

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No GYCV2020/004
Guyana Civil Appeal No 53 of 2013**

BETWEEN

MERLENE TODD

APPELLANT

AND

AND DESIREE PRICE

FIRST RESPONDENT

in her capacity as the Executrix of the
Estate of Allan Price, Deceased,
whereof Probate was granted to her on
the 6th day of December 2010 and
numbered 987 of 2010

AND

ANN JENNIFER JEBOO

SECOND RESPONDENT

Also known as Marie Gloria Elizabeth
Joyeux, added pursuant to the Order of
this Honourable Court dated the 24th
day of August 2020

Before The Honourable: **Mr Justice J Wit, JCCJ**
 Mr Justice W Anderson, JCCJ
 Mr Justice D Barrow, JCCJ
 Mr Justice A Burgess, JCCJ
 Mr Justice P Jamadar, JCCJ

Appearances

Mr Manoj Narayan with Mr. Rajendra Jaigobin and Ms. Anuradha Deodasingh for the Appellant

Mr K. A. Juman-Yassin, SC and Mr Teni Housty for the First Respondent

No appearances for the Second Respondent

Land – Immovable property – Transport – indefeasibility – fraud – whether appellant privy to fraud of second respondent - whether gross negligence is equivalent to fraud – whether fraud was adequately pleaded in relation to the appellant - whether the Court of Appeal was entitled to overturn the findings of fact of the trial judge - Deeds Registry Act Cap. 5:01 s22.

Allan Price (now deceased) owned the West Half of Lot 153 Queenstown, Georgetown. In February 2004, Ann Jennifer Jeboo, claiming to act on behalf of Price, used a Power of Attorney to sell the lands to Todd, who obtained a transport. It was subsequently discovered that the Power of Attorney was fake and Jeboo was convicted of fraud. Price sued both Jeboo and Todd in the High Court seeking to set aside the sale and have the transport declared void.

By section 22 (1) of the Deeds Registry Act, every transport vests in the transferee full and absolute title, but the proviso to the section contains an exception of a transport obtained by fraud in the hands of all parties or privies to the fraud. Price's claim against Jeboo was a straight case of fraud. His claim against Todd was not fraud or privity to fraud. Rather, he claimed that by her negligence she 'contributed' to Jeboo's fraud and the loss of his property. Price died before trial and the claim was continued by his widow, Desiree Price. Following a full trial in the High Court, Chang CJ delivered a written judgment in which he found that no fraud had been pleaded against Todd, that it was impermissible at the trial to advance a case of fraud against her, and that in any event there was no evidence that she was privy to the fraud. Accordingly, he refused to declare the transport to Todd void and to set it aside.

Desiree Price appealed this decision and asked the Court of Appeal to find that Merlene Todd was a party to the fraud. Merlene Todd challenged the appeal by arguing that allegations of fraud had not formed part of the pleadings. On 16 March 2020, the Court of Appeal allowed the appeal and found inter alia that Todd's gross negligence made her a party to the fraud. The court declared that the transport was null and void. Todd appealed the Court of Appeal's decision.

The CCJ allowed the appeal and set aside the orders of the Court of Appeal. The CCJ's judgment was delivered by the Honourable Mr Justice Anderson and Honourable Mr Justice Barrow. Barrow JCCJ found that the allegations of fraud had not been pleaded and Todd was not given an opportunity to respond to these allegations or to defend herself against these allegations. It is well established that allegations of fraud must be properly and adequately pleaded. The allegations of gross negligence were also not pleaded and the Court of Appeal erred in equating gross negligence to fraud. Anderson JCCJ expressed that an appellate court ought to be especially slow in overturning a trial judge's determination of the scope of the pleading, especially where it appears that the scope of those pleadings, as found by the judge, was accepted by the parties. In these circumstances the Court of Appeal was wrong to find that Todd was a party to the fraud.

Barrow and Anderson JCCJ found that the Court of Appeal erred in drawing the inferences and finding the facts they did and, more fundamentally, in the way they conducted the fact finding exercise. Anderson JCCJ expressed that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was “plainly wrong” and should not interfere unless the inferences drawn by the trial judge were “plainly unreasonable”. Finding that the original landowner had been deprived of his land through no real fault of his own, Anderson JCCJ expressed that this showcased the need for legislative reform.

Separate judgments were delivered by the Honourable Mr. Justice Wit and the Honourable Mr. Justice Jamadar, who both reasoned that the approaches to the law as well as the outcome of this appeal, did not seem satisfactory or just. The Honourable judges suggested that a) there may be other legal approaches that could have resulted in different outcomes and explored those possibilities, and b) that the legislature should review and amend the Deeds Registry Act to refine or improve the law to meet the needs of current land law realities in Guyana. Jamadar JCCJ also suggested that the Deeds Registry Act needs to be reviewed and an assessment made whether it passes constitutional muster in Guyana, and if not, what modifications are required to do so, explaining why this should be done.

Todd’s appeal was therefore allowed, the orders of the Court of Appeal set aside and the Orders of the Chief Justice, restored, including the order as to costs.

Cases referred to

Armitage v Nurse [1997] EWCA Civ 1279; *Assets Co- Ltd- v Mere Roihi* [1905] AC 176.; *Attorney General of Guyana v Richardson* [2018] CCJ 17 AJ, (2018) 92 WIR 416, [2018] 4 LRC 488; *Baynes v Price* (1949) LRBG 99; *Belize International Services Limited v The Attorney General of Belize* [2020] CCJ 9 (AJ), [2021] 1 LRC 36; *Bisnauth v Shewprashad* [2009] CCJ 8 (AJ), (2009) 79 WIR 339; *Boyd v Mayor of Wellington* [1924] NZLR. 1174; *Brelsford v Providence Estate Ltd* [2018] 3 LRC 513; *Breskvar v Wall* (1971) 126 CLR 376; *Campbell v Narine* [2016] CCJ 07 (AJ), (2016) 88 WIR 319; *Coddett v Thomas* [1957] LRBG 181; *Collymore v George* (2008) 72 WIR 229; *Crabb v Arun DC* 1976 Ch 179, [1975] 3 All ER 865; *Creque v Penn* [2007] UKPC 44, (2007) 70 WIR 150; *Durrani v Augier* 50 O.R.(3d) 353; *Francis v The State*(2014) 86 WIR 418 ; *Frazer v Walker* [1967] 1 AC 569; *Gibbs v Messer* [1891] AC 248; *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Henderson v Foxworth Investments Ltd.* [2014] 1 WLR 2600, [2014] UKSC

41; *Joseph and Boyce v Attorney General* [2006] CCJ 3, (2006) 69 WIR 104, [2007] 4 LRC 199; *King v Bissember and Mc David* (1951) LRBG 107; *Kwang v Yokkei* [2016] CCJ 9 (AJ), (2016) 88 WIR 339; *Nelson v Odle* (1939) LRBG 24; *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ), (2018) 92 WIR 178, [2018] 4 LRC 545; *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332; *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32; *Minister of Home Affairs v Fisher* (1979) 3 All ER 21; *Oh Hiam v Tham Kong* [1980] UKPC 18; *Pilcher v Rawlins* (1872) LR 7 Ch App 259; *Phillips v Phillips* (1862) 4 De G. F. & J. 208, 45 Eng Rep 1164; *Public Service Appeal Board v Maraj* [2010] UKPC 29, (2010) 78 WIR 461; *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ); *Ramkishun v Fung Kee Fung* [2010] CCJ 2 AJ, (2010) 76 WIR 328; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532; *Re Samson ex parte Official Receiver* (1922) LRBG 133; *Shell Chemical UK Ltd v Vinamul Ltd (formerly Vinyl Products Ltd)* The Times 7 March 1991, (1991) 135 SJ 412; *Spread Trustee Company Ltd v Hutcheson and Others* [2011] UKPC 13, [2012] 2 AC 194; *Subhas Ramdeo v Herallall* [2009] CCJ 3 (AJ), (2009) 79 WIR 320; *Suratt v The Attorney General* 2007 UKPC 55, (2007) 71 WIR 391; *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688; *Thakur v Ori* [2018] CCJ 16 (AJ); *The Earl of Oxford's case* (1615) 1 Rep Ch 1, 21 ER 485; *The Medical Council of Guyana v Sahadeo* [2016] CCJ 14 (AJ); *Three Rivers District Council v Governor and Company of the Bank of England (No: 3)* [2001] UKHL 16, [2003] 2 AC 1.

Legislation referred to

Guyana - Civil Law of Guyana Act, Cap 6:01, Deeds Registry Act Cap. 5:01, Land Registry Act Cap 5:02; **Jamaica** - The Registration of Titles Act; **Saint Lucia** - Land Registration Act Chapter 5:01; **Trinidad and Tobago** - The Real Property Act Chapter 56:02.

Other Sources referred to

Asser C and Beekhuis JH, *Zakenrecht, Tweede Deel* (9th edn, W. E. J. Tjeenk Willink); Agreement establishing the Caribbean Court of Justice (adopted 14th February 2001, entered into force 23 July 2002) 2255 UNTS 319; American Convention on Human Rights, "Pact of San Jose", Costa Rica, (Adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; Apeldoorn LJ van, *Levering en titel van eigendomsovergang in het oude Nederlandse recht*, WPNR 3130-3131; Badenhorst PJ, Pienaar JM and Mostert H, *Silberberg and Schoeman's The law of Property* (5th edn, LexisNexis Butterworths 2006); Best L, 'Outlines of a Model of Pure Plantation Economy', (1968) 17 *Social and Economic Studies* 283; Bishop V, 'A Culinary Paradigm Shift', *Trinidad Express Newspapers* (Port of Spain, 6 January 2021); Bobbitt P, *Constitutional Interpretation* (Blackwells 1991); Chapman G,

- *Revenge for Honour* (1654); Dalton, L I C, *The Civil Law of British Guiana : being the Civil Law of British Guiana Ordinance, 1916, with all Amendments, and with Notes, Cases, Index and Appendix of Ordinances* (The Argosy Co 1921); Di Castri V, *Registration of Title to Land* (Carswell, 1987) vol 2; Dickens C, *Oliver Twist*, (1838); Foss S, *The Calf-Path* (1895); Hayton D, 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems'. (2012) *The Conveyancer and Property Lawyer*: 263; Huhn W, *The Five Types of Legal Argument* (2nd edn, 2007); Huhn W, *The Five Types of Legal Argument* (3rd edn, 2014); Lee RW, *An Introduction to Roman-Dutch Law*, 4th edn, Clarendon Press 1946; O'Connor P, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13, *Edin LR* 194; Panaritis E and Kostopoulos A, 'Guyana Property Rights Study' (IADB Discussion Paper No IDB-DP-141, 2010); Pantin D, 'The Plantation Economy Model and the Caribbean' (1980) 12 *The IDS Bulletin* 17; Ramsahoye F, *The Development of Land Law in British Guiana*, (Dobbs Ferry, NY, Oceana Publications 1966) 277; Record of Appeal Merlene Todd and Desiree Price (7 September 2020), Shortpants (Llewellyn Mac Intosh), 'The Law is an Ass' (1979); *Snell's Equity*, 29th edn, Sweet & Maxwell 1990); *Snell's Equity* (30th edn, Sweet & Maxwell 2000); *Snell's Equity*, (33rd edn, Sweet & Maxwell 2016 ; Supreme Court of Guyana Civil Procedure Rules 2016; Teh GL, '*Breskvar v Wall: The End of Deferred Indefeasibility?*', (1974) 9 *Melbourne University Law Review* 381; Van der Merwe CG Sakereg, (2nd edn, Butterworths 1989), (with references to Grotius, Voet and Van Leeuwen); Williams E, *Capitalism and Slavery* (The University of North Carolina Press 1944);

JUDGMENT

of

The Honourable Justices Anderson, Barrow and Burgess

Delivered by

The Honourable Mr Justice Anderson and the Honourable Mr Justice Barrow

and

SEPARATE JUDGMENTS

of

The Honourable Mr Justice Wit

and

The Honourable Mr Justice Jamadar

Delivered on the 25th day of February 2021

JUDGMENT OF THE HONOURABLE MR JUSTICE DENYS BARROW, JCCJ:

Introduction

- [1] This appeal is against a finding of fraud made by the Court of Appeal reversing the express finding by the trial judge that the appellant was not privy to the fraud by which she obtained a transport to a parcel of land.
- [2] The Court is called upon to consider the important issue for Guyanese land law of what constitutes fraud under section 22 (1) of the Deeds Registry Act¹ ('the Act') in the unusual context of (a) the reversal of the trial court's finding of fact that there was no fraud and (b) fraud not having been pleaded against the appellant. By section 22 (1) of the Act, every transport vests in the transferee full and absolute title, but the proviso to the section contains an exception of a transport obtained by fraud in the hands of all parties or privies to the fraud. What arises for consideration in this case are the limitations on appellate courts to overturn the judge's findings on the section 22 (1) proviso.
- [3] This judgment outlines the factual contents of the case and considers the framework established by the Act for protecting and invalidating title because of fraud under section 22 (1) of the Act. The determinative question on this appeal regarding the power of the Court of Appeal to reverse the decisions of the trial judge is considered below in a separate judgment by Justice Anderson, JCCJ.

The forged power of attorney

- [4] The second respondent, Ann Jennifer Jeboo, was convicted on her guilty plea of offences related to the forging a power of attorney and sentenced to and served three years' imprisonment for the crime. The power of attorney purported to have been given by Alan Price, authorizing Jeboo, who represented herself to be his niece, to sell land being the West Half of Lot 53 Queenstown, Georgetown, held by Transport numbered 936 of 1979 ("the property"). In reliance on the forgery, Jeboo sold the property to the appellant, Merlene Todd. Todd had no knowledge that the Power of Attorney had been forged. It was never claimed in the pleadings

¹ Deeds Registry Act Cap. 5:01.

or otherwise that she knew of the forgery, and it was conceded in this Court that she did not.

[5] There was no disputing Todd's testimony as to the unexceptional way in which she went about making the purchase and obtaining transport. In April 2003, Todd became aware through a realtor that the property was for sale and that Jeboo was conducting the sale purportedly on behalf of Price, who was abroad, as his duly constituted attorney by virtue of a Power of Attorney registered in the Deeds Registry of the High Court. Todd met with Jeboo, negotiated the price, visited the property, attended at the Deeds Registry to verify the authenticity of the Power of Attorney which Registry staff confirmed to her as authentic and in due course, acting through a lawyer, purchased the property for \$4,000,000.00. On 16 February 2004, the Registrar of Deeds passed transport numbered 400 of 2004 transferring title to the property to Todd. The subsequent police investigation into Jeboo's forgery apparently did not implicate Todd since she was not charged.

[6] When he learned of the purported sale, Price reported the forgery to the police and brought a claim against both Todd and Jeboo to recover his property. His claim against Jeboo was a straight case of fraud. His claim against Todd was not fraud or privity to fraud. Rather, he claimed that by her negligence Todd 'contributed' to Jeboo's fraud and the loss of his property. Mr. Price died before trial and the claim was continued by his widow, Mrs. Desiree Price. Following a full trial in the High Court, Chang CJ delivered a written judgment in which he found that no fraud had been pleaded against Todd, that it was impermissible at the trial to advance a case of fraud against her, and that in any event there was no evidence that she was privy to the fraud. Accordingly, he refused to declare the Transport to Todd void and to set it aside. That left Todd with her title undisturbed, notwithstanding it had been transported to her by fraud, because she was not privy to that fraud.

Full and absolute title

[7] Section 22 of the Deeds Registry Act is the legal basis for the proposition, familiar to lawyers but disturbing to the ordinary person, that the lawful owner of land can lose that land by virtue of a forged document which everyone, including lawyers,

accept is void. The effect of the section is to make the title obtained by registering what would otherwise be a purely void document an absolute one. Section 22 states:

“22. (1) ... every transport of immovable property other than a judicial sale transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest therein described in that transport, ...”

The section goes on to create qualifications to that absolute title in favour of specified interests but none of them is relevant to this appeal. The section further goes on, in a proviso, to create a major exception in the case of fraud to the absoluteness of the title and this will be considered below.

[8] The absolute title created by section 22 (1) has come to be described as indefeasible. In *Frazer v Walker*² the Privy Council decided that a forged mortgage, upon being registered, pursuant to the relevant New Zealand legislation, the Land Transfer Act 1952, conferred upon the mortgagee a title to an interest that was immune from adverse claims and thus indefeasible, except in the case of fraud (to which the transferee was privy). The court decided that the conception of indefeasibility was central to the system of registration of title. Previous decisions that were applied to support the determination in *Frazer* dated back over 50 years,³ so it was no new principle being propounded.

[9] The highly legalistic nature of the indefeasibility created by the legislation is seen in the proposition that indefeasibility is achieved not by making good the fraudulent document. Rather, it confers indefeasibility by barring the original owner from bringing an action in the courts to recover the land. In New Zealand there was express provision in section 63 of the Land Transfer Act which provided that the register is, in every court of law or equity, to be an absolute bar to any action to recover land against the registered proprietor, any rule of law or equity to the contrary notwithstanding. In Guyana, that effect is achieved in rather less trenchant language in section 21 of the Act which says that the Registrar may not cancel a transport except pursuant to a court order. The immediately following

² [1967] 1 AC 569.

³ *Assets Co Ltd v Mere Roihi*, [1905] AC 176, and *Boyd v Mayor of Wellington* [1924] NZLR 1174.

proposition, in section 22, is that a transport is absolute, with provision for a court to declare it void only upon finding the holder was party or privy to obtaining the transport by fraud. In this appeal the indefeasibility of a registered transport was not challenged; the contention was that fraud rendered that otherwise indefeasible title liable to be declared void.

Who bears the loss

- [10] Before considering the matter of fraud it may be helpful to appreciate the rationale for a legislative construct that determines which of two innocent parties bears the loss: a landowner who has done nothing to lose the land or a person who innocently purchases from a fraudster? As indicated, section 22 of the Act ordains that a person loses their land once the fraudulently obtained transport is registered unless fraud is proved on the part of the holder of the new transport.
- [11] There is a principled basis for this conception. That basis is the vindication of the system of the registration of titles. To eliminate the uncertainties that arise in a system of land holding by paper title, the Act provides that once a transport is registered all persons may rely on that document as evidencing full and absolute title to that land. As land and title to land are so fundamental to the structure and existence of our societies the need to impose order and eliminate disputes and create certainty for all persons dealing with land for the myriad of reasons that people do, make it imperative that the legislature should make title indefeasible.
- [12] As a matter of policy, the vindication of the system of land registration that depends on the indefeasibility of a title that is registered is a straight case of choosing in favour of the public at large, who are entitled and obliged to rely on the register, over the interest of any single individual who may lose their land because of a fraudulently created document that becomes registered. It must be kept in mind that indefeasibility is conferred on a title because it can become registered only by certain practical and substantial steps that the Act and conveyancing practice provide must be taken to ensure that it is only an authentic document that is registered. These include searches at the Registry to confirm the authenticity of documents, certification by a notary public that a deed was truly executed by the person who is purported to have done so, and advertising

in the official Gazette of the transport to give notice to the world and to enable objections.

- [13] In this case, the forged power of attorney was relied on by Todd only because it was duly registered and had been so registered as no less eminent and trustworthy a person than the Deputy Registrar of Deeds had certified that Allan Price had personally appeared before him and affirmed that he had executed the power of attorney. In considering the matter of the loss that one or perhaps both innocent parties must suffer, fairness requires a recognition that the loss was caused not by a flaw or deficiency in the system but by the failure by a high official to properly perform his solemn duty under the Act.

Fraud

- [14] The factor of fraud is of overarching significance on this appeal because it was only by finding fraud on the part of Todd that the Court of Appeal was able to set aside Todd's title. Section 22(1), which makes a registered transport an absolute title, itself makes fraud capable of defeating that title by stating in a proviso:

‘Provided that any transport, ... obtained by fraud shall be liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud, ...’

- [15] As mentioned, Price, the claimant did not plead Todd was privy to fraud. Rather, the claimant pleaded that Todd was negligent in failing to take steps to ascertain whether the claimant was the true donor of the power of attorney. The particulars of negligence stated were that Todd failed to check the authenticity of the national identification card of the donor, the address given for the donor and other, unstated details of the genuineness of the purported sale.
- [16] It is important to be clear on what was the fraud in this case. Fundamentally, the fraud was Jeboo's forging of the power of attorney and procuring its registration. There is no suggestion that Todd was privy to the forgery and registration. The fraud also consisted of Jeboo acting in reliance on the forged document to execute a transport as the legally authorised agent of Mr. Price. This, it seems, is

the fraud that the Court of Appeal found Todd contributed to by, as they found, her gross negligence in failing to ascertain whether Mr. Price truly gave the power of attorney. The court went on to morph that gross negligence into privity to fraud. In essence, the court decided that Todd's negligence made her a party to Jeboo's fraudulent reliance on the power of attorney.

[17] In his judgment, Anderson JCCJ examines the exercise conducted by the Court of Appeal in arriving at their conclusion that fraud had been pleaded and that it was open to that court to make a finding of fraud against Todd. That examination adverts to but does not exhaust itself on the distinction between gross negligence and fraud and, with respect, there was no need to do so because the conclusion is that neither was pleaded. Therefore, that conclusion make it sufficient for me to state only in a summary way that negligence and gross negligence do not amount to fraud; *Three Rivers District Council v Governor and Company of the Bank of England (No.3)*⁴. No doubt gross negligence may consist of conduct that actually evidences dishonesty and amounts to proof that the perpetrator was privy to another's fraud. Clearly, that is not what was alleged against Todd in the pleadings and was not the case that was put to her to answer when she was testifying. The case pleaded was simple negligence consisting of arguably trite instances of failing to inquire and, it bears repeating and will be elaborated on below, neither negligence nor fraud was put to Todd at the trial.

[18] As a matter of procedural law, it was open to Todd, well before the claim was set down for trial, to have applied to the court to strike out the claim against her as incapable of succeeding. The ground for such an application would have been that even if the pleaded averments made against Todd were to be treated as proven, conduct amounting to negligence gave rise to no cause of action because the Act does not empower a court to declare a transport void on the ground of negligence. It would appear that it was precisely because the evidence at the trial was incapable of proving that Todd was privy to Jeboo's fraud that the Chief Justice took the course of rehearsing the testimony of each witness and then dismissing the claim against Todd, without recording his examining of the evidence for negligence. These matters are pursued in the judgment below.

⁴ [2001] UKHL 16, [2003] 2 AC 1 at [184]; see also *Armitage v Nurse* [1997] EWCA Civ 1279 at [37], *Spread Trustee Company Ltd v Hutcheson and Others* [2011] UKPC 13, [2012] 2 AC 194 at [51]

Finding of fraud on appeal

[19] In their separate oral judgments, each member of the Court of Appeal found that Todd was privy to the fraud of Jeboo. The court found this on the same evidence that the Chief Justice heard and recounted; no new evidence was put before the court. The common finding was of fraud in the form of fraud by way of gross negligence. As earlier indicated, gross negligence is not fraud and, in this case, neither gross negligence nor fraud was pleaded, with the consequence considered below by Anderson JCCJ.

Fairness and natural justice

[20] That treatment, with which I entirely agree, is determinative of this appeal but I consider it necessary to add the following observations, in view of the way in which the Court of Appeal felt minded to proceed. The observations begin with the principle that it is contrary to really fundamental principles of fairness and natural justice that a court should draw inferences and conclusions of facts without the person against whom they are drawn having been given any opportunity whatever to respond to these inferences and deny that they are the fact. A convenient demonstration of the error of proceeding in this way occurred in oral argument before this Court. Counsel for the respondent argued that when Todd attended at the Deeds Registry to satisfy herself as to the authenticity of the power of attorney, Todd should have compared the signature on the original transport held by Alan Price with the signature on the forged power of attorney. This failure, counsel submitted, evidenced the gross negligence of which he accused Todd. It was an unfair accusation to make because it was never put to Todd. What cogently brought home the unfairness was when, in defence to the accusation, counsel for Todd informed this Court that in the normal course of verifying the authenticity of a deed at the Deeds Registry, a member of the public is not normally given sight of a registered deed. Todd would, therefore, have had no opportunity to compare the forged signature with the genuine signature on the registered transport.⁵ When challenged by the Court, counsel for the respondent accepted that this was the fact and apologized to the Court for the unfounded and misleading assertion. The point is that if Todd, through

⁵ It is fanciful that an unsuspecting lay person, not looking out for forgery, would have detected a difference in signatures, since it is expected any competent forger would have presented a forgery that sufficiently resembled the genuine signature.

her lawyer, had not been given the opportunity to respond to the charge that she failed to compare signatures this Court would have been left to possibly believe that the charge was well founded.

- [21] This anecdote conveniently demonstrates the reason why it is an elementary principle that a person must be told of allegations against them and given the opportunity to respond. It shows how easily wrong conclusions can be left standing when that opportunity is denied. Regrettably, the Court of Appeal fell into this very error. The court took what were perfectly insignificant facts and converted them into accusations against Todd of gross negligence and suspicious behaviour. But these accusations had never been put to Todd who, therefore, had no hint that these matters were allegations against her or any opportunity to even say something about them far less defend against them. A brief review of two such allegations demonstrates the error of that course.

The allegation of undervalue

- [22] Firstly, all members of the Court of Appeal found it of great significance that Todd bought the property in the year 2004 for \$4,000,000.00 when the evidence was that the property had been valued at \$12,000,000.00 in the year 2000. This was taken by the court as a purchase at a huge undervalue which should have made Todd suspicious and she should, therefore, have inquired. It is striking that there is no evidence that Todd knew of the valuation at the time she purchased. Knowledge of the valuation or the suggestion that \$12,000,000.00 was the value was never put to Todd. That made it utterly unfair to have determined the appeal against Todd on the premise that she knew of that valuation at the time she purchased the property.

- [23] It was in any case unfair to conclude that the price Todd paid at the time was an undervalue and she should have been suspicious because of the undervalue. This was never put to Todd at the trial. To the contrary, Todd testified that she considered the price she paid was a fair price. She was not cross-examined on that testimony. Nothing was put to her as to why she should have been suspicious about the price she paid. She was not alerted to the need to call

evidence as to property values at the time when she purchased, and she called none.

- [24] The feature of price and value goes further. The Court of Appeal decided the case on the premise that at the time Todd purchased the property it was valued \$12,000,000.00. But the valuation evidence did not establish that. As indicated, the evidence was that in the year 2000 that was the value. The valuer for Price who testified to that value said that at the time of trial, in the year 2011, property values would have appreciated (although a valuation obtained by Todd was to the contrary). However, in cross examination that valuer accepted that values may have fallen in the year of purchase, but he gave no evidence as to the value of the property at the time of purchase. Consequently, there was nothing to say by how much the value of this property had fallen at the time when Todd bought. The entire valuation premise of the Court of Appeal's decision is, therefore, unsound.

Significance of emptiness

- [25] Secondly, the Court of Appeal also attached much significance to the fact that the property was described in the Transport as Lot No 53 "with the building and erections thereon" but when Todd visited the property she saw that it was an empty lot overgrown with bush. It is incomprehensible why the court attached any significance to this. It is common conveyancing practice for lawyers to state the description of land by reference to the surveying or town or country planning data and add a stock clause along the lines 'with the building and erections thereon' and it is entirely irrelevant to their drafting whether the parcel is empty or developed. It is what lawyers do. They routinely throw in those words in case there are buildings and erections on the land, or any is later placed on the land. In this case, the evidence indicates, and so it would be in the normal way, that it was not Todd or Jeboo who included those words in the transport but Todd's lawyer, who drafted the transport for signature.
- [26] More definitively, it was plain for the Court of Appeal to have seen that the lawyer would have gotten the description of the land from a copy of the earlier transport standing in the name of Alan Price, since this transport was an exhibit

in evidence in the case. That is the description that appears in Price's transport. It was, obviously, of no significance whatsoever that the transport in favour of Allan Price contained the superfluous reference to building and erections. It was equally of no significance whatsoever that the transport in favour of Todd also contained this superfluous appendage. The court erred in attaching the significance to this item that they did; again with Todd never having any opportunity to say how meaningless it was to her that the land was empty whereas the description in the transport referred to building and erections.

[27] A further brief observation may be made about the court's focus on the property being an empty lot. The court used that fact as raising suspicion because in the fraudulent transport to Todd, Allan Price's address was stated as Lot 153 Crown Street, but he could not have been living there because it was an empty lot. Again, had the court troubled to look at Mr Price's transport they would have seen that this transport gave that location as his address. It was obviously a simple case of the conveyancing lawyer using the same address for Allan Price in the transport he was drafting in favour of Todd, as appeared as Price's address in the transport in favour of Price, from which title derived. In any case, nothing could have been significant about the address used because it was common knowledge that Allan Price was living in the United States of America so any address in Guyana stated for him would have been purely nominal and a matter of convenience.

[28] It is clear that the Court of Appeal erred in drawing the inferences and finding the facts they did and, more fundamentally, in the way they conducted the fact finding exercise.

**JUDGMENT OF THE HONOURABLE MR JUSTICE WINSTON ANDERSON,
JCCJ:**

[29] I entirely agree that as a substantive matter, negligence, or even gross negligence, are not sufficient of or in themselves to satisfy the section 22 (1) proviso, as discussed by Mr Justice Barrow, JCCJ in his leading judgment in

this case. In this judgment I give reasons why I consider that, as a procedural matter, the Court of Appeal was wrong to overturn the trial judge.

- [30] At the outset, it is to be emphasized that the decisions (1) that fraud had been pleaded against Todd and (2) that there was sufficient evidence of fraud against her, were entirely the finding of the Court of Appeal. In his judgment delivered on the 30 August 2012, the trial judge, Chief Justice Chang, noted that the particulars of fraud which had been pleaded all related to Jeboo and were in respect of the forged Power of Attorney. There was no contention in the Statement of Claim that Todd was privy to any fraud. Rather, the contention was that Todd was guilty of negligence, a claim disputed by Todd. The learned Chief Justice refused to step outside the pleadings to accommodate allegations of fraud against Todd, which he found to be impermissible without amendment of the pleadings. That should have been the end of the matter, but the Chief Justice went on to conclude from the evidence that, in any event, Todd was not privy to the fraud committed by Jeboo. He therefore dismissed the claim against her but thereby opened up the possibility of future litigation on fraud.
- [31] The submissions by Price before the Court of Appeal alleged that Todd was privy to Jeboo's fraud and was guilty of constructive negligence. As regards fraud, Price argued that the trial judge had erred when he found that Todd was not guilty of any fraud or had knowledge of any fraud. Price contended that the decision was unreasonable and against the weight of the evidence, that the learned trial judge failed to consider all the relevant facts and had misdirected himself on the evidence in coming to conclusions that were without foundation.
- [32] It is unfortunate that written judgments were not delivered by the Court of Appeal and that, in consequence, this Court had to resort to the transcript of the oral proceedings in the Court of Appeal to ascertain the nature of the judgments rendered. From the transcript it appears that Persaud JA acknowledged that the pleaded claim against Todd was not based on her being privy to any fraud but on her perceived negligence and that negligence was not canvassed at the Trial. The learned Justice of Appeal considered that fraudulent intention had to be specifically pleaded particularised and proven and that general allegations are

impermissible. However, notwithstanding his finding that fraud was neither pleaded nor particularised and that negligence was not canvassed at the trial, and for reasons not immediately apparent from the transcript, Persaud JA went on to consider, purportedly as a matter of law and having regard to the interest of justice, whether Todd's conduct was "permeated by such gross negligence as to render it fraudulent or in other words could fraud be imputed here". He allowed the appeal as he drew inferences of fact based on the evidence different from that which had been drawn by the trial judge.

- [33] Gregory JA considered that the trial judge did not fully evaluate whether Todd was privy to Jeboo's fraud. The learned Justice of Appeal considered that fraud was sufficiently pleaded and held that had the trial judge fully evaluated the evidence, fraud ought to have been found in light of the authorities. Gregory JA considered that Todd's conduct "amounted to gross negligence so as to lead to a conclusion of fraud, namely a failure to inquire" and that "there was enough evidence that Merlene Todd by her conduct could be regarded as privy to the fraud of Ann Jennifer Jeboo". Similarly, Acting Chancellor Cummings-Edwards found that Todd was either grossly negligent or privy to the fraud. The Chancellor appears to have come to the view that as fraud was pleaded "in relation to the case" it followed that "the parties at all times knew what they had to meet."⁶

Was fraud adequately pleaded in relation to Todd?

- [34] It is well established that allegations of fraud must be properly and adequately pleaded. Order 17, Rule 6 provides that:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases where particulars may be necessary, particulars (with dates and times, if necessary) shall be stated in the pleading."

⁶ Record of Appeal, p 185.

[35] This Court has previously described this rule as “elementary” in *Subhas Ramdeo v Heralall*⁷ where Mr Justice David Hayton also noted that:

[3] ...An allegation of fraud is a very serious allegation, requiring that the person against whom fraud is alleged be made as aware as possible of what is alleged to be his fraudulent behaviour. This is a requirement that enables the defendant to be well-positioned to try to counteract such allegation and that also places the judge in a good position to make definitive findings in support of, or in rebuttal of, such allegation.

[36] In the present case the trial judge, who happened to have been the experienced Chief Justice, was careful to detail that the pleadings by Price contained no allegation of fraud against Todd. The Chief Justice pointed out, correctly, as is evident from the Statement of Claim, that the forging of the Power of Attorney was alleged against Jeboo and that the particulars of fraud all related to the conduct of Jeboo who almost contemporaneously with the start of the trial had pleaded guilty to fraud related offences in criminal proceedings and was sentenced to a term of imprisonment. The Chief Justice made the explicit observation that in the Statement of Claim Price “never made the allegation that ...[Todd]... was privy to any fraud”⁸. An examination of the Statement of Claim⁹ corroborates that fraud was not pleaded and was not specifically particularised against Todd. Indeed, the Notice of Appeal before the Court of Appeal did not specifically challenge the trial judge’s finding that fraud was not pleaded against Todd; a fact that appears to have been acknowledged by at least one member of the Court of Appeal;¹⁰ as indicated earlier, the other two members of the Court of Appeal appear to have conflated allegations of negligence with allegations of fraud.

[37] *Shell Chemical UK Ltd v Vinamul Ltd (formerly Vinyl Products Ltd)*¹¹ involved the issue of whether matters on which the defendants wished to rely ought to have been pleaded before the trial judge. The English Court of Appeal (Civil Division) agreed with counsel for the plaintiff that matters that were required by Rules of Court to be specifically pleaded must be pleaded to avoid taking the

⁷ [2009] CCJ 3 (AJ), (2009) 79 WIR 320.

⁸ Ibid p 168-169.

⁹ Ibid p 53-57.

¹⁰ Persaud JA.

¹¹ The Times 7 March 1991, (1991) 135 SJ 412, at p 4.

opposite party by surprise. Where a case fell into ‘a grey area’ where it may be said it does or does not comply with a particular rule, the correct approach of an appellate court was to hesitate ‘long before interfering with a decision of a learned judge, who is responsible for trying the case’. This is because the trial judge ‘will normally be in a very good position to assess whether the rule is being complied with or not’.

[38] I am of the view that an appellate court ought to be especially slow in overturning a trial judge’s determination of the scope of the pleading, especially where it appears that the scope of those pleadings, as found by the judge, was accepted by the parties. In addition to the trial judge’s familiarity with the contours of the case and thus ability to ascertain whether the pleading rules have been complied with, the trial would have proceeded on certain premises and shepherded by the judge based on certain presuppositions. A reordering of the scope of the pleadings by an appellate court could likely result in an entirely different case from that which was fought in the court below leading to issues of whether fundamental principles of fairness and natural justice have been observed. As Barrow JCCJ has observed, it was unfair for the Court of Appeal to draw inferences and conclusions of facts without the person against whom they are drawn having been given the opportunity to respond to these inferences and deny that they are the fact.

[39] It is also the case that differences between the trial judge and an appellate court on decisions on pleadings could encourage appeals on points of pleading. This would be most unfortunate. Matters of pleading must normally be left to the decision of the judge who conducts the trial unless there is some important point of principle involved. There was no such point of principle involved in the present case.

Was the Court of Appeal entitled to overturn the findings of fact by the trial judge?

[40] Having found that there had been no allegation of fraud in the pleadings against Todd and that it was not permissible to step outside the pleadings to pursue such an allegation, the Chief Justice found that “in any event, on the evidence” he was not able find that Todd was privy to the fraud of Jeboo. The Chief Justice

had the opportunity to observe all the witnesses and he carefully summarized the evidence of the six witnesses for Price. It was significant that one of those witnesses, Trevor Reid, Assistant Commissioner of Police, testified under cross-examination that he had “conducted an investigation into the forgery allegation and based on that investigation, Ann Jeboo was the only person charged”. Most importantly, the Chief Justice also had the opportunity to observe Todd who gave evidence on her own behalf.

[41] The Chief Justice was evidently satisfied that Todd had taken all reasonable steps to ascertain the authenticity of the Power of Attorney. He was evidently also satisfied with the evidence elicited through cross-examination of Price’s witness that the difference between the valuation of \$12,000,000 and the contract price of \$4,000,000 could be explained based on the admission of witnesses to knowing that properties were sometimes sold below market value. He would have evaluated the testimony of the witness that he could not say if the serious crime wave which undoubtedly existed in Georgetown at the time of the sale meant that persons could have sold their property below market value to achieve a quick sale to then migrate from the country. The judge was evidently not unduly detained by the fact that the Affidavit of the Vendor revealed that it was sworn to by Jeboo on 7th April 2003 whereas an examination of the Exhibit of the Affidavit of Vendor revealed that it was, in fact, sworn to on 10th April 2003. The judge accepted that the date was the 10th April 2003, noting that it was significant that it was filed with the Registrar of Deeds on 11th April 2003, the day following. Nor was the judge overly concerned that the Certificate of Compliance indicated that the property was being sold to Bryan Dick who was the father of Todd’s child. The Chief Justice remarked that Price bore the burden of proving fraud and that he was not satisfied that that burden had been discharged.

[42] The principles which govern the review of findings of fact by an appellate court were authoritatively stated by this Court in *Campbell v Narine*.¹² These principles were endorsed, and further developed by this Court in *The Medical*

¹² [2016] CCJ 07 (AJ), (2016) 88 WIR 319.

Council of Guyana v Sahadeo,¹³ *Ramdehol v Ramdehol*¹⁴ and *Thakur v Ori*.¹⁵ *The Medical Council of Guyana* case cited with approval the UK Supreme Court case of *Henderson v Foxworth Investments Ltd.*¹⁶ The point which emerges with clarity from these cases is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was “plainly wrong” and should not interfere unless the inferences drawn by the trial judge were “plainly unreasonable”. The meaning of the “plainly” in this context was explained in *Henderson* at [62], where Lord Reed said:

There is a risk that it may be misunderstood. The adverb “plainly” does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.¹⁷

[43] This Court stated that there will be “limited circumstances where an appellate court can interfere with findings of fact made by a trial judge who has had the advantage of seeing and hearing oral evidence.” We held that interference can only be justified if a factual conclusion is “one that no reasonable judge could have reached,” that is to say that “the making of a critical finding of fact which has no basis in the evidence or a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence.”¹⁸

[44] In *Thakur v Ori*¹⁹ this Court considered whether it was permissible for the Court of Appeal to interfere with a finding that the Appellant was a credible witness. Citing its previous decisions in *Ramdehol v Ramdehol*²⁰ and *Campbell v Narine*²¹ this Court stated that ultimately “an appellate court must be cautious when exercising its discretion to overturn a finding of credibility”.²²

¹³ [2016] CCJ 14 (AJ).

¹⁴ [2017] CCJ 14 (AJ) at [46].

¹⁵ [2018] CCJ 16 (AJ).

¹⁶ [2014] 1 WLR 2600, [2014] UKSC 41.

¹⁷ *Ibid* at [62].

¹⁸ [2016] CCJ 14 (AJ) at [24].

¹⁹ [2018] CCJ 16 (AJ).

²⁰ [2017] CCJ 14 (AJ) at [46].

²¹ [2016] CCJ 7 (AJ) at [39].

²² [2018] CCJ 16 (AJ) at [22].

[45] In the circumstances, were it necessary to decide the point, we would have ruled that it was not permissible for the Court of Appeal to overturn the finding of fact by the trial judge, when that court had acknowledged that Price had not canvassed negligence as an issue at the trial. It was clear that the trial judge considered all the facts and did not find any fact indicative of negligence on the part of Todd or that she was privy to the fraud perpetrated by Jeboo.²³ The trial judge was in a position to make assessments of the truthfulness and credibility of Todd who gave evidence on her behalf. There was, therefore, simply no basis for intervention by the appellate court into these findings although, as it turns out, the failure of the pleadings to allege fraud against Todd rendered much of the discussion in the Court of Appeal entirely moot.

Conclusion

[46] The Court of Appeal erred in deciding that Todd was privy to fraud by that court's finding that Todd was guilty of gross negligence. It was not open to that court to make such a finding but even if it had been so open, the proviso to section 22 (1) requires a finding of fraud, not of negligence or even gross negligence, and the two must not be conflated. The Court of Appeal also erred in permitting a case of fraud to be argued before them when fraud was never pleaded at the trial and in overturning findings of fact by the trial judge when there were no justifiable grounds for doing so. This leads to the inexorable conclusion that the appeal must be allowed and the transport of the property to appellant stands as the transfer of full and absolute title.

Reform

[47] Certainty is an indispensable prerequisite of a successful system of land law particularly to a developing economy such as that of Guyana. Indefeasibility of title supports certainty in land transactions and by extension economic development and is a clear and obvious objective of section 22 of the Deeds Registry Act. The circumstances in which a transport of immovable property attended by fraud may set aside are clearly and unambiguously spelt out in section 22. For the reasons already given these circumstances do not include those in this case.

²³ Ibid p 168-169.

[48] Notwithstanding the clear edicts of the law, the conclusion which they inexorably dictate in this case, is far from ideal. Indefeasibility of title is only conferred upon registration after the undertaking of certain practical steps ordained by the Act and conveyancing practice which are meant to prevent fraud and provide an opportunity for the original landowner to intervene in any fraudulent sale of his or her land. But the fact of the matter is that these mechanisms did not work in this case. The measures legislated in the Deeds Registry Act to prevent the registration of an inauthentic power of attorney failed, and the requirement in section 6 (2) of the Act that notice of the transport be published once in the Gazette on a Saturday did not reach the attention of the original owner ensconced as he was in a foreign land. The net result is that the original landowner was deprived of his land through no real fault of his own; he may, of course, pursue an action against the fraudster but that person has long since disappeared from the picture; will probably not be easily located; and could turn out to be not financially worth suing.

[49] During the oral hearing, I enquired from Counsel as to the possibility of legislative reform to mitigate the hardship on landowners such as the Respondent in this case and was informed there have been meaningful efforts to find workable solutions and that these efforts are continuing. Other countries have found it necessary to provide for such solutions as a complement to the indefeasibility of titles by registration system. A commonplace example is the legislative establishment of a compensation fund, possibly financed by a levy on land transactions, which would make good, whether in whole or in part, the loss suffered by the landowner. No doubt there are other measures that could be researched and evaluated. Whatever measure is chosen from the menu of options available the Government of Guyana is urged to consider reform of this area of the law with all appropriate dispatch.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

[50] I agree *grosso modo* with the reasoning of Justices Barrow and Anderson and the conclusions that they have reached. Within the confines of the pleadings and

the evidence produced in this case in the High Court, it is difficult if not impossible to come to another conclusion than they have. One can, nevertheless, understand why the Court of Appeal did just that. The outcome of this appeal, although correct in terms of law, does not seem satisfactory or just: after all, although Mr Price's land was "stolen" from him by Ms Jeboo, the law – and the judicial system - leaves him with empty hands. Against that background too, I understand, and support, the explorations of Justice Jamadar into the finesses of Guyanese land law, seeking in a general sense to establish a more proper footing for the resolution of issues such as this one. Unfortunately, we will have to await another case to see if a different approach could be more successful. Or, better perhaps, the legislature could amend the Deeds Registry Act to refine or improve the law.

- [51] In addition to Justice Jamadar's opinion, I would like to make a few short remarks. As a starting point, I must refer to a statement of this Court in *Ramkishun v Fung Kee Fung*:

The heirs of Solomon are bound by the agreement because they are volunteers as against Sukhree who was a purchaser for value. Ultimately, *any other conclusion would seem absurd as the land law of Guyana is an amalgam of both Roman-Dutch law and English law, and both would have come to the same result: the granting of specific performance against the heirs.*²⁴

- [52] If it is true that under Guyanese law, without more, an owner of land is not protected against a person who using a forged power of attorney and without authorisation or even knowledge of the owner sells his land, the absurdity as referred to in *Ramkishun* may, however, exist. In the case of immovables, to use the Guyanese expression, both English law ("*Nemo dat quod non habet*") and Roman-Dutch law as it existed (and exists) in The Netherlands and South Africa ("*nemo plus iuris ad alterum transferre potest quam ipse habet*") honour the principle that nobody can give or transfer something (or more rights) to another than he himself has.²⁵

²⁴ [2010] CCJ 2 AJ, (2010) 76 WIR 328 at [61].

²⁵ PJ Badenhorst, JM Pienaar and H Mostert, *Silberberg and Schoeman's The law of Property* (5th edition, LexisNexis Butterworths 2006) 73, C G Van der Merwe, Sakereg, (2nd edn-p. 301 (with references to Grotius, Voet and Van Leeuwen), Asser-Beekhuis, *Zakenrecht, Tweede Deel*, (9th edn), p 174, R W Lee, *An Introduction to Roman-Dutch Law*, (4th edn, p 143.

[53] Most authors agree that Roman Dutch law as it developed in the Netherlands adhered to, what is called, an abstract system of transfer of immovables.²⁶ This means that even when the underlying contract of sale would for some reason be invalid and could not be considered as a just cause (*iusta causa*) or a suitable cause (*causa habilis*), this would not affect the legality of the transfer of ownership in furtherance of that contract except in cases of fraud.²⁷ However, the requirement that the transferor of the land must be the owner or at least be duly authorised by the owner of that land, did remain in place; it could not be ignored. If this requirement were not complied with, the owner of the land could still claim his land back even though it had been registered in the name of even a *bona fide* purchaser.²⁸ Interestingly, this is still the law in The Netherlands, although section 3:88 of the New Civil Code now offers protection to those who acquired the land in good faith from that first purchaser. This is seen as the most equitable solution.

[54] This being so, the registration of land transfers in the Netherlands (and in South Africa) has never been what is called a positive registration system,²⁹ as for example the Torrens system-based Land Registry of Guyana. In such a registration system the State is usually actively involved guaranteeing to a great extent the accuracy of the registration with a corresponding duty to offer compensation to those who in good faith but mistakenly trusted the register. The Roman Dutch (as well as the current Dutch and South African) system of land registration, however, must be qualified as a negative registration system: those who are **not** registered as transport holders are, in most cases, **not** owners or co-owners of the land, which does not mean that those who are registered as such are indeed owners of the land.³⁰ Although in practice reasonably reliable, this registration system does not guarantee the absolute accuracy of what is registered.

²⁶ Silberberg and Schoeman, oc, pp 74-79, Van der Merwe, oc, 16-18, 305-314, Asser-Beekhuis, p 160, Apeldoorn LJ van, *Levering en titel van eigendomsovergang in het oude Nederlandse recht*, WPNR 3130-3131, 711-714, 723-725.

²⁷ See *Ramkishun* [28]-[39] and the sources there mentioned, Apeldoorn LJ van, oc, p 725.

²⁸ Silberberg and Schoeman, oc, p 245.

²⁹ Silberberg and Schoeman, oc, pp 229-238, Asser-Beekhuis, oc, pp 229-233, Van der Merwe, oc, pp 341-345.

³⁰ Silberberg and Schoeman, oc, idem, Asser-Beekhuis, oc, pp 223-226, Van der Merwe, oc, idem.

- [55] Given this background and the statement of Dalton J in *In re Samson ex parte Official Receiver* that “the whole purport of the Deeds Registry Ordinance” (now the Deeds Registry Act) was “the retention of the old law relating to transports and mortgages ... In effect the law as it stood in this Colony before 1917 and in South Africa was retained”,³¹ one may assume that the Deeds Registry in Guyana was similarly meant to be such a “negative” system. And indeed, as has been held, also by this Court, the indefeasibility of titles registered in the Deeds Registry is not as absolute as it may sometimes have been regarded.³²
- [56] In fact, counsel for the appellant accepted that the indefeasibility of transports is subject to exceptions, although he asserted that these exceptions are created by the legislature, for example the Title to Land (Prescription and Limitation) Act. Be that as it may - I am not so sure this is a correct statement - Justice Jamadar has referred to section 2(3) of the Civil Law Ordinance (now the Civil Law Act of Guyana) and the comments of the late Dr Ramsahoye in his seminal work on Guyanese land law,³³ which arguably may have some bearing on the proper interpretation of the Deeds Registry Act. In accordance with this section, “effect may be given to the Roman-Dutch rule or procedure to the extent the High Court deems advisable in the interests of equity [justice in a broad sense, according to Dr Ramsahoye] if that Court is so advised.” This, of course, takes us right back to the question of what was the [Roman Dutch] law as it stood in Guyana before 1917 and in South Africa and to what extent, if any, Dalton J’s dicta notwithstanding, that law may have been transformed by the Deeds Registry Ordinance, an avenue that was not explored in the case before us. I note in this respect that the *Nemo plus* rule is not really a rule but a principle which may allow exceptions.
- [57] It is true that section 22 of the Deeds Registry Act provides that in principle “every transport of immovable property other than a judicial sale shall vest in the transferee *the full and absolute title* to the immovable property subject to certain exceptions stipulated in the section and with a proviso about fraud. I just

³¹ (1922) LRBG 133.

³² *Ramkishun*, [64] and [92].

³³ See paragraphs [139] to [142] of the judgment of Jamadar J.

want to point out that the terminology “full and absolute” does not have the connotation that may sometimes seem to be invoked in terms of indefeasibility. Full and absolute title simply refers to the allodial nature of ownership which in contradistinction to feudal ownership means that the title is not derived from a superior source. Titles are not relative as in English law (he who has the better right, owns) but absolute. The terminology also reflects the fact that Roman Dutch ownership of land cannot be divided in legal and equitable ownership³⁴. That as such has nothing to do with the indefeasibility of title. But, clearly and in agreement with Justices Barrow and Anderson, the structure and content of the Deeds Registry Act, and in particular section 22 of that Act, do robustly and conceptually express the idea that registered transports embody titles that, to the greatest possible extent, must be deemed indefeasible (as is to be expected in any abstract system of transfer of immovables).

[58] However, although section 22 seems to exclude that an owner in the position of Mr Price would have the possibility of the common law equivalent of an *actio in rem*, that does not necessarily mean that he could not have a claim based on *a jus in personam ad rem acquirendam* against the person who, whether in good faith or not, directly acquired the property from a non-owner. As it is said, more roads than one lead to Rome. Whether this is the case with the avenues that I have explored here remains to be seen. But they might.

JUDGMENT OF THE HONOURABLE MR JUSTICE PETER JAMADAR, JCCJ:

Introduction

“[T]he values society labors to preserve are contradictory.”³⁵

[59] Not only are the values of societies at times contradictory, but similarly, so can the effects of the values of the law.

[60] It is generally thought that systems of laws, such as those in Anglo-Caribbean jurisdictions, seek to embody five core underlying objectives and values, that are matched by societal needs and expectations. These objectives/values and needs/expectations may be stated as being: a) law should be clear and

³⁴ See LI C- Dalton, *The Civil Law of British Guiana being the Civil Law of British Guiana Ordinance, 1916, with all amendments*, 1921, p 14, explaining the term “full ownership of immovable property.”

³⁵ Philip Bobbitt, *Constitutional Interpretation* (1991) at [181].

understandable, the value of objectivity and comprehension, b) law should accurately reflect the choices made by legislatures on behalf of its citizens, the value of constituent popular sovereignty, c) law should be consistent and predictable, the value of stability and certainty, d) law should conform to general and settled societal expectations, the value of tradition and social cohesiveness, and e) law should be flexible and able to adapt to changing and evolving societal values, expectations, and needs, and to reflect contemporary notions of justice, the value of adaptability and achieving justice. These five core legal system objectives and values sometimes operate in tension and can have inconsistent effects in any given situation. Indeed, jurists quite often reasonably disagree as to which of these objective/values should prevail in any case, with concomitant consequences for outcomes.³⁶

[61] This case is one of those in which the objectives/values of the law are in apparent-tension. Stark choices have seemingly to be made. Choices which can inevitably, at least in the outcome of this appeal, lead to an arguably ‘innocent party’ being adversely affected with no immediate and realistic prospects of redress. This is not ideal, can never be ideal, and may only serve to undermine public trust and confidence in the administration of justice in Guyana. In short, circumstances like these can give the law a bad name – which can so easily lead to the popular and well known cliched criticism, ‘the law is an ass’.³⁷

[62] Mr Price held a transport for the subject lands. He had acquired these lands by transport since 1979.³⁸ His title was the product of a legitimate transaction. The law provided that he was vested with a ‘full and absolute title’, an ‘indefeasible title’, good *in rem*, presumptively for all time and against all persons.³⁹ As is true for many Caribbean people, the so-called Caribbean diaspora, Mr Price was living out of Guyana. People like Mr Price have for decades been an invaluable source of repatriated economic support for our small nation states, and as well

³⁶ Wilson Huhn, *The Five Types of Legal Argument*, 2nd & 3rd Eds., 2007 and 2014, [15-16].

³⁷ ‘Ere he shall lose an eye for such a trifle... For doing deeds of nature! I'm ashamed. The law is such an ass.’ English dramatist George Chapman - *Revenge for Honour*, 1654. ‘If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, “the law is a ass — a idiot.”’ - Charles Dickens, *Oliver Twist*, 1838. And summed up contextually in true Caribbean style and flamboyance in the melodious 1979 calypso by Shortpants (Llewellyn Mac Intosh), ‘The Law is an Ass’: “I want to see justice shine out in this country ... dis eh no pun, when cases are won, we want to feel that justice is done ... But, if ... then, the law is an ass! If, when ... then, the law is an ass!”.

³⁸ Transport No: 936 of 1979.

³⁹ See the Deeds Registry Act, Cap5:01, s-22 (1); *Coddett v Thomas*, [1957] LRBG 181; *Subhas Ramdeo v Heralall* [2009] CCJ 3 (AJ), [36]; *Ramkishun v Fung-Kee-Fung* [2010] CCJ 2 (AJ), (2010) 76 WIR 328, [64], and *Kwang v Yokkei* [2016] CCJ 09 (AJ), (2016) 88 WIR 339, [1].

a harbour for thousands of locals seeking opportunity abroad when none can be found intra-territorially. His lands in Guyana were never abandoned and he rightly always considered that he was the owner. He assumed that his title was secure – absolute and indefeasible. The law purported to assure him that it was. Indeed, he had no real choice in what the legal system in Guyana prescribed in relation to his land ownership, imposed by the State through a 1919 statute as it was.

[63] Ms Todd currently holds a transport for the same lands, one later in time than Mr Price's. She acquired her transport in February 2004.⁴⁰ Paradoxically, she also now has an absolute and indefeasible title for these lands according to the legislative scheme in Guyana for conveyances by transport. Consequently, Mr Price has apparently lost his title to and ownership of these lands, although he has never divested himself of the land and he has never received any consideration in money or otherwise for these lands arising out of any transaction engaged in by him. Such is the nature of this law. Ms Todd's title is the product of undisputed fraudulent transactions and documents, admittedly so by one Jennifer Jeboo (who was a party to these proceedings but plays no part in this appeal). Her title, unlike that of Mr Price's, is the product of a series of illegitimate acts. Whether or not it is established that she herself was in any way a party or privy to the fraud, the record discloses that she nevertheless paid a significantly under market value for the lands.⁴¹

[64] Unsurprisingly, Mr Price has come to the courts for redress, for justice; it is his expectation that the courts will deliver it. He did so in March 2004, within two months of Ms Todd's transport being registered. Already sixteen years have passed,⁴² Mr Price is since deceased, and this Court is now called upon to finally decide, for the purposes of this appeal, who is entitled to the title to these lands; whose transport should prevail.

[65] Chang CJ, at the trial of this matter found that Ms Todd's title is good. And that Mr Price had lost his title. The Court of the Appeal unanimously overturned the

⁴⁰ Transport No- 400 of 2004.

⁴¹ Ibid p 165-168,179,180,675-676, 684.

⁴² The High Court's decision was given in August 2012, and the Court of Appeal's decision was given in March 2020.

decision of Chang CJ, set aside the transport of Ms Todd, and reinstated the title of Mr Price. However, this Court by majority has concluded that the Court of Appeal was wrong. Mr Price has lost his lands. Distinguishing title from entitlement and ownership from interests is relevant, as they go to the ‘distinction between the vesting effect of registration on the one hand, and the quality of a registered title on the other.’⁴³

[66] Two legal senses are predominantly at play, the sense of legality, and the sense of justice. Few will deny that their sense of justice is that Mr Price has been wronged – indeed, he might well feel that he has literally been fraudulently deprived of his property without any form of assured compensation and that this deprivation has been sanctioned by the legal and judicial system!⁴⁴ Yet the ideology of this law appears on the face of it to suggest that, barring Ms Todd having perpetrated the fraud or being a party or privy to it, Mr Price’s loss of title, with no statutorily prescribed avenues for compensation, is in these circumstances somehow acceptable. How can this be so, if it is left to an innocent registered proprietor who is fraudulently deprived of their property to pursue an uncertain claim for damages at their expense against a fraudster whose fraud slipped through the hands and bypassed the eyes of state agencies and officials, when the State on the one hand chooses to assure title on the register, but also chooses on the other hand, not to assure compensation to those who have lost their property because of fraud, institutional or other systemic failures? For some, legality as narrow textualism and the legal values of certainty and stability trump all other prevailing (and competing) legal objectives/values.⁴⁵ I find this to be, *prima facie*, an inherently unacceptable proposition, one that is both unjust and unfair; especially in the absence of a State supported compensation scheme for situations such as these. As I will attempt to demonstrate, it is a position that is neither inevitable, nor incurable, and one that may also be unconstitutional. In all of this I am not incognizant of the arguments that plead for Ms Todd’s own plight in the circumstances of this case.

⁴³ See ‘Breskvar v Wall: The End of Deferred Indefeasibility?’, Gim L. Teh, (1974) 9 Melbourne University Law Review, 381, at 406.

⁴⁴ Chang CJ ordered that Mr Price receive compensation in the sum of \$12M being the market value of the property from the fraudster, Ms Jeboo. However, this sum has never been paid and the whereabouts of Ms. Jeboo are now unknown.

⁴⁵ See s 22(1) Deeds Registry Act, Cap-5:01, hereinafter ‘the DRA’.

[67] Essentially Chang CJ found that on the evidence Ms Todd neither perpetrated nor was she privy to the fraud that robbed Mr Price of his lands. The Court of Appeal held a contrary view, finding that there was sufficient evidence to infer for the purposes of section 22 of the DRA, that fraud could be imputed to Ms Todd and/or she was privy to the fraud – she and her agents having turned a blind eye and failed to conduct further enquiries into obviously suspicious aspects of the transaction leading to the transport in her favour.

[68] The joint opinion of Anderson and Barrow JCCJs holds that the Court of Appeal was wrong and Chang CJ right. They adopt a more formal and traditional approach. However, I have reservations about both the general approaches to the interpretation and application of the law in question, and as well, the justice of the outcome in this case. Wit JCCJ in his opinion, however, adopts a more open and exploratory approach which I find engaging, insightful, and generally aligned with my own basic concerns. His pointers to the early Roman-Dutch law and relevant South African jurisprudence, filtered through the lenses of equitable possibilities in Guyana and the DRA, are, in my opinion, noteworthy, and I support them. My preference is for a more inclusive and encompassing approach, one more deeply and pragmatically rooted in Guyanese constitutionalism.

[69] What I therefore propose to do in this opinion is set out the bases for my reservations. What I hope to achieve at a minimum is an exploration of what I consider pertinent matters, which could influence future jurisprudence in this area and as well which could trigger legislative reform, that may both serve the ends of justice, even if Mr Price may not be the immediate beneficiary in this appeal. Nevertheless, I have also not ruled out the possibilities for Mr Price yet achieving a just and constitutionally due outcome in these circumstances and would not want to proffer determinative opinions on these, at this time, given the prevailing arguments made by the parties, as well as the opinions of my colleagues in this appeal.

Summary

[70] The law related to a registered proprietor's *in personam* and/or equitable rights, as between themselves and the first purchaser for value of lands in the context of a fraudulent transaction, where the purchaser is neither directly a party or privy to the fraud, but whose title is directly derived thereby, is still unsettled in Guyana, and particularly in relation to sections 2 (3) and 3 (b) of the Civil Law of Guyana Act.⁴⁶ It is arguable that as between such parties, an innocent registered proprietor who has lost their title by reason of fraud may have claims *in personam* and/or in equity (as it is to be understood, interpreted, and applied in Guyana) against a first purchaser whose title and transport is directly derived through fraud.

[71] The DRA read together with the Land Registry Act⁴⁷ and the Civil Law of Guyana Act, and filtered through the lenses of Guyanese constitutionalism, reveals real and arguable adverse impact inequalities in similar circumstances such as have been evidenced in this matter. Given the sovereignty and supremacy clauses in the Guyana Constitution, and the basic 'deep' structure rule of law imperatives of current Guyanese constitutionalism, it is arguable that the DRA does not meet reasonably justifiable socialist-democratic core constitutional values, the consequences of which demand further consideration.

[72] On the cases pleaded and argued before this Court, and based on the evidence on the record, the Respondent Todd's transport No 400 of 2004 was duly registered, and this challenge by Mr Price strictly pursuant to section 22 of the DRA cannot succeed in this appeal. However, such a conclusion is not conclusive in relation to any *in personam* and/or equitable rights that Mr Price may have against Ms Todd in these circumstances, or any other constitutional remedies that may lie against the State.

[73] The state of the law implicated in this matter needs urgent re-consideration and likely reform. In particular, the DRA needs to be reviewed and an assessment made whether it passes constitutional muster in Guyana, and if not, what

⁴⁶ Civil Law of Guyana Act, Cap 6:01.

⁴⁷ Land Registry Act Cap 5:02.

modifications are required to do so. In addition, it also appears that a pragmatic assessment needs to be undertaken to identify areas that can be reformed immediately to meet the exigencies of current land law realities in Guyana, including the introduction of the equivalent of a statutory assurance fund under the DRA land registration – transport, regime.

[74] The analysis below explores these matters in greater detail and follows up on inquiries that I made during the oral hearing of this matter. It is my hope that the relevant authorities will take the initiative for reform, as these kinds of cases and other similar ones demonstrate the pressing need for doing so.

[75] While I appreciate the value of stability and certainty in this area of the law, I eschew blind allegiance to tradition or precedent, particularly in the face of uninterrogated justifications and obvious injustice. Such an attitude in Caribbean contexts can all too easily overlook colonial legal underpinnings, agendas, and structures that were premised on social, class and economic distinctions, and which can have continuing discriminatory and unjust effects. Effects that are inconsistent with Caribbean constitutional aspirations, values, and objectives. The risks involved in this bias remind me of Sam Foss’s *the Calf-Path*.⁴⁸

Analysis

[76] In my opinion, the well-established positions of this Court in relation to the Transport System of land transactions are: a) a transport conveys a form of deferred indefeasible title, as compared to an immediate and absolute indefeasible title, b) land transactions under the Deeds Registry Act (Transports) are distinct and different from those under the Land Registry Act,⁴⁹ and c) fraud renders transactions under both legislative schemes voidable, though with certain nuances in relation to transports under the DRA. This Court has also already hinted at the constitutional implications of circumstances such as have occurred in this case. These will also be explored.

⁴⁸ Sam Foss, *The Calf-Path* (1895).

⁴⁹ Cap. 5:02, Laws of Guyana; hereinafter ‘the LRA’.

Historical and Legislative Contexts

[77] Where does one begin? At the beginning, of course. In *Kwang's case* Rajnauth-Lee JCCJ carefully outlined the historical-legislative contexts of the DRA and the LRA.⁵⁰ The DRA was introduced in 1919 and sought to preserve the Roman-Dutch concept and principle of absolute ownership of land. This was a consequence of the colony being ceded by the Netherlands to the British in 1803. Guyanese law, grounded at the time in the Roman-Dutch traditions, was in the process of transition to English common law. However, express statutory provision was made for Roman-Dutch law to continue in relation to land, 'immovable property'. In this regard, section 3 of the Civil Law of British Guyana Ordinance 1916, is apposite. The Civil Law of Guyana Act⁵¹ preserves this as the current position.⁵²

[78] In 1961, by way of the LRA, Guyana introduced a parallel system for the conveyance of land, based on the Australian Torrens system of land registration. The express intention was to 'simplify the title to land and facilitate dealing therewith and to secure indefeasibility of title to all registered proprietors.'⁵³ That the LRA was intended to be a parallel system, distinct from the DRA, is made clear by section 3 (2) of the LRA: '... the Deeds Registry Act shall not apply to registered land.' That it was introduced in the already existing context of the DRA speaks to the policy makers views about that system.

[79] These two systems are therefore separate and intended to operate exclusively.⁵⁴ Care must therefore be taken not to rush into assimilating the jurisprudence related to these different land conveyancing systems. Indeed, as will be demonstrated, the distinctions between the two systems throw into sharp relief certain inherent inequalities that arise under the DRA that can raise constitutional questions of concern.

⁵⁰ *Kwang v Yokkei* [2016] CCJ 09 (AJ) (Guy), (2016) 88 WIR 339, [17] to [23].

⁵¹ Cap 6:01.

⁵² See Cap 6:01 sections 3(b) and 3(c.).

⁵³ See s 4 (1), LRA.

⁵⁴ See *Kwang v Yokkei*, [23], and see also, Guyana Property Rights Study, 2010, IADB Discussion Paper No IDB-DP-141.

[80] Some awareness of socio-historical context is also helpful, especially in relation to the DRA. Introduced in 1919, it sought to preserve the earliest Roman-Dutch approaches to land ownership by the Netherlands in its colonies. But what was the prevailing ideology at that time? Who was this approach intended to benefit? And for what purposes? These are important questions in 2020, when courts seek to interrogate through the lenses of republican constitutionalism (as exists in Guyana) pre-independence colonial legislation, especially when these laws impacted colonial vested interests that concern power, control, and wealth. The insight of Caribbean colonies being Plantation Economies is apposite.⁵⁵ In Dutch and then British Guyana this model also applied. And so, relevant questions become, for whose benefit, and for what purposes, was ‘full and absolute title’ by way of transport devised and administered in Guyana?

[81] A 2010 IADB study and report on property rights in Guyana, concluded:⁵⁶

It is possible to trace the beginning of Guyana’s property rights “system” back to the late 1800s, with its variations depending on the plot sharing along the shore among the Dutch, Portuguese, French, and British. At the time, property and ownership rights were based on the exploitation of land for the purposes of the owner being the “explorer” or “colonizer.” In other words there were no “property rights” per se, but “exploring rights.

[82] These contexts are legitimate aids to the interpretation and application of legislation. Law is not devoid of context, falling from some eternal and abstract ethereal place. It is human made, arising out of, and shaped by, social, economic, political, and cultural contexts, and intended to serve particular purposes, interests and agendas. This is its pragmatic reality. To understand legislative intent and meaning, and to interpret and apply the law, is therefore impossible without an appreciation of its multiple contexts. It is Lord Steyn who

⁵⁵ The present-day structure of Caribbean economies can only be understood by ‘invoking the resources of history’ - Dennis Pantin, *The Plantation Economy Model and the Caribbean*, *The IDS Bulletin*, Volume 12, Issue 1, December 1980, p 17. With the exception of small communities of the original Amerindian inhabitants, the Caribbean peoples are the descendants of persons imported to service the specific interests of mercantile capitalism (i.e. plantation agriculture) and this mode of production continues to dominate most of the regions economies. In the mature plantation economies, with all or most land engrossed by plantation agriculture, freed labour had little choice but to continue working as subsistence wage labour. In the new plantation economies new forms of slavery were invented to import labour, largely from India, and lower the reserve price of labour. Simultaneously, the colonial authorities effectively legislated against land ownership by most of the ex-slave population – Pantin *supra*, at p 19. See further, Lloyd Best, *Outlines of a Model of Pure Plantation Economy*, *Social and Economic Studies* Vol 17, No 3, *Agricultural Development And Planning In The West Indies*; *Selected Papers from the Third West Indian Agricultural Economics Conference*, Mona, Jamaica, April 1 – 6, 1968 (September, 1968), p 283-326; Dr Eric Williams, *Capitalism and Slavery*, The University of North Carolina Press, 1944.

⁵⁶ Guyana Property Rights Study, 2010, IADB Discussion Paper No IDB-DP-141, [1].

most recently and famously reminded us all that: “In law, context is everything.”⁵⁷ I agree.

Deferred v Immediate Indefeasibility

[83] In *Subhas Ramdeo*⁵⁸ this Court, by a unanimous five-member panel, identified the statutory limitations on the indefeasibility of title under the DRA, including that of fraud.⁵⁹ That panel included both Justices Pollard and Bernard. Noteworthy for the purposes of this matter, is the following:⁶⁰

It is, however, important to realize that apart from the limited statutory exceptions to the principle of indefeasibility of registered or transported title there is an *in personam* exception to such principle. In particular, the doctrines of equity, as administered in the High Court of Justice in England and applicable in Guyana under s 3 (b) of the Civil Law of Guyana Act, provide that “equity will not allow a statute to be used as an instrument of fraud”, while recognizing that if, in the interests of security of title to land, a right affecting land has to be protected by entry on a register then it is not fraud to take advantage of a strict statutory right enabling a purchaser to take free of an unprotected right. As Lord Denning, however, has pointed out in *Crabb v Arun DC*,⁶¹ in a passage endorsed by Ramson JA in *Collymore v George*.⁶²

“Equity.....will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

[84] The long title to the Civil Law of Guyana Act⁶³ states its purpose as being, ‘An Act to codify certain portions of the Roman-Dutch Law of the State and in other matters to substitute the English Common Law and Principles of Equity, along with certain English Statutory Provisions for the Roman-Dutch Law.’

[85] It is worth setting out section 3 (b), (c), and (d) of the Civil Law of Guyana Act in full, as it reveals the tension that has somehow to be resolved when one comes to interpreting and applying the DRA to situations of fraud such as in this matter. Section 3 states:⁶⁴

⁵⁷ See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

⁵⁸ (2009) 79 WIR 320.

⁵⁹ *Ibid*, See paras [36] and [37].

⁶⁰ (2009) 79 WIR 320, Hayton JCCJ, at [38].

⁶¹ 1976, Ch 179, at [187-188].

⁶² (2008) 72 WIR 229 at [244].

⁶³ Cap. 6:01, Laws of Guyana.

⁶⁴ *Ibid*, s 3 (b), 3 (c), and 3 (d).

3. From and after the date aforesaid (the operative date) -
 (b) the common law of Guyana shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by the courts of justice in England, and the High Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter;
 (c) The English common law of real property shall not apply to immovable property in Guyana;
 (d) there shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property within Guyana ... shall be adjudged, construed and enforced, so far as possible, according to the principles of the common law of England applicable to personal property.

[86] In its Ordinance incarnation, this Act was first introduced in 1916 and made operative on the 1st January 1917, prior to the 1919 DRA. Hence the opinion cited above in *Ramdeo's case* and its unequivocal recognition that a relevant equitable principle in relation to fraud under the DRA, is that public policy prohibits a law⁶⁵ to be used as an instrument of fraud. And as Hayton JCCJ explained, in a paper entitled 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems':⁶⁶

In its narrowest meaning the "common law" is used to distinguish between "Common Law" and "Equity", two judge-made bodies of law ...'. And further, 'In the Earl of Oxford's case⁶⁷ in 1615 King James 1 upheld the Lord Chancellor's right to issue injunctions, so that Equity prevails where there is any conflict or variance between Equity and the Common Law.

More of this later. For the moment, what needs to be recognised is that there is no absolute or immediately guaranteed indefeasibility of title under the DRA.

[87] In 2010, in *Ramkishun's case*,⁶⁸ this Court would reinforce the limitations of indefeasibility of title under the DRA in instances of fraud. Wit JCCJ (writing on behalf of de la Bastide, Pollard, and Bernard JJ) explains:⁶⁹

⁶⁵ In this case the DRA.

⁶⁶ D Hayton, 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems' (2012) *The Conveyancer and Property Lawyer* 263.

⁶⁷ (1615) 1 Rep Ch 1, 21 ER 485.

⁶⁸ (2010) 76 WIR 328.

⁶⁹ *Ibid* [28].

Early nineteenth century sources do reveal, however, that the courts in Guyana had always considered themselves as having the power to grant relief in cases of fraud or palpable error based on the broad concept of equity which was, and always has been, part of the civil law. According to Dr FHW (now Sir Fenton) Ramsahoye in his authoritative book *The Development of Land Law in British Guiana: 'Principles of Roman-Dutch law could always have been invoked to prevent fraudulent conduct* and to rectify mistakes and it would appear that a substitution [by the Civil Law Ordinance] of English equity for the broad equity of the Roman-Dutch system was in this respect a substitution only in form.'⁷⁰
(Emphasis added.)

[88] Wit, JCCJ would in his concluding advice, further note:⁷¹

This Court is aware of the fact that its conclusions might at first sight seem to derogate somewhat from the indefeasibility of transports as it is sometimes perceived to have been ordained by s 23 of the Deeds Registry Act, Cap 5:01. It has to be noted, though, that this indefeasibility has never been absolute and certainly not as strongly preserved as under the Land Registry Act. One of the better known exceptions to the indefeasibility of transports is the acquisition of land by prescription which is not disturbed by this provision. There are other exceptions⁷² ... The broader effect of this decision is therefore at its highest a cautious and limited recalibration of the balance between legal certainty and equity.
(Emphasis added.)

[89] In my opinion, the result of both the statutory and equitable limitations on the indefeasibility of title under the DRA, and the consequential 'recalibration of the balance between legal certainty and equity', two aspirational legal values, is that in instances of fraud registration of a transport confers a form of deferred indefeasible title. That is, a title that is not immediately (or absolutely) indefeasible. In my opinion this is clear, at least, because a) section 22 (1) of the DRA itself qualifies the 'full and absolute title' sought to be conferred, and b) section 3 of the Civil Law of Guyana Act renders a transport subject to equitable principles (as under Roman-Dutch and/or English law).⁷³ Thus one may conclude that these statutes, read in their totality and as well taken together, do

⁷⁰ Fenton Ramsahoye, *The Development of Land Law in British Guiana*, (Dobbs Ferry, N.Y., Oceana Publications, 1966) 277.

⁷¹ (2010) 76 WIR 328 [64].

⁷² Citing as an example, *Coddett v Thomas* [1957] LRBG 181.

⁷³ See generally, *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems*, Pamela O'Connor, (2009) 13 Edin LR 194-223; and Dr. Fenton Ramsahoye, *The Development of Land Law in British Guiana*, 1966, Chapter 7, Equity and the Land Law, 273 et seq.

not intend to and do not in fact give an unqualified and absolutely indefeasible title in all circumstances to an immediate transferee. *A fortiori*, what is conveyed is a form of deferred indefeasibility of title.

- [90] By the DRA the State seeks to warrant that the rights (of say ownership/title) shown on the register – the transport, are valid according to its terms. As such it is classified in the academic literature as a ‘positive system’:

This is an authoritative system, a "register of conclusions", which allows purchasers to transact safely in reliance on the registered title even if it turns out to have been procured by defective means. ... The legal rule of the positive system is that registration confers title to the interest shown, irrespective of whether the registered instrument is valid.⁷⁴

- [91] The challenge, at least in legal theory, is that reasonable rules of property law should only permit and uphold valid instruments to pass an interest in land. However, in practice this is not always so under the DRA – as is evident in this case. Here a fraudulent instrument has been used to pass title. A situation that is apparently neither uncommon nor unknown in Guyana.⁷⁵ Two potentially inconsistent and contradictory propositions are in play: ‘The first is that only instruments which are valid under the ordinary rules are to be registered. The second is that registration confers title irrespective of the validity of the instruments.’⁷⁶

- [92] Classification as deferred or immediate indefeasibility allows for the following useful and pragmatic analysis: ‘On one view, the positive system prevails and the purchaser or mortgagee obtains an "immediately indefeasible" title upon registration, that is, a title which cannot be set aside. The opposing view, known as "deferred indefeasibility", holds that a registered title obtained by a forged instrument can be set aside for inconsistency with the ordinary rules of law; but until rectified it provides a good root of title for a subsequent purchaser. The

⁷⁴ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) Edin LR 195.

⁷⁵ See also, Guyana Property Rights Study, 2010, IADB Discussion Paper No IDB-DP-141, at p 21 ‘During the analysis for this paper, a few cases of properties being sold without the consent or knowledge of the owner were noted. This happens often among properties of Guyanese that have expatriated.’.

⁷⁶ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) 13 Edin LR 197.

operation of the positive system is thus "deferred" until the next register entry after the one that was procured by forgery.⁷⁷ (Emphasis added.)

[93] Again, some historical context is enlightening.⁷⁸

As the market economy developed in the mid-nineteenth century, and land transactions between strangers became more common, there was a demand for more dynamic security (that is, security of transaction). This demand emerged earlier and more urgently in British settler colonies, where immigrants were arriving in the expectation of becoming landowners. Forgeries, frauds and missing or incomplete chains of title deeds were a serious problem ..., even threatening the viability of the colonisation plan.

[94] Thus, in the exercise of interpretation and application of this 1919 law it is helpful to understand the historical purposes and objectives of the legislators. What emerges is that for the British, the introduction of the DRA and its saving of the Roman-Dutch Transport System, which was a form of registered title,⁷⁹ met these historical needs – the so called ‘colonization plan’ in relation to title to lands in the colony of British Guyana.

[95] As would be the case subsequently with the 1961 LRA ‘pure’ Torrens system, the Transport System sought to protect purchasers against defects in the root of title, and to do so by protecting ‘the reliance of the purchaser on what the register shows at the time of acquisition.’ Thus defects in the vendor’s title (which is a defect in the root of title) do not affect the purchaser’s title. However, this avoidance of root of title defects may be distinguished from what may be described as: ‘an invalidating defect in the immediate transfer from the vendor to the purchaser - a "transactional error".’⁸⁰

[96] In this regard Pamela O’Conner makes the point (specifically about the Torrens system forms of registered title):⁸¹

The purpose of the registration system is to protect purchasers against defects in the root of title, not transactional error. As Lord Watson said

⁷⁷ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) 13 Edin LR 196-7.

⁷⁸ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) 13 Edin LR 198-9.

⁷⁹ The Torrens system was first introduced in a Common Law jurisdiction by Sir Robert Torrens, in South Australia, in 1858.

⁸⁰ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) 13 Edin LR 201.

⁸¹ See Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’, (2009) 13 Edin LR 201.

in *Gibbs v Messer*, the object of the Torrens system is to save purchasers "from the trouble and expense of going behind the Register to investigate the history of the vendor's title and to satisfy themselves of its validity".⁸² In *Boyd v Mayor of Wellington*,⁸³ Salmond J cited Lord Watson and added that it is not within the object of the statute to validate the title of the immediate purchaser who registers a void disposition.⁸⁴ Deferred indefeasibility achieves the purpose of the Torrens system and is sufficient to overcome the problem of "the dependent character of titles."
(Emphasis added.)

- [97] A legitimate question that arises is: Whether a fraudulent (and at common law void) transaction can confer, in relation to an immediate purchaser, an absolutely indefeasible title? And if so, under what conditions?
- [98] In 1967, in an appeal from New Zealand, in the case of *Frazer v Walker*,⁸⁵ the Privy Council appeared to have answered these questions in relation to the Torrens system forms of registered title: registration of an instrument which is forged or void for any other reason is effective to confer indefeasible title and immunity from adverse claims other than those specifically permitted by the statute and obligations which equity enforces against the registered owner *in personam*.⁸⁶ For Lord Wilberforce, 'registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise'.⁸⁷ Noteworthy is that the rights of *bona fide* third parties had intervened in this case. Further, the Privy Council without overruling *Gibbs v Messer*, distinguished it as being exceptional on the facts, noting the distinction of the purchase from a fictitious person and not from the registered proprietor.⁸⁸
- [99] Nevertheless, *Frazer v Walker* tends towards immediate indefeasibility - the registration of even void instruments confers good and indefeasible title. One consequence is that while such immediate indefeasibility gives purchasers

⁸² *Gibbs v Messer* [1891] AC 248 at 255.

⁸³ [1924] NZLR 1174.

⁸⁴ *Ibid* at 1201-1202.

⁸⁵ [1967] 1 AC 569.

⁸⁶ *Ibid* at 584.

⁸⁷ *Ibid* at 584.

⁸⁸ At, 584. See also, 'Breskvar v Wall: The End of Deferred Indefeasibility?', Gim L. Teh, Melbourne University Law Review, June 1974, Vol. 9, 381, at 400-401: 'The Board in *Frazer v Walker* implied that a registered transferee's title would be defeasible if registration was brought about by a forged transfer from a non-existent registered proprietor and that *Gibbs v Messer* was still good authority for this proposition. It is respectfully submitted, however, that this attempt to put *Gibbs v Messer* on the shelf is highly unsatisfactory in so far as it is based on an irrational and invalid distinction of a transfer, on the one hand, forged by a non-existing person and, on the other forged by a living person. It conceals the fact that there is a forged transfer by a living person in both situations. If a forged transfer will nevertheless operate to vest an indefeasible title in a registered transferee, it is nonsensical to say that a different result is obtained if the forgery is in the name of a non-existing person.'

security when they acquire lands, it also exposes them to the continuous risk of losing their lands by reason of, say, forgery, as has occurred in this case.

- [100] However, it is important to also note that the Privy Council in *Frazer v Walker* specifically recognised that persons deprived of their lands may themselves be able to obtain equitable relief by bringing actions *in personam* against the ‘new’ registered owner. Lord Wilberforce would carefully explain:⁸⁹

First, in following and approving in this respect the two decisions in *Assets Co. Ltd. v. Mere Roihi*⁹⁰ and *Boyd v. Mayor, Etc., of Wellington*⁹¹, their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v. Mayor, Etc., of Wellington* and *Tataurangi Tairuakena v. Mua Carr*⁹². Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted.

- [101] This analysis thus still leaves open the question: Whether an *in personam* claim in equity can arise on the sole basis that the title of the immediate purchaser was obtained as a result of a forgery under the DRA? This is a question that remains to be answered by this Court. Indeed, this kind of scenario is exactly what I believe Hayton JCCJ and Wit JCCJ were alluding to in the citations above from *Ramdeo and Ramkishun* respectively.⁹³ Noteworthy is that these pronouncements in *Ramdeo and Ramkishun* were both made in the specific context of the DRA, although in *Ramdeo* the pronouncement appears to have been made in respect of both the LRA and the DRA.

⁸⁹ *Frazer v Walker* [1967] 1 AC 569 at 585, per Lord Wilberforce. See also, *Oh Hiam v Tham Kong* [1980] UKPC 18 per Lord Russell; and *Creque v Penn* [2007] UKPC 44, (2007) 70 WIR 150, at [16], per Lord Walker.

⁹⁰ [1905] AC 176.

⁹¹ [1924] NZLR 1174.

⁹² [1927] NZLR 688.

⁹³ See paras [18] and [22-23] above, and see however, *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 at 37-38, per Kirby P, at 51-52, per Meagher JA (Mahoney JA disagreeing, at 45-46); *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, at 217-218 per Powell JA.

- [102] Some other interesting distinctions can also be made. In a ‘single transaction fraud’ the fraudster forges the original owner’s signature to an instrument which is registered by an unsuspecting purchaser (the “immediate owner”). In an unadulterated deferred indefeasibility situation, the immediate owner does not get a good title because ‘registration cannot cure the invalidity of a void disposition, but provides a good root of title for a subsequent purchaser.’⁹⁴ Arguably, the Privy Council decision in *Gibbs v Messer*⁹⁵ is an example of such a situation. However, *Frazer v Walker* is to the contrary (albeit in different circumstances) – the common law rule that a forged document is a nullity and so void, is now subject to the prevailing legislation. This Court is not constrained exclusively by either of these approaches, and it is open to this Court to forge an approach that is constitutionally legitimate, and contextually and pragmatically apt.⁹⁶
- [103] From a purposive statutory perspective, section 22 (1) of the DRA suggests that the intended policy of the Act was arguably to prefer some form of deferred indefeasibility, at least in cases of single transaction fraud. Section 22 (1) provides on one hand that a transferee gets a full and absolute title in lands, but on the other hand also and at the same time provides that if the operative transport is ‘obtained by fraud’ it is void – and may be so declared by a court in relation to ‘all parties or privies to the fraud’. Thus, arguably, the statute contemplates that a registered title will not be considered indefeasible if it the product of a void and/or fraudulent transaction.
- [104] A purposive interpretation can therefore permit an approach that places the risk on an immediate purchaser to ensure that a transaction is not fraudulent. Failure, negligence, or carelessness in this regard may arguably impugn *bona fides*. The detailed requirements for the due execution and registration of a transport support such an interpretation.⁹⁷ Noteworthy is that in the structure of the DRA, these sections and the relevant supporting rules precede section 22 of the DRA.

⁹⁴ See *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems*, Pamela O'Connor, 2009 EdinLR Vol 13, at 209.

⁹⁵ [1891] AC 248. The forger in this case had transferred land into the name of a fictitious person, and subsequently mortgaged it to the Messers. The Privy Council held that the Messers' registered mortgage was defeasible, because they had dealt, not with the registered owner, but with a forger using his name.

⁹⁶ The Caribbean Community, Preamble to Agreement establishing the Caribbean Court of Justice (14th February 2001): ‘THE CONTRACTING PARTIES CONVINCED that the Caribbean Court of Justice, ...will have a determinative role in the further development of Caribbean jurisprudence through the judicial process; ...’.

⁹⁷ See sections 9-12, 14, 16, 16A, 17, and 20 of the DRA, and the provisions generally of The Deeds Registry Rules.

Indeed, section 18 of the DRA provides that even as the deposit and filing of an instrument is *prima facie* valid and effectual, it is also ‘subject, nevertheless, to the right of any person interested disputing the validity of the transfer or assignment.’

[105] What this demonstrates therefore is the very high premium the DRA places on objective transactional propriety, and arguably proof of *bona fides* in relation thereto. Such an approach holds an equitable balance between, on the one hand, a transferee who is absolutely innocent of a fraudulent transaction, and on the other hand, one who is either careless or negligent, or a party or privy in relation to any such fraud.

[106] *Coddett v Thomas*,⁹⁸ a unanimous decision of the West Indian Court of Appeal (1957) which received the approval of this Court in *Ramkishun’s case* (2010), is an example of a courts approach to limiting the indefeasibility of title under the DRA. Arguably, in the general context of transactional errors. Of relevance, and no doubt one of the things that Wit JCCJ and the court were alluding to with approval in *Ramkishun* (cited above), was the following statement (which is also apposite in this matter):⁹⁹

The conveyancing system of this Colony does not require a register of titles to be kept; ... Here there is no statutory register: deeds are registered but there is no statutory provision ... which states that a later transport should take priority over an earlier one, and we can see no reason, and none was advanced, why a later title to a particular piece of land should be indefeasible *qua* a prior one which was also indefeasible, unless the statutory procedure ... is followed. It is quite apparent the proper procedure was not followed ... and in the absence of express statutory provision to the contrary it would be against the dictates of justice to allow the respondent to be victimised by the unauthorised and illegal act of the officer in question.

The defects that rendered registration defeasible may be aptly described as: a) transactional impropriety, or transactional error, and b) equitable, interests of justice, contradictions. For this West Indian court, substance eclipsed form and legalisms.

⁹⁸ (1957) LRBG 181.

⁹⁹ *Ibid* at [182-183].

[107] In this case, where the proper statutory and responsible state officials clearly failed to discover and denounce a fraudulent series of transactions, should ‘the dictates of justice’ allow Mr Price to be victimised by the unscrupulously illegal effects of a forgery, and as well by obvious systemic failures in this regard? If not, how is a just outcome arrived at (bearing in mind that the overriding objective of the rules applicable to the civil law justice system in Guyana is to ‘deal with cases justly’)?¹⁰⁰ Clearly the statutory procedures and state officers failed in their statutory functions and duties – Mr Price, who was at all material times out of Guyana, never signed the forged power of attorney and never intended to sell his lands. Within two months of the forgery and under sale transactions being registered he commenced this action to reclaim his title. The forger, Ms Jeboo, has been charged, prosecuted, convicted, and sentenced. She has served her term of imprisonment is now a free person. She has never paid the damages ordered by Chang CJ. Her whereabouts remain unknown. And Mr Price, deceased, is still without meaningful justice – his title stolen. Is a justice system that countenances this state of affairs, when State controlled ameliorating measures are known and easily made accessible, deserving of such a title?

Distinctions between the DRA and the LRA

[108] The Privy Council in *Frazer v Walker*¹⁰¹ has defined indefeasibility of title as:

. . . a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve the registered proprietor being protected against any claim whatsoever . . . there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[109] The Canadian decision in *Durrani v Augier*¹⁰² explains very neatly the general underpinning philosophy of land registration systems such as the LRA, and in particular the philosophy underpinning the doctrine of indefeasibility of title:¹⁰³

¹⁰⁰ Supreme Court of Guyana, Civil Procedure Rules 2016, Part 1.01(1).

¹⁰¹ [1967] 1 AC 569, at 580-81.

¹⁰² 50 O.R.(3d) 353.

¹⁰³ Ibid at [41] to [42], per Epstein J.

[41] The essential purpose of land titles legislation is to provide the public with security of title and facility of transfer: Di Castri, *Registration of Title to Land*, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32.¹⁰⁴ The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

[42] The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.¹⁰⁵

[110] What is significant for the purposes of this aspect of the analysis, are the three principles that Epstein J has identified: the mirror, curtain, and insurance principles. Subject also to statutory exceptions, registered encumbrances, and enforceable equitable interests,¹⁰⁶ the DRA seeks as well to achieve the mirror and curtain principles. However, the DRA is substantively distinct and different from the LRA in that it does not embody or aspire to accommodate the insurance principle. The implications of this are, in my opinion, considerable.

[111] The LRA embodied the insurance principle in Part XVII, sections 127 to 138. This Part establishes the fund, describes the circumstances in which persons would and would not be entitled to compensation,¹⁰⁷ the amount of compensation payable, and other matters facilitative of processing and assessing any compensation payable. Of note is that a person who has suffered loss by reason of the registration of another person as a proprietor is entitled to be considered,¹⁰⁸ and the compensation payable takes into account the value of the lands at the time of the entry which caused the loss.¹⁰⁹ This insurance principle and its resulting compensation provisions are consonant with the scheme, purpose and intention of the LRA in protecting non-fraudulent parties from

¹⁰⁴ Di Castri, *Registration of Title to Land*, Vol 2 (Carswell, 1987) at p 17-32.

¹⁰⁵ Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

¹⁰⁶ See s 22 of the DRA.

¹⁰⁷ See ss 128 to 130 of the LRA.

¹⁰⁸ Section 128 of the LRA.

¹⁰⁹ Section 131 of the LRA.

losses arising out of fraudulent transactions. In my opinion, it is arguably integral to the lawful regulation of all positive systems of land registration.

[112] By the creation of an assurance fund and mechanisms by which claims can be made on it by persons such as Mr Price, the LRA seeks to balance in constitutionally proportionate ways the aims of the legislative intent with the means used to achieve them. Across the common law world, wherever forms of the Torrens system of land registration have been introduced assurance funds have been included. The experience in the Anglo-Caribbean common law jurisdictions is similar.¹¹⁰

[113] In *Frazer v Walker*, Lord Wilberforce referred to these compensation provisions (in New Zealand), indicating the court's opinion that in the circumstances of that case the proprietor who had lost his title could have been entitled to compensation:¹¹¹

Before leaving the provisions of the statute some reference should be made to the compensation provisions, on which each side relied in argument.

The principal section is section 172. Under paragraph (b) compensation may be claimed by any person deprived of any land, or of any estate or interest in land, by the registration of any other person as proprietor of that land or by an error, omission or misdescription in any entry in the register and who by the Act is barred from bringing an action for recovery of that land, estate or interest.

Their Lordships do not wish to arrive at any firm view upon the possible application of this section in the present case - it would be undesirable that they should do so, since claims for compensation may have to be made. They are prepared to assume, for the purpose of argument only, that according as either failed in these proceedings, the former owner, the appellant, would, ... be enabled to claim compensation under this section ...

[114] In this case, whereas I would also not want to state any firm view on the matter, it would appear that if Mr Price's lands were to have been under the LRA, I would be prepared to assume that in the circumstances of this case he would

¹¹⁰ See for example, The Laws of Trinidad and Tobago The Real Property Act Chapter 56:02 section 149; The Laws of Jamaica the Registration of Titles Act sections 162, 167; Laws of St. Lucia Land Registration Act.

¹¹¹ [1967] 1 AC 569, at 582.

likely have been entitled to apply for compensation. Under the DRA no such statutory compensatory possibility exists.

[115] Another distinction between the DRA and the LRA is in relation to *bona fide* purchasers for value. The LRA specifically recognises and protects bona fide purchasers in certain circumstances.¹¹² However, the DRA embodies no such statutory recognition or protection. By way of example, section 65 (1) (b) of the LRA is the classic paramountcy provision in Torrens forms of land registration legislation. It establishes the nature of the title acquired by registration – ‘absolute and indefeasible’, unimpeachable, and therefore paramount, except in the stated instances. These include a) fraud, and b) *bona fide* purchasers for value.

[116] The significance of this is that the concept of a *bona fide* purchaser for value in land law was an equitable principle introduced to achieve justice in land transactions. To qualify, there are three main requirements: Firstly, the purchaser must have gained the legal interest in the property. Secondly, the purchaser must have given value for the property. Thirdly, the purchaser must not have had notice of any equitable interest at the time when he or she gave consideration for the conveyance.¹¹³ Snell’s Equity explains that a purchaser is prejudicially affected by notice in equity in at least three instances: a) actual notice - where the equity is within their own knowledge, b) constructive notice - where the equity would have come to their knowledge if proper enquiries had been made, and c) imputed notice - where their agent in the course of the transaction had actual or constructive notice of the equity.¹¹⁴ A purchaser is deemed to have constructive notice where, whether deliberately or carelessly, they or their agent abstained from making enquiries that a prudent purchaser would have made. Constructive notice also arises if a reasonable purchaser acting on skilled advice would have discovered the interest of another person in the property had proper enquires been made.

¹¹² See ss 61, 65 (1) (b), and 70 (2) of the LRA.

¹¹³ *Pilcher v Rawlins* (1872) 7 Ch App 259 [269]; *Snell’s Equity*, 33rd Edn., paras. 4-21 to 4-45.

¹¹⁴ *Ibid* At para 4-32 to 4-39.

[117] The implications of these differences between the DRA and the LRA will be explored in the sections below. Certain conclusions will be drawn, and recommendations suggested. A material consideration is clearly, to what extent have the approaches of the courts to both the issue of indefeasibility and to the exception of fraud under the Torrens forms of land registration systems, been influenced by statutory provisions for compensation and recognition of *bona fide* purchasers. This consideration becomes more acute where, as in Guyana, there are two distinct land registration systems operating, both are underpinned by the mirror and certainty principles, and both make exceptions for fraud – but one (the DRA) has neither enabled the insurance principle nor statutorily recognised or protected *bona fide* purchasers.

Constitutional Challenges

[118] The Constitution of Guyana in common with most other Anglo-Caribbean written constitutions contains both sovereignty and supremacy clauses.¹¹⁵ However, unlike many others Guyana asserts its sovereignty as an expressly socialist republican state – the Co-operative Republic of Guyana (in express contradistinction to a capitalist state).¹¹⁶ One assumes that this ideological orientation is purposeful, and so has consequential implications for land ownership and use, as we shall see.

[119] Guyana also asserts its Constitution as supreme, and that all other laws inconsistent with its principles and values are to the extent of those inconsistencies void.¹¹⁷ This Court has consistently held that the conjoint effects of these two clauses is to create as supra-constitutional values and principles, the separation of powers, the rule of law, and the independence of the judiciary as guardian of constitutionalism through the mechanisms of judicial and constitutional review (basic ‘deep’ structure constitutional values and principles). In particular, this Court has consistently held that the rule of law includes as an integral aspect fundamental human rights values and principles, and the supremacy clause is to be applied in relation to both legislative and

¹¹⁵ See Articles 1 and 8.

¹¹⁶ Article 1.

¹¹⁷ Article 8.

executive actions with this in mind – even in relation to laws saved as existing laws by the Constitution.¹¹⁸

[120] Being a socialist constitution, it ought to be unsurprising that in Part 1, Chapter II, the Principles and Bases of the Political, Economic and Social System, Article 18 provides that: ‘Land is for social use and must go to the tiller.’ This adoption of the classical socialist notion of “land to the tiller” speaks to both the ideological orientation of underpinning constitutional values in Guyana, as well as to specific intended shifts in approaches to general land law, land use, and ownership – certainly in relation to state lands. Its positioning in the layout and structure of the Guyana Constitution suggests its intended salience.¹¹⁹

[121] Contrast this current constitutional orientation with the historical and legal contexts in 1919 when the DRA was introduced and its teleological intent at that time.

[122] Indeed, in the specific context of Article 18, Article 39 (1) of the Constitution expressly provides in Part 1, Chapter II, that:

It is the duty of Parliament, the Government, the courts ...to be guided in the discharge of their functions by the principles set out in this Chapter ... Thus, the courts are also duty bound to interpret and apply the DRA through these constitutionally declared lenses.

[123] As well, Part 1, Chapter III, addresses the status of the constitutionally declared and protected fundamental human rights and freedoms. Article 40 declares the entitlement of every person to the enjoyment and protection of these rights and freedoms, and references Part 2, Title 1 as detailing the relevant subject matter content. Article 40 (2) makes it clear that the enjoyment and protection of these rights and freedoms are only ‘subject to such limitations ... as are contained in those provisions (Part 2, Title 1), being limitations designed to ensure that the enjoyment of the said rights and freedoms ... does not prejudice the rights and

¹¹⁸ See Wit JCCJ in *Joseph and Boyce v Attorney General* [2006] CCJ 3, (2006) 69 WIR 104 at [20], [2007] 4 LRC 199 at [314]; Byron PCCJ in *Nervais v The Queen* and *Severin v The Queen* [2018] CCJ 19 (AJ), (2018) 92 WIR 178 at [59], [2018] 4 LRC 545 at [572]; Saunders JCCJ in *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332 [41]-[45],[51]; Jamadar JCCJ in *Belize International Services Limited v The Attorney General of Belize* [2020] CCJ 9 (AJ) [319]-[321],[350].

¹¹⁹ See also, *Thankur v Ori*, [2018] CCJ 16 (AJ) [1], per Wit JCCJ – “Tucked away in one of the few deeply entrenched provisions of the Constitution of Guyana, section 18, one can find amid a multitude of legal and technical rules, a little philosophical gem of Lockean stature: “Land is for social use and must go to the tiller.” This, according to the Constitution, is one of the principles and bases of the political, economic and social system of Guyana. Although not classified as a fundamental right, the principle, one assumes, could have some bearing on Guyana’s land law.’.

freedoms of others or the public interest.’ These limitations are germane when one comes to consider other laws which may arguably be inconsistent with these rights and freedoms.

[124] Part 2, Title 1, of the Constitution deals specifically with the content of the declared fundamental human rights and freedoms. Article 142 is apposite. It protects individuals from the deprivation of property, and specifically provides that the acquisition of lands must be under authority of a written law ‘requiring the prompt payment of adequate compensation’.¹²⁰

[125] In *Bisnauth v Shewprashad* this Court unanimously considered that:¹²¹

Section 142(1) of the Constitution clearly considers the protection from arbitrary deprivation of property as a fundamental right worthy of the highest form of judicial relief. It is equally clear that this right is not without exceptions. Properties can be taken “under the authority of a written law” and nothing done under the authority of “any law with respect to the limitation of actions “shall be held inconsistent with” that fundamental right (section 142 (2)(a)(vi) of the Constitution). But because of the very fact that it constitutes an exception to such a fundamental right, the Title to Land (Prescription and Limitation) Act and its provisions have to be interpreted in a way that will be in keeping with its character as an exception. The interpretation has to be such that the property rights of owners will be preserved as much as reasonable. True, exceptions to fundamental rights are generally possible and even necessary but the written law which embodies them will have to contain what I have called elsewhere (*AG v Joseph and Boyce*, [2009] CCJ 3 (AJ), [53], (2006) 69 WIR 104 at 226.) adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. If such safeguards are palpably lacking, such a law, or parts of it, might, although complying with the formal requirement of being a “written law”, still be unconstitutional (which might be arguable if, for example, the legislator would decide to limit the prescription period to one year or if he would expressly allow prescription by concealed possession of land). Be that as it may, at the very least, the interpretation of those provisions should be such as to limit arbitrary deprivation of property as far as possible.

(Emphasis added.)

[126] Notice how the court’s approach was to: a) justify, if necessary, the reading down of provisions in the legislation so as to align them as much as possible

¹²⁰ See Art. 142 (1).

¹²¹ Wit JCCJ, [2009] CCJ 8 (AJ), (2009) 79 WIR 339 [53]; emphasis added. This was a matter concerning the Title to Land (Prescription and Limitation) Act, Chapter 60:02, of Guyana.

with the protected fundamental rights and freedoms provisions, b) recognise that if reasonable safeguards of the rule of law (protection of the law), in the form of protecting and preserving the property rights of land owners, are ‘palpably lacking, such a law, or parts of it, might ... still be unconstitutional’, and c) identify those safeguards in the context of fundamental rights and freedoms as being safeguards against ‘irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power’. In 2018, Wit JCCJ, again delivering the unanimous judgement of this Court, reiterated what had been said in *Bisnauth’s case*: ‘We must be very emphatic in stating that the principles stated in *Bisnauth* remain influential in matters such as these.’¹²²

[127] What is clear, is that the rule of law requires that the DRA be read, interpreted, and applied through the lenses of constitutionalism, including both local and international human rights provisions,¹²³ as well as basic ‘deep’ structure constitutional principles.¹²⁴ What is also clear, is that in this exercise ‘at the very least, the interpretation ... should be such as to limit arbitrary deprivation of property as far as possible.’

[128] Further, even though the DRA is an existing law for the purposes of the savings clause in the Constitution,¹²⁵ that does not prevent a court interpreting and applying the law, modifying it,¹²⁶ so as to bring it into conformity with both local and international human rights and basic ‘deep’ structure values and principles of Guyanese constitutionalism.

[129] This Court in *McEwan* has opined authoritatively on these matters as follows:¹²⁷

(a) Article 39(2) of the Guyana Constitution expressly mandates the courts to “pay due regard to international law, international conventions, covenants and charters bearing on human rights” when interpreting any of the fundamental rights provisions of the Constitution. In *Thomas v AG*, one of the first cases

¹²² *Thankur v Ori*, [2018] CCJ 16 (AJ)[47] – [48] – ‘The protection of property rights has always been of utmost importance and will remain so, but that protection has always been subject to certain exceptions and principles’.

¹²³ See Article 39 (2) of the Constitution – ‘ In the interpretation of the fundamental rights provisions of this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights.’.

¹²⁴ See Jamadar JCCJ, and Wit JCCJ in *Belize International Services Limited v The Attorney General of Belize* [2020] CCJ 9 (AJ), [2021] 1 LRC 36.

¹²⁵ Article 152.

¹²⁶ Section 7 (1) of the Constitution of the Co-operative Republic of Guyana Act Cap 1:01.

¹²⁷ See Saunders JCCJ in *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana* [2018] CCJ 30 (AJ), (2019) 94 WIR 332 [55], and [59].

to examine Article 39(2), George J (as she then was) held [at [12]] that the provision placed courts under a duty ‘to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.’ George J expressly distinguished the situation in Guyana from other Caricom States in which international law is said merely to have persuasive application. In Guyana, therefore, there is an even greater onus on courts, pending legislative reform, to interpret the savings clause as narrowly as possible so as to place the law in compliance with the country’s international law obligations.

(b) This Court’s judgment in *Nervais* came down firmly on the side of the dissentients. At [64] we stated unequivocally, in relation to the Barbados Constitution, that:

Where any person alleges that an existing law has contravened or is contravening or is likely to contravene any of the provisions of sections 12 to 23 in relation to him, the Court must read section 4(1) of the Independence Order together with section 26(1) of the Constitution.

Further, at [68] of the judgment, we concluded that:

Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution.

In other words, we held that the modification clause and the savings clause must be read together so that pre-Independence law is brought into conformity with the Constitution.

[130] *McEwan* was a Guyanese case, and this Court was clear that in Guyana: ‘... the effect of the savings clause, read together with the modification clause (i.e. the section akin to section 7(1) of the Guyana Constitution Act), was to permit the Court to identify an inconsistency between an existing law and the fundamental rights in the Constitution and to modify the inconsistency out of existence. The

savings clause would only be needed where it proved utterly impossible to modify the existing law to make it conform with the Constitution.¹²⁸

[131] In this regard, it is noteworthy that Article 21 of the American Convention on Human Rights¹²⁹ provides as follows:

Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

...

And Article 17 of The Universal Declaration of Human Rights provides that:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

(Emphasis added.)

[132] Of course, the issue now is, how could these constitutional approaches be relevant in the circumstances of the DRA and in the particular circumstances of this case. These matters were not raised in argument, and so no binding decisions ought to be made about them in this case. The State is also not a party. Yet such is the importance of their import, that this provisional analysis is considered well justified.

[133] First. In so far as the State has chosen to regulate by legislation the law in relation to land transactions and in particular the sale and purchase of land, it has a duty to do so in ways that are rule of law compliant. That is, in ways that

¹²⁸ See [58].

¹²⁹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

are rational, fair, reasonable, proportionate, equal, non-discriminatory, and just; constitutionally compliant. To the extent that this is not so, the courts, as guardians of Guyanese constitutionalism, have a responsibility to modify existing laws where appropriate to facilitate consistency with core constitutional values and principles, and/or to make such orders that in the circumstances of any particular case would achieve this standard of constitutional justice.

[134] Second. There is arguably, and compellingly so, an arbitrary, discriminatory, irrational, and unjust difference in the application of the DRA and the LRA in cases such as this one. Both pieces of legislation purport to prescribe for and regulate land transactions by registration schemes. Both seek to embody the mirror and curtain principles, and thereby to establish indefeasible titles to land by virtue of such a register. Yet the DRA has not embodied the insurance principle and the LRA has. Thus, a person similarly circumstanced to Mr Price, who suffered the same fate that he did with respect to lands under the LRA, would qualify to apply for and likely be entitled to receive compensation payable by the State equal to the market value of his lands (his loss). Such disparate consequences for two parallel State approved legislative schemes strike at the heart of fundamental equality, are arguably arbitrary, unfair, unreasonable, unjust and contrary to the avowed constitutional values in relation to land ownership and property rights in Guyana.

[135] Third. Standing on its own, the DRA in so far as it seeks to regulate land transactions as described above, may likely not meet the standards of current constitutional aims-means tests for constitutional compliance in Caribbean democracies.¹³⁰ This is particularly likely given the constitutional recognition and value in Guyana of due compensation for legitimate deprivation of property, and so *a fortiori* for fraudulent deprivation. The State has the constitutional duty to make and reform laws that pass constitutional muster. The courts have a parallel obligation to ensure that this is so.

¹³⁰ *Suratt v The Attorney General* 2007 UKPC 55, (2007) 71 WIR 391 at [58], per Lady Hale; *Public Service Appeal Board v Maraj* [2010] UKPC 29, (2010) 78 WIR 461 at [31]-[32] per Lady Hale; *AG of Guyana v Richardson* [2018] CCJ 17 AJ, (2018) 92 WIR 416, [2018] 4 LRC 488 at [114]-[116], [119], per Wit JCCJ; *Francis v The State* (2014) 86 WIR 418.

[136] Fourth. Compensation payable may well be a possibility in an action against the State for losses such as have occurred to Mr Price in this case. Immediate reform of the DRA, to at least embody an appropriate form of the insurance principle, would also appear to be an urgent imperative.

[137] Fifth. Modification of the DRA to bring it into conformity with Guyanese principles of constitutionalism as they apply to land ownership and property rights in Guyana, remains an option to be explored by the courts, with the consequences that may follow.

Equitable Considerations: Competing Equities

[138] The protections afforded to a *bona fide* purchaser for value are based on equitable principles. Another equitable principle is that equity will not allow a statute to be used as an instrument of fraud. And a third is the order of creation rule that ‘*qui prior est tempore, potior est ius*’ – who is earlier in time is stronger in law. Put together as equitable principles these open up the issue as to whose title should prevail, or rank in priority, as between Mr Price’s and Ms Todd’s. The creation rule suggests that estates and interests should ordinarily rank in the temporal order in which they have been created. This rule applies to both legal and equitable interests. In this case the competing legal interests are of the same juridical rank, the essential difference being that the latter (Todd’s) is the product of fraud.¹³¹

[139] I have already cited extracts from this Court’s decisions in *Ramdeo and Ramkishun* to show that equitable principles apply to fraud in the context of the DRA. Of particular importance, and worth repeating here, is this Court’s recognition and adoption of the statement by Dr Ramsahoye that: ‘Principles of Roman-Dutch law could always have been invoked to prevent fraudulent conduct and to rectify mistakes and it would appear that a substitution [by the Civil Law Ordinance] of English equity for the broad equity of the Roman-Dutch system was in this respect a substitution only in form.’¹³² Significantly,

¹³¹ See *Phillips v Phillips* (1862) 4 De G F & J 208, at 215.; and *Snell’s Equity*, 1990, 29th edn., p 45; 2000, 30th edn., p. 46. – ‘At law, as in equity, the basic rule is that estates and interests primarily rank in the order of creation.’

¹³² See *Deferred and Immediate Indefeasibility*, paras [18] to [42] above.

Dr Ramahoye also makes the point that:¹³³ ‘Equity has intervened to set aside transactions tainted with fraud¹³⁴ and it has not allowed conveyancing statutes to be used as a shield and protection against fraud.’¹³⁵ Regrettably, this interrogation was not raised or explored in this appeal.

[140] In fact, Dr. Ramsahoye in his seminal and widely considered authoritative text on land law in British Guyana, highlights in the context of equitable approaches to land transactions, section 2 (3) of the Civil Law Ordinance.¹³⁶ The marginal note to that subsection in the Act describes it as the ‘Saving of existing rights’. It states (abridged):

(3) Nothing in this Act contained shall be held to deprive any person of any right of ownership, or other right, title, or interest in any property, movable or immovable, ...; and where in any matter whatsoever ... effect may be given to the Roman-Dutch rule or procedure to the extent the High Court deems advisable in the interests of equity if that Court is so advised.”

(Emphasis added.)

[141] Dr Ramsahoye’s comment on this subsection is as follows:¹³⁷

“Section 2 (3) of the Civil Law Ordinance provided for the application of Roman-Dutch law in certain cases to the extent the Supreme Court deems advisable in the interests of equity. It is clear that the equity in that subsection is not the same as the equity referred to in subsequent provisions of the Ordinance. Equity in section 2 (3) can mean no more than justice in a broad sense distinct from the ‘equitable spirit’ of the Roman-Dutch law and the crystallized doctrines of English equity.

(Emphasis added.)

[142] Thus, the equity referred to in section 2 (3) is distinct from, say, that referred to in section 3 (b) of the very Act (referenced in *Ramdeo’s case* and referred to above at paragraph 83 under deferred and immediate indefeasibility), and intended to be in addition to any such equities. What is particularly noteworthy, is that section 2 (3) is seeking to facilitate the achievement of ‘justice in a broad sense’ (to quote Dr Ramsahoye), in the context of ‘special local conditions for

¹³³ *The Development of Land Law in British Guiana*; at p. 282

¹³⁴ Citing, *King v Bissember and Mc David* (1951) L.R.B.G. 107.

¹³⁵ Citing, *Baynes v Price* (1949) LRBG 99, and *Nelson v Odle* (1939) LRBG 24.

¹³⁶ Section 2 (3) in the Civil Law of Guyana Act.

¹³⁷ At p 284.

which no provision is made by this or any other Act' (to quote the words of the subsection itself).

- [143] In *Ramkishun*'s case this Court pointed out the practical effects of upholding an equitable interest in the context of the DRA:¹³⁸

Upon further reflection, however, it will be appreciated that the transport itself is not vitiated by a successful action brought by a prior purchaser and based upon an equitable principle. The transport stays intact. If the action succeeds it only means that the transport has to be passed to the purchaser....In cases like these the perceived certainty and efficiency of the Guyanese Deeds Registry system are not eroded disproportionately (if at all) by allowing the action.

- [144] The High Court of Australia, in *Breskvar v Wall*,¹³⁹ a Torrens system case, was of a similar opinion:

It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for "personal equities" derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.

- [145] The balancing of this twofold approach by the CCJ (the recognition of equitable claims *in personam* and the conclusiveness of the register as a source of title to lands) is consistent with other international approaches to similar situations, albeit in the contexts of Torrens style land registration systems. It is a striving to balance the legal values of certainty and equitable justice. *Frazer v Walker* is a prime example of this as already indicated; noting specifically that Lord Wilberforce was careful to point out that neither the *ratio* nor the *dicta* in *Frazer v Walker* was intended 'to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted.'¹⁴⁰ As recently as 2007, in *Creque v Penn*,¹⁴¹ the Privy Council has reiterated that an indefeasible title under the Torrens systems is not an absolute title both in relation to claims permitted by the relevant legislation, as well as in relation to claims brought *in personam* against a registered proprietor.

¹³⁸ At [64].

¹³⁹ (1971) 126 CLR 376, at [384]-[385], per Barwick CJ.

¹⁴⁰ See [1967] 1 AC 569, at [585].

¹⁴¹ [2007] UKPC 44, (2007) 70 WIR 150, at [16].

- [146] This is acutely so as between registered proprietors and equitable claimants where and when no third-party interests have intervened. Indeed, the mystique of *in personam* ('against a particular person') claims in this context is exposed as meaning simply claims that can be brought against the current registered proprietor, and not *in rem* as against all possible and future registered proprietors.
- [147] What then is the effect of registration on void instruments? In this case the transport in favour of Ms Todd is in law a void instrument, Mr Price never conveyed his interest or title; that conveyance was fraudulently procured. *Breskvar v Wall* is instructive of the approach under the Torrens system. A void transfer facilitated by the registered proprietors, was fraudulently registered by and in the name of a lender. Subsequently the lender transferred the property to a *bona fide* purchaser for value without notice of the lender's fraud. The court held that, a) upon registration in favour of the lender the title to the lands was vested in the lender, b) the former registered proprietors only had an equitable claim to the land as against the lender (to have the land re-transferred), c) the third-party bona fide purchaser acquired an equitable interest in the land which took priority over the former proprietors because of their involvement in the state of affairs that led to the fraudulent registration in favour of the lender, and therefore d) the third-party was entitled to be registered as the title holders of the lands.¹⁴²
- [148] In this case Mr Price was in no way, shape, or form involved in any improper conduct in relation to the void and fraudulent transport in favour of Ms Todd. He is an absolutely *bona fide* and innocent party. No third-party interests are involved. Assuming that Ms Todd is a bona fide purchaser for value without

¹⁴² Per Barwick CJ at [387]: 'If there had been no transaction by the first respondent (lender) with the third respondent (*bona fide* purchaser), the appellants (former registered proprietors) would have been entitled to succeed against the first respondent.'; per Mc Tiernan J at [391]: 'In my judgment the decision of the Privy Council in *Frazer v. Walker* requires the conclusion that Wall's (lender's) certificate of title was good against all the world, except of course the defrauded Breskvards (former registered proprietors).'; per Walsh J at [401]: 'In my opinion it is clear that if the appellants (former registered proprietors) had taken action against Wall (lender), before there had been any dealing by him with a third party (*bona fide* purchaser), seeking to have the transfer set aside or seeking a declaration that it was held by way of security only and claiming appropriate consequential relief, Wall would not have been able to rely on his registered title to defeat such a claim.'; and at [408]: 'The right that they had was in my opinion of the nature of an equitable right. It was a right to ask a court to compel Wall as the holder of the registered title to deal with it in such a way that he would obtain no benefit from the fraud that had been practised on the appellants.'

notice of the fraud, how do the competing equities to an interest in the land rank?
Whose takes priority?

- [149] *Gibbs v Messer* can be helpful in resolving these questions. The Privy Council set aside the title of third party mortgagees because the mortgage was created in favour of a fictitious person whose name had been entered on the land register in place of the former registered proprietors by a fraudster who forged their signatures. That case, and this one, involved the loss by an innocent party and the acquisition by another arguably ‘innocent’ party of title to lands as a result of a forgery and a fraudster. In *Gibbs v Messer*, as here, the party unknowingly defrauded lost their lands and received no benefits or consideration from the theft of their properties. In these circumstances Lord Watson, on behalf of the Board, stated:¹⁴³

In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.

- [150] Lord Watson in arriving at this position first established certain fundamental principles in relation to Torrens type systems:¹⁴⁴

The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

And further:¹⁴⁵

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bonâ fide purchaser by force of the statute, there is no enactment

¹⁴³ [1891] AC 248, at 258.

¹⁴⁴ [1891] AC 248, at, 255.

¹⁴⁵ [1891] AC 248, at, 257-58.

which makes indefeasible the registered right of the transferee or mortgagee under a null deed.

- [151] In the context of the relevant legislation, three general principles can be gleaned from Lord Watson's opinion: a) 'a forged instrument will not be given statutory indefeasibility as between the immediate parties to the transaction even though the instrument is duly registered'; b) 'a bona fide purchaser of such a title will gain statutory indefeasibility upon registration notwithstanding the precarious nature of his transferor's title' by virtue of the statutory provisions; and c) 'a registered transferee will not get an indefeasible title unless he has transacted on the faith of the register.'¹⁴⁶
- [152] In principle, what is true in relation to forged instruments should by analogy also apply to all void instruments *vis a vis* an immediate transferee, barring the *bona fides* exceptions. Thus of special significance in this case is the third of Lord Watson's principles, that indefeasibility of title in a positive system of land registration is conditional upon *bona fide* transactional propriety – '... transacting on the faith of the register.' Again, it is therefore arguable that there is a positive onus on an intended purchaser to ascertain the genuineness of the transaction, and a concomitant consequence to carelessness, negligence, or omission to properly do so.
- [153] What begins to emerge from this analysis is that in cases of fraud/forgery and consequentially void transactions, where no *bona fide* third-party interests intervene, as between a former completely innocent registered proprietor who has lost their lands and an immediate arguably also innocent registered proprietor who has acquired them, the highest courts have at least been willing to find an *in personam* equity in favour of the former registered proprietor as against the latter in Torrens land registration systems. An option which this Court has also already acknowledged as possible under the DRA. That is to say, even though on the one hand, registration of a void transaction and consequent instruments is sufficient and effective in law to vest and to divest title, on the other hand such titles are not absolutely indefeasible. If personal equities can be

¹⁴⁶ See and compare the critique in, 'Breskvar v Wall: The End of Deferred Indefeasibility?', Gim L. Teh, (1974) 9 Melbourne University Law Review 383-385.

established, consequential orders may be made divesting them of their interests acquired by reason of registration.

- [154] What is also interesting is what appears to be an interrogation of what it means to be a *bona fide* purchaser in this context. In *Gibbs' case*, arguably what tilted the scales in favour of the former registered proprietors can be analysed as, a) an evaluation of priorities, and b) an obligation, a duty, on a transferee to ascertain the *bona fides*, the genuineness of offer, offerors, and transactional propriety.¹⁴⁷
- [155] In the context of the DRA this examination warrants further consideration because of: a) the constitutional challenges averred to, b) the absence of statutory recognition or protection afforded to *bona fide* purchasers, unlike in the LRA, c) the recognition of equitable rights in sections 2 (3) and 3 (b) of the Civil Law of Guyana Act, d) the jurisprudence of this Court, and e) the specific proviso in section 22 (1) of the DRA in relation to the fraud exception – ‘parties or privies to the fraud’. In this latter regard, it is noteworthy that in law the expression ‘privy’ can mean a person participating directly in, or having a derivative interest in a legal transaction.¹⁴⁸ Taken in context, a person privy to fraud can at minimum therefore include a party consciously (even if not so participatorily) a privy, and even arguably a party who does little or nothing to avoid being a privy.
- [156] Thus, the onus, duty, and responsibility on purchasers under the DRA for ‘ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal’.¹⁴⁹ In this matter, the onus, duty, and obligation on Ms Todd and her lawyers to ascertain the genuineness of both actors and instruments related to the material transactions in this case, and in particular whether Mr Price was genuinely involved in this sale. In short, a duty to ascertain the genuineness of the transaction, to meet an objective standard of reasonableness.

¹⁴⁷ *Coddett v Thomas* is an example of the duty and the consequences of its failure in relation to transactional propriety.

¹⁴⁸ Derivative in its ordinary usage refers to something which is based in or on another source; something made or developed from another form. Thus, coming from another, taken from something preceding, such as a derivative title, which is a title acquired from another.

¹⁴⁹ See *Gibbs v Messer* above, at 258.

[157] This is not necessarily an issue of equitable fraud, or of culpable impropriety; rather it is one of contextual *bona fide* dealing and the placement and consequences of that responsibility. What then is the duty of *bona fides* on a purchaser in the context of the DRA and in a scenario such as this one? Was Ms Todd and/or her agent and attorney deficient in discharging this duty and responsibility?

The Brelsford case, further Caribbean insights

[158] In *Brelsford v Providence Estate Ltd*¹⁵⁰ the Court of Appeal of the Eastern Caribbean Supreme Court was faced with similar issues. It dealt with them in compelling fashion. It was a case under a typical Torrens system of land registration.

[159] The relevant facts were as follows. Providence Estate ('PEL') was the registered proprietor of lands with absolute title. Brelsford and others all purchased lands from PEL. In the transactions, PEL was purportedly represented by its sole director, C. The law firm of which C, an attorney-at-law, was a member also acted as legal representative for PEL in the transactions, which all culminated with the registration of Brelsford and others as proprietors of the land. C was subsequently convicted of conspiracy to defraud. Brelsford and others brought individual claims against PEL seeking declarations that they were the absolute owners of the lands which had been transferred to them from PEL. PEL counterclaimed a) for a declaration that the appellants were not bona fide purchasers for value, b) for rectification of the land register to reflect PEL as the proprietor of the lands, and c) for a declaration that the land was being held on trust for PEL.

[160] The Court of Appeal concluded that: a) on the evidence, the transactions in question were not the acts of PEL but were in fact forgeries, therefore b) the various land transfers purportedly made on behalf of PEL in favour of Brelsford and others were therefore void for want of authority of C to act in the name of PEL, c) the effect of the void transfers was that PEL was nonetheless divested of its title to the parcels of land and the titles were vested in the purchasers who

¹⁵⁰ [2018] 3 LRC 513.

acquired indefeasible title to the parcels, d) as between PEL and the purchasers, personal equities could nevertheless arise which could affect the relationships between PEL and the purchasers, as no third party interests had intervened with respect to the properties, and e) the void transaction did not give rise to an equitable interest in the property itself, but could give rise to the equitable right to sue for recovery of the land and Brelsford and others, as the new registered proprietors of the land, would hold their titles subject to that right.

[161] Thus the final determination that even though Brelsford and others had acquired an indefeasible title based on their registrations as proprietors, their ownership was subject to equities in favour of PEL on the ground that the transactions were forgeries and therefore void for want of authority of C to act on behalf of PEL. The court declared that Brelsford and others were the absolute owners of the various parcels of land for which they were respectively registered as proprietors, and also ordered that they all held the lands subject to an equity in favour of PEL to apply to the court for an order to compel each one of them as proprietors to re-transfer the parcels to PEL.¹⁵¹

[162] Of further significance was the court's consideration of the *bona fides* of the purchasers, Brelsford and others. The Court of Appeal adopted the approach taken in *Gibbs v Messer*, that there was a duty on them to make proper inquiries as to C's authority to act on behalf of PEL and as well to verify the vendor and ensure that valid transfers were obtained – that is, there was a duty to verify transactional propriety and genuineness. Thus, Carrington JA, with the concurrence of the other judges, opined as follows:¹⁵²

If, as stated in *Gibbs v Messer*, the duty to verify the vendor and to ensure that a valid transfer instrument is executed rests on the purchaser, the learned judge found that the appellants had failed to observe this duty and for this reason were not bona fide purchasers for value without notice.

...I agree with the learned judge that this failure would be sufficient to tilt the balance of equity in favour of PEL.

[163] The parallels in core circumstances between the Brelsford decision and this case are inescapable. The threads of analysis are also inviting. The issue is therefore

¹⁵¹ At [65] to [66].

¹⁵² At [57] to [58].

to what extent can these similarities and analogies be extrapolated into the context of the DRA?

[164] What is most significant and unavoidable, is the range of legal and authoritative sources from which ‘equitable’ relief can be culled in a case such as this. These include, sections 2 (3) and 3 (b) of the Civil Law of Guyana Act, this Court’s consistently unequivocal recognition of the jurisprudential legitimacy of *in personam* claims under the DRA, and as well the equitable approaches taken to fraudulent transactions historically under Roman-Dutch law in Guyana. What all these sources seem to be inviting the courts to avoid is, by analogy, an approach encrusted in ‘the austerity of tabulated legalism’.¹⁵³ An approach that attempts to cut and parse into discrete bits and pieces what ‘equities’ are possible and which ones are not under the DRA. A more holistic and purposive approach seems to be required in 2021, given the constitutional imperatives that the principles of supremacy and sovereignty demand in relation to the interpretation of legislation, especially legislation that was enacted and intended to serve colonial vested interests.

Statutory Compliance, facts and inferences to be drawn in this case

[165] Chang CJ and the three judges of the Court of Appeal in this matter differed on the interpretation and application of the facts. In my opinion any analysis of the facts in this case must be undertaken considering the discussions on the law described above. One relevant consideration is that of objective statutory transactional propriety; a second is a more subjective assessment of Ms Todd’s and her attorneys’ contextual *bona fides*.

[166] The following table documents the steps to be taken and the party responsible in relation to the sale and registration of a transport under the DRA:¹⁵⁴

Steps	Document	Prepared by	Notes
1	Agreement of sale	Usually the Vendor	This facilitates the sale of the property by indicating that there is such an agreement and by identifying the terms the agreement.

¹⁵³ Lord Wilberforce, *Minister of Home Affairs v Fisher* (1979) 3 All ER 21, at 25.

¹⁵⁴ See s 9 (2) and 16A (a) and (b) of the DRA, and the following enabled Deeds Registry Rules: Rules 4; 6(1), (2), (3); 8; 9; and 23. Table researched and prepared by Judicial Counsel Antonio Emmanuel.

2	Transport	The Vendor	This is the legal document to prove that the Vendor has full and absolute ownership of the property and therefore the authority to sell it. This allows the Purchaser to determine whether there are any registered interests and or encumbrances existing on the property, and is used to obtain a full description of the property being sold (Section 22 Deeds Registry Act, cap. 5:01).
3	Certificate of Compliance from the Commission of Inland Revenue (Guyana Revenue Authority)	The Vendor	This indicates that the Vendor has delivered all his tax returns for the preceding year of income and that all taxes due and payable by the Vendor to the Guyana Revenue Authority have been paid (Section 16A(a), Deeds Registry Act, Cap. 5:01).
4	Certificate of Compliance from Mayor and City Council	The Vendor	This indicates that the Vendor has paid all land taxes, rates and other sums due and payable in respect of the property (Section 16A(b), Deeds Registry Act, Cap. 5:01).
5	Instructions to Advertise	The Vendor	These instructions must be provided and lodged at the Registry, and contain the description of the property, names of the parties concerned, and their addresses (Rule 6(1), Deeds Registry Rules, Cap. 5:01). This transaction should be advertised once by the Registrar in the gazette on a Saturday (Rule 6(2), Deeds Registry Rules, Cap. 5:01), and this is done so that anyone having the right to oppose the transfer may so do (Rule 8, Deeds Registry Rules, Cap. 5:01).
6	Affidavit of Vendor	The Vendor	This indicates the particulars of the sale in a sworn form, setting out that the purchase price stated is the true consideration. This must be lodged with the Registrar at the same time of the lodging of the written instructions (above) and the affidavit of the purchaser (below) (Section 45 of the Deeds Registry Act; Rule 6(1), Deeds Registry Rules, Cap. 5:01).
7	Affidavit of Purchaser	The Purchaser	This indicates what the purchaser has agreed to under oath, especially in relation to the purchase price (Section 45 of the Deeds Registry Act; Rule 6(1), Deeds Registry Rules, Cap. 5:01).

[167] The evidence in relation to the conveyancing steps in this case is as follows:

- (a) Desiree Price admitted under cross examination that the power of attorney was registered in the deeds registry, that the requisite documents were filed in the deeds registry for the transport to be passed, and that Allan Price did not object to the passing of the transport.¹⁵⁵ Ms. Price deposed:

I do not deny that the power of attorney was registered in the Deeds Registry. I do not deny that the requisite documents were filed in the Deeds Registry for the transport to be passed and that the transport to Merlene Todd was passed pursuant to that process. Allan Price did not object to the passing of transport.

- (b) Geeta Anirudh, Legal Clerk in the Deeds Registry, representing the Registrar deposed:

When properties are transferred by transport they are recorded in the Deeds Registry. There must be an Affidavit of vendor (Donor) and Purchaser (Donee) with Instructions. Powers of Attorneys are registered, and copies are kept in the Deeds Registry.¹⁵⁶

- (c) Ms. Anirudh also deposed that she had in her possession:

- i. A certified copy of power of attorney No. 1360 of 2003.
- ii. A copy of transport No. 936 of 1979 in the name of Allan Price.

- (d) Ms. Anirudh further deposed that the transported owner of the property was now Merlene Todd pursuant to transport No. 400 of 2004. Notwithstanding the aforesaid, Ms. Anirudh deposed that she did not have a copy of transport No. 400 of 2004, nor the Affidavit of Vendor, or of the Purchaser, or the Instructions. Ms. Anirudh testified that she was also unable to locate the relevant Certificate of Compliance. She confirmed that before a transport is passed a Certificate of Compliance is necessary.¹⁵⁷ She indicated that a) no record indicated where the missing documents can be found, b) she never gave the missing documents to anyone, and none of the missing documents were given to anyone in her presence, and c) she would not be able to say who swore the affidavit of Vendor, or who were the attorneys at law that signed the Instructions. She also confirmed that even if given more time she could not locate the missing documents.¹⁵⁸

¹⁵⁵ Ibid p 81.

¹⁵⁶ Ibid p 83-84.

¹⁵⁷ See s 16A (a) and (b).

¹⁵⁸ Ibid p 84.

- (e) Under cross examination Ms. Anirudh admitted that the power of attorney was filed and registered in the Deeds Registry. She explained that the requirement is that before a document is accepted for filing the officer at the counter in the Registry ought to satisfy themselves that the document was not a forged document.¹⁵⁹
- (f) Merlene Todd deposed that she saw a copy of the transport in the name of Allan Price, and that she took copies of the transport and the power of attorney. She however confirmed that she never saw the signature of Allan Price on the transport. She also explained that Ms. Jeboo, the fraudster who misrepresented herself to be the attorney and agent of Mr Price, did not have the original transport and explained to her that Allan Price had misplaced it. Merlene Todd testified that Ms Jeboo said she would apply for a *loss grosse*. Merlene Todd also claimed that she saw documents which constituted a prepared application for a *loss grosse*.¹⁶⁰
- (g) Merlene Todd testified that the Power of Attorney had a signature purporting to be that of Allan Price and the seal of the Deeds Registry affixed. She visited the property and saw no buildings on it. That she went to the Deeds Registry to verify the genuineness of the transport and the power of attorney. She stated that a staff member of the Deeds Registry gave her assistance in doing the checking and told her that the documents were okay.¹⁶¹
- (h) Merlene Todd testified that Nalini Singh, real estate agent, prepared the Agreement of Sale between herself and Jennifer Jeboo.¹⁶²
- (i) Merlene Todd testified that her lawyer, Mr. Mortimer Codette, prepared the Affidavit of Purchaser and the Instructions to Advertise. And, that the ‘conveyance’ was advertised in the Official Gazette. Further, that no one opposed the passing of the transport.¹⁶³
- (j) Under cross examination Merlene Todd explained that Jennifer Jeboo had obtained a Certificate of Compliance for Allan Price, prior to the passing of

¹⁵⁹ Ibid p 84-85.

¹⁶⁰ Ibid p 86.

¹⁶¹ Ibid p 86.

¹⁶² Ibid p 87.

¹⁶³ Ibid p 87.

transport.¹⁶⁴ She admitted that she knew that when a property is sold the vendor has to get a Certificate of Compliance from city hall, and she also admitted that she never saw the Certificate of Compliance at the time of the conveyance.¹⁶⁵

- (k) Merlene Todd admitted under cross examination that Mr. Codette, her attorney at law, acted on behalf of both parties.¹⁶⁶

[168] The conclusions on the facts by the three judges of the Court of Appeal may be summarised as follows. First, Persaud, JA found that Merlene Todd's conduct was permeated by such gross negligence as to render it fraudulent or sufficient to impute fraud. Persaud, JA found that there was not a proper evaluation of the evidence by Chang CJ, nor that there were proper inferences drawn on the basis of:

- a. "The discrepancies in the dates of the affidavit of vendor, purchaser, in the instruction to advertise and the issuance of certificates of compliance of rates and taxes in the name of another is telling."¹⁶⁷
- b. Discrepancies on the power of attorney.¹⁶⁸
- c. The evidence as it relates to the visit to the property and the description of the property.¹⁶⁹
- d. The undervalued purchase price.¹⁷⁰

[169] Second, Gregory, JA found that the evidence before Chang, CJ was not fully evaluated in relation to the issue whether Merlene Todd was privy to Jennifer Jeboo's fraud. He found that Merlene Todd failed to enquire about Allan Price's address,¹⁷¹ should have been put on alert as the transport described the property as having building and erections thereon, but the actual property was overgrown with bushes when Merlene Todd made a site visit,¹⁷² and the purchase price was under the market value.¹⁷³

¹⁶⁴ Ibid p 88.

¹⁶⁵ Ibid p 89-90.

¹⁶⁶ Ibid p 89.

¹⁶⁷ Ibid p 179.

¹⁶⁸ Ibid p 179.

¹⁶⁹ Ibid p 179.

¹⁷⁰ Ibid p 179.

¹⁷¹ Ibid p 181 -182.

¹⁷² Ibid p 182.

¹⁷³ Ibid p 182.

- [170] Third, Cummings-Edwards, C found that Merlene Todd was either grossly negligent or privy to the fraud. She found that the trial judge either disregarded relevant evidence or otherwise was plainly wrong in his assessment of the evidence or the inferences drawn from the evidence on the basis of “the mix of the dates on the documents, the agreement of sale and the instruction to advertise”, the description of the property being transported with the building and erections thereon contrasted with the visit that Merlene Todd made to a property which did not have a building, and the undervalued purchase price.¹⁷⁴
- [171] In addition to the observations and inferences noted by the judges of the Court of Appeal, one further matter stands out. The same attorney acted for all the parties and Ms Todd was fully aware of this. When one considers the statutory steps that are prescribed and the parties with responsibility for doing them, it becomes apparent that the objective statutory transactional propriety in this case was compromised, and compromised in part by the attorney acting for and on behalf of Ms Todd (and with her knowledge and consent).
- [172] These facts all taken together raise legitimate questions as to the *bona fides* of Ms Todd. Was she a *bona fide* purchaser for the purposes of the DRA and in the context of a void and fraudulent transport?
- [173] On the evidence summarized above, it is fair to say: a) Ms Todd purchased the lands at a significant undervalue, b) the property described as being transported and the property seen at the site visit by Ms Todd were different, c) Ms Todd did not see any of the required certificates of compliance, d) Ms Todd’s attorney prepared the instructions to advertise, e) Ms Todd never saw an original transport, nor the signature of Mr Price on any transport for the subject lands, but was told at the Registry that the genuineness of the Price transport and power of attorney were in order; yet also knew that Ms Jeboo intended to apply for a *loss grosse* for Mr Price’s transport and claimed to have seen the documents in support of that application, f) the same attorney acted for both Ms Todd and Mr Price, g) the Deeds Registry had no records of and could not produce to the court (i) the affidavit of the Vendor, (ii) the affidavit of the Purchaser, (iii) the

¹⁷⁴ Ibid p 186-191.

Instructions to advertise, and (iv) the relevant certificates of compliance, and g) the confirmation by the Deeds Registry of the power of attorney not being a forgery (and that Mr Prices' signature on it was genuine) was fatally flawed.

[174] What then are the consequences of this evidence for this case?

Outcomes

[175] Clearly, on the evidence in this case and given the findings and inferences of facts by the judges of the Court of Appeal, one ought to seriously consider whether Merlene Todd should have reasonably been put on notice and conducted further enquiries about whether or not Jennifer Jeboo, who was claiming to be the attorney of Mr Price, in fact had and/or acted with the due authority of Allan Price. *A fortiori*, whether Mr Price was indeed intent on selling his property at and for the purchase price negotiated? Moreover, one ought to also seriously consider whether Ms Todd's attorney, Mr Codette, ought to have also been put on notice and made similar enquiries. He assumed the responsibility to act for both parties, and one would think that in these circumstances he would bear an even greater responsibility than usual; and that any carelessness and/or negligence on his part may very well be in law attributable to Ms Todd. Of course, until Mr Codette is afforded a fair opportunity to be heard, one ought not to make any premature assumptions. Nevertheless, these are all enquiries that go towards the duty and responsibility to ascertain the genuineness of the transactions.

[176] Factors which weigh against making any further enquiries are, a) that the power of attorney was registered, b) Merlene Todd made enquiries with the Deeds Registry who confirmed the authenticity of the Price power of attorney and transport documents, and c) the power of attorney was accepted by the Registry for the purpose of the conveyancing transactions.

[177] However, even if the evidence is not sufficient to demonstrate that Ms Todd was a party or privy to the fraud of Jennifer Jeboo, it is certainly arguable that it may be sufficient to impeach the *bona fides* of Ms Todd (both by herself and through her attorney and agent Mr Codette) for the purposes of permitting a claim *in personam* by Mr Price against her in relation to transport 400 of 2004 (the

transport and title derived directly and fraudulently through Mr Price's transport). In my opinion there is arguably compelling *prima facie* evidence, when taken in the round and in its totality, to suggest that the suspicions of any reasonable purchaser, and any reasonable attorney, ought to have been aroused by the multiple transactional irregularities in this case. Irregularities that Ms Todd and her attorney arguably were or could easily have become aware of.

[178] Moreover, the purchase price was significantly undervalued, the description on the unsigned transport did not match what was seen at the site visit (which, inferentially, would also presumptively have been inconsistent with what would have been stated in the statutorily required agreement, affidavits of vendor and purchaser, and the instructions to advertise – and also therefore in the advertisement itself), and no original and/or signed transport from Mr Price was ever produced. These were all arguably obvious red flags. To compound it all, the same attorney, Ms Todd's attorney, was acting for both parties! Irregularities and circumstances that the judges of the Court of Appeal, all in their own ways, unanimously alluded to, and which in the ordinary course of things an apex court ought to be restrained in disavowing.

[179] In these circumstances what does the law as explored above demand? If the *bona fides* of Ms Todd can be impeached in relation to her duty and responsibility to take reasonable steps and precautions, and to make reasonable enquiries to ensure the genuineness of the transactions, then a claim *in personam* against her may be possible. The consequences could therefore be as follows.

[180] In this case if the approach in *Gibbs* and in *Bresford* to *bona fides* is adopted, the result could be that Merlene Todd holds the transport for the property subject to a personal equity in favour of Mr Price and can be ordered to convey the property back to him (his estate), with an order also possibly being made for Jennifer Jeboo to repay the purchase price to Merlene Todd (if the balance of equity tilts in Mr Price's favour).¹⁷⁵

[181] This approach arguably preserves the indefeasibility of title that the DRA seeks to ensure (*albeit* as a form of deferred indefeasibility), is *intra vires* the statutory

¹⁷⁵ Ms Jeboo, though not appearing before this Court on this appeal, was a party to the original proceedings before the High Court.

regime prescribed by sections 2 (3) and 3 (b) of the Civil Law of Guyana Act, is consistent with this Court's unequivocal recognition of *in personam* claims under the DRA, and is aligned with the equitable approaches taken historically to fraudulent transactions under Roman-Dutch law in Guyana.

[182] It arguably also reinforces the importance of property rights under the constitution of Guyana, and in particular the right not to be deprived of property without due compensation; properly interrogated, interpreted, and applied bearing in mind the socio-historical contexts of the DRA seen through the lenses of the current socialist and internationalist constitutionalism of Guyana. As such the ideology and core values/principles of the Constitution and of Guyanese constitutionalism could be upheld and the rule of law vindicated, as best they can in the circumstances of this case.

[183] Indeed, it may be said that if one were to follow such an approach the 'dictates of justice' (Wit JCCJ in *Ramkishun*, above) and the 'broader concepts of equity' (Dr Ramsahoye, above) could be satisfied, and satisfied in the context of 'special local conditions for which no provision is made by this or any other Act' (section 2 (3) of the Civil Law Act, above).

[184] Of course, one may ask, what of Ms Todd? Is there no justice for her? In short, the answer lies in principle, by parity of reasoning applied to a purchaser, in the words of Lord Watson in *Gibbs' case* (cited above):

In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.

[185] In the Caribbean, we have a popular saying: 'anything that's too good to be true, is too good to be true!'. It is a truism. One that may likely apply to Ms Todd. And so, may verily and ultimately be apposite in this case. In any event, on the analysis above and in light of the totality of the evidence in this case, the balancing of the equities as between Mr Price and Ms Todd may very well fall in favour of the former. Thus, in the context of the DRA and the Constitution, the person defrauded can still retain rights in equity, and a genuine *bona fide*

purchaser who relies on a registered title is also protected. This is my considered opinion on approaches to be taken on the law and evidence in a case such as this one, and I would endeavor to determine it accordingly, with a likely result as stated at paragraph 180 above.

Postscript

[186] It is my hope that the judgments of the High Court, Court of Appeal, and this Court will all be placed before the Honourable Attorney General of Guyana, for his careful consideration and possible action. I am convinced, and respectfully so, that there is an urgent need for a review and for appropriate reform of the DRA to better align it with the core values of Guyanese constitutionalism, and as well to better serve the interests of Guyanese people and the country's land law.

[187] World renowned Trinidadian chef, Jason Peru, in an interview with the Express newspaper about his 2020 book, *The Impregnation of Flavour*,¹⁷⁶ stated as follows:

‘Food is beautiful ... and the same can be said with our local practice of taking sugar and browning it with a caramelised motivation and balancing it out with the savouriness of beef, chicken, or even pork. It’s truly an amazing alchemy.’

Indeed, it is through analogous approaches applied in the local judicial spheres with a contextualised and ‘caramelised motivation’, finely balancing core Caribbean jurisprudential values and objectives, ‘that the Caribbean Court of Justice, ... will have a determinative role in the further development of Caribbean jurisprudence through the judicial process.’¹⁷⁷

Orders

[188] This Court orders that:

- a. The appeal is allowed.
- b. The orders of the Court of Appeal are set aside and the Orders of the Chief Justice, issued on the 30th day of August 2012, are restored, including the order as to costs.

¹⁷⁶ Verdel Bishop, *A Culinary Paradigm Shift*, Trinidad Express Newspapers Daily Express, (Port of Spain, Wednesday, 6th January, 2021) p 25.

¹⁷⁷ The Caribbean Community, Preamble to Agreement establishing the Caribbean Court of Justice. (14th February 2001).

- c. Costs in this Court and in the Court of Appeal are awarded to the appellant, to be taxed if not earlier agreed.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar