

ON APPEAL
FROM THE COURT OF APPEAL OF THE BAHAMA ISLANDS

B E T W E E N :

KENNETH MCKINNEY HIGGS and

ERIC ALLIDAY HIGGS

Substituted for Clotilda Eugenia
Higgs deceased (Plaintiff)

Appellants

- and -

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CAVES COMPANY LIMITED (Defendants)

Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal by Final Leave to Appeal of the Court of Appeal of the Bahama Islands granted on 7th February, 1975 from a Judgment of that Court delivered on 13th November, 1974 dismissing an Appeal by the Appellants from an Interlocutory Judgment of the Supreme Court of the Bahama Islands given by the Honourable Mr. Justice James A. Smith on 18th April, 1973, leave for which was granted to Appeal on 28th May, 1973.

p.103
p.117

2. After the filing of the Notice of Appeal but prior to the hearing, the Plaintiff in the Action died and was replaced by the Executors named in her Will, namely Kenneth Higgs and Eric Higgs, who will collectively be referred to herein as the Plaintiff and the Respondent as Defendant.

pp. 124,
146 & 148

3. The Appeal arises from the issue of a Writ of Summons No. 838/1974 - Equity - issued on 29th November, 1971 by the late Clotilda E. Higgs pursuant to the provisions of Section 27 of The Quieting Titles Act, 1959 (Chapter 133 of the 1965 Revised Statutes) wherein she claimed:

pp.1, 126,
130 & 147

(1) An order that the Certificates of Title

p.2

RECORD

and relative Orders made thereunder in Supreme Court Action Number 62 of 1965 issued to and made in favour of the Defendant on 17th August, 1965, 28th March, 1966, 5th April, 1966 and 6th April, 1966 be set aside under the provisions of Section 27 hereinbefore mentioned.

(2) A Declaration that the Defendant holds as Trustee for the Plaintiff the whole of the said lands. 10

(3) An injunction restraining the Defendant, its servants, and/or agents from any further dealings with the said lands pending the outcome of the subject Action, and

(4) Such further or other relief as to the Court shall deem just.

(5) Costs.

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4. The Statement of Claim was duly filed and served on the Defendant on 16th December, 1971 and on 4th January, 1972 the Defendant filed a Summons seeking an Order that the Plaintiff do supply the Defendant with further and better particulars on matters arising out of the Statement of Claim above-mentioned. 20

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5. The Defendant having failed to file a Defence within the prescribed time, the Plaintiff issued a Summons on 6th January, 1972, returnable on 13th January, 1972, for an Order that in default of Defence Judgment be entered for the Plaintiff in the terms as set out in the said Statement of Claim. No ruling has been made on this Summons. 30

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6. Notwithstanding the subsistence of the Summons dated 6th January, 1972, H.C. Smith, J. the Judge in No. 62 of 1965, on 28th January, 1972 made an Order in the terms as set out in the Defendant's Summons of 4th January, 1972.

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7. On 12th April, 1972 the Defendant filed a Summons returnable on 24th April, 1972 praying for an Order (inter alia) that (a) the Action be dismissed on the ground that the Plaintiff had failed to supply the further and better particulars within the specified time and (b) alternatively that the Action be struck-out with costs on the ground that it was frivolous and vexatious and an abuse of the process of the Court by reason of the fact that the 40

relief sought had been previously adjudicated upon in Action Number 62 of 1965 and that the issues were substantially the same as those sought to be resolved in the subject Action, namely that the Plaintiff was entitled to the land in question by reason of adverse possession.

8. In the Statement of Claim it was alleged that the relative Certificates were fraudulently obtained on the misrepresentation of facts (inter alia):-

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(a) That an Agent of the Defendant on 30th June, 1965 had sworn that the Defendant was in sole possession of the subject land when he well knew that in 1955-56 there were negotiations whereby it was agreed to partition amicably the subject land and that in reliance on such agreement the Plaintiff acted thereon to her detriment in accordance with such terms.

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(b) That it was further deposed on 9th August, 1965 that the documents produced by the Defendant fully and clearly disclosed all facts mentioned in its claim and all contracts and dealings which affected the land whereas the deponent was fully aware of the long occupation of the Plaintiff, her Title Documents which were submitted to the Defendant at the meetings above-mentioned and the terms of the agreement which were subsequently honoured by the Plaintiff.

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(c) That the Defendant knew the Plaintiff possessed documents of title (since lost or destroyed) to part of the land to the West of Gladstone Road.

(d) The withholding of such facts induced the Court to deliver adverse Judgments, and

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(e) That although alleged by the Defendant, they well knew of the Plaintiff's occupation and that the agents of the Defendant had all been forced to vacate the subject land after attempting to enter.

9. The further and better particulars were filed and served on the Defendant on 28th April, 1972 and the required Defence on 16th May, 1972 was duly served.

p.23

p.28

RECORD

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p.128
p.151

10. At this atage of the proceedings, the Plaintiff had not been supplied with a Certified Copy of the proceedings of Quieting Petition Number 62 of 1965, notwithstanding the provisions of Section 57 (4) of The Supreme Court Act, (Chapter 46 of the 1965 Revised Statues):

57. (4) In all cases where the transcription is made under the provisions of this section such transcription shall (subject to the payment of any fee therefor) be continuously supplied to the parties or their counsel or attorneys during the proceedings of the court as expeditiously as possible, and the parties or their counsel or their attorneys shall (subject to the payment of any fee therefor) have the right to be supplied with the transcription of all proceedings so far as they have gone before any submission or addresses are made at the trial of the particular cause or matter.

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and Rule 11A of The Court of Appeal Rules:

11.A. Every person desiring to appeal to the Court from a judgment of the Supreme Court given in its original jurisdiction shall be entitled on making, either by himself or by his legal representative, written application to the Registrar of the Supreme Court, and on payment of the prescribed fees, to a copy of the notes of evidence taken by the trial judge.

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Counsel on her behalf first made written application on 18th August, 1967 but the same was not supplied until 22nd December, 1972 following numerous oral and written requests. The Pleadings therefore up to the date lastly mentioned were based solely on copies of the Pleadings which were available and the oral instructions received from the Plaintiff.

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11. On 5th July, 1972 H.C. Smith, J. ruled that since in the circumstances the Plaintiff was willing to supply the further and better particulars so as to enable the Defendant to file a Defence he thought it best to grant an extension of time for such filing and otherwise adjourn the Defendant's Summons of 12th April, 1972.

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12. The allegations in the Statement of Claim as supported by the facts contained in the further

and better particulars were denied and traversed. It was specifically averred that since the Defendant purchased the subject land the Defendant had continuously entered onto the subject land for the purpose of exercising acts of ownership as was fully disclosed at the trial of Action No. 62 of 1965. The effect of the 1955-56 meetings was denied but even if an agreement had been made it would be void under the Statute of Frauds as the same was not charged. It was further admitted that in the year 1956 the Defendant brought an Action against Leonard Higgs, the husband of the Plaintiff for trespassing on the subject land (although filed, this Writ was never served). It was further admitted that the Attorneys for the parties and others on behalf of the Plaintiff did meet and that the Defendant's Attorney agreed to allow the Plaintiff to go onto the land to prepare a Plan to show the area claimed by the Plaintiff. Upon the production of this Plan, a discussion on the merits of the Plaintiff's case would be arranged. The Defendant further averred that the Plaintiff's Attorney advised the Court that the Plaintiff had no claim to land to the West of Gladstone Road whereupon a Certificate of Title to such land was issued. The Defence continued with the further admission by the Plaintiff's Attorney to the effect that because the Defendant had built a road through the subject land in 1937 and having leased portions thereof, had in the absence of any action by the Plaintiff, repossessed the land. He further conceded that the Plaintiff had to prove uninterrupted possession for at least 20 years prior to 1936.

evidenced in writing and signed by the party to be

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The Defendant finally averred that the issues between the parties had been duly tried and the matter was res judicata, was frivolous and vexatious and an abuse of the process of the Court.

13. On 8th December, 1972 the Defendant arranged for the continuation of the hearing of its Summons of 12th April, 1972 before James A. Smith, J. and after stating that ground 1 of the same had been dealt with requested the Court to entertain submissions with reference to ground 2. It was submitted that the whole matter was res judicata since the Plaintiff was seeking to re-open the same issues as determined in No. 62/1965 which was the question of possession. It was again further submitted that the present Action and issues were substantially the same. The Plaintiff now raised new issues of an Agreement which according to further and better particulars was merely

p.33

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p.35

RECORD

an oral agreement. The Plaintiff had lost her opportunity and had failed to raise it. It was further prayed that the Plaintiff be estopped from bringing further actions in respect of the subject matter.

- p.36-37 14. In reply the Plaintiff submitted that the basis for the present action was Section 27 of The Quieting Titles Act and consequently the authorities cited from O18/19/10A did not apply. Reference was made to the Plaintiff's Summons of 7th January, 1972 which had not been heard and it was submitted that the Defendant should be estopped from filing a Defence after 30th December, 1971 without leave; (O19/1, 19/1/2, Clough V Clough (1968) 1 ALL E.R. 1179, and Allen V McAlpine & Sons., (1968) 1 ALL E.R. 543). The Plaintiff then erroneously admitted that by filing further and better particulars she had automatically vitiated the Summons of 6th January, 1972. 10
- pp.38 15. By consent Exhibits 1 to 5 inclusive were admitted into evidence. The Defendant further stated the Plaintiff laid no claim to the land to the West of Gladstone Road. 20
168-176
- pp.38 16. The Plaintiff's Attorney then informed the Court (28/12/72) that he had received a copy of the record of 62 of 1965 but that he had not yet had the opportunity to consult with his client. He further submitted that the submissions by Counsel for the Defendant were identical to those made earlier and suggested that as a result of the Order of 5th July, 1972 a fresh Summons was required. The sole question before the Court in 1965 was an investigation as to title and that an Action brought under Section 27, Q.T. Act was a distinct cause of Action. 30
134-151
- p.39 17. The Plaintiff's Attorney further submitted that although there had been a number of applications, none had been decided on the merits. If the plea of res judicata was relied on, the Court must consider all facts relevant to the action No. 62 of 1965. (18/19 and Note 18/19/10A). In the present case, there was a substantive case arising out of an investigation which is distinguishable from the cases of MacDougal V Knight 25 Q.B. p.1 and Greenhalgh V Mallard (1947)2 ALL E.R. 255. 40
- p.41 18. The main contentions of the Defendant's application were (1) the matter was res judicata
- p.42

RECORD

- and (2) the claim was frivolous and vexatious. In rebuttal, however, the Plaintiff contended that a condition precedent to ground (1) was the production to the Court of the complete record or transcript of the original case. Regarding ground (2) it was submitted that the Court only exercised this summary power in plain and obvious cases and not in cases which disclosed arguable issues (The Annie Johnson - G. Laurie & Co. V H.M. Procurator 126 L.T.R. 614, 018/19/3, Wenlock V Maloney et al (1965) 2 ALL E.R. 871). There was an issue as to facts which were triable. (O.19 R27. & O25 R4 Note 018R19 - Walters V Sunday Pictorial Newspapers (1961) 2 ALL E.R. 758).
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19. At this stage of the proceedings, the Plaintiff informed the Court of her intention to join new parties and causes of action and requested the Court to exercise its inherent jurisdiction. The Court, however, refused and adjourned for its ruling. p.43
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20. On 17th April, 1973, the Plaintiff filed a Summons returnable on the 18th day of April, 1973 for liberty to amend her pleadings by the addition (inter alia) of the prayer that the transcript of the oral evidence taken at the hearing of the Petition No. 62 of 1965 in addition to all relevant orders be accepted and be deemed to be part of the pleadings therein, a copy of which transcript was attached. An Affidavit in Support of the Summons was also filed in which it was deposed (inter alia) that the contents of the said transcript did disclose a good cause of action. p.44
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21. Before the Judge's ruling on 18th April, 1973 the Plaintiff informed the Court of the new Summons and submitted that a ruling at this stage would be superfluous. The learned Judge, however, delivered his Judgment striking out the Statement of Claim and dismissed the action with costs, without any reference to the said Summons or Affidavit filed in support thereof. p.51
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p.107
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22. In the Court of Appeal it was submitted that the learned Judge had misdirected himself and failed in his duty to fairly adjudicate on the true issues between the parties since there was a properly issued summons (O32 R2) which should have been adjourned as was apparent (O32 R4 et seq.). Under the circumstances there was a duty to ensure all parties were given every opportunity for a fair and impartial hearing by an independent Court (The Constitution of the Commonwealth of the Bahamas):

RECORD

20.(8) Any Court or other adjudicating authority prescribed by law for the determination of the existence of extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time. 10

20.(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.

The learned Judge was on Notice that all facts were not before him but decided to determine in Chambers the merits of a cause or matter which by law should have been determined in open Court. No consideration was given to the fact that the amendment was sought during the interlocutory stage, even before the Summons for Directions, or to the principles determined in the following cases:- 20

Nagle V Feilden (1966) 1 ALL E.R. 689.
Grimshaw V Dunbar (1953) 1 ALL E.R. 350.
Ellis V Smith (1965) 1 ALL E.R. p.3.

p.128 The Judges of the Court of Appeal expressed
p.146 astonishment that it took nearly $4\frac{3}{4}$ years to
p.163 come into possession of the copy of the notes of
evidence if any diligence had been exercised. 30
There was great delay and in the present case
the proposed amendment failed to come within
reasonable distance of falling within the
principles indicated by Sellers J. in Loufti V.
C.Z. Arnikow Ltd. It is submitted that the
entire Court of Appeal was wrong in this
instance in that the matters for amendment were
raised at even an earlier stage as mentioned.
It is submitted that the Court misdirected 40
itself and applied the wrong principle. No
consideration was given to the provisions of
The Real Property Limitation Acts and in particu-
lar Section 26 of Chapter 148 of the 1965
Revised Statutes which provides as follows :-

In every Case of a concealed Fraud the
Right of any person to bring a Suit in

Equity for the Recovery of any Land or Rent of which he, or any Person through whom he claims, may have been deprived by such Fraud, shall be deemed to have first accrued at and not before the time at which such Fraud shall or with reasonable diligence might have been first known or discovered:

10 Provided that nothing in this Clause
 contained shall enable any Holder of
 Lands or Rents to have a Suit in Equity
 for the recovery of such Lands or Rents,
 or for setting aside any Conveyance of
 such Land or Rents, on account of Fraud
 against any bona fide Purchaser for
 valuable Consideration who has not
 assisted in the Commission of such Fraud,
 and who at the time that he made the
 20 Purchase did not know and had no reason
 to believe that any such Fraud had been
 committed.

No consideration was further directed or given to the provisions of O.20 Rule 5. The Plaintiff will contend that the Court misdirected itself and therefore the Judgment was against the principles of Law and of Natural Justice.

23. On the Second ground of Appeal it was submitted that the Judge in the Court below had erred and failed to act judicially since even an
 30 examination of the true facts should have disclosed
 negligence and bias. The amendments requested
 would have removed any doubt that there was no
 valid ground to support the Judgment.

Hogan J.A. found:

40 Whilst amendment would of course have made it
 unnecessary to determine whether the original
 Statement of Claim in its unamended form
 should be struck out and dismissed, a
 decision that the judge was wrong, as counsel
 contends, in striking it out on the material
 before him, and dismissing the action would
 of course leave the way clear for consider-
 ation of the amendment in the lower court in
 the ordinary way. Furthermore any
 consideration of the amendment in this court
 would have to take account of the attack on
 the pleadings as they stood and the case made

RECORD

out for dismissal. Either way there would appear to be advantage in first dealing with the validity of the judge's ruling on the material before him before considering whether he was right to make it without taking into account the proposed amendment.

It will be submitted that this principle is wrong and is applicable to cases in which all the evidence has been lead and speeches made by the parties, prior to Judgment. This approach is a departure from that which is expected from a Court acting judically and therefore a mis-direction. (Franklyn v. Ministry of Town Planning - (1947) 2. ALL E.R. 296).

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24. It was also contended that the ruling of James A. Smith J. was wrong because all the facts were not before him prior to his decision.

Hogan J.A. found:

p.144

I think it would be wrong to allow a litigant who had appeared in a title quieting action, which is designed and provided for the express purpose of investigating title, to withhold, without good reason, documents and information from the judge engaged on that task and then, when the title had been investigated and settled, to come forward with a claim that the earlier proceedings were a nullity because this information was not put before the judge by someone, even a petitioner, whose interest in so doing was clearly less than that of the individual now seeking to upset the title.

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Inniss J.A. found:

p.159

The Plaintiff also sought to have incorporated in the Pleadings the transcript of the oral evidence taken at the hearing of the Quieting Titles Petition No. 62 of 1965. This was so plainly a breach of the elementary Rules of Pleading that this Court by its Order at the hearing directed that it could not be done. The correct method of bringing the transcript to the attention of the Court, if that was desired, would have been to present it

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in evidence.

10 It seems to me that in refusing to entertain the proposed amendments the learned Judge finds support in the case of Loufti v. Czarnikow Ltd. It was submitted that that case did not apply to the case now on Appeal because the latter was not a trial. In my opinion there is really no difference, in principle between the two cases. Loufti dealt with the action to be taken by a Court when amendment of the Pleadings is sought on the verge of the case being concluded - that is after the close of the final addresses and before judgment. The proceedings, which are the subject of this Appeal, had as their object the final disposal of the Action and the amendments were applied for after the close of the final addresses and only one day before the judgment was to be delivered. In my opinion 20 the learned Judge was right in refusing to entertain amendments of that kind at that stage.

The Plaintiff's right to a fair trial was unjustly taken away since the amendments sought were germane to the original cause of action and not merely an extension thereof.

(The Alert 72 L.T.R. 124, Baker v. Medway (1958) 3 ALL E.R. 540 and Dorman v. J.W. Ellis & Co. Ltd., (1962) 1 ALL E.R. 303).

30 25. On the fourth issue it was contended that the hearing was an infringement of the Plaintiff's constitutional right to a fair impartial and unbiased determination of her legal right.

Bourke P. referred to the various pleadings and stages of the proceedings and concluded as follows:-

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The amendments seem to me not only to constitute p.130 an aggravation but also to carry the hall-mark of irresponsibility.

40 In my opinion the learned judge came to a correct decision both on the merits and in proceeding as he did to the delivery of his judgment.

RECORD

Hogan J.A. concluded:

p.145

Whilst not overlooking that amendment is normally allowed at any stage if costs can be an adequate remedy for the other side and that in the case of Hubbock v. Wilkinson 1899 1 Q.B. 94, the Court of Appeal, after striking out a statement of claim, was disposed to see whether any amendment could salvage the action before deciding to enter judgment for the defendant, it would be extremely difficult to say that in the instant case the judge was wrong in refusing to adjourn and in deciding to deliver his ruling on the matter before him. Even if he had adjourned and taken account of the amended pleading for which permission was being sought, I do not think that he could possibly have granted such permission. The application, without advancing any adequate reason for the great delay which led to its being brought forward at the very latest possible moment and in an irregular manner, sought not only to introduce two new parties into the action but also to introduce new causes of action, including a charge of conspiracy. It also sought to add, as part of the Statement of Claim, the whole record of proceedings in the earlier title quieting action, including the notes of evidence in that action, and to have this record made an integral part of the Statement of Claim. Any such request did not begin to comply with the elementary rules as to pleading and in particular, quite apart from any other objection, would be an infringement of O.18 R.7.

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Inniss J.A. concluded:

p.164

To have allowed the amendments would have meant not merely depriving the Defendant Company of the opportunity of having the Action disposed of but continuing to expose it to the claim for damages in respect of its contract to sell the land in question for a period which, having regard to the proposed widening of the scope of the Action by the addition of new parties and new causes of action, might well have been considerable. In my opinion this is not

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a matter in which the Defendant Company could be compensated by costs and in the circumstances it would have been unjust to it to allow the amendments.

In my opinion if the learned Judge had given further consideration to the amendments in question he could not properly have allowed them at that stage, for the reasons which I have given.

10 26. Finally, the Plaintiff respectfully submits that the findings of the Court of Appeal were against the principles of law, the rules of the Court and against the weight of the evidence before it.

27. The Plaintiff accordingly submits that the said Judgments of the Courts be set aside and that in lieu thereof an order be made in accordance with the prayers set out in the Summons herein dated 17th April, 1973 for the following among other

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REASONS

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1. BECAUSE the Courts in exercising their respective judicial functions failed to be guided by the principle that all amendments are allowed which are necessary for the due prosecution and determination of the case.
2. BECAUSE the decisions of the Courts that the intended amendments were unduly late is contrary to the principles on which amendments are allowed since by refusing the same the real question in dispute was never determined.
3. BECAUSE the legal principles applied were wrong in that the proceedings were still in the interlocutory stages and not even at the Trial.
4. BECAUSE by refusing to entertain the amendment, the Plaintiff was deprived of a vested right.
5. BECAUSE of the Law and facts applicable to the subject case, there was no undue delay.
6. BECAUSE in fact there was no new cause or matter.

RECORD

7. BECAUSE the Courts erred in not considering all the facts before it or to which it had access.
8. BECAUSE by refusing to permit the amendments the Plaintiff was deprived of additional evidence to prove that the Certificates of Title were obtained by fraud or in a purported Trial which was held contrary to the Rules of Court or Natural Justice, notwithstanding the Plaintiff's possession or documents of title to at least a portion of the subject land. 10
9. BECAUSE by refusing the intended amendments the Plaintiff was denied the legal right to prove the existence of an agreement acted on by her to her detriment.
10. BECAUSE by refusing to permit the amendments the Plaintiff was frustrated in her legal right to prove that the Defendant held the subject lands for her as Trustee. 20
11. BECAUSE both Courts erred, by refusing to evaluate or look at the facts contained in the intended amendments and thereby failed to act judicially resulting in a miscarriage of justice suffered by the Plaintiff.
12. BECAUSE by refusing to evaluate the effect of the intended amendments the courts could not judicially determine whether the same would improve the Plaintiff's case or determine the true issue in dispute. 30
- 13.. BECAUSE by refusing to consider the contents of the intended amendments the Courts could not determine judicially whether there had been compliance with the provisions of The Quieting Titles Act hereinbefore mentioned. 40
14. BECAUSE of the findings that the case was such that it was unlikely that the party objecting could be compensated in costs, that it would constitute a serious aggravation - both findings being without legal foundation.

RECORD

15. BECAUSE by refusing to consider the hypothetical question raised by the Court below, the Courts have confirmed a Judgment obtained by fraud and the misrepresentation of material facts.
16. BECAUSE by refusing the intended amendments both Courts deprived themselves of evidence to explain why the Plaintiff is alleged to have failed to bring certain facts or cross-examine certain witnesses.
17. BECAUSE by its own admission the Court of Appeal admitted it did not know why there was a failure to fully disclose all facts, contracts and dealings giving adverse rights to those of the Defendant.
18. BECAUSE there was insufficient evidence to support the Judgment or Judgments of either Court.
19. BECAUSE the decisions of both Courts were contrary to principles of Law.
20. BECAUSE the Judgments were wrong and ought to be set aside.

the weight of evidence and contrary to the

out of Natural Justice

JAMES M. THOMPSON.

No. 8 of 1975

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL
OF THE BAHAMA ISLANDS

B E T W E E N :

KENNETH MCKINNEY HIGGS
and ERIC ALLIDAY HIGGS
Substituted for Clotilda
Eugenia Higgs deceased
(Plaintiff)

Appellants

- and -

CAVES COMPANY LIMITED
(Defendant)

Respondent

CASE FOR THE APPELLANTS

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