COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/COM/com/00054

In the Matter of a Judgement granted by the Superior Court Of Cherokee County State of Georgia:

AND

In the Matter of MAUNDEE HOUSE situate at GREEN TURTLE CAY

BETWEEN:

THOMAS ROY HOLBIRD JR. (Personally and as Executor of the Estate of THOMAS ROY HOLBIRD SR.)

Applicant

AND

JERRY HAMEL **1st Respondent**

AND

HUGH R. BURCH **2nd Respondent**

AND

FLOYD BROWN **3rd Respondent**

Before: The Honorable Mr. Justice Keith H. Thompson.

Appearances: Mr. Thomas Evans Q.C. along with Ms. Veronique Evans, Attorneys for the Applicant;

Mr. Sean Moree along with Ms. Vanessa Smith, Attorneys for the 1st and 2nd Respondents

Hearing Dates: 09th November, 2018.

J U D G M E N T

1. This matter was begun by way of an Originating Summons filed 21st June, 2017. The Originating Summons was subsequently amended and finally re-amended and filed 28th September, 2018. The re-amended Originating Summons prays for;

    1. **A declaration that the purported Conveyances in respect of Maundee House, which is situated upon a piece parcel or lot of land being lot No. 6, in the Green Turtle Cay Club Subdivision situated on Green Turtle Cay, Abaco in the Commonwealth of The Bahamas, which the Applicant has been ordered to sign upon pain of contempt of court by the Superior Court of Cherokee County Georgia, USA, would be invalid unless the said order has first been recognized by this Honorable Court.**

    2. **A declaration that the judgement of the Georgia Court being a foreign judgement in rem determining the title to a Bahamian immovable is incapable of enforcement in The Bahamas.**

    3. **An interlocutory injunction to restrain the Respondents, herein whether by themselves, their servants and/or agents or otherwise, from seeking to avoid applying to this court for recognition of the said order by tendering the said invalid conveyances to be stamped and recorded in The Bahamas.**

    4. **Costs**

    5. **Such other relief as the Court may deem just.**

BRIEF HISTORY OF THE FACTS:

2. Mr. Thomas Holbird, on the 9th day of November, 1981 executed a conveyance made between Brigadier General Gordon Sumner Jr. of 808 East Zia Road in the City of Santé Fe in the State of New Mexico one of the United States of American of one part (as Vendor and Thomas Roy Holbird of Star Route 4 in the Town of Sallisaw in the State of Oklahoma another of the United States of America as Purchaser. The subject property was described in the schedule as;

> **"ALL THAT piece, parcel or lot of land being Lot Number Six (6) in the said Subdivision known as "The Green Turtle Cay Club" situate on the Island or Cay known as Green Turtle Cay one of the Abaco Cays in the said Commonwealth of The Bahamas, which said lot of land has such position shape boundaries marks and dimensions as are shown on the diagram or plan attached to the said Indenture of Conveyance dated the Ninth day of December, A.D., 1965 and is thereon colored Pink."**

2. In Action No. 300 of 1998 (The Bahamas Action), Dr. Hugh Birch, Jim Busby and Jerry Hamel sued "TOM HOLBIRD" in the Supreme Court of The Commonwealth of The Bahamas. In The Bahamas Action, they sought several declarations;

(a) Declaration that the Defendant holds the fee simple estate In Lot No. 6 in the Subdivision known as "Green Turtle Cay Club" situate on Green Turtle Cay, one of the Abaco Cays, Bahamas upon trust for the Plaintiff and the Defendant;

(b) An Order that the Defendant do execute a conveyance of the said property to the Plaintiffs and himself as tenants-in-common in equal shares;

(c) An Injunction restraining the Defendant from selling, transferring, encumbering or otherwise dealing with the said property without the consent in writing of the Plaintiffs;

(d) Such further or other relief as the Court deems just.

4. The outcome of The Bahamas action was that it was ordered that;

1. **The Plaintiffs do within seven (7) days give security for the Defendant's costs in the sum of One Hundred Thousand ($100,000.00).**
2. **The Plaintiffs' application for Judgement upon Admission is dismissed ;**
3. **Costs of this application be the Defendant's to be taxed if not agreed.**

5. The property, the subject of The Bahamas action and the instant action is recorded in Volume 3605 at pages 160 - 167. This property was subsequently contained in a Deed of Assent from Thomas Roy Holbird Sr. to Thomas Roy Holbird Jr. and now of record in the Registry of Records in the Commonwealth of The Bahamas in Volume 10739 at pages 99 - 102. It was recorded on April 2nd, 2009.

6. The further history of this matter is quite clearly set out in the submissions put forward on behalf of the 1st and 2nd Respondents in the instant action and we take the liberty to set out paragraphs 5 - 15 of the submissions made on behalf of the 1st and 2nd Respondents.

5. "On the 4th May, 2007, Holbird, Sr. died while a resident of Cherokee County, Georgia prior to honoring his verbal and written representations to the Respondents, specifically to

properly convey the legal interest in Property to its beneficial owners. On the 12th June, 2007, the Applicant, Holbird Sr.'s son, was appointed Executor of his Estate.

6. **On the 24th March, 2010, the Applicant filed a Motion for Summary Judgment in the U S Action on the basis that *inter alia* the Respondents' claim was barred by:**

    (a) The statute of limitation;

    (b) Res judicata and collateral estoppel; and

    (c) The doctrine of laches.

    On the 12th May, 2010 the Applicant filed a Supplement to Motion for Summary Judgment to add an allegation that the court did not have jurisdiction to determine the title or property located in The Bahamas and sought to dismiss the US Action.

7. **The Hon. Frank C. Mills III, Chief Judge heard the Motion for Summary Judgment and subsequently denied it after finding that the "*evidence suggests genuine issues of material fact still exist, which should be decided by a judge or jury.*"**

8. **The US Action went to a jury trial and counsel for the Applicant argued the merits of the case before the jury who found in favor of the Respondents, specifically that the Respondents were entitled to a 1/12th interest in the Property by virtue of the fiduciary relationship held by Holbird Sr. and the duties owed to them as a result thereof. By the judgment filed on the 30th April, 2012, the court ordered that the Respondents prepare and provide the Applicant with a deed transferring each of the Respondent's fee simple interest and that the Applicants execute the said deeds within ten days of receipt ("the Judgment")**

9. The Applicant appealed the Judgment in the Court of Appeals in the State of Georgia, Appeal Number: A12A2074 on the grounds that the court below erred *inter alia*:

a. By holding that it had subject matter jurisdiction; and

b. By failing to hold that the Statute of Limitation and Statue of Frauds barred the Respondents' claims.

The Court of Appeals affirmed the decision of the lower

court, but did not issue a written opinion.

10. On or about the 24th January, 2014 the 1st and 2nd Respondents filed a Petition for Contempt and for Award of Attorney Fees and Costs ("the Petition") in the Supreme Court of Cherokee County in the State of Georgia, Civil Action No. 14-CV-0205-DC ("the US Contempt Proceedings"). The 3rd Respondent passed away prior to commencement of the US Contempt Proceedings.

11. There was a hearing which took place on the 17th March, 2017 during which the Hon David L. Cannon Jr. accepted the Special Master's finding that the deeds prepared by Rhonda Hull were consistent with the terms of the Judgment and ordered the Applicant to execute them. The Applicant then appealed Judge Cannon's order and the appeal was dismissed by the Court of Appeals on the 11th July, 2017.

12. On the 6th September, 2017, the Petition was heard and the Applicant was found in contempt. The Applicant was again ordered to sign the deeds prepared by Ms. Hull by the 8th September, 2017. The Applicant executed the said deeds on the 7th September, 2017 ("the Conveyances").

13. On the 21st June, 2017 the Applicant filed an Originating Summons commencing an action in Supreme Court of the Commonwealth of The Bahamas seeking *inter alia*:

a. a declaration that the Judgment of the U.S. Court has no direct operation in The Bahamas as it was a judgment of a court of a foreign country; and

b. a declaration that a foreign judgment *in rem* determining the title to a foreign immovable is incapable of enforcement in The Bahamas.

14. The application was supported by the Affidavit of the Applicant filed on the 21st June, 2017 ("the Affidavit"). The Respondents intend to file the Affidavit of Ervin H. Gerson ("the Gerson Affidavit") in response. A draft of the said affidavit has been provided to counsel of the Applicant and is in the process of being apostilled in the United States. The Respondents have undertaken to exhibit the Gerson Affidavit to an affidavit by one of their attorneys.

15. On 21st September, 2017 the Applicant filed an Amended Originating Summons seeking *inter alia.*

a. a declaration that the purported Conveyances in respect of the Property which the Applicant has been ordered to sign by the U.S. Court, would be invalid unless the said order has first been recognized by the Supreme Court of the Commonwealth of The Bahamas.

b. a declaration that a foreign judgment *in rem* determining the title to a foreign immovable is incapable of enforcement in The Bahamas; and

c. **an interlocutory injunction to restrain the Respondents from seeking to avoid applying to this court for recognition of the said order by tendering the said invalid conveyances to be stamped and recorded in The Bahamas and taking any steps to obtain possession or to exercise any other rights in relation to the Property until the determination of the action herein.**

7. The 1st and 2nd Respondents take the position that the questions to be decided by the court were;

   a. **Does the Respondents' failure to have the judgment recognized invalidate the conveyances?**

   b. **Was the judgment given as a result of the US Court exercising *in rem* or in personam jurisdiction?**

DISCUSSION AND DISPOSITION:

8. Having heard the submissions of the Applicant by Mr. Thomas Evans Q.C. and those of the 1st and 2nd Respondents by Mr. Sean Moree esquire, we see the issue as being whether the judgment in the Georgia action was one in personam or one in *rem*.

THE LAW:

9. In order to answer this question we must necessarily analyze the distinction between a judgment in rem and one in personam. The starting point is to highlight the fact that this whole problem arose as a result of a "contractual" arrangement between several individuals.

10. The doctrine of "Lex situs" is the natural obvious starting point. The doctrine of Lex situs is defined as referring;

"to the law of the place in which property is situated for the purposes of the conflict of laws."

APPLICANT'S CASE:

11. The Applicant's position is that undoubtedly Holbird Sr. was the owner in fee simple of the property in question. It is conceded that at least eleven (11) other persons participated in some way with respect to the acquisition of the property.

12. The Respondents do not deny this. In the Bahamas action, the Respondents in the instant matter commenced the action against Holbird Sr. In that action they were ordered to pay security for costs but failed to do so. The Applicant says that they are in contempt.

13. The crux of the Applicant's case is that the purported conveyances which were ordered to be executed in favour of the Respondents by the Georgia Court are not valid in this jurisdiction unless and until the order by which they were made is recognized by this Honorable Court. The further position of the Applicant is that the order of the Georgia Court calls into question the ability of a court in Georgia to make orders which are enforceable in this jurisdiction by completely bypassing the Bahamian Judiciary. This is the point which raises the issue of a judgment in rem or personam.

14. The two opposing views highlight the fact that there is also a question of the conflict of laws. The Applicant poses the question;

"Is the Judgement in this case a judgement in rem?

THE RESPONDENTS' CASE:

15. The Respondents' position is that the Georgia Judgment was a judgement in personam. In other words it was a decision on title by way of a decision on a contractual arrangement thereby ordering the individual to comply with a contractual arrangement which the individual would have breached.

16. In that regard, the Respondents produced a number of cases to support their position.

The cases proffered by the Respondents are all based on judgements in personam. There is a claim by the Applicant that the case mounted in the Georgia Court was mounted based on false evidence or put another way, evidence which was based on deceit.

17. However, that was not the issue in the instant matter. The fundamental question to be answered is whether the Georgia decision was one in rem or in personam. It is the Respondents position, that the Georgia decision was one in personam, thereby giving the Georgia Court jurisdiction to hear the matter. In support thereof several authorities were presented to support this position.

18. Counsel for the Respondents proffered in the first instance an excerpt from "THE LAW OF REAL PROPERTY", Megary and Wade Fourth Edition.

> ***c. Setting Aside and Modification of Conveyances.***
>
> **"An executed conveyance may be avoided, set aside or modified by the court in various cases of fraud, undue influence, or mistake; and where this occurs the court may order the document to be delivered up for cancellation. The jurisdiction is either equitable or statutory. In either case, the conveyance is not void but voidable, and unless and until it is avoided it can pass good title to an innocent purchaser who had no notice of vitiating facts.**
> **The court may always set aside a conveyance induced by fraudulent misrepresentation …….. prejudiced."**

19. What counsel for the Respondents is saying is that the Applicant needs to show that the conveyances are fraudulent based on the above. Counsel does concede that the Applicant did mention fraud. It is the further position of the Respondents that they are not seeking to enforce the Georgia Judgement. In fact he says that

the Respondents are in possession of the conveyance as a result of the Applicant executing the same in accordance with the enforcement proceedings in Georgia, U.S.A.

20. At paragraph 21 of the Respondent's revised submissions they state;

> **"The Respondents are in possession of the Conveyances as a result of the Applicant executing the same in accordance with enforcement proceedings in the U.S. Save any of the aforementioned exceptions, the Applicant has not provided any authority or precedent mandating Court approval of a transfer ordered by a foreign court exercising in personam jurisdiction."**

21. Paragraph 21 clearly shows the position of the Respondents being that the Georgia decision was one in personam.

22. Further, in paragraph 23 it is said;

> **"It is difficult to conceive how the U.S. Court could be accused, let alone guilty of committing, or being complicit or an accessory to fraud by ordering the Applicant to convey the property to its rightful owners. The judgement was made in accordance with U.S. Statute, one in which the U.S. Court had the power to make as they had IN PERSONAM jurisdiction over the Applicant."**

23. In the case of PATTNI V. ALI and another [2007] 2 AC 85, a case which dealt with the conflict of laws and the enforcement of foreign judgements,

at paragraph 14, Lord Mance states;

> **"The proposition advanced by Mr. Haddon-Cane (who appeared for Mr. Ali and Dinky before their Lordships, but not below), and accepted by both courts below, is that the judgement and decree constitute or purport to constitute a judgement in rem incapable of recognition in the Isle of Man under a rule of private international law, set out in Dicey, Morris & Collins.**

The Conflict of Laws, 14th Edition (2006) states as follows;

> **"Rule 40 – (1) A court of a foreign county has jurisdiction to give a judgement in rem capable of enforcement or recognition in England of the subject matter of the proceedings wherein that judgement was given was immovable or movable property, which was at the time of the proceedings situate in that country, (2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of any immovable situate outside that country."**

24. Further, at paragraph 26 of the **PATTI** Case (supra) it states;

> **"Immovables fall into a different and special category in private international law. In British South Africa Co. v. Cia de Mocanmbique [1893] AC 602; Dicey, Morris & Collins, rule 122 (3) and Cheshive & North, p.424. Even so, it has long been accepted in England that an English Court may, as between parties before it, give an in personam judgement to enforce CONTRACTUAL or EQUITABLE (our emphasis) rights in respect of immovable property situate in a foreign country."**

25. The paragraph then goes on to speak about the case of **PENN V. LORD BALTIMORE (1750) (1) VES Senn 444 and 454**. In this case William Penn sought and obtained from Lord Hardwicke LC in the English Courts a decree for specific performance of an agreement made with Lord Baltimore by way of

articles, settling controversies relating to boundaries between Maryland and Pennsylvania. Such an order, Lord Harwicke LC said, referring to a previous order made with reference to land of Lord Anglesey in rem, but could be enforced "by process of contempt in personam and sequestration, which is the proper jurisdiction of this court."

28. It is important to highlight paragraph 39 of the **PATTNI** Decision (supra). It states;

> **"The second preliminary point is whether the Kenyan Court had jurisdiction to make what their Lordships have held to be in all material respects an in personam judgement and order. The answer is straight forward. Mr. Ali and Dinky submitted on the merits to the jurisdiction of the court in the Kenyan proceedings and are bound by the final and conclusive judgement and order, which resulted, subject only to certain defences such as fraud, failure to comply with natural justice, public policy and inconsistency with any other prior judgement in the Isle of Man."**

29. In the case of **WEBB V. WEBB [1991] 1 WLR 1410** Paul Baker Q.C. sitting as Court Judge explained the in personam exception. He said;

> **"Where there is a defendant within the court's jurisdiction, and there exists some relationship between him and the plaintiff arising out of contract, trust or fraud or other fiduciary bond, the court may make an order directed to the defendant to perform his contract, carry out his fiduciary duties or undo the effects of his fraud. Through the relationship, the defendant's conscience is affected and bound. The sanctions for failure to carry out the order are commitment for contempt and sequestration of any assets of his to be found within the jurisdiction. It is no objection that the order relates to land abroad, save only this, that the order will not be made if the**

carrying of it out is illegal or impossible according to the lex situs."

30. It is the Respondent's position that the Georgia action came about as a result of the defendant's breach of contract and/or fraud or other fiduciary bond or duty. This they say is all that the Georgia Court was dealing with. In fact the position is that the Georgia action was not brought to determine title to the subject land but to provide remedy for breach of the contractual agreement made between the Plaintiffs and Defendants in the Georgia action.

31. In furtherance of their position, they cited **DICEY, MORRIS & COLLINS** on the **Conflict of Laws Vol. 1, 15th Edition at paragraph 14-069**, which states;

> **"This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merits, or agrees to a consent order dismissing the claims and crossclaims, or where he fails to appear in proceedings at first instance but appeals on the merits."**

32. In other words, the defendants in the Georgia action having submitted themselves to the jurisdiction of the Georgia Court cannot now come and mount a defence to the outcome of that action.

33. The Georgia Code, **O.C.G.A., s. 23-4-32** reads as follows;

> **"Equity may decree in cases of fraud, trust, or contract, although property not within the jurisdiction may be affected by the decree."**

34. Counsel for the Applicant in the instant matter takes a wholly different position in that the Georgia Court had no jurisdiction to render a judgement rem. It is the further position that the conveyances which were executed by the Applicant under pain of contempt cannot be stamped nor recorded unless first recognized by this court pursuant to the **RECIPROCAL ENFORCEMENT OF JUDGEMENTS ACT, Chapter 77.**

35. This we say would be an issue for the persons vested in the subject property as a result of the Georgia Judgement. We accept the Applicant's position as set out in paragraph 13 of their skeleton arguments.

> 13. **"It is submitted that Dicey's Rule 40 which is set out as follows in the thirteenth edition, is applicable to these circumstances.**
>
> **A court of a foreign country has jurisdiction to give a judgement in rem capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgement was given was immovable or movable property which was at the time of the proceedings situate in <u>that country.</u>**
>
> **A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right of possession of, any immovable situate outside that country."** (emphasis mine).

36. The Applicant says that the instant matter relates to ownership of land, which has been wrongly determined by the Georgia Court in that it is in fact an order compelling the Applicant to convey an interest in the subject land to each of the Respondents.

37. We take special note of certain paragraphs of the Complaint and Judgement filed in the Georgia Court, which for obvious reasons we will set out herein.

"IN THE SUPERIOR COURT OF CHEROKEE COUNTY
STATE OF GEORGIA

JERRY HAMEL, HUGH R. BURCH
And FLOYD BROWN

Plaintiffs

vs.

THOMAS ROY HOLBIRD JR.,
Individually and as Executor of the
Estate of THOMAS ROY HOLBIRD, SR.

Defendants

COMPLAINT

Come now the Plaintiffs, Jerry Hamel, Hugh R. Burch, and Floyd Brown and file this, their Complaint against the Defendants and show the court as follows;

1.

Defendant Thomas Roy Holbird, Jr., (Hereinafter referred to as "Holbird, Jr.") resides in Cherokee County, Georgia Holbird, Jr., by and through his attorney of record, Louis Levenson, has acknowledged service of the within Summons and Complaint and is subject to the jurisdiction of this Court.

2.

On or about May 4, 2007, Thomas Roy Holbird, Sr. (hereinafter referred to as Holbird, Sr.") died while a resident of Cherokee County, Georgia.

3.

On June 12, 2007, Holbird, Jr., the Decedent's son, was appointed Executor of Decedent's Estate.

4.

In or about September or October, 1981, the Plaintiffs, Hugh R. Burch, and Floyd Brown, attended a meeting with several other people, including Holbird, Sr., concerning the joint purchase of a house located on an island in the Bahamas and known and hereinafter referred to as the Maundee House. It was agreed that Maundee House would be purchased for the sum of $99,900.00 by twelve investors, including Burch, Brown and Holbird, Sr., who, at the time, was a resident of the Bahamas. It was also agreed that each investor would own an equal undivided 1/12th interest in the house, but that title to the house would be placed in Holbird, Sr."s name since it was represented by Holbird, Sr., that Bahamian Law did not allow ownership of property by non-Bahamians. The purchase of Maundee House was completed and each of the investors contributed 1/12th of the purchase price for each share purchased. Over the ensuring years, ownership of the 12 shares changed hands and the same representations as to ownership and title made by Holbird, Sr., to the initial investors were repeated to the various subsequent participants including Plaintiff, Jerry Hamel, who purchased his participating interest in 1989.

5.

After the purchase of Maundee House as set forth above, Holbird, Sr. became the "managing partner" and each participant paid, in addition to his share of the initial purchase price of Maundee House, a yearly amount for the taxes, insurance, upkeep and maintenance of the property. Plaintiffs have, at all times, honored their financial and other obligations relating to their percentage ownership in Maundee House.

6.

Holbird, Sr., represented to the various participants, including the Plaintiffs herein, that he and his wife would maintain the property and manage all of the expenses associated with Maundee House out of the proceeds of the dues or fees paid by the various participants, including the Plaintiffs herein.

7.

Holbird, Sr., made these representations knowing that the various owners, including these Plaintiffs, would rely upon such and would continue to make payments for the taxes, insurance, maintenance and upkeep of the property. These Plaintiffs did, in fact, in good faith rely upon the representations of Holbird, Sr., and based upon their justifiable reliance have throughout the years continued to contribute to the maintenance of Maundee House.

Included among the fees and expenses that these Plaintiffs have paid are taxes, insurance, upkeep and other such expenses ordinarily associated with the maintenance of a home and real property and Plaintiffs have expended amounts in excess of their proportional shares in order to ensure the continued upkeep of the property.

8.

Further, during 1999, Hurricane Floyd caused extensive damage to Maundee House and the Plaintiffs herein expended in excess of $20,000.00 to make repairs to Maundee House including, without limitation, replacing the roof, the floor, the oven, the refrigerator, and otherwise make repairs to the structure and its contents damaged by the hurricane. These Plaintiffs paid all the hurricane related expenses on Maundee House, and Holbird, Sr., paid nothing.

The expenses paid by the Plaintiffs as a result of their participation in the ownership of Maundee House exceed the sum of $125,000.00.

9.

From the time of the purchase of Maundee House, Holbird, Sr., consistently accepted funds from the Plaintiffs and acknowledged and agreed

that he was holding the title to the property in his name to and for the benefit of himself and the other owners or participants the Maundee House venture, and that he would honor and protect Plaintiffs' ownership or participatory interest therein.

10.

In the early part of 2007, shortly before his death, Holbird, Sr., reaffirmed Plaintiffs' ownership interest in Maundee House and assured them that prior to his death he would take the necessary steps to correct the property deed. However, Holbird Sr., failed to honor his verbal and written representation to the Plaintiffs, and died without insuring that said the property was properly conveyed the its true owners.

11.

At all times pertaining hereto, Plaintiffs have in good faith relied upon the representations of Holbird, Sr., to their detriment, and have thereby suffered substantial financial losses.

12.

Upon information and belief, Holbird, Jr., has taken full control of Maundee House for his own use and benefit, is holding said property out to the public for rental and has retained possession of all amounts received as rental income.

COUNT ONE

Plaintiffs reallege, reassert and incorporate herein by reference paragraphs 1 through 12 of their Complaint, as if each said paragraph was specifically set forth herein.

13.

At all times pertaining hereto, Holbird, Sr., his Estate and Defendant Holbird, Jr., obtained and continued to retain sole legal title to Maundee House

as a result of fraudulent misconduct, misrepresentations and otherwise wrongful conduct.

14.

By reason of the fraudulent and otherwise wrongful manner in which the Defendants, or any of them, obtained their alleged right, claim or interest in and to Maundee House, Defendants and each of them have no legal or equitable right, claim or interest therein or, at the most, have a legal, or equitable claim equal to that of the Plaintiffs.

15.

Thus, Defendants are merely trustees of Maundee House, holding said property and profits therefrom in constructive trust for the Plaintiffs in accordance with O.C.G.A. ₴ 53-12-93, with the duty to convey to the Plaintiffs their rightful interest in said property forthwith.

16.

Demand has been made on the Defendants to comply with their duties as constructive trustees and to convey to the Plaintiffs their rightful interests in Maundee House and Defendants have failed and refused to do so.

17.

Plaintiffs are entitled to an order from this court requiring Defendants to convey to the Plaintiffs their rightful interests as shown by the evidence.

COUNT TWO

Plaintiffs reallege, reassert and incorporate herein by reference paragraphs 1 through 12 of their Complaint, as if each said paragraph was specifically set forth herein.

18.

Should it be determined that no implied trust existed, which is expressly denied by the Plaintiffs, in the alternative the Plaintiffs are entitled, under the theory of unjust enrichment, to recover from the Defendants, their initial investment in said property, all fees, expenses, taxes, and cost of improvements they have paid into the Maundee House project, together with the increase in value of their investment therein based on the present fair market value of the property, with interest thereon at the maximum rate allowed by law.

COUNT THREE

Plaintiffs reallege, reassert and incorporate herein by reference paragraphs 1 through 12 of their Complaint, as if each said paragraph was specifically set forth herein.

19.

The exercise of full control of Maundee House by Defendant Holbird, Jr., as set forth above, and the collection of rental income generated by said property amount to an unauthorized conversion of said property and rental income to Holbird, Jr.'s own use and benefit.

20.

As a direct result of said conversion, Plaintiffs have been damaged in an amount to be shown by the evidence at trial and are entitled to a recovery.

COUNT FOUR

Plaintiffs reallege, reassert and incorporate herein by reference paragraphs 1 through 12 of their Complaint, as if each said paragraph was specifically set forth herein.

21.

The misrepresentations made by Holbird, Sr., and continued by the Defendants were fraudulent and were done with the intent to deceive Plaintiffs

and did in fact deceive Plaintiffs and induced Plaintiffs to add to their injury. The actions of Holbird, Sr., and the Defendants as set forth herein were done willfully and with the intent to harm the Plaintiffs and were performed with an entire want of care which would raise the presumption of a conscious indifference to the consequences and, as such, Plaintiffs are entitled to recover punitive damages against the Defendants, jointly and severally, pursuant to O.C.G.A. ₴ 51-12-5.1 in an amount to be determined by a jury.

COUNT FIVE

Plaintiffs reallege, reassert and incorporate herein by reference paragraph 1 through 12 of their Complaint, as if each said paragraph was specifically set forth herein.

22.

Plaintiffs have made demand upon Holbird, Sr., and the Defendants on several occasions, for a complete and accurate accounting of all matters relating to Maundee House and Holbird, Sr., and the Defendants have failed to provide such accounting.

23.

Plaintiffs are, therefore, entitled to an accounting of all financial affairs of Maundee House."

24.

The Defendants have acted in bad faith, have been stubbornly litigious and have caused the Plaintiffs unnecessary trouble and expense, thereby entitling the Plaintiffs to recover expenses of litigation, including reasonable attorney fees.

WHEREFORE, the Plaintiffs pray for judgment in their favor and against the Defendants, as follows;

(a) For a declaration that Defendants hold Maundee House as constructive trustees for the Plaintiffs and that Defendants be required to have prepared and filed a properly executed property deed conveying to Plaintiffs their proper and just ownership, interests in Maundee House as evidenced by their payment of their percentage of the initial purchase price as well as payments made thereon throughout the years.

(b) In the alternative, for judgment against the Defendants in an amount equal to the amount of money they have invested in Maundee House throughout the years, plus an amount representing their share of the increase in the fair market value of the property from the time of purchase up through and including the date of judgment together with interest thereon at the maximum lawful interest rate.

(c) For judgment in an amount shown by the evidence for the conversion of the property and profits gained through the use of rental of the property.

(d) For punitive damages in an amount to be determined by the jury;

(e) For a trial before a jury;

(f) For all expenses of litigation, including reasonable attorney fees.

(g) For any and all other and further relief which this honorable court may deem proper.

IN THE SUPERIOR COURT OF CHEROKEE COUNTY

STATE OF GEORGIA

JERRY HAMEL, HUGH R. BURCH	)	CIVIL ACTION
and FLOYD BROWN,	)	FILE NO: 09-CV-4098-FM
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
THOMAS ROY HOLBIRD, JR.,	)	
Individually and as Executor of the	)	
Estate of THOMAS ROY HOLBIRD, SR.)		

Defendants

JUDGMENT

This action having come on regularly for trial before the court and a jury, Honorable Frank C. Mills, III, presiding, and the issues having been duly tried, and the jury having rendered its verdict finding that each plaintiff is entitled to recover against the defendant (s) an implied interest in the subject property identified as Maundee House; and this court having jurisdiction pursuant to O.C.G.A. ₴ 23-3-1; to determine

the rights of all the parties and to apply remedies or relief in favor of either party, as the nature of the case may allow or require; and this court having jurisdiction to grant relief as between the original parties or their privities in law, in fact or in estate pursuant to O.C.G.A. ₴ 23-2-34; and this court having jurisdiction over property not within this jurisdiction pursuant to O.C.G.A. ₴ 23-4-32; and this court having the full power to mold this judgment so as to meet the circumstances and exigencies of this case pursuant to O.C.G.A. ₴ 23-4-31; and this court seeking to do complete justice and give full relief to the parties pursuant to O.C.G.A. ₴ 23-1-7,.

It is hereby ORDERED and ADJUDGED that plaintiffs shall prepare and shall provide to the defendant Thomas Roy Holbird, Jr. a quitclaim deed or a deed of an equivalent nomenclature in a form legally sufficient in nature to be recognized for filing in the Commonwealth of The Bahamas. It is further ORDERED that within ten (10) days of the date of receipt of said deed, the defendant Thomas Roy Holbird, Jr. shall properly execute said deed and deliver it to plaintiffs.

Said deed shall transfer and deed to each of the plaintiffs a fee simple interest, as set forth below, in the real property located in the Commonwealth of The Bahamas, described as follows;

> "All that piece parcel or lot of land being Lot Number Six (6) in the said Subdivision known as "The Green Turtle Cay Club" situate on the Island or Cay known as Green Turtle Cay one of the Abaco Cays in the Commonwealth of The Bahamas which said lot of land has such position shape boundaries marks and dimensions as are shown on the diagram or plat attached to the said Indenture of Conveyance dated the Ninth day of December A.D., 1965 and is thereon coloured Pink.
>
> Together with all furniture, furnishings and fixtures in or on that real property and all policies of insurance relating to them and to the property."
>
> And being the same property identified by an Indenture of Conveyance dated the Ninth day of November A.D., 1981 and now of record in the Registry of Records of the Commonwealth of The Bahamas in Volume 3605 at pages 160-167 made between Brigadier General Gordon Summer Jr. of the one part conveyed unto Thomas Roy Holbird of the other part; and subsequently conveyed by Deed of Assent from Thomas Roy Holbird, Sr. to Thomas Roy Holbird, Jr., now of record in the Registry of Records of the Commonwealth of The Bahamas in Volume 10739, Page 99-102 recorded on April 2, 2009.
>
> To plaintiff Jerry Hamel an undivided 1/24th interest;
>
> To plaintiff Hugh R. Burch an undivided 1/12th interest; and
>
> To plaintiff Floyd Brown an undivided 1/12th interest.
>
> It is further ORDERED and ADJUDGED that the plaintiffs recover of the defendants their costs of this action.

38. As this matter hinges on whether the Georgia Judgment was one in rem or in personam, we ought to start with the complaint (Comp) filed in the Georgia Court. Beginning at complaint 9 it starts to become patently clear that there was always an issue of who would hold the title for the "benefit" of the other contributors to the purchase. In fact, it is said in Comp 9 that Holbird Sr. consistently acknowledged and agreed that he was holding the title to the property in his name **"TO AND FOR THE BENEFIT"** of himself and the other owners or participants and that he would honor and protect the Plaintiffs' ownership or participating interest.

39. In Comp. 10 it says, he re-affirmed the Plaintiffs' ownership interest in the subject property and assured them that prior to his death he would take the necessary steps **"TO CORRECT THE PROPERTY DEED".** It goes on;

> **"However, Holbird Sr., failed to honor his verbal and written representation to the Plaintiffs, and died without ensuring that the said property was "PROPERLY CONVEYED" to its true owners"**

40. Under Count One at paragraph 14 it states;

> **"By reason of the fraudulent and otherwise wrongful manner in which the Defendants, or any of them, obtained their alleged right, claim or interest in and to Maundee House,, Defendants and each of them have no LEGAL OR EQUITABLE RIGHT, CLAIM OR INTEREST**

therein or, at the most, HAVE A LEGAL OR EQUITABLE CLAIM equal to that of the Plaintiffs."

41. In paragraph 15 of Count One it states;

"Thus, the Defendants are merely trustees of Maundee House, holding said property and profits therefrom in constructive trusts for the Plaintiffs in accordance with O.C.G.A. ₴ 53-12-93 WITH THE DUTY TO CONVEY to the Plaintiffs their rightful interest in said property forthwith.

42. In the prayer of the Complaint it is prayed;

(a) **"For a declaration that Defendants hold Maundee House as constructive trustees for the Plaintiffs and the Defendants be required to have PREPARED and FILED A PROPERLY EXECUTED PROPERTY DEED CONVEYING (our emphasis) to Plaintiffs their proper and just OWNERSHIP (our emphases) interests in Maundee House as evidenced by THEIR PAYMENT (our emphasis) of their percentage of the initial purchase price as well as payments made thereon throughout the years."**

43. It would appear that most of what was laid out in the complaint sought to have the Georgia Court determine the alleged agreement between the parties as it relates to the subject land.

44. It is not disputed between the parties that the Georgia Court did not have jurisdiction to grant relief. What is disputed is whether the Georgia Court had jurisdiction to determine title to land which was outside the jurisdiction of the U.S. The pointed question again is whether this was a judgment in rem or in personam. The simple difference between the two is whether the Georgia Court determined title to the subject land or whether it simply determined that there was an agreement between the parties and that the agreement should be specifically performed. In other words was there a claim for specific performance of an agreement.

45. At this point, it is perhaps necessary to address the actual Judgment of the Georgia Court. The actual wording of the judgment goes beyond determining the performance of an agreement between the parties. The Georgia Court appears to have determined that the Plaintiffs in that matter were entitled to a portion of the subject property pursuant to the agreement. By doing this they went beyond the simple alleged agreement, and subsequently, under pain of contempt ordered the Applicant to execute conveyances in favour of the Respondents. The subject property is an immoveable property.

46. In the case of **RE HOYLES [1911] 1 CH F**

arwell L.J. said, at pgs. 185 and 186;

> **"No country can be expected to allow questions affecting its own land, or the extent and nature OF THE INTERESTS IN ITS OWN LAND (our emphases) which should be regarded as immoveable, to be determined otherwise than by its own courts in accordance with its own interests."**

47. The Georgia Court undoubtedly determined the extent and nature of interests in the subject property. There is further clarification on this point. **LORD MANCE** in the case of **PATTNI V ALI and another [2007] 2 AC 85** a Privy Council case states at paragraphs 14 – 25;

> **"14. The proposition advanced by Mr. Haddon-Cave (who appeared for Mr. Ali and Dinky before their Lordship, but not below), and accepted by both courts below, is that the judgment and decree constitute or purport to constitute a judgment in rem incapable of recognition in the Isle of Man under a rule of private international law set out in *Dicey, Morris & Collins, The Conflict of Laws,* 14th ed. (2006), as follows;**

"Rule 40-(1) A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country. (2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country."

15. **Deemster Kerruish expressed this conclusion as follows, at para 35;**

"I find that the judgment is a judgment in rem. By para 2 of the order, made in proceedings to which the company was party, the judge ordered that Mr. Ali and Dinky international transfer 'all the 100% shares' in the company to Mr. Pattni in accordance with the agreement. Such part of the order determines judicially the property that is the legal and beneficial ownership, in the shares in the company to Mr. Pattni. To put it another way, the judgment vests the property in the shares to Mr. Pattni. Whilst I accept that a further step requires to be taken to rectify the register of members, such part of the order clearly purports to pass legal and beneficial ownership in the shares to Mr. Pattni. This part of the order is not as suggested a declaratory order, it purports to pass property in the shares to Mr. Pattni."

16. **The Staff of Government Division put its conclusion as follows, at para 30;**

"We have no doubt that in his judgment Mbaluto J. was not merely finding that a sale and purchase agreement had been made between the parties, defining its terms and upholding that there was a breach, but that he was purporting to transfer

at least the beneficial ownership in the shares in the company to the appellant. In such circumstances we reject Mr. Mann's submission. We reach this conclusion because in our judgment what the judge ordered was only consistent with him having determined that the ownership of Mr. Ali and Dinky's shares in the company now vested in the appellant and is inconsistent with Mr. Mann's concession that further legal formalities in the Isle of Man would need to take place before ownership passed to the appellant. It was on that basis that the judge directed a transfer of shares in the company, ordered the production of profit and loss accounts, required the company's board of management to resign and declared that the appellant be allowed to appoint his own board of management to run the affairs and operations of the company, and ordered the payment of all outstanding dividends *96 and emoluments. Such matters went far beyond a declaration that the appellant was entitled to performance of the terms of the sale and purchase agreement which the judge had found was made. It follows that we entirely agree with the deemester's analysis of the position as set out in paras 35 to 38 of his judgment."

Both para 35 in Deemster Kerruish's and par 30 in the Staff of Government Division's judgment appear to equate any order determining the property in an asset as between parties before the court with an order in rem incapable of recognition in the Isle of Man under rule 40 of Dicey, Morris & Collins.

17. The Staff of Government Division went on to reject any submission that the Kenyan judgment and order could be "severed" into different in rem and in personam parts, expressing the view, at paras 35-36, that "all material parts of the order were founded upon the

premise that [Mr. Pattni] was entitled, at the very least, to beneficial ownership in the shares of the company".

18. Their Lordships note at the outset that rule 40(1) in Dicey, & Collins is dealing with the circumstances and extent to which an English court will treat a judgment in rem given in a foreign state as capable of enforcement or recognition in England, that is, as capable of enforcement or recognition in England as a judgment in rem. It is not focusing on the potentially different question whether a foreign purporting either to be given in rem or to determine the property in English property, but given none the less in proceedings between specific parties, may be capable of recognition in subsequent proceedings between the same parties in England. Their Lordships revert to this point in para 38 below.

19. Both Deemster Kerruish and the Staff of Government Division cited well-known texts considering the distinction between judgments in personam and in rem. In the text to rule 22, Dicey, Morris & Collins states, at para 11-002;

> **"A claim in personam may be defined positively as a claim brought against a person to compel him to do a particular thing, e.g. the payment of a debt or of damages for a breach of contract or for tort, or the specific performance of a contract; or to compel him not to do something, e.g. when an injunction is sought."**

Mr. Pattni submits that a judgment ordering a person to do a particular thing is likewise In personam. In the text to rule 40, Dicey, Morris & Collins states, at para 14-100;

> **"A judgment in rem is a judgment where under either**
>
> **1. Possession or property in a thing is adjudged to a**

person, or

2. the sale of a thing is decreed in satisfaction of a claim;

against the thing itself. The term is used also to describe;

3. an adjudication as to status such as a decree of nullity

or dissolution or marriage, and

4. a judgment ordering property to be sold by way of administration in bankruptcy or on death… The question whether a foreign judgment is in personam or in rem is sometimes a difficult one on which English judges have been divided in opinion. But unless the foreign judgment claims to operate in rem, it cannot be recognized in English as a judgment in rem."

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20. Dicey, Morris & Collins includes, as examples of cases which divided English judges, Cammell v Sewell (1860) 5 H & N 728 and Castrique v. Imrie (1870) LR 4 HL 414. But, although its application in the light of evidence of foreign law may sometimes be difficult, the relevant principle distinguishing between judgments in personam and in rem in the sense of rule 40 appears clearly enough, particularly in the House of Lords in the latter case. The joint opinion of five of the six judges advising the House was given by Blackburn J (its force today undiminished by the fact that he and Bramwell B had both sat in the Exchequer Chamber in the case under appeal: cf (1860) 8 CBNS 405). Blackburn J LR 4 HL 414, 428-430, described a decision in rem as one by a tribunal with "jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing'-in which latter case, he said, where the subject matter is within the state where the court sits, then "Whatever it settles as to the right or title, or whatever disposition it makes of the property by said, revendication, transfer or other act, will be held valid in every other country where the question comes …before any other foreign

tribunal", and "the adjudication is conclusive against all the world". Blackburn J also pointed out that there might be a judgment in rem without or prior to any actual adjudication on the status of a thing, as e in the case of a sale of perishable goods, the proceeds to abide the outcome of litigation. (As an example of an in personam judgment relating only to the property rights inter se of the parties before the court, Blackburm J gave a sale in execution under a fieri facias-in which respect English law was subsequently altered by statute: cf now the Court Act 2003, Schedule 7, paragraph 11,) All the members of this House concurred in Blackburn J's analysis; cf per Lord Hatherley LC, at p 442, Lord Chelmsford, at p 448, and Lord Colonsay, at p 448.

21. **For present purposes, a judgment in rem in the sense of rule 40 is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it).** **The distinction is shortly and accurately put in *Stroud's Judicial Dictionary,* 7th ed (2006), p 2029, cited (in an earlier edition) by Deemster Kerruish;**

> **"A judgment in personam binds only the parties to the proceedings, as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons…"**

Jowitt's Dictionary of English Law, 2nd ed (1977), pp 1025-1026, contains fuller definitions to the same effect.

> **"A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as**

declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure. So a declaration of legitimacy is in effect a judgment in rem. A judgment of divorce pronounced by a foreign court is in certain cases recognized by English courts, and is then a *98 judgment in rem…Judgments in personam are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it."

Cheshire & North, Private International Law, **13th ed (1999), pp 423-234, *Phipson on Evidence, 16th ed* (2005), para 44-10, and *Spencer Bower, Turner & Handley, Res Judicata,* 3rd ed (1996), paras 234-235, are to like effect. The last work suggests, at para 234, that "it would have been clearer if decisions in rem and in personam had been named decisions inter omnes and inter partes".**

22. The authorities give guidance as to some of the factors which can assist to determine whether a judgment has in rem effect against the whole world-inter omnes. They include the nature and terms of the court's jurisdiction to make a determination, f Wakefield Corpn v Cooke [1904] AC 31, where a statute gave to justices summary jurisdiction for the purpose of determining whether any street in the locality was a highway repairable by the inhabitants of the locality at large, provided that they were to determine "the matter of all objections" and included machinery for giving notice to all who might be affected, together with an opportunity to attend and be heard before the court. (Their Lordships note, however, that the

House of Lords contemplated the possibility that a statute might be intended to lead to a judgment of an intermediate character, neither binding against the whole world nor limited in effect to parties and privies, but binding against anyone given notice and the opportunity of appearing: cf para 24 below for the private international law effect of such a judgment.) A second point is that even a judgment which would otherwise be regarded as in rem will not have the effect if made simply by consent of the parties who are before the court; cf *Spencer Bower, Turner & Handley, para 235, where footnote 8 refers to Jenkins v Robertson* (1867) LR 1 Sc & Div 117.

23. In *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508* the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category, its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established. The board referred, at para 13, to judgments in rem and in personam as "judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person." However, their Lordships take the present opportunity to emphasis that in the former case, in order for a judgment to have in rem effect in sense of rule 40 in Dicey, Morris & Collins, the determination must be a determination regarding the status or disposition of property which is to be valid as against the whole world. The fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem.

24. <u>Their Lordships also note the existence of a more general principle. The actual transfer or disposition of property is, in principle, a matter</u>

for the legislature and courts of the jurisdiction where the property is situate (stage A), and will be recognized accordingly by courts in any other state *99 (state B): see Dicey, Morris & Collins, rules 120 to 124. This was described by Blackburn J in Castrique v Imrie LR 4 HL 414, 429 as a "more general principle" of which the rule relating to judgments in rem might "very well be said to be a branch". It does not depend upon the transfer or disposition in and under the law of state A being intended or purporting to bind the whole world. It is enough that it was intended to bind a person in the position of the person who in state B seeks to challenge the transfer or disposition in state A. This principle was applied in Cammell v Sewell 5 H & N 728 and more recently by Gross J in Air Foyle Ltd v Center Capital Ltd [2003] 2 Lloyd's Rep 73, 764. It follows from it, conversely, that in the unlikely event that the courts of state A were to purport actually to transfer or dispose of property in state B, the purported transfer or disposal should not be recognized as effective in courts outside state A.

25. An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the lex situs of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rules 120 and 124 in Dicey, Morris & Collins.

26. Immovable falls into a different and special category in private international law; cf British South Africa Co v Cia de Mocambique

[1893] AC 602; Dicey, Morris & Collins, rule 122(3) and Cheshire & North, p 424. Even so, it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of immovable property situate in a foreign country; see Dicey, Morris & Collins, rule 122(3). The authorities go back to at least the first half of the 18th century: cf Penn v Lord Baltimore (1750) 1 Ves Sen 444, 454. In that case William Penn sought and obtained from Lord Hardwicke LC in the English courts a decree for specific performance of an agreement made with Lord Baltimore by way of articles settling controversies relating to the boundaries between Maryland and Pennsylvania."

48. The **Pattni** case (supra) is quite clear on what the difference is between a judgment in rem and one in personam. Simply put was it a judicial determination of the existence of rights in or over property or rights against a person. Paragraph 23 further speaks to a judgment in rem as it relates to rule 40 in Dicey, Morris & Collins. It says that the determination must be a determination regarding the **STATUS OR DISPOSITION OF PROPERTY**, which is to be valid as against the whole world. It also goes on to say that the fact that a judicial determination determines or relates to the existence of property rights between parties does not in itself mean that it is in rem. We say that it goes beyond what is required. It is patently clear that the Georgia Judgment is one in rem.

49. To further support this, the judgment itself says;

"It is hereby ORDERED and ADJUDGED that Plaintiffs shall prepare and shall provide to the Defendants Thomas Roy Holbird Jr. a quitclaim deed or a deed of an equivalent nomenclature IN A FORM LEGALLY SUFFICIENT IN NATURE TO BE RECOGNIZED FOR FILING in the Commonwealth of The Bahamas."

50. Implicit in the above words is the fact that the Georgia Court itself saw the need for recognition of its judgment vesting title in the Respondents in the instant matter. This clearly states, **"we are determining a decision in rem."**

51. We also cannot ignore the fact that the Plaintiffs in the Georgia case admitted to the court that they agreed for Holbird Sr. to hold the legal title as they accepted the fact that they couldn't hold title because they were not citizens of The Bahamas neither did they have the necessary status to hold title to land.

52. Instead, they agreed with Holbird Sr. to hold for them the legal title and later on sought the assistance of the Georgia Court under the pretence that they were ready to receive what was being held for them on a resulting trust. The latin maxim, he who comes to equity must come with clean hands certainly applies. They sought equitable relief. In light of the fact that we have concluded that the Georgia Judgment was one in rem, the conveyances executed by Holbird Jr. as a result of a judgment in rem are incapable of enforcement in this jurisdiction.

53. Paragraph 8 of the submissions of the Respondents states;

> **"The US Action went to a jury trial and counsel for the Applicant argued the merits of the case before the jury who found in favour of the Respondents, specifically that the Respondents WERE ENTITLED TO A 1/12 interest in the property by virtue of the fiduciary relationship held by Holbird Sr. and the duties owed to them as a result thereof. By the judgment filed on the 30th April, 2012, the court ordered that the Respondents prepare and provide the Applicant with a deed transferring each of the Respondents FEE SIMPLE interest and that the Applicant execute the said deeds within ten days of receipt."**

54. This we say went beyond determining the rights of the parties as per the agreement and went further to determine the title and possession of the subject land which is immoveable.

55. We repeat what **FARWELL J** stated in **RE HOYLES [1911] 1** CH at page 185 – 186;

> **"International law is a matter of international comity. No country can be expected to allow questions affecting its own land or the EXTENT OF THE INTERESTS in its own land which should be regarded as immoveable, to be determined otherwise than by its own Courts in accordance with its own interests."**

56. In action No. 300 of 1998, the first and second Respondents in the instant matter were ordered to pay security for costs in the amount of One Hundred Thousand Dollars ($100,000.00) in addition to costs to be paid to the defendant in the 1998 action, (Holbird Sr.).

57. However, there was never compliance with the said order. Instead, two of the Plaintiffs in the Bahamas action instituted the action in the Georgia Court against Holbird Jr., who was the executor of his father's estate. We have set out at para 43 what was prayed for in that action. Nowhere in the Georgia Complaint or Counts contained therein was there any reference to The Bahamas.

58. In The Bahamas Action, which was commenced by way of Originating Summons prayed for namely;

> **"(a) A declaration that the Defendant holds the fee simple estate in Lot No. 6 in the Subdivision known as "Green Turtle Cay Club" situate on Green Turtle Cay, one of the Abaco Cays, Bahamas upon trust for the Plaintiffs and the Defendants."**
>
> **(b) An Order that the Defendant do execute a Conveyance of the said property to the Plaintiffs and himself as tenants in common in equal shares.**
>
> **(c) An injunction restraining the Defendant from selling, transferring, encumbering or otherwise dealing with the said property without the consent in writing of the Plaintiffs.**

(d) Such further or other relief as to the Court deems just.

59. The Plaintiffs in the Bahamas Action averred therein that they were entitled to an equal share in the property of which the legal title was held at the time by Holbird Sr. There is no getting around the fact that Holbird Sr. held the legal title to the land. In the decision of Mr. Justice Moore at paragraph 3, Mr. Justice Moore states;

> **"The Conveyance of the property shows that on the 9th November, A.D., 1981, it was conveyed from Brigadier General Gordon Summer Jr. to Thomas Roy Holbird Sr. for the sum of $99,000.00. No mention of any trust appears on the face of the Conveyance. Whatever agreement may have been made between the parties concerned, was not made in writing or evidenced by any writing."**

60. In order for the Plaintiffs to have obtained a legal interest in the subject land they would have had to comply with certain statutory requirements and as such they did not. Thus, the alleged arrangement with Holbird Sr. did not deny that he had made an agreement albeit not in writing.

61. The Georgia Court was not seized of all the facts involved in this matter. We say that the Respondents in this matter made a false representation to the Georgia Court knowingly, without belief in the truth of what they presented to the court and were reckless and careless in so doing. In so doing they were able to persuade the court to issue the desired order.

62. **However, Dicey's Rule 40 states;**

> **"40 (1) A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given was immoveable or moveable property which was at the time of proceedings situate in that country."**

"40. (2) A court of a foreign country has NO JURISDICTION TO ADJUDICATE UPON THE TITLE TO, OR THE RIGHT TO POSSESSION OF ANY IMMOVEABLE SITUATE OUTSIDE THAT COUNTRY."

63. Both 40 (1) and 40 (2) are applicable in that as it relates to 40 (1), the immoveable in this case was not situate in Georgia and as to 40 (2), it is patently clear that the Georgia Court had no jurisdiction to order that conveyances be prepared on behalf of Holbird Jr. and executed by him to vest an interest in the Respondents herein. What the Georgia Court did was to adjudicate a right to title and possession of an immoveable which was outside of that jurisdiction.

RECOGNITION OF FOREIGN JUDGMENTS/ORDERS

64. It is the position of the Applicant, that the judgment requiring Holbird Jr. to execute conveyances vesting title and interest in the Respondents herein to the subject property must first be recognized by the Bahamian Supreme Court.

65. While no authorities have been produced, when we look at the **IMMOVABLE PROPERTY (ACQUISITION BY FOREIGN PERSONS) ACT**, **Chapter 125,** which has since been repealed but would have been the applicable law at the time Holbird Sr. was vested with title and in particular Section 5, it is without any doubt whatsoever that we say that at the time Holbird Sr. purchased, as it relates to foreign persons acquiring immoveable property in this jurisdiction, that foreign person would have had to obtained permission by way of a permit , which would have been granted by the Foreign Investment Board as it was then called.

Section: 5 (1), (a) & (b):

"Subject to the provisions of this Act, after the commencement of this Act.

(a) No foreign person shall acquire or hold any immovable property in The Bahamas except under the authority of a permit granted to such foreign person by the Board; and every conveyance which is not made under the authority of a permit purporting to convey any immovable property to any foreign person shall be null and void and be without effect for all purposes of law and in regard to all persons and no interest whatsoever whether legal or equitable shall pass to such foreign person by reason of such conveyance or any other matter; but the foreign person shall be entitled to recover with such legitimate deductions as may be justified in law any and all moneys paid by him as consideration for the said conveyance.

(b) No person shall convey any immovable property to another person as trustee for, or a grantee to the uses of, a foreign person or otherwise transfer any immovable property for the benefit of a foreign person except under the authority of a permit granted to such trustee or grantee by the Board; and every conveyance purporting to convey any immovable property to a trustee or grantee, which is not in accordance with the terms of a permit, shall be null and void and be without effect for all purposes of law and in regard to all persons."

66. The Georgia Action was filed on December 7th, 2009 and the judgment came on or about April 30th, 2012. By 2012 the Immoveable Property (Acquisition by Foreign Persons) Act had been repealed and replaced by THE INTERNATIONAL PERSONS AND HOLDING ACT, (Chapter 140).

Section 6 states;

> **"Where a non-Bahamian acquires any land or an interest in land by reason of that property becoming vested in him by virtue of any order of a court or where a non-Bahamian goes into possession of property as a mortgagee, then he shall make application to the Board to have the acquisition or going into possession registered with the Board and upon receipt of evidence that the appropriate fee specified in the Schedule has been paid to the Public Treasury, the Secretary to the Board shall register that acquisition or going into possession and issue a certificate or registration to the applicant."**

67. We highlight this to show that counsel for the Respondents has not produced to the court any evidence of any preparatory steps for compliance with Section 6. We hasten to add however, that this application does not seek to have this issue addressed.

68. The real issue before us as we would have said before is whether the Georgia Judgment was one in personam or in rem.

69. It is clear from what we have said earlier that we have concluded that the Georgia Judgment was one in rem.

70. Dicey's Rule 40, (2) speaks for itself;

> **"A court of a foreign country has no jurisdiction to adjudicate upon the title to or the right to possession of any immoveable situate outside the country."**

71. For the avoidance of doubt, the Georgia decision in fact and in law made a determination judicially of the legal and beneficial ownership in the subject property. As LORD MANCE would have said at paragraph 15 of the **PATTNI** case (supra);

> "**To put it another way, the judgment vests the property in the shares to Mr. Pattni. Whilst I accept that a further step requires to be taken**

to `rectify the register of members, such part of the order clearly purports to pass legal and beneficial ownership in the shares to Mr. Pattni."

72. Further at paragraph 16 LORD MANCE continues;

"We have no doubt that in his judgment Mbalto J was not merely finding that a sale and purchase agreement had been made between the parties defining its terms and upholding that there was a breach, but that he was purporting to transfer at least the beneficial ownership in the shares in the company to the applicant."

73. We say that the instant case is quite similar. As was stated in the **PATNI** case, we also say that the Georgia Judgment went far beyond declaring that the Respondents in the instant matter were entitled to performance of the terms of the oral agreement between the Applicant and the Respondents herein.

74. We therefore grant the following as prayed for by the Applicant herein;

1. A declaration that a foreign judgment *in rem* determining the title to a foreign immovable is incapable of enforcement in The Bahamas.

We also grant;

2. An interlocutory Injunction to restrain the Respondents; herein whether by themselves, their servants and/or agents or otherwise from seeking to avoid applying to this court for recognition of the said order by tendering the said invalid conveyance to be stamped and recorded in The Bahamas and taking any steps to obtain possession or to exercise any other rights in or in relation to Maundee House until the determination of the action herein or further order;

4. Cost to be taxed if not agreed.

75. The Conveyances therefore executed by Roy Holbird Jr. which relate to an immoveable property are incapable of recognition in this jurisdiction and as such are null and void.

Dated the day of A.D., 2019.

Keith H. Thompson
Justice