



## **The Court of Appeal for Bermuda**

### **CIVIL APPEAL No. 22 of 2010**

Between:

Appellant

**ROBERT GEORGE GREEN MOULDER**

**-v-**

**MESSRS COX HALLETT & WILKINSON (A FIRM)**

Respondent

-and-

**STEPHEN P. COOK**

Second Respondent

-and-

**MICHAEL ALAN CRANFIELD**

Third Respondent

-and-

**PAUL JEREMY SLAUGHTER**

Fourth Respondent

-and-

**JANET MURRAY SLAUGHTER**

Fifth Respondent

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**Before: Zacca, President**  
**Ward, J.A.**  
**Auld, J.A.**

**Appearances:**

Ms. Judith Chambers, as “*McKenzie Friend*”, for the Appellant  
Mr. David Kessaram, for the First Respondent  
Mr. Paul Harshaw, for the Second Respondent  
Mr. Michael Cranfield, the Third Respondent in person  
Mr. Timothy Marshall and Ms Katie Tornari, for the  
Fourth and Fifth Respondents

**Judgment**

**Dates of Hearing:**

**14 and 15 June 2011**

**Date of Judgment:**

**17 June 2011**

**AULD JA:**

**Introduction**

1. This is an appeal by Mr Robert Moulder against an order of the Chief Justice on 26<sup>th</sup> November 2010 striking out his various claims against the Respondents on the grounds that they disclosed no reasonable cause of action and, in any event, were statute-barred.
2. Mr Moulder’s claims stemmed from a conveyance in late 1999 (“the 1999 Conveyance”) by Mr Michael Cranfield, the Third Respondent, to Mr. and Mrs. Slaughter, the Fourth and Fifth Respondents, (“the Slaughters”). The conveyance was of his house, as to which there is no issue, but also purportedly of a plot of land (“the possessory land”) and a right of way on land adjacent to it, both of which Mr Cranfield maintained were his to convey by right of adverse possession. Mr Moulder, his, neighbour, however, regarded the plot as his and the land over which the claimed right of way ran as free of any such right. Before the 1999 Conveyance he made his stance plain to Mr Cranfield and his lawyers, and shortly after it also to the Slaughters and the Second Respondent, Mr. Stephen Cook, then a partner in the First Respondents, firm, Cox Hallett & Wilkinson, who acted for the Slaughters on the transaction. According to Mr. Moulder, he informed Mr Cook of his intention to develop his land and offered to sell the Slaughters a strip of it, and Mr Cook suggested that he should get back in touch when he was ready to start the development.
3. On Mr Moulder’s pleaded case and in his evidence on evidence, in on about 15<sup>th</sup> December 2003 he began to think of preparatory works for the development of his land, and when discussing it with Mr. Slaughter he learned of the inclusion of the possessory land and

purported right of way in the 1999 Conveyance. That date is of critical importance on the first and possibly determinative issue in this appeal, namely whether his claims are statute-barred.

4. Mr Moulder's account is that at about the time of those discussions in mid-December 2003 Mr Slaughter provided him with copies of the 1999 Conveyance together with affidavits on which the Slaughters had relied and continued to rely in support of their possessory claims. In discussion with Mr Cook at about the same time, he returned to his offer some four years before. He proposed selling the Slaughters a strip of the disputed land for \$40,000, and Mr Cook said he "would encourage them to buy". However, in a further conversation shortly afterwards Mr Cook indicated that they relied on the inclusion in the 1999 Conveyance of the possessory land and that, therefore, they were not prepared to pay him anything for it. Mr Moulder then began to clear the possessory land as a start of the development works he had in mind.

5. The Slaughters responded on 17<sup>th</sup> February 2004 by issuing proceedings for trespass ("the 2004 action") on the strength of the 1999 Conveyance, and obtained an interim injunction restraining Mr Moulder from entering on the disputed land – proceedings that must have removed any possible lingering doubts he might have had as to whether the Slaughters would rely on the Conveyance to enforce their claim to the possessory land. Mr. Moulder, in his defence, disputed their claim and counterclaimed for damages, to be assessed, in respect of the wrongly obtained injunctive relief granted to them, which he alleged had caused him much damage, including inability to develop his land. However, he did not further particularise the counterclaim or the alleged damage, and did not pursue it evidentially in the action. He acknowledged in the proceedings the conversations he had had with Mr Slaughter and Mr Cook in 1999 and again in mid-December 2003 – important matters going to the state of his knowledge at the time of the Slaughters' reliance and of Mr Cook's and Mr Cranfield's involvement and stance at those times.

6. The proceedings led to protracted litigation between the Slaughters and Mr Moulder until finally concluded on 9<sup>th</sup> March 2007 by an order of this Court finding in favour of Mr Moulder. The Court determined that he and his wife had throughout owned the possessory land and that neither it nor any other part of his land was subject to a right of way in favour of the Slaughters.

7. It might have been expected that, on achieving such a signal victory and not having pursued in the proceedings any other relief by way of counterclaim other than vindication of his title, Mr Moulder would have been content. But, after a delay of some three years, he issued, on 17<sup>th</sup> February 2010 his writ in this action claiming variously against each of the Respondents damages for: 1) fraudulent or negligent drafting and execution of the 1999 Conveyance and/or of concealment of the inclusion in it of the possessory land and purported right of way; and/or 2) fraudulent and/or negligent misrepresentation by all the Respondents except Mr Cranfield. His claim, which he particularised, Respondent by Respondent, over 41 paragraphs of his Statement of Claim, identifies 12 major factual heads of complaint, but contains no allegation, in terms of conspiracy to defraud. It includes claims for aggravated and/or exemplary damages to a total of nearly \$4m for fraud, deceit, misrepresentation and/or negligence and in trespass, for loss of use and of early opportunity to develop his property, mental and physical injury, distress, loss of reputation and family life, indemnity costs and payment of costs awarded to them in the 2004 action, which he had not pursued by way of taxation or otherwise in the intervening three years.

8. The Chief Justice, struck out all Mr Moulder's pleaded claims as disclosing no reasonable cause of action in either fraud or negligence or for fraudulent or negligent misrepresentation. And he held that, in any event, they were statute-barred on the expiry of over six years from 15<sup>th</sup> December 2003. In addition he ruled that Mr Moulder's claim to enforce against the Slaughters his 2004 action counterclaim for damages to be assessed and to enforce the award to them of costs in that action were an abuse of process, as they were properly the subject of that action.

### **The Appeal**

9. Mr Moulder, in a full and detailed notice of appeal, challenges all the Chief Justice's rulings and material findings of fact on the issues before him, including those of limitation.

10. Ms Judith Chambers, Mr. Moulder's former wife, has clearly been much involved in the direction and preparation of his extensive litigation in this matter, including both actions and this appeal. The Court gave her leave to address the Court on his behalf – a role not normally accorded to a *McKenzie Friend* - which she did at considerable length by reference to a 42 page written submission covering the history from its beginning in 1999 and all the issues raised by Mr Moulder's statement of claim. On the direction of the Court, her submissions were

ostensibly directed to the issue of limitation, as a possibly determinative issue on the whole appeal. But, inevitably perhaps, she traversed the whole range of the substantive issues raised by him in his pleaded case before the Chief Justice and on this appeal. We also had written submissions from counsel for all the Respondents and their oral submissions on the issue of limitation.

11. The general thrust of Mr Moulder's whole case in fraud, as advanced by him to this Court in his written submissions and by Ms Chambers in her oral submissions is that: 1) inclusion of the possessory land and purported right of way in the 1999 Conveyance was dishonest in the sense of amounting to a conspiracy between all of the Respondents knowingly and dishonestly to dispossess him by positively and dishonestly misrepresenting the true nature of the 1999 Conveyance; 2) if and to the extent that any one of the Respondents concealed rather than positively misrepresented the position to him, such persons owed him a duty to volunteer the true position, and dishonestly did not do so; and 3) Mr Moulder acted until about 2006 in ignorance of such conspiracy and/or in reliance on such misrepresentation or non-disclosure. This central reliance on a conspiracy is not how he pleaded his claim or argued it before the Chief Justice.

12. The general thrust of Mr Moulder's case in negligence as submitted to this Court was that each Respondent owed him and breached a duty of care: 1) not to dispossess him unlawfully or otherwise to cause him harm by wrongful inclusion of the possessory land and purported right of way in the 1999 Conveyance ; and/or 2) positively to disclose the fact of such inclusion before or on its execution, or at, at the very latest, before he began in mid-December 2003 to think about starting preparation for development of the land.

### **The Chief Justice's Judgment**

13. The Chief Justice rejected as inadequate Mr Moulder's pleaded claim of fraudulent misrepresentation against each of the Respondents, for want of identification of facts on which fraud could be established and for want of allegations of conveyance to him of the claimed representation or of his reliance on them. In his evidence before the Chief Justice and in his submissions to this Court he has acknowledged that he knew about the stance of Mr Cranfield and the Slaughters on the issue of ownership of the possessory land, if not at the time of the execution of the 1999 Conveyance, by mid-December 2003 at the latest. By then, far from relying on such knowledge as a misrepresentation, he disputed their entitlement to the land and

has continued to do so. The Chief Justice was also of the view that, even if it had been possible to discern from the pleaded claim against each Respondent the makings of a cause of action for fraud, the particulars given were so equivocal as to be equally consistent with negligence - a weakness that Mr Moulder appears to have recognised in pleading it as an alternative on the same facts.

14. The Chief Justice also rejected the claims of negligence as variously pleaded and particularised against each Respondent, for their want of any respectable factual basis for alleging a duty of care, in particular as Mr Moulder's assertion of a positive duty on Mr Cook and the Slaughters positively to disclose matters to him, and also to the requirements of the "proximity" and "just and reasonableness" tests for a duty of care. He said at paragraph 19 of his judgment:

"... taking the factual allegations in the pleading at their highest, they do not establish that any of the participants in the 1999 conveyance owed a duty of care to Mr Moulder. I do not think that there was sufficient proximity between the parties, and I do not think that such a duty of care would be just and reasonable. ..."

15. The Chief Justice expressed his over-all conclusions in the matter in paragraph 41 of his judgment thus:

"... I have exercised particular caution in respect of the negligence claim, because the existence of a duty [of care] is in issue, and such matters are peculiarly fact sensitive. Nonetheless, as far as the claims in fraud and negligence are concerned, and taking the factual allegations in the pleadings at their highest, I do not think that they disclose a cause of action. There were no representations made to Mr. Moulder so as to found a case in fraud, and none of the parties owed him a duty of care so as to found a case in negligence. I consider that this is a matter of law, which I can see around clearly, and that this is one of those obvious and clear cases where it is appropriate to strike out the pleading as disclosing no cause of action."

### **Limitation**

16. In addressing the limitation point, we set Mr Moulder's pleaded case against each of the Respondents and the Chief Justice's response to it.

#### *Mr Cook and Cox Hallett & Wilkinson*

17. Mr Moulder alleged in his statement of claim that Mr Cook and, through him, Cox Hallett & Wilkinson:

1) fraudulently drafted the 1999 Conveyance so as to misrepresent the true position in law of the possessory land and purported right of way;

2) negligently failed to ensure that no part of Mr Moulder's land was included in the 1999 Conveyance, since breach of that duty would affect and injure him; and

3) failed to deal with him in good faith in the discussions between them, in 1999 in not revealing the inclusions of the possessory land and purported right of way in the 1999 Conveyance, thereby lulling him into a false sense of security about his title over the land, and doing so again in mid-December 2003 when he first learned of the extent of the purported conveyance

18. As to the claim of fraudulent misrepresentation, the Chief Justice held that the pleaded facts relied on by Mr Moulder did not disclose any claim of a knowingly fraudulent misrepresentation having been conveyed to him or, if conveyed, his reliance on it. As he observed, such a claim would, in any event, have been inconsistent with Mr Moulder's acknowledged learning on about 15<sup>th</sup> December 2003 of the inclusion in the 1999 Conveyance of the possessory land and purported right of way, and his immediate response in disputing its validity, a stance that he maintained throughout. As to Mr Moulder's claim that such inclusion was negligent because Mr Cook must have foreseen that it would harm his interest, the Chief Justice held that there were no pleaded facts going to satisfaction of the "proximity" and "just and reasonable" tests for a duty of care, especially important here, given Mr Cook's primary duty to his clients, the Slaughters. And he was unable to find any sufficient relationship between him and Mr Moulder to require Mr Cook to be more forthcoming on either occasion.

#### *Mr Cranfield*

19. Mr. Moulder's pleaded claim against Mr Cranfield, though somewhat unclear, appears to be of false misrepresentation by fraudulently instructing the inclusion of the possessory land and purported right of way in the 1999 Conveyance and of swearing a false affidavit in support of its execution and also of swearing a false affidavit to like effect in the 2004 proceedings. But, as the Chief Justice observed in his judgment, there was no pleaded claim that any instructions he gave as to the Conveyance had been conveyed as a "misrepresentation" to Mr Moulder, and his swearing of the affidavit in the 2004 action could not of itself be a basis for such a claim. And, as in Mr Moulder's pleaded case against Mr. Cook, there was no claim of his reliance on any such "representation" of Mr Cranfield.

*The Slaughters*

20. Mr Moulder's claim against the Slaughters is of piece with that against Mr Cranfield in seemingly claiming fraud in that they knowingly made a false claim to the possessory land and concealed it from him in order to lull him into a false sense of security, as well as of lying to the court in the 2004 action. As observed by the Chief Justice, there are the same difficulties as in his claims against the other Respondents in identifying any reasonable cause of action against them in fraud or in negligence.

21. The Chief Justice held, in paragraph 30 of his judgment, that, if, contrary to his rulings, Mr Moulder's pleaded case had disclosed a reasonable cause of action for fraud, fraudulent misrepresentation or negligent misrepresentation against any of the Respondents, he would have found it to be statute-barred. That is because all the claims were for economic damage and each of them would have accrued on the claimed suffering of the damage, at the latest, on Mr Moulder's own case, on or about 15<sup>th</sup> December 2003 when he first learned of the incorrect inclusion in the 1999 Conveyance of the possessory land and purported right of way. In doing so the Chief Justice relied on the ruling of the English Court of Appeal in *Foster v Outred & Co.* [1982] 2 All ER 753, at 765, a claim of negligent advice, in which it held that in cases of financial or economic loss - as here - the damage crystallizes and the cause of action is complete when the claimant, in reliance on the negligent advice, acts on it to his detriment. Though Mr Moulder's essential complaint over-all before the Chief Justice was not of fraudulent or negligent advice, but of misrepresentation, requiring its conveyance to and reliance on by the representee, the Chief Justice clearly considered that that analysis would have applied here if it had been a representation and reliance case. However, in the absence of either, the Chief Justice turned to the date when Mr Moulder first learned, on about 15<sup>th</sup> December 2003, of the contents of the Conveyance. He said:

30. .... It is ... plain ... that Mr. Moulder knew of the 1999 conveyance at some point in December 2003, and I consider that time began to run against him in respect of any cause of action that he could erect ... from that moment at the latest. Any such cause of action was, therefore, in my view, statute-barred at the time when the writ was issued. While that may be academic on the case as pleaded, given my finding that it discloses no reasonable cause of action, it might be important if the plaintiff sought to frame his case in some other way."

A prescient consideration given the change of thrust of Mr Moulder in his written, and Ms Chambers in her oral, submissions on the appeal



22. As to enforcement of Mr Moulder's counterclaim in the 2004 action for damages arising out of the required undertaking given by the Slaughters on obtaining injunctive relief to restrain him from entry on what was later determined to be his property, and for his costs in that action, the Chief Justice held that he should have pursued both at the time, and that to attempt to resurrect them long after the event in this action was as an abuse of process.

### **Mr Moulder's case on the appeal**

23. Mr Moulder, in his written submission and Ms Chambers on her oral submissions in the appeal, put as the start of their complaints against all the Respondents the erroneous inclusion of the possessory land and purported right of way in the 1999 Conveyance. They also relied on the stance thereafter adopted by the Slaughters and Mr Cook in December 2003 and early 2004 and on the Slaughters' commencement and conduct of the 2004 proceedings to enforce the Conveyance, as fraudulent or at least negligent, causing him substantial damage.

24. As we have indicated, it is clear, particularly from the manner in which Ms Chambers dealt with the matter in her oral submissions, that the main thrust of Mr Moulder's case is now based on an unpleaded and unparticularised notion of a conspiracy by all the Respondents to defraud him from as early as the execution of the 1999 Conveyance right up to 2010. In his written submission he characterised the whole course of the pleaded conduct against them as a "conspiracy to defraud" or as "pointing to" it. As to his alternative case on fraudulent or negligent misrepresentation, he relied in the main on his repeated assertions that the Chief Justice had "erred in fact and in law" or in failing to give sufficient weight to the evidence, in rejecting his case on those issues.

25. In the case of Mr. Cook Ms Chambers sought also to argue in support of the claims in fraud and negligence that he owed a positive duty to Mr Moulder to make clearer than he had done in mid-December 2003 and early 2004 the Slaughters' likely stance should he continue to assert his claim to the possessory land. Such a claim is at least questionable in law, having regard especially to his primary duty to his clients, the Slaughters, in the transaction. But even if, on Mr Moulder's pleaded case, it might disclose a reasonable cause or causes of action against Mr Cook, it does not assist him to overcome the limitation bar in view of his acknowledgement of the Slaughters' clear indication of their stance on the matter in mid-December 2003 and again in early 2004 before and by their institution of proceedings against him.

26. Ms Chambers sought to overcome that obstacle to continuance of Mr Moulder's claims against all the Respondents by maintaining that he only became aware in 2006, in the course of the 2004 action, of all the material facts going to their alleged conspiratorial and individual conduct against him. She maintained that their perseverance in that action with their claims of the validity of the 1999 Conveyance was a continuation of their original conspiracy to defraud. She also relied on such conduct and further particularising of their case in that action as evidence of earlier "concealment" of their fraudulent or negligent conduct, within the meaning of section 33 of the *Limitation Act*.

27. Such an argument, not – we believe - advanced before the Chief Justice, is based on pleaded and unpleaded facts that, at their most favourable to Mr Moulder's cause, are equivocal. They do not support the implications that he now seeks to draw from them or Ms Chambers's suggestion that he was not aware of all facts material to his claims before 2006, or indeed since mid-December 2003. They are equally consistent with Mr Cranfield, the Slaughters and Mr Cook having throughout acted honestly and mistakenly and not negligently in the belief that Mr Cranfield had had a possessory title over the disputed land to convey to the Slaughters.

28. But even if there were clearly identifiable reasonable causes of action in fraud or negligence in or to be derived from the facts of Mr Moulder's case as pleaded, Ms Chambers, with one exception, never grappled with the essential matters necessary to bring case home on the issue of limitation, despite being urged repeatedly by the Court to do so. The most crucial and determinative issue before the Judge on limitation was as to his early knowledge of the erroneous nature of the 1999 Conveyance whatever the cause, and of the diminution in value and in its restriction on what he could do with his own land. The one exception was as to the date of accrual of the claimed causes of action by reference to the occurrence of actual damage.

29. Ms Chambers put the date, at the earliest, as 17<sup>th</sup> February 2004, the date of the commencement by the Slaughters of the 2004 action and just within the six year limitation period. However, as we have indicated, she maintained that the true date was much later than that, right up to and beyond 2006 in their perpetuation in the 2004 action and in these proceedings of their earlier fraudulent and/or negligent stance in the matter since 1999.

30. Ms Chambers sought to overcome the *Foster v Outred* principle as to the accrual of economic damage by referring the Court to the ruling of the House of Lords in *Law Society v Sephton & Co* [2006] UKHL 22, a case in which, on its facts, their Lordships held that the out-of- time date on which the defendants relied was not the date of actual, but of contingent, damage, actual damage having been suffered only later on the occurrence of the contingency. Ms Chambers maintained that Mr Moulder suffered only contingent or “potential” damage, if at all, on the execution of the 1999 Conveyance and in the exchanges with the Slaughters and Mr Cook in mid-December 2003, and at the earliest only in February 2004 on their commencement of the 2004 action and obtaining interim injunctive relief against him. Ms Chambers added that, if Mr Moulder did not suffer actual damage as late as that, but earlier and thus outside the period of limitation, the period would fall to be extended under section 33 of the *Limitation Act* by the Respondents’ fraudulent concealment of their wrongs up to and beyond that date including in the course of the present action - a puzzling suggestion on the pleaded facts.

#### **The Respondents’ case on limitation**

31. Mr David Kessaram, for Cox Hallett & Wilkinson submitted that, on the pleaded facts, the only damage that Mr Moulder might have suffered was an immediate diminution in the value of his land on the execution of the erroneous 1999 Conveyance, whether or not he knew of it at the time. He also argued that Mr Moulder’s own case showed, not only that he knew or should have known of the Slaughters’ claim based on adverse possession and the consequent damage at the latest in mid-December 2003, but also that he at no time relied on any representation, false or otherwise, that any of the Respondents might have made to him at any time about the contents of the Conveyance

32. On the issue as to the occurrence of actual damage as distinct from contingent damage, Mr. Kessaram relied on *Foster v Outred*, a case of actual damage, and the Australian case of *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, a case of future contingent loss, on the distinction to be drawn between the two; see also per Lord Hoffmann at para. 30 in *Law Society v Sephton* and *Cartledge v Jopling* [1963] AC 758, HL. The damage, he submitted, was immediate diminution in the value of Mr Moulder’s land, including its development potential –on the execution of the 1999 Conveyance – whether or not calculable at the time. Mr. Kessaram’s submissions on that issue and as to the facts in Mr Moulder’s pleaded case showing no reliance by him on such representations as may have

been made to him by the Slaughters or Mr Cook were adopted by Mr. Paul Harshaw for Mr Cook, Mr Cranfield in person, and Mr. Timothy Marshall for the Slaughters.

## **Conclusions**

33. Mr. Moulder has, by his pleaded case, maintained and acknowledged that throughout this story his stance has been that he was the true owner of the possessory land regardless of his claim of representations by the Slaughters to the contrary. It is thus highly probable that his various claims based on fraudulent or negligent misrepresentation are hopeless on that account alone. There are other powerful obstacles to the merits of his claims of fraudulent and/or negligent conduct in the drafting, execution of the 1999 Conveyance and concealment of its contents made variously against each of the Respondents - in particular as to the existence of a duty of care or to disclose any of them. As to his newly articulated allegation of conspiracy to defraud, such a claim requires clear pleading, so as to allege expressly and/or by reference to all material particulars of primary or secondary fact relied on. There is a high probability that Mr. Moulder's pleaded case, ungarnished or garnished by Mr Moulder's and Ms Chambers' submissions on the appeal, would not meet that test.

34. But the issue of limitation remains for all three species of Mr Moulder's claim. It is on that issue that the Court, with agreement of all the parties, attempted to focus first. We say "attempted to focus" because, despite our efforts to confine Ms Chambers to the issue of limitation, she traversed, with much repetition, the whole range of her Mr Moulder's case on the merits of his appeal as well as overlapping matters going to limitation.

35. If, which all the Respondents challenged, Mr Moulder's pleaded case disclosed a reasonable cause of action against any of them under any of its various heads, the fact of, and his knowledge at the time of, the sale to the Slaughters and, in any event, his later discussions with them and Mr Cook at the turn of 2003/2004 would put his claims out of time. That is both because he was not deceived at the material times and because the sale in 1999 was when he suffered actual loss in the diminution in value of his land, regardless of his appreciation of the damage or its extent at either time. Any claim of fraudulent concealment, relevant to any of the other claimed causes of action arising so as to extend the running of time, pursuant to section 33 of the *Limitation Act* would have been baseless. He knew the "essential" facts on which he variously based his claims from at least mid-December 2003 at the latest, and any further relevant matters he could have discovered with reasonable diligence shortly

afterwards. There are no further essential matters in his pleaded case or indicated by the advocacy of Ms Chambers after that would thereafter trigger section 33.

36. Accordingly, we dismiss the appeal on the ground that all Mr Moulder's pleaded claims and his unpleaded claim of conspiracy to defraud would, in any event be statute-barred. Although it is not necessary to our decision, we add that if all the substantive matters had been fully argued before us by the Respondents as well as Ms Chambers, as they were before the Chief Justice, it is highly probable that we too would have concluded that they showed no reasonable cause of action.

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Auld, JA

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Zacca, P

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Ward, JA