

IN THE COURT OF APPEAL

DOMINICA

Civil Appeal No. 2 of 1972

Between: CASTAWAYS DEVELOPMENTS LIMITED

AND
CASTAWAYS HOTEL LIMITED

Defendants/
Appellants

and

HAKIM E.F. GORDON in his personal
capacity and in his capacity as
Personal Representative of Estate
Clara Marguerite Gordon deceased

Plaintiff/
Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

K. Alleyne, Q.C. and B. Alleyne for appellants
F. Degazon for respondent

1972 December 5, 1973 March 20

JUDGMENT

CECIL LEWIS, C.J. (Ag.)

The respondent instituted two suits in the High Court of Dominica. The first was Suit No. 70 of 1969 in which Christianie Burke, Castaways Developments Ltd., and Castaways Hotel Ltd. were the defendants. The second was suit No. 188 of 1971 in which Christianie Burke, Edwin Lionel Pinard, Daphne Taylor, Castaways Developments Ltd. and Castaways Hotel Ltd. were the defendants. These suits were consolidated by an order of Renwick J. dated December 7, 1971.

In the first suit the respondent sued in his personal capacity and in the second as a personal representative of his mother Clara Marguerite Gordon. His claims for relief in the two suits overlap somewhat. He alleges in his statement of claim in each suit that he is one of the reversionary owners of the fee simple of an area of land known

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as Mero Estate, and among his claims for relief is a claim for a declaration to this effect. He also claims that Christianie Burke who is a defendant in both actions made a "tortious conveyance of the said Mero Estate to the defendant Edwin Lionel Pinard" who in turn disposed of 4.58 acres thereof to Daphne Taylor and another portion to the appellant Castaways Developments Ltd. In addition to his claim for the declaration referred to above the respondent asked for further relief including the cancellation of various indentures listed in the statement of claim in the second suit, recovery of possession of Mero Estate, an order that accounts be rendered by the several defendants in the two suits in respect of this estate, an injunction to restrain them from dealing with the said estate, the appointment of a trustee and receiver of the estate and damages in the sum of \$52.

The "tortious conveyance" to Edwin Lionel Pinard referred to above, is a conveyance made on May 29, 1952 by Christianie Burke to Edwin Lionel Pinard of the Mero Estate for £1200 in which she claimed to convey as beneficial owner.

In suit No. 70 of 1969 the appellant Castaways Developments Ltd. pleaded that an objection in limine would be taken that the respondent "has not sufficient interest to maintain the suit", and in suit No. 188 of 1971 a similar plea was put forward in its defence. This preliminary issue was argued before the trial judge who made an order that the respondent "has sufficient interest and has a locus standi to pursue his claim".

The relevant facts which give rise to this appeal are as follows: 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....

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.G. 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.

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 Maude Christian, Francis Thomas Burke at the request of George James Christian conveyed Mero Estate to Thomas Howard Shillingford in fee simple on March 18, 1913 to hold the same as trustee "to the uses following":

- "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 whichever 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, whichever 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 21 years (twenty-one) or marry.

4. Should...

4. Should either the said Margery Burke or Christianie Burke die under the age of 21 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 21 years (twenty-one) 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 21 (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 21 (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 21 (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."

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.I.R. 204, 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.

Under the settlement the settlor George James Christian created only life interests and did not dispose of beneficial interest in the Mero Estate. As held in

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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 ~~invested~~ invested in him.

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 mother. Under this clause the respondent's 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.

The respondent is a beneficiary under his mother's will and also her personal representative and trustee.

The question which arises in this appeal is whether the respondent is entitled to maintain an action in respect of the Mero Estate in his representative capacity and also in his personal capacity.

Counsel for the appellant contended that the relevant representation is the estate of George James Christian, the reversioner under the settlement and not that of Clara Gordon, a beneficiary under the will of George James Christian. He further contended that a residuary legatee has no interest in any particular part of the assets of an estate where
/administration...

administration is not complete. There was admittedly no vesting assent by the personal representative in respect of the Mero Estate to Clara Gordon and therefore she had no interest and could not sue. Her personal representative, the respondent, therefore could not sue. He supported his contention by citing the case of Corbett v. Commissioners of Inland Revenue(1938) 1 K.B. 567. In that case it was held that the legatee of a share in residue has no interest in any property of the testator until the residue has been ascertained, and that this proposition is applicable to all cases of residue which is being ascertained and which cannot be ascertained until administration is complete. It appears to me that the answer to this submission is that the residue in the present case is ascertained. It is the Mero Estate containing approximately 179 acres.

In my opinion the respondent 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.

Rule 2(2)(c) and rule 3(1) of Order 63 R.S.C. 1970 are applicable to the circumstances of this case. The relevant portions of these rules are as follows -

"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."

"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."

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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:-

"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 estate should be joined as a party. It is true that 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 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 in 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."

In the present case there are no special circumstances which show the respondent is entitled to sue without joining the persons in whom the legal estate is vested.

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

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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.

P. CECIL LEWIS
ACTING CHIEF JUSTICE

ST. BERNARD, J.A.

I agree.

E.L. ST. BERNARD
JUSTICE OF APPEAL

LOUISY, J.A. (Ag.)

I agree.

ALLAN LOUISY
JUSTICE OF APPEAL (AG.)