

- (1) **Lesline Ho Young and**
- (2) **Norles Holdings Limited**

v.

- (1) **Ardon Bess (Administrator of the Estate of Norton Wilfred Bess, deceased) and**
- (2) **Ardon Bess**

Respondents

FROM

THE COURT OF APPEAL OF THE EASTERN
CARIBBEAN SUPREME COURT (SAINT
VINCENT AND THE GRENADINES)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
19TH JANUARY 1995

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD GRIFFITHS
LORD ACKNER
LORD OLIVER OF AYLMEYTON
LORD NICHOLLS OF BIRKENHEAD

[Delivered by Lord Jauncey of Tullichettle]

This appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) concerns the construction of certain provisions of the Aliens (Land-Holding Regulation) Act, c.235 of the current revised edition of the Laws of Saint Vincent and the Grenadines ("the Act"). This imposes restrictions on the holding of land in Saint Vincent by aliens.

The circumstances giving rise to the appeal stem from the death intestate on 17th June 1982 of one Norton Wilfred Bess, a citizen of Saint Vincent. In 1939 the deceased married the mother of the respondent who was born in 1941 and who is the administrator of the deceased's estate. In 1965 the deceased went through a bigamous ceremony of marriage in the U.S.A. with the appellant, who was a Jamaican citizen. Thereafter the deceased and the appellant lived together until his death and during this period they acquired two pieces of land in Saint Vincent as

joint tenants. At all material times the appellant was an alien for the purposes of the Act. In the normal course of events the deceased's share in the land would have passed to the appellant as surviving joint tenant. However the respondent had all along maintained that her shares were forfeited by the Act as a result of which the joint tenancy was severed and the deceased's two shares passed to him as heir on intestacy. He has raised this action to recover for the estate those shares.

Section 3 of the Act provides:-

"3. Subject to the provisions of this Ordinance, neither land in the Territory, nor a mortgage on land in the Territory, shall, after the commencement of this Ordinance, be held by an unlicensed alien, and any land or mortgage so held shall be forfeited to Her Majesty:

Provided that -"

There follow five provisos of which none is relevant to this appeal. Section 4 provides in subsection (1) that the Governor may grant to an alien a licence to hold land as owner, tenant or mortgagee subject to any conditions or not and in subsection (2) that on breach of any such conditions the interest of the alien in the land or mortgage "shall be forfeited to Her Majesty". Section 5 is in the following terms:-

"5.(1) Land or a mortgage forfeited under this Ordinance shall not vest in Her Majesty unless and until a judgment is obtained declaring the forfeiture; but on such judgment being obtained the title of Her Majesty shall relate back to and commence at the time when the forfeiture took place.

(2) A judgment declaring a forfeiture of land shall operate to vest in Her Majesty all the estate and interest of the alien in the forfeited land.

(3) A judgment declaring a forfeiture of a mortgage shall operate to vest in Her Majesty all the estate and interest of the alien in the mortgaged land, subject to any right of redemption subsisting therein, and also to vest in Her Majesty the right to recover and receive and to enforce all securities for the mortgage money."

Finally section 16 provides:-

"16. For the purpose of establishing a forfeiture under this Ordinance the Attorney General may, in accordance with the provisions of the Civil Procedure Code, apply to the High Court for a declaration that any right, title or interest sought to be affected is forfeited to the Crown."

In the High Court of Saint Vincent and the Grenadines Satrohan Singh J. held that forfeiture of the appellant's joint shares in the land was automatic on her acquisition thereof which forfeiture operated as a severance of title

with the result that the deceased's one-half shares formed part of his estate at his death. The Court of Appeal agreed with the judge's conclusions and dismissed the appeal.

The fundamental propositions advanced by the parties were simple. Mr. Guthrie Q.C., for the appellant, submitted that the words "shall be forfeited" in section 3, when construed in the context of Parts II and V of the Act, could only mean "shall be liable to be forfeited". Mr. Isaacs Q.C., on the other hand, argued that the words meant exactly what they said with the result that forfeiture to the Crown was immediate, albeit vesting in Her Majesty did not occur until a judgment declaring a forfeiture had been obtained. Before considering in more detail the implications of the opposing arguments, it may be convenient to look at a number of decisions relating to similar, if not identical, provisions in the legislature of other West Indian countries.

In *Lehrer v. Gordon* (1964) 7 W.I.R. 247 the British Caribbean Court of Appeal, which was the predecessor of the Eastern Caribbean Court of Appeal, held that breach of a condition in a licence to an alien to hold land did not automatically result in forfeiture of the land and that until a judgment declaring forfeiture had been obtained the licence retained its validity. The court was considering sections 4, 5 and 16 of the Leeward Islands Aliens Land Holding Regulation Act which appear to have been, for all practical purposes, identical to the same sections in the Act. Sections 3 and 5 of the Aliens (Land-Holding Regulations) Act of Anguilla are in terms identical to those of sections 3 and 5 of the Act and in *Chase Manhattan Bank N.A. v. Kaffka* (1984) 33 W.I.R. 132 the Eastern Caribbean Court of Appeal held that forfeiture of a mortgage to the Crown took place in the absence of any judgment declaring the forfeiture. *Lehrer v. Gordon* was not referred to in the judgment. In *Ramsaran v. Attorney General for St. Christopher and Nevis* (1986) 38 W.I.R. 160, the Eastern Caribbean Court of Appeal held that forfeiture under an identical section 3 was automatic and that it was only vesting which was postponed. Once again *Lehrer v. Gordon* was not referred to. Robotham C.J. who presided in the Court of Appeal in this case was a member of the court in both *Chase Manhattan* and *Ramsaran*. Finally, in *McMillan v. Peters* (unreported 25th November 1988) Deyalsingh J. in the High Court of Trinidad held that the comparable section of the Aliens (Land-Holding) Act did not impose an automatic forfeiture. In reaching this conclusion he referred to no authorities. It is therefore fair to say that the weight of the West Indian authorities supports the respondent's construction of section 3 but is not conclusive thereon.

Mr. Guthrie also referred to *Attorney-General v. Parsons* [1956] A.C. 421 in which there fell to be considered section 1(1) of the Mortmain and Charitable Uses Act 1888 which is in *inter alia* the following terms:-

"(1) Land shall not be assured to or for the benefit of ... any corporation in mortmain, otherwise than ... and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance."

The majority of their Lordships (Lord Morton of Henryton dissenting) held that the words "shall be forfeited" construed in their context meant "shall be liable to be forfeited" and did not connote immediate forfeiture. A similar result was reached in the construction of the words "shall be absolutely forfeited" in the grant of a mining lease validated by a special act of the British Columbia legislature in *Quesnel Forks Gold Mining Company Limited v. Ward and Others* [1920] A.C. 222. While these cases are not of direct relevance to this appeal they do demonstrate that the words in section 3 are capable of being construed as Mr. Guthrie submits if the context so requires.

Moe J.A. who gave the judgment of the Court of Appeal in this case considered that *Attorney General v. Parsons* was not of assistance and he referred to *Lehrer v. Gordon* without commenting thereon, although it may be inferred that he treated the decision on the relevant words in section 4 as being of no assistance in construing those words in section 3. He referred to both *Ramsaran* and *Chase Manhattan* and concluded that they had been correctly decided.

It is not disputed that, whenever forfeiture takes place under section 3, no vesting in Her Majesty can take place under section 5(1) until a judgment declaring a forfeiture has been obtained. If forfeiture takes place at the date of acquisition, wherein is the title pending the Crown obtaining a declaratory judgment? Mr. Isaacs submitted that it is in limbo or frozen in the alien. He argued that there is an absolute prohibition in section 3 on the holding of land by an unlicensed alien and that the words "forfeited" and "the time when the forfeiture took place" in section 5(1) demonstrate that forfeiture must already have taken place. The words "establishing a forfeiture" in section 16 are not constitutive of the forfeiture but rather determinative that one has already taken place.

Section 3 does indeed bear to prohibit land-holding by an unlicensed alien but it does so "Subject to the provisions of this Ordinance" which includes the vesting provisions of section 5 and the provisions of section 16. The latter section is permissive rather than mandatory. The word "may" empowers but does not oblige the Attorney General to apply for a declaration. This is perfectly logical since there could well be situations in which the Crown would have no wish to acquire title to lands which were heavily burdened or to buildings in a dangerous condition which required immediate expenditure to render them safe. Furthermore the Crown would not necessarily wish to take action in respect of each and every breach of a licence,

however insignificant a breach or unimportant the condition. If forfeiture is automatic, but the Attorney General chooses not to proceed under section 16, the land can neither be used nor disposed of by the alien and no one else has any right thereto.

The Board were informed that the Crown had recently disclaimed any interest in the two shares of land acquired by the appellant. This means that, if Mr. Isaacs' argument is correct, those shares will remain unusable by the appellant and untransmissible by her or anyone else. A similar situation would arise where the alien was the sole owner of a piece of land. In the case of an alien mortgagee the position would be even stranger because the alien having forfeited all rights under the mortgage there would be no one to whom the mortgagor could repay the loan and consequently no one who could give him a discharge to enable him to sell the land with a clear title. Unless driven inexorably thereto by the terms of the Act, their Lordships would be slow to reach a conclusion which produced consequences so bizarre and out of step with normal concepts of land holding.

These difficulties do not arise if the construction advanced by the appellant is correct. Starting with the general proposition that the law abhors a vacuum and that title to land must always be in someone, whether the Crown or a subject, it is clear from section 5(1) that it cannot be in the Crown until a declaratory judgment has been obtained. The only other person in whom it can possibly be is the alien who had acquired the land since section 3 does not nullify the conveyance. The use of the word "may" in section 16 demonstrates that the Attorney General has a discretion whether or not to apply for a declaratory judgment and the words "establishing a forfeiture" are more consistent with the constitution of the forfeiture than with a determination of what has already happened. Construing section 3 in the context of sections 5 and 16, it is apparent that the legislature did not intend forfeiture to be automatic but rather that prohibition on land-holding by an unlicensed alien could be enforced by a discretionary power of forfeiture vested in the Crown. The position in relation to section 4 is similar. It follows that the words "shall be forfeited" in sections 3 and 4(2) must be construed as "shall be liable to be forfeited" and "the time when the forfeiture took place" in section 5(1) is the time when the liability for forfeiture arose. Their Lordships accordingly consider that *Lehrer v. Gordon* and *McMillan v. Peters* were correctly decided and that *Chase Manhattan Bank N.A. v. Kaffka* and *Ramsaran v. Attorney General* should be overruled.

This construction means that the title remains in the alien until the Crown has obtained judgment under sections 5(1) and 16 when it vests in Her Majesty as from the time above referred to. There is no vacuum. The result is that the alien's title is voidable until the

Crown obtains judgment and a *bona fide* purchaser from him would be protected. Furthermore, problems which could arise in determining the date of forfeiture, where a landholder in Saint Vincent who is a "belonger" subsequently becomes an alien by acquiring a domicile of choice elsewhere, are avoided.

A further argument was advanced by Mr. Sylvester Q.C., on behalf of the appellant, to the effect that even if forfeiture had taken place there would have been no severance of the joint interest in the land. In view of the conclusions which their Lordships have reached on the question of construction it is unnecessary to deal with it.

Accordingly their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, the judgments of the Court of Appeal and of the High Court set aside and the action dismissed with costs to the appellant in the courts below. The respondent must also pay the appellant's costs before their Lordships' Board.