

O N A P P E A L

FROM THE WEST INDIES ASSOCIATED STATES SUPREME COURT
(Appellate Jurisdiction)

COURT OF APPEAL

DOMINICA

IN THE MATTER OF CIVIL APPEAL No. 2 of 1972

B E T W E E N :-

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HAKIM E.F.GORDON in his personal capacity
and in his capacity as Personal Representative
of the Estate of Clara Marguerite Gordon
deceased (Plaintiff)Appellant

- and -

CASTAWAYS DEVELOPMENTS LIMITED and
CASTAWAYS HOTEL LIMITED (Defendants)Respondents

C A S E F O R T H E R E S P O N D E N T S

RECORD

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1. This is an appeal from an order of the Court of Appeal of the West Indies Associated States, Dominica, (Cecil Lewis C.J. (Acting), St.Bernard, J.A. and Louisy, J.A. (Acting)) dated 21st March 1973, which allowed the Respondents' appeal from a judgment of Renwick J. delivered in the High Court of Dominica on 17th July 1972 in Suit No. 70 of 1969 consolidated with Suit No. 188 of 1971. p.106,1.26 - p.107,1.19. p.7,1.15 - p.15,1.9.

2. In Suit No.70 of 1969 the Appellant in his personal capacity only claimed against Christianie Burke and the Respondents the following relief:- p.18,1.25 - p.19, 1.38.

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(1) A declaration that he was one of the reversionary owners in fee simple of certain land in Dominica known as the Mero Estate;

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(2) The cancellation of certain specified indentures of conveyance relating to parts of Mero Estate and alleged to have been executed fraudulently;

(3) A direction to the Registrar of Titles to rectify or cancel the Certificate of Title dated 10th April 1968, No. 139/1968, Register Book W.1 Folio 122, in favour of the first named Respondent which relates to part of the Mero Estate;

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(4) Accounts to be rendered by the Defendants in the Suit to the Appellant in respect of the administration of the Mero Estate (as being the corpus of certain trusts in which the Appellant claims to be interested) from 1st January 1929;

(5) An injunction restraining the Defendants in the Suit from dealing in any way with the corpus of the said trusts;

(6) The appointment of a trustee or receiver of the corpus of the said trusts.

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p.24,1.9 -
p.25,1.25.
p.25,1.26 -
p.32,1.14.
p.31,1.24.

3. In Suit No.188 of 1971 the Appellant in his capacity as personal representative of the estate of his mother, Clara Marguerite Gordon, deceased claimed against Christianie Burke, Edwin Lionel Pinard, Daphne Taylor and the Respondents similar relief to that claimed in Suit No.70 of 1969 together with additional claims for possession of the corpus of the said trusts and for damages quantified in the Statement of Claim at \$5,000,000. Christianie Burke is not a respondent to this appeal and neither Edwin Lionel Pinard nor Daphne Taylor has taken any part in either suit whether before or after consolidation.

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p.33,1.1 -
p.35,1.14.
p.37,1.1 -
p.42,1.21.
p.15,11.6-8.
p.106,11.2-15.

4. The Respondents in their Defences pleaded that the Appellant had not a sufficient interest to maintain his suit and this question was tried as a preliminary issue before Renwick J. Renwick J. held that the Appellant had a sufficient interest and a locus standi to pursue his claim. The Court of Appeal reversed his decision, holding that the Appellant's actions were only maintainable if he joined as co-plaintiffs the persons in whom the legal estate in the trust property was vested and giving the Appellant leave to amend his writs, pleadings and other documents on payment in any event of all costs thrown away. If the Appellant elected within 30 days to amend on those terms the Court of Appeal ordered that the actions could proceed, but if he did not so elect the actions would be

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dismissed with costs.

10 5. The principal question raised by this appeal is whether a beneficiary (or person deriving title through or under a beneficiary) under a residuary gift in a will is entitled to bring an action in respect of property subject to that gift before the personal representatives of the testator have assented to the vesting of that property in any person without joining those personal representatives, or the persons in whom the legal estate in that property is vested, as parties in that action.

6. The facts relevant to this appeal are set out in the judgement of Cecil Lewis C.J. (Acting) as follows :

p.101,1.6.

20 "Francis Thomas Burke was indebted to George James Christian in the sum of £120 and in 1894 he executed a mortgage in his favour, on the Mero Estate and the Cassada Garden Estate as security for the said loan. In 1913 this loan with interest thereon was still unpaid. Burke had borrowed the sum of £100 from one A.D.Riviere in 1909 and executed a second mortgage in his favour on the Cassada Garden Estate as security for this loan. This sum and the interest thereon were still unpaid in 1913 and it was agreed between Burke and Christian that Burke would sell the Mero Estate to Christian for £584 out of which Christian would repay the loan due to himself and also the mortgage debt due to A.D. Riviere. It was further agreed that an annuity of £25 would be paid to Burke and this was secured by a bond entered into by Christian and one Thomas Howard Shillingford.

p.90,1.1 -
p.91, 1.29.

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40 In consideration of the aforesaid premises and in further consideration of the love and affection which the said George James Christian bore to Margery Burke and Christianie Burke, Peter Charles Christian, Clara Christian and Maud Christian, Francis Thomas Burke at the request of George James Christian conveyed the Mero Estate to Thomas Howard Shillingford in fee simple on March 18, 1913, to hold the same as trustee. His Lordship then read the Deed of Settlement of 18th March 1913 and continued as follows:7

p.60,1.2 -
p.64,1.16.

It is common ground that Christianie Burke, who is still alive and who was the survivor under paragraph (4) of the limitations in the trust, holds only a life interest in Mero Estate. It was so held in Gordon v. Burke (1970) 16 W.1.R.204, Civil Appeal

p.103,1.6.
p.62,11.42-
47.
p.127,1.1 -
p.146,1.32.

RECORD

p.127,1.1 -
p.146,1.32.

No.3 of 1970⁷, when on an application by the respondent in Suit No.70/ 1969 to determine whether Christianie Burke was empowered to sell the fee simple in Mero Estate as beneficial owner, this Court, reversing the decision of the High Court, held that she was not so empowered as she took only a life interest under the settlement.

p.60,1.2 -
p.64,1.16.

Under the settlement the settlor George James Christian created only life interests and did not dispose of the beneficial interest in the Mero Estate. As held in Gordon v. Burke (supra) Christianie Burke accordingly became entitled only to a life interest in the said estate, and by virtue of this decision under paragraph (6) of the settlement the survivor or survivors of the persons mentioned therein would similarly take a life interest or life interests as the case may be. The result is that George James Christian having not effectively disposed of the equitable interest in the Mero Estate there was a resulting trust to him on the very date on which he executed the trust instrument on March 18, 1913, so that, on that date the equitable fee simple became vested in him. 10 20

p.63,11,17-24.

p.60,1.2 -
p.64,1.14.

p.64,1.17 -
p.76, 1.18.

p.67,1.38 -
p.68,1.35.

George James Christian made a will in 1936 in the residuary clause of which he bequeathed all his property not otherwise disposed of unto his trustees to convert the same into money by sale or otherwise and to divide the proceeds in equal shares among eleven named persons who included Christianie Burke and Clara Gordon, the respondent's [that is, the Appellant in this Appeal] mother. Under this clause the respondent's [that is, the appellant in this appeal] mother, who died in 1964, became entitled to a share in the equitable interest in Mero Estate which had resulted to her father under the settlement because she was alive in 1940 when he died. 30

p.78,1.36 -
p.80,1.49.
p.78,11,25-32.

The respondent [that is, the Appellant in this Appeal] is a beneficiary under his mother's will and also her personal representative and trustee".

p.130,11.1-24.
p.142,11.3-10.

7. The following further facts are not in dispute. Francis Thomas Burke died on 17th June 1913. Margery Burke died in 1919 unmarried, without lawful issue and without having attained her majority. Christianie Burke, who was born on 19th January 1906, is still alive, but unmarried and without lawful issue. She entered into possession of the Mero Estate at some time after she attained her majority in 1927 and remained in possession of it ever thereafter, until, by an indenture dated 29th May 1952, she purported as 40

p.142,11,11-12.

beneficial owner to convey the Mero Estate to Edwin Lionel Pinard in consideration of £1,200. That indenture is recorded in Book of Deeds V 7 folios 154-156. By an indenture dated 30th July 1960 and recorded in Book of Deeds A.No.8 fo.218 Edwin Lionel Pinard conveyed 4.58 acres of Mero Estate to Daphne Taylor. By an indenture dated 29th May 1964 and recorded in Book of Deeds C.No.8 folios 314-318 Edwin Lionel Pinard conveyed the remainder of the Mero Estate to the first-named Respondent. By an indenture dated 13th June 1967 and recorded in Book of Deeds L.No.8 folios 269-272 Daphne Taylor conveyed the above mentioned 4.58 acres of the Mero Estate to the second-named Respondent. On 10th April 1968 the first-named Respondent obtained a First Certificate of Title to its part of the Mero Estate which is registered in Register Book W 1 Folio 122.

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8. The question of the locus standi of the Appellant was referred to in the judgments of the Court of Appeal in Gordon v. Burke (1970) 16 W.I.R.204, Civil Appeal No. 3 of 1970. That Appeal was from the dismissal of an application by the Appellant by summons in Chambers, taken out on 10th April 1969, for a declaration that he was one of the reversionary owners of the fee simple absolute of the Mero Estate. By leave of the Court, however, the grounds of appeal were amended so that the issue before the Court of Appeal was limited to the question whether on attaining her majority in 1927 Christianie Burke became the sole cestui-que-trust with the full beneficial interest in the Mero Estate and was entitled to have those hereditaments conveyed to her and, in turn, was entitled to dispose of them, notwithstanding the conditions as to marriage and issue in clauses 4, 5, 6 and 7 of the Deed of Settlement of 18th March 1913. The Respondents, although technically respondents to that appeal, did not appear, but it was conceded by Counsel on behalf of Christianie Burke, who did appear, that the Appellant had a right to move the Court for the determination of that question only. That question was decided by the Court of Appeal in favour of the Appellant and the Court made thereon the following declaration:-

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p.130, 11.20-24.

p.96, 1.27
p.99, 1.16

p.127,1.1 -
p.146,1.32.

p.130,1.42 -
p.131, 1.11.

p.60, 1.2 -
p.64,1.14.

p.131,11.12-14.
p.138,11.25-38.

(1) that Christianie Burke was entitled

under the Indenture of 18th March 1913 to an estate for life only in the hereditaments therein settled, and

(2) that the said Christianie Burke at the date of the Indenture of Conveyance by herself to Edwin Lionel Pinard was seised as cestui-que-trust of an estate for life in the said hereditaments and not of an estate in fee simple and was accordingly not entitled to sell the said hereditaments as absolute owner thereof in fee simple. 10

9. As between the Appellant and Christianie Burke that decision disposed of all the matters then in issue. As between the Appellant and the Respondents, however, all the claims raised by the Appellant in suit No.70 of 1969 and suit No.188 of 1971 remain in issue and unresolved, and it is in relation to them that the Respondents object in limine that the Appellant has no sufficient interest nor locus standi to maintain these suits. 20

p.7,1.15 -
p.15,1.9
p.14,11.1-14
p.143,11.3-20

10. In his judgment on this preliminary issue Renwick J. held that he was not bound by the expression of the opinion of the Court of Appeal No.3 of 1970 to be inferred from the judgment of Cecil Lewis, J.A. because the Will of George James Christian had not been in evidence before the Court of Appeal. Renwick J. continued as follows :

p.14,1.15.

p.60,1.2 -
p.64, 1.16.

"The position in these cases as I see it is as follows: George James Christian settled Mero Estate in various trusts. Whatever may have been his intention by the failure to use the technical expression "heirs" he created only life interests and as a result he was the reversionary owner of the equitable fee simple. Such an interest is a vested interest and not a future interest properly so called. 30

p.64,1.17 -
p.76,1.18.

The Will of George James Christian contains two residuary clauses. To my mind there is no necessity at this stage to determine which of these clauses is applicable because in each clause Clara Gordon, the mother of the Plaintiff [that is, the Appellant in this appeal] is a beneficiary. Clara Gordon died in 1964, approximately [twenty-] four years after the death of George James Christian so at the date of his death she had a vested interest. The plaintiff [that is the Appellant in this 40

appeal⁷ is the legal personal representative and a beneficiary of his mother's estate and consequently his interest is also a vested interest. p.78,11.25-32
p.79,11.1-33

10 Some of the arguments so ably and candidly put forward by Counsel for the defendants [that is, the Respondents to this Appeal⁷ to my mind are substantive defences and should not be decided on the narrow issue of the plaintiff's locus standi which is before me at this stage. One such matter is the instrument of further assurance referred to in the Defence of Christianie Burke. p.92, 1.1 - p.96,1.26.

No arguments were adduced before me on the probable effect of the counterclaim filed by the defendant Castaways Developments Limited [that is the first-named Respondent to this Appeal⁷. On this counterclaim the plaintiff could and indeed would raise the issue which he seeks to do in his actions. p.34,1.21 - p.35,1.14.

20 In my view in all the circumstances the interest of justice will best be served only if all the many and complex issues raised on the pleadings be fully ventilated and determined.

I hold therefore that the Plaintiff has shown a sufficient interest to maintain these proceedings".

11. His Lordship based his decision, in effect on three grounds :-

- 30 (1) The Appellant had a sufficient interest as the personal representative of his mother and as a beneficiary under her Will, to maintain an action in respect of specific property which passed under a residuary gift in the Will of George James Christian of which the Appellant's mother was a beneficiary. p.78,11.25-32.
p.79, 11.1-33.
p.78,1.36 - p.80,1.49.
p.67,1.38 - p.68,1.35.
p.64,1.17 - p.76,1.18.
- (2) The Appellant could raise the issue which he sought to raise on the counterclaim of the first-named Respondent if not in his own suit. p.34,1.21 - p.35, 1.14.
- 40 (3) Justice required that the Appellant be allowed to ventilate fully the issues raised on the pleadings.

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In the Court of Appeal, however, the Appellant (who was in that Court the Respondent) sought to uphold the decision of Renwick J. on the first ground only and neither of the other two grounds are referred to in the Appellant's Notice of Motion for leave to appeal to Her Majesty in Council. In our respectful submission Renwick J. was wrong and his decision ought not to be restored on the grounds relied on by his Lordship or any grounds.

p.108,1.26-
p.111, 1.30

p.1,1.1-
p.4,1.18
p.3,11.23-27

p.3,11.36-44

p.99.1.17 -
p.106,1.25
p.104,11.35-39
p.64,1,17 -
p.76,1.18
p.106,11.2-5
p.104,11.40-42
p.104,1.44
p.105,1.16.

12. In their Notice of Appeal to the Court of Appeal the Respondents contended (inter alia) that Renwick J. misdirected himself in holding that the Will of George James Christian was relevant to the ruling of the Court of Appeal in Civil Appeal No.3 of 1970 on the issue of locus standi and that the learned judge was wrong in law in holding that a claim to share in the residue of the Estate of George James Christian deceased conferred a vested interest in the hereditaments in question having regard to the Real Representative Ordinance (Chapter 213 of the Law of Dominica), section 2, the Appellant not being or claiming to be a personal representative of George James Christian deceased. In their judgment, which was delivered by Cecil Lewis C.J. (Acting), the Court of Appeal held that the Appellant had an equitable interest under the Will of George James Christian but was only entitled to sue if the persons in whom the legal estate was vested were made parties to the action. Their Lordships held that R.S.C. 1907, Order 63, rules 2(2)(c) and 3 (1) applied. These provisions are in the following terms:-

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*2. (2) Without prejudice to the generality of paragraph (1) an action may be brought for the determination of any of the following questions:-

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a Will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

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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".

Cecil Lewis C.J. (Acting) then continued as follows: p.105,1.17

"The terms of the above rules, in my view, reflect 'the general rule' referred to by Viscount Findlay in Performing Right Society Ltd. v. London Theatre of Varieties Ltd. /1924/ A.C.1 at page 18, where he stated the position as follows :-

10 'It follows that when Messrs Chappell
 and Messrs. Keith, Prowse & Co.
 respectively acquired the copyright in
 these songs, the equitable interest
 in the performing rights in respect
 of them vested in the society as
 assignees from them. The society
 became entitled to sue in respect of
 the interests so acquired, but their
 right to sue is subject to the general
 rule that the owner of the legal
20 estate should be joined as a party.
 It is true the owner of a merely
 equitable estate may in certain
 cases sue alone, as where there are
 special circumstances which make it
 inconvenient that the owner of the
 legal estate should sue, or where
 his conduct with reference to the
 estate is in question. But there is
30 no case in which it has been held
 that the presence of the legal owner
 in an action against a third party
 can be dispensed with on such grounds
 as those which are alleged as the
 present case.....Except under
 very special circumstances the
 ordinary rule should be observed,
 that the legal owner should be
 a party to the proceedings.'

40 In the present case there are no special
 circumstances which show the respondent
 /that is, the Appellant in this appeal/
 is entitled to sue without joining the
 persons in whom the legal estate is vested.

The respondent's actions are only maintain-
able if he joins as co-plaintiffs the persons
in whom the legal estate in the trust property
is vested."

13. The Respondents in this Appeal contend that :-

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p.106,11,2-5

(1) The Court of Appeal was right in holding that the Appellant could only maintain these proceedings if he joined as parties thereto the persons or person in whom the legal estate in the trust property (the Mero Estate) is vested.

(2) It would have been appropriate to join such persons or person as co-plaintiffs; but this could not be done without their agreement, and, if such persons or person had refused to be co-plaintiffs, the proper course would have been to join them as additional defendants. 10

(3) There is no evidence before Her Majesty in Council of any such refusal; and accordingly this appeal must proceed on the basis that the necessary consent (to be joined as co-plaintiffs) would have been obtained.

p.101,11.30-33.

(4) The persons or person who were required to be so joined as additional parties were the present personal representatives or representative of Thomas Howard Shillingford (to whom the Mero Estate was conveyed in fee simple in 1913). 20

p.79,11.1-33

p.78, 1.36

p.80, 1.49

p.78, 11.25-32

(5) It would also have been appropriate to join as additional parties the personal representatives of George James Christian (in whose estate the Appellant is interested as a beneficiary under the Will of his mother Clara Marguerite Gordon and also as her personal representative) as being the persons in whom the equitable reversion in fee simple of the Mero Estate is vested. 30

p.99,1.17 -

p.106,1.25.

14. Further or in the alternative, the Respondents contend that the decision of the Court of Appeal ought to be upheld on the following grounds:-

p.67,1.38-

p.68,1.35.

p.64,1.17 -

p.76,1.18

(1) The Appellant claims to be interested in the Mero Estate by virtue of his deceased mother's (Clara Marguerite Gordon's) interest as one of the residuary beneficiaries under the Will of George James Christian. 40

p.67,1.38 -

p.68,1.35.

(2) By virtue of that interest as residuary beneficiary, the Appellant has no interest in any particular part of the unadministered assets of George James Christian's estate; and

as there has been no assent by George James Christian's personal representatives in respect of the Mero Estate (or the reversionary interest of George James Christian's estate in the Mero Estate), it cannot be assumed that the Mero Estate (or that reversionary interest in it) forms part of George James Christian's residuary estate or that the appellant or his mother's estate has any interest in the Mero Estate (or that reversionary interest):
 see Corbett v. I.R.C. [1938] 1 K.B. 567;
Lord Sudeley v. Att.Gen. [1897] A.C.11,18,21;
Re Cunliffe-Owen [1953] Ch.545; Commissioner of Stamp Duties (Queensland) v. Livingston [1965] A.C.694, 712; Re Hayes's Will Trusts [1971] 1 W.L.R.758,764.

p.104,11.17-20

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(3) The interest as residuary beneficiary referred to above gives the Appellant, as his mother's personal representative, a right to have the estate of George James Christian duly administered see Re Leigh's Will Trusts [1970] Ch.277; and Snell's Principles of Equity, 27th Ed., 326-7; but no such right in respect of the Mero Estate as the Appellant has sought to assert in the present proceedings. On this aspect of the case the Respondents will also refer to Daniell, Chancery Practice, 8th Ed. I,346-7 and Allan v. Allan (1808) 15 Ves.130, 135-6.

p.67,1.38-
p.68,1.35.

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15. By order of the Court of Appeal dated 10th July 1973 the Appellant was granted conditional leave to appeal to Her Majesty in Council and on 11th March 1974 the Court of Appeal granted final leave to appeal.

p.114,1.22-
p.115,1.48

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16. The Respondents submit that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE the Appellant cannot maintain these proceedings without joining as parties thereto the persons in whom the legal estate in the trust property is vested.

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2. BECAUSE the Appellant cannot claim any legal or equitable interest in any

of the assets of the estate of George James Christian which are still unadministered.

3. BECAUSE the learned judge at first instance was wrong in holding that the Appellant had a sufficient interest as the personal representative of his mother, and as a beneficiary under her Will, to maintain these proceedings in respect of specific property which passed under a residuary gift in the Will of George James Christian of which the Appellant's mother was a beneficiary although no vesting assent in respect of that specific property has been executed by the personal representatives of George James Christian.

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4. BECAUSE the judgment of the Court of Appeal was right.

LEOLIN PRICE

DAVID RITCHIE

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No.6 of 1974

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE WEST INDIES ASSOCIATED
STATES SUPREME COURT (Appellate
Jurisdiction)

COURT OF APPEAL

DOMINICA

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 as Personal Representative
of the Estate of Clara Marguerite
Gordon, deceased
(Plaintiff)Appellant

- and -

CASTAWAYS DEVELOPMENTS LIMITED and
CASTAWAYS HOTEL LIMITED
(Defendants)Respondents

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