Privy Council Appeal No. 41 of 1970

Josephine Mary Aloysia Morais – – – – – *Appellant*

v.

Francesca Victoria – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JANUARY 1972

Present at the Hearing:
VISCOUNT DILHORNE
LORD HODSON
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA
LORD KILBRANDON

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal by leave of the Supreme Court of Ceylon by Josephine Mary Aloysia Morais the defendant in the action from a judgment of the Court given on 11th July 1968 dismissing her appeal from the judgment of the District Court of Colombo given on 17th March 1965 in favour of the respondent Francesca Victoria the plaintiff in the action.

The respondent is the grand-daughter of one Marianu Morais hereinafter referred to as the testator. By his last will dated 8th September 1917 the testator appointed his three sons-in-law to be executors and trustees. After making a number of specific dispositions of parts of his estate he devised and bequeathed the residue of his estate subject to the payment of his debts, funeral and testamentary expenses to his trustees to be held by them on the trusts thereinafter set out. There followed two bequests to charity and a direction to the trustees to make monthly out of the residue of his trust estate for a period of ten years from his death certain payments for the saying of Masses. The will then proceeded to give the following further directions to the trustees.

> "4. Upon trust to pay out of the Income of my trust estate the sum of Rupees Twenty five (Rs.25/-) per mensem to my son Lewis Anthony Morais until his marriage and thereafter a sum of Rupees Fifty (Rs.50/-) per mensem together with a further sum of Rupees Twenty five (Rs.25/-) per mensem for each surviving child of my said son until my said son shall attain the age of Thirty five years on the 25th day of July 1933.
>
> 5. Upon Trust to convey the immovable property belonging to my trust estate to my said son Lewis Anthony Morais on his attaining the age of Thirty five years on the 25th day of July 1933 subject to the following reservations restrictions and conditions that

is to say that the said Lewis Anthony Morais shall in no wise sell mortgage or otherwise alienate or encumber the immovable property belonging to my said trust estate or any portion thereof but shall only have possess and enjoy the rents issues and profits arising and accruing therefrom during the term of his natural life and that at his death the said immovable property shall devolve on his lawful son or sons only (if more than one, in equal shares) absolutely but if there be no lawful son surviving him at his death then and in that event the same shall devolve on his lawful daughter or daughters (if more than one, in equal shares) absolutely the lawful issue of a deceased son or daughter taking the share to which his her or their parent would have become entitled if living. But in the event of the said Lewis Anthony Morais dying without leaving any lawful issue or other descendants surviving him then and in that event the said immovable property shall devolve absolutely on the heirs of the said Lewis Anthony Morais. Provided however that in the event of my said son Lewis Anthony Morais dying before attaining the age of thirty five years I direct my trustees to convey the immovable property belonging to my trust estate to the lawful son or sons only (if more than one, in equal shares) of my said son Lewis Anthony Morais absolutely upon his or their attaining the age of twenty one years and in the meantime to administer the trust estate in their absolute discretion but if there be no lawful son or sons surviving him then to the daughter or daughters (if more than one, in equal shares) of my said son Lewis Anthony Morais absolutely upon her or their attaining the age of twenty one years or marrying whichever event first occurs and in the meantime to administer the said trust estate in their absolute discretion the lawful issue of a deceased son or daughter taking the share to which his or her or their parent would have become entitled if living and in the event of my said son Lewis Anthony Morais leaving no lawful issue or other descendants surviving to the lawful heirs of the said Lewis Anthony Morais absolutely.

7. Upon trust to sell and convert into money such of the said immovable properties belonging to my trust estate as my said trustees shall in their absolute discretion think advisable or expedient to sell by reason of the said properties not giving a fair or reasonable rent income or return therefrom and from the proceeds sale thereof to purchase other immovable property or properties and any such immovable property or properties purchased as aforesaid shall form part of my trust estate and be subject to the same trusts as are herein expressed and contained.

9. And I direct that my said trustees shall keep regular accounts of all rents income profits and other monies received by them and of all moneys expended by them and deposit the balance in one of the Banks in Colombo and to apply such balance from time to time as my said trustees shall think fit in the purchase of immovable property and any property so purchased shall form part of my trust estate and be subject to the same trusts as are herein expressed and contained.

10. And I further direct that my said trustees shall be entitled at all times during the continuance of this trust to put up buildings and effect improvements to all or any of the properties belonging to my said trust estate under the powers contained in clauses 7 and 9 aforesaid."

The testator died on 3rd February 1918 and his will was proved on 10th June 1918. Between the date of his death and the attainment by his son Lewis of the age of 35 years the trustees in exercise of the

power given them by clause 7 sold some of the immovable properties forming part of the trust estate devised to them and bought other immovable properties with the proceeds of sale. Lewis having attained the age of 35 on 25th July 1933 the trustees on 21st September 1933 executed a deed which after reciting the relevant parts of the will of the testator, stating that the immovable property devised to them by the testator consisted of the several properties described in Schedules A and B and that they had sold the properties described in Schedule B and purchased those described in Schedule C under the powers given them by the will continued as follows:

> "AND WHEREAS it is deemed expedient that the said Trustees should execute These Presents for the purposes of conveying the said several properties and premises in the Schedules A and C hereto fully described to and vesting the same in the said Lewis Anthony Morais subject however to the reservations restrictions and conditions in the said Last Will and Testament of the said Marianu Morais and hereinbefore recited.
>
> NOW KNOW YE AND THESE PRESENTS WITNESS that the said Maria Joseph Carwalho, Bernard Miranda and Stephen Corera as Trustees as aforesaid in consideration of the premises do and each of them doth hereby grant, convey, assign, transfer and set over unto the said Lewis Anthony Morais all those the several properties and premises in the Schedules A and C hereto fully described together with all rights privileges easements servitudes and appurtenances whatsoever to the said several properties and premises belonging or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right title interest property claim and demand whatsoever of the said Marianu Morais deceased and of them and each of them the said Maria Joseph Carwalho, Bernard Miranda and Stephen Corera as Trustees as aforesaid in to out of or upon the same.
>
> TO HAVE AND TO HOLD THE SAID several properties and premises hereby conveyed unto the said Lewis Anthony Morais, subject to the following reservations and restrictions that is to say that the said Lewis Anthony Morais shall in no wise sell Mortgage or otherwise alienate or encumber the said properties and premises hereby conveyed or any portion thereof but shall only have possess and enjoy the rents issues and profits arising and accruing therefrom during the term of his natural life and that at his death the said properties and premises shall devolve on his lawful son or sons only (if more than one in equal shares) absolutely but if there be no lawful son surviving him at his death then and in that event the same shall devolve on his lawful daughter or daughters (if more than one in equal shares) absolutely the lawful issue of a deceased son or daughter taking the share to which his, her or their parent would have become entitled to if living but in the event of the said Lewis Anthony Morais dying without leaving any lawful issue or other descendants surviving him then and in that event the said property and premises hereby conveyed shall devolve absolutely on the heirs of the said Lewis Anthony Morais."

Lewis married twice. By his first wife who died in 1923 he had two children—a son who died in infancy and a daughter the respondent. In 1927 he married the appellant but there were no children of that marriage. On 4th July 1947 Lewis and the appellant made a joint will each leaving his or her property to the other and on 2nd September 1958 Lewis died leaving the appellant him surviving.

On Lewis' death the respondent claimed the properties described in Schedules A and C to the deed of 21st September 1933 on the footing

that her father had held them subject to a *fidei commissum* in her favour. The appellant on the other hand contended that her husband was free to dispose of them by his will and after his death she entered into possession of them or into receipt of the rents and profits arising from them.

On 15th July 1962 the respondent filed a plaint (No. 9929/L) against the appellant in the District Court of Colombo in which she relied or purported to rely on two separate causes of action. In the paragraphs setting out her first cause of action she alleged that the testator had become the owner of the property described in Schedule A to the plaint (which was one of the properties described in Schedule A to the deed of 21st September 1933) under a deed dated 4th October 1900. She then referred to the will and death of the testator, the deed of 21st September 1933 and to the marriages, family and death of Lewis and continued as follows:

> "9. Upon the death of the said Lewis Anthony Morais the Plaintiff abovenamed became the owner of the land and premises described in Schedule 'A' hereto.
>
> 10. Since the date of the death of the said Lewis Anthony Morais the Defendant abovenamed who is widow has been in wrongful and unlawful possession of the said land and premises without any manner of right or title and has been disputing the Plaintiff's title thereto.
>
> 11. By reason of the wrongful and unlawful possession of the said lands and premises the Plaintiff has sustained damages at Rs.180/- per month aggregating to Rs.8,340/- and is continuing to sustain damages at the said rate.
>
> 12. A cause of action has therefore accrued to the Plaintiff to sue the Defendant (*a*) for a declaration of title to the said land premises more fully described in the Schedule 'A' hereto, (*b*) for ejectment of the Defendant from the said premises more fully described in Schedule 'A' hereto, (*c*) for the recovery of the sum of Rs.8,340/- from the 2nd day of September 1958 to date hereof and for the recovery of continuing damages at Rs.180/- per month from date hereof till date of delivery of the said land and premises more fully described in Schedule 'A' hereto to the Plaintiff."

In the paragraphs of her plaint setting out her alleged second cause of action she repeated the facts already stated as to the will and death of the testator, alleged that on 3rd December 1924 the trustees had purchased the property described in Schedule B to the plaint (which was one of the properties described in Schedule C to the deed of 21st September 1933) out of monies lying to the credit of the trust estate and repeated the averments already made as to the deed of 21st September 1933 and the marriages, family and death of Lewis. The plaint then continued as follows:

> "20. Upon the death of the said Lewis Anthony Morais the Plaintiff abovenamed became the Owner of the land and premises described in Schedule 'B' hereto.
>
> 21. The Plaintiff avers that since the date of the death of the said Lewis Anthony Morais the Defendant abovenamed who is his widow has been in wrongful and unlawful possession of the said land and premises without any manner of right or title and has been disputing the Plaintiff's title thereto.
>
> 22. By reason of the wrongful and unlawful possession of the said land and premises more fully described in Schedule 'B' hereto the Plaintiff has sustained damages at Rs.400/- a month aggregating to Rs.18,535/- and is continuing to sustain damages at the same rate.

23. A cause of action has therefore accrued to the Plaintiff to sue the Defendant.

(*a*) for a declaration of title to the said land and premises more fully described in Schedule 'B' hereto.

(*b*) for the ejectment of the Defendant from the said land and premises more fully described in Schedule 'B' hereto.

(*c*) for the recovery of the sum of Rs.18,535/- from the 2nd September 1958 to date hereof and for the recovery of continuing damages at Rs.400/- per month from date hereof till date of delivery of the said land and premises described in Schedule 'B' hereto.

24. The Plaintiff avers that the value of the subject matter of this action aggregates to Rs.136,875/-.

WHEREFORE THE PLAINTIFF PRAYS

(*a*) that the Plaintiff be declared entitled to the said land and premises described in the Schedule 'A' and Schedule 'B' to the plaint.

(*b*) that the Defendant be ejected from the land and premises described in the schedules to the plaint and that delivery of possession of same be given to the Plaintiff.

(*c*) for the recovery of Rs.26,875/- as accrued damages from the 2nd day of September 1958 to date hereof and continuing damages at Rs.580/- per month till delivery of possession of the said land and premises more fully described in the said Schedule to the Plaintiff with interest in the aggregate amount of the decree at 5 per centum per annum commencing from the date of the decree to date of payment in full.

(*d*) for costs and

(*e*) for such other and further relief as to this Court shall seem meet."

On 17th December 1962 the appellant filed an answer asserting that she was the owner of the two properties described in the Schedule to the plaint and rightfully in possession of them. Having in the plaint 9929/L selected two representative properties in respect of which to sue, the respondent's advisers apparently later decided that it was desirable to sue in respect of the other properties as well and on 13th May 1963 the respondent filed another plaint (10207/L) in the District Court of Colombo relying on thirteen causes of action, ten relating to other properties in Schedule A to the deed of 21st September 1933 and three relating to other properties in Schedule C. The paragraphs in the plaint relating to each cause of action were "*mutatis mutandis*" to the like effect as the paragraphs in the first plaint already referred to and the relief claimed was in each case the same—namely a declaration of the respondent's ownership of the property in question, possession, mesne profits and costs.

The answer of the appellant filed on 16th September 1963 as well as alleging that she was the owner of and rightfully in possession of the properties in question contained the following paragraph:

"4. (*a*) The plaintiff had instituted against this defendant proceedings No. 9929/L of this Court for the recovery of two allotments of land and premises with buildings standing thereon bearing assessment (1) No. G 20 (1–12) Brassfounder Street Colombo and (2) 219, 223, 225, 227 (1–3) 231, 233, and 239 Jampettah Street on the ground that these belonged to the estate of Mariam Morais or were purchased out of the funds of the said estate and that the same had devolved on her.

(*b*) Though grouped under thirteeen items in this case the claim for the recovery of thirteen lands, is on the same ground as in 9929/L.

(*c*) This defendant states that the plaintiff having omitted to sue in respect of, or intentionally relinquished to claim the thirteen lands in proceedings No. 9929/L is debarred in law from now suing in respect of the thirteen lands so omitted or relinquished."

Both actions were fixed for trial on 23rd November 1964. On that day counsel for the respondent (plaintiff) asked the judge to hear the second action (10207/L) first notwithstanding that it was later in date as the value of the properties to which it related was greater. This application was resisted by counsel for the appellant (defendant) but the judge acceded to it and the second action was tried on several days in November and December 1964. By the decree of the District Court dated 17th March 1965 the respondent (plaintiff) was declared to be the owner of the thirteen properties to which the action (10207/L) related and the appellant (defendant) was ordered to give up possession of them and to pay damages at differing monthly rates in respect of each of them. The other action (9929/L) has not yet been tried.

The appellant appealed to the Supreme Court against the decree in the action 10207/L but on 11th July 1968 the Supreme Court affirmed the judgment of the District Judge.

In the courts below the appellant relied on a number of grounds of defence to the respondent's claim but only two points were argued on her behalf before the Board. One was that the will of the testator did not create an effective "*fidei commissum*" in favour of the respondent. The other was that raised in paragraph 4 of the appellant's defence set out above. Their Lordships will deal with them in that order.

The "fidei commissum" point

Counsel for the appellant did not suggest that there was any doubt as to what the testator intended to achieve by the dispositions which he made. He obviously intended that his trustees should manage the immovable properties until his son was 35 years old; that then the properties should be transferred to him; but that he should have beneficially no more than a life interest in them and that on his death they should pass in the events which happened to the respondent. Further, counsel did not suggest that the intentions of the testator could not have been given effect to by a will framed in appropriate terms. His contention was that though the testator meant Lewis to hold the properties as fiduciary no effective "*fidei commissum*" was created (*a*) because Lewis did not take the properties under an immediate gift taking effect on the testator's death but only after an interval and under a conveyance made by the trustees in pursuance of a direction in the will and (*b*) because the trustees were given power under clause 7 to sell any or all the properties devised to them by the testator and were not under an obligation to re-invest the proceeds of sale in immovable property or at all events might not in fact have so re-invested the proceeds when Lewis attained 35 and that a *fidei commissum* could not be created in respect of money. In their Lordships' view there is no substance in either of these contentions. As to the first there is no doubt that a "trust" as well as a "*fidei commissum*" is recognised by the Law of Ceylon and that the directions given to the trustees with regard to the management of the properties while Lewis was under 35 and their conveyance to him when he attained 25 were perfectly valid. Counsel could not refer their Lordships to any authority supporting his submission that the fiduciary under a *fidei commissum* must take the property as legatee or devisee immediately on the death of the testator and that

it is not competent to a testator to do what this testator evidently intended to do—namely to create a trust for a period followed by a *fidei commissum* taking effect by the joint operation of the will and a conveyance by the trustees to the fiduciary in pursuance of directions contained in it. Their Lordships can see no objection in principle to such a disposition and in the absence of authority they are certainly not prepared to lay down a rule which would have the effect of defeating the clear intention of the testator. As to the second contention counsel for the appellant quoted no authority for his submission that a *fidei commissum* could not be created in respect of money—and counsel for the respondent was not prepared to accept it as correct. But even if one assumes that it is correct their Lordships cannot see how the proposition advances the appellant's case. Under clause 7 the trustees had no power to leave the proceeds of sale in the form of cash for an indefinite period but were under a duty to re-invest them in immovable property within a reasonable time. The powers given them by clause 7 certainly did not confer on them—as counsel suggested—a discretion whether or not to create a *fidei commissum* over all or any of the properties devised by the testator. The most that can be said is that if on Lewis attaining 35 there had been in the hands of the trustees some proceeds of sale which had not yet been re-invested a question might possibly have been raised as to whether or not such proceeds of sale should be treated as immovable property—as they certainly would have been under the English doctrine of "conversion". This question did not in fact arise. Their Lordships agree with the courts below that there is no substance whatever in the *fidei commissum* point.

Is the action barred?

The point raised by paragraph 4 of the defence depends on s.34 of the Civil Procedure Code, which is in the following terms:

> "34. (1) Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.
>
> (2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.
>
> (3) For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

Section 5 of the Code contains the following definitions of "action" and "cause of action"

> "5. . . .
>
> 'action' is a proceeding for the prevention or redress of a wrong;
>
> 'cause of action' is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury;"

The contentions of the parties on this point may be stated as follows. The respondent says that if a plaintiff is asserting his ownership of and right to possession of several distinct properties, then even though his title to them arises under the same document and the defendant denies his title and right to possession to all of them at the same time and

on the same grounds he has a separate cause of action in respect of each property. The appellant on the other hand says that in a case like this where the respondent is claiming all the properties described in Schedules A and C of the deed of 21st September 1933 under the joint operation of the will of the testator and that deed and on the death of Lewis the appellant denied her title to all the properties on the same grounds the respondent has in truth only a single cause of action covering all the properties.

Before considering which view is to be preferred their Lordships must deal with two subsidiary points. The first relates to the respondent's state of mind when she started her first action. The use of the word "omits" in subsection (2) shows that the second action will only be barred if the plaintiff when he first "sued" knew that he could have included further claims in respect of the cause of action in question but chose not to do so. Counsel for the respondent submitted that it was for the appellant to show that the respondent knew the full extent of her claim when she first sued, to which counsel for the appellant replied that it was for the respondent to show that she did not know her rights. In their Lordships' view even if the respondent is right as to the "onus" there cannot be any real doubt in this case that she knew when she started the first action that she had claims against the appellant not only in respect of the two properties referred to in her plaint in that action but also in respect of the other properties set out in Schedules A and C to the deed of 21st September 1933 of the terms of which she was well aware.

The second subsidiary point is whether s.35 (2) can in any event apply to a case such as this where the first action has not yet come to trial. In his judgment in the Supreme Court De Kretser J. gave as an alternative ground for dismissing the appeal that the word "afterwards" means after judgment in the first action and their Lordships are disposed to agree with him. What claims are included or not included in the first action cannot be finally determined while the action is pending since up to the date of judgment the plaintiff may discontinue it or obtain leave to amend his pleadings. But their Lordships are unwilling to dispose of this appeal on a narrow ground which might still leave open the question whether the respondent could continue to prosecute the first action after judgment obtained in the second. Accordingly they will consider how the matter would stand if the respondent had obtained judgment in the first action.

The actions 9929/L and 10207/L are what are called in Roman Dutch law "*rei vindicatio*" actions—*i.e.* proceedings by which the plaintiff asserts his title to and his right to possession of a particular thing. The basis of the judgments below on this aspect of the case is simply that each of the properties separately described in Schedules A and C to the deed of 21st September 1933 is a separate "*res*" and that the aggregate of those properties cannot properly be viewed as a separate "*res*" of which the respondent can be regarded as having been dispossessed by a single act of the appellant giving rise to a single cause of action. That the courts of Ceylon do in fact look at this sort of question in this way appears from the case of *Kaluhamy v. Appuhamy* (1914) 18 N.L.R. 87, to which counsel for the respondent referred their Lordships. Counsel for the appellant rested his case on the decision of the Board in an Indian appeal—*Mohammad Khalil Khan and Others v. Mahbub Ali Mian and Others* (1949) All Indian Reports Vol. 36 p. 78. There the Board had to consider the application to the facts of that case of order 2 rule 2 of the Indian Civil Procedure Code, which is—as counsel for the respondent admitted—for practical purposes in the same terms as section 34 of the Civil Procedure Code of Ceylon. The facts there were that a lady R. who died intestate owned lands in Oudh and other lands in Agra. Three sets of persons who may be referred to as

K. M. and A. laid claim to R's estate on different grounds. In India there are proceedings—unknown to the law of Ceylon—called "mutation proceedings" in which a Revenue tribunal can decide which of various claimants to the property of a dead man ought to be put into possession—and become liable to tax—pending and without prejudice to a final decision as to ownership in the appropriate tribunal. In this case "mutation proceedings" in the respective Revenue Courts of Oudh and Agra resulted in A. being put in possession of the Oudh lands and M. being put into possession of the Agra lands. Meanwhile M. and K. each started actions in the Oudh courts asserting title to the Oudh lands and making the other claimants defendants. These two actions were tried together and resulted in K. being declared owner of the Oudh lands. In the course of these proceedings K's counsel sought leave to amend his claim by including in it a claim to the Agra lands as well, but this application was refused. Some years after the decision in their favour as to the Oudh lands K. started an action against M. claiming to be owner of the Agra lands. It was held by the Privy Council affirming the judgments below that this action was barred by order 2 rule 2 of the Civil Procedure Code because the claim of K. to the Agra lands was a claim in respect of the same cause of action as their claim in respect of the Oudh lands—namely, that they were the rightful heirs of R.—and that as they had omitted to sue for the Agra lands in their first action they were not entitled to bring the second action. The Supreme Court of Ceylon sought to distinguish this Indian case from the present case on various grounds which counsel for the appellant contended—as their Lordships think with much force—were none of them distinctions of substance. It was said, for instance, that the Indian code contained no definition of the phrase "cause of action", that the Indian rules with regard to joinder of parties were different from those obtaining in Ceylon, and that Ceylon law knew nothing of "mutation proceedings". This is all true; but none of these distinctions are real grounds of difference. There can, their Lordships think, be no doubt that in a case where the facts are such as they were in this case or in the Indian case the courts of the two countries approach the matter differently. The Indian courts say that looking at the substance of the matter there is only a single issue between the parties—namely, whether the claimant was the heir of the testator or a fidei commissary under a given will—whereas the courts of Ceylon say that there are as many separate causes of action as there are distinct parcels of land. But India and Ceylon are different countries with different systems of law and although the wording of the two legislative provisions is the same their Lordships would not think it right to say that the application of the words to the same set of facts must be the same in each country unless it could be said that only one view was reasonably tenable. Their Lordships are unable to say that here. It is certainly not unreasonable to say that there was really only one issue in this case—namely, whether the respondent was fidei commissary under the will of the testator. On the other hand one cannot say that the Ceylon approach is unreasonable. No doubt the question what does or does not constitute a separate "*res*" is a question of degree. If the contest is as to the ownership of a farm it would not be reasonable to say that the plaintiff had a separate cause of action in respect of each field which happened to be separately delineated on the plan. But here the various properties described in Schedules A and C to the deed of 21st September 1933 were separate properties, yielding different rents; and there is nothing unreasonable in saying that a claim to the ownership of each of them is a claim in respect of a separate cause of action.

For these reasons their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal to the Board.

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In the Privy Council

JOSEPHINE MARY ALOYSIA MORAIS

v.

FRANCESCA VICTORIA

DELIVERED BY

LORD CROSS OF CHELSEA

Printed by HER MAJESTY'S STATIONERY OFFICE

1972