[2010] CCJ 2 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal N. CV 14 of 2007
GY Civil Appeal No 74 of 2003

BETWEEN

JASSODA RAMKISHUN
Executrix of the Estate of Sukhree, deceased, pursuant to a Grant of Probate No 102 of 2004 and substituted by Order of Court dated the 27th day of February 2004 **APPELLANT**

AND

CONRAD ASHFORD FUNG-KEE-FUNG
individually and in his capacity as the Administrator Ad Litem of the Estate of Letitia Fung-Kee-Fung, deceased, Michael Fung-Kee-Fung and Elaine Brooker, deceased, pursuant to Order of Court dated the 7th day of February 2003
DOREEN ELIZABETH DEANE
LEILA GLENDON **RESPONDENTS**

Before The Right Honourable	**Mr Justice de la Bastide, President**
And The Honourables	**Mr Justice Nelson**
	Mr Justice Pollard
	Mme Justice Bernard
	Mr Justice Wit

Appearances
Mr Robin M. S Stoby, S.C. and M. Kashir Khan for the Appellant
Mr Mohabir A Nandlall and Mr C P Satram for the Respondents

JUDGMENT
of The Right Honourable Mr Justice de la Bastide, President
and The Honourable Justices Pollard, Bernard and Wit
Delivered by
The Honourable Mr Justice Wit
on the 31st day of March, 2010
and
JUDGMENT
of the Honourable Mr Justice Nelson

JUDGMENT OF THE RIGHT HONOURABLE MR JUSTICE DE LA BASTIDE AND THE HONOURABLE JUSTICES POLLARD, BERNARD AND WIT

Introduction

[1] This is an appeal from a decision of the Court of Appeal of Guyana given on 31 October 2007. In its decision a majority of that Court (Claudette Singh and Chang JJA, Roy J, Additional Judge, dissenting) allowed an appeal against a judgment of the High Court (Carl Singh CJ) which was handed down on 26 October 2006. After having obtained leave to appeal from the Court below, Ramkishun, the appellant, filed a notice of appeal with this Court on 31 December 2007. The appeal was heard by us on 21 April 2009. Thereafter, in the course of our own researches we unearthed a substantial body of Roman-Dutch law, mainly South African cases and legal writings, which seemed to be highly relevant. Accordingly, we decided to draw the attention of both parties to this material and to invite them to make further written submissions. The parties subsequently filed their submissions and, in the case of Ramkishun, additional authorities. We now give judgment in this case which touches some important aspects of the land law of Guyana.

The factual background

[2] The facts in this case have been established by the High Court without interference from the Court of Appeal. We make the facts so established our point of departure in dealing with this case.

[3] In March 1980, Solomon Fung-Kee-Fung, the father of the respondents in this appeal, agreed to sell to Sukhree, the original plaintiff in this case, a plot of land for the purchase price of $35,000. The land, described as lot 22, Section B, Plantation Ruimzight, West Coast Demerara, comprises 4.915 acres. On 20 March 1980, at the request of Solomon Sukhree paid a deposit of $10,000 against the purchase price. The following day a receipt for this deposit, prepared by attorney-

at-law Hugh Chan, was signed by Solomon in the presence of two witnesses. It was issued to Sukhree who was also given possession of the land. In the following years, on several occasions Sukhree requested Solomon in vain to transfer the land to her.

[4] In February 1983 Solomon died intestate without having transferred the land. Sukhree thereupon contacted Solomon's son, Ashford, the first respondent, who took her to his mother, Letitia, Solomon's widow. Letitia resided elsewhere; for many years she and her late husband had lived separately. In the presence of Ashford, Sukhree showed Letitia the receipt and asked for the land to be transferred to her. Letitia indicated that she was prepared to honour Solomon's agreement with Sukhree but told her that she had to wait for the grant of "probate" before she could do anything and that Sukhree would be informed by Ashford when everything was ready to proceed. Thus the impression was conveyed to Sukhree that once the paperwork was done, the transport would be passed to her.

[5] In the years following that meeting, Sukhree visited Letitia regularly but on every such occasion Letitia told her that the necessary "papers" (the letters of administration) had not yet been obtained. In the initial stage that was not untrue but, unknown to Sukhree, on 23 August 1983 Letitia had been granted letters of administration. And on 15 February 1984, in her capacity of administratrix of the estate of Solomon, she passed transport of the land to Solomon's heirs *ab intestato* ie herself and her children, Ashford, Michael, Doreen, Leila and Elaine. When that transport was passed both Letitia and Ashford were present at the Deeds Registry; the other children were represented by Letitia pursuant to four separate powers of attorney. Sukhree was not informed about these developments, and for many years Letitia kept her dangling, telling her over and over again quite falsely that she, Letitia, was not yet in a position to proceed with the transfer.

[6] It was finally in 1991 that Sukhree, who at that time was still in possession of the land, went to the Deeds Registry only to discover that for a very long time she had been deceived by Letitia and that title to the land had been vested in Letitia and the other heirs as early as 1984. Upon this discovery she went to the United States of America (USA) where Letitia was then staying. There she met with Letitia and Ashford. She confronted them with her findings at the Deeds Registry and insisted that the land had to be transported to her in fulfillment of the agreement of sale with Solomon. Letitia then told her (for the first time) that the land was "children's property" but she gave her word that upon her return to Guyana in two weeks' time she would have the transport passed to Sukhree. Relying on this undertaking Sukhree returned to Guyana. One month later Letitia had still not appeared and Sukhree decided that the time had come to take action.

[7] On 2 September 1991, Sukhree had an action filed in the High Court for specific performance of her contract with Solomon. This action was unfortunately and inexplicably brought against the deceased. It was subsequently dismissed. After the filing of this first case, Ashford took possession of the land, whereupon Sukhree in June 1992 filed a second action, this time against Ashford for an order of possession and damages for trespass. It is not clear what happened to this case. It seems to have evaporated in the mists of time.

[8] Finally, at long last, the current action was filed in August 1993 against Letitia and her five children. In this action Sukhree sought *inter alia* the following remedies:

(a) specific performance of the agreement between herself and the deceased Solomon as evidenced by the receipt of March 21, 1980;
(b) a declaration that the then defendants, the six heirs *ab intestato* of Solomon, held the property in trust for Suhkree,
(c) damages in excess of $15,000 for breach of the said contract,
(d) any further or other relief which to the Court might seem just, and
(e) costs.

[9] Several legal grounds have been advanced on behalf of Sukhree and, after her death, the administratrix of her estate, in support of these claims. Firstly, it was

argued that Letitia and her children had obtained the transport by fraud and that on this basis the transport should be rescinded. Secondly, it was argued that because of the promises expressly made to Sukhree by Letitia and implicitly by Ashford, they together with the other four heirs to the estate had become upon passing of the transport to the six of them, (constructive) trustees for Sukhree and, after her death, Sukhree's estate. A third ground was further developed before the Court of Appeal. It simply stated that Letitia and the five other heirs of Solomon, having received the property as volunteers, were under a duty to honour the contract entered into by Solomon with Sukhree.

The judgment of the High Court

[10] The High Court ruled in favour of Sukhree. The Chief Justice held that the conduct of Letitia and Ashford with respect to Sukhree amounted to a form of fraud ("equitable fraud") by means of which the transport was obtained. Having come to this conclusion, the Chief Justice then considered the relevance of s. 23 of the Deeds Registry Act, Cap. 5:01. According to the proviso to this section "any transport … 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…". This action, having been brought more than two years after discovery of what the Chief Justice deemed to be fraud, would clearly fail if this period of limitation applied to any action based on fraud. Following the reasoning of George J in *Allicock v Demarara Bauxite Co., Ltd*[1], however, the Chief Justice concluded that the proviso did not deprive the Court of its discretionary power under the general principles of equity to order a rescission of a transport obtained by fraud in a suit brought more than one year after the discovery of the fraud.

[11] Having overcome this hurdle, the Chief Justice then turned to the question whether there had been an unreasonable delay in the commencement or

[1] (1968) GLR 140, 151-152

prosecution of the proceedings. After all, Sukhree had waited until August 1993 before requesting the Court to order the specific performance of a contract entered into more than 13 years earlier. Considering, however, that Sukhree had been put into possession of the land by Solomon and had remained in possession until 1991, and that she had over and over again been assured by Letitia and Ashford that the transport would be passed to her, the Chief Justice concluded that the delay in bringing the case had not been so unreasonable as to bar Sukhree from getting the relief to which she was otherwise entitled.

[12] Consequently, the Chief Justice declared the transport obtained by the defendants (all of them) void for the fraud of Letitia and Ashford. This resulted in the cancellation of the transport which in turn had the consequence that title to the land was re-vested in the estate of Letitia through Ashford as administrator of that estate. He was directed to pass transport of the land to Sukhree upon payment by her of the balance of the purchase price.

[13] Alternatively, the Chief Justice decided that when Letitia and Ashford accepted the transport, given their knowledge of the contractual liability of the estate of Solomon and their repeated undertakings to Sukhree to honour that obligation, they clearly held that transport on trust for Sukhree. In the view of the Chief Justice, this knowledge and the "fraudulent conduct" of Letitia and Ashford converted them, and apparently also the other heirs, into "constructive trustees" in which capacity they were all ordered to convey the property to Sukhree upon payment of the balance.

The Court of Appeal's majority judgment

[14] In the Court of Appeal the judicial tide turned in favour of Letitia and her five children. In a fully reasoned judgment for the majority of the Court, Chang JA explained why in his considered view *Allicock v Demarara Bauxite* should not be followed in its entirety. He held that the jurisdiction of the Court in equity to

rescind a transport obtained by fraud had been overtaken by the statutory power of the Court under the proviso to section 23 of the Deeds Registry Act, Cap. 5:01. As this proviso requires any such action to be brought within twelve months of the discovery of the fraud, which requirement Sukhree had not met, her action was barred. Chang JA thought that the word "fraud' in the proviso should be interpreted in a broad way. It was not limited to the more serious type of fraud known as "common law fraud" but also embraced the concept of "equitable fraud." The learned Justice of Appeal reasoned that it could, however, "hardly be contended, let alone concluded that [Letitia and her children] obtained the transport by way of fraud." He stated: "The transport was obtained under the rules governing intestacy and knowledge in the beneficiaries of the agreement of sale and of the payment of the deposit did not infect those proceedings with fraud." On behalf of the majority of the Court of Appeal, he expressed the view that: "In any event, the mere intentional breach of contract cannot be fraudulent and being a party to such breach of contract cannot translate into fraud".

[15] As to the submission that, alternatively, Letitia and her children after having obtained the transport should be considered as holding that transport on trust, as constructive trustees, for Sukhree, Chang JA held that in this case there was no room for the operation of the doctrine of constructive trust as this doctrine was founded on the already rejected submission that Letitia and her children had procured the passing of the transport to themselves by the use of fraud.

[16] According to Chang JA, both the question whether Letitia and her children had obtained the transport by fraud and whether a trust could be constructed in Sukhree's favour, turned of necessity on whether the agreement of sale and purchase conferred on Sukhree as purchaser, legal or equitable rights or interests in the property. Chang JA concluded it did not and that Sukhree had merely a personal right to claim specific performance of the agreement.

[17] Agreeing that there was a deliberate breach of contract by Letitia as administratrix of the estate of Solomon, the majority of the Court of Appeal decided that, were it not for the fact that the case was brought well outside the *three year statutory limitation* period, such a breach could only have given rise to a claim for damages. They concluded that Sukhree or her estate was only entitled to restitution of the deposit originally paid by Sukhree.

The dissent in the Court of Appeal

[18] Perhaps somewhat surprisingly, the majority judgment did not make mention of the third ground advanced on behalf of Sukhree, ie that Letitia and her children having received the transport and title to the property as volunteers were under a duty to honour the contract with Sukhree who was a purchaser for value. It was precisely this point, however, that was addressed by Roy J in his succinct dissent. In his view the agreement of sale and purchase remained alive at the date of the death of the vendor (ie Solomon) and it therefore bound his estate. Consequently, it bound not only the administratrix of the estate but also the intestate's heirs being all volunteers. Roy J based this rather bold assertion on English textbooks and the English authorities which they cited. He also referred to section 3 (d)(iii) of the Civil Law of Guyana Act, Cap 6:01, which expressly provides that the relief by judgment for specific performance shall in the case of immovable property be granted on the same principles on which it is granted in England in the case of contracts relating to land.

[19] Although Roy J did acknowledge that the delay in bringing the action was considerable, he held that this delay was mainly caused by Letitia's false promises and undertakings to pass the transport to Sukhree. Against this background and in the circumstances of the case Roy J considered it understandable that Sukhree had waited as long as she did before she instituted these proceedings. She could, therefore, not be faulted for the delay, at least not to such an extent as to deny her or her heirs their right to the property.

The reasoning in the High Court's judgment; the trust construction

[20] The reasoning of the Chief Justice shows some obvious flaws. Even if the Court had the power to rescind a transport for reasons of fraud outside of the statutory twelve month time limit, it is not at all clear from the judgment how the undoubted fraud of Letitia and Ashord's apparent complicity in it, can be attributed to the other defendants who were not shown by the evidence to have known of the agreement of sale between Solomon and Sukhree. It is even less clear how Letitia's fraudulent conduct ie her lulling Sukhree into inaction with false promises and lies, both before she became administratrix of Solomon's estate as well as after she had ceased to act as such, could have made *all* the heirs trustees for Sukhree.

[21] Assuming, but not deciding, that a resulting or constructive trust of immovables might be possible under the laws of Guyana if only to a limited (in personam) extent, Letitia's conduct, and Ashford's complicity in that conduct, could not in any way have converted the other heirs into trustees for Sukhree. An administrator of the estate represents the deceased and not the heirs. When Letitia made promises and gave undertakings to Sukhree that she would transfer the property to her, it could not be said that she was doing so on behalf of the heirs. Only when she received the transport on behalf of the four children who were not present to receive it themselves, did she represent them. For that purpose she was acting on the authority of separate powers of attorney from the absent heirs. So, even if it could be said (which it cannot) that Letitia's knowledge of the agreement for sale was at that stage imputed to the absent heirs; it could not make the promises made and the lies told by Letitia their promises and their lies. For that reason alone, the trust argument is misconceived.

The concept of fraud in the proviso to s. 23(1) of the Deeds Registry Act

[22] Section 23 (1) of the Deeds Registry Act, Cap. 5:01, provides, so far as relevant for present purposes, that 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, subject to certain statutory claims and registered rights and interests, provided that any transport "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".

[23] Fraud, like freedom, comes in many shapes. On the one hand, there is the more serious and obvious form of fraud, in legal parlance "common law fraud." On the other hand, there are various forms of "unconscionable conduct" or "improper behaviour" which qualify as "constructive fraud", "quasi fraud" or, a rather curious expression, "equitable fraud." The first question to be answered therefore is whether fraud within the meaning of the proviso is limited to "common law fraud" or whether it has a broader meaning which includes "equitable fraud."

[24] It does not appear that the High Court gave a clear answer to this question although the Chief Justice did declare himself "in complete agreement" with the approach taken by George J in *Allicock v Demerara Bauxite Co.* In that judgment George J (as he then was), basing himself on the observations of Bell CJ in *Coombs v Stafford*[2] and some English authorities on the meaning of "fraud" in a limitation statute, held that the word "fraud" in the proviso extended to "equitable fraud" which in his view included undue influence and breach of a fiduciary relationship. The Court of Appeal expressly agreed with George J on this particular issue and held that fraud in the proviso "embraced fraud both in common law and in equity." The Court of Appeal was, however, firmly of the view that it would be taking things much too far to treat "the mere intentional

[2] (1952) LRBG 49, 73

breach of contract" as fraudulent or to hold that "being a party to such breach of contract" would "translate into fraud."

[25] It is clear that in equity the concept of fraud was used in the much wider sense of "unconscionable conduct" and that it was not limited to false statements or other forms of intentional deceit. At first, the equitable rules did not apply to common law actions but after law and equity were fused in England in 1873 these rules applied to those actions as well. It is therefore not illogical that in later statutes the word "fraud" was interpreted in the wider equitable sense. In effect, this was what happened for example when the Courts consistently interpreted the word "fraud" in s. 26 of the English Limitation Act 1939 in this manner. In *Allicock* George J referred to the judgment of Lord Evershed MR in *Kitchen v R.A.F. Association and Others*[3], where the Master of the Rolls said that the word "fraud" in this provision "is by no means limited to common law fraud or deceit. Equally, it is clear, … that no degree of moral turpitude is necessary to establish fraud within the section." Another Master of the Rolls, Lord Denning MR, dealing with the same provision, was equally clear in *King v Victor Parsons & Co (A firm)*[4] where he said: "The word "fraud" here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time…Like the man who turns a blind eye. He is aware that what he is doing may very well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further inquiry lest it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind".

[26] This Court agrees with the Court of Appeal that the word "fraud" in the proviso to s. 23(1) of the Deeds Registry Act, Cap. 5:01 has to be interpreted in a wide sense. The question remains, of course, how wide should this be? In this respect it is instructive to recall the words of Lord Evershed MR in the above mentioned

[3] [1958] 2 All ER 241, 249; [1958] 1 WLR 563, 572
[4] [1973] 1 WLR 29 at 33

case: "What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago and I certainly shall not attempt to do so now...". Lord Evershed was, of course, referring to an abstract definition of fraud. In this case, however, we have before us a concrete situation which has to be assessed and a similarly concrete question which has to be answered: did Letitia's behaviour towards Sukhree, assuming it amounted to an intentional breach of contract, constitute fraud within the broad meaning of the proviso?

[27] To answer that question the Court will first consider what the answer would have been under the Roman-Dutch law which was the body of law in Guyana before 1917 when momentous changes in that law were brought about by the Civil Law of British Guiana Ordinance 1916 (now the Civil Law of Guyana Act). Although that statute sought to substitute the English common law and English principles of equity for the Roman-Dutch law, it simultaneously retained and codified certain portions of that law especially those dealing with immovable property. It was also with respect to that particular "codification" that the Deeds Registry Ordinance 1919 (now the Deeds Registry Act) was designed and adopted. Dalton J (in his judgment in the case *In re Samson ex parte Official Receiver*[5]), describing himself as "one who had some hand in the drafting of the Deeds Registry Ordinance and in seeing it through the legislature", stated that "the whole purport of the Deeds Registry Ordinance" was "the retention of the old law relating to transports and mortgages… In effect the law as it stood in this Colony before 1917 and in South Africa was retained".

[28] What then was the law in the then Colony and in South Africa when a vendor of immovable property breached his contract with a purchaser and transferred the property to another who knew about the earlier contract? Unfortunately, no clear and specific Guyanese case law on this subject prior to 1917 can be located. Early nineteenth century sources do reveal, however, that the Courts in Guyana had always considered themselves as having the power to grant relief in cases of fraud

[5] (1922) LRBG 133

or palpable error based on the broad concept of equity which was, and always has been, part of the civil law. According to Dr F.H.W. (now Sir Fenton) Ramsahoye in his authoritative book *The Development of Land Law in British Guiana*: "Principles of Roman-Dutch law could always have been invoked to prevent fraudulent conduct and to rectify mistakes and it would appear that a substitution [by the Civil Law Ordinance] of English equity for the broad equity of the Roman-Dutch system was in this respect a substitution only in form. Remedies similar to decrees of specific performance and injunction were also familiar to that system…".[6] On the other hand, in South Africa where the Roman-Dutch law is still the common law, both the case law and juridical writings on the subject are rich and plentiful. So it is there where we should look to find out what the position was in "the old law" of Guyana.

[29] That position emerges with striking clarity from both the ancient authorities (the writings of the learned Roman-Dutch jurists[7]) and the constant flow of fairly consistent South African case law as it gradually developed from the last part of the nineteenth century. The classic 1882 case of *Cohen v Shires, McHattie and King*[8] is of special relevance to the case before us. Shires had sold two farms, Hendriksdal and Elandtsdrift, to Cohen who had paid part of the purchase price. Shires subsequently sold and transferred the same farms to McHattie and King who both knew of the earlier sale to Cohen. Cohen instituted an action in the Supreme Court of the Transvaal for the cancellation of the transfers of the farms by Shires to McHattie and King, and further prayed that Shires would be ordered to pass transfer of the farms to him. It was contended on behalf of Cohen that both the vendor and the second purchasers having notice of the first sale were *mala fide*. The transfer in favour of the second purchasers should, therefore, be set aside on the ground of fraud. The subsequent order to pass the transfer of these farms to

[6] Op cit p 277
[7] See eg R G McKerron, *Purchaser with Notice*, 1935 SA Law Times Vol. 4 pp 178-182, who mentions and cites, among others, Voet 6.1.20, Anthonius Matthaeus, *Paroemiae Belgarum jurisconsultis usitatissimae* 7.6, Jan van de Sande, *De prohibita rerum alienatione*, 1.19.2.19,Andreas Gail, *Practicae Observationes* , book 2 55 11, and Joannis Loenius, *Decisiones* (annotated by Tobias Boel), 1712, casus 80
[8] 1 SAR TS 41

Cohen should be granted as Roman-Dutch law (in contradistinction to Roman law) recognizes an action for specific performance. Counsel for McHattie and King, however, contended that Cohen's only remedy was an action for damages now that the transfer had passed or, in other words, had become indefeasible.

[30] Kotzé CJ, ruling in favour of Cohen, stated that the "Roman-Dutch law … clearly recognizes the right to a specific performance of a contract … such is the true rule of the civil law." As to the main point, he deplored the fact that no definite Roman-Dutch authority was cited in support of Cohen's contention. The Chief Justice, however, had found such an authority in *Loenius Decisions,* Case 80[9], which reads: "Also, a person having sold his property thereafter selling and transferring the same to another, the last purchaser, who has received transfer, may retain the same, unless it was known to him that the seller had previously sold the same thing to a third person, and he therefore became *doli particeps*; in that case he may, when defending himself by setting up the last sale and transfer, be repelled by replication *doli*, and made to return the thing last bought by and conveyed to him."

[31] In 1921, in *McGregor v Jordaan and Another*[10] which was a case where the owner of a farm (Jordaan) had granted a right of pre-emption on his farm to another (McGregor) and subsequently sold the farm to a third person who had knowledge of the prior unregistered right, the Cape of Good Hope Provincial Division (Kotzé JP) was able to state unhesitatingly: "It is a clear rule of our law that, where a vendor sells a thing to A, and then subsequently sells the same thing to B, and gives him delivery or transfer thereof, B having knowledge of the previous sale to A, the latter is entitled to claim a cancellation of the delivery or transfer to B upon the ground that the vendor and the second purchaser with notice are considered to have acted in fraud of the rights of the first purchaser…The rule, which gives the first purchaser the right to have the sale to the second purchaser with notice cancelled, is based on fraud. The object is to

[9] See footnote 7
[10] 1921 CDD 301

prevent the second purchaser taking an unfair or improper advantage of his own wrongful act. The policy of the rule is to discourage and disallow covert and fraudulent dealing in violation of another's rights… The object of the law is at all times to discourage and prevent fraud; and conduct such as that of which the second defendant has been guilty amounts to fraud."

[32] This statement of the Roman-Dutch law basically reflects the state of the law as it still exists in South Africa. It should be noted, however, that relevant "notice" or "knowledge" in this law is strictly limited to actual knowledge of the second purchaser or, at its highest, to his acting with *dolus eventualis* in respect of the existence of the prior personal right (the more familiar expression in English law would be blind eye's knowledge)[11]. Constructive notice, as it is known in English equity has never been accepted by the Roman-Dutch law as that would have required the recognition of equitable rights and interests in immovable property which is a concept repugnant to both the Roman-Dutch law in South Africa[12] and the law as it stands in Guyana as this Court recently confirmed *in Ramdass v Jairam*[13].

[33] Although there is a view expressed in some South African legal writings and cases that the mere knowledge of the previous transaction without more provides a sufficient basis for cancelling a transfer of immovable property[14], the leading cases still indicate that the impugned transaction has to have a "fraudulent scent" without which it cannot be declared void. This was recently confirmed by the Supreme Court of Appeal of South Africa in the 2007 case of *Dream Supreme Properties 11CC v Nedcor Bank and others*[15]. In that case Streicher JA stated for the majority of the Court that although "an inference of fraud of a second purchaser is drawn from the mere fact of knowledge of a prior sale" it would still

[11] See P J Badenhorst, Juanita M Pienaar and H Mostert in Silberberg and Schoeman's *The Law of Property*, 5th edition pp 83-88; see also J E Scholtens, *Double Sales*, 1953, SALJ 22 pp 22-34
[12] See McKerron, op cit pp 178-179
[13] [2008] CCJ 6 (AJ)
[14] See Badenhorst, Pienaar and Mostert, op cit pp 86-87 and Gerhard Lubbe, *A Doctrine in search of a theory: reflections on the so-called doctrine of notice in South African Law*, 1997 Acta Juridica p 246 *et seq*
[15] [2007] SCA 8 (RSA)

be necessary to establish that the impugned actions of that purchaser could be regarded "as a species of fraud." It will only be in exceptional cases, however, that the taking of a transport with knowledge of a prior sale will not be categorized as unconscionable and fraudulent.

[34] In conclusion, given that it was "the whole purport" of the Deeds Registry Act to retain "the old law relating to transports" it would appear from these sources that the word "fraud" in the proviso to s. 23 of that Act includes the situation where the owner of a property or the administrator of the estate of which such property forms part intentionally breaches a contract of sale with a purchaser of that property in order to have it transferred to another who knows of the earlier contract but who nevertheless in his own interest participates and assists in that breach. Such a scenario also falls within the ambit of the proviso which provides that fraud can only be invoked against those who are "privy and party" to it.

[35] Despite the fact that Letitia transferred the property to the heirs in accordance with the rules governing intestacy she did so with the knowledge that she was thereby in breach of the agreement for sale made with Sukhree. In order to conclude, however, that all the heirs were involved in a fraudulent transaction and so had obtained the property by fraud within the meaning of the proviso, it should at the very least be shown that the other heirs had that same knowledge.

[36] There is no evidence that the heirs, other than Letitia and Ashford, had any personal knowledge of the agreement of sale with Sukhree. When the transport was passed, however, they were represented by Letitia who did have that personal knowledge. Generally speaking, depending on the circumstances of the case, the knowledge of the representative may sometimes be imputed to the principal and deemed to be his knowledge.

[37] Given the circumstances of the case before us, however, it would be quite wrong to impute Letitia's knowledge to the heirs represented by her when receiving the

transport on their behalf. The authorities show that imputation of knowledge in this context can only be made if that knowledge was acquired by Letitia in the course of acting within the limited mandate she had been given by the heirs to act on their behalf in connection with the transfer of the property to them.[16] The evidence, however, was that she acquired her knowledge of the agreement of sale long before she became administratrix. It has, therefore, not been established that any of the heirs in this case other than Letitia and Ashford had either personal or imputed knowledge of the agreement between Solomon and Sukhree. For this reason alone, it cannot be said that they all obtained the property by fraud.

Does the twelve month limitation period in the proviso to s. 23 of the Deeds Registry Act apply to all forms of fraud?

[38] In his analysis of this issue Chang JA placed remarkable emphasis on the question whether a transport obtained by fraud was void from the very beginning or void or voidable only from the time that the judicial declaration to that effect was made. The learned Justice of Appeal concluded from the wording of the proviso to s. 23 of the Deeds Registry Act that such a transport must be voidable and not void *ab initio* irrespective of the kind of fraud by which it was obtained. He further reasoned that there could not be an equitable jurisdiction *dehors* the proviso when the word "fraud" in the proviso embraced equitable fraud. Hence his conclusion that the exercise of the court's equitable jurisdiction had been overtaken by the statutory power of the court under the proviso to s. 23 and was therefore subject to the twelve month limitation period prescribed by the proviso.

[39] This Court agrees with this last conclusion and the reasoning which supports it. They seem logical and inescapable. But we are not prepared to rule, in the same absolute and unqualified manner as the Court of Appeal did, that under the proviso a transport cannot be held to be void *ab initio*. In some instances of

[16] See *eg Abbey National plc v Tufts* [1999] 2 FLR 399 at 404H and *Rock Permanent Benefit Building Society v Kettlewell* (1956) 168 EG 397

"common law fraud", for example, depending on the circumstances, that might indeed be the case.

The position of the heirs as volunteer transferees

[40] As will be recalled, Roy J in his dissent indicated that he would have dismissed the appeal against the judgment of the Chief Justice as he was of the opinion that Letitia and her children being the heirs to the estate of Solomon Fung-Kee-Fung, were all bound by Solomon's agreement for sale with Sukhree not because they all knew about this agreement (there was no evidence that the heirs other than Letitia and Ashford knew about it) but because they all received the property as volunteers. Unfortunately, Roy J based this conclusion wholly on English textbooks on equity and the English authorities cited therein without any further analysis. Indeed, s. 3 (d) (iii) of the Civil Law of Guyana Act, Cap. 6:01, provides that "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."

[41] Counsel for the respondents, however, objected on several grounds to the unrestricted application of these English principles in this case. In the first place he suggested that the heirs were not volunteers. Making reference to a passage from Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition, Volume 3 (pp. 2964-2965), he contended that a volunteer can only be someone in whose favour an appointment was made when the appointor was under no obligation to appoint. As Letitia in her capacity as administratrix of the estate of Solomon was obliged under the rules of intestacy, as codified in s. 5 of the Civil Law of Guyana Act, Cap. 6:01, to distribute the estate to its lawful beneficiaries, it followed that they could not be volunteers. Counsel conceded that Letitia in her capacity as administratrix had a contractual duty to transfer the property to Sukhree who had a personal right to receive the transport. But given the fact that Letitia was at the same time under the aforementioned statutory obligation to

distribute the estate to the beneficiaries (the heirs) who were statutorily entitled to the assets of the estate, the most Sukhree could have claimed was damages.

[42] A second objection put forward by counsel was that the English rule that volunteers are bound by contracts entered into by their predecessor could only be applied if Sukhree, as a contractual purchaser, had an equitable interest in the land, which is not permissible under Guyanese law. A third objection was that specific performance cannot be decreed where performance is impossible. This was the case here, according to counsel, because when Sukhree filed these proceedings claiming specific performance the title had already been passed to the beneficiaries and therefore, according to counsel, the performance of her contract of sale was legally impossible. The fourth and last objection was to the effect that Sukhree's claim was barred on the basis of analogous limitation, an objection we will address later in the judgment.

[43] It is generally accepted that a person who in relation to any transaction has not given valuable consideration is a "volunteer." Heirs clearly fall within that category.[17] The first objection, therefore, fails. The second and third objections will have to be considered together.

Specific performance against a volunteer in English law

[44] The position in English law is crystal clear from the following:

> "At common law, it would follow from the proposition that the burden of a contract is incapable of assignment that if an owner contracts to sell property to a purchaser, but before completing the sale he transfers the property to a third party, the purchaser cannot enforce the contract against the transferee but is left only with an action for damages against the original owner. If the contract is specifically enforceable the courts of equity will, however, treat the original purchaser as the owner of the property in equity from the time of the contract. He has, therefore, a proprietary claim to the property which can be enforced by an order for specific performance against a subsequent transferee of the legal estate in the property, despite the absence of privity of contract between them,

[17] See eg *Wu Koon Tai and another v Wu Yau Loi* [1997] AC 179 at 184, 189-190

> unless the transferee is a purchaser for value of the legal estate without notice. Thus, if the subject-matter of contract is such that the contract would be specifically enforced against the original vendor (for example, if it is for the sale of land or of a chattel of special value) it can be enforced against a subsequent transferee who is not a purchaser for value from the vendor, such as a donee or the trustee of a voluntary settlement made by the vendor."[18]

In other words: "Where there is a contract for the sale or demise of property and the property is thereafter transferred to a third person, *the general principle* is that *specific performance may be granted against the transferee, if he is a volunteer*, or takes with notice of the prior contract, or has acquired only an equitable title and has no better equity than the purchaser …"[19] (emphasis added).

[45] Applying these equitable principles to the case at hand, as Roy J did and as section 3 (d) (iii) of the Civil Law of Guyana Act, Cap. 6:01, seems to require, it would seem natural to conclude that the contract of sale between Sukhree and Solomon can still be enforced against Solomon's heirs, and that they, being volunteers, are bound to comply with that contract. The problem – and this was counsel for the respondents' main objection – is that the English rule that a volunteer is bound by an agreement to sell land entered into by the person from whom he got the land, is linked to the concept of equitable rights and interests in land, a concept which, as we have seen, is repugnant to the law of Guyana. It would seem therefore that despite the clear words of s. 3 (d) (iii) of the Civil Law of Guyana Act, Cap. 6:01, specific performance cannot uncritically be founded "on the same principles on which it is granted in England." The legal meaning of these words must be established upon a proper interpretation of this proviso in the context of the entire section. As far as relevant, s. 3 of the Civil Law of Guyana Act, Cap. 6:01, provides:

> "From and after the date aforesaid [the 1st January, 1917] –
> (a) the law of Guyana relating to wills …, movable or personal property, immovable or real property and chattels real, and all matters relating to

[18] Jones and Goodhart, *Specific Performance*, Second Edition, pp. 201-202
[19] 44(1) Halsbury's Laws of England, Fourth Edition, Reissue, para. 915

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 herewith the doctrines of equity as then administered or at any time thereafter 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 shall be held as heretofore in full ownership, which shall be the only ownership of immovable property recognised by the common law …;

(ii) the law and practice relating to conventional mortgages or hypothecs of movable or immovable property and to easements, profits *à prendre*, or real servitudes, and the right of opposition in the case of both transports and mortgages, shall be the law and practice now administered in those matters by the Supreme Court;

(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;"

When can specific performance be granted in Guyana?

[46] There have been judicial attempts over time to grapple with the difficulty of reconciling the conflict between those statutory provisions which prescribe the adoption in Guyana of the law of equity as it has been developed in England and those which preserve certain fundamental features of Roman-Dutch land law**.**

Thus, in the case of *British Colonial Film Exchange Limited v De Freitas*,[20] Verity J stated that it must "be borne in mind that equity as now administered in England in no case seeks to override the specific provisions of statute, and that the exercise of equity jurisdiction within this colony is of necessity subject to such restrictions as may be imposed upon it by statute either directly or indirectly by reason of some difference in the statute law of the colony which renders its exercise in certain cases improper or impossible". A little further on in the same judgment Verity J elaborated: "By its provision of a system of civil law … the Ordinance [ie the Civil Law Ordinance which is now the Civil Law of Guyana Act] does limit the application of the doctrines of equity in so far as they may be repugnant to specific enactment or impossible of application to the legal system in force within the colony." As to s. 3 (d) (iii) of what now is the Civil Law of Guyana Act, Cap. 6:01, the judge stated that the effect of that provision was not "to limit the application of the equity jurisdiction to be exercised in this colony but to secure that in these cases it is to be exercised on similar grounds to those upon which it is exercised in England." This interpretation, Verity J said, "excludes the creation of equitable estates in land … but it recognizes the principle of the application of the doctrines 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 from the Civil Law of the Colony, or equitable rules analogous thereto*." (emphasis added). And he concluded: "I have then to consider whether or not the relief asked for in the present case would offend against the statute as so interpreted…"

[47] In 1968 these dicta were by and large endorsed by Luckhoo C (Ag), Bollers CJ concurring, in *Dennis Li v Lucy Walker*,[21] a case which dealt with the application of partition as an equitable remedy in Guyana, which "would not in my view operate to create any equitable interests in land, or to make effective the English

[20] (1938) LRBG at 38-39
[21] (1968) 12 WIR 195 at 202

law of real property or any incident attached exclusively to land tenure or estate in England. It is not a remedy which is peculiar to the English law of real property, but is fundamental to any system of modern law, being really based upon the equitable need for a fair division of land in cases of concurrent ownership."

[48] The thrust of these decisions seems to be that in the case of contracts relating to land the English principles and remedies can be applied if and to the extent that they do not offend against, but are compatible with, statutes like the Civil Law of Guyana Act and the Deeds Registry Act and the parts of the civil (Roman-Dutch) law which they have retained. Ramsahoye[22] states that "the application of equitable doctrines has been excluded when *the results* were likely to conflict with statutory provisions." (emphasis added). And it would appear that these provisions as a rule "must be construed by reference to the old system" as it existed before 1917[23], although there is nothing in these statutes that seems to "preclude the development of the Roman-Dutch law on these subjects on the basis of well established principles."[24]

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

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[22] op cit p 281
[23] See Ramsahoye op cit p 291
[24] See Ramsahoye op cit p 280

[50] This rule of construction applies also to the third proviso in s. 3(d)(iii) although its position is somewhat peculiar. Even though it is apparently the English law of personal property generally that governs immovable property in Guyana (so far as it is not governed by the retained Roman-Dutch law), the proviso seeks to ensure that in the case of immovable property the equitable remedy of specific performance shall be granted *on the same principles on which it is granted in England in the case of contracts relating to land or to interests in land.* The specific question which needs to be answered in this case is whether a purchaser for value of land can obtain specific performance against a volunteer who is not a party to the contract. The answer under English law is, in accordance with Halsbury's Laws of England (see para. [44]), that in such a case relief can be obtained on the *general principle* that "specific performance may be granted against the transferee if he is a volunteer, or takes with notice of the prior contract." As we have seen, the latter part of that principle has been subsumed and modified by the proviso to s. 23 of the Deeds Registry Act but there is no such provision with respect to volunteers.

[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. This legal underpinning or rationalization of the principle that specific performance can be granted against a transferee volunteer is therefore not available in Guyana. That is, however, not the end of the story. It raises the question whether the principle could be accepted and justified on another legal basis which is compatible with the statutory provisions and the aspects of Roman-Dutch law thereby retained. In that case specific performance against a volunteer transferee can be granted "on the same principles as it is granted in England" albeit with a different doctrinal underpinning. Obviously, if specific performance

against a volunteer would have been possible under the Roman-Dutch law in Guyana before 1917, the question whether the principle can be separated from its English underpinning will be answered affirmatively.

Specific performance against a volunteer in Roman-Dutch law

[52] As we have noted before, equity was not unknown to the civil law. It was always part of Roman and Roman-Dutch law but it was never, as in English law, a distinct or separate jurisdiction. The courts of Guyana are enjoined by s. 3(b) of the Civil Law of Guyana Act, Cap. 6:01, to "administer the doctrines of equity in the same manner as the High Court of England administers them", but they must recognize that, in the words of de Villiers CJ, they "can administer equity only so far as consistent with the principles of Roman-Dutch law"[25]. This is a dictum that is also known and has been quoted in Guyana[26]. Given the special position of the core of Guyanese land law, as laid down in s. 3(d)(i) and (ii) of the Civil Law of Guyana Act, Cap. 6:01, and in the Deeds Registry Act, Cap. 5:01, it is necessary to analyse the relevant Roman-Dutch law in order to establish if and to what extent this law and the English doctrines of equity can be harmonized. No specific Guyanese case law was cited to us on this issue, nor did we find any. But it would clearly seem prudent to pay special regard to developments in the law of South Africa, given the many similarities between the Roman-Dutch Law in that country and in Guyana, as evidenced by the many Guyanese judgments in which South African cases were cited and relied upon[27]. All the more so because of the fact that the issue at hand lies squarely in the area of general Roman-Dutch property law and more particularly in the field of transfer of land and registration of deeds, in which the law in Guyana is closely modeled after the South African system. So, again, we return to the Roman-Dutch law in South Africa.

[25] In *Mills and Sons v Benjamin's Trustee* (B. 1876, at p. 211), see Ramsahoye, op cit pp 273-274.
[26] See Ramsahoye, op cit p 274
[27] See Ramsahoye op cit p 17 and, by way of example, *Barry v Mendonca* (1923) LRBG at 107-111 where Douglass J cited both South African and English cases

[53] It might come as something of a surprise that the current position of the Roman-South Africa with regard to the making of orders for specific performance against volunteers is quite similar to that in English law. The position is succinctly stated in Silberberg and Schoeman's *The Law of Property*: "A successor who acquires a real right gratuitously (*ex titulo lucrativo*) has to observe undertakings of his or her predecessor with regard to the thing even in the absence of knowledge on his or her part."[28] Similar statements of the law can be found in most of the relevant commentaries[29], albeit not always without criticism.[30] Although it would appear that this part of the law is not as firmly rooted in ancient Roman-Dutch law as, for example, the doctrine of notice as described at paras. [29] - [33] and its theoretical basis is still somewhat in doubt[31], it is clearly accepted as Roman-Dutch law.

[54] The analysis would have to start with the law of succession. In Roman-Dutch law two separate distinctions are made: the first is between universal successors (*ex titulo universali*) and particular or singular successors (*ex titulo particulari* or *singulari)*, and the second is between onerous successors (*ex titulo oneroso*) and gratuitous or lucrative successors (*ex titulo lucrativo*), known in Guyana respectively as successors for value and volunteers. The essential difference between a universal successor and a particular successor is that the former takes over both the assets and liabilities of his predecessor whereas the latter takes over only a particular asset but no liabilities.[32] It is for this reason that a universal successor is by definition bound to honour an agreement to sell an asset (including immovable property) entered into by his predecessor with a third party. Such a contract creates a personal right in the purchaser to acquire a real right in the property. This right which has been described by this Court in *Ramdass v*

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[28] Op cit p 88
[29] See Mohamed Paleker, *Succession*; C G van der Merwe and A. Pope, *Servitudes and other real rights*, and D. Hutchison and F. du Bois, *Contracts in general*, contributions published in Wille's *Principles of South African Law*, 9th edition, pp 668-637, 627 and 814 respectively; see also Honoré-Cameron, *South African Law of Trusts*, 5th ed., para. 356
[30] See eg W E Cooper, *Landlord and Tenant*, 2/1994, pp 282-284
[31] See Gerard Lubbe op cit p 251
[32] Cooper op cit pp 281-282

Jairam and in *Ramdeo v Heralall*[33] as a *jus in personam ad rem* and in South African jurisprudence and literature as a *jus in personam ad rem acquirendam*, is binding on the universal successor even if the contract is not registered and even if the universal successor has no knowledge of it.

[55] Traditionally, heirs and administrators of intestate estates or executors of wills were counted among the universal successors ie the successors who would be bound by prior obligations (*ad rem*) of their predecessors, whereas purchasers, legatees, usufructuaries and donees were examples of the typical particular successor who would not be so bound. What occurred in the South African courts was a shift in focus from the universal-particular succession dichotomy to one where the emphasis was instead on whether or not one was a successor for value. Clearly, universal successors are always "volunteers" whereas the purchaser for value, an *onerous* successor, is the most prominent *particular* successor. In time, the courts gradually came to interpret the category of particular successors in this context as limited to successors for value only. This development was obviously influenced by English law and occurred against the background of existing and emerging Roman-Dutch principles of equity which tended to soften the rigour of the civil (Roman) law. For present purposes, it does not seem necessary to extensively explore the relevant Roman-Dutch case law, but it might be useful and illustrative to touch briefly on some of the most important cases from the period before 1917.

[56] The 1887 case of *Van Veuren v Van Veuren*[34], concerned a contract between a father and his son for the transfer (for good consideration) of two farms to the son on the death of the father. Afterwards the father, a widower, remarried. The second wife had no knowledge of the contract when she married the father in community of property. Inevitably, when the father passed away, there was a dispute between the widow and the son. The widow contended that as there was

[33] [2009] CCJ 3(AJ)
[34] 5 SC 415

no registration of the son's rights and as the farms were registered in the father's name, the son had only a *jus in personam* upon the contract. According to the widow, her claim to her half of the joint estate took preference. In an extremely concise judgment, De Villiers CJ stated: "This is … a case where the father was the owner of two farms, which he bound himself by a binding contract to transfer to his son, and the defendant, the second wife, obtained no right in respect of these farms except a right subject to the son's claim. The son is in exactly the same position as a purchaser. If A bought land from B and paid the price and B then married and afterwards died, A could compel B's executors to give him transfer."

[57] In *Jansen v Fincham* (1892)[35], a case about a non registered servitude, De Villiers CJ contrasted the position of a purchaser (onerous successor) on the one hand with that of an heir, legatee, or donee, on the other hand. He then reasoned: "It is as the particular successor of Naudé that the defendant acquired his right of ownership [of the land]. If those rights were acquired *bona fide* and for value the absence of registration [of the servitude] is fatal to the plaintiff's claim. If, however, these rights of ownership were not acquired *bona fide* or for value, the defendant cannot, as against the plaintiff, claim greater rights than Naudé himself possessed."

[58] In 1908, the Natal court gave judgment in the case of *Antje Komen v Hendrik de Heer and Others*[36]. The plaintiff in this case was a widow who under her husband's will was bequeathed the lifetime use and enjoyment of the whole of his estate of which a part was leased to De Heer and others. The judgment of the court was given by Broom J who acknowledged that: "The position of the plaintiff as usufructuary for life is, of course, different from that of a universal heir." The judge further stated: "The plaintiff took the usufruct from the testator under a lucrative, as distinguished from onerous, title. In the widest sense of the

[35] 9 SC 289
[36] 29 NLR 237

term, no doubt, she is a singular successor, but her position as usufructuary is very different from that of a purchaser or creditor for value… The plaintiff … gave no value...". Earlier in the judgment Broom J held "that the plaintiff as universal usufructuary can only claim what is left after satisfying the obligations of the testator, and as the lease is included in the obligations of the testator, she can only get it subject to that obligation." Considering the authorities, he explained that: "There appears to be ground for holding that in its primary meaning the term particular or singular successor in this connection would indicate a purchaser, or one acquiring *ex oneroso titulo*."

[59] Having reached this point in tracing the development of Roman-Dutch jurisprudence, nine years before Guyana separated itself for the most part from that great body of law, we can now draw some definitive conclusions. While it is true that Roman-Dutch law in South Africa in the course of the twentieth century further developed what would become a general doctrine ie that volunteers who acquire a real right, in whatever form, are bound by an undertaking of their predecessor with regard to the thing to which the real right adheres whether they have knowledge of that undertaking or not, all the basic elements of that doctrine were already firmly in place before 1917.

[60] Remarkably, there are no South African cases reported which deal with the application of this doctrine in cases where, as in the case before us, the heir to immovable property which has been transported to him, is called upon to transfer that property to a purchaser from his predecessor. But there is a 1971 case which seems to be in point: *Van der Pol v Symington*.[37] In that case the original lessor of a farm, a lady, who had granted the lessee an option to purchase, had died during the currency of the lease. After her executor had transferred the farm to the heir (her son), the lessee sought to exercise the option against the son. Hiemstra J held that the son was bound by the option, even if he had not known of it, on the basis

[37] 1971 (4) SA at 472-475 (reported in Afrikaans with an English summary); also briefly discussed by Hurt AJA (Supreme Court of Appeal of South Africa) in *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd* (214/2008) [2009] ZASCA 70 at para. 56.

that he was a gratuitous successor to the original lessor. The judge acknowledged that he had no direct authority but stated that the case could and should be decided on principle while referring to the case of *Jansen v Fincham*, mentioned above, and *Oliver v Matzner and Matzner*,[38] a 1942 case about servitudes. The 1971 case is now clear authority for the proposition that under Roman-Dutch law even if the property concerned has been transferred to the heir, the latter is still subject to the earlier (personal) right *ad rem* in the same way that would have been the case under English law. But the basis for that conclusion was already laid in the old case law.

Conclusions

[61] On the strength of the above it is apparent that there is indeed a proper legal basis for Roy J's seemingly bold assertion that Letitia and her children were bound by the agreement between their predecessor, Solomon and Sukhree. Both on principle and on the authorities, the Court concludes that the equitable principles as applied in England with respect to specific performance against a volunteer are compatible with Roman-Dutch Law or any Guyanese statute, notably the Civil Law of Guyana Act, which retained and codified part of that law. The Court is therefore of the view that section 3(d)(iii) of the latter Act, properly construed, does indeed fully apply in this case**.** The heirs of Solomon are bound by the agreement because they are volunteers as against Sukhree who was a purchaser for value. Ultimately, any other conclusion would seem absurd as the land law of Guyana is an amalgam of both Roman-Dutch law and English law, and both would have come to the same result: the granting of specific performance against the heirs**.**

[62] As appears from the Roman-Dutch authorities, it is clear that Roman-Dutch law reaches the same conclusion as English law *without relying on the doctrine of equitable interests in land*. It cannot therefore be said that a grant of specific

[38] 1942 TPD 324-334

performance in the circumstances of this case is tantamount to the introduction through the backdoor of equitable proprietary rights or interests. In this connection it is interesting to note that a similar equitable doctrine seems to have developed in Scotland which is also a so-called "mixed jurisdiction" with civilian roots somewhat comparable to Guyana. Scottish property law also knows the concept of full ownership (*dominium*) and consequently also rejects the existence of equitable interests. In that jurisdiction "the rule is that a real right granted in breach of a pre-existing contract or other obligation is voidable at the instance of the creditor in that obligation if the grantee knew of the obligation or if the grant was not for value."[39] This rule against "Offside Goals" as it is now prosaically called in Scotland is "an exception to the usual rule that a purchaser or other grantee takes property free from the personal obligations of his author."[40] The position of the grantee not taking for value (a volunteer) has in some cases been analysed by reference to the principles of unjust enrichment[41], a reference which can also be found in some South African commentaries.[42]

[63] More importantly, however, the difference between the English and the Roman-Dutch systems of equity can be shown when applying the "acid test" of insolvency. Whilst in English law the purchaser of land or some unique chattel has an equitable proprietary interest that is unaffected by the vendor's insolvency, in Roman-Dutch law which does not recognize such equitable interests in land, the purchaser has only a personal right, which means that in case of the vendor's insolvency the property, which is the subject of the agreement for sale, falls into the pool of assets available to the general creditors with whom the purchaser must compete in pursuing such monetary claims as he may have. This is also the case in Guyana where this position has been "codified" in s. 39(5) of the Insolvency Act, Cap. 12:21: "No contract for the sale of any interest in immovable property

[39] See Kenneth G C Reid *et al*, *The Law of Property in Scotland* (1996), para. 695
[40] See Reid *ibid*.
[41] See Scottish Law Commission in Discussion Paper No. 125 on *Land Registration: Void and Voidable Titles* (2004), p 65
[42] See eg Tony Honoré, *Trusts, the Inessentials* p 22 (users.ox.ac.uk/~alls0079/Burn.pdf), and M.J. de Waal and RRM Paisley, *Trusts,* in Mixed Legal Systems p 838

… shall be of any force or give any right of preference which has not been completed by transport … duly passed before the Court or a judge; except that the creditor may claim under his contract as a concurrent creditor against the debtor's estate."

[64] This Court is aware of the fact that its conclusions might at first sight seem to derogate somewhat from the indefeasibility of transports as it is sometimes perceived to have been ordained by s. 23 of the Deeds Registry Act, Cap. 5:01. It has to be noted, though, that this indefeasibility has never been absolute and certainly not as strongly preserved as under the Land Registry Act[43]. One of the better known exceptions to the indefeasibility of transports is the acquisition of land by prescription which is not disturbed by this provision. There are other exceptions[44]. Upon further reflection, however, it will be appreciated that the transport itself is not vitiated by a successful action brought by a prior purchaser and based upon an equitable principle. The transport stays intact. If the action succeeds it only means that the transport has to be passed to the purchaser on the basis of a personal obligation. If that obligation was not personal, it would survive even a bankruptcy but in Guyana at least it does not. In cases like these the perceived certainty and efficiency of the Guyanese Deeds Registry system are not eroded disproportionately (if at all) by allowing the action. In this particular case no reliance on the register by innocent third parties was involved and the property which the respondents are required to surrender (for which they gave no consideration) should never have been transferred to them in the first place. The broader effect of this decision is therefore at its highest a cautious and limited recalibration of the balance between legal certainty and equity.

[65] For completeness' sake, there is one other issue that needs to be addressed. That is "the law and practice relating to the right of opposition in the case of … transports" as enacted in the Civil Law of Guyana Act (section 3 (d) (ii)), the

[43] Although even with respect to the Land Registry Act *in personam* exceptions would seem possible, see Hayton J in *Ramdeo v Heralall* [2009] CCJ 3 (AJ) especially at paras. [38-40]
[44] See eg *Coddett v Thomas* (1957) LRBG 181-183

Deeds Registry Act (sections 23 and 29) and the Deeds Registry Rules (rules 7, 8 and 9). This part of the law is peculiar to Guyana and cannot be found in South Africa or any other existing Roman-Dutch jurisdiction. Under this law any transfer of immovable property has to be publicly announced or advertised in the Official Gazette well in advance of the transfer in order to enable interested parties to preserve their rights. These parties might be persons claiming a right relative to the property (*in* or *ad rem*) or they may be unsecured creditors with a liquidated claim against the owner of the property, though not necessarily related to it. It would appear that this system has some bearing on the law in the context of this case. It does not, however, as was suggested by counsel for the respondents, preclude the application of s. 3(d)(iii) of the Civil Law of Guyana Act.

[66] The fact that a purchaser has the right to oppose a transfer to another person of the land previously purchased by him, does not mean that, if such an opposition has not been filed or pursued, the purchaser is prohibited from seeking an order for specific performance. On the contrary, as a rule an interested party will only be deprived of his rights if he has actual notice of the transaction affecting them and although in a position to do so, takes no steps to oppose, or, having filed an opposition, withdraws it without proper justification.[45] Further, the personal right of the purchaser to compel the vendor or his successors to transfer the title to property to him, is not absolute but is always subject to the rights of the creditors of the vendor or those of his successors "if duly established and enforced against the land in the mode by law prescribed." [46]

[67] It is public knowledge that the efficiency of the Guyanese system of land transfer has substantially deteriorated in the last few decades. But for many years it appears to have functioned quite well. This could provide one explanation for the dearth of Guyanese case law in the area of "double sales". In fact, many dubious

[45] See Ramsahoye op cit p 248 and 268 (footnotes 66 and 67); see also *Gondchi v Hurrill*, (1931-7) LRBG 509, 511
[46] *Re C O Andrews ex parte The Administrator General*, (1901) Official Gazette, 28 September 737

transfers of immovable property in Guyana were actually prevented because of the existing system of advertisements and opposition.[47] It was in such an opposition case, *Bhoolai v Girwar and Mohamed Sadiq*[48], that Duke J (Ag) stated the law in Guyana as follows: "An owner of land is entitled to give it away but he must do so in the proper manner, that is to say, by passing transport which may be opposed by any person to whom he has by an existing enforceable contract of sale agreed to sell it. An owner of land is at liberty to consent to judgment for a debt which does not exist in fact, thereby causing his land to be taken in execution for non-payment of the execution debt, but he is not so entitled where he has by a pre-existing enforceable contract of sale agreed to sell the land to another person. Where there is such a contract, the judgment by consent would be obtained in fraud of the rights of the purchaser under the contract, and the purchaser would have a right to oppose the sale at execution, for non-payment of the debt, of the land which was the subject of the contract of sale. *It would be immaterial that the judgment creditor did not know of the pre-existing contract of sale* by the owner of the land who has consented to judgment, *because the judgment creditor would be a volunteer* and would have acquired the judgment otherwise than by way of valuable consideration" (emphasis added). As we have shown, this is exactly the position in the case of an unopposed transfer.

Limitation and laches

[68] In this case the heirs were bound by the agreement between Solomon and Sukhree, and so the latter was entitled to commence an action against the heirs for specific performance. As this action is not based on the proviso to s. 23 of the Deeds Registry Act, Sukhree was not bound by the limitation period laid down in that proviso. An action for specific performance is an equitable remedy which means that the general rules of equity, including those concerning laches, apply in accordance with s. 3 (b) and 3(d)(iii) of the Civil Law of Guyana Act, Cap. 6:01.

[47] See E M Duke, *A Treatise on The Law of Immovable Property in British Guiana*, 1923, pp 19-21
[48] (1944) LRBG 88

[69] Counsel for the respondents cited a passage from the Court of Appeal decision in this case which he suggested was "most germane to the issue at hand." In that passage the Court of Appeal stated that Sukhree's claim for damages for breach of contract was made well outside the three year statutory limitation period prescribed by s. 8 of the Limitation Act, Cap. 7:02, and the Court noted "*en passant*, that, if the common law remedy for breach of contract has been debarred by the Limitation Act, the equitable remedy of damages cannot be granted as a corresponding or substitute remedy". It then went on to say that: "Equity follows the common law and the equitable remedy of specific performance is in practice granted where damages will not be an adequate remedy – not where equity is no longer legally available". By expressly adopting those words, counsel for the respondents apparently seeks to argue that Sukhree's action for specific performance could be barred using statutory limitation by way of analogy.

[70] This argument is clearly wrong. An equitable action for damages cannot be compared with an equitable action for specific performance. It would be distinctly inequitable for a court of equity, a court of conscience, to be compelled to apply a rigid limitation period taking no account of the justice of each case. Indeed, the law reports are replete with cases where specific performance has been decreed well after such a rigid limitation period has expired. While equity provides a remedy by way of specific performance and the common law by an award of damages, "even if it is appropriate to analogize from the common law, the analogy will be governed by the parameters of the equitable doctrine of laches."[49] This Court is in agreement with this statement of the law. There is no need to say more on this point.

[71] Counsel for the respondents, however, did also invoke the defence of laches on at Sukhree had waited unreasonably long before she filed this action. After all, he averred, it was only in 1993 that she filed this action for specific performance while the breach of contract had already occurred in 1984.

[49] La Forest J in *M.(K.) v M.(H.) [1992*] 3 SCR 6

[72] In order to successfully invoke laches as a defence it is not enough to plead and prove mere delay. It is usually necessary to establish (1) that the action has been commenced after an unreasonably long period and (2) that the party against whom the action was launched has been prejudiced[50]. The leading case on laches is still the Privy Council case of *Lindsay Petroleum Co v Hurd*[51] in which the Lord Chancellor, Lord Selborne, said: "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party, in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy". The Court recalls that this authority was also appropriately cited and relied on by the Chief Justice when he dealt with this defence.

[73] Although the Court is in full agreement with the respondents that a very long time (nine years) had gone by before Sukhree filed her action in the High Court, it is evident on the facts of the case that almost seven of those nine years were lost due to Letitia's deceit. Even if one takes the view that Sukhree had waited unreasonably long before bringing her action after she discovered what Letitia

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[50] See **I C F Spry**, *The Principles of Equitable Remedies; Specific Performance, Injunctions, Rectification and Equitable Damages*, 2001 p 235: "… a court with equitable jurisdiction, when it is deciding whether the defence of laches should prevail, enquires whether there has been, first, unreasonable delay by the plaintiff, and secondly, any consequent prejudice or detriment to the defendant or third persons in ordering specific performance." See also *Meagher Gummow and Lehane's Equity, Doctrines & Remedies*, 4th edition, 36-20 and *Snell's Equity*, 31st edition, 5-19. Further Lord Neuberger of Abbotsbury in *Fisher v Brooker* [2009] UKHL 41 at para. 64 and 79 emphasising the significance of detrimental reliance.

[51] (1874) LR 5 PC 239-240

had done, it would still be difficult to establish laches on Sukhree's part. Obviously, at no point in time could her conduct have been interpreted as acquiescing in the situation, not between 1984 and 1991, when she regularly visited Letitia to enquire about a possible date for the passing of the transport, nor between 1991 and 1993, when she upon discovery of the deceit followed Letitia all the way to the USA to confront her and subsequently filed several actions in Court to pursue her right to the property. Furthermore, not only did the respondents never allege any prejudice because of the delay, but also the evidence in the case does not disclose any prejudice or detriment suffered by them. On balance, it would not be just to bar Sukhree's action. The defence of laches can, therefore, not successfully be invoked. It follows that the appeal must be allowed.

Decision

[74]
- The appeal is allowed.

- The respondents shall convey to the appellant within eight weeks of the date of this order the property described as Lot 22, Section B, Plantation Ruimzight, West Coast Demerara, upon payment of the balance of the purchase price, failing which the Registrar of Deeds is authorised and empowered to do so

- The respondents shall pay the appellant the costs of these proceedings in this Court and in the courts below, such costs to be taxed unless agreed.

JUDGMENT OF THE HONOURABLE MR JUSTICE NELSON

[75] I have reached the same conclusion as my learned colleagues, but have done so by a somewhat different route.

[76] At the time when this action was brought in 1993 to enforce an agreement for sale between Solomon and Sukhree on March 21, 1980 in respect of Lot 22 Section B, Ruimzight, West Coast Demerara, (the disputed land") the respondents were the registered proprietors of the disputed land.

[77] In obtaining letters of administration of the disputed land the administratrix went through the administration procedures provided by the Deceased Persons Estates' Administration Act, Cap. 12:01. This procedure involves notice to the public and the right of an interested person to lodge a caveat. Letters of administration were duly granted to Letitia in August 1983. No claim was made against Solomon's estate by the appellant.

[78] Letitia then vested the disputed land in the respondent beneficiaries including herself. The statutory procedure required notice of the impending transport of title to be advertised in the Gazette. There was an opportunity for any objector, even a simple unsecured creditor, to object to the transport: see proviso (ii) to section 3 of the Civil Law of Guyana Act, Cap 6:01. The passing of transport is a public judicial proceeding: see section 12 of the Deeds Registry Act, Cap. 5:01 and Rules 6 and 8 of the Deeds Registry Rules. No objection has been taken to the procedure leading up to registration.

[79] No issue arose in the courts below or in this Court as to the state of mind of Sukhree in relation to the facts above recited. Ultimately the state of mind of Letitia and Ashford (which could conceivably fall within an expanded definition of fraud) could not be attributed to the next-of-kin beneficiaries collectively. The state of mind of the respondents or fraud is therefore not relevant to this appeal.

[80] In my judgment, given the facts accepted by the Court of Appeal, the resolution of the issues in this appeal lies within the very narrow compass of the proper construction of the relevant Guyanese statutes. For ease of reference I set out hereunder the relevant provisions, so far as is material:

The Civil Law of Guyana Act, Cap. 6:01

"3. From and after the date aforesaid -

(a) the law of Guyana relating to wills ... 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) ...

(c) the English common law of real property shall not apply to immovable property in Guyana;

(d) ...

Provided that –

(i) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognized by the common law and shall not be subject to any rule of succession by primogeniture or preference of males to females, or to any other incident attached to land tenure or to estates in lands in England and not attached to personal property in England ;

(ii) the law and practice relating to conventional mortgages or hypothecs of movable or immovable property, and to easements, *profits à prendre*, or real servitudes, and the right of opposition in the case of both transports and mortgages, shall be the law and practice now administered in those matters by the Supreme Court;

(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;"

[81] In the context of Guyanese property law which does not recognize equitable interests in land[52], how can specific performance of a contract of sale of land between V and P be granted against V's successor in title in favour of P, where in English law specific performance would be granted to P on the basis that V's successor in title took subject to P's equitable interest? In Guyanese law what do the words in the third proviso to section 3 of the Civil Law of Guyana Act ("the

[52] *Ramdass v Jairam* (2008) 72 WIR 270; and cases at footnotes 1-6 of [22] of *Ramdass v Jairam* (supra); *Vansluytman v New Building Society* (1996) 54 WIR 270, 276

third proviso") mean – *"on the same principles on which it is granted in England in the case of contracts relating to land or interests in land"?*

The Deeds Registry Act, Cap 5:01

> 23. (1) 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."
>
> "12(3) All transports and mortgages passed after the commencement of this Act shall be registered by the Registrar and filed as of record in the registry."

[82] In the Guyanese Deeds Registry system does registration of a subsequent dealing extinguish all prior unregistered interests subject to any exceptions as to indefeasibility mentioned in section 23 of the Deeds Registry Act? It is clear that the fraud exception does not arise because no fraud can be proved in relation to the registration of the beneficiaries' title. Would specific performance lie against heirs to land under an intestacy (a) where their deceased predecessor in title entered into a contract for the sale of land and title had been vested in them after his death and (b) where 9 years' delay in bringing such an action is treated as not unreasonable in the circumstances?

The meaning of the third proviso

[83] In my judgment the drafters of the Civil Law of British Guiana Ordinance intended that full and absolute ownership was to be the "*only ownership of immovable property*" recognized in Guyana from January 1, 1917: see the first proviso to section 3. It is also clear that the doctrine of estates in lands, including the judicial recognition of obligations of an estate owner to deal with land in a particular way (equitable estates), was not recognized in Guyanese law.

[84] The drafters of the Civil Law Ordinance were also aware that by section 3(c) the English common law of real property was being abrogated and replaced by the English common law of personal property.

[85] Thus, when the drafters of the Civil Law Ordinance referred in the third proviso to specific performance being granted *"in the case of contracts relating to land* or *interests in land*" they did not intend by a side wind to re-introduce the régime of equitable estates and interests in land from English real property law. That phrase merely identifies a type of contract for which specific performance is available in English law and does not import substantive English real property law. It would have made no difference if the availability of specific performance in Guyana was referenced to the availability of that remedy in England in relation to the sale of unique chattels.

[86] The phrase "*the same principles on which it is granted in England*" signifies that the remedy of specific performance is available in Guyana on the same general principles that govern the exercise of specific performance in English law. For example, specific performance will not be granted to a volunteer under a voluntary agreement[53]. Another well-known principle is that specific performance is a discretionary remedy.

[53] *Re Anstis* (1886) 31 Ch D. 596

[87] Thus, a Full Bench of this Court contemplated in *Ramdass v Jairam*[54] at [17] that, although the appellant acquired no equitable interest in the land purchased from Loki, he was entitled to seek from Loki an order for specific performance of the agreement for sale under the third proviso to section 3 of the Civil Law of Guyana Act if title to the land remained vested in her. Specific performance of a contract for the sale of land is thus available in Guyana to a party although the contract of sale creates no equitable interest in the land. In my judgment the same principle would apply to the person who took the land from the owner without providing any consideration[55]. I would therefore hold that the heirs of Solomon upon an intestacy would themselves be *prima facie* exposed to an action for specific performance.

The indefeasibility point

[88] Although the Deeds Registry Act does not use the word "indefeasible", the term can be used to describe the result of proper registration of title pursuant to section 23. It is not suggested that title under the transport land system is as cast-iron as title under the Torrens system or the Land Registry system of Guyana.

[89] The plain words of section 23(1) of the Deeds Registry Act say that *"every transport shall vest in the transferee the full and absolute title"*. The question is whether under the transport land system of Guyana ("*the Deeds Registry System")* a volunteer, like a transport holder who has bought the land, is entitled to the protection of the register. That cannot be determined without asking how conclusive is entry on the register in the Deeds Registry System? Are there any exceptions to indefeasibility other than the statutory ones?

[90] In Australia where the Torrens system legislation has an indefeasibility clause some jurisdictions have held that such a clause protects a registered proprietor

[54] (2008) 72 WIR 270
[55] 44(1) Halsbury's Laws of England (Fourth Edition, Reissue) para. 915 where this exception to the doctrine of privity is set out.

who is a volunteer. New South Wales and Western Australia have accorded protection to volunteers: *Bogdanovic v Koteff*[56] applying the principle of indefeasibility in *Frazer v Walker*[57] and approved in *Breskvar v Wall*[58]*; Conlan v Registrar of Titles*[59] where Owen J examined the cases and held that "*the doctrine of indefeasibility can apply to the holder of a registered interest where the proprietor has been registered through a voluntary transaction.":* see [200].

[91] Victoria and South Australia have denied protection to volunteers. The leading case is *King v Smail*[60]. It is to be noted that this case was decided before the Privy Council decision in *Frazer v Walker* (supra) where it was held that a third party acquired a good title from a registered proprietor who had bought from a fraudster, even if the instrument of transfer was forged and was otherwise void. In *Rasmussen v Rasmussen*[61] Coldrey J followed *King v Smail* (supra). The divergence of opinion in the Australian jurisdictions is in my view due to differing perceptions as to how "rock-solid" the register should be. The same problem faces Guyana.

[92] At the end of the day the courts have already eroded the indefeasibility of the register in the Deeds Registry System: see *Toolsie Persaud Ltd v Andrew James Investments Ltd et al*[62] a decision of this Court. Any further erosion of the indefeasibility principle by the judges must be based on a policy choice between the certainty and security of title when once on the register i.e public confidence that there is no return to the uncertainties of title searches, and on the other hand the unfairness of reversing the land title of a successor in title by gift or inheritance. In the instant appeal in which the Court of Appeal has upheld a finding that there was an excusable delay of nine years in approaching the courts, it is open to the courts to hold that in certain cases, of which the present facts

[56] (1988) 12 NSWLR 472
[57] [1967] AC 569 (P.C.)
[58] (1971) 126 CLR 376
[59] (2001) 24 WAR 299; [2001] WASC201
[60] [1958] VR 273
[61] [1995] VR 613
[62] (2008) 72 WIR 292

provide one example, the courts will treat a successor in title who has not given value as bound by a contract of sale made by an immediate predecessor in title with a third party. On the present facts public confidence in the reliability and security of the register will not be destroyed where a purchaser has been in possession of most of the land since 1980 and the land has been transferred to volunteer beneficiaries against whom specific performance is available in Guyana law. I would hold that specific performance would lie against the next-of-kin beneficiaries and that for present purposes the register is not indefeasible.

[93] In *Dennis Li v Lucy Walker*[63] Acting Chancellor Luckhoo admonished that a court in interpreting section 3(a) of the Civil Law of British Guiana Ordinance should not lose sight of *"the main object of the Ordinance, namely, the abrogation of the Roman-Dutch law*". I have respectfully borne this admonition in mind in arriving at my conclusion.

Conclusion

[94] I would accordingly allow the appeal and make the same orders as those contained in the joint judgment of my learned colleagues.

[63] (1968) 12 WIR 195, 204