

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL (CIVIL SIDE) OF THE COMMONWEALTH OF THE BAHAMA ISLANDS

B E T W E E N :

KENNETH MCKINNEY HIGGS
ERIC ALLIDAY HIGGS
substituted for Clotilda
Eugenia Higgs deceased (Plaintiff) Appellants

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- and -

CAVES COMPANY LIMITED (Defendant) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by leave of the Court of Appeal from an Order of that Court dated the 13th November 1974. By that Order the Court of Appeal upheld the decision at first instance by dismissing an appeal of the above-named Appellants from the Order of James Smith J. in the Supreme Court dated the 18th April 1973, save as to part thereof.

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pp.107-8

2. The basic matter underlying this appeal is the title to 253.23 acres of land at Gladstone Road in the Western District of the Island of New Providence, although the Orders made below simply strike out the Appellants present action as frivolous and vexatious and an abuse of process. There have been two previous actions relating to that land to which the Respondent and Clotilda Eugenia Higgs ("Clotilda Higgs") were parties. The present Appellants are two of the sons of and are the executors of Clotilda Higgs, who died between the hearings in the Supreme Court and the Court of Appeal.

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3. The first action concerning the title to the land at Gladstone Road was No.62 of 1965 ("the quieting action"). By that action the Respondent petitioned for a Certificate of Title to the land under the Quieting Titles Act 1959 and was represented by Mr. Paul H. Bethel of Counsel. Clotilda Higgs was an adverse claimant in the action and was represented by Mr. Paul L. Adderley of Counsel; her claim was based upon alleged adverse possession and not upon a documentary title. The hearing of the action lasted 7 days in January and February 1966. 8 Witnesses (including Clotilda Higgs, her husband Leonard Higgs and her sons Oliver W. Higgs and the present Appellant Kenneth Higgs) gave evidence. The Judge (Cunningham Smith J.) also visited the land. On the 28th March 1966, he gave judgment in favour of the Respondent, and ordered a Certificate of Title to be issued in its favour.

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4. Clotilda Higgs did not appeal in time against Cunningham Smith J's order in the quieting action. However on the 25th June 1970, over four years later, she applied to the Court of Appeal for leave to appeal out of time. The application was refused, as also was her application for leave to appeal to the Privy Council against that refusal.

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5. In the second action (No.627 of 1969), the Respondent, as Plaintiff relying upon the Certificate of Title granted some 3 years earlier, claimed against Clotilda Higgs an injunction restraining her from entering or crossing the said land and removing soil and rock and cutting down trees or bush or otherwise damaging the said land and carrying on farming activities thereon. Clotilda Higgs filed a Defence in the action, alleging fraud on the part of the Respondent in obtaining the Certificate of Title in the quieting action. On the 3rd July 1970, some days after the unsuccessful attempt to appeal against the decision in the quieting action, the Defence was struck out, and the Court granted the Respondent an injunction against Clotilda Higgs in the form claimed.

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6. In the present action (No. 838 of 1971), Clotilda Higgs claimed to have the Certificates

of Title issued to the Respondent in the first action set aside under section 27 of the Quieting of Titles Act 1959. The sections of that Act which are directly relevant to this appeal are sections 5, 19 and 27 which read as follows :-

10 "5. The affidavit in support of the petition shall confirm all the facts set out in the petition and shall be made by the petitioner or may, with leave of the court, be made by some person other than the petitioner or as to part by one person and as to part by another and shall in addition set out whether any person is in possession of the land and under what claim, right or title, and shall state that to the best of the deponent's knowledge, information and belief, the affidavit and the other papers produced therewith fully and fairly disclose all facts material to the title claimed by the petitioner, and all contracts and 20 dealings which affect the title or any part thereof or give any rights as against him.

19. Subject to the provisions of section 27 of this Act and notwithstanding the provisions of any other Act or law, on and from the date of the certificate of title the same shall be -

30 (a) conclusive as to the accuracy of the contents thereof (including any schedule thereto and any plan annexed thereto) and binding on the Crown and all persons whomsoever; and

(b) conclusive evidence that every application, notice, publication, proceeding, consent and act which ought to have been made, given, taken or done before the granting of the certificate of title, have been properly, duly and sufficiently, made, given, taken and done.

40 27. If in the course of any proceedings under this Act any person acting either as principal or agent fraudulently, knowingly and with intent to deceive makes or assists or joins in or is privy to the making of any material false statement or representation,

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or suppresses, withholds or conceals, or assists or joins in or is privy to the suppression, withholding or concealing from the court of any material document, fact or matter of information, any certificate of title obtained by means of such fraud or falsehood shall be null and void except as against a bona fide purchaser for valuable consideration without notice."

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p.3-6

7. The Statement of Claim in the present action alleged that in Affidavits sworn by Mr. Clifton Borer and Mr. Paul H. Bethel on behalf of the Respondent in the quieting action, they had failed to disclose certain alleged facts and documents material to the proceedings. The alleged facts would have been within the direct knowledge of Clotilda Higgs at the time of the quieting action in which she gave evidence, and the documents alleged were title-deeds, since said to have been lost or destroyed, in her possession.

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8. On the 12th April 1972, the Respondent issued a Summons asking (among other relief) that the present action be struck out as being frivolous and vexatious and an abuse of the process of the Court. This part of the Summons came before James Smith J. on the 8th, 14th and 28th December 1972 and the 26th March 1973. On the last of those dates, the argument was concluded, and the Summons was adjourned for a ruling to the 18th April 1973. However, on the 17th April 1973, Clotilda Higgs issued a Summons for leave to amend her pleadings by joining Mr. Paul H. Bethel (Counsel for the Respondent in the quieting action), Paul L. Adderley (Counsel for Clotilda Higgs in the quieting action), and Cunningham Smith J. as defendants, and claiming damages against them and the Respondent for conspiracy, making substantial amendments to the Statement of Claim for that purpose.

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9. At the sitting of the Court on 18th April 1973 Clotilda Higgs argued that, having regard to her Summons to amend, judgment should not be delivered on the Respondent's Summons. The learned Judge decided that he should deal with the case argued before him, and delivered his ruling on

the Respondent's Summons. He ordered that the Statement of Claim be struck out as frivolous and vexatious and an abuse of the Court, and the action be dismissed with costs. After stating that he would assume for the purpose of his ruling that the facts set out in the Statement of Claim (as amplified by Further and Better Particulars) were correct, he said :

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"As the matters which are alleged by the plaintiff as facts in her statement of claim were within her own personal knowledge it seems to me to be begging the question to say that the defendant or its agents were fraudulent in failing to put those matters fully before the court in action No.62 of 1965 when the plaintiff herself as adverse claimant in that action had the opportunity to do so. It appears to me that she now seeks by means of the present action to blame the defendant for not doing what she herself as adverse claimant should have done. By alleging in paragraph 4 of her statement of claim that the trial court in action No.62 of 1965 was influenced in its decision by the alleged fraudulent conduct of the defendant's agents described in the other paragraphs of the statement of claim, the plaintiff has sought to show that she was thereby deprived of the land the subject of the quieting of title action. But all she has done by her allegations is to show that there were matters within her knowledge which she alleges were not properly brought to the notice of the Court when she herself as adverse claimant should have put those facts to the Court through the evidence of her own witnesses and cross-examination of the petitioner's witnesses thereon."

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10. In the Court of Appeal Burke P. considered that James Smith J. had held that the action raised matters which were res judicata in the quieting action, and held that the learned judge was correct on this. Hogan J.A. and Inniss J.A. considered that the matter was not res judicata in the quieting action, but both considered that the action was nevertheless an abuse of the process

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of the Court. Hogan J.A. said:

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"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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To allow such conduct would or could lead to a multiplicity of litigation and seriously undermine the whole value of the title quieting legislation. It would be a glaring example of an abuse of the court's process which should not, I think, be allowed. Subject to one reservation I would on this ground have stayed the proceedings in the court below but without making the assumptions adopted by the learned trial judge.

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I have spoken advisedly of withholding the information without good reason because, it seems to me, if there was good reason for this action or inaction the litigant should not necessarily be debarred, in subsequent proceedings, from relying on the information withheld."

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Inniss J.A. said :

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"The implications of s.5 of that Act are no doubt that an obligation is placed on the Petitioner, inter alia, to the best of his knowledge, information and belief, fully and fairly to disclose all facts material to the title claimed by him, and all contracts and dealings which affect the title or any part thereof or give any rights as against him. But in this particular case, as the learned Judge pointed out, the

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10 Plaintiff was an Adverse Claimant and a Party in the same proceedings. The matters which she now accuses the Defendant of failing to disclose were matters within her own knowledge. As Adverse Claimant she had the onus of proving her claim and, apart from that, presumably a vital interest in bringing to the attention of the Court all facts which tended to support it. As a Party in the proceedings she had full opportunity of adducing evidence before the Court as to all such facts, including the allegations of fact which she now makes, and of challenging the witnesses for the Petitioner in cross-examination by questioning them as to such allegations. Having failed to do so, how can she now be heard to accuse the Defendant of fraud and an intention to deceive the Court because it did not bring these matters to the attention of the Court? To my mind, to countenance such allegations would be to allow an abuse of the judicial process."

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11. The Respondent submits that James Smith J. and the Court of Appeal were correct in striking out the Statement of Claim and dismissing the action as an abuse of the process of the Court for the reasons given by Hogan J.A. and Inniss J.A. in the passages cited above.

30 12. James Smith J. did not deal with and consider Clotilda Higgs' Summons to amend. The Court of Appeal refused leave to amend. Hogan J.A. and Inniss J.A. both cited the judgment of Sellers J. in Loufti v. Czarnikow Ltd. 1952 2 A.E.R. 823, and held that, having regard to the nature of the proposed amendments and the great delay in the application to amend, the Court should exercise its discretion by refusing the amendments. The Respondent submits that the Court of Appeal exercised its discretion on the correct principles, and that its decision in this respect should not be disturbed.

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13. It was also argued on behalf of the Respondent before the Court of Appeal that the present action raised issues which were res judicata under the second action, No. 627 of 1969. Bourke P. did not deal with this point. Hogan J.A. dealt at length

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p.143 with the question whether a judgment by default could raise an estoppel per rem judicatum, citing several cases including Henderson v. Henderson (1843) 3 Hare 114, Carl Zeiss Stiftung v. Rayner and Keeler Ltd. 1971 Ch. 506 and Kok Hoong v. Leong Cheong Kweng Mines Ltd 1964 A.C. 993. However, he said that having regard to the limited evidence on the point, which had not been argued at all in the court below and had only received "incidental and very brief notice" in the Court of Appeal, he was not prepared to hold that there was an estoppel. 10

p.157 Inniss J.A. referred briefly to the point, but said that it was not one of the grounds set out in the Respondent's Summons to strike out and that there was insufficient evidence before the Court of Appeal to decide the point.

14. The Respondent does not challenge the view of Hogan J.A. and Inniss J.A. that there was insufficient material to enable the Court of Appeal to determine the point. However, in any further proceedings between the Appellants and the Respondent (whether in the present or any future action) the Respondent will seek to rely upon the Order of the Court in the second action, whereby the Respondent was granted an injunction restraining Clotilda Higgs from trespassing on the land at Gladstone Road, as founding an estoppel per rem judicatum. 20

p.108 15. James Smith J. also ordered that Clotilda Higgs be prohibited from bringing any further proceedings relating to the land the subject of the quieting action except by leave of the Supreme Court. The Court of Appeal set aside this part of James Smith J's Order. The Respondent does not seek to disturb the decision of the Court of Appeal in this respect. 30

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16. The Respondent humbly submits that this Appeal should be dismissed and that the Appellants should be ordered to pay the costs thereof for the following among other 40

R E A S O N S

- (1) BECAUSE the action is frivolous and vexatious and an abuse of the process of the Court for the reasons given by Hogan J.A. and Inniss J.A.

- (2) BECAUSE it is plainly an abuse of the process of the Court to seek ^{to} ~~the~~ litigation again points which were directly relevant to the adverse claim and which were in the direct knowledge of the adverse claimant, but which (whether deliberately or carelessly) were not raised in the quieting action.
- 10 (3) BECAUSE the Court of Appeal exercised its discretion in accordance with the correct principles in refusing the Appellants' leave to amend in accordance with their Summons dated the 17th April 1973, and the Court's decision in that respect should not be disturbed.
- (4) BECAUSE the judgments and orders of James Smith J. and the Court of Appeal were right.

JEREMIAH HARMAN

NIGEL HAGUE

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(Defendant) Respondent

CASE FOR THE RESPONDENT

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