

Kenneth McKinney Higgs & Another – – – – *Appellants*

v.

Caves Company Limited – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 30TH MAY 1977

Present at the Hearing:

LORD WILBERFORCE

VISCOUNT DILHORNE

LORD KEITH OF KINKEL

[*Delivered by* LORD KEITH OF KINKEL]

This appeal is the latest stage in a long standing dispute over the title to 253·23 acres of land at Gladstone Road in the Western District of the Island of New Providence. In 1965 the respondent in the present appeal, Caves Company Limited, ("Caves"), presented to the Supreme Court of the Bahama Islands a petition under the Quieting Titles Act (Ch. 133) claiming title to the disputed land. An adverse claim to 225 acres of the land was filed by Mrs. Clotilda Eugenia Higgs, who died in 1973 and whose executors are the appellants in the present appeal. Evidence in the action was led by both parties before Cunningham Smith J. in January and February 1966, and on 28th March 1966 he gave judgment in favour of Caves and ordered that a certificate of title to the land be issued in its favour. Mrs. Higgs did not appeal timeously against that judgment, but on 25th June 1970 she applied to the Court of Appeal for leave to appeal out of time. This application was refused, as was an application by her for leave to appeal to this Board against that refusal. In 1969 Caves took proceedings against Mrs. Higgs founding upon the certificate of title in its favour and claiming an injunction against Mrs. Higgs restraining her from entering the land and carrying on farming or other activities thereon. Mrs. Higgs filed a defence alleging fraud on the part of Caves in obtaining the certificate of title in the 1965 action. On 3rd July 1970 the Court ordered that this defence be struck out and granted to Caves an injunction as claimed.

The action with which this appeal is concerned was raised by Mrs. Higgs in November 1971. The principal claim is for an order setting aside under section 27 of the Quieting Titles Act the certificate of title

granted to Caves in the 1965 proceedings. The relevant provisions of the Quieting Titles Act are as follows:

Section 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 dealings which affect the title or any part thereof or give any rights as against him."

Section 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—

- (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, proceedings, 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."

Section 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, 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."

By her Statement of Claim dated 16th December 1971 Mrs. Higgs made a number of allegations that affidavits sworn by agents of Caves in connection with the 1965 proceedings contained deliberate misrepresentations and deliberately concealed material facts. The principal matters in question were said to be (1) certain negotiations between the parties and their attorneys in 1955 and 1956 whereby it was agreed that Mrs. Higgs would restrict her activities to the portion of the disputed land lying to the east of Gladstone Road and Caves would be entitled to quiet enjoyment of the portion lying to the west of that road; (2) the long occupation by Mrs. Higgs of part of the disputed land; (3) the possession by Mrs. Higgs of documents of title to parts of the disputed land; and (4) the giving on behalf of Caves of false evidence that any acts of occupation of the disputed land by or on behalf of Mrs. Higgs were acts of trespass. The Statement of Claim was eventually supplemented by further and better particulars filed on behalf of Mrs. Higgs, but these did not add to its substance.

On 12th April 1972 Caves issued a Summons asking *inter alia* that the action be struck out as being frivolous and vexatious and an abuse of the process of the Court. Argument on this part of the Summons was heard by James Smith J. on 8th, 14th and 28th December 1972 and 26th

March 1973. In the course of the hearing on 28th December, Mr. Thompson, counsel for Mrs. Higgs, stated that he had only then received a copy of the transcript in the 1965 proceedings. It appears that this had first been asked for on 18th August 1967, but the reason for the delay remains a matter of speculation. On 26th March 1973 Mr. Thompson asked for leave to amend his pleadings so as to bring in further defendants, namely counsel for Mrs. Higgs and for Caves in the 1965 proceedings, and to add a further cause of action. The learned judge said that he would deal with the matter before the Court first, and he adjourned the Summons for a ruling to 18th April 1973.

On 17th April 1973 Mrs. Higgs issued a Summons for leave to amend her pleadings by joining as defendants the two counsel mentioned and also Cunningham Smith J., and by claiming against them and Caves damages for conspiracy, with associated amendments to the Statement of Claim. The relevant Rule of Court required two days notice of the Summons, and when the case came before James Smith J. on 18th April counsel for Caves objected that the notice was insufficient. Mr. Thompson submitted that the ruling on Caves' Summons to strike out should be stayed. The learned judge proceeded, however, to give judgment, ordering that the Statement of Claim be struck out as frivolous and vexatious and also as being an abuse of the process of the Court, and that the action be dismissed with costs.

In the course of his judgment James Smith J. said :

“The matters alleged in the statement of claim in the present action were matters within the plaintiff's own knowledge which she now alleges would have supported her adverse claim in action No. 62 of 1965. The onus lay upon her to present this evidence to the Court at the hearing of action No. 62 of 1965 and by cross-examination of the petitioner's witnesses to challenge them with the allegations she now makes in the statement of claim. The situation may have been different had the plaintiff not been an adverse claimant in action No. 62 of 1965. But she was a party in those proceedings and as such had the opportunity of presenting this evidence to the Court in support of her adverse claim at that time. Her remedy if she was dissatisfied with the judgment in action No. 62 of 1965 was to appeal to the Court of Appeal. In 1970 application was made for leave to appeal out of time but the application was refused.”

and later,

“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."

Mrs. Higgs appealed against the judgment, but it was affirmed by the Court of Appeal (Bourke P., Hogan J.A. and Inniss J.A.) on 13th November 1974. Mrs. Higgs died prior to the hearing before the Court of Appeal and her executors were substituted for her as plaintiffs. They were granted leave by the Court of Appeal to appeal to Her Majesty in Council and now do so.

The Court of Appeal had to deal with two matters. The first was whether James Smith J. was right in ordering that the Statement of Claim in its original form be struck out and the action dismissed, and the second was whether the proposed amendments should be allowed. The second matter had not been specifically dealt with by James Smith J. He had done no more than refuse to stay his ruling with a view to the question of amendment being later considered. The Court of Appeal disallowed the amendments.

The reasons given by the members of the Court of Appeal for affirming the decision of James Smith J. to strike out the Statement of Claim were not identical. Bourke P. took the view that the issues raised in the action were *res judicata* in the 1965 proceedings, and that James Smith J. had rightly so held. Hogan J.A. and Inniss J.A., on the other hand, considered that the issues were not *res judicata*, but that the action constituted an abuse of the process of the Court.

In the opinion of their Lordships the conclusion reached by Hogan J.A. and Inniss J.A. was a correct one, in respect that the Statement of Claim, taken along with the further and better particulars, does not disclose with adequate specification facts and circumstances apt to set up a relevant case of fraud and to constitute a cause of action under section 27 of the Quietening Titles Act.

The matters alleged in the Statement of Claim as being the subject of misrepresentation or concealment in the 1965 proceedings are all matters which were within the knowledge of Mrs. Higgs at the time of those proceedings. Indeed, the matter of acts of occupation of the disputed land by or on behalf of Mrs. Higgs or her predecessors in title, and the character of these acts, were investigated in considerable depth, as the transcript of the proceedings shows, and the transcript also contains some reference to meetings between the parties or their agents about the disputed land and to documents of title in the possession of Mrs. Higgs, those documents not, however, having been placed before the Court.

The principles applicable in an action to set aside a certificate of title under section 27 of the Quietening Titles Act are, where the action is brought by someone who was party to the original proceedings, the same as those applicable in any action to set aside a domestic judgment on the ground that it was obtained by fraud. One such principle is that the action will be dismissed unless the plaintiff can produce evidence newly discovered since the trial, which is so material that its production would probably have affected the result. In *Boswell v. Coaks* (1894) 86 L.T. 365, at p. 366, Lord Selborne said :

"Upon that point I will only add this, that it seems to me that in every case of this kind, if a motion to stay an action is so made, the court ought to receive such evidence *pro* and *con.* as is material

to the question whether there has really been, since the former judgment, a new discovery of something material in this sense, that *prima facie* it would be a reason for setting the judgment aside if it were established by proof”.

The principle was also enunciated in *Birch v. Birch* [1902] P.130.

In the present case there is no averment of any new discovery since the 1965 proceedings of anything material in the relevant sense. Further, such averments of fact as are made are entirely consistent with those who swore the affidavits in question, assuming they were aware of the matters which it is said they should have disclosed, having taken the view that these matters were not relevant and not such as to have any influence on the disposal of the proceedings. As regards the matter of occupation, the correctness of such a view would appear to be vindicated by the circumstance that this matter was fully investigated at the trial and decided adversely to Mrs. Higgs, while either she or her legal advisers apparently did not think it worth while to put in issue the effect, if any, of the meetings in 1955 and 1956 and of the documents of title she was said to have possessed.

In the result, the present action is clearly no more than an attempt to re-open, upon completely inadequate and unsatisfactory grounds, the merits of the decision in the 1965 proceedings, against which an appeal was undoubtedly available but not taken in due time. In the circumstances the action is an abuse of the process of the Court.

As regards the matter of the proposed amendments, their Lordships are of opinion that the Court of Appeal was fully entitled, in the exercise of its discretion, to disallow these, and indeed could not properly have done otherwise, having regard to the nature of the original Statement of Claim, the character of the allegations in the amendments and the late stage at which they were tendered.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs; and they will humbly advise Her Majesty accordingly.

In the Privy Council

**KENNETH MCKINNEY HIGGS
& ANOTHER**

v.

CAVES COMPANY LIMITED

DELIVERED BY
LORD KEITH OF KINKEL

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