplied)

[98] As previously stated the weight to be attached to an expert's evidence was a matter for the learned judge's discretion. He could accept or reject the evidence of Mr Kindness, including his report, either in whole or in part. The appellant did not present any expert evidence to refute or challenge Mr Kindness's evidence and findings, despite the court's order appointing Mr Alexander as an expert on the appellant's behalf. The appellant's attempts to challenge Mr Kindness's findings based on his interpretation of the technical data had to be weighed by the learned judge against the evidence given by Mr Kindness. The learned judge was also entitled to conduct his own assessment of the evidence in order to make a determination on the issues raised.

[99] The learned judge, at para. [21] of the judgment, demonstrated that he was aware of the principles surrounding the treatment of expert evidence (see para. [97] above).

[100] The Kindness report was admitted into evidence by consent, along with the questions that were put to Mr Kindness and the answers to those questions. In addition, Mr Kindness was rigorously cross-examined by the appellant. Therefore, although no survey was conducted in accordance with the Land Surveyors Act and Regulations, the learned judge's treatment of the evidence presented to the court and his findings relative to the evidence cannot be said to have been plainly wrong. Grounds 4, 5, 6 and 9 also fail.

Issue 7: Whether the learned judge erred when he accepted the evidence of the expert regarding defacement of the Diana Chapman Certificate of Title (Volume 1098 Folio 523-Exhibit 3) (Ground of Appeal No. 7)

Issue 8: Whether the Judge erred in concluding that the land described in the 'Diana Chapman Title' is not part of the disputed area, contrary to his own findings of fact, and in concluding that there was insufficient evidence to establish a connection between that land and the disputed area (Ground of Appeal No. 8)

Appellant's submissions

[101] It was submitted that the learned judge, at para. [17] of the judgment, erred in finding that the notation of "K. Whitelock" on the Diana Chapman certificate of title was not an original notation and was a defacement of the title. Additionally, the appellant submitted that, as with issue no 6, this issue was raised by Mr Kindness for the first time in his answer to questions posed by the court.

[102] The appellant noted that Mr Kindness, in his report, stated that the name "K. Whitelock" was written on a copy of the diagram annexed to the original certificate of title registered at volume 1089 folio 523 ('the Chapman title') kept at the Office of the Registrar of Titles ('the titles office'). He also noted Mr Kindness's evidence that subsequent checks made by him at the titles office revealed that the name was not legally written on the diagram and that a member of the public may have defaced the document.

[103] It was submitted that the learned judge ought not to have relied on this finding by Mr Kindness for the following reasons:

I. The fact that there are different handwritings on the document is not definitive evidence of a defacement;

II. The Registrar of Titles or persons from the titles office were not called upon to give evidence;

III. The information provided by Mr Kindness was hearsay (see rule 32.7(2) of the CPR); and

IV. The other handwritten information on the Chapman title, which was said to be defacements, was proven to be part of the title.

[104] It was submitted as an undisputable fact that the land owned by Diana Chapman had been transferred by her to Cornerstone Investments. Consequently, the land owned by Diana Chapman, Michael Lester and Cornerstone Investments is the same parcel of land.

[105] The appellant also submitted that the learned judge erred in finding that there was insufficient evidence to demonstrate that there was a connection between the land described in the Chapman title and Section 1. This was said to be contrary to the learned judge's findings at para. [20] that: (a) Cornerstone Investments is the current owner of the land, which was owned by Michael Lester; and (b) this parcel of land adjoins the property. The appellant asserted that since the learned judge found that Michael Lester's land adjoins the property, the land said to belong to Diana Chapman adjoins the property. The appellant opined that since the Chapman title shows "K. Whitelock" as being on the opposite side of the road from the property, K Whitelock's parcel is in the same location as the land referred to in the description on the certificate of title for the property as belonging to David Whitelock. Consequently, K Whitelock's parcel is in the same location as Section 1.

[106] The appellant submitted that by rejecting the Chapman title, the learned judge deprived him of a fair trial.

The respondent's submissions

[107] Mr Brown stated that the Chapman title was tendered in evidence by the respondent, who sought to furnish the court with a history of the lands to the south of the property. He submitted that the appellant, in an effort to prove that the notation "K. Whitelock" on the diagram attached to the Chapman title meant that the land in Section

1 was owned by his family, posed questions to Mr Kindness on the issue. Mr Kindness, he said, in attempting to address the questions, opined that the writings were not part of the original title. In any event, the learned judge gave no weight to that opinion as he found that the Chapman property was not within the disputed area.

Discussion

[108] It is my understanding that the learned judge did not reject the Chapman title but merely stated that it could not assist in the determination of whether Section 1 was a part of the property. At para. [17] of the judgment, he stated thus:

> "The [appellant] produced a certified true copy of a registered title found at Volume 1089 Folio 523 in respect of property in the name of Diana Chapman ("the Diana Chapman Title"). Scribbled on the survey diagram to the west of the subject lands is the name "K. Whitelock". In his response to questions posed by the Defendant, the Expert explained that his investigations revealed that this writing was not a part of the original title. **It is the Court's view that one does not need to be an expert in the field of handwriting to see that the "K. Whitelock" as it appears is markedly different from the other handwritten text which appears on that diagram and the Court accepts the evidence of the Expert on this point**. **In any event, even if the presence of that name was legitimate and did indicate the ownership of land by the person so named, because of the absence of sufficient evidence to demonstrate a connection of the land shown on the Diana Chapman Title to the disputed area, Section 1, it would be of no assistance to the Court in determining the issue of ownership of the disputed area**", (Emphasis supplied)

[109] The appellant had raised this issue with Mr Kindness at question 10, albeit not directly. The question states:

> "Question 10
>
> With reference to paragraph 3 of your report, you said that pre-checked plan bearing Survey Department No. 148920

dated June 1977 suggested that Linda Crooks was acknowledged as owner of the disputed land.

Why didn't you mention in your report the plan bearing Survey Department No. 104489 (Volume 1098 Folio 523) dated April 1970, which using the criterion set out in paragraph 3 of your report in the case that K. Whitelock was acknowledged some 7 years earlier as the owner occupier of the disputed land?

ANSWER

THE NAME K. WHITELOCK IS WRITTEN ON THE COPY OF THE DIAGRAM IN THE REGISTRAR OF TITLE OFFICE BEARING SURVEY DEPARTMENT EXAMINATION NO. 104489 WHICH IS PART OF TITLE BEARING VOLUME 1098 FOLIO 523. AN EXAMINATION OF THIS DIAGRAM AND CHECK WITH THE TITLES OFFICE REVEALS THAT K. WHITELOCK WRITTEN ON THE DIAGRAM WAS NOT LEGALLY OR OFFICIALLY PLACED ON IT AND IT BEARS NO PART OF THE DIAGRAM ATTACHED TO THE REGISTERED TITLE. PREVIOUSLY THE RECORDS IN THE TITLE OFFICE WERE MADE AVAILABLE TO THE PUBLIC WHO WOULD FREQUENTLY DEFACE THEM. **IT IS BELIEVED THAT THIS TITLE WAS DEFACED WITH THE K. WHITELOCK AND THE NUMBERS 65059 AND 1052/729 BECAUSE THE TITLES OFFICE CONFIRMS THAT THEY ARE NOT A PART OF THE REGISTERED TITLE. K. WHITELOCK WAS THEREFORE NOT ACKNOWLEDGED IN THE LEGAL RECORDS OF THE REGISTRAR OF TITLE OFFICE AS NEIGHBORING TO THE LAND REFERRED TO IN TITLE REGISTERED AT VOLUME 1098 FOLIO 523. FURTHERMORE, THE TITLE REGISTERED AT VOLUME 1098 FOLIO 523 REFERS TO LAND FURTHER SOUTH AWAY FROM THE DISPUTED LAND WHEREBY EVEN IF K. WHITELOCK OWNS LAND ON THE OTHER SIDE OF THE PAROCHIAL ROAD FROM THIS PROPERTY IT WOULD NOT FALL WITHIN THE DISPUTED LAND**." (Emphasis supplied) (caps as in the original)

[110] The learned judge, at para. [17] of the judgment, made the point that Section 1 was not mentioned either in the wording of the certificate of title or the plans associated with the Chapman property. The learned judge was entitled to look at the writing on the

diagram attached to the Chapman title and make his own assessment, which he did. He was not obliged to agree with the opinion of Mr Kindness (see **Winston Coley v Roy Tyrell and anor** [2024] JMCA Civ 45 and **Cherry Dixon-Hall v Jamaica Grande** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 18/2007, judgment delivered 13 March 2008).

[111] The learned judge accepted the evidence of Mr Kindness that the notation "K. Whitelock" on the plan, annexed to the Chapman title, was not part of the original certificate of title. He also considered what the result would be if the notation were legitimate. His conclusion cannot be said to have been plainly wrong.

[112] Similarly, the learned judge's finding that there was insufficient evidence linking the Diana Chapman land with the property cannot be faulted. Mr Kindness, in answer to question 10, had stated that the Chapman title relates to land "further south away from [Section 1]" so "even if K. Whitelock owns land on the other side of the parochial road from the Diana Chapman land, it would not fall within [Section 1]".

[113] At para. [20] of the judgment, the learned judge inferred that "lands shown on the [Casserly no 1 survey] as being owned by Michael Lester, (or at least a portion of those lands which are adjacent to the property on the southern boundary) at the time when the title was prepared in 1973, belonged to David Whitelock". He arrived at this position based on his acceptance of Mr Kindness's evidence that the lands immediately below Section 1 are owned by Kenneth Thorpe. To the immediate right of the Thorpe lands are lands owned by Michael Lester (now owned by Cornerstone Investments). Those lands are adjacent to the property. The learned judge also accepted Mr Kindness' evidence that if Section 1 is treated as part of the property, the Casserly no. 1 survey would reflect that it is "butting, southerly partly on lands belonging to Kenneth Thorpe and partly on lands belonging to Michael Lester (instead of [David] Whitelock as described in the Title." This would be in keeping with the description of the property on the title. Judges are allowed to draw reasonable inferences from proved facts in arriving at their decisions, and the inference drawn by the learned judge pertaining to the

boundaries of the property cannot, in my view, be faulted. The drawing of inferences is tantamount to findings of fact, and his conclusion cannot be said to have been plainly wrong. In the circumstances, grounds 7 and 8 also fail.

Conclusion

[114] The determination of this appeal is largely dependent on whether this court finds that the learned judge erred in relying on the evidence of Mr Kindness pertaining to the southern boundary of the property. The appellant did not present any expert evidence to challenge Mr Kindness' evidence. Mr Kindness was, however, rigorously cross-examined by the appellant. In the circumstances, the learned judge was required to balance the evidence given by the respondent and Mr Kindness with that given by the appellant. The learned judge demonstrated that he was aware of the principles governing the treatment of expert evidence and applied those principles. His approach cannot be faulted, and he did not arrive at a decision which could be described as being "palpably" wrong or based on a misunderstanding of the facts or law. His decision was, in my view, correct. Therefore, the appeal as a whole must fail.

BROWN JA (AG)

[115] I, too, have read the draft judgment of Simmons JA and agree with her reasoning and conclusion.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. Costs of the appeal to the respondent to be agreed or taxed.