8 pages.

ROYAL COURT

24th July, 1990 112.

Before: P.R. Le Cras, Esq., Commissioner,
Jurat Coutanche,
Jurat Gruchy.

Between:	Vekaplast Heinrich Laumann K.G.	Plaintiff
And:	T.A. Picot (C.I.) Limited	First Defendant
And:	Vekaplast Windows (C.I.) Limited	Second Defendant
	(First Action)	
	AND	
Between:	T.A. Picot (C.I.) Limited	First Plaintiff
And:	Vekaplast Windows (C.I.) Limited	Second Plaintiff
And:	Terence Alan Picot	Third Plaintiff
And:	Vekaplast Heinrich Laumann K.G.	Defendant
	(Second Action)	

Applications:

(1) by the Defendant in the second action:

(a) for an order that the Order of Justice of the First, Second, and Third Plaintiffs in the Second Action be struck out under the provisions of Rule 16/13 of the Royal Court Rules, 1982, as amended on the grounds that (i) the Order of Justice discloses no reasonable cause of action; (ii) the claim is scandalous, frivolous, or vexatious; and (iii) the claim is otherwise an abuse of the process of the Court; and

(b) for an order that the First, Second, and Third Plaintiffs in the Second Action be ordered to pay the costs of and incidental to the Second Action; and

(2) by the First and Second Defendants in the First Action for an Order setting aside the Judgment delivered on the 21st August, 1986.

Mr. T.A. Picot on behalf of himself and of T.A. Picot (C.I.) Limited, and Vekaplast Windows (C.I.) Limited
Advocate C.M.B. Thacker on behalf of Vekaplast Heinrich Laumann, K.G.

JUDGMENT

THE COMMISSIONER: We have before us two summons: (1) a summons, by the defendant in the second action, Vekaplast Heinrich Laumann K.G., to show cause why the Order of Justice of the first, second and third plaintiffs in that action should not be struck out on grounds set out in the summons; and (2) a summons by the first and second defendants in the first action, that is T.A. Picot (C.I.) Limited and Vekaplast Windows (C.I.) Limited, to have the consent judgment, order and costs order dated the 21st August, 1986, in favour of Vekaplast Heinrich Laumann K.G., the plaintiff, set aside on the grounds that the judgment was obtained through fraudulent misrepresentation; and to have this application consolidated with their action against Vekaplast Heinrich Laumann, K.G., that is to say with the second action.

We deal first with summons No. (2). The case was put by Mr. Picot in this way: in the hearing which was compromised in 1986, he relied on the pleadings which he believed; the pleadings were materially wrong; and Vekaplast Heinrich Laumann, K.G. must or ought to have known that they were wrong and hence the consent judgment which was based on them can and should be set aside. He produced as authority a line of cases as to the meaning of fraud and as to absence of belief being all that was necessary to establish fraud.

Amongst others he referred us to Thorne -v- Smith (1947) 1 All ER 39, in particular the passage at p.41 where Scott L.J. stated:

> "If the misrepresentation is fraudulent the tenant who has submitted to a consent judgment because of the landlord's representation that he wanted the house for his own occupation could have brought a common law action for damages for deceit and the consent judgment would have been no defence. In addition, he would have been entitled to have that judgment set aside by bringing an action for the purpose and the two causes of action could have been included in the one writ. In the second place, even without an allegation and proof of fraud, if the judgment had been obtained by innocent misrepresentation the tenant could, in equity, have had the consent judgment set aside as in the case of any contract obtained by misrepresentation".

Mr. Picot referred us as well to a passage from 4 Halsbury 31, paragraph 1059:

> "What constitutes Fraud:
> By the mid nineteenth century it had been established that not only a misrepresentation known or believed by the representor to be false when made was fraudulent but the mere non-belief in the truth was also indicative of fraud. Thus whenever a person makes a false statement which he does not actually and honestly believe to be true for purposes of civil liability, that statement is as fraudulent as if he had stated that which he did not know to be true or knew or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law whether the representation has been made recklessly or deliberately. Indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief".

It is quite clear to us that a consent judgment may be set aside in certain circumstances. The question is whether these circumstances apply here.

Mr. Thacker puts his case in this way - we should accept, he says, that the first action was concerned with the common law rights of

the plaintiff and for that he quotes from paragraphs 24 and 33 of the affidavit sworn by Mr. Picot. Paragraph 24 reads:

> "It was my clear understanding from Advocate Michel that the action commenced by [Vekaplast Heinrich Laumann, K.G.] in June, 1984 was based on its rights under Jersey common law as [it] was claiming to be the beneficial owner of the trade names Veka and Vekaplast in Jersey". And 33: "Much was made during the continuation of the hearing of this ownership and the common law rights relating to trade mark ownership by Miss Nicholls on behalf of the .... plaintiff as well as the extent of the .... plaintiff's worldwide application for the same trade marks".

There must, he says, be something beyond the mere assertion that the pleadings are untrue to substantiate an allegation of fraud. There has to be, he submitted, assertions of fact. In support of this he cited a passage from 4 Halsbury 16, at paragraph 1669:

> "Setting aside a judgment obtained by fraud. A judgment which has been obtained by fraud, either in the Court or of one or more of the parties, can be impeached by means of an action which may be brought without leave and is analogous to the former Chancery suit set aside a decree obtained by fraud. In such an action it is not sufficient merely to allege fraud without giving any particulars and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof and not to matters which are merely collateral. The court requires a strong case to be established before it will allow a judgment to be set aside on this ground and unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment complained of the action will be stayed or dismissed as vexatious".

He referred also to Jonesco -v- Beard (1930) JAC 298 and I quote from p.300 of that report, where Lord Buckmaster in the House of Lords stated:

"It has long been a settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which as in any other action based on fraud the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires".

He further submitted that the evidence was available to Mr. Picot's companies at the time of the hearing and he cited a passage from 4 Halsbury 16, paragraph 1534:

"Fresh evidence. The mere discovery of fresh evidence as distinguished from the development of fresh circumstances on matters which have been open for controversy in the earlier proceedings is no answer to a defence in res judicata. Where this is applicable the original cause of action is gone and can only be restored by getting rid of the res judicata and this must be done by an action or application which can only succeed on the same grounds as the former "Bill of Review" in the Court of Chancery, namely the discovery of fresh evidence which entirely changes the aspect of the case and was not and could not by reasonable diligence have been obtained before. The affect of fraud and collusion in preventing an estoppel by record from arising is considered later".

As to the general principles he put to us a passage from 4 Halsbury 16, paragraph 1518:

"Records of courts of law. The doctrine of estoppel by record thus limited finds expression in two legal maxims: 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. It accords with the first of these maxims that a party relying on estoppel by record should be able to show that the matter is being determined by a judgment in its nature final. The word 'final' is here used as opposed to 'interlocutory'. A judgment which purports finally to determine rights is nonetheless effective for the purposes of creating an estoppel because it is liable to be reversed on appeal, or because an appeal is pending

or because for the purpose of working it out enquiries or accounts have to be taken".

Mr. Thacker complains of the delay in the bringing of Mr. Picot's application and refers as well to 4 Halsbury 16, paragraph 1559:

"Judgment by default or consent

...On the same principle a defendant who has consented to judgment before service of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence because they have never been in issue. But it is otherwise for the defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in a later proceedings".

So far as concerns Mr. Picot's allegations that it was the pleadings on which he relied he referred to Mr. Picot's affidavit at paragraphs 39 and 40 which read:

"39. Once the court had adjourned Advocate Michel explained to me why he had stopped me giving evidence and halted the proceedings".

"40. He told me that he had become convinced by the evidence and believed the Court were also by that stage convinced that the .... plaintiff's pleadings of 1984 were true".

We accept for the purpose of these proceedings that Mr. Picot had evidence which he could have put to the Court showing that the statements in the pleadings of Heinrich Laumann were wrong. But we do not accept that this shows that Heinrich Laumann's pleadings are thereby wrong. This is a step for which we do not have sufficient evidence and one which we are not prepared to take.

Furthermore, we find that Mr. Picot had an opportunity to put this evidence before the Court at the 1986 hearing when he had the chance to cross-examine Heinrich Laumann's witnesses.

We have no hesitation in accepting the submissions of Mr. Thacker in preference to those of Mr. Picot. We find that Mr. Picot has failed to show fraudulent misrepresentation. As these two summonses are in effect two sides of the same coin, it seems to us that they stand or fall together and we therefore strike out Mr. Picot's summonses and grant the summons of Mr. Thacker's client.

Authorities

4 Halsbury 16 paras: 1518, 1552, 1553, 1555, 1556, 1558, 1559, 1660, 1661, 1669, 1672.

4 Halsbury 31, paras: 1058, 1059, 1062.

R.S.C. O18/19/3, 7, 8, 15, 17, 18.

R.S.C. 026.

Jonesco -v- Beard (1930) JAC 298.

Knapp -v- Harvey (1911) 2 KBD 725.

A.G. -v- Gaskill (1822) 20 Ch. D. 519.

Langmeade -v- Maple 18 CB (NS) 256.

Serrao -v- Noel (1855) 15 QBD 549 CA.

Marchioness of Huntley -v- Gaskell (1905) 2 Ch. D. 656.

Bell -v- Holmes (1956) 1 WLR 1359.

Remmington -v- Scoles (1897) 2 Ch. D. 1.

Carl Zeiss -v- Rayner & Keeler Ltd (No. 3) (1970) 1 Ch. D. 506.

Briant -v- Falles Motor Works (Airport) Ltd. (1963) JJ 307.

O'Rourke -v- Poole (16th March, 1988) Jersey Unreported.

Extracts from Le Geyt, p.p. 80-126.

Extracts from Pothier p.p. 653-675.

Vekaplast H. Laumann K.G. -v- T.A. Picot (C.I.) Ltd & Anor. (15th August, 1989) Jersey Unreported.

Chitty on Contracts (26th Ed'n) Vol 1: para. 348.

Chitty on Contracts (25th Ed'n) Vol 1: para. 413.

Thorne -v- Smith (1947) 1 All ER 39.

Wilding -v- Sanderson (1897) 2 Ch. 534.