[2010] SC (Bda) 62 Civ (26 November 2010)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: No. 53

BETWEEN:

ROBERT GEORGE GREEN MOULDER
Plaintiff

- and -

MESSRS. COX HALLETT WILKINSON (A FIRM)
First Defendant

and

STEPHEN P COOK
Second Defendant

and

MICHAEL ALAN CRANFIELD
Third Defendant

and

PAUL JEREMY SLAUGHTER
Fourth Defendant

and

JANET MURRAY SLAUGHTER
Fifth Defendant

Dates of Hearing: 25 – 27 October 2010
Date of Judgment: 26 November 2010

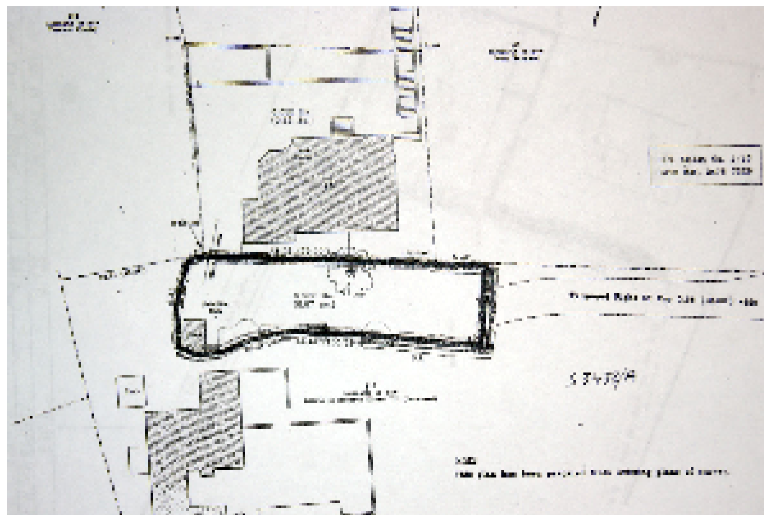
The Plaintiff in person (Ms. Judith Chambers as McKenzie friend);
David Kessaram for the First Defendant;
Paul Harshaw for the Second Defendant;
The Third Defendant in person;
Timothy Marshall and Katie Tornari for the Fourth and Fifth Defendants.

JUDGMENT

INTRODUCTION

1. This judgment is given on the defendants' several applications to strike out the plaintiff's writ and statement of claim on the grounds that they disclose no reasonable cause of action and are vexatious and abusive.

2. The action arises out of a boundary dispute and this is not the first time that it has led to litigation. The plaintiff ('Mr. Moulder') owns a parcel of land in Sandys parish which he was proposing to subdivide and develop[1]. The third defendant ('Mr. Cranfield') owned a house, 'Hillcrest,' which lies to the north of the Moulder parcel. Hillcrest was essentially land-locked, at least for vehicular access, and the original plot lacked a rear garden. Nonetheless its owners exercised vehicular access across the Moulder parcel, and over the years they had encroached upon that land to create a hedged garden space at the rear of the house. The encroachment is shown as the outlined area in the plan below. The vehicular access is shown to the right of that.



3. In 1999 Mr. Cranfield sold Hillcrest to the fourth and fifth defendants ('the Slaughters'), at which time he purported to convey to them a right of way across the plaintiff's land, and also title to the rear garden area (indeed, the plan above is taken from the Slaughter conveyance). The title that Mr. Cranfield conveyed was based on adverse possession, and

[1] He did not always own all the parcel, but has been putting together his title by acquiring the interests of other family members over the years, but I do not think that that has a direct bearing on this application.

he also, at the Slaughters' request, supplied affidavit evidence, both from himself and from third parties, to support that. The second defendant ('Mr. Cook') acted for the Slaughters in respect of that conveyance. The first defendants ('Cox Hallett') employed Mr. Cook at that time as a salaried partner.

4. The Slaughters continued to enjoy their access and garden until early 2004 when Mr. Moulder asserted his title by clearing the hedge around the encroachment and blocking the access. Mr. Moulder says that this was the initiation of his development scheme. The Slaughters then obtained an emergency *ex parte* injunction on 17th February 2004 to restrain this, and brought an action (2004 No. 63) to assert their title. That litigation was protracted. On 6th June 2005 Wade-Miller J refused to declare that they had acquired possessory title to the disputed land. That was appealed, and on 17th November 2005 the Court of Appeal dismissed that appeal, giving reasons for doing so on 25th November 2005. However, they also held that the learned Judge had not dealt with the issue of the right of way, having been misled by counsel into the belief that that had been sorted out by agreement. The Court of Appeal accordingly remitted that question to the trial judge. There was then a second trial, and on 5th December 2006 the Judge this time found for the Slaughters. However, that decision was then appealed, and on 9th March 2007 the Court of Appeal allowed that appeal, and set aside the Judge's order. The net effect was that the Slaughters lost on all points.

5. The matter did not, however, end there. On 17th February 2010, nearly three years after the second Court of Appeal judgment, Mr. Moulder issued these proceedings. It is perhaps not coincidental that the proceedings were issued six years to the day after the issue of the injunction which started the Slaughters' action. The writ identifies 12 heads of claim:

1. Damages for "the fraudulent, deceitful or in the alternative negligent drafting execution and concealment" of the Slaughter conveyance.
2. Damages for fraudulent or negligent misrepresentation by D1 and D2.
3. Damages for fraudulent misrepresentation by D3 – D5.

4. Damages for the plaintiff's loss of use of his land, including the loss of the opportunity to develop etc.

5. Damages for increased costs and loss occasioned by the delay to Mr. Moulder's proposed development on his land.

6. Damages for trespass, including mesne profits for the Slaughters' occupation of the land from 28th October 2003 to 9th March 2007.

7. Damages for wrongful building works on the disputed land by D3 – D5.

8. Damages "for mental and physical injury and distress and damages to reputation and loss of family life caused to the Plaintiff".

9. Aggravated and exemplary damages.

10. Further or other relief.

11. Indemnity costs for action 63 of 2004, including the appeals.

12. Indemnity costs for this action.

6. The Statement of Claim is dated 8th March 2010. Paragraph 85 pleads various items of damage totaling $3,918,113, although $1.5M of that is made up of 'estimated aggravated damages'. The pleading begins with an introductory section which sets out the narrative background, and then goes on to plead specific claims against each of the defendants.

7. The pleaded narrative history is, in broad terms, that there was a history of dealings between Mr. Moulder and Mr. Cranfield which demonstrates that the latter knew that any claim to the disputed land was contested. In particular there had been an exchange with Mr. Cranfield's then lawyers in 1999: by a letter of 27th May 1999 Conyers Dill & Pearman wrote on Mr. Cranfield's behalf claiming the land and the right of way, to which Mr. Moulder says that he replied on 23rd July 1999 offering to grant a right of way on terms, but stating that he disputed the claim to the land and that he would defend any action. He pleads that when he got no substantive reply he assumed the claim was abandoned. Mr. Moulder also pleads that after the conveyance to the Slaughters he contacted them in late 1999 informing them of his development plans and offering to sell them a strip of land to enlarge their garden, but they told him to contact their lawyer, Mr. Cook, which he did. He says that Mr. Cook told him to get back in touch when he was ready to start his

development and at that time they could discuss the possibility of an acquisition further. Four years later in December 2003, Mr. Moulder says that he was about to start preparatory works for his development, so he again contacted the Slaughters and proposed selling them a strip of land for $40,000. He was again referred to Mr. Cook, whom he contacted with that offer, whereupon he says that Mr. Cook told him that he would discuss the offer with his clients and that "he would encourage them to buy". It is Mr. Moulder's case that up to this point no-one had told him about the purported conveyance of the disputed land, of which he remained unaware. However, after this conversation Cook did tell him about it, saying that as a result the Slaughters were not willing to pay anything for the land.

8. The date of the conversation when the plaintiff says he first learned about the conveyance is crucial to the limitation defence which the defendants seek to raise. It is not specified in the Statement of Claim, but in subsequent Further and Better Particulars given on 3rd May 2010 the plaintiff stated that "It was on or about 15 December 2003 that the Fourth Defendant first stated to the Plaintiff that the Third Defendant had conveyed the "possessory land" to the Fourth and Fifth Defendants." It should also be noted that in his evidence in 2004 No. 63 the plaintiff had sworn an affidavit[2] in which he gave a similar date and source for his discovery of the conveyance:

> "34. In mid December 2003 Mr. Slaughter provided me with copies of the Conveyance to him dated 31 October 1999, together with copies of the various affidavits that he was relying on to support his claim to title. It was only then that I found out that Michael Cranfield had conveyed to the Plaintiffs a supposed possessory title to the disputed area and a right of way over the estate property."

9. The introductory section of the Statement of Claim concludes with a general averment that:

> "25. The Defendants have acted fraudulently, deceitfully, or in the alternative negligently causing injury and damage to the Plaintiff."

The pleading then goes on to set out the case against each defendant, and I have followed the scheme of that when considering the sufficiency of the pleaded case.

[2] See paragraph 34 of his second affidavit sworn on 8th September 2004.

The First Defendants

10. In respect of the first defendants the case is one of liability for the acts of Mr. Cook as a partner in the firm. It is pleaded that the "the First Defendants are directly or in the alternative vicariously liable for the fraud and or negligence which caused the Plaintiff injury and damage." The case against them, therefore, stands or falls with that against Mr. Cook.

The Second Defendant

11. The case against Mr. Cook is pleaded in fraud and negligence, as alternatives. It is essentially said that Mr. Cook knew, or ought to have known, that Mr. Cranfield's claim to the disputed land was bad, and various means of knowledge are alleged. It is pleaded that despite that he drafted "a conveyance containing fraudulent . . . misrepresentations."

12. The nature of the cause of action for fraud is summarised in Clerk & Lindsell on Torts, 19th ed., 2006, at para. 18-01:

> "Where a defendant makes a false representation, knowing it to be untrue, or reckless as [to] whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable for that loss."

13. In my judgment Mr. Moulder's pleaded claim against the defendants in fraud discloses no cause of action because it is not pleaded that the misrepresentations made in the conveyance were made to him, nor is it pleaded that he relied upon them. Indeed, either such averment would be inconsistent with his case that he did not know about the conveyance until December 2003, and that when he found out, he disputed it.

14. It is said in the alternative that Mr. Cook owed a duty of care to the plaintiff "as a known owner of the Moulder Estate property and therefore a person who would be directly affected and injured by his failure to ensure that no part of the Moulder estate property was wrongfully included in the Slaughter Conveyance."

15. In my judgment that is not enough to establish a duty of care. I have been taken through the analysis of the various modern approaches to when a duty of care may arise conducted by Sir Brian Neill in BCCI (Overseas) Ltd. v Price Waterhouse [1998] BCC 617 (CA), including the 'threefold test' of –

> (a) was it reasonably foreseeable that the plaintiff would suffer the kind of damage which occurred?
> (b) Was there sufficient proximity between the parties?
> (c) Was it just and reasonable that the defendant should owe a duty of care of the scope asserted by the plaintiff?

16. There obviously has to be more than the loss itself. As Lord Hoffman said in Stovin v Wise [1996] AC 923:

> "The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from the person . . . whose act or omission can be said to have caused it. The default position is that he is not."

17. Forseeability of damage is only one limb of the test, and does not automatically determine the question of proximity. As Lord Oliver explained in Murphy v Brentwood District Council [1991] 2 AC 398 at 486G:

> "In his classical exposition in Donoghue v Stevenson . . . Lord Atkin was expressing himself in the context of the infliction of direct physical injury resulting from a carelessly created latent defect in a manufactured product.
>
> "In his analysis of the duty in those circumstances he clearly equated "proximity" with the reasonable foresight of damage. In the straightforward case of the direct infliction of physical injury by the act of the plaintiff there is, indeed, no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a "proximate" relationship with the plaintiff . . . The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen."

18. Similarly, in White v Jones [1995] 2 AC 207 at 273 Lord Browne-Wilkinson said:

> "Let me now seek to bring together these various strands so far as is necessary for the purposes of this case: I am not purporting to give any comprehensive statement of this aspect of the law. The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationships can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in *Hedley Byrne* . . . he has "accepted a relationship . . . which requires him to exercise such care as the circumstances require," i.e. although the extent of the duty will vary from category to category, *some* duty of care arises from the special relationship. Such relationship can arise even though the defendant has acted in the plaintiff's affairs pursuant to a contract with a third party."

19. In my 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. Mr. Cook in particular owed his duty to the Slaughters, and there is nothing pleaded to take this case out of the general rule that a lawyer owes his duty to his client only.

20. It is also said, apparently in the context of some sort of duty, that Mr. Cook misled Mr. Moulder by not revealing the true nature and content of the conveyance either in 1999, when it is said he had a conversation with him about the possible purchase of a strip of his land, or in 2003, when there was a similar conversation and it is said that Mr. Cook stated that he would 'encourage' the Slaughters to purchase. Mr. Moulder pleads in this regard that:

> "The Plaintiff was entitled to be dealt with in good faith, however the Second Defendant deliberately concealed the true nature and content of the Slaughter Conveyance and lulled the Plaintiff into a false sense of security by failing in his duty to speak."

However, I do not think that there was any sufficient relationship between them to give rise to a duty of 'good faith', and whatever the normal decencies of life may have required, they did not in my judgment impose a legal duty to disclose.

21. In a similar vein, in argument Ms. Chambers advanced the alternative case that in Mr. Cook's conversation with Mr. Moulder in 2003 (in which it is said that Mr. Cook responded to Mr. Moulder's offer to sell the Slaughters a strip of land by saying he would encourage them to buy) there was some positive misrepresentation to the effect that the Slaughters maintained no claim to the land, and that it had not been conveyed to them. That is not pleaded. Had it been, I would have struck it out on the basis that no such misrepresentation could be construed out of Mr. Cook's failure to disclose the conveyance, or his willingness to enter into sale negotiations. As Clerk & Lindsell (*op. cit.*) states at paragraph 18-05:

> "The general rule is that a positive act or representation is required: 'mere silence, however, morally wrong, will not support an action of deceit[3]'."

There are exceptions to that, which the learned authors go on to discuss, but none of them applies to this case.

The Third Defendant

22. It is not entirely clear what the cause of action advanced against Mr. Cranfield is, but it appears to be fraud in that he executed the conveyance to the Slaughters and thereby "fraudulently purported to convey" the disputed land and right of way. It is also said that he swore a false affidavit, being one of those requested by Mr. Cook in support of the title prior to the execution of the conveyance, "which contained fraudulent misrepresentations and untrue statements" about the land and his occupation of it. Again, it is not pleaded that the representations were made to the plaintiff, and indeed in the nature of things they could not have been. Nor is it pleaded that the plaintiff relied upon them, and again it could not be

[3] See Lord Maugham in *Bradford Third Equitable Building Society v Borders* [1941] 2 All ER 205, at 211.

for that would be utterly inconsistent with his case. There is, therefore, no sustainable pleading of a case of fraud.

23. It is also pleaded that Mr. Cranfield damaged Mr. Moulder by swearing an affidavit on 17th August 2004, in support of the injunction which he knew to be false. That bare assertion on its own does not amount to a cause of action. In order to claim damages the plaintiff has to bring himself within a recognized cause of action. Nor do I think it for the court to suggest causes of action, or to speculate whether one could be made to fit. It is for the plaintiff to identify his cause of action and then plead the necessary facts to support it.

The Fourth and Fifth Defendants

24. As with Mr. Cranfield, the pleading against the Slaughters is not entirely clear, but again appears to be based upon their knowledge of the falsity of the claim to the disputed land. Again, as with the other defendants, I do not consider that that can amount to a cause of action in fraud, nor do I think that the purchasers of a property owe a duty of care to ensure that they are not being conveyed someone else's land.

25. There is also a pleading against the Slaughters of deliberate concealment, it being said that the plaintiff was entitled to be dealt with in good faith but was "lulled into a false sense of security". Again, that does not plead a recognizable cause of action.

26. It is then said that the Slaughters lied to the court in action 2004 No. 63, and misled it by relying on the conveyance to obtain the injunction. Whether that be true or not, it does not disclose a cause of action known to the law. Mr. Moulder did, however, have a remedy for any damage caused by the injunction against him, and I have dealt with that further below.

27. Finally it is said that the Slaughters blocked and delayed the plaintiff's applications to the Planning Department, by asserting their false claim to the land. Again, I do not think that this discloses a recognisable cause of action.

Insufficiency of the Pleaded Case in Fraud

28. Had the statement of claim pleaded the necessary formal elements of a cause of action for fraud or dishonesty, I would nevertheless have struck it out against Mr. Cook and the Slaughters (and by extension against Cox Hallett) on the basis that the particulars pleaded were equivocal and equally consistent with innocence – indeed Mr. Moulder impliedly accepts that by pleading fraud and negligence in the alternative. In doing so I would have had in mind the observations of Lord Millett in Three Rivers District Council & Ors. v Bank of England (No. 3) [2003] 2 AC 1 at 291, [183] – [190], and in particular the following at paragraph 184:

> "It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularized; and that it is not sufficiently particularized if the facts pleaded are consistent with innocence . . . This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so."

29. In this regard it is not necessarily dishonest or otherwise improper to buy land on the basis of a title founded on adverse possession. In respect of the purported cause of action in fraud, it is not pleaded against the Slaughters that they had the particular means of knowledge of Mr. Cook or Mr. Cranfield. The only ground for inferring knowledge of falsity alleged against them is the wording of the conveyance itself, and seems to be based on a point made by the Court of Appeal, namely that claims to adverse possession of the disputed land and of a right of way over that land are conceptually inconsistent, as you cannot acquire a right of way over your own land. The plaintiff says that that "is evidence that the Fourth and Fifth Defendants did not truly have the belief that the Third Defendant had acquired ownership of any part of the Plaintiff's land but was nevertheless concocted in such a way as to lay the foundation for them to wrongfully claim both ownership of the formerly disputed land and a right of way over the acquired right of way." In a similar vein, it is also pleaded against the Slaughters, in respect of Mr. Cook's conversations about a possible purchase, not that that was itself a misrepresentation but that it is further evidence of knowledge of the fact that the conveyance did not convey any interest in the disputed

land. I consider both those points absolutely specious, and an utterly insufficient basis on which to allege fraud.

Limitation

30. Had there been a cause of action in fraud or negligence, I would have considered that it accrued when damage was suffered, the cause of action being incomplete until then. Damage is normally suffered when the plaintiff relies upon the false statement to his detriment: see Foster v Outred & Co. [1982] 2 All ER 753, at 765 (a case of negligent advice):

> "I would hold that in cases of financial or economic loss the damage crystallizes and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment."

However, it is hard to apply that sensibly here, where there was neither representation nor reliance. It is however plain, as set out in paragraph 8 above, 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 on that 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.

31. Different rules would apply to any loss flowing from the wrongful obtaining of the injunction, and costs. As noted below, any application in respect of the former should be made promptly. In respect of the latter, there is a six-month time limit: see RSC Ord. 62, r. 29. That can be extended on application to the Registrar: see Ord. 62, r. 21. Whether, if Mr. Moulder now applied for the taxation of his costs is action 2004 No. 63, it would be proper to extend time to allow him to do so is not a question that is before me, and I make no comment on it.

The Injunction and the Counterclaim

32. Some of the damage pleaded is said to flow from the injunction, in that it obstructed and delayed the proposed development of the land and created a cloud on the plaintiff's title. Part of the factual basis for this is demonstrated by the following plan, which is relied upon by Mr. Moulder as showing that the encroachment obstructed the proposed primary access to his planned sub-division.

33. The interlocutory injunction of 17th February 2004 contained the usual undertaking in damages. The enforcement of that by means of an assessment of damages would be the normal method of seeking recompense for a wrongful injunction. That would not necessarily require proof of fraud or knowledge of the falsity of the claim or anything like that. The dismissal of the claim by the Court of Appeal was all that was necessary. The application to enforce the undertaking should have been made to the Court of trial. If it thought appropriate it could have ordered an assessment of damages. Such an application should normally be made promptly: see <u>The Supreme Court Practice</u>, 1999 ed., note 29/L/30.

34. There was also a Counterclaim in action 2004 No. 63, which repeats the substance of the Defence and pleads damage flowing from the delay to Mr. Moulder's development

caused by the injunction and the way it is said to have impeded access and the installation of utilities.

35. The Slaughters argue that the plaintiff is now debarred from pursuing either the Counterclaim or the assessment of damages under the undertaking because of the procedural history leading up to the second trial in action 2004 No. 63. Prior to the second trial the Judge gave directions on 20th February 2006 that:

> " The defendants shall file and serve on counsel for the Plaintiffs a summons setting out any relief sought beyond the issue of the Right of Way;"

That this related to the injunction appears from Mr. Moulder's skeleton argument for that directions hearing, in which he claimed a complete accounting of the Slaughters' assets "prior to proceeding with his claim for damages". No such summons was ever filed.

36. At the second trial the Slaughters argued that the failure to file such a summons meant that the issue of the undertaking in damages was not properly before the Court, and that in any event the evidence as to damage was vague and unquantified: see paragraph 4 of their submissions of 24th July 2006. Against that background the learned Judge held:

> "5. No summons has been filed before the Court setting out any relief beyond the issue of the right of way. Therefore the only issue this Court has to consider is whether or not there is an existing right of way."

37. Notwithstanding that, the learned Judge did go on and address the Counterclaim, holding in brief terms that, having found that the Slaughters did have a right of way by prescription, "there is no need to address the Defendant's counterclaim, which has not been particularized and has not been established." In his notice of appeal from that judgment Mr. Moulder sought – "4.4 An Order that damages be assessed at a future date;". In his written submissions of 23rd February 2007 this was addressed further as follows:

> "Under the original 6th June 2005 Judgment damages are still to be assessed. The remittance of the matter to the Supreme Court was of the right of way issue only, however in the event that the Appellant requires a further, separate, Order with regard to an assessment of damages particular to the right of way issue such an Order for assessment is prayed for as set out in the Notice of Appeal."

However, at the end of the day the Court of Appeal did not address that in their judgment.

38. Where does that leave things? It seems to me that anything in the Counterclaim cannot now be pursued in a separate action. If it is to be pursued at all it should be pursued in the original action. Whether it was indeed disposed of in that original action, so that it cannot now be taken further, should be decided in that action, when and if the plaintiff applies for trial directions in respect of his Counterclaim against the Slaughters. It is, however, an abuse to make it the subject of a fresh action between them. That includes any loss resulting from the alleged inability to pursue his development. It also includes any damages for trespass, including the claim for mesne profits for the Slaughters' occupation of the land from 28th October 2003 to 9th March 2007. That is because that was pleaded in the Counterclaim, albeit in a rather convoluted way[4].

39. Alternatively, had Mr. Moulder not counterclaimed in respect of the damage said to have been caused by the injunction, I would have said that his remedy was by way of an application to enforce the undertaking, and that a fresh action was an abuse and struck it out on that basis. As to whether the plaintiff can now proceed by way of an application in action 2004 No. 63 to enforce the undertaking in damages, I express no view. That question is not strictly before me.

Costs of the Action 2004 No. 63

40. As to the claim for the costs of the previous action, including the costs in the Court of Appeal, Mr. Moulder pleads in paragraph 83 that he "has not had such costs taxed and

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[4] Paragraph 19 of the Defence asserted trespass by the Slaughters by reason of the conveyance itself; paragraph 21 contain an averment "that it is he that [is] entitled to damages for trespass to his land by the Plaintiffs [i.e. by the Slaughters]"; paragraph 29, which introduces the Counterclaim, repeats paragraph 21 – 28; and paragraph 32 of the Counterclaim recites that "by reason of the matters aforesaid the Defendant is been (*sic*) deprived of the use and development of his land and has suffered damage."

seeks to recover compensation in the form of damages for all such costs." In my judgment that is not a permissible course, and that claim should have been pursued by way of the appropriate applications in those proceedings, followed by taxation. I consider it an abuse of process to attempt to claim costs in a separate action, when they were not pursued in the litigation which gives rise to the claim.

CONCLUSIONS

41. I have born in mind the strictures in Electra Private Equity Partners (Ltd Partnership) & Ors v KPMG Peat Marwick (A Firm) & Ors [1999] EWCA Civ 1247 at p. 17. I have exercised particular caution in respect of the negligence claim, because the existence of a duty 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 clear and obvious cases where it is appropriate to strike out the pleading as disclosing no cause of action.

42. I therefore strike out the indorsement of the writ and the statement of claim against all the parties on the basis that –

(i) in respect of any and all claims in fraud and/or negligence the pleadings fail to disclose a reasonable cause of action;

(ii) any and all claims in fraud and/or negligence, or indeed any other claim, arising out of the 1999 Conveyance, are now statute barred;

(iii) in respect of any claims for damages for trespass against the Slaughters, they are properly the subject matter of action 2004 No. 63;

(iv) in respect of any damage flowing from the injunction in action 2004 No. 63, that should have been pursued by way of an application to enforce the undertaking in damages against the Slaughters, and that to attempt to do so in a separate action is an abuse of process; and

(v) in respect of the costs of action No. 2004 No. 63, they should have been pursued in that action and taxed therein, and that to attempt to pursue them by way of a separate action against the Slaughters is an abuse of process.

43. I therefore dismiss the action, and will hear the parties on costs.

Dated this 26th day of November 2010

Richard Ground
Chief Justice