JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 35/98

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN	LEILA COOPER (AKA CECILIA BADCHAM)	APPELLANT
AND	SIMEON LINTON	1ST RESPONDENT
AND	MADELEINE LODGE	2ND RESPONDENT

George Traile, instructed by Phillip, Traile and Company, for the appellant

Rudolph Smellie and Hugh Wilson, instructed by Daly, Thwaites and Campbell, for the 1st respondent

May 31; June 1 and July 6, 1999

FORTE, J.A.:

Having read in draft the judgment of Walker, J.A., I agree with the reasoning and conclusion.

WALKER, J.A.:

This appeal is directed at a judgment of Pitter, J. whereby on the ground of fraud he ordered the rescission of a transfer under and by virtue of which the names of the appellant (the first defendant at the trial) and her

daughter (the second defendant at the trial and at present the second respondent) were endorsed as the registered proprietors of land, part of Stewart Castle in the parish of Trelawny, comprised in Certificate of Title registered at Volume 1000 Folio 654 of the Register Book of Titles. At the same time the learned trial judge also ordered a cancellation of the said title and the re-issuance of a new title in the name of the first respondent (the plaintiff at the trial) and granted an injunction to restrain the appellant from interfering with the property and/or from intermeddling with any of the tenancies thereon.

A history of this matter reveals that for some time during the decade 1970-1980 the parties, that is, the appellant and the first respondent, lived together in a common law relationship at Stewart Castle. Prior to the commencement of this liaison the first respondent had on November 4, 1967, become the registered proprietor of the property which is the subject matter of these proceedings. During the parties' relationship, the appellant kept the duplicate Certificate of Title to this property. In 1993 the first respondent proposed to sell the property to a man named Winston Browning and, for this purpose, he requested the title from the appellant. Despite repeated requests from both the first respondent and Mr. Browning the title was not forthcoming. In these circumstances, Mr. Browning took legal advice which led him to the Titles Office where in early 1994 he obtained a copy of the title. The document revealed that a transfer of the property from the first

respondent to the appellant and her daughter had been registered more than 16 years earlier on October 4, 1977.

At the trial, the case for the appellant was that prior to the commencement of her co-habitation with the first respondent, and while she was still married to her husband, she gave the first respondent £600 which he used to buy the disputed property. She said that she agreed to the property being purchased in the name of the first respondent. This she did for confidential reasons having regard to her marital status. In 1977 her daughter, then resident in the United States of America, visited Jamaica. The appellant said that it was during this visit that the first respondent decided to transfer the property into the names of herself and her daughter. In due course, all three persons attended the office of an attorney-at-law where they all executed the instrument of transfer. At this time the first respondent subscribed his signature by marking "X" at the appropriate place on the document. Significantly, that document which was exhibited before the learned trial judge showed a mark "X" inserted above, rather than in the usual way between, the names "Simeon" and "Linton" and the word "his" written below the mark rather than in the usual way above it. For the first respondent, who was at the date of the trial a blind, illiterate octogenarian, the case consisted of a comprehensive denial of all the circumstances surrounding the transfer of the property. In particular, he denied having signed the transfer document. In the result, the learned trial judge found that the appellant and her daughter had collaborated to dispossess the first

respondent of his property by fraudulent means. Specifically, the court found that the first respondent had not personally attended the attorney's office, and had not, himself, executed the transfer document.

Before this court, the present appeal is prosecuted on six grounds, some of which overlap. They are stated as follows:

> "1. That the Learned Trial Judge erred in law in finding that the action was not statute barred when the Writ of Summons and the Statement of Claim were filed on the 11th of September 1995 and the 14th of May 1996 respectively alleged that the land was fraudulently transferred to the Defendants on the 4th of October 1977.
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> 2. The Learned Trial Judge erred in law in finding that an allegation of concealed Fraud need not be pleaded and could be relied upon by the Plaintiff without being specifically pleaded.
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> 3. The Learned Trial Judge erred in law in finding that fraud had been specifically and sufficiently pleaded by the Plaintiff in the particulars in paragraph 5 (a)-(c) of the Statement of Claim in that:
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> a) the particulars set out no actions on the part of either Defendant that were unlawful or calculated to deceive anyone;
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> b) The particulars failed to precisely state any allegations of facts which could lead to an inference that there was fraud;
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> c) the particulars were too general and imprecise to be any basis for an inference of fraud by the 1st Appellant.

4. The learned Trial Judge erred in not dismissing the action as an abuse of the Court on the basis of the particulars being only general averments of fraud.

5. The Learned Trial Judge erred in finding that fraud had been proved against the first Defendant and his finding is against the weight of the evidence.

6. The finding of the learned trial judge that the defendant had fraudulently contrived with her daughter, the second defendant to have the document registered was not supported by the evidence in particular as:

   a) the transfer was prepared by an attorney with whom the Plaintiff stated he had had transactions;

   b) the signatures and the Plaintiff's 'x' were witnessed by a Justice of the Peace;

   c) the judge found that both the Plaintiff and the 1st Defendant suffered lapse of memory and therefore the best evidence was that of the 2nd Defendant."

In addressing these grounds of appeal, the first consideration must be as to whether, at the stage of trial, the action of the first respondent (then the plaintiff) was statute-barred. In this regard, sections 3 and 30 of the Limitation of Actions Act are relevant. They read as follows:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next

> after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.
> ...
>
> *Extinguishment of Right*
>
> **30.** At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

The plaintiff's writ of summons was filed on September 11, 1995. In paragraph 5 of his Statement of Claim which followed, fraud was alleged in this way:

> "**5.** In or around the year 1977 the Defendants fraudulently transferred the said property to themselves by an Instrument of Transfer numbered 352774 dated the 15th day of August 1977 and registered on the 4th day of October, 1977 (hereinafter called 'the transfer') with which the Defendants caused themselves to be registered as joint tenants and the proprietors of the premises.
>
> PARTICULARS OF FRAUD
>
> **a)** Fraudulently proceeding with the registration of a Transfer of the property without the Plaintiff's knowledge, consent and his signature on the transfer.
>
> **b)** Fraudulently dealing with the title to the said property in order to defeat the Plaintiff's interest.
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> **c)** The relationship between the Plaintiff and the First Defendant was at all material

> times such that the Plaintiff reposed full confidence in her, allowed her to conduct business on his behalf and he expected her to treat him honestly and with probity."

Subsequently, a defence and counter-claim was filed on behalf of the first defendant to which the plaintiff filed a reply. At paragraph 7 of the defence it was averred as follows:

> "7. The alleged cause of action did not arise within 6 years before the commencement of this action and is barred by the provisions of the Limitation Act, and is therefore statute-barred."

In the plaintiff's reply, this averment in paragraph 7 was studiously ignored. This was the state of the pleadings up to the time that the matter came on for trial.

Before Pitter, J., counsel appearing for the first defendant took the preliminary point that the plaintiff's action was statute-barred and, as such, should be struck out. Counsel submitted then that on the face of the pleadings, the plaintiff's cause of action arose either on August 15, 1977 (the date of the instrument of transfer) or at the latest on October 4, 1977 (the date of registration of the transfer), whereas the plaintiff's action was not filed until September 11, 1995. The action could only be sustained on a specific averment of concealed fraud which was absent from the plaintiff's pleadings, said counsel. In the result, the judge overruled this submission and allowed the trial to proceed. Before us Mr. Traile made a similar submission in arguing the first ground of appeal. When one examines the provisions of

sections 3 and 30 (supra) against the background of the pleadings as they stood before Pitter, J., and stand even now, it is clear that, prima facie, the plaintiff's action does appear to be statute-barred. But it is obvious that the plaintiff's case was not founded on what I might call fraud simpliciter but on concealed fraud within the context of section 27 of the Limitation of Actions Act. As appears from the record at the trial counsel on both sides appreciated that this was so, Mr. Daly, Q.C. appearing for the plaintiff at that stage erroneously taking the view, it would seem, that a pleading of general averments of fraud was enough to sustain the plaintiff's action, it being sufficient for full particulars of concealed fraud to be supplied by evidence afterwards. Section 27 provides:

> "**27.** In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered:
>
> Provided, that nothing in this section contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed."

It is well settled law that where concealed fraud is relied upon as postponing a limitation period, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision (see ***Lawrence v. Norreys*** (1890) 15 A. C. 210). Here it cannot be gainsaid that insofar as the plaintiff's case rested on concealed fraud, the pleadings were deficient. But they were not incurably bad. A simple amendment, if applied for and granted before Pitter, J., would have sufficed to put the matter right. Indeed, it is just such an amendment that has been canvassed before this court by Mr. Smellie. He has invited us to exercise our discretion, pursuant to the provisions of section 18(1) of the Court of Appeal Rules, 1962, to allow an amendment to the plaintiff's reply to add as paragraph 6(a) the following averment:

> "As to paragraph 7 of the Defence the plaintiff avers that the fraud was concealed and was only first discovered by the plaintiff in 1994 when it was first discovered that an alleged transfer of the said property had been effected and it was not reasonable to have expected the plaintiff to have discovered such fraud before then in all the circumstances of the matter."

Not surprisingly, Mr. Traile strongly objects to any amendment being granted at this stage on the ground of prejudice to the appellant. However, I think that the amendment ought to be allowed. An amendment to pleadings should always be allowed if it can be made without injustice to the other side. In the instant case, the amendment that is sought is warranted by the findings of the learned trial judge, findings which are, in my opinion,

entirely justified on the evidence. Certainly, this amendment could cause no injustice to the appellant in the sense of allowing the respondent to raise for the first time an issue of fraud. As I have already observed, the issue of fraud was raised initially in the plaintiff's statement of claim albeit not expressly in an averment of concealed fraud. So the appellant must always have been aware of an allegation of fraud and had every opportunity to address that issue at the trial. In the circumstances, she may not now be heard to complain of a denial of justice on that account. It follows, therefore, that I would order that the plaintiff's reply be amended accordingly.

This amendment having been allowed, I would affirm the judgment of the court below and dismiss this appeal with costs.

HARRISON, J.A.:

I also agree.