The Court of Appeal for Bermuda

CIVIL APPEAL No. 24 of 2017

B E T W E E N:

ROBERT GEORGE GREEN MOULDER

Intending Appellant

and

MESSRS COX HALLETT & WILKINSON (A FIRM)

1st Intended Respondent

STEPHEN P. COOK

2nd Intended Respondent

MICHAEL ALAN CRANFIELD

3rd Intended Respondent

PAUL JEREMY SLAUGHTER

4th Intended Respondent

JANET MURRAY SLAUGHTER

5th Intended Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Judith Chambers, McKenzie Friend, for the Intending Appellant
David Kessaram, Messrs Cox Hallet Wilkinson Ltd, for the 1st Intended Respondent
Paul Harshaw, Canterbury Law Ltd, for the 2nd Intended Respondent
Michael Mr Cranfield, the 3rd Intended Respondent in Person

Jonathan White, Messrs Marshall Diel & Myers Ltd, for the 4th and 5th Intended Respondents

Date of Judgment: **12 March 2018**

EX TEMPORE JUDGMENT

Whether judgment obtained in 2010 should be set aside on the ground that it was obtained by fraud

CLARKE, JA

Introduction

1 This is an application for leave to appeal from a judgment of the Chief Justice of 27 July 2017 whereby he dismissed Mr Moulder's application by way of originating summons of 4 January 2017 (numbered 2016 No 491 - *sic*) to set aside a judgment of the former Chief Justice Sir Richard Ground dated 26 November 2010. That judgment was delivered in an action – No 53 of 2010 – brought by Mr Moulder against five parties: (1) Cox Hallett & Wilkinson ("CHW"), (2) Stephen Cook (who in 1999 was a salaried partner of CHW), (3) Michael Cranfield, and (4) Paul and (5) Janet Slaughter.

2 The underlying facts are well known to the parties and it is sufficient to record them in summary.

3 Mr Moulder owned a parcel of land in Sandy's. Mr Cranfield owned a house to the north called "Hillcrest". Hillcrest was landlocked at least for vehicular access and lacked a rear garden. Its owners exercised vehicular access across Mr Moulder's parcel and encroached over that parcel to create a hedged garden space. Mr Cranfield claimed to have a possessory title to the rear garden ("the land") and to a right of way ("the right of way"). He claimed these entitlements by reason of adverse possession and long usage.

4 On 24 September 1999 Mr Cranfield agreed to sell Hillcrest to the Slaughters together with the land and the right of way. The sale agreement provided that the title to the land and to the right of way were based on adverse possession and use for over 20 years, of which Mr Cranfield undertook to the Slaughters to provide sworn evidence. On 29 October 1999 Mr Cranfield purported to convey the title to the rear garden and the right of way to the Slaughters. It is said that there was no separate payment for the land and the right of way, but they were undoubtedly purportedly included in the conveyance. Mr Cook, then of CHW, acted for the Slaughters.

5 It was only on 15 December 2003 that Mr Moulder first learnt of this conveyance and he was provided with a copy of it. Mr Moulder had contacted the Slaughters in late 1999 offering to sell to them the strip of land. They did not then tell him that they had already bought the land but told him to contact Mr Cook their lawyer. Mr Cook told Mr Moulder to get back in touch when he was ready to start development, and they could discuss the possibility of an acquisition further.

The Slaughters' action

6 In early 2004 Mr Moulder started clearing the hedge around the land and blocking the access to it. On 17 February 2004 the Slaughters obtained an ex parte injunction restraining Mr Moulder from entering on the disputed land; and they gave the usual undertaking in damages. On 20 February 2004 they brought an action against Mr Moulder – Action No 63 of 2004 – in which they asserted their right to the land and the right of way and claimed damages for trespass and other relief. This claim was based on adverse possession and long use. Mr Moulder issued a counterclaim for damages to be assessed in respect of the damage caused by the wrongly granted injunction and for trespass.

7 The ultimate outcome of this action was that the Slaughters lost. This was after two appeals to this court – No 15 of 2005 which was an unsuccessful appeal by

the Slaughters from the decisions of Wade-Miller J refusing to declare that they had acquired possessory title to the land; and No 1 of 2007 (decided by this court on 9 March 2007) which was a successful appeal by Mr Moulder from the decision in favour of the Slaughters that they had established that they had the right of way. The relief sought by the Slaughters was refused.

8 Mr Moulder did not further advance his counterclaim for damages, nor did he advance his claim against the Slaughters under their undertaking in damages. We were told that he did not do so because the damage which he had claimed to have suffered would have been more than what would have been covered by the undertaking. But as it seems to me whatever damage he suffered, if recoverable at all, would be recoverable either under the undertaking or as damages for trespass under the counterclaim or both. In any event, the result of the action was that Mr Moulder's title was unaffected by any claim of the Slaughters to adverse possession.

The 2009 Action

9 On 18 June 2009 the Slaughters began Action 2009 No 179 against Mr Cranfield alleging fraudulent concealment by Mr Cranfield of a letter which Mr Moulder had written on 23 July 1999 to Conyers Dill & Pearman, Mr Cranfield's then attorneys, disputing Mr Cranfield's title to the land, reminding Mr Cranfield that he was well aware of the position in relation to the land and of Mr Moulder's invitation that he should make an offer to purchase it, and saying that Mr Moulder had no objection to granting a legal right of way providing Mr Cranfield paid the cost of installing the roads servicing Mr Moulder's property. The letter indicated that Mr Moulder did not agree that the boundary between the two properties was as indicated on the plan attached to a letter of 27 May 1999 from Conyers Dill & Pearman, in which they had, on behalf of Mr Cranfield, claimed ownership of the land and asserted the right of way. The letter of 23 July 1999 was a reply to that letter. It was disclosed later in the 2010 action to which I shall refer.

10 By his defence of 4 September 2009, Mr Cranfield denied any obligation to disclose the Mr Moulder letter or any fraud and contended, *inter alia*, that the Slaughters case in the proceedings brought by Mr Moulder, and his own belief, was that a title to adverse possession had been acquired before Mr Cranfield had acquired the property. He also relied on a provision in the Sale and Purchase Agreement which expressly stated that the Vendor could not give good legal title to the land and the right of way and that the Vendor had supplied affidavits attesting to the Vendor's adverse possession and use of the right of way for more than 20 years, it being for the Slaughters to decide whether they should accept the title offered in that form. It was also alleged that the claim was barred by limitation, to which the response in a Reply was that the Slaughters had only learnt of the letter of July 1999 in 2004.

11 This action has never been heard and none of the averments have, therefore, been proved. It is, of course, an action to which only Mr Cranfield and the Slaughters are parties.

The 2010 Action

12 On 17 February 2010 Mr Moulder began Action No 53; and the statement of claim followed on 8 March 2010. That action was against the five parties whom I have mentioned.

13 The claim against CHW was that they were either directly or vicariously liable for the alleged fraud or negligence of Mr Cook.

14 The case against Mr Cook was that he was fraudulent or negligent in that he knew or ought to have known that Mr Cranfield's claim to the land and the right of way was bad and yet included them within the 1999 conveyance. Despite his knowledge he is said to have drafted a conveyance, which included the land and the right of way, and contained fraudulent misrepresentations as to the true

position in law in respect of both. It was also alleged that Mr Cook was in breach of a duty of care to Mr Moulder as a known owner of the Moulder estate whose property was wrongly included in the conveyance to the Slaughters.

15 The case against Mr Cranfield was that he had fraudulently purported to convey the disputed land and right of way and had sworn a false affidavit, being one of those requested by Mr Cook, on behalf of the Slaughters, in support of the title prior to the execution of the conveyance, which affidavit contained fraudulent misrepresentations and untrue statements about the land and his occupation of it.

16 The case against the Slaughters appears to have been that they knew and were party to the fraudulent or negligent drafting and execution of the 1999 conveyance of the land and the right of way and knew the falsity of Mr Cranfield's claim to the land.

The Judgment of Ground CJ

17 On 26 November 2010 Ground CJ struck out the 2010 action on the ground that it disclosed no reasonable cause of action and, also, parenthetically, that it was statute barred. He did so essentially on the following bases:

(i) No claim was made by Mr Moulder that any representation in respect of the 1999 conveyance was made to him, or that he relied on it; he claimed he did not know of the conveyance until 2003 and, in any event, claimed that the land was his and that there was no right of way. That ruled out any claim in misrepresentation against CHW, Mr Cook or Mr Cranfield;

(ii) No duty of care was owed by any of the participants in the 1999 conveyance to Mr Moulder; nor did Mr Cook or CHW owe him any duty of disclosure or good faith;

(iii) The Slaughters supposed knowledge of the falsity of the claim to the disputed land did not amount to a cause of action in fraud on which Mr Moulder could rely; nor did they owe him any duty of care to ensure that they were not being conveyed someone else's land.

(iv) The allegation against the Slaughters that Mr Moulder was lulled into a false sense of security did not give rise to any cause of action;

(v) The particulars of the supposed fraud by Mr Cook (and CHW) and the Slaughters were inadequate; being equivocal and equally consistent with innocence; but Ground CJ said that he would have struck the claim out against them, even if it had pleaded the necessary elements of a cause of action in fraud or dishonesty;

(vi) Even if there had been any cause of action in fraud or negligence it would have been barred by limitation since time began to run against Mr Moulder at the latest from December 2003, which was, on Mr Moulder's own case, the time when he became aware of the 1999 Conveyance;

(vii) The claims in the counterclaim in Action 2004 No 63, including the claim for damages against the Slaughters, could not be pursued in a separate action; nor could any claim to enforce the undertaking in damages.

18 As that judgment indicates, fraud does not necessarily unravel all – a maxim invoked on a number of occasions by Ms Chambers on the part of Mr Moulder. On the contrary, the law places limitation on those who can make a claim on fraud.

The judgment of the Court of Appeal

19 When the case came, with the leave of Ground CJ, to the Court of Appeal Mr Moulder had asserted, but had not pleaded, a cause of action in conspiracy to

defraud. On 17 June 2011 the Court dismissed the appeal on the basis that any claim, whether in fraud, negligence or conspiracy, was in any event barred by the Limitation Act since any cause of action arose upon the sale and conveyance in 1999, which diminished the value of his land and restricted what he could do with it. Further, more than six years had elapsed since December 2003, when Mr Moulder had learnt of the conveyance, which the Court of Appeal regarded as "*the essential fact*", on which he based his claims, before the 2010 action was launched.

20 In February 2013 Mr Moulder discovered that the Slaughters had sued Mr Cranfield. He only secured access to the pleadings in that action in July 2016.

21 Mr Moulder now contends that the judgment of 2010 was obtained by fraud and should on that account be set aside, together with all subsequent orders in the action.

22 In order to set aside that judgment on those grounds it would be necessary:

(a) to show that the 2010 judgment was obtained by the defendants deliberate or recklessly misleading the court on a material matter;

(b) to establish that the matter would, if known, entirely change the basis on which the 2010 order was made.

(c) to show that the information relied upon was new information not reasonably available in 2010.

23 In addition, the proper way to seek to impugn the 2010 action is by a fresh action to set aside the judgment in which, the alleged fraud is distinctly, fully and clearly particularised.

24 Lastly, an application to set aside the 2010 order on the grounds of fraud is not to be regarded as some sort of rehearing of the application before Ground CJ or the Court of Appeal. Unless the grounds for setting aside an action for fraud are established, it is immaterial that either the Chief Justice or the Court of Appeal were in error in their analysis of the law.

Conclusion

25 In my judgment Mr Moulder clearly has no realistic prospect of persuading the Court of Appeal that the Chief Justice should have decided that the 2010 action should be set aside on the grounds of fraud. I say that for a number of reasons.

26 Firstly**,** it is, with one exception, not at all clear to me, what exactly is the fraud on the court in 2010 that is relied upon. I find it impossible to work out from Mr Moulder's discursive affidavit of 23 December 2016 and his subsequent affidavits, with their repeated reference to fraud in general terms, exactly what false statements of material facts, by whom, in 2010 are relied on, and what effect they are said to have had on (a) Ground CJ and (b) the Court of Appeal. The application wholly lacks the clear and distinct particulars - of falsity and intention to deceive ("*conscious and deliberate dishonesty*") - necessary to support an application to set aside a judgment on the ground that it has been obtained by fraud.

27 The only thing that is clear is that Mr Moulder relies on the non-disclosure /concealment of the 2009 action. Insofar as what is relied on is the non-disclosure in 2010 of the pleadings in the 2009 action, that was not something that any of the defendants were bound to disclose upon an application to strike out the 2010 action on the ground that it disclosed no reasonable cause of action or was barred by limitation.

28 Secondly, the only new material relied upon is the discovery of the 1999 Action and the pleadings therein. I accept, as did the Chief Justice, that Mr Moulder could not have had access to those pleadings in 2010. But they are no more than pleadings. No determination has ever been made of the truth or otherwise of the averments made therein. If Ground CJ had seen the pleadings he would not have taken the averments as established (especially when there was a dispute about them).

29 Third, there seems to me to be no realistic prospect that Ground CJ would have viewed the position as "*entirely changed*" if only he had seen the pleadings in the 1999 action. The basis upon which he reached his decision, as I have set out, was:

(a) that Mr Moulder had pleaded no tenable cause of action;

(b) that he had not given adequate particulars of fraud against Mr Cook CHW and the Slaughters; and

(c) that any claim was in any event out of time.

30 The fact that the Slaughters had brought an action against Mr Cranfield alleging fraud in relation to the 1999 conveyance did not affect any of these points. Even if the averments were true they would not affect the basis upon which Ground CJ reached his decision.

31 In truth, the dispute between the Slaughters and Mr Cranfield was truly *res inter alios acta.* Any misrepresentation made by Mr Cranfield to the Slaughters gave rise to no possible claim in misrepresentation by Mr Moulder. Nor did what happened between the seller and the buyers give rise to any duty of care to a third party. The fact that the transaction between them was (so Mr Moulder

claims) "*tainted by allegations of fraud*" does not establish that he has any claim against any of the defendants.

32 Mr Moulder places reliance on the fact that Ground CJ gave him permission to appeal to the Court of Appeal. That is of no assistance to him. It reflects no more than that the Chief Justice thought that there was an arguable point as to whether his decision was right that was fit for consideration by this court. Ground CJ was in no sense purporting to overturn his own decision or indicating that he had changed his mind. Further, this Court decided that his decision was correct.

33 Further, and in event, the case was decided against Mr Moulder on the limitation point. The Court of Appeal dismissed the appeal from the judgment of Ground CJ on the basis that the cause of action under any of the three possible heads, accrued in 1999 when Mr Moulder suffered actual loss by reason of the conveyance. Even if the Chief Justice and the Court of Appeal were wrong as to when the cause of action arose or when time began to run (and I do not think that they were) their decision on limitation would not have been in any way affected by the knowledge of what happened in the 1999 action and nor would it have been any different if the averments in that action had been shown to be true. The 1999 action would not have entirely changed the basis upon which either Ground CJ or the Court of Appeal made their decision, nor would any conspiracy claim.

34 As the CJ said it was and is obvious that the object of the present action is to re-litigate a claim which was itself struck out nearly 7 years ago. That is, in the circumstances which I have described, in my view, an abuse of the process of the court.

35 For all these reasons I would refuse permission to appeal.

BAKER, P

36 I agree.

BELL, JA

37 I also agree.

C.S.R.S. Clarke

Clarke JA

Scott Baker

Baker P

Geoffrey R. Bell

Bell JA