

J/MC 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 108/92; 5/93; 6/93

**BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
 THE HON. MR. JUSTICE PATTERSON, J.A.
 THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)**

BETWEEN	SON WHEATLE	
AND	NERRISA THOMPSON	
AND	L. RAYMOND	APPELLANTS
AND	EVELYN DONALDS	RESPONDENT

Earle Witter and Miss J. Cummings
for appellants

Anthony Pearson for respondent

July 1, 2, 3 and September 30, 1996

PATTERSON, J.A.:

The appellants appealed against two interlocutory orders made and the final judgment in this action. On the 3rd July, we dismissed the appeals which were heard together, confirmed the orders and judgment of the court below, and awarded the respondent costs to be taxed if not agreed. In keeping with our promise, we now put in writing our reasons for so doing.

On the 17th November, 1988, the respondent, who is the lawful representative of Ernest Russell by virtue of a power of attorney, commenced an action by a specially indorsed writ of summons to recover possession of a parcel of land at Westlands, Negril in the parish of Westmoreland, registered at Volume 1199 Folio 536 of the Register Book of Titles. She alleged that Ernest Russell is the "owner" of the said parcel of land, but that about August, 1985, the appellants had wrongfully taken possession of it. The relevant sections of the statement of claim read as follows:

"2. The owner is and was at all material times the owner and entitled to possession of land situate at Westlands, Negril in the parish of Westmoreland being 4 acres and 6.4 perches and registered at Volume 1199 Folio 536 of the Register Book of Titles.

3. On or about the month of August, 1985 the first Defendant his servants and/or agents the second and third Defendants wrongfully entered the said land and have either jointly and/or severally took possession of the same, and have thereby trespassed and are still trespassing thereon.

4. By reason of the matters aforesaid, the owner has been deprived of the use and enjoyment of the said land and has thereby suffered loss and damage.

AND THE PLAINTIFF CLAIMS:-

- (a) Possession of the said land.
- (b) Damages or mesne profits at the rate of per month from August, 1985 until possession is delivered up."

The appellants entered an appearance to the writ of summons on the 19th December, 1988, but they did not file their defence until the 17th May, 1989. This is how they answered the respondent's claim:

"2. As to paragraph 2 of the Statement of Claim the Defendants will say that one Gwendoline Russell of 25 1/2 Portland Road, Kingston 16 in the parish of Saint Andrew fraudulently and wrongfully procured a title in respect of the land, the subject matter of this Suit on or about the 1st day of May, 1986, registered at Volume 1199 Folio 536 of the Register Book of titles.

(Note: The Defendants will at a later date furnish full particulars of the said fraud when an order of the Court is obtained and after discovery)

3. The said Gwendoline Russell died leaving a Will wherein she appointed one Irene Russell, her daughter, her Executrix and devised the said land to her son Sydney Russell.

4. The aforesaid Irene Russell obtained Probate of the aforesaid Will and conveyed the legal estate to herself and by Transfer registered on the 1st day of February, 1988, conveyed the fee simple estate to the aforesaid Sydney Russell.

5. The Defendant will say that the aforesaid dealings with the said land was effected by a conspiracy between Gwendoline Russell, Irene Russell and Sydney Russell and was fraudulent, the particulars whereof will be furnished after discovery.

6. As to paragraph 3, the Defendants will say that in the month of August, 1985, they were lawfully in possession of the said land and in the premises paragraph 3 of the Statement of Claim is denied.

7. The Defendants will say further that the said land was owned and occupied by one Miriam Jackson who was in open and undisturbed possession thereof for over 60 years and who by her Last Will and Testament dated the 2nd day of

February, 1988 devised the same to her children and grandchildren including the Defendants.

8. Save as is herein expressly admitted, these Defendants deny each and every allegation against them in the Statement of Claim as fully as if the same were herein separately set out and traversed seriatim."

The respondent filed and served a reply, joining issue with the appellants on their defence. On the 1st May, 1990, the appellants filed an *ex parte* summons for an interlocutory order:

"...that the Defendants and/or their Attorneys-at-law are at liberty to inspect and take copies of the documents filed by the predecessors of title of the Plaintiff herein in support of their application to bring the lands now registered at Volume 1199 Folio 536 of the Register Book of Titles pursuant to section of the Registration of Titles Act."

The affidavit in support of the summons made it quite clear that the appellants were seeking to discover if there was evidence which could establish the fraud to which they alluded in their defence. This is what was said in the affidavit by Bernard Marshall, attorney-at-law, for the defendants:

"2. That I crave leave to refer to the Defence herein with particular reference to paragraphs 2 and 5 of the Defence.

3. That I verily believe that an examination of the documents will disclose the particulars of the fraud complained of by the Defendants."

This summons was heard *inter partes* by Reid J. on the 29th September, 1990, and was dismissed with costs. This order of dismissal gave rise to the first appeal.

On the 2nd day of July, 1992, the respondent applied to strike out the defence, and Panton, J. ordered:

- "1. That the defence filed herein be struck out.
2. That judgment be entered for the Plaintiff."

Consequently, the respondent, on the 15th October, 1992, perfected the judgment by filing and entering formal judgment in accordance with section 250 of the Judicature (Civil Procedure Code) Law, in the following terms:

"That the Defendants having entered an Appearance and the Defence herein being struck out IT IS THIS DAY ADJUDGED:

1. That the Plaintiff recover from the Defendants lands at Westlands, Negril in the parish of Westmoreland registered at volume 1199 folio 536 of the Register Book of Titles.
2. That the Defendant pay to the Plaintiff costs to be agreed or taxed."

The interlocutory order of Panton J. on the 2nd July, 1992, and the final judgment entered on the 15th October, 1992, gave rise to the second and third appeals.

The first ground of appeal argued by Mr. Witter was directed at the order of Panton, J. and it reads as follows:

"The Learned Trial Judge erred in law in making the Order in that the allegations contained in the Defence raised triable issues which ought to have been determined at a Trial of the Action."

Mr. Witter submitted that the judgment of Panton J. was improperly obtained. Foremost among the reasons he advanced was that the order striking out the defence was predicated on a lack of the particulars of the general averments of

fraud which were made in paragraphs 2 and 5 of the defence filed. He argued that the appellants "were prevented or wholly disabled" from particularising the fraud as a result of the order of Reid J. on 22nd September, 1990, refusing leave to inspect the documents presented to the Registrar of Titles pursuant to section 42 of the Registration of Titles Act.

It seemed quite clear to us that the defence which Panton J. considered did not contain the necessary particulars of the facts relied upon to support an allegation of fraud against the virtual plaintiff. The land in question had been brought under the operation of the Registration of Titles Act, and accordingly, the registered proprietor's rights may not be defeated except in the case of fraud; a mere allegation of fraud is not enough. The Judicature (Civil Procedure Code) Law provides:

"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, ..."

The Lord Chancellor, Lord Selborne, highlighted the necessity for particulars when in *Wallingford v. Mutual Society* (1880) 5 App. Cas. page 697, he said:

"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."

In *Thomas v. Morrison* [1970] 12 J.L.R. 203 (at page 211) Luckhoo J.A. expressed the view with which we agree that "a general allegation of fraud is not sufficient to be supported by evidence at the trial."

In the instant case, the sole defence relied on was a vague allegation of fraud, the nature of which was not stated, and since no particulars were pleaded, in our judgment Panton J. was right in striking out the defence.

Mr. Witter contended that Reid J. misconceived the application for leave to inspect documents and treated it as an application for discovery against the respondent. Accordingly, he said the learned judge entertained and upheld submissions made on behalf of the respondent, although the application was not one for discovery and had been made *ex parte*. He submitted that in law a general averment of fraud in the terms pleaded at paragraphs 2, 5, 6 and 7 of the defence was quite sufficient to found the order sought directed to the Registrar of Titles. It was pertinent, therefore, to examine the nature of the application which Reid J. considered.

The summons is intituled "**Summons for leave to inspect documents**" and it was filed as an interlocutory proceeding in a pending matter. There is an apparent reference to section 42 of the Registration of Titles Act which empowers a judge to order inspection of the deeds, instruments or documents in the custody or possession of the Registrar of Titles, evidencing the title of a person upon registering a certificate of title. The documents which the appellants sought to inspect were said to be those "filed by the predecessors of title" of the respondent "in support of their application" to bring the land under

the operation of the Registration of Titles Act. The purpose for the inspection may be gleaned from the affidavit which made "particular reference to paragraphs 2 and 5 of the Defence." In paragraph 2, it is alleged that "one Gwendoline Russell of 25 1/2 Portland Road, Kingston 16 in the parish of Saint Andrew fraudulently and wrongfully procured a title in respect of the land" on or about the 1st of May, 1986 and the "note" made it quite clear that "the Defendants will at a later date furnish full particulars of the said fraud when an order of the Court is obtained and after discovery." The defence continued by stating the subsequent dealings with the land up to the 1st February, 1988, when it was said that the fee simple was conveyed to Sydney Russell by Irene Russell, the executrix of the estate of Gwendoline Russell.

Paragraph 5 then followed wherein it was alleged that:

"...the aforesaid dealings with the said land was effected by a conspiracy between Gwendoline Russell, Irene Russell and Sydney Russell and was fraudulent, the particulars whereof will be furnished after discovery." [Emphasis added]

The affidavit in support expressed the belief that "an examination of the documents will disclose the particulars of the fraud complained of by the Defendants." The source and ground for the belief was not disclosed.

It is worth noting that the statement of claim sets out in paragraph 1 that "the Plaintiff brings the action as the lawful representative by way of Power of Attorney of the owner Ernest Russell" (emphasis added). The defence stated in answer that "Paragraph 1 of the statement of claim is not admitted." The appellants did not ask for particulars of the facts relied on by the respondent to

support the alleged title, as they could have done. By not admitting ownership, the respondent would be obliged to prove his title on a trial of the action. But the real point is that nowhere in the defence was it alleged that Ernest Russell was a party to a fraud which secured his title to the land. Nor was there an allegation that he was a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud. It was difficult to understand, therefore, how an inspection of documents could assist the appellants, in their defence, having regard to their pleadings.

The undoubted purpose of the application for inspection was to discover whether or not there was evidence to support the bald allegation of fraud. The pleadings did not contain any material from which even a vague inference could be drawn to support a case of fraud on the part of Ernest Russell in obtaining his title. In a case founded on fraud, the fraud alleged in the pleadings, and the fraud set out in the particulars must be the fraud of the other party to the action, and not of a third party. (*Staffordshire Financial Co. v. Hill* [1909] 53 S.J. 446, H.L.]. We were referred to the case of *Norwich Pharmacal Co. And others v. Commissioners of Customs and Excise* [1973] 2 All E.R. 943, but we did not find it helpful in the circumstances of this case.

The relevant part of the headnote to that case reads as follows:

"(I) Although as a general rule no independent action for discovery would lie against a person against whom no reasonable cause of action could be alleged, or which was in the position of a mere witness in the strict sense, the rule did not apply where (a) without discovery of the information in the possession of the person against whom discovery was sought no action could be begun against the wrongdoer, and (b) the person against whom

discovery was sought had himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. In such circumstances, although he might have incurred no personal liability, he was under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoer."

In the instant case, it is significant that the appellants did not file a counter-claim nor did they seek to join the persons who they alleged acted fraudulently. Their application for inspection may be properly described as a trip on a fishing expedition with the hope of catching a defence. There was no foundation whatsoever to say that by an inspection, they would discover fraud, and an order for inspection would give rise to a mere speculation. Section 42 of the Registration of Titles Act specifically provides that:

"...the Registrar shall retain in his custody and possession all deeds, instruments and documents, evidencing the title of the person registered, and...

No person shall be entitled to inspection of any such deeds, instruments or documents, except upon the written order of the persons who originally deposited the same, or of some person claiming through or under him, or upon the order of a Judge."

In our judgment, the power under section 42 (supra) to order inspection should not be exercised unless good cause is shown to lift the veil of confidentiality reposed in the Registrar of Titles, and that by so doing, it would not be assisting a mere fishing or speculative case. It must be clearly established that in the circumstances it is fair and reasonable and expedient for the purpose of obtaining full information or evidence. Where the ground for

applying is based on an allegation of fraud, the nature of the fraud must be specifically stated in the pleading; a general allegation of fraud is not sufficient. For example, where the fraud alleged was perpetrated by the filing of a false document, the pleading should state, the nature of the fraud, identifying the document and naming the maker thereof in order to identify him as a party to the action. The purpose of the inspection in such a case would be to obtain the particulars of the fraud contained in the document in order that they may be particularised in the pleadings.

The requirement for obtaining an order for inspection under the provisions of section 42 of the Registration of Titles Act is peculiar, and its application does not fall within Title 29 of the rules of the Judicature (Civil Procedure Code) Act, which provides for discovery and inspection of documents. However, we were satisfied that in the circumstances of this case, Reid J. came to a right decision. He may have used the term "Discovery" to include the disclosure of documents and production of those documents for inspection by the other party; that is permissible and is of no great moment in this case. He arrived at the correct order in our judgment.

At the end of the day, therefore, the defence having been struck out, the respondent was at liberty to enter judgment in default of pleadings to recover possession of the land described in the statement of claim. This was done and the complaint that the judgment was irregularly obtained is wholly without merit and was not argued. In the event, all three appeals were dismissed.

CAREY, J.A.:

I agree.

BINGHAM, J.A. (Ag.):

I agree.