

**IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No GYCV2021/005
GY Civil Appeal No 46 of 2016**

BETWEEN

SAHADEO PRASHAD

APPELLANT

AND

**BASMATTIE PERSAUD
BHAGMATTIE PERSAUD
COBLALL PERSAUD**

RESPONDENTS

**Before the Honourable: Mr Justice J Wit, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ**

Appearances

**Mr Robin M S Stoby, SC with Mr Mohamed S G F Khan and Mr Kashir Khan for
the Appellant**

Mrs Rinee R Kissoon and Mr Satyesh S Kissoon for the Respondents

Practice and Procedure – Action for possession of land – Counterclaim that property was obtained by fraud, or alternatively, held in trust for father’s estate – Objection to standing of respondents – Application for joinder – Interlocutory order dismissing application for joinder – No appeal made to Full Court of the Court of Appeal – Whether Court of Appeal had jurisdiction to entertain appeal against interlocutory order – Whether respondents had standing – Court of Appeal Act, Cap 3:01, ss 6(2)(a)(i), 6(4).

Land – Equitable interests – Resulting and Constructive trusts – Whether a resulting or constructive trust could exist and operate under Roman-Dutch system of land law in Guyana – Civil Law Act, Cap 6:01, s 3d(i) – Deeds Registry Act, Cap 5:01, s 22(1).

SUMMARY

The parties in this appeal are siblings. The appellant brought an action for possession and mesne profits against the respondents in their personal capacities. He claimed he has been the owner of the land ('the land') by virtue of transport since 1985. The respondents defended and counterclaimed that the appellant obtained the transport by fraud or alternatively, that he held the land in trust for the estate of their father, Harold Prashad ("Harold"). The respondents pleaded that their parents, Harold and Raywantie Prashad, desired to purchase the land but could not secure a mortgage because of their advanced age so they entered into an agreement with the appellant to acquire the land. The alleged agreement was that the appellant would apply for the mortgage and have the transport passed to him, but all the mortgage payments would be funded by the parents. When the mortgage payments were completed, then the appellant would transfer the land to his parents.

The appellant replied denying any such agreement and the respondents' legal standing to make a claim on behalf of the father's estate. On the eve of the trial the respondents applied to join Harold's estate but the trial judge refused the application (the "interlocutory order"). The respondents did not appeal this decision. Following the trial on the merits, the judge dismissed the claims of fraud and trust.

On appeal by the respondents against the judgment on the merits and the interlocutory order, the Court of Appeal stated that although an appeal against an interlocutory order must be made to the Full Court, nevertheless they could entertain it because the appeal was against the "whole of the judgment". On the issue of the trust, the court found there was sufficient evidence to prove the existence of a trust. Accordingly, the court found that the appellant held the land in trust for Harold's estate. Interestingly, in its disposition of the appeal, the Court of Appeal ordered that Harold's estate be joined to the proceedings.

The appellant appealed to this Court. Following the oral hearing, the Court asked the parties to submit responses to questions concerning whether trusts in land could exist and operate in Guyana. The Court in a judgment authored by Barrow JCCJ found that the appeal should

be allowed because the respondents had no legal standing since they were before the lower courts only in their personal capacities, and there was nothing to show that they had a right to possession of the land. The defence of *jus tertii* (the right of a third party), on which the respondents were apparently relying, was no defence to an action for ejectment. For clarity, it was the estates of the parents which would have had to assert a right to the land. Therefore, when the interlocutory order was issued, the judge should have struck out the Defence and Counterclaim because the respondents had no right to the land and thus, no legal standing.

Barrow JCCJ also found that the order for joinder served no purpose and had no effect because it was made after the High Court proceedings ended and after the appeal had been heard. More particularly, in the first place, the Court of Appeal had no jurisdiction to hear the appeal against the interlocutory order. That appeal could have only been entertained by the Full Court in accordance with s 6(2)(a)(i) of the Court of Appeal Act.¹

Wit, Rajnauth-Lee and Burgess JJCCJ in a joint concurring judgment stated that even though the matter could be disposed of without considering the “trust issue”, having regard to the Court of Appeal’s acceptance of *Collymore v George*² as good law and the concomitant finding that a trust existed, they should address that issue. The Judges noted that, according to the first proviso to s 3 of the Civil Law of Guyana Act, full ownership is the only form of ownership of immovable property recognised in Guyana. This is reinforced by s 22(1) of the Deeds Registry Act. Therefore, as this Court had already definitively established in earlier cases, there is no duality of ownership and no division of legal and equitable interests. As such, a resulting or constructive trust under the English system, which recognises both a legal owner as well as a beneficial owner would be problematic with respect to the law of immovable property in Guyana.

¹ Section 6, so far as material, is set out at [26]-[27], below.

² So far as material, is set out at [37], [49], [62], [63], [70], below.

The Judges then highlighted an interesting issue raised by the parties in their post hearing responses, that is, whether the equitable remedy/doctrine of a constructive trust, in the absence of equitable interests in immovable property, could be available in Guyana in the circumstances of this case. Upon a perusal of judgments from various common law jurisdictions, the Judges noted the development of a constructive trust as an equitable remedy for wrongful acts such as fraud, breach of duty of loyalty, unjust enrichment and the like. The Judges were of the view that the issue remains unexplored in the context of full and absolute ownership of immovable property, recognised by the Civil Law of Guyana Act and the Deeds Registry Act. They decided that the issue should be left for determination by this Court after consideration by the courts of Guyana in an appropriate case.

The Judges also observed that in the circumstances of the case, they would leave open whether the third proviso to s 3 or any provision of the Civil Law of Guyana Act gives rise to *in personam* rights. They were also content to leave open to what extent an express trust could be created in Guyana in respect of immovable property and the legal requirements for such a trust and the nature of the rights, if any. Counsel submitted that in Guyana the express trust relating to immovables must be in writing and it is usually under seal, and formally registered in the Deeds Registry. However, the Judges found that it was not necessary in this case to decide whether that was a correct proposition of the law.

Given the foregoing, the appeal was allowed, and the respondents were ordered to pay standard costs to the appellant.

Cases referred to:

British Colonial Film Exchange Limited v SS DeFreitas [1938] LRBG 35; *Chung v AIC Battery and Automotive Services Co Ltd (in Receivership)* (Guyana CA, 23 May 2011); *Chung v AIC Battery and Automotive Services Co Ltd (in Receivership)* [2013] CCJ 2 (AJ (GY), (2013) 82 WIR 357; *Collymore v George* (2008) 72 WIR 229 (GY); *Fazal v Annamanthadoo* (1991) 48 WIR 150 (GY); *Henderson v Archila* (1983) 37 WIR 90 (BZ); *Kitty v Vieira* (1961) 3 WIR 249 (GY); *Lucas' Trustee v Ismail & Amod* 905 Transvaal Supreme Court Reports 239; *McDonna v Richardson* (Anguilla CA, 29 June 2007); *Muschinski v Dodds* (1985) 62 ALR 429; *Obermuller v Obermuller* [1927] LRBG 71;

Persaud v Pln Versailles & Schoon Ord, Ltd (1970) 17 WIR 107 (GY); *Persaud v Prasad* (2020) 97 WIR 324; *Pettkus v Becker* [1980] 2 SCR 834; *Prasad v Persaud* (Guyana HC, 25 February 2016); *Ramdass v Jairam* [2008] CCJ 6 (AJ) (GY), [2008] 72 WIR 270; *Ramkishun v Fung-Kee-Fung* [2010] CCJ 2 (AJ) (GY), (2010) 76 WIR 328; *Soulos v Korkontzilas* [1997] 2 SCR 217; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

Legislation referred to:

Guyana – Administration Ordinance 1887, Civil Law of British Guiana Ordinance 1916, Civil Law of Guyana Act, Cap 6:01, Court of Appeal, Cap 3:01, Deeds Registry Act, Cap 5:01, High Court Act, Cap 3:02; **United Kingdom** – Trustee Act 1893 (56 & 57 Vict c 53).

Other Sources referred to:

Cameron E, ‘Constructive Trusts in South African Law: The Legacy Refused’ (1999) 3 Edinburgh L Rev 341; Dalton L, *The Civil Law of British Guiana: Being the Civil Law of British Guiana Ordinance, 1916: With all Amendments, and With Notes, Cases, Index, and Appendix of Ordinances* (Argosy Co 1921); Hayton D, Matthews P and Mitchell C, *Underhill and Hayton Law of Trusts and Trustees* (19th edn, LexisNexis 2016); Morice G T, *English and Roman-Dutch Law: Being a Statement of the Differences Between the Law of England and Roman-Dutch Law as Prevailing in South Africa and Some Other of the British Colonies* (African Book Co 1903); Ramsahoye F H W, *The Development of Land Law in British Guiana* (Oceana Publications 1966); *Tort: The Law of Tort* (3rd edn, LexisNexis 2014).

JUDGMENT

of

The Honourable Justices Wit, Rajnauth-Lee, Barrow, Burgess, and Jamadar

Delivered by

The Honourable Mr Justice Barrow

and

CONCURRING JUDGMENT

of

The Honourable Justices Wit, Rajnauth-Lee, and Burgess

Delivered on 18 February 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW JCCJ:

Introduction:

[1] This appeal is against the decision of the Court of Appeal to set aside an order for possession of land in favour of the holder of the transport to the land because, the court found, he held title in trust for a non-party to the proceedings.

Parties and Non-Parties

[2] The parties are siblings. For convenience, generally they will be referred to in this judgment by their first names or in their capacities in the High Court claim; thus, the present appellant will be referred to as the claimant and the current respondents as the defendants. Sahadeo Prashad was the successful claimant for the order for possession against the defendants, his sisters Basmattie and Bhagmattie Persaud and his brother Coblall Persaud. The claim was brought against them purely in their personal capacities as persons in occupation. The second defendant, Bhagmattie, was the executrix of the estate of their father, Harold Prashad also known as Jankiprasad, but she was not sued in that capacity.

[3] Neither the estate of the father, who died on 29 June 2007, nor of the mother, Raywantie Prashad, who died on 17 July 1997, was made a defendant to the claim. The claim was purely for possession and mesne profits, brought against the three siblings. On 25 September 2012, the day before the scheduled trial in the High Court, the defendants applied to join the estate of the father as a defendant, but this application was refused. The trial began in March 2013 and judgment was delivered on 25 February 2016.

No Appeal at the Time

[4] There was no appeal, at the time joinder was refused, against the refusal. Nor did the estates of the father and mother thereafter commence separate proceedings

against the claimant. Interestingly, the parents had brought a claim for a declaration of trust and possession against Sahadeo on 18 March 1997, but this had been struck out for want of prosecution on 20 February 2006, well before Sahadeo commenced his claim, in November 2007, against his siblings for possession. However, in the defendants' appeal against the High Court judgment, they appealed against the interlocutory order, made four years earlier, refusing to join the estate of the father. Remarkably, in its judgment disposing of the appeal the Court of Appeal "*ordered that the estate of ... [the father] be joined to these proceedings.*"

The Case before the High Court

- [5] The nature and issues of the case that the court was both required and permitted to decide must be kept clearly in mind. This was a claim only for possession and mesne profits. It was brought by Sahadeo on the undisputed basis that since 16 December 1985 transport to the land, #1486/1985, was passed to him.
- [6] The defendants contested the claim by filing a Defence and Counterclaim, the substance of which was that the claimant obtained the transport by fraud. The defendants pleaded that in 1985 the parents desired to purchase the property but due to their advanced age it was difficult to obtain a mortgage. Therefore, the father asked Sahadeo to apply for a mortgage and take title in his name, but the parents provided the deposit and made all monthly payments on the mortgage. It was alleged that Sahadeo agreed that when the mortgage was paid off, he would pass title to the property to his parents. The defendants pleaded that the mortgage was paid off in 1994 but Sahadeo has refused to comply with their demand to transfer title.
- [7] The defendants contended that as beneficiaries of the father's estate they, along with Sahadeo, 'are entitled to the property.' The defendants contended, in the alternative, that Sahadeo held the property in trust for the estate of the father.

- [8] In their counterclaim, the defendants asked for a declaration that the claimant obtained the transport by fraud and to set aside the transport on that ground. They asked, alternatively, for declarations that Sahadeo holds the property in trust for the estate of the father and that the property forms part of the father's estate.
- [9] Sahadeo filed a Reply and Defence to Counterclaim, disputing the averments of the defendants and stating his version of the facts to show there was no agreement. Notably, the Reply and Defence to Counterclaim took the point that the defendants had no standing or authority to assert a claim on behalf of the father's estate. Therefore, it was pleaded, that the Counterclaim was without basis in fact, misconceived, bad in law and should be dismissed. The force of this objection was undeniable and the failure to deal with it has haunted this case up to the present, as will appear below.

Decision of the High Court

- [10] At the trial, testimony came only from Sahadeo and Bhagmattie in support of their respective cases. The trial judge easily dismissed the assertion that Sahadeo obtained the property by fraud because, she observed, it was integral to the agreement alleged by the defendants that title was to be put in his name. Therefore, even on the defendants' case, there was no fraud in Sahadeo's taking transport in his name.
- [11] Under s 22 of the Deeds Registry Act ³ a transport vests full and absolute title to immovable property in the transferee, subject to presently inapplicable limitations. Gregory J relied on s 23 of that Act which required that, to set aside a transport on the ground that it was obtained by fraud, the claim had to be brought within twelve months of the discovery of the fraud. As that was not done in this case, fraud could not succeed even if there had been factual support for the contention.

³ Cap 5:01.

[12] The judge then considered whether it was fraudulent to renege on the alleged agreement to transfer the property to the parents and considered the significance of the absence of any evidence in writing, required by s 3(d)(iv) of the Civil Law of Guyana Act⁴, to establish and enforce a contract for the sale of land or to prove the existence of a trust. The judge considered it significant that the alleged agreement was made at a lawyer's office with the family gathered and there was nothing about such an agreement put in writing. She decided this factor weighed against the case for the defendants and the alleged trust.

[13] On the other hand, the judge noted the claimant's moving out of the property in 1997 leaving his parents and siblings in the property and his not bringing a claim for possession until 2007. She decided that while this evidence raised suspicion, it was not enough to prove fraud. The judge concluded that the preponderance of the evidence weighed against the defendants who failed to prove fraud or the creation of a trust in favour of the father's estate.

Decision of the Court of Appeal

[14] The decision of the Court of Appeal canvassed three issues. These were, the refusal of the judge to join the estate of the father, the judge's refusal to find that a trust had been created and the finding that the transport was not obtained by fraud.

[15] In relation to the refusal of the trial judge to join the estate of Harold Prashad, the Court of Appeal agreed with the claimant that an appeal should have been made to the Full Court. However, the court found that since the defendants had appealed against the whole of the judgment, and all the issues were before the court, it was within its jurisdiction to determine whether Gregory J was correct to refuse the application.

⁴ Cap 6:01.

- [16] In relation to the failure of the trial judge to find a trust, the court agreed with the defendants' argument that notwithstanding the statutory requirement for writing, parol evidence can be relied on to prove the existence of a trust. The court considered the observations of the trial judge on the evidence that gave rise to suspicion as to the veracity of the claimant's case. In reliance on those same factors that the trial court found were not sufficient to make it reject the claimant's case, the Court of Appeal found that there was sufficient evidence to establish the existence of a trust.
- [17] In relation to the failure of the trial judge to find that fraud was committed by the appellant, the court found that there was no fraud in the acquisition of the land. However, it held that the claimant was in a fiduciary position, and it was therefore unconscionable for him to renege on the arrangement he made with his parents.
- [18] Given the foregoing, the court ordered that: (1) the order for possession be set aside; (2) the appellant held the property in trust for the estate of Harold Prashad; and (3) in accordance with s 7(1)(a) of the Court of Appeal Act⁵ the estate of Harold Prashad be joined to the proceedings.

The Need for Joinder

- [19] The objection pleaded in the Reply and Defence to counterclaim, mentioned at [9] above, that the defendants had no standing or authority to assert a claim on behalf of the father's estate (the standing point), would necessarily have prompted the unsuccessful application to join the father's estate. There are three propositions to which the objection would have drawn attention. The first proposition was implicit; it was that the defendants had advanced no fact or argument that showed a right in the defendants, themselves, that amounted to a defence to the claim for

⁵ Cap 3:01. Section 7(1)(a) - "On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to –

(a) confirm, vary, amend, or set aside the order or make any such order as the court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or either order as the case may require".

possession by the transport holder. The second proposition was the defendants' premise that the father's estate had a right to legal ownership of the property and, inferentially, to immediate possession of it. The third proposition was the implicit assertion by the defendants – and not by the estate - that the estate (a) opposed the claim for possession; and (b) supported the defendants' remaining in possession.

[20] In relation to the first proposition, except for the empty assertion in the Defence that as beneficiaries of the father's estate the defendants were entitled to possession, there was nothing to show that the defendants had any right to possession of the property. Rightly, no consideration was given in either court's judgment to the defendants' baseless contention that they were entitled to possession, and it earns no different regard now. But the emptiness of the assertion exposes the absence of any right in the defendants to resist the claim for possession.

Jus Tertii

[21] The second and third propositions disclose that the defendants had only the alleged rights of the father's estate on which to purport to rely for a defence to the claim. This is what at common law is called *jus tertii*, which is a Latin expression translated as 'the right of a third party'.⁶ As discussed in Tort: The Law of Tort,⁷ *jus tertii* is no defence to an action for ejection. This was the root of the claimant's objection to standing: the defendants were not permitted by law to rely on the alleged right to title in the father's estate. The law required the estate, itself, to assert its right to title, not a beneficiary of the estate. It was to get around this fundamental objection and ground for dismissal of the defendants' case that the defendants found it necessary to apply, on the eve of the trial, to join the estate of the father.

⁶ *Merriam-Webster's Dictionary of Law* (2022) < <https://www.merriam-webster.com/legal> > accessed 18 October 2021.

⁷ *Tort: The Law of Tort* (3rd edn, LexisNexis 2014) ch 10, [10.44].

[22] When the application to join the estate was refused the consequence should have been for the Defence and Counterclaim to be struck out as being wholly incapable of succeeding. Judgment should have been entered for the claimant, without conducting a trial. Why this was not done is simply unknown.

Joinder by the Court of Appeal

[23] The very belated action by the defendants to appeal the High Court's refusal of joinder, some four years after the event, and the decision of the Court of Appeal to order joinder are telling. They confirm the overriding need for joinder, without which the defendants were simply not permitted to rely on the alleged rights of the father's estate. To be sure, without the order to join the father's estate the defendants could not properly prosecute or succeed on an appeal because, with no rights in themselves in relation to the property, their entire appeal would be confronted with the same objection of *jus tertii*.

[24] The defendants succeeded in the Court of Appeal in obtaining an order for joinder, as they needed to do, but that order gives rise to insuperable difficulty because it ordered that the estate of the father⁸ 'be joined to these proceedings.' The Court of Appeal made that order in its judgment, after the appeal had been heard. At the time when the court made that order the High Court proceedings were at an end; they had ended with the pronouncement of judgment by that court. The appellate proceedings had also ended, except for the pronouncement of judgment. Therefore, the order for joinder could have served no purpose and had no effect except to fill the otherwise fatal gap in the defendants' case. With respect, it was a hapless order the Court of Appeal made.

⁸ The submissions of the appellant make the point that the need to join the estate of the mother, who died ten years before the father, was not even considered by the court. The appellant contends that since the mother was equally the beneficiary of the alleged promise by Sahadeo to pass the property to both his parents, it would not have been proper for the court to order joinder of only the father's estate.

Jurisdiction

- [25] More fundamental than the inappropriateness of making the post-hearing order for joinder is the proposition that the Court of Appeal had no jurisdiction to hear an appeal against the trial judge's interlocutory order refusing joinder. As a starting observation, the Court of Appeal apparently gave no attention to the factor that the trial court had no jurisdiction to entertain the defendants' Defence and Counterclaim. As discussed, the defence consisted entirely of *jus tertii* and should have been struck out following the refusal to join the father's estate. The trial court had no jurisdiction to adjudicate, at the wish of the defendants, upon the estate's alleged cause of action. That conclusion of law could be no different on appeal.
- [26] Further, the Court of Appeal lacked jurisdiction also because the purported appeal was against an interlocutory order made four years earlier. That order was not even mentioned in the judgment that was appealed. The Court of Appeal accepted that the order refusing joinder was an interlocutory order and that, at the time of the refusal, an appeal should have been made to the Full Court. This is because s 6(2)(a)(i) of the Court of Appeal Act⁹ excludes from the right of appeal to the Court of Appeal an order of a judge of the High Court made in chambers. However, s 79 of the High Court Act¹⁰ gives a right to appeal to the Full Court against an interlocutory order, hence the conclusion by the Court of Appeal that the defendants should have appealed to the Full Court.
- [27] The Court of Appeal failed to appreciate, in an unfortunate departure from its pellucid recognition in the past,¹¹ how complete a jurisdictional barrier s 6(2)(a)(i) of the Court of Appeal Act creates to an appeal of an interlocutory order to that court. The section states quite simply, paraphrased and with emphasis added, that 'an appeal shall lie to the Court of Appeal ... from any order ... of a judge of the High Court ... where such an order is --- (a) ... not --- (i) an order of a judge of

⁹ Cap 3:01.

¹⁰ Cap 3:02.

¹¹ *Chung v AIC Battery and Automotive Services Co Ltd (in Receivership)* (Guyana CA, 23 May 2011).

the High Court made in chambers ...'. The converse should not need to be stated: that an appeal does not lie to the Court of Appeal against an order made in chambers.

[28] The completeness of that proposition is underscored and, perhaps, also relieved by s 6(4) of the Court of Appeal Act which provides that:

(4) *With the leave* of the Full Court or of the Court of Appeal, an appeal shall lie under this section from a decision of the Full Court upon appeal from a judge of the High Court in respect of an order referred to in subsection (2) (a) (i) [*an order made in chambers*], ... (emphasis added)

[29] In sum, there is no appealing to the Court of Appeal against an order of a High Court judge made in chambers. That conclusion disposes of this appeal.

[30] For completeness, it is mentioned that the right of appeal to the Full Court against such an order is only with leave. Therefore, the purported appeal to the Court of Appeal was a double nullity, if such a thing is possible, because, firstly, an appeal against an interlocutory decision, which a statute states may be brought only with leave, is a nullity if it is brought without leave.¹² Secondly, the court before which it was brought had no jurisdiction to hear such an appeal. A Court of Appeal, even if it has jurisdiction, which was not the case in this instance, cannot waive the requirement or give leave after the purported appeal is filed.¹³

The Misstep

[31] The judgment of the Court of Appeal considered the argument that it lacked jurisdiction and accepted the lack of jurisdiction to hear an appeal against an

¹² *McDonna v Richardson* (Anguilla CA, 29 June 2007) at [28].

¹³ *Henderson v Archila* (1983) 37 WIR 90 (BZ) at 93.

interlocutory order. Despite so doing, the court went on to give itself jurisdiction, using the following reasoning:

[15] However, given that the whole judgment has been appealed and the appeal on the final issues has been filed here, this court can inquire into whether the trial judge was correct in refusing the application below. If this court finds that the refusal of the trial judge to join the estate was wrong, it can so rectify in the interest of justice without the need for a separate appeal.

[32] This passage betrays the confusion that crept into the court's approach. The second sentence shows that what the court did was to consider, for itself, the merits of the application for joinder and then decided that since, in its impermissible determination, the trial judge had wrongly decided the issue, it the Court of Appeal, could reverse the trial judge 'without the need for a separate appeal.' This is simply wrong and the absence of any reference to authority is unsurprising because none exists.

[33] The true position was that the Court of Appeal could only consider if the trial judge was wrong if there was before them an appeal against that decision. It could only consider the merits of the decision in chambers if it had jurisdiction to embark on that consideration. It could not engage in such consideration and, thereafter, moved by the outcome of the consideration, give itself jurisdiction. As was aptly stated by Cummings JA (as she then was) in *Chung v AIC Battery and Automotive Services Company Limited*¹⁴ a court is given jurisdiction by statute and must always satisfy itself that it has jurisdiction in each case.

Conclusion

[34] In my opinion, the appeal must be allowed, and the decision of the Court of Appeal set aside, with costs in that court to be agreed or assessed, and standard costs in this Court.

¹⁴ *Chung* (n 11) (affirmed on appeal in [2013] CCJ 2 (AJ (GY), (2013) 82 WIR 357).

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT JCCJ, MME JUSTICE RAJNAUTH-LEE JCCJ, AND MR JUSTICE BURGESS JCCJ:

Introduction

[35] This is an appeal from the Court of Appeal of Guyana. The parties in this matter are siblings. Sahadeo Prashad (“Sahadeo”) is the owner of property described as Lot 32 Section AA, Vryheid’s Lust, East Coast, Demerara (the “property”) by transport #1486/1985. Basmattie Persaud, Bhagmattie Persaud and Coblall Persaud (individually referred to by their first names and collectively as the respondents) argued that Sahadeo held the property in trust for the estate of their father, Harold Prashad (“Harold” or the “father”). The Court of Appeal agreed with them. Sahadeo denied that a trust was ever created and contended moreover that the Roman-Dutch system of land law retained in Guyana, did not accommodate the creation of a constructive or resulting trust. The appellant has appealed to the Court.

[36] We have read the judgment of Barrow JCCJ and agree with him that on the pleadings, the respondents had no defence to the claim; the counterclaim could not be sustained; and this appeal should be dismissed. We also agree that the Court of Appeal erred in joining the estate of Harold “to these proceedings” for the clear and cogent reasons enunciated by Barrow JCCJ.

[37] After hearing this matter, this Court was of the view that further submissions should be received from the parties, on the issue, among others, whether an implied, resulting, or constructive trust can exist and operate in Guyana, having regard to s 3(d)(i) of the Civil Law of Guyana Act¹⁵ (the “Civil Law Act”). This judgment addresses the important issue of Guyanese land law which arises from those further submissions; that is, whether in Guyana, a resulting or constructive trust in immovable property can be created. Even though, as seen from the

¹⁵ See (n 4).

judgment of Barrow JCCJ, this matter can be disposed of without the Court considering this issue, having regard to the judgment of the Court of Appeal in Guyana in this matter, and to the case of *Collymore v George*¹⁶, which the Court of Appeal accepted as good law, we believe that this Court should shed some light on this issue.

[38] After considering the several authorities cited by Counsel in this appeal, and the provisions of the Civil Law Act and the Deeds Registry Act¹⁷, we are of the view that, to the extent that resulting and constructive trusts assume and recognise duality of ownership and the existence of equitable interests in immovable property, such trusts cannot be created under the Roman-Dutch system of land law retained by statute in Guyana.

Background Facts

[39] On 29 August 1985, Sahadeo, who was twenty years old at the time, entered into an agreement with Moses Ramkellawan (“Moses”) to purchase the property. Moses was represented by Mr Ramroop Shewnarine, Attorney-at-Law. There were two witnesses to that agreement, one of whom was Coblall. Sahadeo paid the deposit on signing the agreement and secured a mortgage from New Building Society Limited to satisfy the balance of the purchase price. On 16 December 1985, transport #1486/1985 was passed to Sahadeo.

[40] Sometime in 1994 the mortgage was paid off. Around this time, Sahadeo’s parents, Raywantie (“Raywantie” or the “mother”) and Harold (collectively the “parents”) and the respondents were living with him on the property. In 1997, the relationship between Sahadeo and the parents broke down. His parents filed an action against him for possession and other remedies, including, a declaration for the existence of a trust. At that time, Sahadeo moved out of the property and went to Kitty Georgetown leaving his parents and the respondents.

¹⁶ (2008) 72 WIR 229 (GY).

¹⁷ See (n 3).

- [41] The parents' case was that the idea to purchase the property was theirs, but because of their age, they could not secure a mortgage. The parents claimed that they came to an oral agreement with Sahadeo that he would pay the deposit with their monies. He would secure a mortgage and make the monthly payments, again with their monies; when the mortgage payments were satisfied, he would pass transport to them.
- [42] Sahadeo denied these claims. He stated that he did not take any action to remove them from the disputed land out of his filial affection for them. The parents' action was dismissed for want of prosecution on 20 February 2006. Raywantie died on 17 July 1997, and Harold died on 29 June 2007. On 12 November 2007, Bhagmattie became the Executrix of Harold's estate.
- [43] In 2007, Sahadeo commenced these proceedings against the respondents seeking possession of the property, as well as mesne profits.
- [44] The essence of the Defence was that Sahadeo acquired the property under an arrangement with the parents, who had provided the deposit from their own funds, but required a mortgage to pay the balance of the purchase price. Because of their age, they were ineligible to obtain a mortgage. They therefore made an arrangement with Sahadeo that he would obtain the mortgage but that all payments would be made by them. Accordingly, the agreement for sale, the mortgage and transport were all executed in the sole name of Sahadeo with the understanding that upon repayment and cancellation of the mortgage, he would convey the property to the parents. By way of counterclaim, the respondents sought a declaration that Sahadeo had obtained the transport by fraud, an order setting aside the transport, a declaration that the property formed part of the father's estate, the mother having predeceased him. In the alternative, they sought an order that Sahadeo held the property in trust for the estate of the father. Sahadeo denied the alleged arrangement.

Judgment of the High Court

[45] The matter came up for trial before Gregory J who held in favour of Sahadeo, and dismissed the respondents' counterclaim. She noted that under s 22(1) of the Deeds Registry Act a transport vests full and absolute title to immovable property to the transferee subject to certain claims and interests not applicable in this case. The proviso to that section makes any transport obtained by fraud in the hands of all parties or privies to the fraud to be declared void by the court, in any action brought within twelve months after discovery of the fraud.¹⁸

[46] Gregory J however was of the view that the transport was not obtained by fraud since it was agreed between the parents and Sahadeo that he would take out the mortgage in his name and convey the property to them upon its repayment and cancellation. She found that obtaining transport in the plaintiff's name was integral to obtaining and securing the mortgage.¹⁹ She further noted at [17] of the judgment that the parents in their case never alleged fraud but a breach of trust and breach of contract.

[47] The trial judge made the further observation that if there was such an arrangement, its subsequent breach could support a finding of unconscionable conduct amounting to fraud and could attract an order for specific performance.²⁰ She relied on the reasoning of the Court as to the broad interpretation to the word "fraud" discussed in *Ramkishun v Fung-Kee-Fung*.²¹

[48] The trial judge was also of the view that s 3(d)(iv) of the Civil Law Act required written evidence to prove the existence of a trust. She found that no document evidencing the arrangement between the parents and Sahadeo had been produced.²² She noted in particular that Bhagmattie had testified that the

¹⁸ *Prasad v Persaud* (Guyana HC, 25 February 2016) at [9] (Gregory J).

¹⁹ *ibid* at [10].

²⁰ *ibid* at [11].

²¹ [2010] CCJ 2 (AJ) (GY), (2010) 76 WIR 328.

²² *Prasad* (n 20) at [12].

arrangement was made at the lawyer's office (Mr Neville Bhulai) in the presence of the lawyer and family members, yet no note of this important arrangement was made by the lawyer.²³ She did, however, find that it was suspicious that Sahadeo would move out of the property in 1997, allowing his parents and siblings who disputed his ownership, to occupy the property for thirteen years before bringing this action. The trial judge however found that these suspicious circumstances were not enough to establish fraud.²⁴ She therefore found that despite the suspicious circumstances, the preponderance of the evidence supported Sahadeo's case and weighed heavily against the respondents.²⁵

Judgment of the Court of Appeal

[49] The Court of Appeal, comprising Cummings-Edward C (Ag), George CJ (Ag) and Insanally J (Additional Judge) upheld the respondents' appeal. The court relied on the case of *Collymore v George* a judgment of the Court of Appeal of Guyana. The court noted that in *Collymore* the Court of Appeal was tasked with ascertaining whether a trust existed between a plaintiff who had provided money to her daughter and son-in-law for the purchase of property. The son-in-law later effected a conveyance to himself. The Court of Appeal noted that the court in *Collymore*, after reviewing the authorities, held "that the son-in-law had been a trustee for the plaintiff, and whether it was an express, constructive or resulting trust, it would be inequitable not to divest him of that legal title".²⁶

[50] The Court of Appeal was satisfied that in all the circumstances, Sahadeo held the property in trust, and that there was sufficient evidence placed before the trial judge which established a trust. The Court of Appeal therefore ordered *inter alia* that Sahadeo held the property in trust for the estate of Harold. The court set aside the order of the trial judge and awarded costs to the respondents in the sum of \$250,000.00.

²³ *ibid* at [14].

²⁴ *ibid* at [17].

²⁵ *ibid* at [19].

²⁶ *Persaud v Prasad* (2020) 97 WIR 324 at [25].

Statutory Framework

[51] Section 3 of the Civil Law Act plays a pivotal role in this appeal. The relevant provisions are set out in full:

From and after the date aforesaid -

- (a) the law of Guyana relating to wills, *fideicommissa*, trusts, suretyship, donations or gifts (both as regards movable and immovable property), liens or rights of retention, tacit and legal hypothecs or mortgages, partnership, agency, mandate, powers of attorney and appointment, hiring and lease, landlord and tenant, negotiable instruments, bailments, carriers, torts, or delicts, quasi-delicts, every description whatsoever of contracts and obligations whether mercantile or otherwise, all questions relating to husband and wife, marriage, separation, and divorce (save as to the rights acquired and obligations contracted by marriage in community of goods or subject to ante-nuptial contract prior to the Married Persons (Property) Act), parent and child, guardian and ward, minors or infants, lunatics, persons of unsound mind, master and servant, the presumptions and rules as to continuance of life and proof of death, movable or personal property, immovable or real property and chattels real, and all matters relating to any of the aforesaid subjects, and the law of Guyana relating to all other matters whatsoever, whether *ejusdem generis* with the foregoing or not, shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accruing after the date aforesaid, the Roman-Dutch law shall cease to apply to Guyana;
- (b) the common law of Guyana shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by the courts of justice in England, and the High Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter;
- (c) the English common law of real property shall not apply to immovable property in Guyana;
- (d) there shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property within Guyana and to movable property subject to the law of Guyana shall be adjudged, determined, construed and enforced, as far as possible, according to the

principles of the common law of England applicable to personal property:

Provided that:

- (i) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognised by the common law and shall not be subject..... any other incident attached to land tenure or to estates in lands in England and not attached to personal property in England;

....

- (iii) the relief by judgment for specific performance shall be granted in the case of immovable property on the same principles on which it is granted in England in the case of contracts relating to land or to interests in land;

- (iv) no action shall be brought whereby to charge anyone upon –

...

any declaration, creation or assignment of any trust relating to immovable property, unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised;

[52] Section 10 of the Civil Law Act provides:

Subject to this or any other Act, the Trustee Act, 1893, of the United Kingdom shall be part of the law of Guyana so far as the same is applicable.

[53] Section 50 of the Trustee Act, 1893 (to which we will return later in the judgment) reads, “unless the context otherwise requires”-

The expression “trust” does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions

“trust” and “trustee” include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

[54] In addition, s 22 of the Deeds Registry Act is an important aspect of this appeal. It reads as follows:

From and after the 1st January, 1920, every transport of immovable property other than a judicial sale transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest therein described in that transport, subject to -

- (a) statutory claims;
- (b) registered incumbrances;
- (c) registered interests registered before the date of the last advertisement of the transport in the Gazette;
- (d) registered leases registered before the date of the last advertisement of the transport in the Gazette.

Provided that any transport, whether passed before or after the 1st January, 1920, obtained by fraud shall be liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud, or from the 1st October, 1925, whichever is the more recent.

The Creation of Trusts in English Law

[55] It is instructive to note that during oral argument before us, Mr Kissoon for the respondents contended that in the present appeal, an express trust pursuant to a family arrangement, was created. When pressed by Burgess JCCJ to clarify his position, Mr Kissoon abandoned his reliance on an express trust based on a family arrangement, and argued for the creation of a constructive trust in the circumstances of this case. This judgment proceeds on the basis that what is being argued for is a constructive or a resulting trust.

[56] English law recognises various types of trusts. At Article 3.1 of Underhill and Hayton *Law of Trusts and Trustees*²⁷, the learned authors note that there are express trusts, statutory trusts, constructive and resulting trusts. Whilst formalities normally apply to express trusts, the creation and operation of the resulting or constructive trusts generally require no formalities. A resulting trust may be imposed in circumstances where a transferor gratuitously transfers or causes a transfer of property that he owns or purchases to the transferee, once there is no evidence that the transferor intended to make a gift or loan or to abandon all interest in the property. On the other hand, a constructive trust of property is imposed on proof of recognised categories of special circumstances where a court considers it unconscionable for the owner of the property to hold it for his own benefit to the entire exclusion of the claimant. The learned authors recommend that the term “implied trusts” should be avoided altogether in order to prevent any confusion, since, in their view, parliamentary counsel and the courts have used it as a generic term connoting resulting and constructive trusts but have also used the term in several other ways. Once a trust is established, the beneficiary has in equity a proprietary interest in the trust property which proprietary interest is enforceable in equity against any subsequent holder of the property other than a purchaser for value of the legal interest without notice.²⁸ The trust is therefore enforceable *in rem* against the trust property.

Equitable Interests in immovable property are not recognised in Guyana

[57] On 22 July 2008, this Court issued a significant judgment in the appeal of *Ramdass v Jairam*²⁹. The judgment was delivered by Bernard JCCJ, who wrote on behalf of the full Bench, comprising the first complement of judges appointed to the Court. The critical issue before the Court was whether equitable interests in land in Guyana were recognised or could be acquired, having regard to the development of the law of immovable property in Guyana, particularly in relation

²⁷ David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees* (19th edn, LexisNexis 2016).

²⁸ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705 (Lord Browne-Wilkinson).

²⁹ [2008] CCJ 6 (AJ) (GY), [2008] 72 WIR 270.

to a purchaser who was put in possession under an agreement of sale, and the effect of statutory provisions on the indefeasibility of title to such property. The Court held that dicta from a formidable array of cases of older as well as more recent vintage led to the inevitable conclusion that equitable interests in immovable property were not recognised and could not be acquired in Guyana. The appellant had therefore acquired no equitable interest in the land purchased from L but had merely the right to seek against L an order for specific performance of the agreement for sale under proviso (iii) to s 3 of the Civil Law Act, if title to the land had remain vested in L. A distinction had to be made between acquiring an equitable interest in immovable property and seeking equitable relief on the same principles on which it is granted in England.³⁰

[58] Bernard JCCJ noted at [17] that the Civil Law of Guyana Ordinance (which came into effect on 1 January 1917) was intended to substitute the English common law and the principles of equity, along with certain English statutory provisions for the Roman-Dutch Law, according to the long title of the Ordinance. She noted however that it was also enacted to codify certain portions of Roman-Dutch Law which had been until then the law governing immovable property in the Colony of British Guiana.

[59] Bernard JCCJ was of the view that the first proviso to s 3 of the Civil Law Act specifically excluded any incidents attached to estates in land in England and the stipulation that only full ownership of immovable property shall be recognised in Guyana suggested that all other forms of ownership were excluded. Bernard JCCJ made reference to Dalton's commentary on this proviso in his 1921 book, *The Civil Law of British Guiana*, (page 14) that - "Under the English system two kinds of ownership may be co-existing in the same *res*. This duplication of ownership

³⁰ *ibid* at [27].

with respect to immovable property is not introduced, but the Roman-Dutch law on this matter is retained.”³¹

[60] Bernard JCCJ observed that debate had raged over the years on whether equitable interests in land were recognised in Guyana, and that the case law on the subject had indicated the conflict of opinions on the interpretation of s 3 of the Civil Law Act.³² The Court further noted that the Civil Law Act expressly enacted that full ownership was to be the only ownership of immovable property in Guyana. The Deeds Registry Act, passed in 1920, placed this beyond doubt and went even further when s 23(1) [sic]³³ provided that every transport of immovable property vested in the transferee full and absolute title to immovable property, subject only to certain claims, encumbrances, and interests mentioned therein.³⁴

[61] In 2010, another important judgment on Guyanese land law was issued by the Court. In the case of *Ramkishun v Fung-Kee-Fung*³⁵ the Court considered whether specific performance can be obtained of an agreement for sale against the heirs to immovable property. Following on from the important principles set forth by the Court in *Ramdass*, Wit JCCJ, writing on behalf of the majority, made the following points at [49] and [51] which merit being set out:

[49] When section 3 of the Civil Law of Guyana Act is read in its entirety, it is clear that its drafter or, to be exact, the drafter of the Civil Law of British Guiana Ordinance, 1916 (the predecessor of the Civil Law of Guyana Act), intended to introduce by and large the English common law (including the doctrines of equity) as the common law of Guyana. This follows from sections 3(a), (b) and (d). It is equally clear that in the area of immovable property, the Roman-Dutch law was retained to some extent, which follows from s. 3 (d) (i) and (ii). From this legal structure it can be deduced that in the interpretation of Guyanese law the main rule of construction must be that the English common law

³¹ Sir Llewelyn Chisholm Dalton spent the first nine years of his legal career (1901-1910) in South Africa and was therefore fully acquainted with Roman-Dutch law. From 1910-1919 he was Registrar of the Supreme Court of British Guiana, acting as a Puisne judge and Chief Justice from 1917 to 1919 in which year he was appointed as a Puisne Judge in that Court until 1923. Given his record and his presence and position in Guyana during the period which saw the adoption of the Civil Law Ordinance and the Deeds Registry Ordinance, his observations and comments must be considered as of great authority.

³² *Ramdass* (n 31) at [21].

³³ Properly s 22(1). Incorrectly referenced in *Ramdass* (n 31).

³⁴ *Ramdass* (n 31) at [23].

³⁵ See (n 23).

(including the doctrines of equity) should be followed unless the expressly retained Roman-Dutch law would strongly otherwise require.

...

[51] The general principle referred to, is in English law, as we have stated, clearly linked to the concept of an equitable interest or estate in immovable property. The first proviso in s. 3(d)(i) of the Civil Law of Guyana Act, however, states: “immovable property may be held *as heretofore in full ownership*, which shall *be the only ownership of immovable property...*”. The effect of this proviso is, as we held in *Ramdass v Jairam*, that there can be no equitable interests in immovables in Guyana. ...

Collymore v George and Resulting and Constructive Trusts in Guyana

[62] It is interesting to note that on 23 and 28 April 2008, (just prior to the judgment of this Court in *Ramdass*) the Court of Appeal of Guyana issued two judgments in the appeal of *Collymore v George* (the majority judgment of Ramson and Cummings-Edwards JJA, delivered by Ramson JA, and the dissenting judgment of Chang CJ (Ag)). Among the issues before the court was the question: whether the law of Guyana recognised the equitable concept of a trust. The majority of the Court of Appeal answered in the affirmative. The court noted that the trial judge had found that the plaintiff had given the first defendant (her son-in-law) money over a period of time to purchase a property for herself, but the first defendant had, by stealth, engineered the passing of the conveyance in his own name. The majority of the Court of Appeal was of the view that the first defendant had therefore been in a fiduciary position vis-a-vis the plaintiff and the uncontradicted testimony had been to the effect that the property had not only been purchased but substantially renovated after its conveyance over a period of time with moneys entrusted to the first defendant upon a written request by the first defendant to the plaintiff. The majority observed that to this end, the first defendant had irrefragably been a trustee for the plaintiff and, whether an express, constructive or a resulting trust, as erroneously determined by the learned trial judge, it would be inequitable not to divest him of that legal title.

[63] Chang CJ (Ag) did not agree. He was of the view that the weight of the more recent local decisions favoured the proposition, that express trusts apart, there could be no equitable interests in immovable property.³⁶ He observed that although the facts of *Collymore* cried out for justice for the plaintiff, the remedies sought by her were wholly misconceived. According to Chang CJ (Ag), the defendants were trustees of the money they received from her, but they were never trustees of the property.³⁷

[64] Both the majority and Chang CJ (Ag) observed that there were two lines of authorities on whether, in Guyana, there could be equitable interests in immovable property. Among the many cases cited, Ramson JA considered the judgment of George C (delivering the unanimous judgment of the court) in the 1991 case of *Fazal v Annamanthadoo*³⁸. In *Fazal*, a property agent instituted proceedings for payment of his commission in a transaction involving a contract of purchase and sale of land entered into by the property agent in circumstances where the owner of the land decided not to sell to the prospective purchaser. In considering whether two previous agreements for sale of two smaller portions of the land in question, and which had been registered at the Deeds Registry as miscellaneous deeds, fell within the term “registered interests” in s 2 of the Deeds Registry Act, George C made the distinction between English law and the law as it stood in Guyana. George C remarked:³⁹

Under English law the effect of a contract of sale of immovable property is to vest in the purchaser an equitable interest in the property which under the Land Charges Act 1925 is registrable. But section 3 of the Civil Law of Guyana Act (which introduced, with effect from 1st January 1917, the common law of England together with the doctrines of equity then or at any time thereafter administered by the English court) by subsection (c) expressly excluded the common law of real property. ...

Further, under proviso (1) to the section immovable property was not to be subject to any of the incidents attached to land tenure or to estates in land in

³⁶ *Collymore* (n 18) at 247.

³⁷ *ibid* at 250.

³⁸ (1991) 48 WIR 150 (GY).

³⁹ *ibid* at 158-159.

England which are not attached to personal property, except that the equitable relief by way of specific performance was to be granted in case of immovable property on the same principles on which it is granted in England in contracts relating to land or to interests in land. Although there have been isolated *dicta* to the effect that equitable interests can be created in land (see, for example, *Ishriprasad v Jaikaran* [1951] LRBG 86), the overwhelming body of judicial opinion is of the view that, express trusts apart, equitable estates or interests are precluded by the above provisions (see *Gajadar v Barracot* [1919] LRBG 216, *Parikhan Rai v la Penitence Estate Co* [1926] LRBG 142 and *British Colonial Film Exchange v ss de Freitas* [1938] LRBG 35). ...

And in *Kitty and Alexanderville Village Council v Vieira* (1961) 3 WIR 249 at page 252 Luckhoo CJ has noted that “it has been decided over and over again in this Colony that the only interests in land possible in this Colony are legal interests”.

When therefore the definition of “registered interests” was made to include “rights” or interests . . . imposed or attached to immovable property by agreement or otherwise” it could not have been referring to the registration of an equitable interest such as a contract of purchase and sale. What is envisaged is the registration of legal interests or liabilities such as easements, *profits-à-prendre* and servitudes and not what may be considered to be estates or interests in land whether of an equitable or legal nature.

- [65] Ramson JA also referred to the 1927 case of *Obermuller v Obermuller*⁴⁰ which was argued before the Supreme Court of British Guiana. The case concerned the division of land by a father into three portions, for himself and for his two sons. There was an understanding that a small portion of four acres was to be transported from the son with the legal title to the son in possession of the four acres. Differences having arisen between the sons, the son in possession but without title, sought an order to compel his brother to transport that area to him. Ramson JA observed that E Mortimer Duke, the learned author of *A Treatise on the Law of Immovable Property in British Guiana* [1923] appeared for the defendant brother. Mr Duke had argued that trusts in the English sense were unknown to Roman-Dutch law. Mr Duke further argued that the law of trusts was inapplicable to a situation facing the defendant in whose name the title was vested, since s 3(b), by

⁴⁰ [1927] LRBG 71.

implication, regarded the doctrines of equity as part of the common law, and since the common law of real property was specifically excluded by s 3(c), the equitable device of a trust could not apply to land in British Guiana.

[66] Douglass J, the trial judge in *Obermuller*, rejected these contentions. Sir Fenton H W Ramsahoye, the renowned author of *The Development of Land Law in British Guiana*,⁴¹ in considering the judgment in *Obermuller*, commented at page 279, that Douglass J had observed that trusts were recognised even by the legislature, when Ordinance No 10 of 1887 was enacted – “An Ordinance to provide for the better administration of property held in trust”. Douglass J had also referred to Morice, *English and Roman-Dutch Law*,⁴² where Morice remarked: “Even now the use of trusts cannot be said to be contrary to Roman-Dutch law and they are in frequent use in South Africa.” In the result, Douglass J held that an express trust was created. He found that the brother holding the legal interest could not use the provisions of the Civil Law Ordinance requiring writing for the creation of trusts as a cloak for his own breach of duty in withholding transport. An order for specific performance was made.

[67] Ramsahoye, however, did not agree with the approach of Douglass J. Ramsahoye expressed the view that the trial judge in *Obermuller* did not clearly grasp the nature of an express trust or a constructive trust. He observed that it seemed farfetched to hold that where A provided money to purchase land and title was taken in the name of B on the understanding that B should later convey it to C, there was an express trust, as between B and C. Ramsahoye added that the learned author Morice (referred to by Douglass J) could have meant no more than that express trusts were known in South Africa.

⁴¹ Fenton H W Ramsahoye, *The Development of Land Law in British Guiana* (Oceana Publications 1966).

⁴² *English and Roman-Dutch Law: Being a Statement of the Differences Between the Law of England and Roman-Dutch Law as Prevailing in South Africa and Some Other of the British Colonies* (African Book Co 1905).

[68] Ramsahoye expressed the further view that the doctrines of implied, resulting, constructive and secret trusts were incompatible with the Roman-Dutch system of law and the system of deeds registration. Ramsahoye however considered that the position in British Guiana was that there was a line of cases which firmly established that the law of trusts was a part of the country's legal system. He noted however the confusion generated by the courts in other cases which did not recognise equitable interests in land.

[69] Importantly, at page 284, Ramsahoye concluded that the Civil Law Ordinance provided for the recognition of full ownership, and the recognition as legal interests of those equitable interests in land known to the English system would not have been possible after the introduction of the Deeds Registry Ordinance. In his view, the provisions of the Deeds Registry Ordinance would have prevented the application of the rules which favoured the creation of those equitable interests. Ramsahoye's conclusion is supported by the dicta of Luckhoo CJ in the case of *Kitty v Vieira*⁴³ that "as Mr. Shahabuddeen has pointed out, it has been decided over and over again in this Colony that the only interests in land possible in this Colony are legal interests." Further: "Equitable interests in land are not recognised in British Guiana."

[70] Another case considered by Ramson JA in *Collymore*, was the 1938 judgment of Verity J in *British Colonial Film Exchange Limited v SS DeFreitas*.⁴⁴ Although Ramson JA made reference to the judgment of Verity J, he failed to consider the authoritative statement on the distinction between equitable interests and equitable doctrines made by Verity J at page 39 of his judgment. This statement merits being set out in full:

Examination of the provisions of section 3 of Cap. 7 in the light of a recognition of the true nature of the English system of equity and of the principles underlying the cases to which I have referred leads me to the conclusion that the real effect of that section as it affects the issues involved

⁴³ (1961) 3 WIR 249 at 252 (GY).

⁴⁴ [1938] LRBG 35.

in the present case may be stated to be that the doctrines of equity as administered by Courts of Justice in England are applicable in so far as they do not operate to make effective the English law of real property or any incident attached in England exclusively to land tenure or to estates in land.

This interpretation which appears to me to be clear in view of the words of the section excludes the creation of equitable interests in land as has already been decided by the cases to which I have referred, but it recognises the principle of the application of the doctrines of equity to persons rather than to classes of property, and only excludes their application where it would involve the recognition and adoption of legal rules of land tenure or estates in land excluded by the Civil Law of the Colony, or of equitable rules analogous thereto.

[71] In *British Colonial*, therefore, based on the interpretation of s 3 arrived at by Verity J, on the preliminary objection which had been taken before him, he found that the equitable doctrine of relief from forfeiture of a lease was available to the plaintiff company in British Guiana.

Conclusions

[72] It is important to note that the first proviso to s 3 of the Civil Law Act specifies that full ownership shall be the only ownership of immovable property recognised by the common law. Indeed, s 22(1) of the Deeds Registry Act reinforces this by providing that a transport in Guyana vests in the transferee full and absolute ownership in immovable property. There is therefore in Guyana no duality of ownership and no division of legal and equitable interests in immovable property. After the introduction of the Civil Law Act and the Deeds Registry Act, therefore, it would not be possible to create those equitable interests in land known to English law. As noted earlier, according to Dalton, Roman-Dutch law on this matter was retained.⁴⁵ Accordingly, a resulting or constructive trust under the English system, which recognises both a legal owner holding the legal title, and a

⁴⁵ See above [59] and (n 33).

beneficial owner holding an equitable estate or interest, would be utterly problematic with respect to the law of immovable property in Guyana.⁴⁶

[73] What is more, an analysis of the several authorities cited in this appeal leads to the inescapable conclusion that the Roman-Dutch system of the law of immovable property as retained in Guyana does not accommodate the recognition of resulting or constructive trusts as far as these are grounded in the legal concept of equitable interests in immovable property. This accords with the Court's authoritative decision in *Ramdass* that equitable interests were not recognised and could not be acquired in Guyana. To the extent that constructive and resulting trusts assume and recognise the existence of equitable interests under English law, and create rights *in rem*, they are therefore ruled out in Guyana.

[74] In *Ramdass*, Bernard JCCJ made it clear that although the appellant had acquired no equitable interest in the land which he had purchased from L and of which he was let into possession under the agreement of sale, he had the right to sue for specific performance (a '*jus in personam ad rem*') under the third proviso to s 3, but only if title was not yet conveyed to another.⁴⁷ In *Ramkishun*, Wit JCCJ observed that when the drafters of the Civil Law Ordinance referred in the third proviso to section 3 to specific performance being granted 'in the case of contracts relating to land or to interests in land' they did not intend by a side wind to reintroduce the regime of equitable estates and interests in land from English real property law. The phrase merely identified a type of contract for which specific performance was available in English law and did not import substantive English

⁴⁶ See also Edwin Cameron, 'Constructive Trusts in South African Law: The Legacy Refused' (1999) 3 Edinburgh L Rev 341, 345 discussing the South African case of *Lucas' Trustee v Ismail & Amod* 1905 Transvaal Supreme Court Reports 239 at 242 where the court expressly rejected the importation of the English law of trusts, whether express or constructive, if it implied "the existence of some real right in the cestui que trust which would not be conferred by our law". See the further discussion of *Lucas* at 351. In his book *The Civil Law of British Guiana: Being the Civil Law of British Guiana Ordinance, 1916 : With All Amendments, and With Notes, Cases, Index, and Appendix of Ordinances*, Dalton refers to this case and particularly to the remarks of Solomon J who made the point that "our law... does not recognise that there can be any such divisions of the *dominium*, or that there can be two estates in landed property, but that the person who is registered in the Deeds Office as the owner of the property is the only *dominus* of such property." That Lucas was to hold the property entirely for the benefit of the respondents (who were not allowed to own it), did not create a *jus in re* in the property, but only constituted a *jus in personam*! (247-248).

⁴⁷ *Ramdass* (n 31) at [33].

real property law.⁴⁸ Accordingly, the persons who have been unjustly deprived of immovable property are entitled to certain *in personam* rights which may produce some *in rem* consequences.

[75] This case, and in particular, the further written submissions filed by the parties, raise a further interesting issue: whether the equitable remedy/doctrine of a constructive trust (in the absence of equitable interests in immovable property) would be available in Guyana in the circumstances of this case? We have perused some judgments which emanate from common law jurisdictions such as Canada and Australia, and have observed the development of, what is called, the constructive trust as an equitable remedy for wrongful acts such as fraud, breach of duty of loyalty, unjust enrichment, and the like.⁴⁹

[76] We have also noted that the 1970 Guyanese case of *Persaud v Pln Versailles & Schoon Ord, Ltd*⁵⁰ in which the Court of Appeal, considering the employer's claim for monies paid by the employer on behalf of employees to cover the employees' indebtedness to a recreation club, of which the employees were members, held that a remedy should be provided for what had been called unjust enrichment. Crane JA agreeing with the judgment of Bollers C (Ag) observed that it would be a rank piece of injustice, if the employees were allowed to dispute the employer's claim. Crane JA observed that underlying the law of restitution was the concept that no one should unjustly enrich himself at the expense of his neighbour. Accordingly, Crane JA found himself on the side of those who would develop the law (in Guyana) by means of the application of equitable remedies in the dualism of common law and equity which was sanctioned by and built into the legal system by s 3(b) of the Civil Law Act. We note, however, that this case did not deal with immovables and that the Guyanese legal system does not appear to exclude constructive trusts with respect to money or movables.

⁴⁸ *ibid* at [85].

⁴⁹ See *Muschinski v Dodds* (1985) 62 ALR 429; *Pettkus v Becker* [1980] 2 SCR 834; *Soulos v Korkontzilas* [1997] 2 SCR 217.

⁵⁰ (1970) 17 WIR 107 (GY).

[77] Returning to the issue as it concerns the availability of the equitable remedy/doctrine of a constructive trust in immovable property in Guyana, where equitable interests are not intended to be created, it should be noted that this issue remains unexplored in the context of full and absolute ownership in immovable property recognised by the Civil Law Act and the Deeds Registry Act. In our view, this issue should be left for determination by this Court after full consideration by the courts of Guyana in an appropriate case.

[78] In the circumstances of this case, we are obliged to leave open whether the third proviso to s 3 or any provision of the Civil Law Act gives rise to any *in personam* rights to the respondents or any other person. We are also content to leave open to what extent an express trust can be created in Guyana with respect to immovable property, and the legal requirements for such a trust and the nature of the rights, if any, flowing from an express trust.⁵¹ Mr Stoby has submitted that in Guyana an express trust relating to immovable property must be in writing and is usually under seal and formally registered in the Deeds Registry in order to create an interest in land.⁵² It is not necessary for us to decide whether this is a correct proposition of the law, and whether this is the proper approach under the statutory framework in Guyana.

[79] For completeness, we wish to note that the application of the Trustee Act 1893 (referred to at [18] and [19] of this judgment) is specifically made subject to the Civil Law Act, and any other Act. It is therefore subject to the Deeds Registry Act and in particular to s 22 set out above. In our view, therefore, the definition set out at s 50 of the Trustee Act 1893 does not impact the issue before this Court.

⁵¹ See Llewlyn Dalton, *The Civil Law of British Guiana: Being the Civil Law of British Guiana Ordinance, 1916: With All Amendments, and With Notes, Cases, Index, and Appendix of Ordinances* (Argosy Co 1921) 81 as to the vesting of trust property.

⁵² Record of Appeal, 524, Sahadeo Prasad, 'Further Submissions on behalf of the Appellant', Submission in *Prasad v Persaud*, GYCV 2021/005, 5 November 2021, para 42.

Disposal

[80] The following are the Orders of the Court:

- (a) The appeal is allowed, and the orders of the Court of Appeal dated 17 August 2020 are set aside; and
- (b) The respondents shall pay the standard costs to the appellants.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar