

IN THE PRIVY COUNCILNo. 6 of 1974ON APPEAL FROM THE WEST INDIES ASSOCIATED  
STATES SUPREME COURT (Appellate Jurisdiction)COURT OF APPEALDOMINICA10 IN THE MATTER OF CIVIL APPEAL No. 2 of 1972

B E T W E E N : HAKIM E.F. GORDON in his personal  
capacity and in his capacity as  
Personal Representative of Estate  
Clara Marguerite Gordon, deceased  
Plaintiff/Appellant

20 - and -

CASTAWAYS DEVELOPMENTS LIMITED  
and  
CASTAWAYS HOTEL LIMITED

Defendants/RespondentsCASE FOR THE APPELLANT

- 30 1. This is an Appeal, by leave of that Court, RECORD  
from an Order of the Court of Appeal of the P.106/7  
Supreme Court of the Associated States dated  
the 21st March 1973 following a Judgment delivered  
by the Court on the 20th day of March, 1973.  
The said Order and Judgment of the said Court of  
Appeal which is the subject of this Appeal to  
Her Majesty-in-Council appears at pages 106 and pp.100/6  
100 respectively of the Record, shows that the  
40 Appellant sued the Defendants, in his personal  
capacity and also as the Personal Representative  
of the Estate of his mother, Clara Marguerite  
Gordon, deceased. The essence of his claim for P.18 1.28  
relief was that certain indentures, and in P.25 1.31  
particular, a certain Certificate of Title had  
been obtained by fraud and should be set aside,  
so that he could succeed to the devise of a  
certain Trust property made to him in his  
mother's Will.
- 50 2. At the hearing, the Respondents contended  
that the Appellant had no "locus standi" to  
pursue his claim. The details of the submission  
appear at line 44 of page 100 of the Record. It P.100 1.44  
is important to note that there was no submis-  
sion concerning the joinder of parties either on  
the part of the Plaintiff or of the Defendants.  
The preliminary objection, which was argued  
before the Trial Judge, in first instance, was P.16 1.15

P.104 1.35 not upheld, but the Court of Appeal came to the conclusion that the Appellant could not proceed with his suit until he had joined the legal owners of the said trust property namely, the Mero Estate now known as Castaways, as co-plaintiffs. This is the essential and only point of this Appeal, because both the Trial Judge and the Court of Appeal found that the Appellant had an equitable, interest in the said trust property. The Court of Appeal held, however, that, on certain terms as to costs, the Appellant should be permitted to amend his pleadings. The Final Order of the Court of Appeal appears at page 107 of the Record. 10

3. The decision of the Court of Appeal was based on their interpretation of the Rules of the Supreme Court of Dominica Order 63, Rule

P.105 1.8/16 "3.(1) All the executors or administrators of the estate or trustees of the trust, as the case may be, to which an administration action or such an action as is referred to in rule 2 relates must be parties to the action, and where the action is brought by executors, administrators or trustees, any of them who does not consent to being joined as a plaintiff must be made a defendant." 20

It is clear that the Order contemplates the joining of co-plaintiffs where the Plaintiff is a Trustee of the Trust or Settlement as the case may be, in the same right as the other Trustees who have not been joined. In the instant case, the Appellant was, in no sense, a Trustee in the same right as the Trustees of the Settlement nor did he, at any time, purport so to be. In any event, there were de facto and de jure no Trustees of the Settlement in respect of the Mero Estate in issue in 1969 when the Appellant first entered suit. This point is returned to later. 30 40

P.19 1.35

4. The Plaintiff sued in his personal capacity as well as in his capacity of personal representative of his deceased mother's Estate. He at no time purported to sue as one of the Trustees of the Settlement of George James Christian. Accordingly, the question of his joining the Trustees of the Settlement, as co-plaintiffs, could not possibly arise. Reference is made to page 104 of the Appeal Record, lines 39/40, where there is a slight error in typing. The Rule should be properly quoted as Rule 2(2) and Rule 3(1) of Order 63 of the Rules of the Supreme Court of Dominica 1970 (not 1907). While the Plaintiff was suing as the personal representative of his 50

P104.1.39/40

mother's Estate he was by no stretch of the imagination a Trustee of the Settlement which is in contemplation in Rule 3(1). If the Court of Appeal meant that the Appellant should have joined the Trustees of the Settlement as co-defendants, all that the Court need have ordered was the consolidation which had already been sought and to which reference is made in lines 35 to 42 at page 109 of the Record. In any event, the Trustees of the Settlement in 1969, had ceased de jure and de facto to be vested with the legal estate in the Trust property in issue. While the Trustees remained Trustees, of the rest of the settled properties, they were not then legally vested with the legal estate in the land in issue.

P.105 1.13/16

P.109 1.35/42

5. From the outset of these proceedings, it was common ground to both the Plaintiff and the Defendants that, the Defendants were ostensibly the legal and equitable owners, in possession, of the land in dispute. This is quite clear from the proceedings and this posture has been maintained up to the present time. The issue between the Plaintiff and the Defendants was that the Defendants had reached this status of legal and equitable ownership by means of fraud and/or by purporting to purchase the land in question with notice and knowledge of the Trust attaching thereto. In other words, they had used fraud, namely, equitable fraud by breach of duty in acquiring ostensible ownership while well aware of the defect in the Title, in that a Trust existed in respect of the land in dispute. This situation is clearly revealed by the following extracts from the pleadings in the actions:-

Plaintiffs Statement of Claim in action 1969 No. 70 delivered 10th November 1969.

"The Plaintiff is one of the reversionary owners of the fee simple of the lands, the subject of this suit, and his interest has been mis-appropriated by the defendants in fraudulent breach of the trusts included in the Indenture of Trusts dated 18th March, 1913, and recorded in Book of Deeds E No. 7 folio 689".

P.18 1.28/35

Plaintiffs Statement of Claim in action 1971 No.188 delivered the 27th November 1971.

7. "The said Clara Marguerite Gordon, as a residuary devisee, on the demise of George James Christian, her father, in 1940, also inherited a vested equitable interest as a reversionary owner of the Mero Estate now known as Castaways.

P.26 1.26/38

RECORD  
P.28 l. 17  
to end  
P.29 l.1/13

14. Although the Trustees of the Settlement were vested with the legal estate in fee simple in the corpus of the trust property, they at no time conveyed the same to any person or persons, nor did they intervene to protect the said Trust Property nor in any way to preserve its integrity.
15. The conveyance of 1952 by Christianie Burke to Edwin Lionel Pinard constituted a fraudulent breach of trust because:- 10
- (i) The purported vendor was aware of the trusts which she recited in the said conveyance;
- (ii) She omitted from the recital paragraphs 5 to 7 thereof concerning Clara Marguerite Gordon, although paragraphs 1 to 4 thereof were, therein, quoted verbatim; 20
- (iii) As a beneficiary thereof, Christianie Burke knew the contents of the last Will and Testament of George James Christian aforesaid, because although she had invaded the trust property in 1927 at the age of 21, and even before then (see 1952 conveyance); after the death of George James Christian in 1940, she attorned to his Executor, Peter Charles Christian, for administration of the trusts, and for possession of the trust property which, indeed, she retained in her physical possession until 1952; 30
- (iv) Christianie Burke, accordingly, deliberately and fraudulently misrepresented her title; and the purchaser, Edwin Lionel Pinard, accepted the conveyance with the knowledge and notice of the trusts created by the Deed of Settlement of 1913." 40

Defence of Castaways Development Limited in action  
1969 No. 70 delivered 8th January 1970 50

P.22 l.5/12

- "1. The Defendant (Castaways Developments Limited) is the registered proprietor of all the land described in Certificate of Title Number 159 of 1968 issued the 10th day of April, 1968 filed in Register Book W folio 122.
2. The Defendant is in possession of said land."

Defence of Castaways Development in action 1971  
No. 188 delivered 14th December 1971

RECORD

"1. The defendant, Castaways Development Limited, is the registered proprietor of all the lands described in Certificate of Title No. 139 of 1968 issued on the 10th day of April 1968 and filed in Register Book W 1 folio 122;" P.33 l. 19/24

10

Defence of Castaways Hotel Limited in action 1971  
No. 188 delivered 6th January 1972

"1. The Defendant Castaways Hotel Limited is the bona fide purchaser of the legal estate in respect of 4.58 acres of the Mero Estate without notice of any breach of trust affecting the same, by virtue of an Indenture dated the 13th day of June 1967 recorded in Book of Deeds L No. 8 folios 269 to 272 from Daphne Taylor to Castaways Hotel Limited." P.37 l.3/11

20

It is abundantly clear from these references, that both the Plaintiff and the Defendants had accepted the situation that the Defendants were the ostensible legal and equitable owners of the land in question at the time suit was first entered by the Plaintiff, in 1969.

30

6. The Court of Appeal took the view that the Plaintiff had not joined the legal owners of the land in the proceedings and further, that he should have joined the legal owners as co-plaintiffs. Reference to the grounds of appeal will reveal the absurdity of this finding (see paragraphs 1(i)(b)-(vi)). Indeed, it was not within the province of the Court of Appeal to decide this issue against the Plaintiff when it had been accepted by the Defendants as resolved, and was always common ground throughout the whole of these proceedings. The mere fact that prior to 1969, or even prior to 1952, there may have been Trustees vested with the legal estate in the land in dispute, did not alter the fact that when suit was instituted in 1969, this position had long ceased to exist, because the land in question had rightly or wrongly escaped from the Trust, and had become vested in the Defendants; in the case of the 1st Defendant, by a Registered Title which constitutes under the Title by Registration Ordinance Cap.222, absolute dominion or ownership and in the case of the 2nd Defendant, a Common Law Conveyance which still subsists and has not yet been set aside. Indeed, one of the remedies sought in

40

P.109 l.13 to  
end and  
P.110 l.1/35

50

RECORD  
P.30 l.30  
to end  
P.31 l.1  
to 8

the instant suit by the Plaintiff is that both the Registered Title and the Common Law Conveyance should be set aside, because they were obtained by fraud and despite notice of the trusts which were engrafted on the Title at the time of the original Conveyance in 1952.

The following reports, definition and sections of Chapter 222 of The Laws of Dominica are apposite

10

- (a) Attorney General of Dominica-v-Shillingford  
West Indian Reports 1969 Vol. 12 Part 1  
at page 83.
- (b) Attorney General of Dominica-v-Shillingford  
West Indian Reports 1971 (Privy Council)  
Vol. 14 Part 3 at page 531.
- (c) Definition "Trustee"

20

Words and Phrases Legally Defined. Second Edition 1969 Vol. 5 at page 231 as follows:-

TRUSTEE

"A Trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his cestuis que trust." Smith v. Anderson (1880) 15 Ch. D.247, C.A., per James, L.J. at p.275.

30

- (d) Chapter 222. The Laws of Dominica  
Title by Registration

Sec 2 (3) Provides -

40

2. (1) In this Ordinance -

+++    +++    +++

(3) Whenever any of the expressions defined in the First Schedule occurs in this Ordinance, it shall, unless the context otherwise requires, have the meaning assigned to it in the said Schedule.

50

Sec 5

5. The date of every first certificate of title shall be the day and hour at which the registrar of titles shall place the certificate of title in the current volume;

up to which period of time the former title shall be held to continue to exist, and immediately after to cease and determine, and all deeds upon which the land to which the certificate of title relates had been theretofore held, or by which any mortgages or incumbrances upon the said land were shown to exist, shall cease to have any force or effect, and shall be preserved in the custody of the registrar of titles, or in such manner as the chief justice, in his capacity of keeper of the public records, shall, under the provisions of the Registration and Records Ordinance, from time to time direct.

Sec 12(2) and 12(4)

(2) The Application to bring land under this Part of this Ordinance shall be made by the owner who shall present a request to the registrar of titles for the issue to him of a first certificate in respect of the land described in the request.

+++    +++    +++

(4) The request shall be in Form 1 in the Second Schedule and shall be accompanied at the time of presentation by all the titles, deeds or other documents under which the applicant claims to be the owner of the land.

Sec 13

The registrar of titles shall thereupon submit such titles, deeds and documents to a judge, and if such judge shall be satisfied that the person presenting the request is entitled to have a certificate of title issued to him, the registrar of titles shall issue such certificate of title accordingly, and shall note thereon the mortgages and incumbrances affecting the same. The title deeds and documents which accompanied the request shall remain in the custody of the registrar of titles.

Sec 19(2)

Where any person has, by wilful misrepresentation or otherwise, obtained a certificate of title to any land to be wrongfully issued, the registrar of titles shall call in the same to be cancelled in any case in which the rights of a

## RECORD

transferee or incumbrancee; who has taken bona fide for value without notice, will not be prejudiced thereby: and where damages have been recovered against the Attorney-General in any such suit as in this section is mentioned, the Attorney-General, on behalf of the Government of the Colony, shall sue the person who has obtained the certificate of title for the issuing of which such damages have been recovered, for damages to be paid into the said fund: Provided always, that if the person so sued has not obtained the said certificate by fraud, and can show that he has not been benefited by the issue of such certificate to the whole amount of the damages recovered against the Crown, he shall not be liable to a greater amount than that by which he has been so benefited: Provided also, that no transferee or incumbrancee who has taken bona fide for value, without notice, subsequent to the issue of the first certificate of title, shall be liable in any action for damages. 10 20

## Sec 137

If any person shall be dissatisfied with any act, omission, refusal, decision, direction, order, noting, or other completed proceeding of a registrar of titles affecting the right of such person to any land, or any mortgage or incumbrance thereon, or any caveat in relation thereto, such person may apply to the registrar of titles to set forth in writing the grounds upon which he proceeded, and, thereupon, such person may bring any question in relation thereto before the Court by summons served on the registrar of titles, and the Court shall hear and determine the the question at issue, and give such order and directions thereupon as may appear just. 30 40

## Sec 138

In case it shall appear to a registrar of titles that any certificate of title has been issued in error, or contains any misdescription of land or boundaries, or that any noting of any mortgage or incumbrance or otherwise has been made in error, either wholly or as to any part thereof, or that the certificate of title, or noting thereon, has been obtained by fraud, or that any certificate of title has been fraudulently obtained or 50



is fraudulently retained, he may require the duplicate certificate of title issued from the registry to be returned for correction, or to be delivered to the true owner thereof, and, if the person so required shall fail to return the certificate of title, or to deliver the same to the true owner, the registrar of titles may apply to the Court for a summons to bring the person before the Court for examination; and the Court may thereupon examine the person, and may direct the certificate of title to be given up to the registrar of titles or to the true owner thereof, or may grant a warrant for searching for and recovering the same, or, if the said person shall refuse to be examined or shall refuse to deliver up the certificate of title, or deliver it up to the true owner, either then or at any time ordered by the Court, may commit the said person to prison for any term not exceeding six months.

#### Sec 139

At the request of a registrar of titles upon petition or case stated, or in any proceeding respecting any land, or in respect of any contract or transaction relating thereto, or in respect of any instrument, caveat, or dealing with land, the Court may by decree or order direct the registrar of titles to cancel, correct, substitute, or issue any certificate of title, or make any noting or entry thereon, and to do any such acts as may be necessary to carry into effect any judgment of the Court.

#### 40 Sec 140

A registrar of titles may require any person, for the purposes of this Ordinance, to produce the duplicate certificate of title issued to the registered proprietor, and may make enquiry into any matter affecting titles to land and the accuracy of the register, and may summon any person before him for the purpose of giving evidence and explanation in regard to any such matter, and any person refusing to appear in **answer** to such summons may be proceeded against in the same manner as a person refusing to give evidence before the Court. The summons may be in Form 26 in the Second Schedule.

#### THE FIRST SCHEDULE. Definitions

INDEFEASIBLE The word used to express that the

## RECORD

certificate of title issued by the registrar of titles and the notings by him thereon, cannot be challenged in any Court of law on the ground that some person other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are not mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of such certificate of title, or the noting of such mortgages or incumbrances, or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Ordinance, by the person making the challenge, The word also means that, the certificate of title being issued by the Government of the Colony, the Government of the Colony is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by the issue to bring an action for money damages against the Government of the Colony.

10

20

30

OWNER

The person having the legal right to land and the full dominium thereof, but who has not become the registered proprietor under this Ordinance. This distinction is for the temporary purposes of this Ordinance only, as the registered proprietor is in the fullest sense the absolute owner of the land.

40

And see Second Schedule form 4 Chapter 222 page 2323.

P.109 l.13  
to end and  
P.110 l.1  
to 35

7. The point made by the Court of Appeal is, of course, procedural, but it has the effect of placing an insurmountable obstacle in the path of the Plaintiff/Appellant's quest for justice. Paragraphs 1(iii)-(v) of the grounds of Appeal clearly indicate why it is impossible for the Plaintiff/Appellant, now or at any time, to join the Defendants as co-plaintiffs in these proceedings.

50

8. The Appellant submits that this Appeal should be allowed with costs and that the Judgment and Order of the Court of Appeal should be set aside and the Judgment and Order

dated the 17th and 27th July 1972 respectively of Mr. Justice Renwick in the Court of First Instance should be restored for the following, amongst other

R E A S O N S

- 10 (1) BECAUSE the Court of Appeal misinterpreted Order 63, Rule 3(1) of the Rules of the Supreme Court of Dominica.
- (2) BECAUSE the Court of Appeal erred and was wrong in Law in holding:
- (i)(a) That the Plaintiff/Appellant had not in suits Nos. 70 of 1969 and 188 of 1971 joined the persons in whom the legal estate was then vested. At the time that these suits were entered the legal estate in the lands in issue as well as the equitable estate therein were vested by Registered Title in the first-named Defendant and by Registered Conveyance at Common Law in the second-named Defendant, both of whom were in possession thereof.
- 20
- (b) From the inception of these proceedings, it was consistently part of the Defendants/Respondents' case that from 1967 onwards, they were the legal and equitable owners in fee simple in possession of the lands in issue, Paragraphs 1 of their Defences dated respectively 7th January, 1970, 13th December, 1971, and 6th January, 1972, are apposite.
- 30
- (ii) The Court erred and was wrong in law in failing to consider that suits Nos. 70 of 1969 and 188 of 1971 were by Order of the 7th December, 1971, consolidated; WITH LIBERTY TO APPLY FOR further consolidation therewith of suit No. 189 of 1971 instituted against the persons in whom the legal estate in the aforesaid lands had been vested some years prior to the grant of the aforesaid Registered Title in 1968 and the Conveyance at Common Law of 1967.
- 40
- (iii) The Court erred and was wrong in law in deciding that in the year 1969 and onwards there were persons or trustees vested with the legal estate in issue other than the two Defendants/Respondents herein.
- 50
- (iv) The Court erred and was wrong in law in deciding that there were no special circumstances which showed that the Plaintiff/Appellant was entitled to sue without joining the persons in whom the legal

RECORD

estate was vested. At paragraph 14 of the Statement of Claim dated and served on the 27th November, 1971, the following occurs:-

"Although the Trustees of the Settlement were vested with the legal estate in fee simple in the corpus of the trust property, they at no time conveyed the same to any person or persons, nor did they intervene to protect the said Trust Property nor in any way to preserve its integrity."

10

This statement clearly indicated that the Plaintiff/Appellant was alleging negligence or misconduct on the part of the former Trustees.

(v) The Court erred and was wrong in law in requiring the Plaintiff/Appellant to join as co-plaintiffs the persons "in whom the legal estate in the trust property is vested." At the time of entry of the suits the legal and equitable estates in issue, were vested in the two Defendants/ Respondents who were incompetent to sue themselves at the instance of the Plaintiff/Appellant.

20

30

(vi) The Court erred and was wrong in law in making any order conditional or otherwise as to costs ad terrorem, the said Court having confirmed the substantial finding of the trial Judge that the Plaintiff/Appellant "has an equitable interest under the Will of George James Christian ...".

40

(3) BECAUSE the Judgment of the Court of Appeal omits, entirely, any indication that any submission made by Counsel, for the Plaintiff/Appellant was considered at any time or indeed, that Counsel made any such submission at all.

(4) BECAUSE the said Judgment of the said Court of Appeal was wrong and ought to be set aside and for the reasons herein, the Judgment of Mr. Justice Renwick in the Court of the first instance was right and should be restored.

50

IN THE PRIVY COUNCIL

ON APPEAL FROM THE  
WEST INDIES ASSOCIATED STATES

SUPREME COURT  
(Appellate Jurisdiction)

COURT OF APPEAL DOMINICA

CIVIL APPEAL No. 2 of 1972

BETWEEN:

HAKIM E. F. GORDON

- and -

CASTAWAYS DEVELOPMENTS LTD.

- and -

CASTAWAYS HOTEL LTD.

---

C A S E

- of the -

A P P E L L A N T

---

WATERHOUSE & CO.  
4 St. Paul's Churchyard,  
London EC4M 8BA

Agents for:

F. E. DEGAZON  
Roseau, Dominica