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EASTERN CARIBBEAN SUPREME COURT

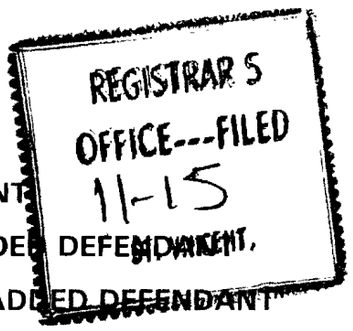
IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SUIT NO.: 318 OF 1993

BETWEEN:

ASHFORD COLE	**PLAINTIFF**
AND	
DOROTHY REY	**DEFENDANT**
ALBERTINA JOHN	**FIRST ADDED DEFENDANT**
DEVELOPMENT CORPORATION	**SECOND ADDED DEFENDANT**



B. Commissiong Esq QC for the Plaintiff
S. John Esq for the Defendant
R. Howard Esq for the First Added Defendant

Mitchell J

JUDGMENT

This case was commenced by a generally endorsed Writ of Summons issued out of the Supreme Court of St Vincent and the Grenadines on 16th July, 1993, seeking: (i) a declaration as to the intent of the deceased Enid Beatrice John (hereinafter Mrs John), the maker of two Deeds of Conveyance in favour of the Ashford Cole (hereinafter the Plaintiff, (ii) rectification of the Deeds, (iii) alternatively, a declaration as to equitable estoppel, (iv) an order as to the Plaintiff's entitlement to the fee simple interest in the lands in question, and (v) an injunction against the Defendant, Mrs Rey.

By a Statement of Claim, served and filed by consent out of time on 1st February 1994, the Plaintiff claims:

(a) that the eighty-one (81) year old deceased Mrs John lived alone and near him at Arnos Vale in St Vincent in the year 1988;

(b) that a close relationship developed between him and Mrs John, and in 1989 she gave him the first parcel of land, and, subsequently, a small additional piece, on which to place his garage/workshop;

(c) and that, accordingly, the Plaintiff constructed his garage, borrowing money from a bank to do so. He claims the remedies set out above.

By a Defence and Counterclaim served and filed on 24th May, 1994 the Defendant:

(a) denies that the deceased Mrs John was fully possessed of all of her senses at the material time;

(b) denies that the deceased Mrs John ever intended to give the Plaintiff the lands in question and asserts that she only intended to give the Plaintiff the temporary use of the lands;

(c) asserts that in 1990 before her death Mrs John had a solicitor write the Plaintiff denying that she had ever intended to make a gift of the land; and

(d) that, in any event, the issue of whether the Deeds passed any beneficial interest in the lands in question to the Plaintiff was determined in favour of the Defendant by a judgment of the High Court of 26th June 1992 in Suit 483 of 1991; and

(e) alternatively, that the Deeds contain no error that entitle the Plaintiff to rectification or any other remedy. By the Counterclaim the Defendant claims:

(f) that on 5th June 1990 Mrs John made her last Will giving the lands mentioned in the second of the two Deeds to her three (3) great grand children;

(g) that following the death of Mrs John, the Defendant as Executrix vested the land in herself as trustee under the trusts of the Will;

(h) further, that following the death of Mrs John the Plaintiff wrongfully entered upon additional portions of Mrs John's property;

(i) and, the Defendant seeks recovery of possession, mesne profits, damages for trespass, and costs.

By a Reply and Defence to Counterclaim served and filed on 27th September 1994 the Plaintiff claims:

(a) that the deceased Mrs John did know what she was doing when she made the Deeds, as she voluntarily went to the Registry of Deeds in Kingstown and acknowledged before an officer there that both conveyances were her own act and deed. Further,

(b) the Plaintiff does not admit that the deceased Mrs John made any Will in which she knowingly bequeathed the said lands to her three (3) great grandchildren. He asserts, rather, that the Defendant Mrs Rey together with one Mrs Frank and a Solicitor, Mr Arthur Williams, went to the deceased Mrs John before she died. They requested her to sign a paper to make sure the remainder of the land was not conveyed

to the Plaintiff but went to the great grandchildren.

The Plaintiff denies:

(c) that he has entered upon any additional lands, and says that he has at all times kept within the boundaries of the land conveyed to him by Mrs John.

On 28th October 1994 Joseph J made an order in this case under the usual Summons for Directions ordering an exchange of lists and setting three days for the trial of the matter. The matter has been ready for hearing since 24th March, 1995. The order made by Joseph J is significant in view of paragraph 11 of the Defence which raises an issue of estoppel by matter of record. The claim of the Defendant at paragraph 11 is that:

> "... the Defendant contends that the issue of whether the said deeds passed any beneficial interest in the said property to the Plaintiff was determined in favour of the Defendant against the Plaintiff by the judgment of the High Court dated 26th June 1992 in Civil Suit No 483 of 1991. The said judgment was final and conclusive and as a matter of law bars the Plaintiff's claim to a beneficial interest in the said property by virtue of the said deeds".

This contention was raised *in limine* by Counsel for the Defendant. It needed to be disposed of first, as, if it had merit, there was no point in wasting time determining all over again the same issue previously determined by this Court. I had read the Judgment in question of Joseph J. It appeared that by suit 483/91 of 1991 the Defendant in this case, Dorothy Rey, by an Originating Summons filed on 15th October 1991 sought from the High Court in St. Vincent orders that

(a) the documents made the 14th day of June 1989 and the 14th day of March 1990 between the deceased Mrs Enid John and the Plaintiff Ashford Cole and purporting to be Deeds of Gift are not Deeds, and

(b) an order declaring the Donee's title and interest as created by the documents in question, and

(c) an order determining the Defendant's Mrs Rey's interest in the property on the death of Mrs John.

Joseph J in a long and thoughtful judgment, that must reflect all the law and the multitude of issues that were canvassed before her on that application, drew attention to the failure of the Deeds to comply with section 7 of the Registration of Documents Act 1937, No. 30 of 1937, which requires that a Deed must be sealed. It was evident that although both Deeds say they were "signed sealed and delivered" by the donee, the deceased Mrs John, yet there was no red wafer or seal, as is usual, glued on to the paper next to the signature of Mrs John. After reviewing the authorities of TCB Ltd v Gray (1986) 1 All E R 587, and First National Securities Ltd v Jones (1978) 2 All E R 221, she ruled that the absence of

the seal cannot be relied on by the Defendant Mrs Rey, and she held that the documents are Deeds.

Joseph J then considered the more contentious question before her, of the construction of the Deeds. The question was whether the Deeds passed the estate in the lands to the donee for his use and benefit, or whether, as must have been argued before her, the estate was to be held by the donor (the deceased Mrs John) for the use and benefit of the donee (the Plaintiff in this case, Mr Cole). The Deeds stated in several places that the consideration described had passed to the Donor Mrs John from the Donee Mr Cole. The Deeds also stated in the time-honoured antiquated language beloved by conveyancers, that "... the Donor doth hereby Give Grant and Convey unto the said Donee and his heirs ...". So that, it was clear from the contents of the Deeds that the donor, the deceased Mrs John, was attempting by these her Deeds to make outright gifts of the two pieces of land to the Plaintiff, Mr Cole. Yet, the draughtsman, inexplicably, had the habendum clauses in both Deeds conclude with the words that the donee Mr Cole is given the lands "... to have and to hold the same unto and to the use of the Donor her heirs and assigns forever". The habendum clause is a very important clause in a conveyance, as it is the clause that actually conveys the interest being dealt with by the Deed in question. From the contents and tenor of the Deeds, the correct words that clearly should have been used by the draughtsman, to be consistent with the remainder of the Deeds and with the intention of Mrs John, were the words "... Donor his ...". These words would have had the effect of having the Deeds vest title in the Plaintiff Mr Cole.

The Defendant in those proceedings 483/91 (the Plaintiff in this case, Mr Cole) had, in reply to Mrs Rey's Summons, filed an application before Joseph J seeking rectification of the Deeds. He had asked that the habendum clauses in both Deeds be corrected to state "... unto the use and to the use of the Donee his heirs and assigns forever". Joseph J considered Section 1 of the Statute of Uses of the United Kingdom, as applied to St Vincent by virtue of Section 5 of the Application of English Law Act 1989, No. 36 of 1989, in dealing with these vexing errors made by the Solicitor who drafted both Deeds in question. She considered Halsbury's Laws of England, 4th Edition, Vol. 39, page 235, para 334, note 7 Leggott v Barrett (1880) 15 Ch D. 305 and Christian v Mitchell-Lee (1969) 13 WIR. 392. She also considered Halsbury's Laws of England, 3rd Edition, Vol 11, page 390, para 638, and Snell's Principles of Equity, 28th Edition, page 187. She concluded that, although the donor Mrs John may have intended by her Deeds to convey the properties to the donee, Mr Cole, the words of the habendum were, as a technical matter of conveyancing law, ineffectual to pass the property to him, and no property or title passed to him by the Deeds.

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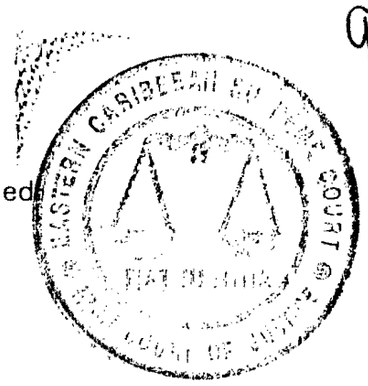
She next considered whether she could order rectification of the Deeds as requested by Mr Cole to give effect to the alleged intention of Mrs John. She cited from Atkins Court Forms, 2nd Edition, Vol. 18, page 223, para 8, dealing with the correct procedure in rectification actions. She concluded that rectification could be obtained only in an action begun on a Writ of Summons, and tried on evidence subject to testing by cross-examination. And, the applications before her, as we have seen, were Originating Summonses, supported by a variety of affidavits and counter affidavits. Following the guidance given in Atkins Court Forms, she ruled that she could not consider the application for rectification of the documents based on affidavit evidence. She concluded her eight (8) pages of reasoning by simply declaring, in accordance with the specific and limited application of Mrs Rey before her on the Originating Summons, that (i) the documents made on 14th June 1989, and 14th March 1990 were Deeds; and (ii) the property described in the Deeds vested in the estate of the deceased Mrs John.

On my reading of her decision, Joseph J clearly left open for a future Court to decide the question of whether the High Court would order rectification of the Deeds if a proper application by way of a Writ of Summons was brought before the Court. Indeed, only two years later in 1994 she made an order on the Summons for Directions in the suit we are now dealing with, making this case ready for trial. So, we may assume she was not of the view that the Plaintiff in this suit was estopped from seeking by this present action rectification of the Deeds in question. If such rectification were ordered in this suit Joseph J would have been well aware that the consequence would be that the beneficial interest in the properties would no longer be vested in the estate of Mrs John but in the Plaintiff Mr Cole. I found, therefore, that the application for rectification of the Plaintiff in his Writ could properly be considered and dealt with in these proceedings. Counsel for the Defendant indicated that he would wish to return to the issue of *res judicata* at a later stage.

The trial of this matter began on the morning of 21st April 1997, and continued until late afternoon on 22nd April. The Court during those days heard evidence for the Plaintiff from: the Plaintiff Mr Cole, Ronald Claudius Jack the Solicitor who drew the Deeds in issue, Sebastian Alexander the Surveyor who did the plan for the second Deed, Jennifer Morris a Supervisor at the Caribbean Banking Corp where the Plaintiff and the deceased Mrs John banked, Catherine Samuel a domestic who worked both for the Plaintiff and the deceased. Evidence was then given for the Defendant by: Arthur Fredrick Williams Esq the solicitor who drew up Mrs John's last will, Alton Cropper a neighbour of Mrs John, and Joyce Frank a retired nurse and friend of Mrs John. By the conclusion of the testimony of these witnesses a number of exhibits had been put in evidence. They were in chronological order:



(1) 14th June 1989 - a Deed of Gift between the deceased Mrs John and the Plaintiff Ashford St Clair Cole of approximately 22,594 sq ft being part of lot No 26 at Arnos Vale (Exhibit ACC 2);

(2) 14th February 1990 - a plan drawn by Sebastian Alexander showing the exact measurement of the land dealt with in the deed above, and of the land dealt with in the following deed (Exhibit ACC 1);

(3) 14th March 1990 - a Deed of Gift between the deceased Mrs. John and the Plaintiff of 2,908 sq ft being a triangular lot of land adjoining the northern boundary of the land referred to at Exhibit ACC 2 above (Exhibit ACC 3);

(4) 22nd May 1990 - a Mortgage Deed between the Plaintiff and Caribbean Banking Corp Ltd (hereafter "CBC") in an amount of EC$20,000 of Cole's 22,594 sq ft referred to above (Exhibit ACC 4);

(5) 6th June 1990 - a letter to the Plaintiff from Arthur F Williams Esq Solicitor instructed by Mrs John claiming that the Deed of 14th June 1989 requires rectification as it is for more land than Mrs John had intended to give to the Plaintiff (Exhibit ACC 6);

(6) 14th August 1990 - a Promissory Note from the deceased Mrs John to CBC for EC$30,000 principal and EC$12,000 interest to a total of EC$42,000 (Exhibit ACC 8);

(7) 16th May 1991 - a Mortgage Deed between the Plaintiff and the Development Corporation of St Vincent and the Grenadines (hereafter "Devco") in the amount of EC$152,000 of the two lots of land, the one of 22,594 sq ft dealt with in Exhibit ACC 2 above, and the other of 2,908 sq ft dealt with in Exhibit ACC 3 above (Exhibit ACC 5);

(8) 3rd July 1991 - a Grant of Probate of the Will of Mrs John dated 5th June 1990 and who died on 16th January 1991 (Exhibit AFW 1);

(9) 27th August 1991 - a letter to the Plaintiff from Stanley K John Esq, on behalf of Dorothy Rey the Executrix of the Will of the late Mrs John, giving notice that the Plaintiff is considered a tenant at will of the property at Arnos Vale and that he is to give up vacant possession by 30th September 1991 (Exhibit ACC 7);

(10) 20th September 1991 - a Deed of Assent prepared by Stanley

K John Esq and whereby Dorothy Rey vests in herself as trustee on a trust for sale upon the trusts of the Will of

(1) 21,947 sq ft of land being part of Lot No 2 of a 1975 survey by Steinson Campbell; and,

(2) of the 25,561 sq ft surveyed by Sebastian Alexander on 14th February 1990, ie, in this second case the lands claimed by the Plaintiff and mortgaged to Devco (Exhibit ACC 9);

(11) 1st December 1992 - a survey of 3,757 sq ft of land evidently done by Rudy Coombs for the purpose of the next following exhibited Deed (Exhibit AFW 3);

(12) 9th December 1992 - a Deed of Conveyance prepared by Stanley K. John Esq and between Dorothy Rey as Executrix/Vendor and Albertina John as Purchaser conveying to Albertina John some 3,757 sq ft for the sum of EC$18,785 (Exhibit AFW 2);

(13) 21st April 1997 - a letter from CBC to Stanley John Esq confirming that the sum of EC$5,031.17 was deducted between 18th September 1992 and 25th August 1993 from a cash collateral in the name of the Estate of the deceased Enid John and credited to a loan account in the name of the Plaintiff Ashford Cole (Exhibit JM 1).

At the conclusion of the above testimony it was apparent from the Deed of 9th December 1992 that Mrs Rey, acting under her Deed of Assent of 20th September 1991, had on 9th December 1992 conveyed 3,757 sq ft of land to Albertina John. The land that Albertina John had purchased from Mrs Rey was a portion of the same land alleged to have been given by the deceased Mrs John to the Plaintiff Ashford Cole by the Deed of 14th June 1989. This presented the Court with a complication the Court could well have done without. The implications of this new development in 1992 were clear. If the Plaintiff's Deeds were rectified as he was seeking, then a conflict would arise between the Plaintiff's title and Albertina's title to a piece of the same land. Additionally, it was apparent from the Mortgage Deed of 16th May 1991 that Devco had taken, as security for a loan of $152,000.00, a mortgage of the lands held by the Plaintiff by his Deed of 14th June 1989. Joseph J had on 26th June 1992, subsequent to the mortgage, ruled that this Deed of 14th June 1991 had not conveyed any title to the Plaintiff. Devco's security of 16th May 1991 for its loan to the Plaintiff became of doubtful validity when Joseph J made her ruling on 26th June 1992. If this Court at the conclusion of this case were to rule that rectification of the Plaintiff's Deeds did not lie, then the consequence must necessarily follow that Devco never had, did not

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now have, and never could have the security it thought it had when it granted the loan. Devco would forever be deprived of the legal security it accepted when it made the loan. The Plaintiff would be faced with a complaint that he did not fully disclose to the Bank. In giving judgment on the issues raised in this case, the Court, far from resolving the disputed title to the land in question would only be creating new disputes, putting citizens to further expenses and the stress and strain of litigation already long protracted. Both Albertina John and Devco have a real interest in having this matter determined once and for all. Further, they are entitled to be heard in this suit, and to have representation by Counsel in protecting their interests in these proceedings, so as to minimize the need for either of them to bring further future proceedings. Order 15 rule 6(2) of the Rules of the Supreme Court gives the Court authority, either on application by one of the parties or on its own motion, to order any person who ought to have been joined as a party, or whose presence before the Court is necessary to ensure that all matters in dispute in the cause may be effectually and completely determined and adjudicated upon, to be added as a party. The Court took the view that this was eminently a case for the operation of Order 15 rule 6(2) and, counsel for the Plaintiff and for the Defendant not objecting, at the close of proceedings on 22nd April 1997, of its own motion, ordered the Plaintiff to serve a joinder of Albertina John, and the Defendant to serve a joinder of Devco, both to be made parties to the proceedings. The Court then adjourned the hearing of further evidence in the case to Thursday 29th May to give the new parties an opportunity to be served and to secure representation. Mrs Rey was to be given notice of the adjournment also partly made to facilitate her, as she had yet to travel from the United States of America to give evidence on her own behalf in this matter.

When the trial resumed on Thursday 29th May both Devco and Albertina John had been joined as parties. Devco did not appear, but Albertina John was represented by counsel. Mrs Rey had also arrived from New York, and gave evidence and was cross-examined. Through her there was put in evidence a further exhibit:

(14) 25th January, 1990 - an earlier will of the deceased Mrs John (Exhibit DR 1).

Albertina John did not give evidence and called no witness. At that point, the case for the Plaintiff, the Defendant, and the Added Defendants, being closed, counsel addressed the court on the facts and law as they saw them.

The facts as I find them are as follows. The deceased Mrs John was an elderly, well educated, and strong minded retired person in good health living at her home at Arnos Vale in the year 1988. She had lived and worked for much of her life in New York, but was now a pensioner in her 70s, and preferred to spend the greater part of the year at that age in the island of her birth, St. Vincent. Her

husband had died, but she had two daughters, Mrs Rey and Irma, living in the USA. Her only son had been murdered as a young man in the USA. Mrs John did not approve of her daughter, Mrs Rey, and was not close to her. Mrs Rey occupied and paid rent to Mrs John for an apartment in Mrs John's apartment building in Brooklyn. Mrs John's other daughter Irma had suffered a stroke in 1981 and in any event lived a long distance from Mrs John's home in New York.

In or about the year 1988 while on one of her annual periods of residence in St. Vincent, Mrs John met and became acquainted with the Plaintiff, who was a distant relative of hers, living on family land nearby at Arnos Vale. The Plaintiff and his workers were engaged in doing body repair work in the yard of the house where the Plaintiff lived across the road from Mrs John. Mrs John was interested in the activity and used to visit the body work yard to chat almost daily. The Plaintiff is a good cook and he began cooking for Mrs John from time to time. Mrs John lived alone, and we can imagine, as the Plaintiff says, that she was glad for the company. The Plaintiff at Mrs John's request used to visit her in 1988 for some months. This went on until Mrs John went back for one of her regular stays in the USA. She stayed in New York for some months and then, when the time came, she returned to sojourn in St Vincent. She resumed her contact and relationship with the Plaintiff. She used to visit the Plaintiff and his family, and he would visit her. He used to take her to the beach to soak her legs for the arthritis. He ran errands for her and assisted her in a variety of ways.

For many years before that time Mrs John had allowed a niece, Albertina John, to live on and work the land on the property. In exchange, Albertina looked after the property, particularly in the prolonged absences of Mrs John in the USA. Although Albertina was a niece, it does not appear that she did anything for Mrs John other than living on the land and cultivating bits of it, and presumably keeping an eye on the property when Mrs John was gone, sometimes for months or years at a time. Albertina John declined to give any evidence on her or the Defendant's behalf. I do not accept that she cooked or cleaned or assisted Mrs John in any of her domestic chores. The Plaintiff shared his family cooking with Mrs John, and arranged for his wife's domestic helper at the time, a Ms Catherine Samuel, who is no longer employed by Mr Cole, and who gave evidence and whom I believe, to also clean and do chores for Mrs John.

The Plaintiff commenced his vehicle body repair business on his family land in 1988, but was stopped by the Planning Department sometime in 1989. Mrs John learned of the problem and offered a solution. By this time she seems to have become quite attached to the Plaintiff. I also find that she clearly understood what she was doing. The Plaintiff was unable to make a living as a result of the action taken by the Planning Department. Mrs John told the Plaintiff that he was like a son to her. She told him that she would give him an area of her land to the south

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of her house to do his car repair business. I am satisfied that she gave him all of the land shown on Exhibit ACC 1. Mrs John assisted in the measuring of the land and told the Plaintiff to get a lawyer to prepare a Deed.

The Plaintiff went to Mr Jack who prepared the Deed Exhibit ACC 2. Mr Jack visited Mrs John and satisfied himself that she knew what she was doing and had agreed to give the Plaintiff the land. Mrs John signed the Deed on 14th June 1989 in the presence of Mr Jack's clerk, and she also signed an acknowledgment at the Court House in Kingstown before the Registrar. This is the first of the two Deeds with the habendum clause erroneously stating that the Plaintiff is to "have and to hold the same unto and to the use of the donor her heirs and assigns forever" which Joseph J previously ruled in suit 483/91 did not vest the land in the Plaintiff.

By early 1990 the Plaintiff's business had grown, and he was expanding his garage premises. He was still taking care of Mrs John and assisting her with her chores, as indeed he did up to a few days before she died in 1991 in New York. Other persons assisted Mrs John such as Joyce Frank, an old friend. Some of these friends and relatives did not approve of the assistance that Mrs John had given to the Plaintiff. In 1990 the Plaintiff had been introduced by Mrs John to her bank, the CBC. The Plaintiff applied to borrow in the first instance some $10,000.00 to expand his business, and CBC agreed to lend the money on a mortgage of part of his property. To give CBC a proper mortgage, the Plaintiff had to have a proper survey done. No survey had been done at the time of his Deed. In any event, he was proposing to give CBC only the small plot of land around the garage for the mortgage, not the entire half acre that Mrs John had given him. Mr Sebastian the surveyor gave evidence, which I accept, about doing the survey and marking off on the plan the plot around the garage for the mortgage. I believe that it was this survey, when it got into the hands of Mrs John's family, that caused them to believe that Mrs John had only intended to give the small area around the garage. In any event, Mr Sebastian discovered that the garage was too close to, and partially extended over, the boundary on the Plaintiff's Deed. The foundations of the garage had been put down while the Plaintiff had been in the U.S for a period of some months, and had been incorrectly located. The Plaintiff went and spoke to Mrs John about the new development, and asked her if she would let him have a small additional portion of land to allow access to the garage. Mr Sebastian also spoke to Mrs John about the problem that he had discovered, and I believe him when he says that Mrs John told him that the Plaintiff could have the extra piece as proposed by Mr Sebastian to allow proper access. She herself gave Mr Sebastian instructions to measure off the additional land. When Mr Sebastian asked her if she would sell it to the Plaintiff, she said she was not selling it, she was giving it to him. I believe Mr Sebastian when he says that she looked sharp, with a good

mental picture of what was going on, and that she knew exactly what she was talking about.

The Plaintiff now went back to Mr Jack to have the second Deed drawn up. On or about 14th February 1990, Mr Sebastian measured the old lot and found it to be 22,594 sq ft, and he measured off the triangular sliver of additional land for the access with an area of 2,908 sq ft. He also indicated on the plan the position of both, around the foundation of the garage, measuring 6,277 sq ft, for the proposed mortgage. Mr Jack, the Solicitor for the Plaintiff, went back to see Mrs John with the surveyor to satisfy himself that she had indeed consented to this additional gift. He explained to her that a further Deed was necessary to give the Plaintiff the additional portion of land, and she told him that the Plaintiff could have the land. Mr Jack's impression was that Mrs John was very much aware of what was happening and he had no reason to question her judgment. I am satisfied from the evidence of Mr Jack and of Mr Sebastian and of Miss Morris of the CBC that Mrs John clearly knew what she was doing, intended to benefit the Plaintiff, and agreed to sign the Deeds of gift. I suspiciously considered the evidence of all the witnesses as to the relationship between the comparatively young Mr Cole and the relatively elderly Mrs John. There was not a shred of evidence to suggest that the relationship was in any way exploitative, or that Mrs. John was taken advantage of in the slightest. Mr Jack proceeded to draw up the second Deed, have Mrs John sign it, and had her acknowledge it again before the Registrar. This Deed also has the identical error in the habendum clause as the first Deed. Mr Jack in his testimony has explained that the error having been made on the first Deed, his secretary simply followed it on the second Deed. His evidence, which I entirely accept, was that this was a clerical mistake on his part, that it was not as a result of any instructions from Mrs John to in any way limit the conveyances to the Plaintiff, and that his instructions from Mrs John were that the Deeds were to be gifts of the land to the Plaintiff.

Mrs Rey did not get on that well with her mother. The reason why is not clear, and is not significant for this case. I accept from the evidence of the Plaintiff, and as admitted by Mrs Rey on cross examination, that, as an illustration of the nature of her relationship with her mother, on one of her two visits to St. Vincent between 1988 and 1989 she tried to get the Plaintiff to get money for her out of her mother. The Plaintiff says it was $25,000.00 that Mrs. Rey wanted for a cruise. This request of Mrs John, made by the Plaintiff on behalf of Mrs Rey, made Mrs John so upset that she became angry both with the Plaintiff and Mrs Rey. Mrs John as we have seen made Mrs Rey pay rent for her accommodation in Mrs John's Brooklyn apartment. When Mrs Rey visited St. Vincent on her two visits she did not stay with her mother, but with a cousin nearby. When Mrs John visited New York at the end she did not stay in the same building with Mrs Rey.

Shortly before she died, Mrs John sold the building Mrs Rey lived in to a cousin, a Mrs Schnyder, out from under Mrs Rey. Mrs John clearly did not like her daughter Mrs Rey, did as she wanted with her land and her considerable financial savings, and only in her last months, sick and dying, did she come under the influence of Mrs Rey.

In December 1990 Mrs John went to the USA for the last time. The Plaintiff went with her to assist her. Mrs John stayed with the Plaintiff at relatives of the Plaintiff, not with either of her daughters. The Plaintiff took her to visit Mrs Rey, but Mrs Rey refused to see her and walked away. He took Mrs John to visit other of her relatives. None of them came to visit her. She complained to the Plaintiff that none of her grandchildren came to visit her, although she had bought cars for them. She appears to have been ailing, as the Plaintiff took her to see the doctor. One day when he was out, Mrs Rey came and took Mrs John away from where she was living with the relatives of the Plaintiff. She placed Mrs John in King's County Hospital in New York. Mrs John asked the Plaintiff when he visited her to take her out of that place. But, the doctors were running tests on her. The Plaintiff had to leave the USA a few days later as his time was up. Mrs John died in the Hospital on the 14th January 1991.

The first that the Plaintiff knew that there was a problem was when he received a letter from Mrs Rey's Solicitor dated 27th August 1991 telling him that Mrs John had left the land she had given him in a Will of 5th June 1990 to her three great grand children Justin, Jonathan and Zeamara, and giving him notice to quit and deliver up possession of the premises. An earlier letter of 6th June 1990, purportedly written by Arthur F Williams Esq as Solicitor for Mrs John, and claiming that Mrs John wished to have the first Deed rectified, in effect, to reduce the space that she was giving him to the area around the garage, was put in evidence. There is no evidence this letter was ever served on the Plaintiff, and I accept that he never received it.

Meanwhile, on 22nd May 1990 the Plaintiff had given the CBC a mortgage of the entire 22,594 sq ft property for a second loan of $20,000.00. On 14th August 1990, i.e, after the alleged earlier letter of 6th June 1990, Mrs John backed a note to the Bank for the Plaintiff in the amount of $30,000.00, i.e., the sum of the two loans, plus interest of $12,000.00. This does not sound like Mrs John was annoyed with the Plaintiff, and really believed that he had abused her good nature and had taken land or more land than he was given. Nothing turns on the debiting by the bank after Mrs John's death of a sum of $5,031.17 from an account of Mrs John in connection with a loan of the Plaintiff. It appears that when Devco took over the loan they did not pay CBC in full for a reason that has not been explained, and CBC in accordance with Mrs John's guarantee debited her

account. I only note that this was after Mrs John had died. I any event, there is no evidence that the Plaintiff had refused to pay CBC the balance due to them.

The real truth about the letter of 6th June and the Will of 5th June is that on 5th June 1990 Mrs John's daughter Mrs Rey was in St Vincent. Mrs Rey and a number of her friends were determined to undo the gift to the Plaintiff, and to assist Mrs Rey in gaining control of Mrs John's remaining assets. Mrs John had in January 1990 had her own Solicitor, Henry H Williams Esq, draw up an earlier Last Will, in which she left the home and all her real property to her two daughters equally, and all her money to her great grandchildren. Mrs Rey when she arrived in St Vincent arranged for her Solicitor, Arthur Williams Esq, to visit her mother and to do a different Will. This one, dated 5th June 1990 (hereinafter the second Will), is the one that was eventually probated. In this second Will Mrs John inexplicably cuts out her daughter Iris, and leaves the house and land at Arnos Vale "to the fruit trees" to Mrs Rey.

The remainder of the lands "between Ashford Cole's garage and the Seargant boundary, and between Ashford Cole's garage and Mabel Cambridge's boundary" she leaves in the second will to the three great grand children, Justin, Jonathan and Zeamara. All the rest and residue of her estate she leaves to Mrs Rey. If she really believes that Cole's garage is on her land, it is not clear who she leaves it to, unless it is in the residue. The great grand children are now deprived of the considerable savings of Mrs John left to them in the Will of earlier that year, and which now went, as Mrs Rey admitted, in the remainder clause to Mrs Rey. Arthur Williams, the Solicitor who drew up the second Will, gave testimony for Mrs Rey. From his evidence and the surrounding other facts I find that he was taken to the house of Mrs John by Mrs Rey and several of Mrs Rey's family and friends. I believe him that he went there to satisfy himself that the testatrix agreed to do the Will. But, I find that Mrs John was cowed by her daughter, and her daughter's friends, into consenting to sign the second Will, which was based really on the instructions of Mrs Rey. I accept Mr Williams' testimony that he visited the house only once at the request of Mrs Rey. I accept that Mr Williams was not present for the subsequent signing of the second Will, or he would never have allowed the next legal catastrophe to have occurred. The second Will was witnessed by Lemuel T. Rey, the husband of Mrs Rey who was the principal beneficiary of this second Will.

On the visit by Solicitor Arthur Williams, Mrs Rey also persuaded Mrs John to go along with her instructions to Mr Williams to write the letter to the Plaintiff of 6th June 1990. This letter could never have been written on the instructions of Mrs John. The letter was based on instructions from someone who knew nothing of the arrangements between Mrs John and the Plaintiff. The factual errors in the letter demonstrate this. One need only refer to the fact that the real writer of the letter is unaware that there were two Deeds given by Mrs John to the Plaintiff.

The letter is based on the belief that only Deed 3365 of 1989, the first Deed, existed. The writer is unaware of the second Deed. The letter also has Mrs John claiming that the Plaintiff's original intention had been to rent the Plaintiff a spot to put his garage on, but that Mrs John is now willing in 1990 to let the Plaintiff have the parcel of land in as much as he has been very attentive to Mrs John and in as much as he had already gone through the expenses of building his foundation. The letter has it that Mrs John wished to have the Deed of gift rectified to exclude the area of land between his foundation and the boundary with Sergeant and with Cambridge. This letter never actually reached the Plaintiff. Nothing appears to have occurred to interfere with his relationship with Mrs John. Nor, of course, was he aware of the Will of 5th June which purported to have Mrs John bequeathing a part or possibly even all of the land she had, in his mind, given him. The Plaintiff never saw this letter until copies of it surfaced after the death of Mrs John. I believe that this letter, like the Will of the day before, was written on the instructions of Mrs Rey and not of Mrs John. I believe that its purpose was to attempt to show that the Plaintiff was only entitled to the small lot of land around the original foundations of the garage, as partitioned by the surveyor for the purpose of the mortgage, and which had mistakenly come to be connected in the mind of Mrs Rey with the boundary of the land given by her mother Mrs John to the Plaintiff. If Mrs John had really written this letter in June 1990 I cannot see how she would be subsequently backing notes at the bank for the Plaintiff after her daughter went back to New York, or how she would still have the Plaintiff taking her in December 1990 to New York for medical treatment, or how she would be staying with relatives of the Plaintiff instead of with her own family. The confusion in Mrs Rey's mind about what to do about her mother's gift to the Plaintiff is further illustrated by the words of the Will which appear to mean that Mrs John gives away to others the land she had given the Plaintiff, and the letter from Solicitor Williams written the following day on Mrs Rey's instructions in which she has Mrs John giving title to a part of the lands to the Plaintiff, Mr Cole. Unless it is that they are consistent, and they both mean that Mrs Rey, and the estate of Mrs John, acknowledge the Plaintiff's title, but to the smaller portion.

Mrs John died in New York on 16th January 1991. Mrs Rey on 3rd July 1991 took a Grant of Probate of her Last Will of 5th June 1990. On 20th September 1991 Mrs Rey as Executrix of Mrs John's Last Will and "as personal representative of the Testatrix pursuant to provisions of the Administration of Estate Act and all other powers her enabling" vested by deed poll in herself upon trust for sale the lands of Mrs John at Arnos Vale. She then proceeded to sell one half of it, the part with the house of Mrs John, to her friend Mrs Frank and her husband. The other half of the land of Mrs John consisted of the area that Mrs John had earlier in the two Deeds attempted to give to the Plaintiff. Mrs Rey on

9th December 1992 purported, acting under the Vesting Assent in her favour just described, to convey to Albertina John for $18,785.00 the house lot that Albertina had been occupying with Mrs John's previous consent. This is a piece of the land that Mrs John had previously given by the Deeds of Gift to the Plaintiff.

Given the witnessing of the second Will by Mrs Rey's husband, questions must one day arise as to the validity of all of the gifts in the Will to Mrs Rey. However, the Will was not in issue in this case, and I did not hear extensive argument on the validity of the gifts. Mrs Rey is not resident in St. Vincent and probably was not entitled to a grant of probate under the Probate Rules, but that is a matter for the heirs to take up if they have any interest in their old grandmother's estate in St Vincent. More to the point, Mrs Rey's gifts under the specific bequest and the residuary clause fail because her husband had no business signing the Will as a witness, as every school child knows. If the issue ever comes up in court the likely ruling is that the Grant of Probate did not apply to any of the gifts to Mrs Rey. Mrs John appears to have died intestate regarding all the property she left to Mrs Rey. No Letters of Administration having been taken out by one of Mrs. John's heirs in relation to the property passing on the intestacy, Mrs Rey probably had no power or capacity to make Vesting Assents or conveyances in relation to them. But, I do not decide this case on the basis of these apparent errors, as they have not been fully argued before me and are not germane to this case. I decide this case on the basis of the Plaintiff's right to rectification and estoppel which were pleaded and argued before me.

First we must return to *res judicata*. At the conclusion of the evidence in the case counsel for the Defendant returned, as he had indicated he would, to the issue of res judicata. He argued fully, as he had not done before, the law on *res judicata* as he saw it applied to this case. He argued that the broader of the two principles of *res judicata* applies. That is, that for a matter to be *res judicata* it does not have to be a matter that was actually decided in the earlier proceedings, but also, where the party had an opportunity in the earlier proceedings to raise the point, and he declined or failed to do so, he is stopped from raising it in later proceedings. The Plaintiff, he urges, had an opportunity when the mater came on in the earlier suit 483/91 to fully ventilate his claim to rectification. The judge ruled as she did because the claim for rectification was not presented to her in a proper manner. The correct practice in rectification claims involving disputes such as this is invariably to require proceedings where the evidence is thrashed out. It was open to the Plaintiff, he submits, to make the appropriate application to the Judge under Order 28 rule 8 for evidence to be taken and tested by cross-examination. The Plaintiff failed to do so, and the wider *res judicata* principle applies. In reply, counsel for the Plaintiff submitted that Order 28 rule 8 gives the court a discretion which it might or might not apply. In suit 483/91 the court declined to hear the

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application for rectification. That declining cannot be put to the fault of the Plaintiff. The Plaintiff has not previously had an opportunity to argue for rectification. *Res judicata* does not arise, he argued, when the previous court declines to hear the application. I have considered the submissions of counsel, and I have reviewed the authorities provided by counsel. For the reasons I have given earlier I find that the Plaintiff did not in fact have an opportunity earlier to argue his entitlement to rectification, Joseph J in the earlier suit 483/91 having declined to hear the Plaintiff's application for rectification of the two Deeds in question, and having dealt with the narrow issue before it on the Originating Summons, and having left it to the Plaintiff to bring these proceedings by Writ. On the facts of this case the Plaintiff's claim for rectification is not a matter that is *res judicata*.

Now to the question of rectification. In addition to a well prepared written brief, counsel for the Defendant argued with great skill the inapplicability of the remedy of rectification to this case. The law and authorities on the issue of rectification presented to the Court and argued by the Defendant included:

Joffre Sardine et al v. Alban Dos Santos et al (1984) CA No. 6/1982
13 Snell's Equity 28th Edition, 612 Fowler v. Fowler (1859) HD&J 265
Wright v. Geoff (1856) ER 1087
18 Hals 3rd Ed page 397 para 775, and page 398 para 757
Milroy v. Lord (1862) 4De GF&J 264 at 274
Price v. Price (1851) 14 Beav 598
Real Property Act Cap 248 s.598
26 Hals 3rd Ed page 920 para 1707
Lister v. Hodgson (1867) LR Eq 30
Phillipson v. Kerry (1863) 55 ER 247 at 248
Thomas v. Times Book Co Ltd (1966) 2 All ER 241
Wilson v. Wilson (1854) 4 HLC 40 at 66
Green v. Weatherill [1929] 2 Ch 213
Hoystead v. Comm of Taxation [1926] AC 155

The authorities relied on by the Plaintiff in reply on the issue of rectification included:

Snell's Principles of Equity 26th Editiom, 679
Sardine v. deFreitas (1984) 34 WIR 97 at 103
Whiteside v. Whiteside (1949) 2 All ER 913
Crane v. Hegeman-Harris (1939) 1 All ER 662 at 664/665
Bon Hope v. Henderson (1895) 1 Ch 742 at 748
Walker v. Armstrong 54 ER 495
Hanley v. Pearson (1879) 13 ChD 545
Barrow v. Barrow 52 ER 208

The Defendants' first objection to the claim for rectification is founded on the submission that the Plaintiff, to succeed in a plea for rectification, must satisfy the following three conditions:

(i) there must be the absence of an alternative remedy available to him;

(ii) he must prove the mistake;

(iii) he must produce convincing proof of the mistake on the part of all parties.

Counsel agreed that where the transaction is unilateral, such as a gift by Deed Poll as in this case, then unilateral mistake would suffice.

A gift is by its nature gratuitous, made with the full expectation that the thing shall not return to the donor. Counsel submits that in order for a gift to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. Counsel for the Defendant further submits that if a gift is intended to be made by one mode and that mode failed, the court will not give effect to it by applying one of the other modes. Equity will not, for example, assist in completing an imperfect gift by holding the intending donor is a trustee for the intended donee. The Defendant submits that, in our case, a gift of land can only be made by a conveyance by Deed. The Deeds in this case having been previously held to be ineffective to pass title to the Plaintiff, the Court will not assist the Plaintiff by holding that Mrs John held as trustee for him. I entirely agree.

Counsel for the Defendant properly accepts that an application for rectification can be made even by a volunteer, once he can bring sufficient proof to demonstrate that there was a mistake in carrying out the true intentions of the grantor. But, he submits, the Court will only act upon the clearest and most certain demonstration of error and of actual intention. In our case it is agreed on all parts that the claim of the Plaintiff is that Mrs John intended to make a gift to the Plaintiff, but that the Deeds she executed do not carry out the intention of Mrs John in that they failed to vest the legal and beneficial title to the property in the Plaintiff. The Defendant submits in consequence that the Court will not compel the completion of these imperfect instruments.

The Defendant acknowledges that if the Plaintiff produces clear and certain evidence that the Deeds were not prepared in the exact manner Mrs John intended them and also that her actual intentions were as pleaded, then they may be rectified and if those particular words are necessary to carry her intention into effect, they may be introduced. But counsel argues that if as in this case where she is said to have made a mistake, and she denies that it was her intention to give the beneficial title in the property to the Plaintiff, no amount of evidence however conclusive proving that she did so intend will at all justify the Court in compelling the alteration of the Deeds in a manner which she would clearly not have chosen to do up to the time of her death.

So, the Defendant submits, the issue which falls for the Court's decision in this case is not simply whether there is convincing evidence of the unilateral mistake alleged; but further, what did Mrs John indicate her intention to be in relation to the beneficial interest in the subject premises after the Deeds were executed and up to the time of her death. On evidence of intention, the Defendant

submits that the burden of proof rests on the Plaintiff. She submits that the Plaintiff must produce clear and unambiguous evidence, not merely showing a mistake, but showing the actual intention of Mrs John, and that the Deeds in their proposed state will be in conformity with the intention of Mrs John at the time of their execution. A denial by Mrs John, she submits, ought to have considerable weight with the Court, as established by the authorities quoted. The Defendant further submits that the Plaintiff's account of events is to be approached with suspicion in view of the fact that Mrs John has since died. Her counsel produces authority for the proposition that no amount of convincing evidence proving that the Deeds do not carry out her intentions, as established at the time she executed them, can be of any assistance to the Plaintiff if there is other evidence showing that subsequently she denied her intention to transfer the legal and beneficial title to him. With all of the above propositions of law I respectfully agree.

Unfortunately for the Defendant, the facts as I find them are that there is clear and convincing circumstantial evidence that Mrs John never in fact denied the gift to the Plaintiff. I refer to Mrs John's continuing relationship with the Plaintiff after the alleged repudiation of the gift and after Mrs Rey returned to New York; her subsequent backing the note at the bank for him; her not once telling the Plaintiff in the presence of witnesses, though he worked in what Mrs Rey has described as Mrs John's yard surrounded by workmen and other people in the village, that she considered that he had wrongfully obtained from her the two Deeds of Gift; the failure to ensure that the letter of Arthur Williams Esq to the Plaintiff was actually delivered to the Plaintiff, so that he could take some action while Mrs John was still alive to clear up the issue; the suspicious and questionable circumstances surrounding the making by Mrs John of her second and final Will of 1990. I find, rather, that the documents apparantly asserting denials by Mrs John were in reality the creations of her daughter Mrs Rey, who was trying to secure for herself as many of the assets of Mrs John as she could, and that she was the one who repudiated the gift by her mother to the Plaintiff, not the mother Mrs John. If Mrs John was absentminded and gravely incapacitated mentally and emotionally due to old age at the time she made the two Deeds of Gift, as Mrs Rey alleges in her Defence, then I shudder to consider what her condition must have been a year later when she made the Last Will in Mrs Rey's favour that was probated, and when Mrs John allegedly authorised the writing of the letter of 6th June to the Plaintiff. No shred of evidence of this alleged incapacity was produced by the Defendant. I can only conclude that the reason that no action was taken against the Plaintiff during the lifetime of Mrs John is that Mrs John was not incapacitated and would have made it clear that the gift to the Plaintiff was made with her full consent.

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We now look at proprietary estoppel and alternative reliefs as prayed by the Plaintiff. The law and authorities argued by the Plaintiff included:

Inwards v. Baker (1965) 1 All ER 446
Pascoe v. Turner (1979) 2 All ER 945
18 Hals 3rd Edition para 758
Dillwyn v. Llewelyn [1861-73] All ER Rep 384

The law and authorities argued by the Defendant included:

Bullen & Leak 13th Edition 1148-1149
RSC 1970 Order 18 rule 8
15 Hals 3rd Edition page 227 para 429
Porter v. Moore (1904) 2 Ch 367 at 373
Ballantyne v. Hunte (1994) AC 4/1993 at page 5
Ord v. Ord (1923) 2 KB 432
Khan v. Golecha International Ltd (1980) 2 All ER 259.

The Defendant submits that there is no evidence that the Plaintiff took up possession of all the lands set out in his Deeds, nor that he improved all the lands to his detriment. Estoppel could only arise in relation to that portion of the land in which Mrs John acquiesced his occupation and on which during her lifetime he made improvements to his detriment and with her knowledge. The Plaintiff claims in the prayer to his Statement of Claim estoppel in relation to all the land in his Deeds, not to a portion of the land. The Defendant submits that if the Plaintiff has to resort to estoppel by acquiescence or proprietary estoppel, he has not made out his claim in his prayer. The Plaintiff in response submits that we have the acts of Mrs John putting the Plaintiff in physical possession of the land before the Deeds were made. The Plaintiff then, relying on the promise made by Mrs John, put himself to enormous debt.

I visited the locus at the request of counsel for the Defendant. I am satisfied that the Plaintiff has occupied all the land he was given by Mrs John. He has roofed over all the area he needs for his garage, and the rest he leaves partly in bush, and small areas of it are cultivated from time to time by Albertina. I have noted that Albertina is in the process of attempting to concretize her claim by commencing to block in her chattel house. She is a party to this case now, and appeared at the trial by counsel. She is bound by the ruling that I make in this case.

The evidence is that Mrs John, before the date of the first Deed, put the Plaintiff in possession of all of the land. First, I believe that she helped the Plaintiff measure out the bounds, i.e, she physically put him in possession. Secondly, I believe she knew and approved of his putting the land up to the banks on the two mortgages. She backed the note in the first mortgage. She encouraged him to use the land for his business, and to put up the land to the banks as security for loans. The law is that when a property owner by her conduct induces or encourages or allows another to come upon her land or acquiesces in his remaining on the land and expending money on the land in the hope or expectation or promise that it will

be his, then the landowner will be precluded from denying the right of the other to remain on the land. I have no difficulty in finding that Mrs John would have been estopped from denying her Deeds of Gift in favour of the Plaintiff. And, if she is estopped, then so must be her Executrix.

It follows that I am finding that, if it were necessary, and if I were wrong on my finding on the issue of rectification, I would grant the Plaintiff the alternative remedies he prays: first, a declaration that the Defendant in her capacity as the Executrix of the estate of the late Enid Beatrice John is estopped from turning the Plaintiff out of the lands conveyed by the Deeds of Gift; second, a declaration that the Plaintiff is entitled to have the whole interest in the said parcels of land conveyed to him; and, third, an order directing the Defendant to convey the said parcels of land to the Plaintiff, and on her failure so to do that the Registrar of the High Court be empowered so to do.

I make the following orders and grant the following reliefs to the Plaintiff:

1. A declaration that at all material times it was the settled intention of the late Enid Beatrice John, deceased, to convey the legal and beneficial interest in the properties described in Deeds 3365 of 1989 and 1952 of 1990 to Ashford St Clair Cole;
2. An order that the said Deed numbered 3365 of 1989 and dated 14th June 1989 be rectified by deleting the words "Donor her" in the fifteenth line on page 2 thereof and substituting therefore the words "Donee his";
3. A further order that the said Deed numbered 1952 of 1990 and dated 14th March 1990 be rectified by deleting the words "Donor her" in the fourteenth line on page 2 thereof and substituting therefore the words "Donee his";
4. Costs to the Plaintiff to be taxed if not agreed.

It must follow that the Deed No. 956 of 1995 of Albertina John is void and of no effect. Law and equity demand, though Albertina as Added Party filed no pleadings in this suit to which she was joined at the instance of the Court and gave no evidence on her own behalf or on behalf of the Defendant, that I order the Defendant Mrs Rey to repay to Albertina John the sum of $18,785.00 together with interest at the rate of 6% from the date she received that sum, which I find from the Deed to be 9th December 1992. I order Albertina's costs to be paid by Mrs Rey, to be taxed if not agreed. I make no order as to costs in favour of the Development Corporation, as they did not appear.

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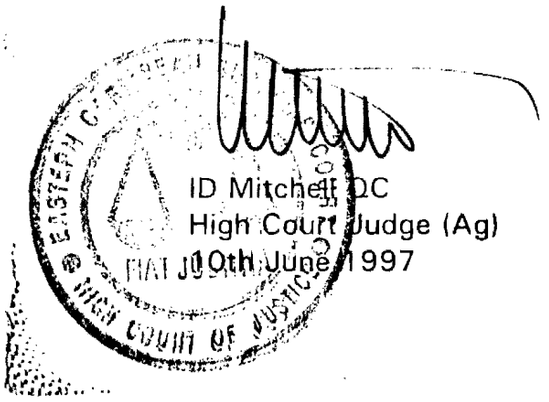
A stay of execution for six (6) weeks granted.



ID Mitchell QC
High Court Judge (Ag)
10th June 1997