IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2016: No. 491

BETWEEN:

ROBERT GEORGE GREEN MOULDER

Plaintiff

-v-

MESSRS COX HALLETT & WILKINSON (A FIRM)

1st Defendant

-and-

STEPHEN P. COOK

2nd Defendant

-and –

MICHAEL ALAN CRANFIELD

3rd Defendant

-and –

PAUL JEREMY SLAUGHTER

4th Defendant

JANET MURRAY SLAUGHTER

5th Defendant

RULING ON STRIKE OUT APPLICATION

(in Chambers)

Date of hearing: May 10, 2017, July 24, 2017
Date of Ruling: July 27, 2017

The Plaintiff (assisted by Ms Judith Chambers as his McKenzie Friend) appeared in person
Mr David Kessaram, Cox Hallett Wilkinson, for the 1st Defendant
Mr Paul Harshaw, Canterbury Law Limited, for the 2nd Defendant
Mr Timothy Marshall, Marshall Diel & Myers Limited, for the 4th and 5th Defendant
The 3rd Defendant appeared in person

Introductory

1. On February 17, 2010, the Plaintiff issued proceedings against the Defendants in the present action in Civil Jurisdiction 2010: No. 53 (the "2010 Action"). Those proceedings were struck out by Ground CJ on November 26, 2017 (*Moulder-v- Cox Hallett Wilkinson (a Firm)* [2010] Bda LR 78) (the "2010 Order"). The Court of Appeal dismissed the Plaintiff's appeal against Ground CJ's decision on June 17, 2011 ([2011] Bda LR 40). Subsequently, leave to appeal to the Judicial Committee of the Privy Council was refused.

2. The Defendants obtained substantial costs orders against the Plaintiff in the 2010 Action which they are currently seeking to enforce by way of execution against property owned by the Plaintiff. The motivation behind the present Originating Summons was clearly a desire to obtain a full trial of the 2010 Action and to set aside the costs orders the Defendants are currently enforcing against the Plaintiff.

3. On January 4, 2017, the Plaintiff issued an Originating Summons against the Defendants seeking the following primary relief:

> "*1. For the strike-out Judgment dated the 26th November 2010 and all subsequent decisions, writs and orders obtained in Supreme Court civil proceedings number 53 of 2010 be set aside as a consequence of the Defendants having obtained the judgment by way of a fraud on the court. The plaintiff will set out details of the fraud in his accompanying affidavit, but such fraud is alleged due to the discovery of new material evidence being the existence of, and contained within, Supreme Court Civil Jurisdiction case no. 179 of 2009 between the Fourth and Fifth Defendants and the Third Defendant, which file was material to case number 53 of 2010 but was concealed from both the Court and the Plaintiff…*"

4. In March and April 2017, the Defendants filed Summonses seeking to strike out the Plaintiff's Originating Summons on the grounds that it was frivolous and vexatious and did not disclose a reasonable cause of action.

5. At the outset a central theme ran through the Plaintiff's presentation. The word fraud was bandied about so indiscriminately as to strip the word of its legal meaning. It was recited like a ritual incantation, often to merely embrace conduct by the Defendants (and their lawyers) which ranged from entirely innocent acts to simply firmly defending their legitimate rights. The 2010 Action was in large part struck out because the Plaintiff failed to appreciate how narrow a concept fraud is in the legal context. The Defendants effectively contended that the present proceedings were

afflicted by the same fatal flaw; a failure to appreciate that the ability of the courts to grant remedies is not open ended but is constrained by established principles of substantive and procedural law. Mr Marshall put the position concisely thus. Any loss flowing from the injunction obtained against the Plaintiff in the 2004 proceedings which he ultimately won could have been recovered by enforcing the undertaking given the 4th to 5th Defendants in those proceedings. In commencing the 2010 Action the Plaintiff had simply pursued the wrong remedy.

6. Before considering the facts relevant to the present application (most importantly what was the basis of the 2010 Order and how does the new evidence undermine it), it is necessary to decide what legal principles apply to:

   - striking out proceedings;
   - setting aside judgments procured by fraud.

Legal findings

<u>Striking out test</u>

7. The legal test for striking out proposed by Mr Harshaw was not in dispute. In *Broadsino Finance Co Ltd-v- Brilliance China Automotive Holdings Ltd* [2005] Bda LR 61 at page 4, the Court of Appeal for Bermuda (Stuart-Smith JA) stated:

   > "*<u>There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible</u>. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known.....*
   > *There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219-220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the*

Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence". [Emphasis added]

8. The governing principles for deciding an application to strike out may be reduced, for present purposes, to three short propositions:

- a proceeding should only be struck out when it is obviously bound to fail;
- when considering whether a claim should be struck out because it discloses no reasonable cause of action, the Court looks only at the pleadings and ignores the evidence;
- when considering whether a claim should be struck out because it is (legally <u>and factually)</u> frivolous or vexatious, the Court does have regard to the factual position. The present strike out applications fall into this category.

<u>Setting aside a judgment procured by fraud</u>

9. There is one local decision on this legal test, which Mr Marshall placed before the Court. In *Fidelity Advisor Series VIII and others-v- APP China Group, Ltd.* [2007] Bda LR 35, I held:

"*66. There was no serious dispute on the legal principles applicable to proving the fraud allegation. Mr. Woloniecki submitted that (a) perjury was a recognised form of fraud for the purposes of an application to set aside a judgment by fraud, (b) the action must be based on new evidence not previously available, (c) a witness for the successful party in the previous proceedings must be shown to have wilfully made a statement he knew to be false or did not believe to be true[9] , (d) the burden was on the Plaintiffs to establish that perjury was "*distinctly more probable than not*", and (e) the perjured evidence would be material if it 'entirely changed the nature of the case'* : *Kuwait Airways Corp v Iraqi Airways Corp (No. 5) [2003] 1 Lloyds Rep 448 .*

67. I also accept the following submissions of Mr. Hargun. Firstly, this action is limited to the fraud issue and cannot be treated as a rehearing of the original application under section 99 of the Companies Act 1981 for the sanction of the Scheme: Flower v Lloyd *(1876) 6 Ch 297 at 301 . Secondly, the allegation must be fully particularised and strictly proved; "there must be conscious and deliberate dishonesty, and the declaration must be obtained by it": The Ampthill Peerage case [1977] AC 547 at 571. I accept this latter*

dictum, having regard to the fact that deliberate dishonesty is what is pleaded in this case, but mindful of the fact the strict legal position appears to be that recklessness will suffice. In Fletcher -v- Royal Automobile Club Ltd . [2000] 1 BCLC 331 , Neuberger J held:

> *'The fraud alleged in the present case is therefore an admittedly inaccurate statement made by or on behalf of RACL allegedly in order to deceive the court into granting the relief which it duly granted. So far as the principles are concerned in relation to pleading and establishing this fraud, it seems to me that the following five points apply.*
>
> *First, the position is no different from any other allegation of allegedly fraudulent misstatement.* ***What has to be pleaded and established is actual dishonesty or recklessness. Mere negligence or inadvertence is plainly not enough. In other words, the plaintiffs would have to establish that the person responsible for giving the information knew it was wrong or was completely unconcerned as to whether it was right or wrong and took no steps whatever to check*** *; it would not be enough to show carelessness ….' [emphasis added]*"

10. From that somewhat indigestible passage it is possible to extract the following bite-sized propositions:

- the Plaintiff must show that 2010 Order was more probably than not obtained by the Defendants deliberately or recklessly misleading the Court on a material matter;
- a matter will be material if it would entirely change the basis on which the 2010 Order was made;
- the information relied upon by the Plaintiff to demonstrate the falsity of the Defendants' case must be new information not reasonably available at the time the 2010 Action was struck out.

The basis of the 2010 Order

11. Ground CJ in his judgment provided the following helpful overview of what the 2010 Action was about:

"*2. The action arises out of a boundary dispute and this is not the first time that it has led to litigation. The plaintiff ('Mr. Moulder') owns a parcel of land in Sandys parish which he was proposing to subdivide and develop. The third*

defendant ('Mr. Cranfield') owned a house, 'Hillcrest,' which lies to the north of the Moulder parcel. Hillcrest was essentially land-locked, at least for vehicular access, and the original plot lacked a rear garden. Nonetheless its owners exercised vehicular access across the Moulder parcel, and over the years they had encroached upon that land to create a hedged garden space at the rear of the house. The encroachment is shown as the outlined area in the plan below. The vehicular access is shown to the right of that.

3. In 1999 Mr. Cranfield sold Hillcrest to the fourth and fifth defendants ('the Slaughters'), at which time he purported to convey to them a right of way across the plaintiff's land, and also title to the rear garden area (indeed, the plan above is taken from the Slaughter conveyance). The title that Mr. Cranfield conveyed was based on adverse possession, and he also, at the Slaughters' request, supplied affidavit evidence, both from himself and from third parties, to support that. The second defendant ('Mr. Cook') acted for the Slaughters in respect of that conveyance. The first defendants ('Cox Hallett') employed Mr. Cook at that time as a salaried partner.

4. The Slaughters continued to enjoy their access and garden until early 2004 when Mr. Moulder asserted his title by clearing the hedge around the encroachment and blocking the access. Mr. Moulder says that this was the initiation of his development scheme. The Slaughters then obtained an emergency ex parte injunction on 17th February 2004 to restrain this, and brought an action (2004 No. 63) to assert their title. That litigation was protracted. On 6th June 2005 Wade-Miller J refused to declare that they had acquired possessory title to the disputed land. That was appealed, and on 17th November 2005 the Court of Appeal dismissed that appeal, giving reasons for doing so on 25th November 2005. However, they also held that the learned Judge had not dealt with the issue of the right of way, having been misled by counsel into the belief that that had been sorted out by agreement. The Court of Appeal accordingly remitted that question to the trial judge. There was then a second trial, and on 5th December 2006 the Judge this time found for the Slaughters. However, that decision was then appealed, and on 9th March 2007 the Court of Appeal allowed that appeal, and set aside the Judge's order. The net effect was that the Slaughters lost on all points.

5. The matter did not, however, end there. On 17th February 2010, nearly three years after the second Court of Appeal judgment, Mr. Moulder issued these proceedings. It is perhaps not coincidental that the proceedings were issued six years to the day after the issue of the injunction which started the Slaughters' action. The writ identifies 12 heads of claim:

> *1. Damages for "the fraudulent, deceitful or in the alternative negligent drafting execution and concealment" of the Slaughter conveyance.*
>
> *2. Damages for fraudulent or negligent misrepresentation by D1 and D2.*

3. Damages for fraudulent misrepresentation by D3 - D5.

4. Damages for the plaintiff's loss of use of his land, including the loss of the opportunity to develop etc.

5. Damages for increased costs and loss occasioned by the delay to Mr. Moulder's proposed development on his land.

6. Damages for trespass, including mesne profits for the Slaughters' occupation of the land from 28th October 2003 to 9th March 2007.

7. Damages for wrongful building works on the disputed land by D3 - D5.

8. Damages "for mental and physical injury and distress and damages to reputation and loss of family life caused to the Plaintiff".

9. Aggravated and exemplary damages.

10. Further or other relief.

11. Indemnity costs for action 63 of 2004, including the appeals.

12. Indemnity costs for this action."

6. The Statement of Claim is dated 8th March 2010. Paragraph 85 pleads various items of damage totaling $3,918,113, although $1.5M of that is made up of 'estimated aggravated damages'. The pleading begins with an introductory section which sets out the narrative background, and then goes on to plead specific claims against each of the defendants.

7. The pleaded narrative history is, in broad terms, that there was a history of dealings between Mr. Moulder and Mr. Cranfield which demonstrates that the latter knew that any claim to the disputed land was contested. In particular there had been an exchange with Mr. Cranfield's then lawyers in 1999: by a letter of 27th May 1999 Conyers Dill & Pearman wrote on Mr. Cranfield's behalf claiming the land and the right of way, to which Mr. Moulder says that he replied on 23rd July 1999 offering to grant a right of way on terms, but stating that he disputed the claim to the land and that he would defend any action. He pleads that when he got no substantive reply he assumed the claim was abandoned. Mr. Moulder also pleads that after the conveyance to the Slaughters he contacted them in late 1999 informing them of his development plans and offering to sell them a strip of land to enlarge their garden, but they told him to contact their lawyer, Mr. Cook, which he did. He says that Mr. Cook told him to get back in touch when he was ready to start his development and at that time they could discuss the possibility of an acquisition further.

Four years later in December 2003, Mr. Moulder says that he was about to start preparatory works for his development, so he again contacted the Slaughters and proposed selling them a strip of land for $40,000. He was again referred to Mr. Cook, whom he contacted with that offer, whereupon he says that Mr. Cook told him that he would discuss the offer with his clients and that "he would encourage them to buy". It is Mr. Moulder's case that up to this point no-one had told him about the purported conveyance of the disputed land, of which he remained unaware. However, after this conversation Cook did tell him about it, saying that as a result the Slaughters were not willing to pay anything for the land.

8. The date of the conversation when the plaintiff says he first learned about the conveyance is crucial to the limitation defence which the defendants seek to raise. It is not specified in the Statement of Claim, but in subsequent Further and Better Particulars given on 3rd May 2010 the plaintiff stated that 'It was on or about 15 December 2003 that the Fourth Defendant first stated to the Plaintiff that the Third Defendant had conveyed the "possessory land' to the Fourth and Fifth Defendants.' It should also be noted that in his evidence in 2004 No. 63 the plaintiff had sworn an affidavit in which he gave a similar date and source for his discovery of the conveyance…"

12. It is clear from the judgment as a whole, and the penultimate paragraph of the judgment in particular, that the 2010 Order was based on (a) the pleadings disclosing no reasonable cause of action, and (b) a finding (based on the pleadings and certain evidence) that any claim arising out of the 1999 Conveyance was clearly time-barred (i.e the claim was frivolous and vexatious and bound to fail) :

"*42. I therefore strike out the indorsement of the writ and the statement of claim against all the parties on the basis that -*

(i) *in respect of any and all claims in fraud and/or negligence the pleadings fail to disclose a reasonable cause of action;*

(ii) *any and all claims in fraud and/or negligence, or indeed any other claim, arising out of the 1999 Conveyance, are now statute barred...*"

13. The central findings made by Ground CJ in relation to no reasonable cause of action being disclosed were the following:

(1) **1st and 2nd Defendants**:

"*13. In my judgment Mr. Moulder's pleaded claim against the defendants in fraud discloses no cause of action because it is not pleaded that the misrepresentations made in the conveyance were made to him, nor is it pleaded that he relied upon them. Indeed, either such averment would be inconsistent with his case that he did not know about*

the conveyance until December 2003, and that when he found out, he disputed it.

14. It is said in the alternative that Mr. Cook owed a duty of care to the plaintiff 'as a known owner of the Moulder Estate property and therefore a person who would be directly affected and injured by his failure to ensure that no part of the Moulder estate property was wrongfully included in the Slaughter Conveyance.'

15. In my judgment that is not enough to establish a duty of care. I have been taken through the analysis of the various modern approaches to when a duty of care may arise conducted by Sir Brian Neill in BCCI (Overseas) Ltd. v Price Waterhouse [1998] BCC 617 (CA), including the 'threefold test' of -

> *(a) was it reasonably foreseeable that the plaintiff would suffer the kind of damage which occurred?*
>
> *(b) Was there sufficient proximity between the parties?*
>
> *(c) Was it just and reasonable that the defendant should owe a duty of care of the scope asserted by the plaintiff?*

16. There obviously has to be more than the loss itself. As Lord Hoffman said in Stovin v Wise [1996] AC 923 :

> *'The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from the person . . . whose act or omission can be said to have caused it. The default position is that he is not.' ...*";

(2) The 3rd Defendant

"*22. It is not entirely clear what the cause of action advanced against Mr. Cranfield is, but it appears to be fraud in that he executed the conveyance to the Slaughters and thereby 'fraudulently purported to convey' the disputed land and right of way. It is also said that he swore a false affidavit, being one of those requested by Mr. Cook in support of the title prior to the execution of the conveyance, 'which contained fraudulent misrepresentations and untrue statements' about the land and his occupation of it. Again, it is not pleaded that the representations were made to the plaintiff, and indeed in the nature of things they could not have been. Nor is it pleaded that the plaintiff relied upon them, and again it could not be for that would be utterly inconsistent with his case. There is, therefore, no sustainable pleading of a case of fraud*";

(3) The 4th to 5th Defendants

> *"24. As with Mr. Cranfield, the pleading against the Slaughters is not entirely clear, but again appears to be based upon their knowledge of the falsity of the claim to the disputed land. Again, as with the other defendants, I do not consider that that can amount to a cause of action in fraud, nor do I think that the purchasers of a property owe a duty of care to ensure that they are not being conveyed someone else's land.*
>
> *25. There is also a pleading against the Slaughters of deliberate concealment, it being said that the plaintiff was entitled to be dealt with in good faith but was "lulled into a false sense of security". Again, that does not plead a recognizable cause of action.*
>
> *26. It is then said that the Slaughters lied to the court in action 2004 No. 63, and misled it by relying on the conveyance to obtain the injunction. Whether that be true or not, it does not disclose a cause of action known to the law. Mr. Moulder did, however, have a remedy for any damage caused by the injunction against him, and I have dealt with that further below.*
>
> *27. Finally it is said that the Slaughters blocked and delayed the plaintiff's applications to the Planning Department, by asserting their false claim to the land. Again, I do not think that this discloses a recognisable cause of action.*"

14. In each case the claims against the Defendants were struck out because, assuming the facts alleged by the Plaintiff in his pleadings in the 2010 Action were true, the conduct complained of did not support a legally recognised claim. This was essentially because the Plaintiff was complaining about fraudulent conduct by the Defendants in relation to a transaction (the 1999 Conveyance) in which the Plaintiff was not directly involved. The 2010 Order was made on the implicit or tacit basis that (1) it could potentially be legally viable for the Slaughters as purchasers to allege that they were deceived by false representations made by Mr Cranfield in the 1999 Conveyance which they relied upon, but (2) the Plaintiff could not rely upon any such deceit or fraud, because he was not on his own case deceived by any misrepresentations made in a contract to which he was not a party and of which he was unaware until 2003. These fundamental legal problems were not pleading points which could have been cured by way of amendment[1]. Nor did they depend on any assessment of the truth of the underlying facts. These were legal findings which were summarised by Ground CJ as follows:

> "*41. I have born in mind the strictures in Electra Private Equity Partners (Ltd Partnership) & Ors v KPMG Peat Marwick (A Firm) & Ors [1999] EWCA*

[1] It was only in the alternative that Ground CJ ruled that the allegations of fraud were liable to be struck out because they were improperly pleaded.

Civ 1247 at p. 17. I have exercised particular caution in respect of the negligence claim, because the existence of a duty is in issue, and such matters are peculiarly fact sensitive. Nonetheless, as far as the claims in fraud and negligence are concerned, and taking the factual allegations in the pleadings at their highest, I do not think that they disclose a cause of action. There were no representations made to Mr. Moulder so as to found a case in fraud, and none of the parties owed him a duty of care so as to found a case in negligence. I consider that this is a matter of law, which I can see around clearly, and that this is one of those clear and obvious cases where it is appropriate to strike out the pleading as disclosing no cause of action."

15. Identifying what the core of the 2010 Action was about is fundamental to any meaningful assessment of whether or not the 2010 Order should be set aside because the Defendants obtained the Order by deceiving the Court about a significant matter. It was on the face of it difficult to see how the matters the Plaintiff complains were fraudulently concealed from him and the Court (the fact that in 2009 the Slaughters sued Mr Cranfield for fraudulent misrepresentations made in the 1999 Conveyance) had any relevance to the <u>legal</u> validity of the Plaintiff's pleaded claims in the 2010 Action.

16. The central findings recorded in relation to the 2010 action being time-barred were as follows:

> "*30. Had there been a cause of action in fraud or negligence, I would have considered that it accrued when damage was suffered, the cause of action being incomplete until then. Damage is normally suffered when the plaintiff relies upon the false statement to his detriment: see Foster v Outred & Co. [1982] 2 All ER 753 , at 765 (a case of negligent advice):*
>
> > *'I would hold that in cases of financial or economic loss the damage crystallizes and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment.'*
>
> *However, it is hard to apply that sensibly here, where there was neither representation nor reliance. It is however plain, as set out in paragraph 8 above, that Mr. Moulder knew of the 1999 conveyance at some point in December 2003, and I consider that time began to run against him in respect of any cause of action that he could erect on that from that moment at the latest. Any such cause of action was, therefore, in my view statute barred at the time when the writ was issued. While that may be academic on the case as pleaded, given my finding that it discloses no reasonable cause of action, it might be important if the plaintiff sought to frame his case in some other way.*"

17. The finding that any viable claims would have been time-barred in any event was based primarily on the Plaintiff's pleaded case (Further and Better Particulars of the Statement of Claim) <u>and</u> based on an Affidavit sworn by the Plaintiff himself in 2004:

No. 63. It was based entirely on the Plaintiff's own case as to when he first became aware of the 1999 Conveyance. It was a finding which could not have been undermined in any way by the 'new evidence' upon which the Plaintiff relied in the present case.

18. On appeal, the Plaintiff sought to sidestep the no reasonable cause of action findings of Ground CJ by advancing a new conspiracy to defraud claim. This resulted in the Court of Appeal, in an effort to save time, basing its decision on the more clear-cut limitation issue. Sir Robin Auld JA, delivering the judgment of the Court of Appeal on the Plaintiff's appeal against the 2010 Order striking out the 2010 Action, concluded as follows:

> "*36. Accordingly, we dismiss the appeal on the ground that all Mr Moulder's pleaded claims and his unpleaded claim of conspiracy to defraud would, in any event be statute-barred. Although it is not necessary to our decision, we add that if all the substantive matters had been fully argued before us by the Respondents as well as Ms Chambers, as they were before the Chief Justice, it is highly probable that we too would have concluded that they showed no reasonable cause of action.*"

The "new" evidence and its impact on the 2010 Order

19. The "new" evidence the Plaintiff relied upon as grounds for setting aside the 2010 Order on the grounds that it was obtained by a fraud on the Court. In his First Affidavit sworn in the present proceedings, the Plaintiff deposed as follows:

> "*14. My application alleges fraud on the court, and is made due to the discovery of new evidence which could not be discovered previously. The new evidence includes the fact that the Fourth and Fifth Defendants filed a claim against the Third Defendant, being Supreme Court case number 179 of 2009, eight months before I filed my claim 53 of 2010-and that their claim also alleged fraud. The existence of the Case 179 of 2009 was concealed even though it was a huge material fact in my claim 53 of 2010 and the non-disclosure, concealment and conflicting statements painted a false picture which deceived the court in the strike-out hearing of my claim 53 of 2010…*
>
> *20.Had he known about Case 179 of 2009 the then Chief Justice would have known that the transaction between the Third Defendant and the Fourth and Fifth Defendants was already touched by allegations of fraud and dishonesty and that my claim 53 of 2010 alleging the same was not frivolous, vexatious, scandalous or abusive. Instead what transpired is that by concealing major material facts and filing documents which conflicted with the existence of Case 179 of 2009 and its contents the then Chief Justice was wrongfully induced by the Defendants into making the material findings that he did.* "

Was the evidence available at the time of the 2010 Action

20. The Plaintiff through Ms Chambers submitted that the contents of the pleadings were not available because even if he had searched the Cause Book in 2009 or 2010 (as he did when he learned about the case brought by the Slaughters against Mr Cranfield in 2009: No. 179 (the "2009 Action")), those pleadings were not legally available to him. This submission was clearly sound.

21. It was only in 2015, thanks in large part to the advocacy of Mr Marshall in another case (*Bermuda Press Holdings Ltd-v-Registrar of the Supreme Court* [2015] SC (Bda) 49 Civ) , that the right of public access to files in pending cases began to open up. An Amended Practice Direction on Access to Court Records (Circular No. 23 of 2015, November 16, 2015) introduced for the first time, in limited categories of cases, access to "*(a) originating process, and (b) judgments and orders*". The full contents of the file in the 2009 Action would probably have been liable to be disclosed by the parties to it in the 2010 Action; but the 2010 Order was made before the discovery stage was reached. It is a settled legal principle that a party alleging fraud in a legal proceeding must be able to plead a viable claim at the start of the case and cannot hope to solidify a shadowy case by information which may be obtained from his opponent through discovery. For example, in *The Ampthill Peerage* [1977] A.C. 547 at 591 (House of Lords), Lord Simons observed: "*A person is not permitted to merely allege fraud in the hope of discovering it as the case develops*".

Was the evidence material

22. It is easy to see that the fact that the 4th and 5th Defendants were alleging that the 3rd Defendant was guilty of fraud in relation to the 1999 Conveyance was evidence which the Plaintiff would have wished to deploy at trial in the 2010 Action, had he been able to formulate a legally recognised fraud claim which was not time-barred. However, the test of materiality in the context of setting aside judgments procured by fraud is far narrower than relevance in a general sense. This narrow test is based upon a very important legal principle that there is a public interest in promoting the finality of judgments. Litigation would never end if it were possible to set aside judgments merely by finding new material which could support a favourable outcome in a second adjudication of the concluded proceedings.

23. No reasonable court properly directing itself in the present case, however, could validly find that the new material in the present case potentially meets even a liberal materiality test, let alone the applicable restrictive requirement that the discovery of the new material must have "*entirely changed the nature of the case*". The fact that in the 2009 Action the Slaughters accused Mr Cranfield of fraud in relation to the 1999 Conveyance has no legal connection with and did not potentially undermine the central findings in the 2010 Action, namely:

    (1) the Plaintiff as a non-party to the 1999 Conveyance could not complain of any fraud or negligence in relation to that transaction and the Plaintiff's

pleaded case (assuming it to be true) did not support fraud or negligence in any legally recognised sense (Ground CJ); and

(2) any claim the Plaintiff could validly advance was too late to bring in any event (Ground CJ and the Court of Appeal).

<u>Did the Defendants obtain the 2010 Order by deliberately deceiving the Court?</u>

24. The Defendants had no duty to disclose the pleadings in the 2009 Action in the course of the strike out hearing in the 2010 Action. There is no arguable basis for contending that the Defendants obtained the 2010 Order by fraud. Their strike out applications succeeded:

(1) as regards the fraud and/or negligence claims, on the basis of a legal analysis of the Plaintiff's own pleadings without regard to any evidence;

(2) as regards their limitation defences, on the basis of the Plaintiff's own pleadings and his own evidence filed in the 2004 proceedings, without regard to any evidence as to the merits of the Plaintiff's fraud allegations against the Defendants.

25. The new evidence was potentially relevant and supportive of the Plaintiff's general complaints, but this assumes that these complaints potentially supported a legally recognised claim which was not time-barred. Ground CJ and the Court of Appeal (without considering the evidence in relation to the merits of the Plaintiff's allegations) found that the Plaintiff's claims could not possibly succeed. It follows that it is impossible for the Plaintiff to establish in the present proceedings that the Defendants obtained that judgment by deliberately misleading this Court. Even if Ground CJ was given the general impression that the Slaughters were not accusing Mr Cranfield of fraud in connection with the 1999 Conveyance, this would have made no difference to his central legal conclusion that the Plaintiff had no legal standing to complain about any allegedly false representations which were not made by Mr Cranfield to the Plaintiff himself.

Disposition: merits of the present strike out application

26. I have considerable sympathy for the Plaintiff who over the years, with Ms Chambers at his side, has shouldered the crushing burden of conducting complex civil litigation as a litigant in person. Ms Chambers' eloquent pleas in support of the Plaintiff's sense of injustice might well have stirred a jury, but her entreaties are not capable of stemming the tide of legal principles which flow irresistibly in the Defendants' favour in the present case. I am bound to find that it is plain and obvious that the Plaintiff's present action is liable to be struck out on the grounds that it is legally and factually frivolous and vexatious and bound to fail. Bearing in mind that it is equally obvious that the object of the present action is to re-litigate a claim which was itself struck out

almost seven years ago, I find that it is not properly open to me to exercise my discretion otherwise than in favour of striking out the present action.

27. Unless any party applies within 21 days by letter to the Registrar to be heard as to costs, the Plaintiff shall pay the Defendants' costs of the present applications, to be taxed if not agreed.

Dated this 27th day of July 2017______________________________

IAN RC KAWALEY CJ