

**Confait v Nilsen**

**(2013) SLR 535**

MacGregor P, Fernando, Twomey JJA

6 December 2013

SCA 13/2009

**Counsel** P Pardiwalla for the appellant

K Domingue for the respondent

**The judgment of the Court was delivered by**

**MACGREGOR P**

[1] This case is one of the alleged encroachment by the appellants onto the respondents' land at Amitié, Praslin. The original complaint was made 17 years ago, with a plaint filed in 2001. The case in the Supreme Court took eight years to complete and another two and a half years from the completion of hearing to the delivery of the judgment, in which the trial Judge found that the appellants had encroached on the respondents' land to the extent of 18 square metres and had constructed part of their building thereon. He further found that that as a result of the encroachment, consequent damage had been caused to the respondents' property and ordered the sum of R 33,189.71 as indemnity, together with legal interest from the date of the filing of the plaints together with costs. He also ordered that the encroaching structure be demolished.

[2] The appellants have appealed against this decision on five grounds namely:

- 1) The learned judge erred in his finding that the evidence of Mr. Leong was not controverted on the question of an encroachment. The cross-examination of Mr. Leong clearly demonstrated that an error was manifest.
- 2) The evidence in this case does not support the learned judge's finding that the Plaintiff had proved its case in respect of the encroachment on a balance of probability. Consequently the learned judge erred in concluding that an encroachment had been proved by the plaintiff.
- 3) The award of damages by the learned judge is flawed and based on a wrong principle of law.
- 4) The order of the learned judge as to the time within which the encroachment should be demolished is unreasonable in the circumstances of the case. The learned judge failed to take into account that the premises in question was a tourism establishment
- 5) The order of the learned judge awarding interest from the date of the Plaint is unjust and unreasonable, bearing in mind that the learned judge first set the case for judgment on the 26/1/07.

[3] Ground 4 has not been pursued. We treat Grounds 1 and 2 together and as the other grounds are consequent to our determination of Grounds 1 and 2, they will be addressed at the same time.

[4] We find merit in the appellants' counsel's argument in relation to Ground 1 that the evidence of the Land Surveyor Leong was indeed controverted in cross-examination, and that he made a manifest error in calculating the alleged extent of encroachment.

[5] Cross-examination can controvert the evidence of a witness. In fact the main purpose of cross-examination is to test the evidence of a witness as to its veracity, credibility, accuracy, authenticity or weight. *Cross and Tapper on Evidence* (12th ed) at 313 states:

The object of cross-examination is twofold: first to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted; second, to cast doubt upon the accuracy of the evidence in chief given against such party.

[6] It is clear from the transcript of proceedings that his evidence could not be relied on given the fact that Mr Leong contradicted himself on many occasions.

[7] In the instant case the credibility of the respondents' main witness and the accuracy of his oral evidence were also further controverted by the documentary evidence of exhibit D5 which was not objected to by the respondents. Exhibit D5 is a letter to the Director of Surveys dated 23April 2003 from David Lebon, a Land Surveyor of long standing and of experience of which we take judicial notice. He states:

We have spent one day on Praslin endeavouring to find reliable control points on which to base the survey but to our dismay none of the points observed were consistent with one another. We have come to the conclusion that no reliable control points which can be

used to provide an unambiguous location of a boundary line in dispute, exist within the locality.

[8] We also note the contents of another letter from an officer of the Ministry of Land Use and Habitat, dated 5 August 1999 which states:

Since no beacons were to be found it was therefore impossible to ascertain the possibility of an encroachment. Note that we cannot rely on the sketch provided.

[9] In terms of this appeal, a final survey was sought but has proved difficult to conclude. When asked on appeal whether there was any exactitude in terms of the boundary on which this case was based, counsel for the respondent conceded that there could not be. It would appear to us that if a boundary cannot be established with any accuracy, no encroachment can be proved and hence neither damages, nor interests thereon or costs arise.

[10] There is also, as pointed out by counsel for the appellants a manifest error in a simple mathematical calculation on the part of the witness for the respondents, Mr Leong, which seriously undermines his credibility. In his sketch plan there is shown an encroachment of a length of 4.5 metres with a varying width of 0.41 to 0.45 metres. This would result in an encroached area of 1.845 square metres to 2.025 square metres. Both calculations however blatantly contradict the 18 square metres of encroachment averred by Mr Leong in his testimony. We have also taken into account the fact that he never went on site and instead relied on a technician whose name he could not remember and who had since left his employ.

[11] He also implicitly agreed with the appellants' case as to the uncertainty in the boundary between the land of the two parties at page 97 of the transcript of court proceedings.

Q. What is the total area of what you allege to be the encroachment?

A. Approximately 18 square metres.

Q. Is it possible for you to use the width and the lengths that you have to give us your calculations of PR10?

A. I will not get it correctly because there are no coordinates. The area is not calculated. The lines are not parallel. You cannot calculate exactly but we can get approximate calculations.

And at page 103

Q. You would agree with me that there are beacons which are not 100% accurate?

A. Yes

Q. The most accurate is to take the Government control points if there is one?

A. Yes.

His findings on the encroachment are accepted and relied on by the trial Judge and as this is a clear misdirection of fact, it clearly cannot stand.

[12] Accordingly Grounds 1 and 2 succeed. This relieves us of the need to consider the other grounds appeal.

[13] However, we feel the need to mention that had the appeal not succeeded on these grounds, we would have found in favour of the appellants on the issues of damages, interest and costs. While a claim for R 33,189.72 was made by the respondents for the costs of survey, relocating beacons and moral damage the trial Judge made an award for “injury to property and aesthetic value.” Article 555 (2) of the Civil Code only allows for the payment of damages “for any damage sustained by the owner of land.” While damage to property and moral damage could indeed have been awarded, the trial Judge awarded the sum of R 33,189.72 for what he terms “consequent injury to [his] property and its aesthetic value.” This was in clear contradiction to what was claimed and could not have been upheld by this Court.

[14] It was also grossly unfair to award interest on the award from the date of the plaint given that the inordinate delays in the completion of the trial could not be attributed to the appellant. We also note that it is unfortunate that counsel despite their attempts in exploring the settlement of this appeal lost a lot of time between August 2010 and November 2013 with 10 adjournments, failing in the end to reach an amicable settlement. This perhaps could have been achieved and may have restored good relations between parties who will nevertheless remain neighbours.

[15] For the reasons set out above, this appeal succeeds. We feel that given the circumstances of this case it would not be fair to order costs in the event. Consequently we order that each party should bear their own costs.