Privy Council Appeal No. 6 of 1974

Hakim E. F. Gordon (in his personal capacity and as Personal Representative of the Estate of Clara Marguerite Gordon (deceased)) – *Appellant*

v.

Castaways Developments Limited and Another – – *Respondents*

FROM

THE COURT OF APPEAL OF THE WEST INDIES ASSOCIATED STATES SUPREME COURT (DOMINICA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY, 1975

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD CROSS OF CHELSEA
LORD KILBRANDON

[*Delivered by* LORD CROSS OF CHELSEA]

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 in Dominica on 17th July 1972 in Suit No. 70 of 1969 consolidated with Suit No. 188 of 1971.

The facts are as follows. By an indenture made 18th March 1913 between Francis Thomas Burke of the first part, George James Christian of the second part and Thomas Howard Shillingford of the third part, Christian purchased from Burke for the consideration therein mentioned, which included the payment of an annuity to Burke during his life, two estates known as the Mero Estate and the Cassada Garden Estate in the parish of St. Joseph in the Island of Dominica which Burke by the direction of Christian conveyed to Shillingford to be held by him in fee simple as trustee upon the following trusts:—

> " 1. The Trustee his heirs or Executors shall remain in possession of the said lands hereditaments and premises during the lifetime of Francis Thomas Burke or until the said Margery Burke and Christianie Burke shall attain their majority (or marry) or which ever event the death of the said Francis Thomas Burke or the majority or marriage of the said Margery Burke and Christianie Burke shall happen later.

2. The said Trustee shall manage, superintend the management or lease the said Estates or plantation which ever he may deem expedient and shall in no case be liable for impeachment for waste.

3. From the rent or net profits of the said hereditaments the said Trustee shall pay and satisfy the amount which by Bond he the said George James Christian and the said Trustee have bound themselves to pay to the said Francis Thomas Burke and from any balance which may remain shall at his discretion pay the whole or such part thereof for the maintenance and personal support or benefit of Margery Burke and Christianie Burke until they shall attain the age of twenty one years or marry.

4. Should either the said Margery Burke or Christianie Burke die under the age of twenty one years or without having married and leaving lawful issue the whole of the lands hereditaments and premises shall be held in trust for the survivor.

5. Should the said Margery Burke and Christianie Burke die without attaining the age of twenty one years or without having married and without having left lawful issue then the said Trustee shall hold the said lands hereditaments and premises in trust for Peter Charles Christian, Clara Christian and Maud Christian until they shall attain the age of twenty one years or being girls attain that age or marry, with power at his discretion to pay any part of the rents and profits of the said hereditaments and premises for the maintenance and personal support and benefit of the said Peter Charles Christian, Clara Christian and Maud Christian.

6. Should either the said Peter Charles Christian, Clara Christian or Maud Christian die without attaining the age of twenty one years or marrying and leaving lawful issue then the whole of the said lands hereditaments and premises shall be held in trust for the survivor or survivors of them.

7. Should the said Peter Charles Christian, Clara Christian and Maud Christian all die without attaining the age of twenty one years or marrying and leaving lawful issue then the whole of the lands hereditaments and premises shall be held by the Trustee his heirs or Executors in trust for the said George James Christian or as he shall by Deed or Will appoint."

Francis Thomas Burke died on June 17th 1913 and Margery Burke who was born in 1902 died in 1919. Christianie Burke is still alive but has never married. Peter Charles Christian and Maud Christian have both died without issue. Clara Christian married Edgar Fitzgerald Gordon and died in 1964 leaving several children of whom the appellant Hakim Gordon is one. George James Christian, who made the settlement contained in the indenture of 18th March 1913, died in 1940. By his will dated 22nd February 1936 he appointed Peter Charles Christian to be executor and trustee of his estate in Dominica and made a devise and bequest in the following terms:

" I give and bequeath all my interests in Syers Estate and Placeville Estate in the Parish of St. Joseph Dominica British West Indies aforesaid and Houses and land in Roseau Dominica and any other real or personal property or interest therein to Peter Charles Christian and Clara Gordon in equal shares absolutely as tenants in common. Mero Estate and Cassada Gardens estate I have already settled on Chrissie Burke and her lawful children (if any) but if she dies without lawful issue then the said estates to follow the terms of the Deed of Settlement."

His will also contained a residuary gift of all his property not otherwise disposed of to his trustees upon trust for sale and for division of the net proceeds of sale after payment of debts, duties and legacies between eleven persons one of whom was the appellant's mother Clara Gordon. Thomas Howard Shillingford the trustee of the settlement made on 18th March 1913 died many years ago.

By an indenture made 29th May 1952 between Christianie Burke (therein called the vendor) of the one part and Edwin Lionel Pinard (therein called the purchaser) of the other part Christianie Burke sold or purported to sell the fee simple of the Mero Estate to Pinard. After reciting the indenture of 18th March 1913 down to and including paragraph 4 of the trusts set out above and the deaths of Francis Thomas Burke and Margery Burke the said indenture continued as follows:

> "(4) The said Christianie Burke attained majority on the 19th day of January, 1930, having already entered into possession of the said hereditaments.
>
> (5) The Trustee above-mentioned has long ceased or failed to manage or superintend the management of . . . the said premises, for the purposes of the Indenture above-referred to or for any other purpose, and the premises have thereby become ruined and abandoned, wherefore the vendor as sole cestui que trust entered into possession of the aforesaid premises before attaining her majority as explained above.
>
> (6) The vendor on attaining her majority became seized as sole cestui que trust to uses in fee simple of the aforesaid hereditaments for an estate in fee simple absolute in possession free from incumbrances and hath agreed with the purchaser for the sale to him of same for the sum of £1,200.0.0. sterling.
>
> Now Therefore This Indenture Witnesseth that in pursuance of the said agreement and in consideration of the sum of £1,200.0.0. paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges) the vendor as Beneficial Owner hereby conveys unto the purchaser all That Estate and Plantation known as the 'Mero Estate' situate in the Parish of St. Joseph in the said Colony of Dominica containing 179 acres 1 rood or thereabout and bounded as follows:— Northerly by the Macoucherie Estate; Southerly by land formerly belonging to Antoine Gibson and now belonging to the heirs of Rand; Westerly by the Sea or howsoever otherwise the same may be butted bounded known distinguished or described To Have and To Hold the same Unto and To The Use of the purchaser and his heirs in fee simple for ever."

By an indenture dated 30th July 1960 Pinard conveyed 4·58 acres of the Mero Estate to Daphne Taylor and by a further indenture dated 29th May 1964 he conveyed the remainder of the said estate to the first respondents Castaways Developments Ltd., who on 10th April 1968 were registered as proprietors of the land so conveyed to them. By an indenture dated 13th June 1967 Daphne Taylor conveyed the said 4·58 acres to the 2nd respondents, Castaways Hotel Ltd., but that part of the Mero Estate is still unregistered land.

The appellant was born in Dominica in 1924 but while he was still a small child his parents went to live in Bermuda where his mother Clara Gordon died, as above stated, in 1964. In 1968 he came back to Dominica to look into the position of his mother's estate in that island and then discovered that the respondents were in possession of and claimed to be the owners of the Mero Estate. He took legal advice as

to his rights and in the light of it issued a summons on 10th April 1969 against Christianie Burke and the two respondents claiming (1) A declaration that he was one of the reversionary owners of the fee simple absolute of the lands included in the indenture of 18th March 1913. (2) Cancellation of the four indentures of 29th May 1952, 30th July 1960, 29th May 1964 and 13th June 1967 hereinbefore mentioned. (3) Cancellation of the certificate of title issued to the first respondents in respect of the land included in the indenture of 29th May 1964. (4) Accounts. (5) An injunction to restrain the respondents from dealing with the property in question. (6) The appointment of a Receiver. The summons could not under the rules of Court be served on the second respondents who are resident in Canada and accordingly on 30th May 1969 the appellant issued a writ starting an action (No. 70 of 1969) against the same persons as were parties to the summons claiming the same relief and on 10th November 1969 a Statement of Claim in that action was delivered. On 8th January 1970 the first respondents delivered a defence paragraph 4 of which ran as follows—" The Defendant will object *in limine* that the Plaintiff has not sufficient interest to maintain the suit ". It was however agreed between the parties that without prejudice to the contention that the appellant had no sufficient interest to maintain the suit it would be convenient to obtain a decision on the summons as to the extent of the interest in the Mero Estate taken by Christianie Burke under the settlement. In this connection one must bear in mind that there is no legislation in Dominica corresponding to the Law of Property Act 1925 and that the old law of real property still applies. The judge of first instance—Berridge J.—held that notwithstanding the absence of words of limitation in the trust in her favour in paragraph 4 Christianie on attaining 21 acquired an absolute beneficial interest in the estate. The appellant appealed to the Court of Appeal which by a judgment delivered on 30th November 1970 reversed this decision and declared that she took only a life interest. Having regard to the course which the proceedings on the summons had taken it is not, it seems, clear whether this judgment is binding on the respondents as well as on Christianie Burke but their Counsel agreed that for the purpose of this appeal he must accept it as correct. It follows, of course, from the decision that the reversionary interests taken under the settlement by Peter Charles Christian, Clara Christian (afterwards Clara Gordon) and Maud Christian were also only life interests and that the equitable interest in fee simple expectant on the determination of the various life interests remained in the settlor and after his death formed part of his estate. It is not however clear whether that interest is included in the specific gift set out above or forms part of the ultimate residue.

The appellant had been granted in Bermuda on the 3rd September 1970 administration with the will annexed of the estate of his mother Clara Gordon and on 6th April 1971 that grant was resealed in Dominica. On 15th November 1971 suing as personal representative of his mother he issued a further writ (No. 188 of 1971) to which he made defendants (1) Christianie Burke (2) Edward Lionel Pinard (3) Daphne Taylor (4) the first respondents and (5) the second respondents and by which he claimed the same relief as he was claiming in his personal capacity in Suit No. 70 of 1969 and also recovery of possession and damages. The Statement of Claim in that action was delivered on 27th November 1971. By their defences each respondent pleaded (*inter alia*) that the appellant had no sufficient interest to maintain the action.

On the 15th November 1971 the appellant as personal representative of his mother issued yet a third writ (No. 189 of 1971) to which he made defendants—(1) Howell Donald Shillingford and Donald Shillingford and (2) Stafford Shillingford and Patrick Shillingford. In his Statement of

Claim delivered on 13th December 1971 he alleges (1) that the personal representatives of Thomas Howard Shillingford the Trustee of the settlement made on March 18th 1913 were Mary Eliza Shillingford and Howell Donald Shillingford, that the former died on 20th September 1943 and that Donald Shillingford is her personal representative and (2) that Peter Charles Christian whom George James Christian appointed sole executor of his property in Dominica died before he proved the will of the testator, that probate of Peter Charles Christian's will was granted to Isaac Newton Shillingford who died in 1970 and that Stafford Shillingford and Patrick Shillingford are his executors. The Statement of Claim as well as setting out the various documents and facts hereinbefore mentioned contains the following paragraph —" 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." In his prayer for relief the appellant claims against the defendants (*inter alia*) accounts of the trust and of the estate respectively and damages which he puts at over five million dollars. On 26th November 1971 he applied for an order consolidating the three actions—No. 70 of 1969 and Nos. 188 and 189 of 1971. On 7th December an order was made consolidating the first two actions, but Suit No. 189 of 1971 remains a separate action.

In January 1972 the consolidated actions No. 70 of 1969 and No. 188 of 1971 came on for hearing before Renwick J. on the preliminary issue raised by the respondents—namely whether the appellant had sufficient interest to maintain the suit. At this point one must bear in mind that the appellant had two separate hurdles to surmount. In the first place it could be said that the proper persons to take proceedings to recover the Mero Estate for the settlement were the trustees of the settlement and not any individual beneficiary; but secondly it could be argued that the whole beneficial interest in remainder in the estate was vested in the legal personal representatives of George James Christian and that individual beneficiaries under his will could not be regarded as having even such rights to intervene to protect the Mero Estate as might be possessed by the legal personal representatives. This second line of attack could obviously be urged with greater force if the Mero Estate did not pass under the specific gift set out above but was included in the ultimate residue. But their Lordships need not spend time in discussing this question, for both Renwick J. and the Court of Appeal held that the appellant could be considered as having as great a right to take proceedings to protect the corpus of the property comprised in the settlement as he would have had had his mother's interest arisen directly under the settlement and not only derivatively through the will and Counsel for the respondents did not seek to challenge this decision before the Board. It is, however, necessary to consider the first line of attack open to the respondents in more detail.

If the object of an action is to recover trust property the proper persons to bring the proceedings are obviously the trustees. They represent all the beneficiaries and any property or damages recovered will be re-transferred or paid to them whereas if individual beneficiaries could sue on their own account the defendants might be exposed to a series of separate actions. If the trustees are in doubt whether or not to bring proceedings they can apply to the Court—making some representative beneficiaries respondents to their application—and ask the Court whether they ought to sue at the expense of the Trust Estate. Circumstances may however arise in which a particular action—though not a frivolous one—cannot well be brought by the trustees. It may be, for example, that the trustees are said to have been themselves wholly or partially to blame for the

loss which has occurred. Again there may be no other trust property out of which the costs of the action can be paid and the beneficiaries who wish an action to be brought may be unable to provide an indemnity against possible costs which the trustees consider to be adequate. Yet again some beneficiaries may wish the action to be brought while others do not. In cases of this sort, in order to secure that a wrong shall not go without a remedy, the Court is prepared, if the action is not a frivolous one, to allow individual beneficiaries who wish it to be brought to sue themselves at their own risk as to costs provided that they join the trustees as defendants as well as the persons from whom they wish to recover the trust property. See generally, *Halsbury: Laws of England* 3rd Edition volume 38 paragraph 1790. Their Lordships think, however, that the statement contained in that paragraph that in such cases it is necessary for all the beneficiaries who do not join as plaintiffs to be added as defendants needs to be qualified. It is true that in the case there referred to (*Meldrum v. Scorer* (1887) 56 L.T. 471)—the other beneficiaries were joined as defendants—but that was at the express request of the main defendants and without any objection from the plaintiffs. There may well be cases in which for one reason or another it may be desirable that they should be joined but their Lordships do not think that there is any inflexible rule to that effect. After all in some settlements the number of actual or potential beneficiaries is very large and to require all to be joined as defendants in actions of this sort without regard to the circumstances or the wishes of the other parties might add to the costs to a wholly unreasonable degree.

Having regard to the long period which has elapsed since the conveyance made by Christianie Burke in 1952 the plaintiff obviously faces difficulties—particularly so far as concerns the part of the Mero Estate of which the title has been registered; but the respondents did not suggest that it was a frivolous action nor did they ask that the other beneficiaries or possible beneficiaries under the will of George James Christian should be added as defendants. On the other hand the action as it stands is plainly defective for want of parties, since the trustees of the settlement are neither plaintiffs nor defendants.

Their Lordships turn now to consider how the preliminary objection was dealt with in the Courts below. From his notes it would appear that the argument for the respondents before Renwick J. was directed almost entirely to the point that the appellant being only interested under the will and not directly under the settlement had no "*locus standi*" whatever. Counsel did indeed refer to the passage in *Halsbury* mentioned above but he seems to have laid little stress on that aspect of the case and the judge did not deal with it in his judgment which was delivered on 17th July 1972. In it he said that it was not necessary for him to express any view as to whether George James Christian's interest in the Mero Estate passed under the specific gift or fell into residue since in either event Clara Gordon—and consequently the appellant as her personal representative—had a sufficient interest in it to enable him to bring these actions. The respondents appealed from this judgment to the Court of Appeal. In their grounds of appeal they made no reference whatever to the objection for want of parties and we were told by Counsel for the appellant that this aspect of the matter was not mentioned in the argument. The appeal was heard on 5th December 1972 and the Acting Chief Justice delivered a reserved judgment in which his colleagues concurred on the 20th March 1973. His judgment proceeded on the footing—favourable to the respondents—that the equitable interest in fee simple in the Mero Estate which formed part of the estate of George James Christian at his death fell into residue so that the interest of the appellant's mother therein was only an eleventh share in the proceeds of its sale. He held, however, that

even on that footing the appellant as her personal representative had a beneficial interest in the estate sufficient to give him a *locus standi* to bring the action. The Chief Justice then went on to deal with the point as to the absence of the trustees which had presumably occurred to the members of the Court while they were considering their judgment. He prefaced this part of his judgment with the following words:

> " In my opinion the respondent "—that is to say the present appellant—" has an equitable interest under the will of George James Christian but is only entitled to sue if the persons in whom the legal estate is vested are made parties to the action."

After a reference to Order 63 rules 2 (2) and 3 (1) of the Rules of the Supreme Court—which correspond to the same rules in Order 85 of the Rules of the Supreme Court in this country and make it clear that all the trustees must be parties to proceedings to execute a trust—and after quoting a passage from the speech of Viscount Finlay in the case of the *Performing Right Society Ltd. v. London Theatre of Varieties Ltd.* [1924] A.C.1 at p. 18 he concluded his judgment as follows:

> " The respondent's actions are only maintainable if he joins as co-plaintiffs the persons in whom the legal estate in the trust property is vested. The respondent will therefore be given the opportunity of amending the writs pleadings and other documents in his actions on payment by him in any event of all costs thrown away. If the respondent elects within thirty days to amend on these terms, the actions can proceed, but if he does not so elect the actions will be dismissed with costs. The trial Judge's order will therefore be set aside and the appeal allowed with costs here and in the court below."

On the next day—21st March 1973—an order was drawn up in the following terms—

> " Appeal allowed with costs here and in the court below, Order of the court below set aside.
>
> Respondent's actions only maintainable if he joins as co-plaintiffs persons in whom legal estate in trust property is vested.
>
> Respondent permitted to amend writs pleadings and other documents on payment in any event of all costs thrown away.
>
> If the respondent elects within thirty days to amend on these terms, the actions can proceed, but if he does not so elect the actions will be dismissed with costs."

As the point had occurred to them it was clearly right for the judges of the Court of Appeal to call attention to the fact that the consolidated action as at present constituted is defective for want of parties. It was, however, unfortunate that before they gave their judgment they did not afford Counsel for the appellant an opportunity to address them on the form of the order which they proposed to make since it is open to several objections. First—and most importantly—as they were agreeing with Renwick J. on the only point which had been argued before them—namely whether the appellant could be considered as having a beneficial interest in the Mero Estate sufficient to enable him to bring proceedings himself against the respondents—it is hard to see why they allowed the respondents' appeal and ordered the appellant to pay the costs of it. Secondly, although they must have meant to indicate that the parties to be added were the present trustees of the settlement they were wrong to refer in the order to the persons in whom the legal estate in the trust

property was vested. It may be that the legal estate in the 4·58 acres is still vested in the trustees—though the second respondents are arguing, rightly or wrongly, that they have acquired the legal title either by limitation or under the local Settled Land Act—but whatever the position as to the legal estate in that part of the Mero Estate may be the legal estate in the bulk of it is undoubtedly vested in the first respondents who are its registered proprietors. Thirdly, it is difficult to see to what costs the Court was referring as "costs thrown away" since so far the failure of the appellant to join the trustees has not increased the costs in any way. Finally, it is not clear whether the Court intended that the appellant should pay the costs payable by him under the order before he could amend the writ and pleadings—*i.e.* within the 30 days specified. That, Counsel told us, is the interpretation which the respondents are placing on the order.

The contents of the judgment may well have come as a surprise to Counsel for the present appellant. At all events he did not attempt to make any representations to the Court before it was drawn up but advised his client to appeal to the Board. Most of the grounds of appeal are directed to the fact that the order of the Court referred to the addition as co-plaintiffs of the persons in whom the legal estate was vested but the point is also taken that it was wrong for the Court to have allowed the appeal as it had upheld the trial judge on the point argued before it. There is also a submission that in the special circumstances of this case it was not necessary for the trustees to be made parties, but in arguing the appeal before the Board Counsel did not take this last point. He only argued that the order should be varied to clear up the various ambiguities contained in it and to make a fairer provision with regard to costs. As has been said Counsel for the respondents did not seek to challenge the correctness of the view taken both by the trial judge and by the Court of Appeal as to the sufficiency of the appellant's beneficial interest. His contention was that although the reference in the order to the holders of the legal estate was a mistake the appellant's legal advisers must have known perfectly well that the persons whose joinder was called for were the present trustees of the settlement and that if they would not agree to be joined as co-plaintiffs they could be joined as additional defendants. He submitted, therefore, that the order should be left as it stands with the result that as the trustees had not been joined within the time allowed the action would be dismissed with costs—though the appellant could start fresh proceedings if he thought it worth while to do so. Their Lordships think that there is some force in the submission that it should have been apparent to the appellant's legal advisers that the persons who were to be added were the trustees of the settlement in whom the legal estate —according to the appellant—ought to have remained vested. But as they have said this is by no means the only objection to the order made and they have no doubt that it must be varied. Before the Board the question was raised whether it was necessary for the appellant before joining the trustees as defendants to ask them to sue as co-plaintiffs with him. Of course the fact that trustees decline to bring an action will not necessarily entitle a beneficiary to sue himself, making them defendants, for the action may be a hopeless one; but assuming that the action has a reasonable chance of success it is undoubtedly the general rule that a beneficiary before suing himself ought to ask the trustees to sue and only to join them as defendants if they decline to be plaintiffs (see *Franklin v. Franklin* (1915) W.N. 342). But cases may arise where it is so obvious that the trustees would decline to be plaintiffs that the Court will dispense with the formality of a request to them (see *Howden v. Yorkshire Miners' Association* [1903] 1 K.B. 308 at 341). In this case the appellant has brought an action charging the present trustees and their predecessors

with breach of trust in failing to protect the trust property. In these circumstances it is most unlikely that they would consent to become co-plaintiffs with him and moreover undesirable that they should do so. So in this case their Lordships think that a previous request can be dispensed with.

The orders of the Court of Appeal and of Renwick J. should therefore be discharged and an order to the following effect substituted:—

> " Declare that Hakim E. F. Gordon the plaintiff in the consolidated actions 1969 No. 70 and 1971 No. 188 is entitled to maintain the said consolidated actions provided that he joins as additional defendants the persons who now have vested in them the interest of Thomas Howard Shillingford as trustee of the deed of settlement dated 18th March 1913. If within 42 days of the 12th day of February 1975 the writs in the said actions are amended by the addition of the said persons as additional defendants then the said actions can proceed with liberty to all parties to make any amendments in their pleadings rendered necessary by the addition of such persons as additional defendants and so that the costs of any amendments so made by the existing defendants be their costs in any event. But if the said writs be not so amended within the said period of 42 days then the said consolidated actions be dismissed and the costs incurred by the defendants other than those costs the payment of which is provided for by the Order in Council determining the Appeal to Her Majesty in Council (Privy Council Appeal No. 6 of 1974) be paid to them by the plaintiff."

It remains to be decided how the costs of the respondents' preliminary application should be dealt with. As it failed both before Renwick J. and the Court of Appeal on the only point argued their Lordships can see no reason why the appellant should not be paid his costs of those two hearings by the respondents. Different considerations however apply to the costs of the appeal to this Board. Even if it be accepted that in the difficult situation in which he found himself the appellant was justified in appealing from the order made by the Court of Appeal the respondents were not to blame for that situation. In all the circumstances their Lordships think that justice will best be done if each side is left to bear its own costs of the appeal to them.

They will humbly advise Her Majesty accordingly.

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In the Privy Council

HAKIM E. F. GORDON (IN HIS PERSONAL CAPACITY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CLARA MARGUERITE GORDON (DECEASED))

v.

CASTAWAYS DEVELOPMENTS LIMITED AND ANOTHER

DELIVERED BY
LORD CROSS OF CHELSEA

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1975