JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL 12/68

BEFORE: The Hon. Mr. Justice Eccleston - Presiding.
The Hon. Mr. Justice Luckhoo - J.A.
The Hon. Mr. Justice Smith - J.A.

MATILDA THOMAS v. ENA MORRISON

Dr. L.G. Barnett appeared for the appellant
Mr. W.B. Frankson appeared for the respondent.

16th October, 1970.

LUCKHOO J.A.

This is an appeal by the defendant Matilda Thomas against the judgment of Mr. Justice Fox who, in an action brought by the plaintiff Ena Morrison against the defendant granted a declaration that the plaintiff and Samuel Fitzgerald Holness are the beneficial owners of a parcel of land of approximately ¾ acre situate at Saa Hill Pen in the parish of St. Catherine as shown on a plan prepared by V. D. Prendergast, a commissioned land surveyor, pursuant to a survey carried out by that surveyor on January 23, 1964. The learned trial judge ordered that the defendant deliver to Holness and Morrison possession of the parcel of land and directed that the certificate of title issued on October 24, 1960, to the defendant in relation thereto be cancelled.

The grounds of appeal are directed to the orders made by the trial judge at the trial of the action granting an application by the plaintiff for leave to amend her statement of claim, refusing the defendant's application for an adjournment of the trial consequent thereon and directing that the costs of the amendment should be costs in the cause.

The plaintiff by her statement of claim filed and delivered on May 7, 1964, averred that she and her son Holness had acquired ownership of the parcel of land as joint tenants in common by way of a conveyance by deed from one Anita Ellis (half sister of the appellant and now deceased) on April 7, 1952, and that Ellis, who at that time was seized in fee and in possession of the parcel of land, had acquired the same by way of conveyance by deed on October 2, 1926, from Mary Gordon (since deceased) who at that time was seized in fee and in possession. The

plaintiff.....

plaintiff further averred that she and Holness had entered into possession of the parcel of land and was seized in fee and in possession as joint tenants up to December, 1954, when Holness went to reside in the United Kingdom. By paragraph 3 of her statement of claim the plaintiff alleged -

> "The defendant by making false representations to the Registrar of Titles fraudulently and/or wrongfully obtained a registered certificate of title under the Registration of Titles Law, Cap. 340 of the Revised Laws of Jamaica in respect of the said parcel of land."

The defendant had obtained a certificate of title to the parcel of land under the provisions of the Registration of Titles Law, Cap. 340, on October 24, 1960, upon application made under that Law claiming to be the owner in fee simple. By paragraph 4 of her statement of claim the plaintiff alleged that the defendant wrongfully and unlawfully entered into and still remained in possession of the parcel of land. By paragraph 5 the plaintiff alleged that by virtue of the matters stated in paragraphs 3 and 4 of her statement of claim she was wrongfully deprived of the parcel of land or an estate and/or interest therein and had suffered loss or damage. She prayed for a declaration that she and Holness are the beneficial owners of the parcel of land as joint tenants. She also prayed for an order for possession of the parcel of land and for damages, under s.155 of the Registration of Titles Law, Cap.340, for deprivation of land.

The defendant in her statement of defence filed and delivered in June, 1965, denied that the plaintiff and her son Holness were the beneficial owners of the parcel of land. She averred that the parcel had belonged to her mother Catherine Gray who died in 1924 and that since her mother's death she had occupied the parcel and had exercised all the right of owner and that she subsequently had obtained a certificate of title(issued under Cap. 340) in respect of the land. She denied that the plaintiff and Holness had entered into possession of the land or were seised in fee or in possession as alleged. She also denied the averments made by the plaintiff at paragraphs 3, 4 and 5 of the statement of claim.

No reply was filed. On July 16, 1965 an order was made by the Registrar of the Supreme Court on a summons on the part of the plaintiff for directions as to trial of the action.

On June 26, 1967, upon application by summons filed on January 12, 1967, on the part of the plaintiff a judge in chambers ordered that the Registrar of Titles allow the plaintiff and/or her solicitors to inspect the deeds, instruments or documents evidencing the title of the defendant to the parcel of land in dispute.

Inspection.....

Inspection was duly made under that order and on July 14, 1967, notice of intention to apply to amend the statement of claim to add certain particulars was served on the defendant's solicitors. The action was listed for hearing on July 20, 1967, but was not reached. On October 26, 1967, the action was called on for hearing and on opening the case for the plaintiff counsel made application to amend paragraph 3 of the statement of claim by adding at the end thereof the particulars appearing in the notice dated July 14, 1967. The particulars are as follows -

"

(i) The defendant was fraudulent in that she averred that "I am not aware of any Mortgage or incumbrances affecting the said land or that any other person hath an estate or interest therein at law or in equity in possession, remainder, reversion, contingency or expectancy" when she well knew or ought to have known that the plaintiff was seized in fee simple in possession of the said land.

(ii) The defendant was fraudulent in that she procured one Roosevelt C. Thompson, a commissioned land surveyor to execute a survey and prepare a plan of lands to include the plaintiff's said land without giving notice of the said survey to the plaintiff, when she knew or ought to have known that the plaintiff was seized in fee simple in possession of the said land.

(iii) The defendant was fraudulent in that she declared and procured Geraldine James and Naaman Clayton to declare that she occupied the said land jointly with Anita Ellis and that the said Anita Ellis died in the year 1946, when she knew or ought to have known that the said Anita Ellis was in sole occupation of the said land up to the time of her death on the 10th day of September, 1953.

(iv) The defendant was fraudulent in that she declared that the said land was her late mother's property, when she knew or ought to have known that Anita Ellis purchased the said land from one Mary Gordon who was the owner in fee simple in possession thereof.

(v) The defendant was fraudulent in that she stated that she entered into possession of the said land upon the death of her sister Anita Ellis, when she knew or ought to have known that the said Anita Ellis by conveyance dated the 7th day of April, 1952, transferred all her estate in the said land to the plaintiff and placed the plaintiff in possession thereof before whe died."

Counsel for the defendant opposed the application on three grounds, viz.,

(a) that in spite of the wording of paragraph 3 of the statement of claim the amendment sought if granted would introduce for the first time a charge of fraud;

(b) that there had been undue delay on the part of the plaintiff in making application for leave to amend in this regard;

(c) that at.....

(c) that at this stage the defendant would be unfairly and irredeemably prejudiced by such an amendment as he would be precluded from relying on an alternative defence that the plaintiff's action is statute barred, the defendant having been in sole possession of the land in dispute for a period of over 12 years at the date of the application for leave to amend.

The learned trial judge gave the following reasons for allowing the amendment applied for:-

" The amendment sought is for the purpose of ensuring that the real substantial question can be raised between the parties. This question is based on the allegation of false and fraudulent representations to the Registrar of Titles by the defendant - which is set out in para. 3 of the statement of claim. The charge of fraud was therefore introduced at that stage, and not for the first time at the trial, as the defence contends. The plaintiff should be allowed to give particulars of this fraud since

(a) The defence was given notice of such particulars within a reasonable time after they came to the plaintiff's knowledge, and

(b) it has not been shown that the defendant will be unfairly prejudiced in any special defence which might have been open to her if the application is granted."

Thereupon counsel for the defendant asked that the defendant be allowed to file an amended statement of defence within a specified time with liberty to apply for further and better particulars of the plaintiff's claim within that specified time. He also asked that the defendant be awarded all the costs up to the date of the amendment and any costs thrown away by reason of the amendment together with the costs occasioned by the amendment. He contended that the effect of the amendment was to introduce a new case/as without the amendment the plaintiff's claim could not have succeeded. After further submissions were made by counsel for both parties on those matters the learned trial judge finally ruled that an amended statement of defence might be filed at any time during the hearing of the action and that in the particular circumstances of the case "it would be fair and just that the costs of the amendment should abide the event and be costs in the cause." The learned trial judge in ruling as he did stated that having regard to the date on which the notice of intention to apply for leave to amend was given - July 14, 1967 - the defendant had more than ample time to formulate such an amended statement of defence as was necessary and to consider and tabulate a request for such further and better particulars as may be required. Upon that ruling being given the defendants took no further part in the

proceedings.....

proceedings at the hearing. Eventually after evidence had been adduced on the part of the plaintiff judgment was delivered as has already been indicated.

It was submitted before us by Dr. Barnett on behalf of the defendant (appellant), firstly, that the learned trial judge erred in allowing the plaintiff to amend her statement of claim at the trial to include particulars of fraud because the statement of claim without the amendment did not effectively raise in issue the question of fraud and the learned trial judge misdirected himself in holding that the plaintiff had "sufficiently and distinctly raised the issue of fraud by paragraph 3 of her statement of claim." Section 170(1) of the Judicature (Civil Procedure Code) Law, Cap. 177 provides as follows -

> " 170(1). In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading:
>
> Provided that, if the particulars be of debt, expenses or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading."

Dr. Barnett in referring to those provisions urged paragraph 3 of the statement of claim contained only a vague allegation of fraud. He said that there was no allegation of fraud in substance and that in effect the amendment sought introduced the allegation of fraud for the first time. In support of this submission Dr. Barnett cited a number of cases including the cases of Wallingford v. The Directors, etc., of the Mutual Society (1880)5 App. Cas. 685, In re Rica Goldwashing Co., (1897) 11 Ch. D. 36, Lawrence v. Norrays (Lord) (1890)15 App. Cas. 210, Hendricks v. Montagu 1881) 17 Ch. D. 642 and Bentley v. Black (1893)9 T. L. R. 580. In Wallingford's case the defendant Wallingford was sued for certain sums of money upon a specially endorsed writ by the plaintiff society the action arising out of the defendant's membership in the society. The defendant entered an appearance to the writ after which under O.xiv, r.1(a) of the Judicature Act, 1875, the plaintiff society took out a summons for leave to sign judgment on an affidavit that there was no defence to the action. The defendant in his affidavit filed under O.xiv,r.3, alleged generally that he had by fraud and misrepresentation been induced to enter the society but did not give particular instances of the alleged fraud. This charge he afterwards withdrew. He also made a denial and contradiction of the accounts on which the claim was founded. After the plaintiff society's summons had been

determined....

determined there were certain other proceedings (which are not relevant to the matter now in issue) and ultimately there was an appeal by the defendant to the House of Lords. Dr. Barnett relies on what the Lord Chancellor, Lord Selborne had to say in the course of his opinion in that House - [(1880) 5 App. Cas. at p. 697] -

> " With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case."

The other Law Lords delivered opinions to a similar effect on this point but I would like to refer to what Lord Blackburn had to say [(1880) 5 App. Cas. at p. 704] -

> " There may very well be facts brought before the judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and to fight it if he pleases, although the judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence, and in like manner as to illegality, and every other defence that might be mentioned."

I do not think that Wallingford's case is authority for the contention advanced by Dr. Barnett. In that case the question was whether any triable issue was disclosed in the affidavit of the defendant. As the matter stood on the affidavit of the defendant clearly there was no triable issue disclosed in relation to the allegation of fraud and misrepresentation. No question of amendment to include material facts arose in that case. In re Rica Gold Washing Co. (1879) 11 Ch. D. 36 came before the Court of Appeal on appeal from the dismissal of a petition to wind up a company. The Court of Appeal expressed the view that in a winding up petition as well as in an action, a vague general allegation of fraud is not sufficient and evidence of acts of fraud is not admissible. In Lawrence v. Horreys (Lord) (1890) 15 App. Cas. 210 it was held that where a plaintiff's claim to land would be barred by the Statute of Limitations unless he can show that he has been fraudulently

deprived of.....

deprived of it within the 26th section it is essential for the allegations of fraud to be definite and precise leading to the reasonable inference that the fraud complained of was the cause of his deprivation and that in the absence of such averments the court may dismiss the action as an abuse of the powers of the court. In Hendriks v. Montagu (ubi. sup.) Jessel, M.R., at p. 642 in refusing an application by a plaintiff for leave to amend a motion for an interim injunction said -

> " There is no judge more liberal, if I may use the expression, in allowing amendments, in order to try the real case, than I am, at any stage of the case; but I make one exception, that is as to charges of fraud. I do not as a rule,allow amendments to make a charge of fraud at a time when the case is launched, independently of fraud. I generally stop there. To allow such an amendment as this would be to contravene that rule. Of course, like all my rules, it is not an absolute rule. I may make an exception to it if I see good ground for doing so, but generally it is my rule."

This statement would be applicable to the instant case if the case were launched independently of fraud. An examination of the statement of claim shows that the instant case was not launched independently of fraud. Bentley v. Black (1893) 9 T.L.R. 580 was an action brought to recover calls in respect of certain shares which had been allotted to the defendant. The defendant pleaded that he had been induced to take the shares by misrepresentations contained in a prospectus. At the trial he said that he had been induced to enter into the contract to take the shares by a fraudulent misrepresentation. The trial judge held that no case had been made out in support of the defence and directed a verdict and gave judgment for the plaintiffs. An application by the defendant to the Court of Appeal for a new trial was dismissed. In the course of his judgment with which Bowden and Kay L.J.J. concurred, Esher, M.R. (at p. 580) referred to the fact that objection had been taken to the defence made at the trial that the defendant was induced to enter into the contract to take the shares by misrepresentations contained in a prospectus and that in the first place it was pointed out that fraud had not been pleaded neither had an amendment been made for the purpose of adding a plea of fraud. In concluding that this defence could not be relied on he said that it had for a long time been the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud had not been pleaded in the first instance.

It need only be observed that at paragraph 3 of the statement of claim in the instant case it is specifically pleaded that the defendant "by making false representations to the Registrar of Titles fraudulently and/or wrongfully obtained a registered certificate of title.....in respect of the said

parcel.....

parcel of land." The cases Leitch v. Abbott (1886) 31 Ch. D. 374 and Waynes Merthyr Co., v. Radford & Co. (1896) 1 Ch. 29 cited by Mr. Frankson show that a general allegation of fraud may later be supplemented by particulars of the frauds alleged. At the time those cases were decided O.xix., r.6 of the Rules of the Supreme Court was in force. The local counterpart of that rule is s.170(1) of the Judicature (Civil Procedure Code) Law, Cap. 177, which was in force at the time the instant case was decided. Perhaps the words of Bowen, L.J. in Leitch v Abbott (ubi sup) at pp. 378, 379 on examining the question of the right to discovery upon a general allegation of fraud serve to underline the point -

> " I think rule 6 of Order XIX is only a rule of pleading, and I believe that this has been so decided by the Court of Appeal. Though the omission of one party to comply with the rule gives a right to the opposite party to complain, yet it is an error in pleading and nothing more, and I should be prepared so to decide, if the point had not already been decided. Ought, then, the generality of an allegation of fraud to be a bar to the right to discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? I say this in order to show that rule 6 of Order XIX. is only a rule of pleading, and we ought not, I think, to scan the pleadings too narrowly upon a question of the right to discovery."

A consideration of the cases referred to by counsel shows that a general allegation of fraud is not sufficient to be supported by evidence at the trial but that in a proper case an amendment to add particulars of fraud may be made before or at the trial before evidence in that regard is led.

It was urged, however, on behalf of the defendant/appellant that the learned trial judge ought not to have granted the amendment sought because the plaintiff/respondent had without justification delayed unduly in making the application. I cannot but agree with Dr. Barnett that the respondent could have taken the necessary steps to procure the information she needed to furnish particulars of the fraud alleged in her statement of claim long before she did in fact do so and that application for amendment of the statement of claim could have been made a considerable time before the matter was called on for trial. However, an amendment should always be allowed if it can be made without injustice to the other side. See ss. 259 & 264 of the Judicature (Civil Procedure Code) Law, Cap. 177 the equivalent of the English O.28, rr. 1, 6. In this connection it might be useful to refer to the words of Bowen L.J. in Cropper v. Smith (1884) 26 Ch.D. at p. 710 -

".....I know.....

> ".....I know of no kind of error or mistake which, if not fraudulent or intended to overreach, a court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or of grace."

This leads us to a consideration of the submission made by Dr. Barnett that the defendant was unfairly prejudiced by the amendment granted because by October 26, 1967, when application was made to amend the statement of claim the plaintiff's right to recover possession of the land in dispute from the defendant had become statute barred under the provisions of s.3 of the Limitation Law Cap. 222. Further, in effect the amendment also circumvented the right which the defendant then had to rely on the certificate of title issued to him and the rules of limitation in relation to that certificate. Dr. Barnett advanced his argument as follows. Paragraph (4) of s. 154 of the Registration of Titles Law, Cap. 340 provides that no action of ejectment or other action, suit or proceeding for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of that law except in the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud. Section 155 of that law provides a right of action in damages to any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing of such land under the operation of that law or by the registration of any other person as proprietor of such land, estate or interest against the person on whose application such land was brought under the operation of that law or such erroneous registration was made or who acquired title to the estate or interest through such fraud. Section 161 of that law provides that no action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, shall lie or be sustained against the person upon whose application such land was brought under the operation of that law or against the person who applied to be registered as proprietor in respect of such land unless such action shall be commenced within the period of six years from the date of such deprivation. When these provisions are read together it will be seen that in the absence of fraud the certificate of title is a bar to all actions in ejectment and that all actions for damages through deprivation of land are barred after a period of 6 years from the date of the registration has elapsed. Further, in any case, under the proviso to s. 161 of that law, when an action for deprivation of land is brought the plaintiff will be non-suited unless he proves to the satis-

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faction of the judge that he had no notice that the application had been made under the law or that he had not acted wilfully or negligently in failing to lodge a caveat against the person bringing the land under the operation of the law. This demonstrates clearly that the order by which the plaintiff was allowed to raise the issue of fraud for the first time amounted to an order which could lead to defeating the plaintiff's defences and to circumventing the limitation periods under the Limitation of Actions Law, Cap. 222 and the Registration of Titles Law, Cap. 340. Where an amendment may have that sort of result then the discretion to allow the amendment should not be allowed in favour of an applicant, not in any event in favour of an applicant who is guilty of delay in making the application for amendment.

It is well settled that as a general rule a court will not give leave to a party to enable him to put his proceedings in order if to do so would defeat the rights which have accrued to the opposite party by virtue of the expiration of the limitation period. (Weldon v. Neal (1887) 19 Q.B.D. 394; Marshall v. L.P.T.B. (1936) 3 All E.R. 83). (It should be stated that the provisions of the new English O.20, r.5(1) are not in operation in Jamaica). Where a plaintiff has pleaded a complete cause of action expiry of the limitation period will not debar him from delivering particulars of the allegation made in his original pleading. (Hanily v. Minister of Local Government (1951) 2 K.B. 917; Osborne v. Snook (1953)1 All E.R. 332. In Dornan v. Ellis & Co., Ltd. (1962) 1 Q.B. 583, a claim in damages for negligence as the result of an accident, the trial judge refused to allow an amendment of the plaintiff's statement of claim to add to the particulars of negligence allegations which in substance claimed that the accident had been caused by the negligence of a fellow worker or other servants or agents of the defendants and that the defendants were therefore vicariously liable. On appeal, it was held allowing the appeal that the new particulars of negligence though different in quality from the original particulars did not raise a new cause of action nor a different case of negligence but merely invited a different approach to the same facts.

The question is whether in the instant case the particulars of fraud sought to be introduced where originally there were none raised a new cause of action or a different case of fraud. I do not see that any new cause of action or different case of fraud from that originally pleaded, however ineffectually, was raised. As I see it a plea of fraud by way of false representations made by the defendant to the Registrar of Titles was sought to be set up by the statement of claim and the amendment sought merely had the effect of supplying particulars of the nature of the false representations which the plaintiff had averred constituted the fraud, the manner in which the and the occasions on which they were made.

The premise upon which Dr. Barnett's submission is based is that the plaintiff was allowed to raise the issue of fraud for the first time by virtue of the amendment granted. I have endeavoured to show that that premise is without foundation. I am unable to see that there is any ground for holding that the discretion exercised by the learned trial judge in allowing the amendment to be made was wrongly exercised.

It was next submitted by Dr. Barnett that the learned trial judge erred in granting the amendment on the terms he did, more particularly, that the trial was to continue forthwith, without allowing the defendant time or opportunity -

(i) to consider the amended statement of claim;

(ii) to prepare, file and deliver in reply thereto an amended statement of defence;

(iii) to prepare her case for trial to meet the amended statement of claim.

The learned trial judge took the view that the possibility of the amendment sought being granted should have been distinct and clear to the defendant and that having regard to the date on which notice of intention to apply for amendment was given - July 14, 1967, the defendant had more than ample time to formulate such defence to the proposed amended statement of claim as was necessary and to consider and tabulate a request for such further and better particulars as might be required. The learned trial judge ordered that the trial be proceeded with, giving leave for an amended statement of defence to be filed at any time during the trial. This was a discretionary order.

As was observed by Lord Wright in Evans v. Bartlam (1937) A.C. at p.487 a judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers and would be interfered with by the Court of Appeal only in exceptional circumstances, yet it may be reviewed by the Court of Appeal as it was in Maxwell v. Keun (1928) 1 K.B.645 where the trial judge's order refusing the plaintiff an adjournment was reversed. In that case Atkin, L.J. said (at p.653) -

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned trial judge on such a question as an adjournment of a trial, and it very seldom does so; but on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

The onus is on the defendant to show that the trial judge was wrong. The defendant says that the amendment sought and granted was substantial and without it the plaintiff could not.....

could not succeed. That is indeed so. The defendant complains that no time was given her to consider the amended statement of claim or to prepare, file and deliver in reply thereto an amended statement of defence or to prepare her case for trial to meet the amended statement of claim thereby resulting in injustice to her. The trial judge's view was that steps to do these things should all have been taken in anticipation of the amendment being granted. The defendant's view was that until the trial judge, in the exercise of his discretion, granted the amendment she was under no obligation to take those steps. Further, it was urged on behalf of the defendant the amendment introduced a new factual dimension which required time for investigation and preparation of a defence. I think that the defendant's view is not without merit but assuming that her view is incorrect and that the trial judge's view is the true one in the circumstances does it follow that injustice would not be occasioned if the trial were ordered to proceed forthwith? The defendant would be guilty of neglect by not taking the necessary steps to prepare her defence to the amended claim but does that mean she should be made to suffer for her neglect by in effect being precluded from advancing such defences as she might have? Of course a trial judge could properly refuse a party an adjournment which would have such a result if he is satisfied that that party has been guilty of such conduct that justice can only properly be done to the other party by refusing an adjournment. (See Maxwell v. Keun (1928) 1 K.B. at p.657 per Atkin, L.J.). But I do not think that this is so in this case. Surely the defendant could have been allowed to put matters right on terms which could be reflected in the judge's order for costs. By the refusal of the defendant's application for an adjournment there resulted in my view a substantial injustice to the defendant. In the circumstances the judgment ought not to be allowed to stand.

One other matter remains to be dealt with - the trial judge's order that the costs be costs in the cause. The arguments in respect of the application for leave to amend the statement of claim began on October 26 and continued on October 27. In the result the defendant failed in her objection to the application being granted. While it is true that the application for leave to amend ought to have been made at an earlier date much of the time spent on October 26 and 27 was taken up in respect of the objection which failed. In the circumstances I cannot say that it is clear that the order for costs made by the trial judge on October 27 was wrong.

I would allow....

I would allow the appeal and set aside the judgment entered in favour of the plaintiff. There ought to be an order for a new trial with costs to the appellant of the appeal. The defendant having withdrawn from the proceedings in the court below on the determination of the plaintiff's application for amendment of her statement of claim there will be no order as to costs in relation to the proceedings in the court below.

SMITH, J.A.

Two questions arise on this appeal: the first is whether in granting leave for the statement of claim to be amended at the trial the learned trial judge properly exercised his discretion; secondly, were the terms of grant fair and just in the circumstances.

It was conceded that the court has power to allow a statement of claim to be amended at the trial (see s.259 of the Judicature (Civil Procedure Code) Law, Cap.177). But it was submitted that leave should not have been granted in this case for the following reasons:-

It was said, firstly, that there was no justification or reasonable excuse for the plaintiff delaying the application for leave to amend until the trial of the action and that the courts do not readily grant leave to amend at the trial where the applicant has been guilty of inexcusable delay. It must have been known from the time the statement of claim was filed in May, 1964, that it would require amendment. No particulars of the general allegation of fraud contained in it had been given, as the rules specifically require (see s. 170(1) of Cap. 177). The fraud alleged was in relation to representation said to have been made by the defendant in her application to bring the land in dispute under the operation of the Registration of Titles Law. The plaintiff said that she was unable at the outset to give particulars as these were contained in documents deposited by the defendant with the Registrar of Titles, which she had no right to inspect without either the defendant's permission or an order of a Judge (see s. 41 of the Registration of Titles Law, Cap. 340). An order to inspect the documents was not obtained until the 26th June, 1967 - nearly two years after the order on the summons for direction was made on 16th July, 1965, and less than one month before the action was due to come on for trial on 20th July, 1967. On 14th July, 1967, the plaintiff served notice on the defendant of her intention to apply at the hearing to amend the statement of claim to include the necessary particulars, a copy of which accompanied the notice. No explanation has ever been given for the plaintiff waiting three years before making application for the order to inspect the documents. Had the order been obtained earlier, there would have been ample time to amend the statement of claim before trial. The plaintiff was, therefore, guilty of inexcusable delay in this respect. This was, however, only one of the matters to be considered by the learned trial judge in deciding whether or not to grant leave to amend. I do not think that by itself, it was a sufficient ground for refusing leave.

Next.....

Next, it was contended that the amendment sought to introduce a charge of fraud in a proper manner for the first time at a late stage and, in effect, introduced a substantially new case; that no particulars of fraud had been pleaded and in the absence of good cause the applicant for leave to add particulars should not be permitted to do so. A number of cases were relied on in support of these contentions. In Wallingford v. Directors of the Mutual Society, (1880) 5 App. Cas. 685, Lord Selborne, L.C. said, at p. 697:-

> " With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded;...."

This case was cited as authority for the proposition that the allegation of fraud as made in the case under consideration did not raise the issue of fraud. It was said that there was no allegation of substance of fraud in the original statement of claim. In the Wallingford case (supra), Lord Selborne did say that general allegations are insufficient to amount to an averment of fraud of which any court ought to take notice. This statement must, however, be understood and applied in the context of a case, as that was, in which some relief is sought on the basis of general or vague allegations of fraud. I do not think it applies where a general allegation is made and it is being sought to set matters right by giving particulars.

In Leitch v. Abbott, (1886) 31 Ch.D.374, the plaintiff delivered interrogatories asking the defendant for certain particulars to enable him to give details of allegations of fraud he had made against the defendant. The defendant refused to answer on the ground that the plaintiff was not entitled to the information until after the decree, if any,at the trial of the action. It was held that though there were no particulars of the frauds alleged, the plaintiff was entitled to discovery. In his judgment, Cotton, L.J. said, at pp. 376,377:-

> " There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed."

If Lord Selborne's statement, referred to above, applied generally, a plaintiff who, like in Leitch v. Abbott (supra), is forced to file his action and make a general allegation of fraud before he can take steps to obtain the particulars of the fraud, would never be able to prove his allegation. He would never be allowed

to amend his.....

to amend his pleadings. The plaintiff in the case under consideration was in that position. It was not reasonable to expect that the defendant would have given permission for inspection of the documents deposited with the Registrar of Titles. In order to provide a proper basis on which to apply to a Judge for an order under s. 41 of the Registration of Titles Law it seems that the plaintiff was obliged to file her action and make the general allegations which she made in her statement of claim.

Hendriks v. Montagu, (1881) 17 Ch. D. 638 and Bentley & Co. (Ltd.) v. Black, 9 T.L.R. 580, which were also relied on, support the contention that it is only in exceptional circumstances that an amendment will be allowed at the trial to add a plea of fraud where fraud had not been pleaded in the first instance. This is not the case here. In the statement of claim as filed originally the allegation made was that, "the defendant, by making false representations to the Registrar of Titles, fraudulently and/or wrongfully obtained a registered certificate of title under the Registration of Titles Law." Though the plaintiff would not be allowed to give evidence in proof of the allegation without giving particulars, it cannot, in my opinion, be said that fraud had not been pleaded. I hold that there was here a sufficient statement of the nature of the fraud alleged to raise the issue of fraud.

Lastly, it was submitted that the effect of the amendment was to defeat the defendant's defence and, in particular, to circumvent the right which the defendant then had to rely on her certificate of title and the rules of limitation in relation to that certificate as well as under the statute of limitations and the Registration of Titles Law. In this connection reference was made to s. 154(4) of the Registration of Titles Law, which states that: "no action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Law, except in.. ....the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud." Section 161 of the Law was also referred to. This provides that:"no action for recovery of damages sustained through deprivation of land..... shall lie or be sustained.....against the person upon whose application such land was brought under the operation of this Law, or against the person who applied to be registered as proprietor in respect of such land, unless such action shall be commenced within the period of six years from the date of such deprivation." The plaintiff claimed damages for deprivation of land under s.155 of the Law, which authorises the bringing of an action for damages where a.....

where a person is deprived of land in consequence of the fraud. I have held that the issue of fraud was sufficiently raised on the pleadings as filed. If I am right, then the contention based on s. 154 (4) and on the period of limitation in s.161 fails, as the basis of this contention was, also, that the order granting leave to amend allowed the plaintiff to raise the issue of fraud for the first time.

I do not understand the reference to the statute of limitation. Presumably s. 3 of the Limitation of Actions Law, Cap. 222 was intended; but I am unable to see how the amendment could deprive the defendant of any defence based on this provision. The statement of claim as filed claimed possession of the land in dispute. Surely time ceased to run in the defendant's favour from the filing of the action! As to the contention that the effect of the amendment was to defeat the defendant's defence based on her certificate of title, if the defendant was not fraudulent her defence would not be affected; if she was, justice required that her defence be defeated.

In G.L. Baker, Ltd. v. Medway Building and Supplies, Ltd. (1958) 1 W.L.R.1231, the Court of Appeal considered the principles which should guide a court in deciding whether or not to grant leave to amend the pleadings. Jenkins, L.J. said, at p.1231:

> "I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the judge with which this court should not in ordinary circumstances interfere unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties."

Then, after referring to Order 28, rule 1 of the Rules of the Court, which are in identical terms to s. 259 of Cap. 177, the learned judge continued:-

> "I repeat the second half of the rule 'and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' I do not read the word 'shall' there as making the remaining part of the rule obligatory in all circumstances; but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made 'as may be necessary for the purpose of determining the real question in controversy between the parties.' It appears to me that the pleadings as they stood when the matter came before the judge were not in this case so framed as to enable the real question in controversy to be determined."

It was a matter for the learned trial judge's discretion whether leave to amend the statement of claim should be granted or not, bearing in mind that the application was being made at the trial and that there was undoubted delay on the part of the plaintiff in obtaining the order for inspection of the documents. This delay

was clearly.....

was clearly attributable to her legal advisers. I cannot say that in granting leave to amend the learned judge applied any wrong principle. Nor has it been shown, in my opinion, that the amendment would work any injustice between the parties. Clearly, this amendment was necessary if the real question in controversy between the parties was to be determined.

I turn now to the second question, namely, whether the terms of grant were fair and just in the circumstances. At the trial the defendant asked for the following terms:(1) that the defendant be allowed to file an amended defence within a specified time, say fourteen days; (2) liberty to the defendant to apply for further and better particulars of the plaintiff's claim within fourteen days; and (3) all the costs up to date, any costs thrown away by reason of the amendment and costs occasioned by the amendment. The defendant's request was resisted on behalf of the plaintiff, mainly on the ground that the defendant had ample notice of the proposed amendment and should have been prepared to advance any further defence and to ask for any further and better particulars that were necessary. As I have indicated above, notice was served on the defendant on the 14th July, 1967, that application to amend would be made at the trial on the 20th July, 1967. The trial did not take place on that date. The trial commenced on the 26th October, 1967. So the defendant had over three months notice. The reply on behalf of the defendant was that she ought not to have been asked to meet a possibility which had not yet arisen; that it was not reasonable to expect that the court would grant the application to amend, therefore further defence was not foreseen. The learned judge expressed the view that the possibility of the amendment being granted should have been distinct and clear to the defendant. He said that the defendant had more than ample time to formulate such defence to the proposed amended claim as was necessary and to consider and tabulate a request for such further and better particulars as may be required. He gave leave for the amended defence to be filed but ruled that it should be filed forthwith, the trial to proceed in the meantime. It was ordered that the costs of the amendment should abide the event and be costs in the cause.

It is quite clear on the authorities that where leave to amend a statement of claim is granted at the trial a defendant should be allowed every opportunity to meet the amended case if he reasonably asks for it; and he is normally entitled to costs occasioned by the amendment in any event. As I have said, the learned judge ruled as he did because of the ample notice which the defendant had had. It appears, however, that the defendant was not ready to meet the amended claim. This may have been the result of the misguided attitude of the defendant's legal advisers towards

the notice.....

the notice served on them, but this should not be allowed to prejudice the defendant.

In my opinion, though there was time for an amended defence to be prepared and ready for filing before the amendment was granted, the trial should not have been made to proceed against the defendant's consent until an amended defence had, in fact, been filed. In any event, it could not have been filed forthwith if it had not yet been prepared.

Apart from leave to file the amended defence, counsel for the defendant asked for leave to apply for further and better particulars, presumably resulting from the amendment of the statement of claim. The request for these particulars could not properly have been made before the application for amendment was granted, and it seems that the defendant would be entitled to have the particulars supplied before the trial proceeded. The defendant's application for leave to apply for particulars was, however, not granted.

I agree with the view of the learned judge that the defendant should have been prepared to meet the amended claim. But I think her failure to be so prepared should have been penalised by, perhaps, depriving her of the costs to which she would otherwise have been entitled rather than by compelling her to continue with a trial for which she was unprepared. In my judgment, the learned judge was in error in not allowing the defendant a reasonable time within which to formulate and file an amended defence and to apply for and obtain further and better particulars. I agree with the submission made before us on behalf of the defendant that once there was the probability that the defendant would suffer some disadvantage by the trial being made to proceed, the defendant was entitled to an adjournment.

I would allow the appeal and I agree with the order proposed.

ECCLESTON, J.A.

The judgments delivered by my brothers have extensively covered the submissions made and the authorities cited. I would only say, shortly, that as it was conceded that the court had power to allow a statement of claim to be amended at the trial, it was a justification of the exercise of the discretion of the trial judge that has now been called into question because of the long delay on the part of the plaintiff of over three years in taking steps to obtain the information necessary for such amendment. The plaintiff could and should have taken steps to obtain the necessary information long before she did. She then could have applied by summons and that done to have the statement of claim amended before applying for summons for directions which is applied for when the pleadings are deemed to be closed. That was done on the 16th of July, 1965. No doubt, on such a summons being applied for either before a judge in chambers of the Registrar, that summons would be granted; and on an application being made an order would likely be made that the defence be at liberty to file an amended defence to the action within some stated period of time with the usual order for costs in the cause which amount of cost is never prohibitive but rather on the small side as such summons is usually uncontested. Not having done so, and advancing as a reason the impecuniosity of the plaintiff, it was only to be expected that the trial judge would exercise his discretion favourably on her behalf and grant the application.

The case of Leitch v. Abbott (1886) 31 Ch.D.374 is in point, and as it appears that there was a general allegation of fraud in her original statement of claim, the judgment of Cotton, L.J. at pp.376,377 is apposite:-

> "There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits.."

I do not consider that the case of Wallingford v. Directors of Mutual Society (1880) 5 App.Cas. 685 and Hendriks v. Montagu (1881) 17 Ch.D.638 afford much help in the solution of the problem that this court had to grapple with as these cases were concerned with pleadings in which there had been no general allegation of fraud in the original statement of claim. Having decided that there was a general allegation of fraud in the original statement of claim and that the amendment sought to do no more than give particulars, the further submission to the effect that the allowed amendment would have defeated the plea of the Statute of Limitation which the defendant had available to her was, in my view, not

maintainable.

maintainable. Section 259 of Cap. 177 of the Judicature (Civil Procedure Code) states:-

> "The court or a judge may at any stage of the proceedings allow any party to alter or amend an endorsement or pleading in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions of controversy between the parties."

In my view the trial judge acted correctly in allowing the amendment asked for. The moot question for decision is: was it on such terms as may be just. The defendant asked the court to grant the following terms:

1. That the defendant be allowed to file an amended defence within a specified time, say fourteen days;
2. That the defendant apply for further and better particulars of the plaintiff's claim within fourteen days;
3. All the costs of the day and any costs thrown away by reason of the amendment and costs occasioned by the amendment.

Notice of amendment with copy of same had been served on the defendant on the 14th of July, 1967. The notice stated that at the trial the amendment would be asked for. Counsel for the plaintiff submitted that the defendant had three months within which to prepare and have ready at the trial the amended defence and so avoid adjournment. It is regrettable that at this juncture of the proceedings the impecuniosity of the plaintiff did not seem to have been present in the mind of her counsel as he pressed for the trial to proceed forthwith. By so doing, he led the trial judge into making an order which brought about an unfortunate situation which must eventually occasion some pecuniary loss. No doubt the judge may have felt that the defendant had ample time in which to prepare the amended defence. However, on being advised that it had not been prepared but was awaiting the grant or otherwise of the amendment which the defendant was well within her rights to do the practical solution then would have been an adjournment for the preparation and filing of same and so have all the pleadings in before proceeding with the trial. He may then have withheld the payment of costs to the defendant if he was mindful so to do. In any event, it was unfortunate that the trial was embarked on after what appeared to have been an impasse. The result was that the only evidence heard was for the plaintiff in a case in which the registered title held by the defendant was being impugned. It was incumbent on the court, in my view, for a proper adjudication in the matter to afford the defence the opportunity of meeting the amended pleadings not only by the filing of the amended defence but also procuring and placing before the court all

available.....

available evidence to meet the amended pleadings and in support of the amended defence, if justice was to be done between the parties.

I would allow the appeal, set aside the judgment entered for the plaintiff, and order a new trial. I would make no order as to the costs in the abortive trial. I would order that the appellant have the costs of this appeal.