[2024] CCJ 1 (AJ) BZ

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCV2023/001
BZ Civil Appeal No 8 of 2019

BETWEEN

MERICKSTON NICHOLSON **APPELLANT**

AND

ANNA MAGDALENA AHRER NICHOLSON
FRANZISKA NICHOLSON **RESPONDENTS**

And

CCJ Appeal No BZCV2023/002
BZ Civil Appeal No 8 of 2019

BETWEEN

ANNA MAGDALENA AHRER NICHOLSON **APPELLANT**

AND

FRANZISKA NICHOLSON
MERICKSTON NICHOLSON **RESPONDENTS**

[Consolidated by Orders of the Court dated 17 February 2023]

Before: **Mr Justice Anderson**
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Burgess
Mr Justice Jamadar

Date of Judgment: **11 January 2024**

Appearances

Mr Estevan Perera for Merickston Nicholson

Ms Ashanti Martin for Anna Magdalena Ahrer Nicholson

Mr Darrell Bradley and Ms Kimberly Wallace for Franziska Nicholson

Land – Tenancy in common – Joint tenancy between spouses – Severance – Survivorship – Testamentary disposition – Equitable release – Evidence adduced by party expressly contradicting their pleadings – Judicial Notice – Fraud against court – Duties of Executor – Gender perspectives in land rights – Legal methodology – Hermeneutic of suspicion – Unconscious judicial bias – Costs – Law of Property Act, CAP 190, s 38(2) – Registered Land Act, CAP 194 – Land Utilization Act, CAP 188.

SUMMARY

These appeals concern a dispute over land between a mother, a son and a daughter, which emerged upon the death of the husband and father. The father, Merickston Nicholson ('the deceased'), died on 16 February 2009, leaving a will executed on 31 May 2005. In the will, he appointed his wife Anna Nicholson ('Anna') as the executrix of his estate and made certain devises to her and their children, including their daughter Franziska Nicholson ('Franziska'). The deceased devised to Franziska 500 acres comprising land identified as 'Parcel 302', as well as 500 of the overall 1000 acres comprising land identified as 'Parcel 303'.

Anna transferred the 500 acres comprising land identified as 'Parcel 302' to Franziska, but in respect of land identified as 'Parcel 303' - where she and the deceased were named in the vesting Deed as owners in fee simple - she removed the deceased's name from the title, and vested the entire 1000 acres in herself and her son Merickston Nicholson Jr ('Merickston Jr') by way of Land Certificate and then later transferred the entire 1000 acres to Merickston Jr. Franziska thus did not receive the remaining land (500 acres under Parcel 303) devised to her under the deceased's will.

On 10 January 2018, Franziska commenced proceedings before the High Court by way of Fixed Date Claim Form, wherein she sought relief from the court as against Anna and

Merickston Jr to recover the devises made to her under the will. On 10 July 2018, a defence was filed purporting to be made jointly by Merickston Jr and Anna, which was ostensibly fixed with the signature of each. Anna later filed an Affidavit on 17 August 2018 distancing herself completely from the alleged joint defence and supported Franziska's case by asserting that it was the intention of herself and her husband that Franziska receive 500 of the 1000 acres comprising Parcel 303. She further explained that the transfer to Merickston Jr was by mistake on her part. At the trial of the matter, Anna gave evidence in line with her Affidavit.

The High Court found that Parcel 303 was owned jointly in law by the deceased and Anna at the time of the deceased's death. According to the trial judge, if it were to be found that there was joint tenancy severance in respect of Parcel 303, the effect would be that when the deceased died, Anna, as the survivor, would then have the legal title vested in her, but she would hold the beneficial interest in equal shares, on trust for herself and the deceased's estate. The judge reasoned that if there was no severance then the interests, both legal and beneficial, would vest in Anna alone and she could do with the land, whatsoever she desired. The judge explained that severance of a joint tenancy under the Law of Property Act ('LPA') was very different than doing so under the Registered Land Act ('RLA') which required more stringent formalities. She held that as none of the parties had provided evidence for determining whether the land was subject to the provisions of the LPA or whether it was subject to the RLA, Franziska, who bore the burden of proving severance, had not proven her case to the requisite standard. Accordingly, the trial judge reasoned that there was therefore no need to embark on the question of whether the joint tenancy had in fact been severed and the claim was dismissed.

The judgment of the Court of Appeal was delivered by Woodstock-Riley JA (with whom Foster JA concurred, with Hafiz-Bertram P (Ag), dissenting). The majority was of the view that whether the trial judge ought to have taken judicial notice of the date from which the RLA applied to the land, was irrelevant. According to the majority, the fact was that the land had been brought under compulsory registration on 25 March 2008, and this meant that it had been brought under the RLA on this date. Since this had been brought to the attention of the Court of Appeal, the majority were satisfied that they could take judicial

notice as a matter of public and discoverable information. Contrary to the finding of the trial judge, the majority of the Court of Appeal held that the evidence disclosed that Franziska did in fact impugn registration of the land, and the signature of the deceased on the Application for Registration in respect of Parcel 303 which is dated after his death. The court found that on the available evidence there had been severance of the joint tenancy in respect of Parcel 303, and the gift by the deceased to Franziska of 500 of the 1000 acres comprising Parcel 303 was therefore valid. Accordingly, the court ruled that Franziska was entitled to the full 1,000 acres devised to her in the deceased's will.

In her dissenting judgment, Hafiz-Bertram P (Ag) found that there was no specific pleading of fraud or mistake by Franziska in relation to the registration of the land. Further, according to the dissenting judge, even if it can be found that fraud or mistake was pleaded, the evidence was not sufficient to prove that same took place. Nor did the evidence satisfactorily prove that there was severance of the joint tenancy. Thus, it was not open to the deceased to devise joint land in his will. The dissenting judge was of the opinion that the gift to Franziska failed.

On 23 January 2023, Merickston Jr and Anna filed separate Notices of Appeal before the Caribbean Court of Justice ('CCJ'). Merickston Jr pleaded that the majority in the Court of Appeal erred in law and or misdirected themselves in thirteen particulars. Anna pleaded three grounds in her Notice of Appeal.

Authoring the lead judgment (with which Rajnauth-Lee and Burgess JJ agreed), Jamadar J noted that when historically disadvantaged groups are to be affected by virtue of the interpretation and application of statutory provisions, such as married women in the context of property rights, there arises a need for a hermeneutic of suspicion in the application of the law. Thus, deciding whether to apply equitable release under s 38(2) of the LPA to the facts of this case, the evidence and surrounding circumstances in the case have to be scrupulously examined to ensure that presumptive social context realities are properly reckoned with and accounted for. According to Jamadar J and applying a gender sensitive adjudicatory lens, if one is to conclude a release in law, by which a married woman is

thereby completely deprived of all her rights and interests in property, the evidence must be clear, conclusive, and beyond any ambiguity or equivocation.

Jamadar J noted that in the context of married persons in the Caribbean, and bearing in mind the social context considerations mentioned, generally, where it is argued that a wife has released to her husband her title in lands held by both as joint tenants, (i) the essential formalities for the disposition of title must be established, and (ii) the hermeneutic of suspicion must be applied to the facts and circumstances.

According to Jamadar J, it would be an extraordinary exception to have a release and transfer of title in land by conduct. He observed that a wife whose husband severs title in a joint tenancy in which his wife is a co-owner, or a wife who does the same in those circumstances, results in the wife retaining an interest in the lands as a tenant in common. He further observed that such a result does not undermine rights of women under the constitution and under international human rights law, as it does not operate to the absolute disadvantage of or to cause irreparable harm to a wife in relation to land ownership, and its implications for her agency, autonomy, and independence. He noted that a release in similar circumstances is more questionable because of the potential for disadvantage and harm. Hence the relevance in such circumstances of the hermeneutic of suspicion and the inquiry into adverse effects as a method of legal interpretation. He expressed the view that the appropriate standard of proof for the party asserting release, ought to be cogency on a balance of probabilities.

Jamadar J reasoned that it was highly improbable that Anna and her deceased husband intended, or agreed, that Anna was to release her interests and title in their joint property, and Anna was to be left to the vagaries of circumstance, including the whims of her deceased husband between the making of his will and the unknown time of his demise, or similarly upon the subsequent signing of the July 2006 joint declaration. He observed that from Anna's evidence, she never acknowledged any such agreement. He further observed that such an occurrence would cause great potential disadvantage and harm to Anna, in her most vulnerable years, and a court would have to be extremely careful before arriving at

any such conclusion. He also noted that release had not been contended by any party at any stage in these proceedings.

It was held by Jamadar J that the assessment and judgment of the majority in the Court of Appeal was sustainable. A holistic, practical, and common-sense approach was adopted, grounded in a forensic factual analysis that was tested against and corroborated by contemporaneous, relevant, and largely uncontested documentary evidence. He expressed the view that there was no good reason for the CCJ to disturb such findings, and the conclusion that during the lifetime of the deceased, himself and Anna had effectively severed their joint tenancy in the subject properties. He concluded that at the time of death of the deceased, Parcel 303 was held by Anna and the deceased as tenants in common, with all of the legal and equitable implications that attach to such co-ownership.

Anderson J began his judgment by reviewing the decisions below on the applicable pleadings. Reasoning that the rules on pleadings must be scrupulously complied with, he found that the pleadings in the case were: (1) the fixed date claim form dated 6 June 2018 as supported by (2) the affidavit dated 13 June 2018 and that (3) the defence was that dated 10 July 2018. He explained that no other pleadings (whether claim forms, defences, or affidavits) were properly relied upon for decision on the merits in this case.

Accepting and applying *Re Diplock,* it was reasoned that estate property such as Parcel 303 can be traced by a beneficiary if transmitted to the wrong person. Anderson J thus noted that where it can be established that Parcel 303 has been conveyed to the wrong person, the question of fraud or mistake, whether made out on the evidence or not, is not required to allow Franziska to access the redress she seeks. On the question of judicial notice of the date of the Minister's declaration transitioning Parcel 303 from the LPA to the RLA regime, it was held that the Court of Appeal was entirely right to take judicial notice of the fact that the LPA contained the relevant law for determining whether the joint tenancy had been severed or subject to equitable release.

According to Anderson J, testimony in chief and under cross-examination whether by the claimant or defence, is evidence and is accordingly fully capable of being used by the

claimant to prove the truth of his claim. For this reason, it was found that the provision in r 10.5 of the Civil Procedure Rules ('CPR') requiring the defence to set out all the facts on which the *defendant* relies, and r 10.7 of the CPR stipulating that the *defendant* may not rely on any allegation or factual argument which is not set out in the defence unless the court gives permission, are entirely irrelevant in the case at bar. He held that Franziska, as the claimant, was entitled to rely on admissions made by the defendant during oral testimony.

Next Anderson J turned to the important question of whether the evidence adduced in the case supported a finding that the joint tenancy in respect of Parcel 303 had been severed, or whether the evidence supported the view that Anna's equitable interest had been released in favour of the deceased during his lifetime. The evidence included various documents bearing Anna's handwriting or signature or made with her knowledge and approval including firstly, a Sketch Plan prepared prior to 2005 illustrating the various parcels of land that were to be devised. Further, such evidence included acknowledgements that Franziska owned the building known as Mayan Loft situated on land devised by the deceased, by virtue of a handwritten declaration dated 2 July 2006, type written declaration dated 4 November 2005 and company meeting minutes. Finally, the Last Will and Testament of the deceased made with the knowledge and consent of Anna, was deemed evidence relevant to determining whether there had been discontinuance of the joint tenancy.

According to Anderson J, the manner in which Parcel 303 is treated in the will of the deceased is worthy of note. It was noted that the deceased though patently aware that Parcel 303 was undivided, devised 500 of the 1000 acres constituting the undivided Parcel to Franziska, and the remaining 500 acres to Anna. Since it is the case that only a tenancy in common would have allowed for testamentary disposition of the land, Anderson J took the view that the framing by the deceased of his will in the terms recited can be deemed an act clearly inconsistent with recognition of the continuance of joint tenancy during the deceased's lifetime. According to the judgment, the will being framed in the way it is, appears to have the effect of corroborating the written acknowledgements prior to execution of the will, in establishing that the joint owners of the undivided parcel regarded

it as being divided.

Anderson J made it clear that a joint tenancy may come to an end by severance or release. It was explained that severance may occur by the giving of notice in writing, mutual agreement, or course of dealings. The evidence of the agreement between Anna and her husband and subsequent events indicated that there had been severance of the joint tenancy during the lifetime of the deceased. Release does not require any form of words but must be evidenced by settled commitment, usually accompanied by legal input on behalf of or with the knowledge of the release. Accepting and applying the principles espoused in *Hudson v Hathway,* Anderson J found that it was entirely plausible that the equitable joint interest held by Anna had been released by her in favour of the deceased prior to the execution of the deceased's will in accordance with s 38(2) of the LPA.

Concerning the Land Utilization Act, Anderson J held that notwithstanding that the Act may preclude transfer of valid legal title where its stipulations have not been met, the Act does not prevent severance of a joint tenancy in equity. Nor does it preclude the power and right of one joint tenant to release that tenant's interest in the co-owned land to the other joint tenant under the terms of s 38(2) of the LPA. The Act was therefore found to have no relevance to the instant case.

Agreeing with the outcome of the case, but differing as to reasons, Barrow J noted that the court below failed to appreciate that the denouncing by Anna of the defence by virtue of her affidavit dated 17 August 2018 and her testimony at trial, was a clear statement that the defence was a forgery and a fraud, and therefore a nullity. Barrow J further noted that the High Court wrongly decided what, as a matter of law, was an undefended and admitted claim, by reference to the purported issue as to proof of ownership of the devised property.

Barrow J expressed the view that there was no standing on the part of Merickston Jr to argue that it was his mother who owned Parcel 303 on the father's death and not the estate. Neither was it permissible for Anna being executrix in the deceased's estate, in litigation commenced against her in her capacity as executrix, to compete for ownership of property with the estate which she had sworn to probate.

Barrow J noted that he was deeply conscious that neither fraud, forgery nor nullity of defence was raised by the parties nor addressed in any court, only fraud by Merickston Jr in obtaining title was ever alleged. He explained that a fundamental principle upon which courts deliver justice is that parties must have the opportunity to be heard on the issues upon which it adjudicates. He further explained that because of the gravity of the issues which he identified, he was minded to cause a further hearing to be convened to give the respondents an opportunity to be heard. However, he considered there was hardly anything to be said on a further hearing to the conclusion he reached.

Barrow J reasoned that the alternative to a further hearing, was to decide the instant appeals on the grounds upon which they were argued, as it avoids delay and because it produces the same result as that at which he arrived based on the existential matters before the court as highlighted by him. If that were to be so, he would concur with the judgment authored by Anderson J.

Cases referred to:

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Roaches v Wade (SC BZ, 30 April 2004); *Robinson's Case* 131 Mass 376 (1889); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773; *Santiago Castillo Ltd v Quinto* [2009] UKPC 15, (2009) 74 WIR 217 (BZ); *Stewart, Re* (2002) 5 ITELR 622; *Thomas v Davis* [2015] JMCA Civ 22, JM 2015 CA 45 (CARILAW); *Tilley's Will Trusts, Re* [1967] Ch 1179; *Todd v Price* [2021] CCJ 2 (AJ) GY; *Wade v Roaches* (BZ CA, 9 March 2005); *Williams v Hensman* (1861) 1 J & H 546, (1861) 70 ER 862; *Wright v Gibbons* (1949) 78 CLR 313.

Legislation referred to:

Barbados - Domestic Violence (Protection Orders) Act, Cap 130A, Domestic Violence (Protection Orders) (Amendment) Act 2016; **Belize -** Administration of Estate Act, CAP 197, Belize Constitution Act, CAP 4, Land Utilization Act, CAP 188, Law of Property Act, CAP 190, Registered Land Act, CAP 194, Supreme Court (Civil Procedure) Rules 2005; **United Kingdom -** Law of Property Act 1922 (12 & 13 Geo 5 c 16), Law of Property Act 1925 (15 & 16 Geo 5 c 20), Law of Property (Amendment) Act 1926 (16 & 17 Geo 5 c 11), Law of Property (Joint Tenants) Act 1964, Married Women's Property Act 1870 (33 & 34 Vict c 93), Married Women's Property Act 1882 (45 & 46 Vict c 75), Parliament (Qualification of Women) Act 1918 (8 & 9 Geo 5 c 47), Sex Discrimination (Removal) Act 1919 (9 & 10 Geo 5 c 71).

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Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III); United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Realizing Women's Rights to Land and Other Productive Resources' (2013) HR/PUB/13/04.

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JUDGMENT

Jamadar J (Rajnauth-Lee J concurring)

Separate: Anderson J

Concurring: Barrow J

Concurring: Burgess J

JAMADAR J:

> *It was only long years after that I understood the limitation on spirit, vision and self-respect which was imposed on us by the fact that our masters, our curriculum, our code of morals, everything began from the basis that Britain was the source of all light and leading, and our business was to admire, wonder, imitate, learn; our criterion of success was to have succeeded in approaching that distant ideal – to attain it was, of course, impossible.*[1]

[1] CLR James, *Beyond a Boundary* (Stanley Paul & Co 1963) 38-9.

-CLR James

From Belize and Havana to Cayenne and Paramaribo, there is currently a crisis of Caribbean civilization, which is a genuine crisis, first, because so many of us do not even suspect it … and second, because it reduces to a crisis of self-awareness.[2]

-Lloyd Best

Introduction

[1] When judges speak, to what extent are we aware on whose silencing our own capacity to speak, to write, to exist, depends?[3] This is an important question of legal methodology, especially in post-colonial societies. The interpretation and application of the law, the use of precedent, reliance on so called 'rules' of statutory interpretation and judicial policy such as *stare decisis* or the presumption of constitutionality, as method, if applied uncritically, can result in injustice, and undermine fundamental human rights and core constitutional values, including the rule of law, in current Anglo-Caribbean contexts.

[2] This opinion applies a gender sensitive adjudicatory lens to the interpretation and application of the pivotal law in this case, s 38 of the Law of Property Act, CAP 190 (BZ). In doing so, it interrogates existing legal methodologies, and postulates critical nuances within existing frameworks. Outwardly academic in tone, it intends a pragmatic and practical impact on methods and outcomes.

[3] Legal methodological praxis, in post-colonial Anglo-Caribbean societies, demands that a first important step is to silence the dominant voices and listen responsibly in open-minded and jurisprudentially empathetic and understanding ways to all perspectives. And in doing so, paying special attention to the voices of those rendered, historically and socio-legally, vulnerable, and marginalised – and bearing in mind that their systemically displaced voices often have to be discovered in their silence and invisibility.

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[2] Lloyd Best, 'Race, Class and Ethnicity: A Caribbean Interpretation', (Third Annual Jagan Lecture, York University, 3 March 2001).
[3] Gina Heathcote 'On Feminist Legal Methodologies: Spilt, Plural and Speaking Subjects' (2018) 8(2) Feminists@law 1, 4 < http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/667 > accessed 11 October 2023.

[4] This is one of the challenges of legal subjectivity, which seeks to acknowledge and honour the entitlement of all legal persons to hold and enjoy rights, exercise powers, and be subject to responsibilities and duties. This includes differences as integral to all accounts of subjectivity and which acknowledges as a pragmatic and salient difference, gender-relations as aspects of power and privilege that intersect other power structures and relationships and include overlapping categories of disadvantage. In addition, it also accepts the patriarchal discriminatory history and structure of, at least, Anglo-Caribbean pre-independence (colonial) laws. It therefore enables a critique of potentially discriminatory supporting legal assumptions, approaches, and methods.[4] It also enables reconstructions that equally accommodate all different forms of life, living and persons, which is to say, different subjectivities.

[5] Birth, rather than sex or gender or any other distinguishing characteristic, is constitutive of legal personhood. However, to be human is to be born into difference. To be human is also to be at once both connected and separate, a 'split-subject'.[5] Therefore laws and legal methods, which in their interpretation, application, or effects (impacts), facilitate discrimination (direct or indirect) based on human differences, impugn the fundamental constitutional principle of dignity and its insight into what it means to be human – as asserted in Article 1 of the Universal Declaration of Human Rights.[6]

[6] Multiple or plural subjectivities are therefore an important starting point for legal methodology. A consequence is a methodological openness to fluidity and change and an attentiveness to diversity and inclusivity, with a measured critique of assertions of fixed principle or theory, whether substantive or procedural.[7]

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[4] To be clear, it is a perspective that threats the human legal subject more as a person, informed and implicated by the experiences of be(com)ing human-in-community, and not just as an individual, rational, separate, and transactional entity, nor as defined by sex or gender. This preferred conception of humanness within law accommodates both autonomy and inter-dependencies, and facilitates equality of legal recognition, protection, and empowerment. It is therefore a potential model for imagining law as a non-discriminatory mediating process that facilitates equality and fairness as among legal subjects.

[5] Heathcote (n 3) 8-9. See also *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332 at [1].

[6] (Adopted 10 December 1948) UNGA Res 217 A(III), art 1: 'All human beings are born free and equal in dignity and rights.'

[7] And upon which hang such legal ideologies as certainty, *stare decisis* and the like, which perpetuate status quo and ingrain resistance to change as method.

Difference thus becomes an organising legal methodology. Hence, the disciplines of reciprocal and responsible silencing and listening as legal methods to discover and correct inequalities and discrimination. In this latter regard, responsible listening involves both listening and reflection, and in particular, reflection on complicity and/or enabling, both in relation to substantive and procedural aspects of the law.

[7] In addition, and as a continuation of this approach, the historical, cultural, and socio-legal peripheral subject is also deliberately treated as a normative and co-equal starting point (in contradistinction to the dominant cultures privileged and usual subjective centres). This step is important, because the peripheral subject's non-dominant perspective recognises and uplifts for reform, areas of inequality and discrimination otherwise unseen, unheard, and passed over. In this regard, a necessary focus is on the 'disparate impact' or effect of laws and practices, including 'compounded harms' amplified by intersectionality, on individuals or groups, and not merely on intentionality.[8] It is through this methodology that an effective interrogation of uncritically accepted (invisible or normalized) and discriminatory dominant legal methods, laws, and their adverse effects can be discovered, and through that discovery, their influences on both process and outcome disrupted and reformed.[9]

[8] Gina Heathcote eloquently explains:[10]

> The peripheral subject asks difficult (and different) questions with regard to whose interests are represented … given her location outside of dominant power structures and knowledge producing spaces …

[9] What is being described is an approach that is, at its heart, epistemological. That is, in so far as it recognises and seeks to address assumptions about the methods that inform the formation of knowledge (and consequently the validity and scope

[8] Rebecca J Cook (ed), *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023) xi and 10.
[9] ibid xi, 5 and 10-12. In what is being articulated as 'transformative equality', the transformation of systemic and structural dimensions of inequality and discrimination.
[10] Heathcote (n 3) 12.

of what is claimed as knowledge itself). It is also at heart an approach grounded in substantive equality and fundamental fairness,[11] core Anglo-Caribbean constitutional values and human rights[12] that must be given effect to. For example, and from a critical gender perspective, one question that is encouraged to be asked is the 'woman question': 'The woman question means examining how a law, policy, or practice affects or disadvantages women.'[13]

[10] This appeal raises frontally these issues of awareness (as Lloyd Best has articulated) and challenges our uncritical Anglo-Caribbean genuflexion to colonial legal methods that continue to impose limitations on our freedom, spirit, vision, and self-respect (to adopt CLR James' insight). It is especially important for persons and groups made marginalised by the legal systems that were imposed by colonial laws and that we as Caribbean peoples have uncritically perpetuated, in some instances.

[11] Included among these groups made marginalised in Caribbean spaces are women, and in the context of intersectionality, especially those women whose life circumstances disadvantage them further on the bases of colour, status, education, economic standing, and property ownership (as well as all other applicable discriminating considerations).[14] A 2013 UN Women's global report on women's rights to land and productive resources, points out that:[15]

> Throughout the world, gender inequality when it comes to land and other productive resources is intimately related to women's poverty and exclusion. …

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[11] Caribbean Court of Justice, 'Code of Judicial Conduct' (2020) 9: 'Substantive equality refers to the right of every individual to an equal opportunity to make the most of their lives, talents, and ambitions, and not to be unfairly disadvantaged or discriminated against in relation thereto. It recognises that rights, entitlements, opportunities, and access are not equally enjoyed throughout society and is aimed at equitably redressing these inequalities so as to affirm the equal and inherent dignity and value of all persons.' Differential treatment as a means of achieving fairness is recognised as equitable and conforming with the constitutional standards of equality.

[12] Constitution of Belize, s 6(1); Preamble para (a).

[13] Cook (n 8) 9: 'This question encourages examination of the assumptions that are made about a law or practice, … and "how … excluded viewpoints might be identified and taken into account"', citing Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harv L Rev 829.

[14] United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Realizing Women's Rights to Land and Other Productive Resources' (2013) HR/PUB/13/04.

[15] ibid 2.

> In many communities gender disparities with regard to land and other productive resources are linked to assumptions that men, as heads of households, control and manage land – implicitly reflecting ideas that women are incapable of managing productive resources such as land effectively, that productive resources given to women are "lost to another family" in the event of marriage, divorce or (male) death, and that men will provide for women's financial security.
>
> Challenging these discriminatory ideas is critical.

[12] This 2013 UN report cites several international instruments that unequivocally establish a woman's right and entitlement to land ownership in a rule of law context. And equally important, it points out the human rights imperatives, based on the principles of equality, non-discrimination, the protection of the law, and the inherent dignity of all persons, all values that are central to Caribbean constitutionalism. Thus, the report states:[16]

> Land is key to a life with dignity and a basis for entitlements which can ensure an adequate standard of living and economic independence and, therefore, personal empowerment. Regardless of whether a woman lives in a rural or urban setting, land rights also have major implications for the achievement and enjoyment of her human rights such as the right to equality, food, health, housing, water, work and education.

[13] In short, land and property rights are integral to the fundamental rights of women to dignity, life, and liberty.

[14] In Caribbean spaces the property rights of women, including of widows, have been historically determined and imposed in patriarchal socio-legal cultures. Colonial property and succession laws evince this reality. A rights centric approach to statutory interpretation, as advocated by this Court,[17] demands a careful and critical interrogation, interpretation, and application of property laws and precedents, especially those of colonial and pre-independence vintage. In a case such as this, what is required is a balanced human rights-based approach that is premised on the equitable recognition, empowerment, and development of

[16] ibid 3 (footnote omitted).
[17] *OO v BK* [2023] CCJ 10 (AJ) BB.

women. It is an approach that is grounded in the lived experiences of the gendered realities of Caribbean peoples, which acknowledges asymmetrical man-woman power relations as historically normative, and all taken in a wider context of historical, residual, and perpetuated socio-legal discriminatory assumptions and approaches. This appeal invites and affords that opportunity.

Anna's Story

[15] As between spouses, much of the focus in this case has been on the deceased husband of Anna Nicholson (Merickston Nicholson), and what he did and did not do. But who is Anna, and what is her story? What is it that she intended, and did not intend? Agreed to, and did not agree to? We must try to deeply hear and understand Anna, wife and mother, a woman entitled to full agency and power, a joint owner of the contested and other properties, acquired by her husband and placed in their joint names. A woman entitled to the full protection and enjoyment of her rights.

[16] Her evidence in this matter, all of her evidence, must be considered, because it all bears on what we can know about her and the alleged family arrangements, and spousal agreements that are contested in this matter. When one reads Anna's testimony, what comes across is a full felt sense of her desires, concerns and angst, her conflicts and contradictions, her expectations and assumptions, and as well her state of mind, all acutely revealed in her cross-examination and re-examination. More than anything else, what is striking is a portrait of an aged mother's and widow's desire for peace and good relations among her disputing children – in her words 'I really want my family together.'[18] The extent to which this abiding desire influenced her decision making during her marriage, in what she and her deceased husband agreed to in relation to their joint properties, and in her changing evidence during this matter, will always be specifically unknown and yet can be located objectively in wider prevailing cultural mores.

[18] Record, 'Witness Statement of Anna Nicholson', 24 October 2018, [23].

[17] Anna's story must therefore be situated, understood, and interpreted in the broader context of influencing patterns of social and cultural realities, including those reproductions of inequality that would likely have impacted her.[19] She was 83 years at the time of giving evidence, in her own words, 'I am an old lady'.[20] Her recollection at that time was not the best and she seemed to be confused about some matters: 'My intention was to settle the claim … but I also see that I do not have funds … and I cannot seem to remember why.'[21] Yet, there is enough evidence from her for reasonable legal conclusions to be drawn, provided one can stay grounded in context and not retreat into abstractions. The lynchpin is the understanding of the real-life context, the human problem, and the array of influencing forces that have shaped the events in this matter.

Analysis

(i) Severance v Release

[18] 'In law context is everything', said Lord Steyn in *R (Daly) v Secretary of State for the Home Department*.[22] Lord Bingham would also agree.[23]The salience of this observation, transplanted from the public law arena, is prescient in this case. Context is central to the discovery of what were common intentions and agreements of Anna and her deceased husband.

[19] In Belize, the Law of Property Act 1954[24] is apposite ('the Act') and this appeal ultimately turns on the interpretation and application of s 38(2) of the Act. It therefore involves statutory interpretation and an acceptance that 'its somewhat malleable nature can lead to different opinions about the five key elements of

[19] See for example Rhoda Reddock, 'Reflections on Gender and Democracy in the Anglophone Caribbean: Historical and Contemporary Considerations' (SEPHIS/CODESRIA Lecture No 5, January 2004) 5: 'In the Caribbean case, forms of extreme authoritarianism and patriarchal control as existed in slave and indentured plantations, continue to influence political, quasi-political and inter-personal relations in these societies' (footnote omitted).
[20] Record, 'Witness Statement of Anna Nicolson', 24 October 2018, [19].
[21] ibid.
[22] [2001] 2 AC 532, 548.
[23] See also *R (ProLife Alliance) v British Broadcasting Corp* [2004] 1 AC 185.
[24] CAP 190; promulgated 1 March 1954.

meaning, intent, context, coherence and consequences.'[25] Part II (Rev Ed 2000), which begins at s 3, is entitled 'General Principles as to Legal Estates, Equitable Interests and Powers, … Undivided Shares and Joint Ownership.' Section 36(2) provides that prospectively, where title to land is vested in more than one person, the title deeds shall presumptively operate to vest the title in those persons as joint tenants, subject to the statutory trusts created by s 37 of the Act. Section 38 deals with joint tenancies, and sub-s (2) has exercised the legal analysis in this matter.

[20] Section 38 states:

> 38. (1) Where a legal estate (not being settled land) is beneficially vested in more than one person or held in trust for any persons as joint tenants, it shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.
>
> (2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants: Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.
>
> (3) Nothing in this Act shall affect the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.
>
> (4) Without prejudice to the right of a joint tenant to release his interest to the other joint tenants, no severance of a trust estate, so as to create a tenancy in common, shall be permissible.

[25] *Persaud v Nizamudin* [2020] CCJ 4 (AJ) GY at [7]. See also at [7]: 'A proper approach, we suggest, balances three fundamental teleological poles, discovering and applying the meaning of the text, the legislative intent (purpose), as well as ensuring that the consequences and policies of interpretation and application are fair, reasonable and just (appropriateness).'

[21] Passed over by most, but relevant when we come to consider the evolution of land rights from a gender perspective, is s 39 of the Act.[26] It states: 'A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons.' To the modern legal mind this need to statutorily declare the treatment of spouses 'as two persons' may seem quaint, but it evinces a deep history of gender discrimination and inequality in relation to property rights and ownership that this section seeks to mitigate. A disparity that has therefore been addressed statutorily. For the moment, noting and bringing it to the foreground is important methodologically, because otherwise its voice and shadow remain silenced in conventional approaches to legal analysis.

[22] Section 38 of the Act is in identical terms to s 36 of the Law of Property Act 1925 (UK) as amended by the Law of Property (Amendment) Act 1926 (UK), save for some very minor alterations (which are inconsequential in this appeal).[27] For the purposes of s 38, co-ownership is where any two or more persons each simultaneously owns a given estate in land and are thus entitled to an interest, or interests, in that estate. For the purposes of this appeal, two types of co-ownership that can exist are, joint tenancies and tenancies in common. A joint tenant (owner) is one who is equally and 'wholly entitled on the whole' to the estate.[28] That is to say, no joint tenant holds a share *per se* in the land, as each is invested with the whole interest in the land.[29] However, a joint tenancy can be severed, in which event the resulting interests in land can become tenancies in common (but not necessarily so if there are more than two joint tenants).[30] There are two characteristics of joint tenancies that distinguish them from tenancies in common,

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[26] This appears in identical form as s 37 in the Law of Property Act 1925 (UK).
[27] The 1926 amendment (UK) added what appears in the Act as s 38(3): 'Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.' Section 38(4) of the Act differs from s 36(3) of the UK legislation In the latter, the words 'mortgage term or' precede the words 'trust estate'. Section 38(2) of the Act was extended retrospectively by the Law of Property (Joint Tenants) Act 1964 (UK).
[28] *Burton v Camden London Borough Council* [2000] 2 AC 399 (Lord Millett).
[29] *Wright v Gibbons* (1949) 78 CLR 313 (Dixon J).
[30] ibid. In circumstances with three or more joint tenants, then it is the tenant who has had their interest severed that becomes a tenant in common alone, whilst the others retain their status as joint tenants.

the right of survivorship, and the requirement of the four unities.[31] The former is relevant in this appeal, and as to the four unities, there is no dispute that Anna and her deceased husband owned the contested lands as joint tenants.

[23] The right of survivorship provides that on the death of any of the joint tenants, the entire co-owned estate is said to 'survive to' the living joint tenant(s). The rights of the deceased joint tenant are therefore entirely extinguished. The deceased cannot deal with or dispose of the lands in their will. This is because the deceased has no share in the estate since shares do not exist in a joint tenancy. The surviving joint tenant(s) takes the entire co-owned estate. Since 1925 in the UK, and by reason of s 36(2) of the 1925 Law of Property Act, co-ownership of any legal estate in land has necessarily been rendered as a joint tenancy, and it is not 'permissible' to sever a joint tenancy of a legal estate into a tenancy in common. Thus, it is often stated that the common law preference for joint tenancies in the legal estate (for purposes of certainty and survivorship), has been given statutory recognition in ss 1(6) and 36(2) of the Law of Property Act 1925 (UK), which is also reflected in the equivalent ss 4(2) and 38(2) of the Act.

[24] Different from joint tenancies, are tenancies in common, where co-ownership is such that each of the co-owners holds a distinct share in land, described as an undivided share because the co-owned lands have not been actually, physically, sub-divided as between the owners. Also different from joint tenancies, there is no right of survivorship, and the only unity which exists between co-owners is that of possession. Furthermore, tenancies in common take effect only in equity. Two important consequences follow. First, upon the death of a tenant in common their share passes either under a testamentary disposition (by will) or on intestacy. Second, each of the co-tenants has a right to possession, the use and enjoyment, of all of the land (unity of possession). Whereas the common law had a preference for joint tenancies, equity favours tenancies in common on a premise of fairness

[31] The four unities are unities of possession, interest, title and time; all must be present for a joint tenancy to exist, and if all are present the form of co-ownership is a joint tenancy. See *AG Securities v Vaughan* [1990] 1 AC 417 (Fox LJ).

as between co-owners, each of whom holds a fixed beneficial interest in the land.[32] An equitable estate can therefore either be a joint tenancy or a tenancy in common.[33] Spouses who hold lands as either joint tenants or tenants in common, enjoy the relevant protections.

[25] Equity follows the law. A well-known matrimonial case illustrates the presumption that equity follows the law in matters of land title. In *Pettitt v Pettitt*,[34] the wife purchased a matrimonial home for herself and her husband to live in using her money and conveyed the home into her name only. The husband made alterations and improvements to the home. Upon divorce, the husband claimed that he had a beneficial interest in the home as his contributions to the property had increased its value. The House of Lords held that the improvements made to the home did not entitle the husband to an equitable interest in the property, and that voluntary improvements to a family home only served the purpose of making 'the home pleasanter for their common use and enjoyment'.[35]

[26] This presumption is however capable of being displaced. In which event equity can declare a tenancy in common. Severance is one such way. It is the basis on which this appeal has been presented and disposed of hitherto. It refers to the process of converting a joint tenancy into a tenancy in common. In addition to written notification, s 38(2) of the Act effectively provides for three traditional methods of severance that were statutorily prescribed and presumed in the Law of Property Act 1925 (UK), and that reflect the categories explained in *Williams v Hensman*.[36] These are, firstly, a unilateral act of one of the co-owners operating on their own share so as to alienate it wholly or partially, secondly, by mutual agreement of all the co-owners, and thirdly, by mutual conduct where there is a

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[32] Tenancies in common render a co-owner immune from the risks of survivorship and a co-owner can exercise full control over their share of the property.
[33] See for example *Jones v Kernott* [2010] 3 All ER 423, where though a cohabiting couple purchased a home in their joint names (their legal title), the parties conduct and contributions to the acquisition rendered their beneficial interests/shares as tenants in common (their equitable title). This despite the principle that equity follows the law and a presumption that their beneficial interests in the property would coincide with their legal estates.
[34] [1970] AC 777.
[35] ibid at 826.
[36] (1861) 1 J & H 546, 70 ER 862. In this case a will had created a joint tenancy among eight beneficiaries. The joint tenancy had been severed by the consensual actions of the beneficiaries by which they agreed to treat their interests as a tenancy in common.

course of dealing that is sufficient to show that the interests of all the parties were mutually being treated as a tenancy in common. However, these are not closed categories, as they are not specifically prescribed in the Act.[37]

[27] Section 38(2) of the Act speaks to 'the right of a joint tenant to release his interest to the other tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants …' These words must be read in the context of the entire subsection, which is addressing the statutory prohibition against 'severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land …' Thus, what the subsection countenances is severance in relation to equitable interests, and release of presumably both legal and equitable estates to other co-owners.

[28] In none of the lower courts was the issue of release determinative, and indeed, it was neither pleaded nor relied on. This was no doubt so for good reason as considered by both the parties and judicial officers. Nevertheless, it is the basis of an opinion of this court in this matter and needs to be addressed for the reasons explained in this analysis.

[29] The available law on release is relatively sparse, but such as exists makes certain matters quite clear. First, s 38(2) provides that 'this subsection does not affect the right of a joint tenant to release his interest to the other tenants.' Release is possible.[38] Second and significantly, whereas in the instance of severance the ways in which this can be done/inferred are prescribed, there is no such statutory indication in relation to release. Thus, the law of release remains informed by both the common law and statute (as we will see). The common law is always developing and contextual, and affords this Court the opportunity to expound it, especially in the context of spouses who own land as joint tenants.[39]

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[37] Section 38(2) states, '… or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity.'
[38] See also s 38(4) of the Act.
[39] *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ) (GY).

(ii) **Some Further Historical Context, Land Ownership Between Spouses**

[30] The complexities surrounding the formation of joint ownership rights as between married spouses may in part be attributed to common law principles that have been influenced by legal and historical circumstances.

[31] A first principle has already been explored, which is the common law preference for imputing a joint tenancy where title in land was in the names of two or more persons. Another is equity's preference for tenancies in common and the implications for the severance of joint tenancies. And the third has to do with the requirement for the existence of the four unities in order to create a joint tenancy, ie the unities of interest, title, time, and possession, and the necessity only for the unity of possession in relation to tenancies in common.

[32] Less well known, is the tenancy by the entirety, by which special treatment was given to joint ownership by a husband and wife who acquired property in their joint names. Under early common law, the tenancy by the entirety was characterised by the husband's exclusive control over his wife's property, giving his creditors access not only to his own interest, but to the whole property. The tenancy was created upon the belief that the unity of marriage was personified in the figure of the husband, and that all property was owned and controlled by him, including property owned by the wife before marriage.

[33] The most significant incident attached to this estate was the right of survivorship. In the early development of the common law, it was confined largely to interests in real property, and was considered a 'sub-species of joint tenancy'.[40] Because husband and wife were considered one person under the law for purposes of concurrent ownership, the tenancy by the entirety was created to permit concurrent ownership between spouses. To create a tenancy by the entirety, all of the unities of the joint tenancy needed to be satisfied, and the tenants needed to be legally married. Spouses hold *per tout et non per my*[41] interest in the property:

[40] 2 Bl Comm (1836) 181-183.
[41] That is, by the whole and not by a share, moiety, or divisible part.

both spouses hold the entire interest, rather than one-half of the whole. Thus, under a tenancy by the entirety, spouses are considered to be seised of an undivided whole and not by a share.

[34] An underlying, important, and interesting aspect of the tenancy by the entirety was the philosophy of family economic security lying at the root of this estate. Under the tenancy, creditors of an individual spouse could not attach and sell the interest of a single debtor spouse. Only creditors of both could attach and sell the interest of the property owned by the tenancy by the entirety. Another important aspect was that unlike a tenancy in common or a joint tenancy, one tenant by the entirety could not sell or give away their interest in the property without the consent of the other tenant. Upon death of one spouse, the deceased's interest devolved to the surviving spouse (and not to the heirs of the deceased) – the right of survivorship.

[35] Thus, like dower (by which provision was made for a wife upon marriage should she become widowed), and courtesy (by which a widower may claim a life interest in the lands of his deceased wife in certain circumstances), and the civil law principle of community property,[42] the protection of economic rights to enable living in dignity and freedom was somewhat enabled by the tenancy by the entirety, but in an entirely patriarchal context.

[36] The married women's property law of 1925 (UK) added some confusion to the application of the tenancy by entirety through interpretations as to the policy of this legislation, and by decisions that its purpose was to separate the single entity concept attached to marriage from property ownership.[43] The consequence is that by virtue of the Law of Property Act 1925 (UK), tenancy by entireties has been considered abolished and only joint tenancies and tenancies in common can exist.

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[42] George McKay, *A Treatise on the Law of Community Property* (2nd edn, Bobbs-Merrill 1925) paras 4, 36 and 38, cited in Paul H Dué, 'Origin and Historical Development of the Community Property System' (1964) 25 La L Rev 78-79: 'The predominant universal cause of a community property system was the natural desire to provide for the wife's support and to curb the husband's despotic power. The marital community is an association consisting of husband and wife, and community property is the property belonging to this association. By investing the wife with an interest in such property the law affords her security. The earliest community property systems could then be explained as the efforts of different cultures to achieve the same general goal – protection of the weaker spouse'.

[43] See s 37 of the Law of Property Act 1925 (UK) and s 39 of the Act.

From a gender sensitive adjudicative perspective, an important question is: Why was this change made and what/whose interests was it intended to protect? And consequently: How has it impacted the rights of married women, and women generally?

[37] In the context of this opinion, it is equally important to note that the Law of Property Act 1925 (UK) was the product of an extremely patriarchal socio-legal culture and Parliament,[44] and in so far as its provisions were incorporated verbatim into the Act, it too is tainted by these inherited social-legal and cultural biases. Most of the enactments fail to deal with the specific matter of husband-wife co-ownership and the special concerns of women. Gaps that are reasonable to be inferred as being the by-product of a prevailing patriarchal socio-legal context.

(iii) **Caribbean Gender Realities**

[38] Professor Tracy Robinson's 2008 analysis of gender discrimination in Caribbean constitutionalism is a useful entry point.[45] She explains:[46]

> I use two cases from the 1980s, *Nielsen v Barker*[47] and *Girard v Att-Gen,*[48] ... Until recently, they were the only gender equality cases decided under Caribbean constitutions. *Nielsen* is a 1982 decision of the Guyana Court of Appeal, then that country's highest court of appeal. It upheld the constitutionality of an immigration law which granted 'belonger' status to

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[44] In the UK, women were not allowed to become Members of Parliament until the enactment of the 1918 Parliament (Qualification) of Women Act. The Act allowed women aged 21 and above to stand as candidates in general elections. In 2018, 17 female candidates stood for election and 1 was elected, who declined to take up her seat. In 1919, the first woman was seated as a Member of Parliament. Nancy Astor was the only woman alongside 650 male Members of Parliament. In 1921 a second woman joined Astor, Margaret Wintringham. Astor recounts that many of the male MPs refused to acknowledge or speak to her, apart from shouting at her when she asked questions in the House of Commons. She recalls Winston Churchill telling her that her arrival in Parliament made him feel 'like a woman had entered my bathroom and I had nothing to protect myself with except a sponge'. See Caitriona Beaumont, 'Women in Parliament from 1918-2020' (British Library 2020) < https://www.bl.uk/womens-rights/articles/women-in-parliament-1918-2020 > accessed on 18 October 2023). Over the period 1918 to 1945 there were only 38 women, in total, elected as Members of Parliament in the UK. In 1925 there were 4 women in Parliament. See Parliament of the United Kingdom, 'Women in the House of Commons – Appendix B' < https://www.parliament.uk/globalassets/documents/commons-information-office/m04b.pdf > accessed on 18 October 2023. In 1987 the first woman of colour, Diane Abbott, was elected as a Member of Parliament, UK. See Parliament of the United Kingdom, 'Women in the House of Commons' <https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/overview/womenincommons/ > accessed on 18 October 2023.

[45] Tracy Robinson, 'Gender, Nation and the Common Law Constitution' (2008) 28(4) Oxford J Legal Stud 735.

[46] ibid 745.

[47] (1982) 32 WIR 254 (GY CA).

[48] LC 1986 HC 24 (CARILAW), (17 December 1986).

> the wives of Guyanese men, but not to husbands of Guyanese women.[49] In *Girard* the St. Lucia High Court held in 1986 that a law requiring the termination of the employment of twice-pregnant unmarried teachers was not in violation of the St. Lucia Constitution 1978. … Notions of feminine propriety and masculine authority embedded within the existing laws were given constitutional imprimatur.

[39] In *Girard* and on appeal, the Court of Appeal did not disturb the High Court's ruling on the constitutional questions.[50] The court had applied the presumption of constitutionality and placed the burden on the claimants to rebut it by demonstrating enactment of the law by Parliament in bad faith or by otherwise misinterpreting the Constitution.[51] Indeed, Professor Robinson would point out: 'The danger of this approach is hard to miss. The more pervasive the ideologies that undermine women's potential for a full life, the less likely lawmakers will appear to be behaving irrationally or in bad faith.'[52] What is true for lawmakers is also true for judicial decision-makers. This is because the interpreters of the law, judicial officers, emerge from the very cultures that create discrimination and have to make the assessments of rationality and/or bad faith.

[40] Significantly therefore, these constitutional challenges reveal an underlying socio-legal mindset that permeates the interpretation and application of law in Caribbean spheres. Professor Robinson elaborates: 'Though this approach is less fashionable today, the thinking displayed in these cases has influenced the evolving meaning of gender equality … in the Caribbean.'[53] And she would quite poignantly opine: 'Using existing laws as a constraining force, it (Caribbean

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[49] Article 29 of the 1980 Republican Constitution of Guyana, now art 149 pursuant to the Constitution (Amendment) Act 2003, provided that women and men had equal rights and the same legal status, and that all forms of discrimination against women on the basis of their sex were illegal. Nielsen, newly married to a Guyanese woman and facing deportation, argued that a pre-independence colonial immigration law violated art 29. The Immigration Act 1948 defined a 'belonger' as the 'dependant' of a Guyanese citizen, and s 2(1)(a) and (3) further described 'dependant' as including the wife of a Guyanese citizen. Nielsen had argued that 'wife' in the Immigration Act had to be modified to the neutral 'spouse' to conform with the Constitution, pursuant to the power and duty of courts to modify existing laws, so as to bring them into alignment with the Constitution.
[50] *A-G* v *Girard* LC 1988 CA 1 (CARILAW), (25 January 1988).
[51] Applying *Hinds v R* (1977) AC 195 at 224.
[52] Robinson (n 45) 747-748.
[53] ibid 745.

constitutionalism) also validated measured advances for women, what I call here *feminine emancipation.*'[54]

[41] Professor Robinson in her analysis of *Nielsen's* case would elaborate as follows:[55]

> The Court of Appeal in *Nielsen v Barker* ruled that the colonial immigration law did not violate article 29. The crux of the case was the content of *existing family laws* that made women, as a matter of law, dependent on their husbands. The Court concluded that article 29 neither altered the concept of female dependency in the immigration statute, nor was it inconsistent with it. The Court of Appeal reasoned that success for the Dane would produce 'chaos' to longstanding and fundamental rules of matrimonial law that assumed male headship/female dependency and had been also preserved by the Constitution as existing laws. If a husband could be treated as a 'dependant' of his wife for the purposes of immigration law, then the constitutionality of family laws that gave wives access to maintenance, but not vice versa, would be imperilled.[56]

[42] Indeed, and in a more jurisprudential sense, Professor Robinson offers the following as a deeper explanation:[57]

> The quotidian facet of common law constitutionalism after independence was the privileging of existing laws in elaborating the constitutions and their bills of rights. Admittedly the veneration of existing laws became unfashionable by the end of the 1990s, but *change* does not render analyses of earlier periods redundant. In the working out of a tradition, there are continuities between what we *had* and what we *have* and, as Reva Siegel puts it, stories about the past shape out 'common sense' intuitions about the present.[58] Crucially, the interaction between shifting emphases of the language of the common law constitution over time - including the ubiquitous faith in the common law's dynamism - provide insight into gender relations and the development of nations in the Caribbean and may help explain why gender equality is yet to emerge as a central plank of Caribbean constitutional regimes.

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[54] ibid 746. See also from 748 for the interpretation and critique of '*feminine emancipation'* as used by Massiah JA in *Nielson's* case (n 47) at 290 and its patriarchal connotations; 'Femininely emancipated women were expected to defend fiercely the new Caribbean nations by maintaining propriety, guarding the conjugal family, especially marriage, and assuming responsibility for socialising children with proper values.' (Robinson (n 45) 748).

[55] Robinson (n 45) 746.

[56] See *Nielson* (n 47) at 262 and 272. See also Arif Bulkan, 'The Poverty of Equality Jurisprudence in the Commonwealth Caribbean' (2013) 10 Equal Rights Review 11, 16 and 17; and note his critique at 12 of 'a crippling judicial conservatism in the interpretation and enforcement of equality claims.'

[57] Robinson (n 45) 738. See also Tracy Robinson, 'Gender Equality and Judging in the OECS and Wider Commonwealth Caribbean' (Report prepared for UN Women and the Judicial Education Institute of the Eastern Caribbean Supreme Court, 12 July 2011).

[58] Citing Reva B Siegel, 'Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse on Sex Discrimination' in Austin Sarat and Thomas N Kearns (eds), *History, Memory and the Law* (University of Michigan Press, Ann Arbor 2002) 131, 180.

[43] On the matter of method, Professor Robinson shares the following insights: (i) the 'reverence for existing laws' and methods of legal interpretation, based in 'discrete rationality' which combines the constitutional practice of continuity with an adherence to past approaches 'unless there was a valid reason to do otherwise',[59] can have a retarding effect on the development of constitutional values; and (ii) uncritical adherence to the presumption of constitutionality as a means of 'preserving the status quo',[60] can be detrimental to the advancement of human rights. In the end Professor Robinson would opine that, '*Nielsen and Girard* placed crucial questions of gender equality outside the usual constitutional scrutiny and the domain of *fundamental* rights and further stereotyped women as dependants of the state.'[61] The clear message is the risk involved in uncritically honouring harmful methods of legal interpretation. What Caribbean constitutionalism invites are new approaches to statutory interpretation that are not afraid to break our bonds with the past.

[44] Evidence of this capacity to break with the past is already present. In *Wade v Roaches*[62] the Court of Appeal in Belize affirmed the Chief Justice's decision,[63] that dismissing a female employee, in this case the dismissal of a pregnant schoolteacher from a Catholic school, was discriminatory.[64] In the High Court, the Chief Justice would opine:[65]

> I therefore find that the respondent's policy is inherently and in fact, capable of affording different treatment to different persons, in this case male and female teachers, attributable wholly to their respective sex or gender: unmarried female teachers are the prime if not the exclusive targets of such a policy.

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[59] Robinson (n 45) 747, and as per the reasoning in *Neilson's* case.
[60] ibid, and as per the reasoning in *Girard's* case.
[61] ibid 749 (footnote omitted).
[62] (BZ CA, 9 March 2005).
[63] At [3]: 'The learned Chief Justice found that the respondent was in fact dismissed from her job as a teacher because she was pregnant. He concluded that in such circumstances her dismissal violated her constitutional right under section 16 (2). In addition, he held that the refusal to reinstate the respondent after being required to do so by the Chief Education Officer, constituted an infringement of her right to work under section 15(1) of the Constitution.'
[64] *Wade* (n 62) at [46]-[47] (Mottley P).
[65] (BZ SC, 30 April 2004) at [49]. See also [45]-[50].

[45] To arrive at this conclusion, the Chief Justice would abandon formal and traditional notions of equality (as sameness of treatment), and would offer and apply the following pragmatic statement on substantive equality: 'The Greek philosopher Lysia pointed out more that [sic] 2000 years ago that true justice does not give the same to all but to each his due: it consists not only in treating like things alike, but unlike things as unlike'.[66] His focus on effects and impact, on compounded harms, arrived at by asking, among other things, the 'woman question' as the method of interpretation, is noteworthy and was imbued with foresight.

(iv) **Constructing Constitutionally Legitimate Legal Methods**

[46] Legal methods are among the most basic tools that lawyers use. Method '… organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification.'[67] Methods matter because they shape and influence the focus of inquiry and possible outcomes. Legal methods that have contributed to the creation and continuation of discrimination, inequality, and the denial of rights for all, and that have been employed in the contexts of such experiences to legitimise and justify them or render them invisible or normative, must be viewed critically and with a hermeneutic of suspicion. Failure to do so could lead to the perpetuation of inequality and injustice, despite otherwise good intentions. This is because:

> Traditionally, legal method has operated within a highly structured framework which offers little opportunity for fundamental questioning about the *process* of defining the issues, selecting relevant principles, and excluding irrelevant ideas. In this context, decision-making takes place according to a form which usually "sees" present questions according to patterns established in the past, and in a context in which ongoing consistency in ideas may be valued more often than their future vitality.[68]

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[66] ibid at [51].
[67] C A MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7(3) Signs 515, 527.
[68] Mary Jane Mossman, 'Feminism and Legal Method: The Difference it Makes' (1987) 3 Wis Women's LJ 147, 149.

[47] This focus on methodology is of great importance. Legal methodology that is built upon the traditional triad of issues, evidence, and precedent is boundary defining (by filtering in some ideas and filtering out others, based on relevance), and tends to preserve the status quo (by reliance on the past and the limitation of certain considerations, including limitations on entertaining new ways of seeing). But what is one to do when the laws and cases being interpreted and applied were drafted and decided entirely or mostly by men and deal with or affect the affairs of women? In such circumstances the myth of law's neutrality is called into question. What of history, culture, social context, the realities of experience (past and present), the proofs of science? It would be quite naive to turn a blind eye to the convergence between those who hold power over others and those who make the tools of thinking and for analysis which explain and justify reality.

[48] To clarify this hermeneutic of suspicion; one is not asserting that traditional legal methods are of no value, or that their basic structures are totally flawed. Rather, it is to assert that they are neither complete nor exhaustive. For example, the high premium they place on predictability and certainty anchored in past occurrences, is sometimes too rigid an approach in post-colonial constitutional democracies. In particular, what is needed are more flexible approaches that can, among other things, (i) identify and admit missing (hitherto suppressed, denied, excluded) voices and points of view, (ii) take account of relevant differences, (iii) interrogate embedded structures of (discriminatory or exclusionary) power relations and privilege (typically patriarchal in the context of gender biases) and any constitutionally adverse and harmful effects, and (iv) attend to any relevant privileging or discriminating intersectional impacts (eg gender, colour, status, religion, ethnicity, disabilities). Indeed, what is needed is a methodologically and consciously overarching, critical approach to traditional forms of legal inquiry. This methodology must also be able to identify bias in decision-making methods and processes.

(iv) **Deconstructing the Law's Claims to Neutrality**

[49] In the context of women's rights to property, in the UK and in the British colonies, at common law and up to the end of the nineteenth century, women suffered several disabilities. For example, married women were denied the right to hold interests in property or to enter into contracts. On marriage a married woman's 'personal property became the absolute property of her husband at the instant of marriage; her earnings became the property of her husband, her real estate could be worked or rented by her husband and the proceeds became his personal property; she could not convey it away except by joining with her husband in a deed, nor could she will her property away without the consent of her husband.'[69]

[50] Basically, women who held property of any kind were required by law to give up all rights to it to their husbands, making their legal status akin to criminals and insane persons. Put another way, the law saw and treated women in the manner that men saw and treated women. And the State coercively and through the authority of the law organised itself and human affairs by privileging men's interests over all others including women, with effects in daily life for how women can live and relate in society.[70] One must recognise and name this for what it is, male bias (systemic and structural patriarchy). Hence the imperative for legal methods to 'ask … "the woman question" … to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.'[71] What one may call, a methodology for gender sensitive adjudication, with an emphasis on an effects evaluative process and a results-oriented jurisprudence. What is now being referred to as transformative equality (reaching beyond formal and substantive equality).

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[69] John B Winslow, 'The Property Rights of Married Women Under Modern Laws' (1916) 1 Marq L Rev 7, 15.

[70] Historically, English common law controlled a woman's economic prosperity through principles such as coverture. Under the legal doctrine of coverture, a married woman endured the legal status of a 'femme couverte' and was subsumed under the protection and influence of her husband, her baron, or lord. According to William Blackstone, *Commentaries on the Laws of England* (1765-1769), the 'legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of her husband'. Any personal property a woman owned, either through wages, investment, or inheritance, belonged to her husband upon marriage. Once married, she could own real property, but she could not exercise control over it without her husband's consent. The doctrine of coverture and unity of spouses encroached on women's right to property.

[71] Katherine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harv L Rev 829, 837.

[51] A specifically gender sensitive legal methodology must include, at least: (i) 'asking the woman question' to expose implicit bias in legal methods, rules, and practices,[72] (ii) contextual thinking, expanding spheres of legal relevance to include differences, sensitivity to contexts, and all perspectives,[73] and (iii) considering the personal experiences of affected women in collaborative and interactive processes so as to discover the impact of law and legal approaches on women.[74] Indeed, this is an approach that this Court has conceptually adopted, most recently in *OO v BK*, a domestic violence matter involving statutory interpretation, in which this pluralistic approach was taken including inviting *amicus curae* to offer both voice and view.[75]

[52] Legislative interventions brought measured changes in the UK, with resonances in Anglo-Caribbean states. The passage of the Married Women's Property Act 1870 (UK), permitted women to hold interests in property, and an extension to the law in 1882, gave married women complete control over their own property. The Sex Disqualification (Removal) Act 1919 (UK), amended the law to remove any 'disqualification on account of sex', and to prevent women from being 'disqualified by sex or marriage from the exercise of any public function'. In 1922, the Law of Property Act (UK) enabled a husband and wife to inherit each other's property. It was not until 1926 (UK), that legislation permitted women to hold and dispose of property on the same terms as men.

[53] To be clear, these enactments were intended to empower women and confer rights, albeit in a patriarchal socio-legal and law-making context. It therefore behoves us to ask from a gendered perspective: Who were the lawmakers? Who

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[72] It is a way of interrogating 'how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups.' This approach involves analysing 'how the law fails to take into account the experiences and values' of women, and 'how existing legal standards and concepts might disadvantage women.' See Bartlett (n 71) 836, 837.
[73] Bartlett (n 71) 836-837; Carol Sanger, 'Feminism and Disciplinarity: The Curl of the Petals' (1993) 27 Loy L A Law Rev 225, 225 and 245.
[74] Bartlett (n 71) 864.
[75] *OO v BK* (n 17).

were the judicial officers interpreting and applying these new laws? What were the prevailing cultures and contexts of both?

(v) Confronting Potential Unconscious Gender Bias in Judicial Decision Making

[54] These are important methodological inquiries, because of the reality of unconscious (also referred to as implicit) bias. No human is free from unconscious bias, judicial officers included.[76] Unconscious bias has been understood to be the consequence of how our human brain functions, how it processes information, as a pattern formation instrument of perception, memory, and recall, operating in the contexts of our exposures in life.[77] That is to say, because of social context, culture, and human interactions, we all develop subjective (individual and ingroup/outgroup) recognition patterns (perceptions) that become default assumptions about reality. These can lead to stereotyping, prejudice, and presumptions about certain groups or populations pre-reflexively, that is, without conscious knowledge or awareness.[78] It is an inherently human phenomenon.[79]

[55] Our ways of seeing and hearing are biased by our life experiences. These biases impact how we assess and process information, and thus influence our perceptions, interpretations, and applications of facts (evidence) and law.[80] They

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[76] Mike Noon, 'Pointless Diversity Training: Unconscious Bias, New Racism and Agency' (2018) 32(1) Work, Employment and Society 198, 199: 'Everyone possesses bias. People are mostly unaware of the bias. It is deeply engrained. It influences attitudes. It probably influences behaviour. It can be measured (or at least quantified)'.

[77] D Randall Smith and others, 'Favoritism, Bias, and Error in Performance Ratings of Scientists and Engineers: The Effects of Power, Status, and Numbers' (2001) 45(5–6) Sex Roles: A Journal of Research 337, 338: '… we define bias as the over- or underinflation of evaluations relative to performance for some groups because of identification that the rater may have toward his or her own or toward a reference group.'

[78] Bernice Donald, Jeffrey Rachlinski and Andrew Wistrich, 'Getting Explicit about Implicit Bias' (2020) 104(3) Judicature 75.

[79] Kai Inga Liehr Storm and others, 'Unconscious Bias in the HRM Literature: Towards a Critical-reflexive Approach' (2023) 33(3) Human Resource Management Review 1 < https://www.sciencedirect.com/science/article/pii/S1053482223000207 > accessed 18 October 2023.

[80] See Peter A Jamadar, Elron Elahie and Richard Jamadar, *Mindful Judging: Exploring the Impact of Intentional Awarenessing on Judicial Officers*, (Bettering Justice) < https://betteringjustice.com/mindful-judging > accessed 18 October 2023. See also Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241, 242-243: 'Like other political elites, judges have policy preferences, shaped by factors that include their race, gender, and, most importantly, ideology or partisanship (which themselves could be influenced by race or gender). In other words, judges are nuanced decision-makers who bring their preferences and experiences to bear on what are sometimes difficult questions lacking in objectively correct answers'. See further Donald C Nugent,

can be shared and perpetuated in both overt and subtle ways, including through public and political discourse and through all forms of media (including social media).[81] Importantly, 'unconscious bias [can be] a source and means of reproducing and maintaining entire systems of inequality.'[82] Indeed, it may very well be that 'courts are an ideological body whose rulings represent the preferences of the men and women who serve on them.'[83]

[56] In the context of this case, gender bias[84] refers to discriminatory assumptions, attitudes, and behaviours towards women in general and married women in particular, because of, among other things, their sex and status.[85] It is both institutionalised (systemic) and individualised.[86] Individually, it is a prejudicial stereotype[87] that is held internally and unconsciously. As such it is a cognitive distortion of reality that shapes attitude and behaviour unconsciously and affects, among other things, decision making. It is irrational, in part because it is an 'inaccurate evaluation reflecting a generalization rather than an individual's true qualities'.[88] The outcome is flawed decision making that is however considered rational for the biased decision maker.

'Judicial Bias' (1994) 42 Clev St L Rev 1, 3: 'all judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process.' See as well, Godfrey Cole, *Making Decisions Judicially: A Guide for Decision Makers* (Hart Publishing 2022) 21-22.

[81] Amarina Ariyanto, Matthew J Hornsey and Cindy Gallois, 'Group Allegiances and Perceptions of Media Bias: Taking into Account Both the Perceiver and the Source' 2007 10(2) Group Processes and Intergroup Relations 266.

[82] Storm and others (n 79) 23.

[83] Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241, 243.

[84] Claartje J Vinkenburg, 'Engaging Gatekeepers, Optimizing Decision Making, and Mitigating Bias: Design Specifications for Systemic Diversity Interventions' 2017 53(2) Journal of Applied Behavioral Science 212, 217: 'Gender bias is defined as our prejudice in favor of one gender over the other, generally used as "bias against women".' It is sometimes referred to as a 'pro-male bias', and 'a pro-male bias tends to be greatest when the task at hand is incongruent with gender role expectations for women.' See Manos Matsaganis, 'Union Structures and Pension Outcomes in Greece' (2007) 45(3) BJIR 537.

[85] Ellen R Auster and Ajnesh Prasad, 'Why Do Women Still Not Make It to the Top? Dominant Organizational Ideologies and Biases by Promotion Committees Limit Opportunities to Destination Positions' (2016) 75(56) Sex Roles: A Journal of Research 177: 'Gender bias refers to negative attitudes and behavior toward women because of their sex.'

[86] Luc Cousineauand Jennifer Roth, 'Pervasive Patriarchal Leadership Ideology in Seasonal Residential Summer Camp Staff' (2012) 8(4) Leadership 421, 429: 'In this way, we see that the problem of gender bias in leadership is not a question of men's discomfort with women leaders, but an ideological system which encourages all members of society, men and women, to internalize the belief that men make better leaders.'

[87] Kerry Kawakami, John F Dovidio and Simone van Kamp, 'The Impact of Counterstereotypic Training and Related Correction Processes on the Application of Stereotypes' (2007) 10(2) Group Processes and Intergroup Relations 139, 139: 'A stereotype refers to the association of specific traits, roles, and characteristics with a person or a group based on group membership', and 'bias may emerge from the activation and application of stereotypes, which can harm how women and minorities are perceived.'- Katherine L Milkman, Modupe Akinola and Dolly Chugh, 'What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations' (2015) 100(6) Journal of Applied Psychology 1678, 1680.

[88] Amanda J Koch, Susan D D'Mello and Paul R Sackett, 'A Meta-analysis of Gender Stereotypes and Bias in Experimental Simulations of Employment Decision Making' (2015) 100(1) Journal of Applied Psychology 128, 129.

[57] It is also inconsistent with the core judicial principles of impartiality and independence, as the judgment of the individual or the group is influenced by irrelevant and extraneous considerations. Thus, it is considered by some to be professionally unethical.[89] Institutionally, it can be found embedded in organisational culture, traditions, and practices.

[58] Individual and institutional gender bias can also have deep and pervasive societal, community, and group roots. An interesting aspect of unconscious bias is how binary configurations (apart from the direct male-female binary) may affect decision making. In terms of the 'ingroup-outgroup' binary, research suggests that 'groups that made joint decisions displayed a stronger intergroup bias than did individual group members who acted in isolation.'[90] The implications of this for appellate courts and the composition of panels in gender sensitive matters is worth reflecting on.

[59] Two examples, one of some vintage and another more recent, can help demonstrate the conundrum of unconscious bias for courts and also offer some methodological insights. The first case is that of Mabel Penury French, in *Re French*.[91] French was born on 4 June 1881 in Portland Parish, New Brunswick, Canada. In 1902 she was admitted as a law student and in 1905 she graduated with a Bachelor of Civil Law degree from King's College Law School (the first woman in New Brunswick to receive that degree). She requested the Council of the Barristers' Society of New Brunswick to recommend her for admission as a lawyer. The Council considered her request and passed a resolution recommending her for admission as a lawyer, 'subject to the opinion of the court as to her sex being under existing laws a bar to her admission ...'[92]

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[89] Mahzarin R Banaji, Max H Bazerman and Dolly Chugh, 'How (Un)ethical Are You?' (2003) 81 Harv Bus Rev 56, explain that there are 'four related sources of unintentional unethical decision making: implicit forms of prejudice, bias that favors one's own group, conflict of interest, and a tendency to overclaim credit.'

[90] Lars-Eric Petersen, Joerg Dietz and Dieter Frey, 'The Effects of Intragroup Interaction and Cohesion on Intergroup Bias' (2004) 7(2) Group Processes and Intergroup Relations 107, 113-114.

[91] 37 NBR 359 (SC). See generally Mary Jane Mossman, '"Invisible" Constraints on Lawyering and Leadership: The Case of Women Lawyers' (1988) 20 Ottawa L Rev 567.

[92] *Re French* 37 NBR 359 (SC) at 359.

[60] Before the courts, the issue was whether a woman was eligible for admission as a lawyer. In dispute was the meaning of the word 'persons' in the Barristers' Society Act 1903[93] which regulated admission to the practice of law. It was argued on behalf of French, that the word should be interpreted broadly so as to permit French to become a lawyer. Despite these arguments, however, the court unanimously concluded that the legislature's use of the word 'persons', construed in the context of an exclusively male legal profession, could not have been intended to permit women's admission to the practice of law.[94] Five judges heard the arguments and three wrote opinions, the decision was unanimous.

[61] Tuck CJ dismissed the arguments based on 'the advanced thought of the age …'[95] For his part, he thought that women should not compete with men and that they should attend to 'their own legitimate business.'[96]He concluded that the word 'persons' applied only to males since 'it was never in the contemplation of the legislature that a woman should be admitted an attorney of this court.'[97] Hanington J agreed, noting that in most other jurisdictions, the admission of women as lawyers had been accomplished by statutory amendment.[98] The third judge to write an opinion, Barker J, affirmed the idea of separate spheres for men and women,[99] 'founded in the divine ordinance as well as in the nature of things',[100] and concluded that there was no right at common law for women to practise as attorneys. He also opined that the statute's use of the gender-neutral word 'persons' could not signify the admissibility of women to the legal profession because when the statute was

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[93] Subsection [sic] 13(1) authorised the Society to make rules for 'the admission of persons to the study of the law and the periods and conditions of study'.

[94] To protest this decision, she stopped paying her bills. Upon being sued for debt, her defence was that since she was not a person, she could not be sued, nor did she have to pay. In 1907, due to pressure from women's groups, the Provincial Legislature passed 'An Act to Remove the Disability of Women so far as Relates to the Study and Practice of the Law', and French was admitted to the New Brunswick bar.

[95] *French* (n 92) at 361.

[96] ibid at 362.

[97] ibid.

[98] ibid at 363. In fact, women were not allowed to practice law in England until the 1919 Sex Disqualification (Removal) Act was passed. In 1921, Ivy Williams was the first woman to be called to the English bar.

[99] Citing with approval two American cases, *Bradwell v State of Illinois* 83 US (16 Wall) 130 (1872) and *Robinson's Case* 131 Mass 376 (1889).

[100] *French* (n 92) at 365-366.

first enacted in 1846, no women were lawyers and therefore the word 'persons' meant only men. In his view, the statute had never been intended to make 'the radical change' suggested by the applicant, and 'by every rule of construction applicable to such a case the court [was] bound to hold that no such change [had] been made.'[101]

[62] With the passage of time and the benefit of hindsight, it is quite easy and convenient to see the patriarchal mindset and unconscious gender bias at work in the approaches and justifications in denying Mabel French's petition to become a lawyer. Gender neutral language was used, yet an interpretation that was male-exclusive and informed by patriarchal values and assumptions was applied. It is not therefore surprising that such occurrences would engender the following opinion: 'It has been a strength of patriarchy in all its historic forms to assimilate itself so perfectly to socioeconomic, political, and cultural structures as to be virtually invisible.'[102] All five judges in *Re French* were male.

[63] A more recent Anglo-Caribbean case also warrants our consideration, though more inconveniently so because of its contemporaneity. In 2023 this Court decided *OO v BK*.[103] OO and BK were involved in an intimate partner relationship for three years. During that time, they lived together for 21 months and had a son. In November 2019, the relationship ended. In February 2020, their relationship resumed in the form of a visiting intimate relationship, which continued until the end of May 2020. After a violent incident involving BK, OO sought a protection order against BK at the Magistrates Court for her and her minor son. Under the relevant law, a Domestic Violence Act, a spouse included persons in a cohabitational relationship, and former spouses were entitled to apply for domestic violence protection orders.

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[101] ibid at 371.
[102] Joan Kelly, 'The Doubled Vision of Feminist Theory: A Postscript to the "Women and Power" Conference' in *Women, History and Theory: The Essays of Joan Kelly* (University of Chicago Press, 1984) ch 3, 51, quoted in, Mary Jane Mossman, '"Invisible" Constraints on Lawyering and Leadership: The Case of Women Lawyers' (1988) 20 Ottawa L Rev 567.
[103] [2023] CCJ 10 (AJ) BB.

[64] At the hearing, the Magistrate focused on whether OO had the status of a 'former spouse', this being one of the named categories in the relevant Domestic Violence Act.[104] After examining the relevant sections of the legislation,[105] the Magistrate concluded that OO was not a person in a domestic or cohabitational or visiting relationship at the time of the incident and was therefore not a 'former spouse'. OO's application for a protection order was dismissed. The appellant appealed and the majority of the Court of Appeal upheld the Magistrate, concluding that she was entitled to decline jurisdiction. The majority of the Court of Appeal found it difficult to comprehend how a former intimate partner could be eligible to apply for a protection order. The third member of the Court of Appeal disagreed, concluding that OO was clearly a former spouse as defined in the legislation. All three appellate judges were male, the magistrate was female.

[65] In the Court of Appeal, the following exchange occurred between one of the majority judges (who gave the main reasons of the majority) and counsel for OO:

> CA: When does a person stop being a former spouse?
> Counsel: Sorry?
> CA: When does a person stop being a former spouse?
> Counsel: When they die, sir.
> CA: So forever …
> Counsel: Precisely.
> CA: Do you really think that is practical?
> Counsel: Sir, that is what the law says.
> CA: That is not what it is, that is not the intention of the law, but anyway, move on.

[66] In delivering the main reasons of the majority, it was stated:[106]

> ... in relation to the construction of the legislation it is very difficult to comprehend how a person who once had a relationship with someone, … who once had a living relationship with someone, would fall under this Act no matter how remote that situation may be, it has to be given some kind of purposive meaning in our view and that would mean that there has to be something else in that relationship.

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[104] Domestic Violence (Protection Orders) Act, Cap 130A, as amended by Act 2 of 2016 (BB).
[105] ibid ss 2(b) and 4(1).
[106] Transcript of proceedings, (Court of Appeal of Barbados, 27 May 2021).

> That to my mind (that) would mean that they are either living together or there is some way in which they depend on one another and so on.
> These parties did not even have a proper manner of dealing with one another when it came to the interests of the child, so that shows the extent to which they were separated from each other and not dealing with each other as persons in any kind of relationship even a relationship of two parties who are parents of a child.

[67] The concurring Court of Appeal judge would only add: 'This opinion of my brother … is shared by me ... the definition that we looked at was one that was reflected in the amendment to the Act, the definition of spouse.'

[68] In the lead judgment of the CCJ, Rajnauth-Lee J examined the statutory framework for domestic violence legislation in Barbados, noting the aim of the amendment in 2016, which was to define domestic violence and to make greater provision for the safety of victims of domestic violence and the accountability of perpetrators of such violence. As part of the amendment, definitions for 'cohabitational relationship', 'domestic relationship', and 'visiting relationship' were included in the legislation and the definition of 'spouse' was amended to 'a party to a marriage or cohabitational relationship', explicitly recognising those in cohabitational relationships as 'spouses'. In these circumstances, all of the opinions of the Court unanimously concluded that the appellant was therefore a 'former spouse' (being a former cohabitant and a former partner of an intimate visiting relationship) within the meaning of the amended Domestic Violence Act and was entitled to seek a protection order.

[69] Rajnauth-Lee J also stated that to impose a time limit on an applicant's capacity or status to make an application for a protection order after the breakdown of a cohabitational relationship, would run counter to the clear purpose and policy objectives of the amended Act. Additionally, to construe 'former spouse' as limited by time without any specific provision to that effect contained in the legislation would give rise to an absurdity. In her opinion, legislation should be interpreted not only to achieve the objectives of the legislation and the intention

of Parliament but to achieve alignment with (i) fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions, and (ii) international treaty obligations and commitments of these States. All of the opinions of the Court concluded, that when interpreting the amended Act in light of Barbados' constitutional values and international obligations, a conclusion that the appellant was not a 'former spouse' within s 2 of the amended Act was wholly incorrect.

[70] What seemed clear to the judges of the CCJ and the minority judge in the Court of Appeal, was apparently opaque to the Magistrate and the majority of the Court of Appeal. The reading into the legislation of seemingly arbitrary time, dependency, and/or closeness considerations as prerequisites for legal standing for a former spouse to seek a domestic violence protection order, had no statutory warrant. Yet it was prompted by real concerns, as the extracts above indicate. Which begs the questions: What were the sources of these concerns? Would these concerns have similarly arisen if the applicant was a spouse, or former spouse, of a marriage (compared to say an intimate partner of a cohabitational or visiting relationship)? These may be inconvenient inquiries, yet they are necessary ones.

[71] Saunders P would indeed opine:[107]

> As rightly pointed out in the lead judgment, the amended Act cannot sensibly be interpreted to mean that, unlike married spouses, an unmarried person who is or was in an abusive domestic relationship should be forced to stay in or resume that relationship to be eligible to apply for a protection order. Or that, to put it another way, if a traumatised unmarried woman or man ends a violent domestic relationship (irrespective of the length of the union) and tries to move on, they thereby automatically 'withdraw themselves' from the category of persons who may seek the protection of the amended Act, even if the threat of violence from their former partner persists.

[72] What these examples describe ought not to result in a descent into cynicism or hopelessness. Rather they should prompt a commitment to continuing judicial

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[107] *OO v BK* (n 17) at [110].

education, for all judicial officers at all levels, on the matter of gender sensitive adjudication. In the Caribbean, there are some current resources that are worth mentioning and that can be utilised. Two examples are, (i) The Judiciary, Gender Equality and Empowerment: Training Manual,[108] and (ii) Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers, Trinidad and Tobago and Belize.[109]

(vi) **A Caribbean Methodology**

[73] The CCJ has been consistently developing a Caribbean methodological approach to statutory interpretation that can help mitigate the effects of individual and systemic (socio-legal and cultural) unconscious bias and discrimination. Such a methodology is necessary because the traditional methods that have been passed on for centuries tend to perpetuate the status quo, including entrenched biases and discrimination (where these are already present in laws, precedents, methods and in their current uncritical reliance and application). These Caribbean approaches advocated by the CCJ facilitate new ways of seeing and hearing the past, present, and future.

[74] Most recently, in *OO v BK*, the CCJ reiterated this constitutional approach to statutory interpretation as follows:[110]

> This Court has pointed out that constitutional democracies function under the rule of law and in the context of constitutional supremacy. Accordingly, where the issue of statutory interpretation is at play, the Court should interpret legislation not only to achieve the objectives of the legislation, and the intention of Parliament but to achieve alignment with (1) fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions, and (2) international treaty obligations and commitments of these States.

[75] In this exercise of statutory interpretation, and as the analyses of this Court in *OO v BK* demonstrate,[111] Caribbean laws must be understood: '(i) in ways that

[108] UN Women, Jurist Project 2017.
[109] (Judicial Education Institute Trinidad and Tobago 2018), and (Belize Judiciary 2018).
[110] (n 17) at [67] (Rajnauth-Lee J) (footnote omitted). See further [67] – [74] and [166] – [171].
[111] See also *Marin v R* [2021] CCJ 6 (AJ) BZ.

interpret and apply the law in alignment with social context and also with constitutional and international principles, and (ii) in ways that make sense to the citizens …'[112] This constitutional approach to statutory interpretation is not peripheral, but is central and paramount.[113] This entire process is grounded in an unapologetic rights-centric ideology which drives and informs both methodology (how we do things) and epistemology (how we know things, with implications for what we know).[114]

[76] In Belize, constitutionally avowed fundamental human rights include rights to life, liberty, protection of property, and recognition of human dignity. [115] In so far as the preamble is an aid to interpretation,[116] it is noteworthy that cl (e) speaks to the elimination of economic and social privilege and disparity among citizens, the ensuring of gender equality, the protection of life, liberty and the pursuit of happiness, the right to the ownership of private property, and the prohibition of exploitation. These are all lenses through which the process of statutory interpretation in Belize must be filtered. Their relevance for women's rights to land and other productive resources is obvious.

[77] The CCJ in deploying these constitutionally mandated approaches in *OO v BK* (in particular, the privileging of human rights and alignment with relevant international obligations),[117] also applied the gender sensitive legal methodology explained above as inherent in its Caribbean constitutional methodologies. The lead judgment of Rajnauth-Lee J explained the following. First, at case management, the Court sought to apply a flexible approach that identified and admitted missing voices and points of view by inviting the Attorney General and *amici curiae* to participate and in so doing to take account of relevant differences

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[112] *OO v BK* (n 17) at [171].
[113] ibid at [73]-[74] and [170].
[114] ibid at [68]-[69] and [74].
[115] Section 3, Constitution of Belize.
[116] See *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178.
[117] See *OO v BK* (n 17) at [67] – [81], [112] – [113], [166] – [170]. See also at [91]: '[This case] has also underlined the necessity for judicial officers and court staff dealing with domestic violence matters to receive comprehensive training and sensitisation, to better understand the significance of human rights provisions and international treaties to the legislation which they are tasked to interpret and apply.'

and considerations.[118] Second, the Court set about to interrogate embedded structures of power relations and privilege in the context of gender and any constitutionally adverse and harmful effects, including consideration of any relevant privileging or discriminating intersectional impacts.[119] In adopting these approaches the Court was in effect applying contextual thinking, expanding spheres of legal relevance to include differences, sensitivity to contexts, and all perspectives, and considering the personal experiences of affected women in a collaborative and interactive process so as to discover the impact of law and legal approaches on women.[120] Noteworthy is the reliance by the Court on shared and known lived experiences as a part of social context relevance.[121]

[78] It is exactly this approach to methodology that is apt in this case, with certain nuances. The Caribbean literature on gender relations and inequality is replete with examples and analyses of how past and current Caribbean patriarchal systems and structures cause harm to women and girls.[122] To be counted amongst these systems and structures are the court systems and the justice sector. Indeed, as Professor Eudine Barriteau would point out in 2003, 'To date we have not questioned the power/gender confluence as representing a major hurdle to unravelling the enduring practices that maintain inequalities and the absence of gender justice.'[123]

[79] In fact, it is a common historical experience of married women in Caribbean society that default to male wishes and directives is culturally normative, even when it can be detrimental to their wellbeing.[124] This is a social context truism that any well-informed member of society who lives in these spaces we call

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[118] ibid at [22] – [25].
[119] ibid at [32] – [47] and [83] – [85].
[120] See also at [84] – [85] and [88]: 'It belies an understanding of the ways in which legal processes can perpetuate class and gender hierarchies and undermine women's use of the court for protection from violence.'
[121] See at [107], [154] – [157], [174] – [175]. See also *R v RDS* [1997] 3 SCR 484.
[122] See for example Eudine Barriteau (ed), *Confronting Power, Theorizing Gender: Interdisciplinary Perspectives in the Caribbean* (University of the West Indies Press 2003).
[123] ibid 7.
[124] ibid. Barriteau points out at 4: 'gendered relations were characterized "as the ways in which social relations between women and men are socially constituted to perpetuate male dominance"', quoting V Eudine Barriteau Foster, 'The Construct of a Postmodernist Feminist Theory for Caribbean Social Science Research' (1992) 41(2) Social and Economic Studies 15.

Caribbean knows all too well.[125] It is what Professor Barriteau refers to as 'the implications of the power of dominating relations of gender,' and 'the *relations of power* within relations of gender.'[126] She is explicit, 'one of the shortcomings … in the Caribbean is our failure to confront the raw power dynamics impinging on our ongoing attempts to expose and alter the systemic character of women's multiple experiences of material and ideological subordination.'[127] This 'material and ideological subordination' has some of its most profound adverse effects on women in the area of property rights.

[80] Judges are entitled to take cognisance of this reality, as explained by the Supreme Court of Canada, 'Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality.'[128] Furthermore, there is a presumption of knowing, as explained in the Canadian context (and as is equally applicable in the Caribbean):[129]

> The reasonable person, … is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the Charter and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken.

[81] Applying these insights to methods of statutory interpretation, yields what has been described above as the need for a hermeneutic of suspicion in the application

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[125] See *R v RDS* [1997] 3 SCR 484, for the applicability of social context in judging; and see especially at [30]; at [39]: 'Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function'; at [41]: 'It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context …'; at [44]: 'An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context … from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.'

[126] Barriteau (n 122) 4.

[127] ibid 5.

[128] *R v RDS* [1997] 3 SCR 484 at [42].

[129] ibid at [46].

of statutory provisions when historically disadvantaged groups are implicated, such as married women in the context of property rights. Thus, in applying s 38(2) of the Act to the facts of this case, the evidence and surrounding circumstances have to be scrupulously examined to ensure that presumptive social context realities are properly reckoned with and accounted for. If one is to conclude a release in law, by which a married woman is thereby completely deprived of all her rights and interests in property, the evidence must be clear, conclusive, and beyond any ambiguity or equivocation. It is noteworthy that the existing law on release is sparse.

(vii) **Section 38(2), Making Sense of Release**

[82] Transfer of legal title requires, as a general rule, certain formalities. It is trite that a disposition of land must be in writing, and as ss 43(1) and 55(1) of the Act stipulate:

> 43(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol, no interest in land shall be created or disposed of except by writing signed by the person creating or conveying it, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law.[130]
>
> 55(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

[83] Reading ss 43(1) and 38(2) of the Act together and purposively, a release is a disposition of an interest in land. The essential formalities are therefore (i) a sufficient conveyance, agreement, memorandum, or note in writing, which is (ii) signed by the party creating or disposing of their interest in land or their

[130] Section 43 of the Act is in identical terms as s 53(1)(a) and (2) of the Law of Property Act 1925 (UK). Section 43(2) provides 'This section shall not affect the creation or operation of resulting, implied or constructive trusts.'

authorised agent. Section 55(1) of the Act supports this construction and interpretation.

[84] Release in s 38(2) deals with the title in land held by co-owners. Whereas in severance, which deals with the beneficial title, a co-owner's interest and title in land is not extinguished or lost but converted in species from a joint tenancy to a tenancy in common, in release the joint owner releasing their title loses all legal interests, entitlements, and title in the lands.

[85] In the context of married persons in the Caribbean, and bearing in mind the social context considerations explained, generally, where it is argued that a wife has released to her husband her title in lands held by both as joint tenants, (i) the essential formalities for the disposition of title must be established, and (ii) the hermeneutic of suspicion must be applied to the facts and circumstances. Part of this latter inquiry is an adverse effects analysis which reaches beyond intentionality.

[86] It would be an extraordinary exception to have a release and transfer of legal title by conduct. A wife whose husband severs title in a joint tenancy in which his wife is a co-owner, or a wife who does the same in those circumstances, results in the wife retaining an interest in the lands as a tenant in common. Such a result does not operate to the absolute disadvantage or to cause irreparable harm to a wife in relation to land ownership and its implications for her agency, autonomy, and independence. Such a result is more aligned with the rights of women under the Constitution of Belize and under international human rights law. However, a release in similar circumstances is more questionable because of the potential for disadvantage and harm. Hence the hermeneutic of suspicion and the inquiry into adverse effects as a method of legal interpretation. The burden of proof is on the party asserting the release. The appropriate standard of proof ought to be cogency on a balance of probabilities.

[87] There is no inequality of treatment in applying this differentiated approach in the case of married women, once one grasps that equality is substantive equality and that the objective of transformative equality is apt (both of which inform structural and systemic processes, including legal methods). Thus, a Caribbean common law that is relevant and responsive to current needs, would include the requirement for minimum formalities in the instance of any release as between joint owners, and in the case of a married woman the additional elements as described. Such a development is consistent with statutory requirements (ss 43(1) and 55(1) of the Act) and hence with Parliamentary intent, as well as with Caribbean policy to protect and empower women in fulfilment of constitutional and international law human rights standards, and precedent.

[88] On the matter of precedent, the recent English Court of Appeal decision in *Hudson v Hathway*[131] is helpful. The essential facts were that an unmarried couple, Lee Hudson and Jayne Hathway, purchased a family home in their joint names and held the same as joint tenants in law and in equity. The couple later separated. Discussions about the division of assets including the family home were set out in emails and subscribed (signed) by each respective party. For example,[132] Hathway in her initiating email stated: 'I hope we are both adult and reasonable enough to reach some sort of compromise?' To which Hudson replied: 'My thoughts on this are that anything accrued while we were together is for us to come to an agreement on, which I think fits with what you are saying.' The parties were therefore very clear on what they were discussing and why. Hudson would subsequently write as follows (31 July 2013):

> So here it is. We were never married. You have no claim over what is mine. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I'm not agreeing to give you any. … The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] moving on with our lives … You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live …

[131] [2023] 3 All ER 718.
[132] ibid at [8] – [22].

[89] In response Hathway stated:

> So that we can move forward and get to a point of completely severing our financial connections, your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this and will do everything I can to get the house ready for sale …

[90] Hudson would reply (9 September 2013): 'Yes, that's right. … Under this arrangement, I've no interest whatsoever in the house …' All of this happened between November 2011 and September 2013. Then in August 2014, Hudson would write (following a series of exasperated email exchanges about the delay in finalising the settlement of their joint affairs) and say: 'Remember the House is of no value to me: the deal from one year ago which was supposed to be finalised 6 months ago gave you all liquid assets, including the proceeds of the house sale. I don't care what it sells for.'

[91] On the issue of whether Hudson had released his interests in the land to Hathway, the court explained that: (i) s 53(1)[133] 'applies to instruments which effect an immediate disposition of an interest,' (ii) the necessary formalities for a disposition of an interest in land were 'signed writing,' for which no particular form of words was necessary, and (iii) Hudson's emails of the 31 July and 9 September 2013 complied with the statutory formalities and constituted a release as contemplated by s 36 of the Law of Property Act 1925 (UK).[134] In relation to the meaning of 'disposition' as used in s 53(1) of the Law of Property Act 1925 (UK),[135] the court would opine that it means 'an act by which someone ceases to be the owner of that property in law or in equity' and was to be interpreted as such in the context of a release.[136] Lewison LJ would conclude:[137] 'In my judgment Mr Hudson's emails of 30 July and 9 September 2013 are sufficient in

[133] Section 43 of the Act.
[134] Section 38(2) of the Act. See *Hudson v Hathway* [2023] 3 All ER 718 at [32], [46] – [48], [50].
[135] Section 43(1) of the Act.
[136] *Hudson* (n 131) at [51] – [53].
[137] ibid at [50].

point of form to amount to a release of his equitable interest in the house. They evince a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future.'

[92] A few observations are apposite, (i) a release as between joint tenants was treated as an immediate disposition of an interest in land, (ii) supported by a clear intention to do so, and (iii) is to be distinguished from an intention for a future disposition (a promise). Also, in the discussion, Lewison LJ dealt with the requirement of an intention to create legal relations as between married persons, as distinguished from family arrangements. On an assumption, *arguendo*, that the principle would apply to immediate dispositions, such as a release, he avoided the application of the presumption that, as between married parties, there is no intention to create legal relations. He did this on two bases, (i) the parties were in fact never married, and (ii) in fact they were separated and negotiating the terms of their final separation.[138] Thus, there were no impediments to finding that Hudson had released his interests in the land to Hathway.

[93] These observations are opposite because, in this appeal, (i) the parties were married and in good relations at the time of the suggested release, and (ii) there is no evidence of an intention to effect an immediate disposition of an interest in the subject lands, or indeed, any specific actions taken to do so. The evidence if anything is to the contrary. Furthermore, for all of the social context reasons explained above, the hermeneutic of suspicion requires that there be careful scrutiny as to whether there was an intention to create enforceable legal relations, or whether, say, what took place was more akin to a family arrangement. In instances of married persons, certainly where a release is argued against a married woman, the presumption not to lightly infer enforceable legal relations is preferable, which is, of course, a rebuttable presumption.

[138] ibid at [49]. See *Merritt v Merritt* [1970] 2 All ER 760.

(viii) **Disposition, Applying Law to Facts, in Context: no Release**

[94] Franziska Nicholson (as Claimant) sues as beneficiary under the will of the deceased (Merickston Nicholson) dated 31 May 2005. For the purposes of this appeal, she is claiming by virtue of that will[139] 1,000 acres of lands, and a two-storey house known as 'Villa Franziska' which she claims to have built.[140] She asserts, and it is agreed that these (and other) lands were owned by the deceased and his wife Anna as joint tenants (it seems that the deceased acquired these properties and placed them in the joint names of Anna and himself at the time of acquisition). Franziska also specifically claims a declaration that the lands held by the deceased and Anna 'was severed during the lifetime of the deceased by the mutual agreement, acts, and course of dealing of the joint tenants thus creating a tenancy in common of the beneficial interests in the property.'[141] In language and in form this is obviously a claim under s 38(2) of the Act for severance, and it is not a claim for release.

[95] The High Court declined to consider whether this relief should be granted and dismissed Franziska's claim. The Court of Appeal disagreed, considered that the issue of severance arose for determination under the Act (and not under the Registered Land Act), and by majority granted the declaration of severance. In the majority opinion, there was sufficient evidence of a mutual agreement supported by conduct in relation to the disputed lands, to conclude that the joint tenancy had been severed during the lifetime of the deceased. Franziska was therefore held to be entitled to the 1000 acres claimed by her, as well as 'Villa Franziska'. The dissenting opinion held that there was insufficient evidence to find severance.

[96] In paragraph 6 of Franziska's supporting affidavit, she asserts:

> It was a well-known fact in the family that the parcels of land … acquired by my father in the joint names of himself and my mother was by the

[139] As per the fifth devise. See Record, 'Supporting Affidavit of Franziska Nicholson', 29 December 2017, [3].
[140] The particulars are set out in the claim form and supporting affidavit.
[141] Record, 'Amended Fixed Date Claim Form', 6 June 2018, [3].

> agreement of our parents, it was decided what property or portion of property would go to each of their children.

[97] She continued 'This arrangement was later confirmed in the will of our father made on the 31st May 2005.' What Franziska is asserting is a family arrangement, which had been agreed by her parents as to how their jointly owned property was to be divided among their four children, which she claims was represented in the will of the deceased.

[98] However, following the death of her father, Franziska asserts that Anna was not willing to comply with the terms of the deceased's will, about which Anna had a disagreement.[142] The consequence was the filing of this action as, in the words of Franziska: 'I respectfully believe that the only practicable way forward is for (the court) to make the orders that I seek.'[143] On Franziska's claim and supporting affidavit, it is clear that Anna was disputing the alleged terms of the family arrangement purportedly evidenced in the will of the deceased.

[99] In Anna's defence,[144] which she signed, she specifically denies that the claimed properties formed a part of the estate of the deceased.[145] She also denies that there was any legally enforceable family arrangement or spousal agreement or severance as alleged by Franziska or at all (denying [6] of Franziska's supporting affidavit),[146] and asserts that upon the death of the deceased the principle of survivorship took effect and that she became the sole surviving owner of the subject properties.[147]

[100] Very interestingly, Anna also filed an affidavit on 17 August 2018, a little over one month after the filing of her defence, which was notarised in the United States of America and filed on her behalf in Belize by different attorneys from those

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[142] Record, 'Supporting Affidavit of Franziska Nicholson', 13 June 2018, [9]: 'I have tried on several occasions to reason with my mother … to settle this matter amicably and to have what is rightfully mine granted to me according to the Will of my late father. I have even proposed to (Anna) that since she is unable or unwilling to act and execute the wishes of my father as stated in his Last Will that she should resign … (as executrix) … but she has refused.'
[143] Record, 'Supporting Affidavit of Franziska Nicholson', 13 June 2018, [14].
[144] Record, 'Defence of Anna Nicholson', 10 July 2018.
[145] ibid [3].
[146] ibid [4]. See also (n 148) below.
[147] Record, 'Defence of Anna Nicholson', 10 July 2018, [7], [9], [10], [12], [16], [22]-[26] and [33].

who filed her defence. In this affidavit she renounces the averments in her defence and supports the case of Franziska. To the ordinary and untrained eye, the signatures of Anna on the Defence and on this affidavit appear to have noticeable differences.

[101] Finally, Anna also filed a witness statement, on 24 October 2018, this time by a third firm of attorneys in Belize (different from those who filed her Defence on 10 July 2018 or her notarised affidavit of 17 August 2018). By this affidavit Anna renounces the witness summary filed on her behalf on 29 August 2018 which aligned with her Defence, and as well her Defence (alleging that it was not signed by her). In this document Anna asserts that there was a family agreement as asserted by Franziska and that the deceased's will reflected the terms of what had been agreed between her husband and herself in that regard.

[102] Barrow J has discussed in his opinion how these contradictions were not fully explored or addressed, or their implications interrogated in the earlier proceedings. His explorations, concerns, and conclusions are noted.

[103] Of relevance to this analysis, however, is his note of the trial judge's observations of Anna during the trial,[148] as follows:

> Anna Nicholson appeared distraught throughout the trial. She had outbursts where she begged the Court's immediate assistance as she was "*hurting"* due to the dispute between her children. She subsequently testified that she is old. … She beseeched the Court to intervene to set aside a number of transactions including the transfer of the Property. She said it had been transferred by mistake and she had no recollection of the signing.[149]

[104] The trial judge had previously noted:

> When the proceedings begun Anna and Merickston shared counsel and their pleadings were jointly presented. As the matter progressed … Anna, through her affidavits, began to visibly distance herself from those

[148] Barrow J at [208].
[149] Judgment of the High Court at [23].

> pleadings. Eventually, practically her entire testimony was in full contradiction of her Defence. … she retained separate Counsel.[150]

[105] Indeed, Barrow J's assessment of the trial judge's concern for Anna's plight,[151] was that:

> The judgment concluded with the expression of consternation that, notwithstanding there had been no amendment of the mother's pleadings, Counsel for the mother focused on seeking a finding by the court of presumed influence and abuse of confidence. Further, it was stated, no claim of any kind had been made seeking relief for the mother.

[106] These impressions recorded by the trial judge are important. They offer a window into Anna's concerns and beliefs. Significantly, for the purposes of a release pursuant to s 38(2) of the Act, at [18] of the witness statement of Anna, filed on 24 October 2018, she asserts: 'I thought I still owned my 500 acres and my house ... ' The simple point is, on Anna's Defence and/or on this evidence, there cannot be any unequivocal finding that Anna had a clear intention to effect an immediate disposition of her legal and equitable interests in the properties of which she was a co-owner as joint tenants with her husband.

[107] Indeed, on the pleaded cases and even taking into account the subsequent renunciations by Anna, the evidence of both Franziska and Anna, taken together, speak of a family arrangement that may have crystallised into an agreement with sufficient intentionality to create enforceable legal relations as between the children and their parents. This if not succeeding in contract, then arguably maybe in constructive trusts.[152] However, these arrangements all acknowledged Anna's continuing interests and title in the lands, which have been presumed in this litigation and never disputed. There simply is no cogent and unequivocal evidence supporting a release. On the contrary, the dispute has always revolved around the extent of Anna's ownership, whether of the entirety on survivorship, or as a tenant in common upon severance.

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[150] ibid at [3].
[151] Barrow J at [211].
[152] See ss 43(2) and 55 of the Act.

[108] Applying the hermeneutic of suspicion to these circumstances only heightens the reluctance to find a release in law that will disadvantage and harm Anna in relation to her property rights. On the matter of formalities and the need for some signed writing by Anna evidencing her release, there is no clear and cogent evidence of this, or any evidence comparable to that in *Hudson v Hathway*. Is it to be found in the sketch plan prepared by someone else with Anna's writing on it, or in the form of the 2005 will, or in the joint declaration signed by both the deceased and Anna in July 2006, or in an amalgam of all of these? Do any of these individually, or all taken together, evince a clear intention by Anna to divest herself of all her interests in the subject properties immediately (rather than a promise or undertaking to do so in the future)? In the circumstances of this case, I think not.

[109] Take for example the handwritten note signed by Anna and the deceased on 2 July 2006 (their joint declaration). It simply says, 'let it be known ...' that the building known as 'Villa Franziska … belongs to Franziska Nicholson' and is not part of the larger property jointly owned by the deceased and Anna. This can hardly be construed as a release by Anna to her deceased husband of her title in the joint tenancy. How so? And if so, why not the other way around, a release from the deceased to Anna?

[110] Anna gave evidence in the matter. At the time she was 83 years. The attorney who examined her in chief appears to have been the one who filed her US notarised affidavit. What was tendered as her evidence in chief, as AN-1, was her witness statement of 24 October 2018. She was cross-examined by Franziska's attorney, and in answer accepted that she and her husband had agreed to a family arrangement to divide up their joint property among their children, and to give to Franziska the property and house that Franziska was claiming. She also pointed out that in those arrangements she was to continue to enjoy the use of a portion of those lands.

[111] Anna was also cross-examined by her son's attorney, the second Defendant. Anna accepted that the properties were jointly owned by herself and the deceased and accepted that the deceased's will specifically stated, 'It is my intention to dispose of all property I am entitled to dispose of by will, other than my disposal interest if any, in any property held in joint tenancy, if any to be exercised by specific articles of this will.' The implications are obvious, or at least the questions that are raised. If a release was intended or agreed at the time of the making of the will, why include these words of limitation and exclusion? Especially when in doing so the deceased's and Anna's interests in the joint tenancies would be left as such. How difficult would it have been if it was the joint intention or agreement, and given the time and care taken to prepare the formality of a will and all of the other documents tendered, for Anna to have been unequivocal about her intention to dispose of her interests in the joint tenancies and to act concretely on it? The will of the deceased simply cannot be reasonably construed as constituting a release by Anna of her legal title in the joint tenancies.

[112] Throughout this cross-examination, Anna's concern was for Franziska to receive what she and the deceased had intended should be hers (as happened to be described in the deceased's will), but at the same time she also maintained that she retained property interests in the joint properties. As she put it, (i) 'we owned everything', (ii) 'Actually that other 500 acres is the Common Ground Area, includes my house too and I would like to keep that for the whole family,' and (iii) 'I was always living there. We built this resort for our retirement, and that is why I am living there.' This is not evidence that supports either an intention or agreement to denounce a joint owner's title and interests in land – and certainly not so for a married woman who would as a consequence lose all property rights in the subject lands.

[113] In re-examination, there is also this revealing evidence:

> Q – Let me ask you this question, Ms Anna, what was your, you and your husband's intention in relation to Parcel 303, who was it to go to?
> A – To our children eventually.

[114] What is clear, is that in Anna's mind she was not giving up her property interests in the joint tenancies held by her and the deceased. She retained ownership and had agreed with her deceased husband that in the future (and in relation to the deceased's will, upon his death) she would honour that agreement. It is inconceivable, on the evidence, that Anna intended upon the execution of the deceased's will that she had immediately divested herself of her ownership and title in the joint properties. If that were so, her husband could have the very next day disposed of it all as he liked, and to her detriment. This was clearly never in Anna's contemplation. In her mind, and intent, this was their joint property, built up for their enjoyment and use, an investment and security for their later years, and eventually to be given to their children as they had discussed and agreed. This was an undertaking by spouses for a future eventuality, not an immediate disposition of rights and entitlements.

[115] The understanding and interpretation of Anna's evidence must take place in the social context in which it occurred. It requires a common-sense assessment, and not a legalistic analysis. Reading all of Anna's evidence, including her August 2018 affidavit and October 2018 witness statement together with her cross-examinations and re-examinations, and taking into consideration all of the contemporaneous documentation, reveals a picture that settles most realistically as a family arrangement made between spouses for the division of, among other things, their joint assets, in the future. The fact of this litigation only arising after the death of the deceased testifies to this truth.

[116] It is therefore highly improbable that Anna and her deceased husband intended, or agreed, that Anna was to release her interests and title in their joint property, and Anna was to be left to the vagaries of circumstance, including the whims of her deceased husband between the making of his will and the unknown time of his demise, or similarly upon the subsequent signing of the July 2006 joint declaration. From Anna's evidence, she certainly never acknowledged any such agreement. Such an occurrence would cause great potential disadvantage and

harm to Anna, in her most vulnerable years, and a court would have to be extremely careful before arriving at any such conclusion.

(ix) **Disposition, Applying Law to Facts, in Context: Severance**

[117] Under the Act, barring written notification which does not arise in this case, severance can occur as between two joint tenants in at least three well recognised ways. These are, firstly, a unilateral act of one of the co-owners operating on their own share so as to alienate it wholly or partially, secondly, by mutual agreement of all the co-owners, and thirdly, by mutual conduct where there is a course of dealing that is sufficient to show that the interests of all the parties were mutually being treated as a tenancy in common. These are not closed categories, developed as they were by the common law, and any acts and combination of events sufficient to establish severance may be relevant. As s 38(2) explains, severance may be established by '… such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity.'

[118] In the event of severance, the resulting interests in land between the former joint tenants become interests where co-ownership is such as between tenants in common. Which means that each former joint tenant holds a distinct share in land, described as an undivided share because the co-owned lands have not been actually sub-divided between them. Upon severance there is no right of survivorship, and the only unity which exists between tenants in common is that of possession. That is, each of the co-tenants has a right to possession, to the use and enjoyment, of all of the land. Also, upon the death of a tenant in common their share can be disposed of under a testamentary disposition, by will.

[119] It is accepted that there is no sufficient evidence to support a unilateral act of alienation by the deceased, while he was alive, capable of effecting severance. A will in and of itself is not sufficient, it takes effect upon death and in this case the limiting clause in the deceased's will that preserved the joint tenancy interests of

the deceased and Anna, confirms that this was not intended to be a unilateral act of alienation by the deceased. And there is no such evidence from Anna.

[120] However, as vigorously contested by the parties, and as the trial judge explained (but declined to decide), and as the Court of Appeal explored in great detail and determined (by majority), there is a plethora of evidence that could support severance by mutual agreement and/or mutual conduct. This evidence has been thoroughly interrogated in all of the opinions in the Court of Appeal. It includes the written and oral evidence of Anna, Franziska, and Merickston Jr in relation to discussions and agreements between Anna and the deceased about how the joint property was to be divided among the family members, as well as contemporaneous supporting documents, including a sketch plan with details of those agreements, a declaration signed by Anna and the deceased in July 2006, and the will of the deceased which mirrors the agreements.

[121] Significantly, the recanted evidence of Anna in her August 2018 affidavit and the evidence in her October 2018 witness statement (which constituted her evidence in chief), as well as her answers in cross-examination, corroborate the fact of a settled agreement between herself and the deceased for the effective partition and family settlement of their joint properties, including what Anna's interests were to be. At [25] to [32], the majority opinion of the Court of Appeal carefully reviewed and evaluated the evidence in support of severance.[153] In their judgment: 'A review of the evidence indicates overwhelming evidence to support a mutual agreement between the joint owners and the course of conduct and dealing of the intentions of the joint owners.'[154]

[122] The majority would conclude:[155]

> In the circumstances it is determined that there is clear evidence that there was a mutual agreement and acts by the joint owners on the division of the

[153] Court of Appeal decision at [27]-[30].
[154] ibid at [26].
[155] ibid at [31].

property in question sufficient to determine that the joint tenancy was severed during the lifetime of the deceased.

[123] In my opinion, the assessment and judgment of the majority in the Court of Appeal is sustainable. A holistic, practical, and common-sense approach was adopted, grounded in a forensic factual analysis that was tested against (and corroborated by) contemporaneous, relevant, and largely uncontested documentary evidence. There are no good reasons for this Court to disturb those findings and the conclusion that during the lifetime of the deceased, he and Anna had effectively severed their joint tenancy in the subject properties. At the time of death of the deceased, those properties were held by Anna and the deceased as tenants in common, with all of the legal and equitable implications that attach to such co-ownership.

[124] There has been no suggestion that if this Court were to support the majority opinion of the Court of Appeal on the issue of severance, that the consequential orders made by that court should be changed.

Conclusion

[125] Accordingly, my conclusion is that these appeals should be dismissed and the orders of the Court of Appeal affirmed. Before this Court, the Appellant Merickston Nicholson Jr shall pay to Franziska Nicholson and Anna Magdalena Ahrer Nicholson the costs of these appeals.

Epilogue: The CCJ, Law, Science, and Cosmology

[126] Legal methodologies are inevitably attuned to influencing cosmologies, they must make sense in the universe as it is known and understood, they must match reality as best we can discern it. Anything else will be both untrue and unreal – and so, most likely unjust. In these times, science, which includes the social sciences, can enlighten the law. Law and science must recognise their symbiotic

relationship. What we practice as legal method today, is still very much anchored in the insights and understandings of the Ptolemaic universe and Newtonian physics-mechanics. The law we practice in the Anglo-Caribbean was and is still irrevocably seen as held together by and centred in uncritically accepted British-colonial models, and still based on assumptions of separation and grounded in fixed concepts and categories considered to be stable and thus absolute.

[127] To challenge or disrupt this legal order is viewed as heresy! More metaphorically, we believe that to interfere with these foundations would result in the sky falling in, as Chicken Little (or Henny Penny, depending on the telling of the folk tale) was convinced was happening when an acorn fell on its head. It is as if, as in ancient mythology, the legal heavens are supported by these British-colonial legal columns of sacrosanct and immutable methods, which if disrupted would cause an epic collapse of the legal edifices that sustain our societies. But is this true? Or is this exactly what CLR James is trying to expose as limitation in *Beyond a Boundary* and Lloyd Best is urging in his provocation for Caribbean cultures to find escape and new expressions truer to their own realities? Maybe we are being invited to reimagine ourselves, paradoxically, as we truly are, and discover and construct for ourselves truer paths to freedom.

[128] These old Ptolemaic and Newtonian cosmologies are no longer entirely true, and certainly their limitations are evident, as quantum physics-mechanics has revealed. There are new quantum cosmological insights and understandings that are disrupting the old ways. The idea of the human as a split-subject (at once both connected and separate), inherently relational, easily aligns with this new science. As do grounding concepts of fluidity and change. Nothing is as fixed or as certain as it may sometimes appear to be, and reality is much more intertwined and inter-dependant than the illusions of separation conjure up. And the sky will not fall in if changes are made. On the contrary, the unity of reality is more secure in its empowerment of diversity and inclusivity, and evolution's engine is powered by change. We live and move and exist in a quantum, dynamic, fluid, and constantly

interchanging and transforming evolutionary universe. The practice of law and the development of legal methods must, needs be, rediscover themselves if they are to also evolve and meet the requirements of Caribbean peoples' expectations and their constitutionally based aspirations.

[129] In a certain sense, Caribbean legal methods have tended to become somewhat 'pot-bound'. They need to be re-potted, put in larger and more inclusive constitutionally and rights-centric soil, if they are to flourish and respond to current Caribbean and global realities, insights, and demands. As jurists, both advocates and decision makers, it is for us to do the work of replanting, into pots that match the galaxies that we inhabit – and not to remain pot-bound in someone else's universe.

[130] This is exactly what this Court's constitutionally, and rights-centric, developmental, and democratic jurisprudence is doing. It is much more in tune with the new quantum cosmologies which understand the cosmos as holarchy. Hence it is a Caribbean jurisprudence that adopts holistic, inclusive, and encompassing approaches to constitutional and statutory interpretation.[156] Central to this CCJ jurisprudential cosmology, is the idea of holarchy,[157] the intrinsic connection between and among the parts and the whole, the entire corpus of the law, in which there is differentiation of purpose and function organised around a central ordering principle – Caribbean rights-centric constitutionalism, which is itself a part of the whole.

[131] Thus, in the CCJs developmental Caribbean jurisprudence, there is an effects oriented emergent and evolutionary holistic hierarchy of interacting and intersecting values and principles. All laws, and their interpretation and application, take shape and have meaning in what can be understood to be a holarchic form of organisation, which allows each law and all laws to find their

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[156] *Marin* (n 111).

[157] A system composed of interacting holons, in which a holon is an identifiable part of one or more systems and is, at the same time, a system formed by subordinate parts that integrates it as a whole. See for example *Marin* (n 111).

place in the context of and around the central engendering whole that is Caribbean rights-centric constitutionalism.

[132] It therefore demands a shift from thinking and reasoning from the part (starting from an individual law), to thinking and reasoning from the whole (starting from a felt sense of Caribbean rights-centric constitutionalism as a jurisprudential field infusing individual law). This approach is at the heart of a relevant and responsible Caribbean legal methodology for statutory interpretation and the interpretation and application of all law. It allows each law to take shape around a central organising principle and can manifest meaningfully as a Caribbean legal landscape of unity in differentiation.

[133] Applying this methodology in gender sensitive ways is a natural and necessary jurisprudential development. It aligns with the Court's decolonial approaches to constitutional and statutory interpretation and to its development of a relevant and responsive Caribbean common law and methods of legal interpretation, at the heart of which are the core value of equality. These approaches are necessarily contextual and relational, and include historical, cultural, and socio-legal settings. They also recognise that judicial interpretation and decision making are never purely neutral and objective and include intersecting human and societal realities that must be reckoned with in order to advance the goals of justice. These approaches stand in measured tension with more adversarial methods and their traditional reliance on abstract reasoning, while preserving the objectives of impartiality, independence, and integrity. Justice is, after all, a deeply human endeavour.

ANDERSON J (separate):

Introduction

[134] These are consolidated civil appeals against the decision of the Court of Appeal of Belize whereby that court reversed the decision of the first instance court and

decided that Franziska Nicholson was entitled to land willed to her by her father. This was so because the court found that, contrary to the arguments of her brother, Merickston Nicholson Jr, and her mother, Anna Nicholson, the joint ownership of the land by Franziska's parents had been severed during the lifetime of her father. This meant that on the death of her father the land did not pass to her mother under the doctrine of survivorship but remained available for disposition according to her father's will. In the present appeal Merickston Nicholson Jr and Anna Nicholson seek an order from the Caribbean Court of Justice reversing and or setting aside the decision and the orders handed down by the Court of Appeal.

Background

[135] The father, Merickston Nicholson ('the deceased'), died on 16 February 2009, leaving a will executed on 31 May 2005. In the will he appointed his wife Anna Nicholson the executrix of his estate and made certain devises to her and their children, including their daughter Franziska. The Third and Fifth devises are of relevance to this case, and they read as follows:

> THIRD: I give, devise and bequeath from the 1500 Acres of real property situated immediately North of the 40 ½ Mile Post of Northern Highway, Belize that 500 Acres which is developed and known as "The Common Area", generally known as Maruba Resort Jungle Spa to my beloved wife, ANNA MAGDALENE AHRER NICHOLSON, to have and to hold as her property absolutely… Should my wife predecease me in death, I leave 55% of this area to my daughters Veronika […] Nicholson and Franziska Nicholson, of the remaining 25% shall be given to my son Merickston Laurenszco Nicholson Jr. and the remaining 20% to Alexandra Magdalena Nicholson.
>
> FIFTH: I give, devise and bequeath the remaining portion of the 1500 Acres of real property situated immediately North of the 40 ½ Mile Post of Northern Highway, Belize, that 1000 Acres adjacent to the developed area, known as "The Common Area"; and the house which FRANZISKA NICHOLSON built on "The Common Area" to my daughter FRANZISKA NICHOLSON, absolutely at the execution of this will.

[136] It is agreed as between Anna and Franziska, that during the deceased's lifetime it was his intention that Franziska receive ownership of land identified as 'Parcel 302', which comprises 500 acres, and that 500 further acres be transferred to Franziska from the 1000 overall acres comprising land identified as 'Parcel 303, Block 11' ('Parcel 303'), along with dwelling house built by Franziska thereto annexed (known as 'Mayan Jungle Loft' or 'Villa Franziska').

[137] Anna transferred the 500 acres comprising Parcel 302 to Franziska, but in respect of Parcel 303 - where she and the deceased were named in the vesting Deed as owners in fee simple - she struck the deceased name from the title, vested the entire 1000 acres in herself and her son Merickston Jr by way of Land Certificate and then later transferred the entire 1000 acres to Merickston Jr.

The High Court

[138] On 10 January 2018, Franziska commenced proceedings before the High Court by way of Fixed Date Claim Form, wherein she sought relief from the court as against Anna and Merickston Jr to recover the devises made to her under the will. The hearing took place on Tuesday, 27 November 2018. Young J began by settling the pleadings and the case was tried. In her judgment dated 5 February 2019, the Learned Judge commenced her analysis by identifying and determining a preliminary issue raised by Merickston Jr, namely the right of a beneficiary to bring a claim where it is being alleged that property in which they possess a beneficial interest has been wrongfully disposed of.

[139] The Judge considered that an assent or conveyance does not prejudice the beneficiary's right to recover the property if it has been assented to or conveyed to the wrong person. Until transfer, the beneficiary's right is inchoate but transmissible to his personal representative. After the assent or conveyance, the person properly entitled to the legacy, is vested with a proprietary right in the legacy, thereby allowing him to trace the asset into the hands of any third party

and to sue for its recovery. She explained that the right to trace applies only to volunteers; those who have not purchased for valuable consideration without notice. Merickston Jr was identified as a volunteer. The Judge concluded that land which had been conveyed by Anna to Merickston Jr, but which was in fact properly and specifically bequeathed to Franziska under the will could be recovered by her and that she could claim indemnification out of the estate for expenses incurred because of the wrongful conveyance.

[140] On the question of severance of the land, Young J found that Parcel 303 was owned jointly in law by the deceased and Anna at the time of the deceased's death. The effect of a severance would be that when the deceased died, Anna, as the survivor, would then have the legal title vested in her, but she would hold the beneficial interest in equal shares, on trust for herself and the deceased's estate. The Judge reasoned that if there was no severance then the interests, both legal and beneficial, would vest in Anna alone and she could do with the land, whatsoever she desired. The Judge explained that severance of a joint tenancy under the Law of Property Act ('LPA') was very different than doing so under the Registered Land Act ('RLA') which required more stringent formalities. She held that as none of the parties had provided evidence for determining whether the land was subject to the provisions of the LPA or whether it was subject to the RLA, Franziska, who bore the burden of proving severance, had not proven her case to the requisite standard. There was therefore no need to embark on the question of whether the joint tenancy had in fact been severed. Accordingly, the Judge dismissed Franziska's claim.

The Court of Appeal

[141] The judgment of the Court of Appeal was delivered by Woodstock-Riley JA (with whom Foster JA concurred, with Hafiz-Bertram P (Ag), dissenting). The majority ruled that whether the trial Judge ought to have taken judicial notice of the date from which the RLA applied to the land was irrelevant, since the fact that the land had been brought under compulsory registration on (25 March 2008) had been brought to the attention of the Court of Appeal and the court could take note of it.

[142] The court explained that the legal requirements at the time of the purported acts of severance were determinative. Consequently, the requirements of the RLA did not apply to the land at the time of purported severance; instead, it was the provisions of the LPA which were to be considered. Accordingly, the ground on which the trial Judge determined that Franziska's claim must be dismissed for want of evidence, fell away. The majority held that there was clear evidence of the existence of a mutual agreement as well as acts by the joint tenants, concerning the division of Parcel 303, sufficient to determine that the joint tenancy was severed during the lifetime of the deceased.

[143] Contrary to the finding of the trial Judge, the Court of Appeal held that the evidence disclosed that Franziska did in fact impugn the registration of the land and the signature of the deceased on the Application for Registration in respect of Parcel 303, dated after his death. Accordingly, the Court ruled that Franziska was entitled to the 1,000 acres devised to her in the deceased's will as well as the house referred to as Villa Franziska.

[144] In her dissent, Hafiz-Bertram P (Ag) found that there was no specific pleading of fraud or mistake by Franziska in relation to the registration of the land. Simply mentioning it in the relief sought was not enough. Neither was it sufficient that there had been reference to mistake or fraud in old pleadings that had been disregarded by the trial Judge. Further, Hafiz-Bertram P (Ag) emphasised the importance of setting out a defence in accordance with the court rules. She agreed with the trial Judge that evidence given by Anna Nicholson which contradicted her defence, without first seeking the court's permission to amend such defence, could not be considered. Finally, Hafiz-Bertram P (Ag), found that agreements and acts relied on by Franziska were not adequate to establish severance.

The Caribbean Court of Justice

[145] In his Notice of Appeal dated 23 January 2023, Merickston Jr, pleaded that the majority in the Court of Appeal erred in law and or misdirected themselves in 13

particulars. These pleadings were supported by written submissions and supplemented by oral submissions. Merickston Jr alleged that the majority considered documents that did not form part of Franziska's Pleadings before the High Court and that they erred further in considering that her Pleadings were sufficient to impugn the application for the registration of Parcel 303. He asserts that the Court of Appeal failed to adequately consider and give appropriate weight to Anna's acts in consistently treating Parcel 303 as joint property (save for her final witness statement), including her application for joint registration, and seeking to remove her husband's name from the title after his death. Merickston Jr contended that any promises made by the deceased to subdivide Parcel 303 would be invalid under the Land Utilization Act of Belize and that the Court of Appeal's order to transfer the area where Maya Jungle Loft is located to the Claimant is not possible under that Act.

[146] For her part, Anna pleaded and submitted that there was no evidence of severance of the joint tenancy in respect of Parcel 303 and that the Court of Appeal erred in impugning title in respect of Parcel 303 notwithstanding omission by Franziska to plead fraud or mistake before the High Court.

[147] In her defence before this Court Franziska argued that there was overwhelming evidence, including the evidence of Anna herself, that Parcel 303 was severed by the agreement of the joint owners during the deceased's lifetime. She further argued that the clear understanding and intention of Anna and the deceased was that he could validly deal with the land, according to the agreed divisions, by his will. She asserted that it was not necessary to prove mistake or fraud to be capable of receiving redress in the circumstances, and that the trial judge ought to have considered all the evidence in all affidavits put before her.

Discussion and Analysis

[148] The issues raised in these appeals may be usefully considered under the following

five headings:

(a) Applicable Pleadings
(b) Impugning of Application for Registration
(c) Severance and or Equitable Release
(d) Land Utilization Act
(e) Costs

[149] There is also a dormant or nascent issue of fraud which is mentioned in passing towards the end of this judgment.

(a) **Applicable Pleadings**

[150] The Supreme Court Rules contain clear guidance on how a claimant should start proceedings. Rule 8.1(1) prescribes that a claimant starts proceedings by filing the claim form and the statement of claim or '… an affidavit or other document'. Rule 8.1(5) specifies that Form 2 (fixed date claim form) must be used in, among others, 'proceedings for possession of land'. Rule 8.2(1) stipulates that the claim form may only be issued and served without the statement of claim or affidavit or other document if the Court gives permission. A defendant who wishes to dispute the claim must file a defence but where the claim is started by a fixed date claim form in Form 2 and there is served with that claim an affidavit instead of a statement of claim, the defendant may file an affidavit in answer instead of a defence (r 10. 2(1) and (2)).

[151] Franziska had filed her fixed date claim form dated 10 January 2018 against Anna and Merickston Jr. This was followed by an amended fixed date claim form dated 6 June 2018. Anna also filed her First Affidavit dated 29 December 2017, a Second Affidavit dated 26 March 2018, a Third Affidavit dated 26 April 2018, and a Fourth Affidavit dated 13 June 2018. She also filed a Witness Statement dated 17 August 2018. Anna and Merickston Jr filed a Joint Defence dated 2 March 2018 and an Amended Defence dated 16 April 2018 and a Second

Amended Defence dated 10 July 2018. Both also filed affidavits dated 10 July 2018. Additionally, Anna filed an Affidavit dated 17 August 2018. A Witness Summary was filed by Anna dated 29 August 2018. Anna also filed a Witness Statement dated 24 October 2018, and Merickston Jr filed his Witness Statement dated 29 August 2018.

[152] The trial Judge began proceedings by settling the pleadings. She strongly deprecated the flurry of filings back and forth and the confusion that this engendered. The Judge decided, with the apparent concurrence of counsel on both sides, that the pleadings of the Plaintiff would consist of the amended fixed date claim form dated 6 June 2018, and the supporting affidavit dated 13 June 2018 which would serve as the Statement of Claim. She made clear that Anna and Merickston Jr could file either a defence or an affidavit but not both. The Judge then held that the amended defence dated 10 July 2018 and signed by Anna and Merickston Jr, would be accepted as the Pleading of the Defendants.

[153] The majority decision in the Court of Appeal referred to all the documents filed in the case and sought to extract the essence of the claim and the defence from these documents. Emphasis and reliance were placed on Anna's Affidavit filed on 17 August 2018, a document which the trial Judge did not consider. The majority gave no reason for thus turning a blind eye to the settled pleadings, and proceeding to consider pleadings that were expressly excluded in the trial.

[154] With respect, I do not agree with this course of action. Pleadings are the alpha and omega of litigation in our legal system. They are the guard rails which guide the commencement, progression, and disposition of the case. The rules governing pleadings are therefore not optional. They are pivotal. They are mandatory. They are to be complied with by the parties lest chaos overtakes the process of adjudication. Chaos was threatened in the present case causing the trial judge to go to great pains in deciding on what were the appropriate pleadings.

[155] The relevant rule in this case required the filing of the claim form and the

statement of claim or '… *an* affidavit …'. The trial judge made clear what affidavit was to be accepted as the Statement of Claim. The Civil Procedure Rule required the filing of a defence or affidavit in response. Either a defence or affidavit but not both. The Judge made this clear and after extensive exchanges with counsel, identified the defence that would serve as the pleading in this case. This course of action was plainly reasonable given the multiplicity of filings from the parties and the obvious confusion to which they gave rise. Without a clearly expressed reasoned decision it was not opened to the Court of Appeal to disregard these rulings at first instance. Accordingly, I find that the pleadings in this case were: (1) the fixed date claim form dated 6 June 2018 as supported by (2) the affidavit dated 13 June 2018 and that (3) the defence is that dated 10 July 2018. No other pleadings (whether claim forms, defences, or affidavits) are properly relied upon for decision on the merits in this case.

(b) **Impugning of Application for Registration**

[156] The argument by the appellants that Franziska's pleadings before the High Court did not expressly impugn the application for registration of Parcel 303 for fraud or mistake, is well taken. The fixed date claim form is innocent of any pleading of fraud or mistake and so too the supporting affidavit. There are no particulars of fraud or mistake against which the defendants could defend or prepare their defence. Such particulars are crucial, especially where fraud is alleged.

[157] This is not, however, the end of the story. The leading English case of *Re Diplock*[158] concerned tracing and an action for money had and received. It was held that money wrongfully paid by personal representatives under a will could be recovered by the rightful beneficiaries. The court explained that:

> An assent or conveyance does not prejudice the beneficiary's right to recover the subject matter of same if it has been assented to or conveyed to the wrong person. Until transfer, the beneficiary's right is said to be inchoate but transmissible to his personal representative. After the assent or

[158] [1948] Ch 465. See also *Re Tilley's Will Trusts* [1967] Ch 1179.

> conveyance, the person properly entitled to the legacy, is vested with a proprietary right in the legacy. This allows him to trace the asset into the hands of any third party and to sue for its recovery.

[158] The reasoning in *Re Diplock* has been endorsed by common law courts across the world. Recently, in *RnD Funding Pty Ltd v Roncane Pty Ltd*[159] the Federal Court of Australia noted that *Re Diplock* was an important case because it established that an equitable interest in property, deriving from a fiduciary duty, generates a right to trace which persists even where the property or its proceeds have passed to a third-party volunteer. In the recent Hong Kong case of *Connaught West Ltd v Global Fiduciary Solutions Ltd*[160] trust monies had been conveyed to the wrong person by virtue of misappropriation; citing *Re Diplock* the court explained that in such circumstances, it was long and well established that equity allows for tracing. Finally, in the Vincentian case of *Joseph v Burgin*[161] the Eastern Caribbean Supreme Court cited *Re Diplock* in concluding that there is to be no doubt that a beneficiary of a deceased has the right to trace the assets of an estate into the hands of someone who has wrongfully acquired title.

[159] In Belize, there also now exists a statutory framework for tracing. Under s 43(1) of the Administration of Estate Act[162] beneficiaries to an estate are empowered to trace estate property into the hands of a third party, other than a bona fide purchaser for value.

[160] From the pleadings which were before the High Court, it appears clear that Franziska, by her claim, aimed to recover the gift made to her under her father's estate. The point is that if the land was conveyed to the wrong person, the question of fraud or mistake, whether made out on the evidence or not, is not required to allow Franziska to access the redress she seeks. Accepting and applying *Re Diplock*, and the impressive line of cases which have followed it, estate property such as Parcel 303 can be traced by a beneficiary if transmitted to the wrong

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[159] (2023) 411 ALR 1 at [63].
[160] [2019] HKCU 96 at [30].
[161] (VC HC, 26 June 2000) at [16].
[162] Cap 197.

person. Accordingly, fraud and mistake are not issues on which this case turns.

(c) **Severance and Equitable Release**

(i) *Judicial Notice*

[161] The trial Judge considered that she was unable to determine the question of whether there had been severance of the joint tenancy as between the deceased and Anna, since neither party before her had provided evidence of the date on which the Minister's declaration had been made pursuant to s 4 of the Registered Land Act, bringing Parcel 303 under the registered land regime.

[162] There is a marked difference between the treatment of joint tenancy severance under the Law of Property Act as opposed to under the Registered Land Act. Primarily, under the LPA there may be notice in writing to the other joint tenants *or* other acts or things effective to sever the joint tenancy in equity; under the RLA there must be notice in writing *and* such other acts or things.

[163] The doctrine of Judicial Notice allows a court to rely on its own familiarity with common knowledge, thereby relieving the parties from the obligation to provide such information: *Zukerman on Civil Procedure*[163]. Further, *Blackstone's Civil Practice 2022*[164] explains that Judicial Notice refers to facts, which a judge can be called upon to receive or to act upon. These principles appear to have found favour with the majority of the Justices of Appeal. They reasoned that, 'Whether she [trial Judge] should have, as argued by the Appellant, taken judicial notice of information in the Gazette it is sufficient to say it is brought to our attention and as a result this Court must take note of this fact and the consequence.' [165]

[164] The majority therefore did not take a position one way or the other regarding the question of whether the learned trial Judge ought to have taken judicial notice.

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[163] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet and Maxwell 2021) 1123.
[164] Stuart Sime and Derek French (eds), *Blackstone's Civil Practice* (Oxford University Press 2022) 913.
[165] *Nicholson v Nicholson* (BZ CA, 19 May 2022) at [20].

Instead, they considered that they had a mandate to accept judicial notice in the circumstances and did so. None of the parties have challenged the right of the Court of Appeal to take judicial notice, and there appears no available grounds for doing so. The Court of Appeal was entirely right to take judicial notice of the fact that the LPA contained the relevant law for determining whether the joint tenancy had been severed or subject to equitable release prior to 25 March 2008.

(ii) *The Principles of Severance and of Equitable Release*

[165] Section 38(2) of the Law of Property Act of Belize[166] states that:

> No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect *the right of a joint tenant to release his interest to the other tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants*. Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other tenants a notice in writing of such desire *or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity…* (emphasis added).

[166] Similar legislative provisions in other Caribbean jurisdictions and in England have been the subject of useful judicial commentary. Most of these cases have concerned severance, rather than release. For reasons explored below, there are important legal distinctions between release and severance which appear not to have been considered in the cases brought to our attention. Such distinctions are, however, of crucial importance to the current appeal.

[167] In the foundational case of *Williams v Hensman*[167] Sir William Page Wood VC delivered as follows:

> A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by

[166] Cap 190.
[167] (1861) 1 J & H 546; 70 ER 862, 867.

> survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship.
> Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson v. Bell* and *Jackson v. Jackson*.

[168] This dictum was followed verbatim in *Re Draper's Conveyance*[168] decided after s 36(2) of the Law of Property Act 1925 had radically altered the law in respect of severance by introducing the entirely new method of severance, that is, notice in writing given by one joint tenant to the other. It was also applied in *Burgess v Rawnsley*[169], the seminal English case on co-ownership of land and the conditions for severance of a joint tenancy. Here, the joint tenants agreed that one would sell her share in a house to the other for £750, but she later changed her mind and wanted more money for the sale of her share. The other joint tenant died, and the house was sold. The administratrix wanted to establish severance to get half the proceeds, which would have been more than £750. The Court of Appeal held that there was sufficient common intention to sever at £750 and that the subsequent repudiation made no difference. Lord Denning MR noted the distinction by Page Wood VC between severance 'by mutual agreement' and severance by a 'course of dealing'. In the view of Lord Denning:

> That shows that a "course of dealing" need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasise that it must be made clear to the other party… Similarly, it is sufficient if both parties enter on a course of dealing which evinces an intention by both of them that their shares shall henceforth be held in common and not jointly.

[168] [1969] 1 Ch 486.
[169] [1975] 1 Ch 429.

[169] For his part, Sir John Pennycuick in *Burgess v Rawnsley* examined the 'long series of authorities' to which the court had been referred and concluded that, 'Once it has been determined that an agreement was made, as in the present case, anything more one may say on this line of authorities must necessarily be obiter'[170]. Even so, the Judge thought it helpful to state certain views he had formed considering the authorities. Specifically, he observed that:

> The policy of the law as it stands today, having regard particularly to section 36 (2), [of the Law of Property Act 1925] is to facilitate severance at the instance of either party, and I do not think the court should be over zealous in drawing a fine distinction from the pre-1925 authorities.

[170] A reason for the policy favouring of severance was offered by Panton P in the Jamaican case *Thomas v Davis.*[171] Panton P quoted from *Cheshire's Modern Law of Real Property*[172] to provide a brief picture and history of the nature of joint tenancies and tenancies in common as follows:

> From early times the right of survivorship caused a divergence of views between common law and equity. Common law favoured joint tenancies because they inevitably led to the vesting of the property in one person through the operation of the doctrine of survivorship, and thus facilitated the performance of those feudal dues that were incident to the tenure of land. But a tenancy in common never involved this right of survivorship, and equity, which was not over-careful of the rights of the lord, soon showed a marked inclination, in the interests of convenience and justice, to construe a joint tenancy as a tenancy in common.
>
> Equity aims at equality, a feature that is conspicuous for its absence if the survivor becomes the absolute owner of the land.

[171] The court in *Thomas* accepted that the principles expounded in *Williams v Hensman* and *Burgess v Rawnsley* formed part of the law of Jamaica[173]. Applying those principles, the court held that the signing of an instrument of transfer

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[170] ibid at 447.
[171] [2015] JMCA Civ 22, JM 2015 CA 45 (CARILAW) at [22].
[172] E H Burn, *Cheshire's Modern Law of Real Property* (11th edn, Butterworths 1972) 329.
[173] Referring to *Lawrence v Mahfood* [2010] JMCA Civ 38 at [25], [30] (Morrison JA).

severed the joint tenancy notwithstanding the allegation of the signee, which the court did not accept on the facts, that she misunderstood the nature of the document that she had signed. The court thereby accepted that a joint tenant could dispose of his interest independently and thereby destroy the joint tenancy but affirmed that a joint tenancy cannot be severed by a will.

[172] *Gamble v Hankle*[174] involved a joint tenancy between the plaintiff and her deceased husband, wherein the deceased had sought to dispose of his interest in the tenancy by way of Deed of Gift which remained unregistered. In the Supreme Court of Jamaica, Wolf J held that the unregistered deed had the effect of severing joint tenancy in equity. Accordingly, the court reasoned that failure to register the Deed of Gift did not make the gift void, it merely postponed the vesting of the legal estate in the intended beneficiary until it was registered.

[173] The statutory language speaks to a release of interest as an alternative to the severing of the joint tenancy in equity. There may be severance, *or* a release. A joint tenant may therefore release his estate to a co-tenant, in whom the land then becomes solely vested. A release indicates that an interest in land is given up and is extinguished in the estate of the remaining joint tenant or joint tenants. No formal notice or form of words is required for a release. What is required is evidence of the settled intention to surrender the interest in the joint tenancy. As this is a serious matter, not to be easily or casually inferred, it is desirable and appropriate that some form of legal input be involved. Neither is there any interest left over as where a joint tenancy is severed, and the default assumption is that the former joint tenants now hold in equal shares as tenants in common. Finally, in the case of a release, the acquiring former joint tenant may treat with the property as he or she wishes, subject to any relevant terms of the release. There is nothing to prevent such a person from passing property under his or her will or to prevent any such devise from taking effect upon death.

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[174] (1990) 27 JLR 115.

[174] Unfortunately, there is little authority on 'release' and even less on the distinction between release and severance of the joint tenancy. Indeed, there has been a seeming tendency to conflate the two. In *Bodden v Gentle* the Supreme Court of Belize[175] was presented with a document signed by two of the joint tenants indicating their willingness to give their interest to their younger brother, the third joint tenant. The document, which had been signed before a Justice of the Peace, indicated that the two were 'willing to grant our portion of the property' to the third joint tenant. Eliding the two concepts, counsel contended that these words were 'a release, sufficient to sever the joint tenancy'. The Judge held that the document was not sufficient to amount to a release (since, a 'readiness or inclination to release is clearly not a release and is not sufficient to give him a beneficial interest in all the property') but was possibly sufficient to sever.

[175] A more elaborate discussion of release was recently shared by the Court of Appeal of England and Wales in *Hudson v Hathway*[176]. The joint tenants had an intimate relationship which produced two sons. The relationship broke down and the parties engaged in sporadic email exchanges about their financial arrangements. In an email from Mr Hudson dated 30 July 2013, he stated:

> The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] moving on with our lives … You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live …

[176] Ms Hathway sent an email requesting clarification and Mr Hudson replied on 9 September 2013, 'Yes, that's right. … Under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever'. Accepting that the subscribing of his name to the email constituted signing, the Court of Appeal concluded that the two emails amounted to a release of his equitable interest in the house, and this constituted a 'disposition' within

[175] BZ 2015 SC 30 (CARILAW), (14 July 2015).
[176] *Hudson* (n 131).

the meaning of the Law of Property Act (s 53). The Court of Appeal stated[177]:

> It is common ground that on acquisition of Picnic House it was held by Mr Hudson and Ms Hathway as joint tenants both in law and in equity. In strictly technical terms, it is not possible for one joint tenant to assign his beneficial interest to another joint tenant. That is because, as a matter of theory, each joint tenant is entitled to the whole of the land. But s 36(2) expressly preserves the right of one joint tenant to release his interest to the other joint tenant. The difference between a release and an assignment was explained by Lord Millett (albeit in a dissenting speech) in *Burton v Camden London BC* [2000] 1 All ER 943 at 950, [2000] 2 AC 399 at 408:
>
> > A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole...
> >
> > Before 1926, therefore, one joint tenant could not assign his interest to the other. But he could achieve much the same result by releasing his interest. The release operated to extinguish his interest and not to assign it. The difference, though technical, was not a formality. Since a release did not operate by way of assignment or conveyance, it required no words of limitation. Moreover, where there were three or more tenants, a release by one joint tenant did not destroy the unity of title of the others and so sever their interests, for they did not acquire any interest by the release which they did not already own.
> >
> > No particular form of words was required for a release. Even if it was drafted as an assignment, it still took effect as a release. The difference was one of substance not form; it was not merely a matter of language. The ability of one joint tenant to release his interest to the other has been preserved by s 36(2) of the Law of Property Act 1925…

[177] In sum, then, a joint tenancy may come to an end by severance or release. Severance may occur by the giving of notice in writing, mutual agreement, or course of dealings. In the absence of severance, the joint tenancy may be ended if one joint tenant releases his or her interest to the other. Release does not require any form of words but must be evidenced by settled commitment, usually accompanied by legal input on behalf of or understood by the releasee.

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[177] ibid at [46].

(iii) *The Evidence of Severance and or Release*

[178] In determining whether there was in the present appeal severance of the joint tenancy or release of the interest of one of the joint tenants, it is first necessary to locate the evidence upon which such determination is to be made. The appellants argue that the majority decision considered documents which were not included in the Pleadings of Franziska at the Supreme Court. These documents include three Affidavits from Franziska dated 29 December 2017, 26 March 2018, and 26 April 2018. The appellants argue further that the majority in the Court of Appeal decision relied on Anna's affidavit which was not properly before the High Court and was therefore not considered by that court.

[179] For reasons given earlier, I accept this argument. However, the fact remains that much of the evidence that makes the case for severance or release came out from the Witness Statement of Anna dated 24 October 2018, including all the documentary evidence of the agreement and course of conduct, and from her cross-examination. There are submissions that Anna's evidence ought to be discarded as contrary to her defence. However, nothing in rr 10.5 and 10.7 requires that such a drastic course be taken. It is the case that r 10(8) requires that the defendant must verify the facts set out in the defence by a certificate of truth. The implications of the certificate which Anna signed were not explored by counsel in the context of her evidence from the witness box. It remains the case that the testimony in chief and under cross-examination was evidence and fully capable of being used by the claimant to prove the truth of the claim. For this reason, the provision in r 10.5 requiring the defence to set out all the facts on which the *defendant* relies, and r 10.7 stipulating that the *defendant* may not rely on any allegation or factual argument which is not set out in the defence unless the court gives permission, are entirely irrelevant in the case. Here it is the claimant who seeks to rely on admissions made by the defendant; admissions which were largely made pursuant to probing cross-examination.

[180] The case for Franziska does not turn on the documents complained of but rather

on the admissible evidence of Anna. What then is this evidence? Anna testified that in the lifetime of her husband they had come to an agreement as to how their property was to be divided amongst their children. The agreement was made in 2004 and allowed the husband to treat their property as his to dispose of in accordance with the agreement. This came to be reflected in his will of 2005 which was executed with legal advice and in Anna's presence and of which she was designated the executrix. There followed a 2006 agreement entirely consistent with the will signed by both Anna and her husband. Anna testified that they both regarded the land which they owned located at Mile 40 ½ on the old Northern Highway as divisible, and that Franziska owned the house that she built in the common area. The Court of Appeal properly highlights this evidence as pivotal.

[181] The granular details of evidence given by Anna for severance or release are substantial. In summary, such evidence includes:

(a) *Mutual Agreement*: Anna avers that herself and the deceased agreed on the manner of distribution in respect of the lands which they owned located at Mile 40 ½ on the old Northern Highway, including Parcel 303. She has accepted that prior to the deceased's death, it was agreed as between herself and the deceased that Franziska would receive 500 of the 1000 acres comprising Parcel 303.

(b) *The Sketch Plan*: Anna noted in her cross-examination that prior to the deceased's execution of his will in 2005 she had prepared a Sketch Plan, with the deceased's agreement, illustrating the various parcels of land that the deceased owned. The Sketch Plan was adduced into evidence and identifies portions of land that were intended to be given to the children of the deceased. On the Sketch, in her own writing, Anna indicates that Franziska is to receive 500 of the undivided 1000 acres comprising Parcel 303.

(c) *Acknowledgment that Franziska owned 'the Mayan Loft'*: By handwritten declaration (dated 2 July 2006), typewritten declaration (dated 4 November 2005) and company meeting minutes (dated 26 December 2004), both the deceased and Anna Nicholson acknowledged that Franziska owned 'the Mayan Loft'. To begin with, the company minutes reflect that '*Franziska's house can be used for timesharing and rentals'*. Further, the handwritten declaration is signed by Merickston Nicholson and says '*the property known as Villa Franziska on the grounds of Maruba Resort & Jungle Spa belongs to Franziska Nicholson. The property is not part of Maruba Jungle Spa'*. Finally, a typewritten declaration confirms that at that time the house belonged to Franziska and was not to be treated as part of Maruba Resort.

(d) *The Will*: By his will the deceased sought to devise 500 of the undivided 1000 acres comprising Parcel 303 to Franziska. He also sought to devise to the other joint owner, being Anna, the remaining 500 acres of the 1000 undivided acres of Parcel 303. Anna accepts that the will was made with her knowledge and consent.

[182] Anna declined the opportunity to appeal to the Court of Appeal against the decision of the trial court, in which court the evidence referenced above had been adduced. A party wishing to challenge material and findings of a trial court in a case such as this cannot seek to do so for the first time before an apex court. Such a party is taken to have accepted what has come before and the facts and conclusions drawn evident upon the testimony he or she offered or adduced under cross-examination. Accordingly, it must be concluded that all the evidence given by Anna, and which was properly before the trial Judge, are fixed and cannot here be disturbed.

(iv) *The Court's Position on the Question of Severance and or Equitable Release in the Instant Case*

[183] Concerning the abovementioned documents adduced and or addressed by Anna

in her evidence, it is to be noted firstly that such documents are written in the present tense, they are not written prospectively. The documents would therefore seem to reflect, not what the joint tenants hoped would take place in the future, but how they viewed and treated the parcel as an existing situation during the lifetime of Merickston Nicholson.

[184] Further, the way Parcel 303 is treated in the will of the deceased is worthy of note. The deceased though patently aware that the land now known as Parcel 303 was undivided, devised 500 of the 1000 acres constituting the undivided Parcel to Franziska, and the remaining 500 acres to Anna. Since it is the case that only a tenancy in common would have allowed for testamentary disposition of the land, the framing by the deceased of his will in the terms recited can be viewed as an act clearly inconsistent with recognition of the continuance of joint tenancy during the deceased's lifetime.

[185] In addition to the joint tenancy being severed, an equally persuasive perspective would be to regard this case as one of release. The will being framed in the way of the previous agreement between the parties, the devise in the will to Anna, who witnessed and agreed to it in the presence of a legal adviser; Anna's undertaking of the role of executrix of the will without demur; Anna's subsequent statements and evidence in court that the will was a faithful reflection of the agreement of the parties, all point unmistakably to an acknowledgment of release. It must be remembered that there is no provision in the statute for an 'express' release and that no particular form of words is required for a release. What matters is whether release can be confidently inferred from the factual circumstances. To take but one example, where there exists acknowledgment of Parcel 303 being divided *prior* to execution of the will, in the form of the company minutes and the annotated Sketch Plan prepared by Anna with the agreement of the deceased, accepting and applying the principles espoused in *Hudson v Hathway*, it becomes entirely plausible that the equitable joint interest held by Anna had been released by her in favour of the deceased prior to the execution of the deceased's will in

accordance with s 38(2) of the Law of Property Act.

[186] I would say further that the theory of release has the added advantage of being best able to account for the contents of the will, the behaviour of the previous joint tenants and the general treatment by the parties of the undivided joint property prior to and after the execution of the will. On this theory of the case there is no difficulty with the will being the instrument of disposition of the devised property. Even if such a disposition would appear to conflict with severance it is perfectly consistent with the doctrine of release.

[187] In all the circumstances, therefore, at the time of executing his will, the deceased was seised of the full equitable interest in the 500 acres of Parcel 303 which he sought by his will to devise to Franziska, and the will was effective to dispose of the land to her.

Land Utilization Act

[188] Under this ground of appeal Merickston Jr asserts that the learned Justices of Appeal erred in law by failing to consider ss 4, 7, 8 and 8(3) of the Land Utilization Act of Belize, which prohibits persons from attempting to transfer a portion of land that has not been subdivided, and which makes any such attempt void and of no effect.

[189] This ground does not appear in the pleadings filed before the Court of Appeal by Merickston Jr. The law is clear that this Court is concerned with issues which were examined by an Appeal Court: *Alexander v R*[178]. As a general rule this Court does not accept for determination issues that were not before the Court of Appeal. Accordingly, this issue is not properly before this Court.

[190] For the avoidance of doubt, however, it should be said that notwithstanding that the Land Utilization Act may preclude transfer of valid legal title where its

[178] [2020] CCJ 13 (AJ) BB, (2020) 97 WIR 34.

stipulations have not been met, the Act does not prevent severance of a joint tenancy in equity. And it certainly does not preclude the power and right of one joint tenant to release that tenant's interest in the co-owned land to the other joint tenant under the terms of s 38(2) of the Law of Property Act.

Costs

[191] Clause 10 of the deceased's will states the deceased's express desire that his beneficiaries adhere to his testamentary wishes and not seek to contest the terms of the will in any court proceedings. Under the clause any such contest results in the devise to such beneficiary becoming 'null and void' and the distribution of such devise among heirs not contesting the will. Clause 10 was not litigated in these proceedings but clearly evinces an attempt to safeguard the meticulous consultations and planning which engaged the deceased and his wife in planning for the distribution of his property. The point was reinforced by Anna in her evidence in which she claims to have agreed with her husband's plans for settlement of the property upon his death. Unfortunately, Anna and her son Merickston Jr have gone against the wishes of their deceased husband and father, respectively, in circumstances which are regrettable.

[192] No persuasive argument has been presented by either Anna or Merickston Jr that there are grounds upon which the decision by the Court of Appeal on costs ought to be reversed. Accordingly, the decision of the Court of Appeal on this issue is upheld.

Fraud

[193] I have read the judgment prepared by Barrow J. As I understand it, my brother is of the view that the evidence discloses that the joint tenancy was severed during the lifetime of the deceased and his wife Anna, and that Anna released her interest in the joint tenancy to the deceased during his lifetime. However, my brother would decide the case on the basis that the defence against severance and release

involved a fraud upon the court. Perhaps unfortunately, fraud upon the court was never frontally raised in any of the proceedings below (whether by the parties or by the court) and the parties were therefore never given an opportunity to make submissions on this very serious matter, submissions which as a matter of natural justice they would be entitled to make. Fraud upon the court was also not raised in the written submissions or at the oral hearing before this Court. As an affirmative finding of fraud on the court, which, to repeat, was never at any stage considered a live issue in the case by the Bench or Bar, leads to the same result as a positive finding of severance and release, which was the issue most hotly contested by the parties, I consider it prudent not to comment on the issue of fraud and rather to decide the case on the basis of severance and release.

Conclusion

[194] In all the circumstances, I am of the view that the Court of Appeal was correct in finding in favour of Franziska's entitlement to the land devised to her under the deceased's will. The appeals against the decision of the Court of Appeal stand dismissed. The orders of the Court of Appeal are affirmed.

BARROW J (concurring):

'Something is rotten in the State of Denmark.'
Hamlet Act 1, scene iv (67)

Introduction

[195] These appeals concern a claim for a parcel of land devised in a will by a father to his daughter which the mother, the executrix, transferred to the son. The daughter claimed in the High Court against the mother and the son to recover the property. The claim was opposed in a joint defence filed on behalf of the mother and the son but well before the hearing the mother, in the most unmistakable way, repudiated the defence filed in her name and 'beseeched' the court to give

judgment in favour of the daughter. Nonetheless, the court dismissed the claim.

[196] The daughter appealed the dismissal of her claim to the Court of Appeal and the son opposed the appeal. The mother did not oppose the appeal and did not participate in those proceedings. The appeal was allowed by majority decision. Now, each of the mother and the son appeals against the decision of the Court of Appeal and these were consolidated and heard together.

The Parties and their Interests

[197] The claimant daughter was Franziska Nicholson, and she brought the claim against the mother, Anna Nicholson, the first defendant, in her personal capacity and in her capacity as executrix of the estate of Merickston Nicholson, the deceased husband of Anna and father of the claimant. The will was dated 31 May 2005 and the testator died on 16 February 2009. The son, Merickston Jr, was named second defendant, 'as a person having a beneficial interest under the estate'. It emerged that the claim presented against him was in his personal capacity and not as a beneficiary of the estate, although it was for land that had belonged to the estate.

[198] The daughter claimed against the mother for the latter's failure to execute the devise in the will of the father of 500 acres of a 1,000-acre parcel of land, ('the Property'). Title to the Property had been held in the names of the father and the mother as joint tenants. The daughter claimed that the equitable joint tenancy in the Property had been severed in the lifetime of the father and the father had a right as the sole proprietor of the equitable interest to devise it to her. The claim also sought relief against the mother in her personal capacity, for transferring title to the Property to the son, which she did by way of gift and not by way of benefit under the Will.

[199] The claim against the son, therefore, was to recover the Property as having been

wrongly transferred by the mother to the son; it was not in relation to any right the son held in the estate or transfer made to him by the estate. This is made clear by examining the reliefs that were claimed:

> (1) An Order that the Claimant is entitled as devisee under the (said) Will of her father Merickston Laurenzco Nicholson to 1,000 acres of land adjacent to a developed area known as "The Common Area", known as Maruba Resort Jungle Spa situated immediately North of the 40 ½ Post of the Old Northern Highway, Belize District.
>
> (2) An Order that the Claimant is entitled as devisee under the said Will to the house which she built on the said Common Area being a two-storey concrete house with a loft (known as "Maya Jungle Loft", also call [sic] "Villa Franziska).
>
> (3) A Declaration that the property, which comprised several parcels of land in the said Maskall Area of the Old Northern Highway, including the said developed "Common Area" where the said Maruba Resort Jungle Spa and Parcel 303- Block 11 in the Belize rural North (1,000 acres) are located, which was acquired by the late Merickston Laurenzco Nicholson in the Joint names of himself and his wife Anna Nicholson the First Defendant, was severed during the lifetime of the deceased by the mutual agreement acts and course of dealing of the joint tenants thus creating a tenancy in common of the beneficial interests in the property.
>
> (4) An Order that the first-named Defendant, as Executrix of the Probated Will of the said deceased, execute a vesting Assent (transfer of title) to the Claimant of the said 1000 acres and the said house devised to the Claimant under the Will of Merickston Laurenzco Nicholson.
>
> (5) An Order for rectification of the Registrar for Parcel ID 11-101-303 in which 455.09 Hectares (approximately 1000 acres) was transferred from the estate of Merickston Nicholson deceased, to Merickston Nicholson Jr., the Second Defendant, on the 13th April 2010, be cancelled, the said transfer having been made or obtained by fraud or mistake and that the 500 acres thereof and house devised to the Claimant under the Will of the said deceased be transferred by the First Defendant to the Claimant.
>
> (6) Damages against the Second Defendant for Trespass of the Claimant's 500 acres and interference with the Claimant's said house which the Second Defendant wrongfully took possession and control of and has without the consent or permission of the Claimant, destroyed the loft of the house,

closing it off with a concrete ceiling and converted the living room into bedroom which he has been renting to guests of Maruba Resort Jungle Spa.

(7) An Order directing that the Second Defendant to account for all the rental income collected in respect of the Claimant's house.

(8) An Order directing that upon the accounting of the rental income collected and owed to the Claimant that the said sum owed be paid to the Claimant by way of damages or restitution.

The Defence

[200] A Joint Defence and an Amended Joint Defence[179] were filed by Attorney-at-Law Mr Estevan Perera in the names of the mother and son, each document containing the standard certificate of truth that was purportedly signed by the mother. The joint defence and amended joint defence, which (it must be recalled) was completely renounced by the mother, consisted almost entirely of a denial that the joint tenancy between the father and mother had been severed and that the devise of the Property was valid and effective in law. A separate assertion by the son was that he and not the daughter had built a villa that the daughter included in her claim and in relation to which she claimed damages including for loss of rental income.

[201] A witness summary of the evidence that the mother would give, as stated by Mr Perera, her Attorney-at-Law at the time, was filed in support of the defence on 29 August 2018. The document was a summary of the law on joint tenancy and an argument that there had been no severance. Mr Perera signed a certificate of truth as required by r 29.6 of the Supreme Court (Civil Procedure) Rules ('CPR') in which he stated that the mother would file her witness statement 'which shall have the exact statements as contained in this Witness Summary' as soon as reasonably practicable.

[179] This document was dated 10 July 2018.

[202] Before the date of that witness summary, however, on 17 August 2018, Messrs Musa & Balderamos LLP, the Attorneys-at-Law for the daughter, filed an affidavit sworn by the mother before a notary public in Texas. It was one of several remarkable occurrences in the case that this affidavit, supporting the daughter's claim, was filed by the Attorneys-at-Law for the daughter and the very firm who were bringing the claim against the mother. In this affidavit, the mother identified herself as the first defendant in the claim and set out the history of the land and an agreement with her husband on how they would divide the lands among their four children. She stated she was present when the husband made his will, and she affirmed that the devise of the Property to the daughter was what was agreed. She said she made the mistake of giving to the son 500 acres and she would now like this to be corrected and for the daughter to get this portion that was due to her.

The Defence Denounced

[203] In her witness statement of 24 October 2018, filed by her new Attorneys-at-Law, Bradley and Company, the mother completely denounced the Defence and the witness summary filed in her name. Among other statements, all quite grave, the mother stated:

> …
> 2. It was brought to my attention that a Witness Summary for this claim was filed with the Court. Before filing, the Witness Summary was not shown to me. It was signed on my behalf and not by me personally. I do not agree with its contents and would not have signed it if my son Merickston Jr the second defendant had shown it to me. I am now replacing the entire contents of the Witness Summary with this my Witness Statement.
> 3. Also, there is an affidavit dated the 10th of July[180] with a signature purporting to be mine. I did not sign the affidavit because it was not shown to me. If it was shown to me I would not have signed. I do not agree with the contents of this affidavit and wish to disassociate myself from it.
> …
> 17. I can still see I have missed my husband very much and had allowed my son Merickston Jr to make all decisions on my behalf. However, now I

[180] This reference may be to the Amended Defence referred to in the text to (n 179) above.

> realise that he has taken advantage of me and everyone. I now see he only has had his own interests at hand and not mine or anyone else's.
> 18. I thought I still owned my 500 acres and my house at the Maruba Properties. I just recently found out I own nothing. My son owns them.
> …
> 25. I really feel that I have been taken advantage of by my son at a time when I was most vulnerable, and if Merickston Jr does not give Franziska her 500 acres and her house on his own, then he needs to be dealt with by the Court.

[204] The repudiation of the defences was done not only by way of the mother's witness statement and oral testimony to the court but, as well, by her new counsel, Mr Richard Bradley, to devastating effect in his written closing submission to the court. Counsel completely denounced the amended joint defences that had been filed on the mother's behalf and on behalf of Merickston, the son, by Attorney-at-Law Mr Estevan Perera, then acting as the lawyer for both mother and son. Mr Bradley urged the court to find that Anna had been the victim of undue influence and breach of confidence by the son, citing legal authority[181] supporting the proposition that undue influence was to be presumed in the situation, with the burden upon the son to rebut it. The submissions closed with the request that the court should find in favour of the claimant, the daughter.

[205] In her repudiation of the defence and witness summary, the language in which the mother described the actions of the son is to be seen as filtered by that elemental maternal relationship; she does not state the facts in open language. Stated plainly, however, the mother's evidence is that her signature on the defence was a forgery, that the witness summary was false, and that the son had improperly (implicitly, fraudulently) procured the transfer to himself of properties that belong to her and the daughter. Remarkably, at no stage in the entire course of this litigation has this evidence been recognised for its purport or considered for its significance. To relate the Shakespearean epigram with which

[181] *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773; John McGee, *Snell's Equity* (31st edn, Sweet & Maxwell 2005).

this opinion begins, to the facts of this case, the something which is rotten in this case is what appears to be very serious fraud.

The High Court Judgment

[206] The High Court dismissed the claim on the singular ground that the claimant had failed to 'prove' which of the two Acts was to be applied to determine the issue whether, before the father's death, there had been a severance of the joint tenancy of the equitable interests held in the Property.

[207] The trial judge refused to take judicial notice of the legal instrument published in the Gazette that stated the date when title to the Property was brought under the operation of one law[182] and the other law ceased[183] to apply. The judge held that it had been the onus of the claimant to have brought proof of the applicable law.

[208] Having so decided, the judge pronounced that the claim failed but then observed in a concluding paragraph:

> Anna Nicholson appeared distraught throughout the trial. She had outbursts where she begged the Court's immediate assistance as she was "*hurting*" due to the dispute between her children. She subsequently testified that she is old. She says she trusted Merickston and thought he would have done what was right. She had been misled or unduly influenced, by him, to sign documents, transfer property and make decisions. She beseeched the Court to intervene to set aside a number of transactions including the transfer of the Property. She said it had been transferred by mistake and she had no recollection of the signing.

[209] The response of the judge to the mother's cry for help was to decide that it could not be acted upon because the mother was giving evidence that contradicted her pleadings and the relevant rule of pleading; rr 10.5 and 10.7 of the CPR precluded

[182] Registered Land Act, Cap 194.
[183] Law of Property Act, Cap 190.

her from doing so without permission of the court. It was because permission had not been obtained, the court said, it did not countenance the plea of the mother.

[210] The core of r 10.5(1) is that the defence must set out all the facts on which the defendant relies to dispute the claim; and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence, r 10.5(4)(b). Rule 10.7(1) was noted as reinforcing the previous rule in stating that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission. The times for giving such permission and departure from the timeline are stated in r 10.7(2) and (3).

[211] The judgment concluded with the expression of consternation that, notwithstanding there had been no amendment of the mother's pleadings, counsel for the mother focused on seeking a finding by the court of presumed influence and abuse of confidence. Further, it was stated, no claim of any kind had been made seeking relief for the mother. The court regarded this approach as incomprehensible and not to be considered in the instant proceedings but stated that perhaps it could be the basis of another claim. While the court failed to appreciate the true nature and effect upon the proceedings of what the mother stated – that the defence was a forgery – the court's indication that this evidence could be grounds for a separate claim provides a cogent judicial assessment of the apparent credibility of the mother's evidence.

The Daughter's Appeal to the Court of Appeal

[212] The daughter appealed to the Court of Appeal, where she succeeded by majority decision. The mother did not oppose the appeal and made no submissions. Woodstock-Riley JA authored the majority decision which allowed the appeal by holding that there had been severance of the joint tenancy in the Property. This finding was based to a great extent on the evidence of the mother, which the judge

described as pivotal. Before addressing the factual issue, the majority decided the question of what law applied by which to determine if the legal requirements for there to be severance had been satisfied; it did so by deciding that the Court of Appeal itself could take judicial notice of the Government Gazette in which was published the legal instrument that stated the date from which the Property was declared to fall within a compulsory registration area under the Registered Land Act. That date was 25 March 2008 and was after the date when the severance occurred. Therefore, severance was to be decided in accordance with the old law which operated at the time of severance, that is the Law of Property Act.

[213] The majority also decided that r 10.7 in the Supreme Court Rules did not operate to exclude the evidence of the mother because what that evidence amounted to was not a contradiction of the mother's defence but was evidence in support of the claim. As the judgment stated, this was something that happens at trials when evidence is elicited on cross-examination that supports the claim. It may be interjected, there hardly can be a more fundamental objective of the cross-examination of a defendant than to get them to contradict their defence by giving evidence that supports the claimant's case. It is of the essence of adversarial proceedings to try to get an adversary to agree to the other party's case. A trial judge is not in a position to discount such evidence, as the court stated, and in this case the mother voluntarily gave evidence in support of the claim. This was evidence.

[214] The court added, this evidence was no surprise to the son who was aware of it from months before the trial, with the filing of the mother's affidavit and witness statement. As the court also stated, it was elicited from the son in cross-examination that he well knew of the mother's desire and intention that the daughter should get the Property. And, it was observed, the son failed to discredit and failed to address the direct evidence of the mother that supported the daughter's claim.

[215] The dissenting decision upheld the decision of the trial judge that it had been for the daughter to prove that at the date of severance the new law did not apply although it ultimately agreed with the majority that the Court of Appeal should determine the matter of severance in accordance with s 38(2) of the LPA. The dissent however, supported the decision of the trial judge that the evidence of the mother contradicted her defence, and the court was correct in not considering the 'new assertions', without permission having been sought from the court, or the defence having been amended. The minority opinion proceeded to consider the evidence of severance disregarding the evidence from the mother and concluded that it did not amount to severance.

[216] The orders made by the Court of Appeal by majority decision in summary were firstly that the daughter was entitled to the 1000 acres of land devised to her by her father, as well as to the house known as, 'Maya Jungle Loft', and that same be conveyed to her. The court also issued a declaration that joint tenancy in the land was severed in favour of the father during his lifetime. Further, the court ordered accounting of the rental income wrongfully collected by the son, and that same be paid to the daughter. Finally, the court ordered Costs to be paid by the son to the daughter in respect of the appeal as agreed or assessed, and to the daughter from the estate in respect of High Court proceedings.

The Appeal to the CCJ

[217] The Court of Appeal decision has now been appealed to this Court by the son and, in another remarkable aspect of these proceedings, separately by the mother who had not opposed the appeal in the Court of Appeal. The appeals were consolidated but were separately presented and argued and it will be helpful to state the substance of each.

(a) **Written Submissions of Merickston Nicholson Jr (Named as Appellant and 2nd Respondent)**

[218] According to the son, the majority decision of the Justices of Appeal considered additional affidavits which were not part of the trial pleadings. He asserts that only the 13 June 2018 Affidavit deposed to by the daughter is valid, and that such affidavit does not contain evidence concerning mistake, fraud, or the severance of joint proprietorship. Accordingly, the son claims that the Court of Appeal's order to transfer the title to the daughter in respect of the entirety of Parcel 303 is unjustified and unsupported, as she did not claim the parcel.

[219] The son makes the point that responsibility to prove property severance under the LPA rested with the Claimant. Accordingly, he reasons that since the daughter did not ask the trial judge to take judicial notice of the compulsory land registration order issued by the Minister, the trial judge cannot be faulted for not considering same.

[220] The son posits that the mother's witness statement dated 24 October 2018, which was deemed pivotal by the Court of Appeal, should not have been considered as evidence of severance as it contradicted her filed pleadings entirely.

[221] The son argues that any promises made by the deceased to subdivide Parcel 303 in the future would be invalid under the Land Utilization Act of Belize.

(b) **Written Submissions of Anna Nicholson (Named as 1st Respondent and Appellant)**

[222] The mother identifies the live issues before the CCJ as being whether there was evidence of joint tenant severance in respect of Parcel 303 and whether the Court of Appeal erred in impugning title in respect of Parcel 303 notwithstanding omission by Franziska to plead fraud or mistake before the High Court.

(i) *Severance*

[223] *Severance by Mutual Agreement*: According to the mother, the Court of Appeal placed great weight on her 'admission' that herself and the deceased had agreed to the division of the Joint Property. The Court of Appeal considered that there '*could be not much more powerful evidence than that*'. The mother, argues however, that the Court of Appeal could only accept her admission as evidence of mutual agreement after properly assessing the admission, and giving due consideration to the fact that, as a lay person, she would not appreciate the distinction between an agreement to sever a joint tenancy, and an agreement as to how to divide their assets among their children when they passed. The mother avers that the discussion concerning ownership arrangements in respect of the Property, to which herself and the daughter referred in their evidence before the High Court, was therefore a discussion as to how the Joint Property would be divided among the mother and her children '*later on*'.

[224] *The Will*: The mother argues that it is trite law that a joint tenancy cannot be severed by a will. Accordingly, she argues that the Court of Appeal erred in accepting the Will as proof of the severance of the joint tenancy.

[225] *Acknowledgment that Franziska owned* '*the Mayan Loft'*: The mother asserts that board of director meeting minutes and written declaration amounted to no more than an acknowledgement of interest of a third party, who was not a joint proprietor. Accordingly she posits that at most, the said acknowledgements create some trust or equitable right in favour of the daughter to pursue the ownership of the house, or entitlement to compensation for the value of same.

(ii) *Failure to Plead Fraud or Mistake*

[226] The mother points out that the daughter at [12] of her Witness Statement dated 17 August 2018, alleged that on checking at the Lands Department she, 'discovered that on the 14th April, 2009 my brother had filed a fraudulent application purporting that it was signed by my father and my mother for a First

Certificate of Title to Block 11 – Parcel 303'. The mother asserts that this excerpt of evidence is the only averment of fraud appearing in the record. The mother makes the point that case law is clear that evidence of fraud cannot stand in the absence of pleading and provision of particulars of the alleged fraud.

The Existential Foundation

[227] There are matters concerning the bringing of these appeals that are existential and should be considered before considering the substance of what was argued on these appeals, because they may be effective to dispose of the appeals. The matters to be so considered begin with the determination that, as a matter of law there was no cognisable dispute before the court as to the right of the father to devise the Property. The son did not have the capacity or standing to assert the contrary and throughout the proceedings he alone, as the mother's denunciation of the joint defences exposed, purported to deny the father's right. Only the mother, as the former joint tenant, could have asserted that she became the owner of the Property on the father's death and, to the contrary, she admitted the daughter's claim.

[228] The foundational matters also include the fact and legal effect of the admission of the claim by the mother; the impermissibility of an executrix opposing the will by which she was appointed and which she had sworn to probate; the forgery of the defence and resultant fraud upon the court; and fraud against the estate and the daughter.

(a) No Cognisable Dispute as to Ownership

[229] That two distinct claims were joined in the same proceedings may be seen in the clear division that exists between the eight reliefs claimed, reproduced at [199] above: the first four arise only on a claim against the mother. The other four reliefs claimed could be granted only on a claim against the son. The two claims

were properly made in the same proceedings because they related to the same subject matter, and for the reliefs that were sought against each defendant to be effective and capable of execution both sets of relief needed to be granted. In no way, however, did that alter the fundamental nature of the two claims. More particularly, it did not make the defendant in either claim a defendant to the other claim or competent to defend against that claim.

[230] It was much overlooked in the courts below that the son was not representing or defending any interest in the estate. Importantly, he was not a party to the dispute between the daughter and the mother/executrix as to the daughter's rights under the estate. No doubt he was deeply interested as a person who could be affected by it, in the conduct and outcome of the claim against the mother as executrix of the estate, and personally. But the son did not have the standing to resist or defend the claim by the daughter against the mother because he was a third party. This central proposition will be developed immediately below.

[231] As revealed by the order for relief that the Court of Appeal granted to the daughter on her successful appeal to that court, what was being sought by the daughter against the mother/executrix was for her to perform her duty as executrix and to execute the devise from the estate. The claim against the son was consequential; it was to recover from him the Property that he had unjustly obtained from the mother in her supposed[184] unwitting breach of her duties as executrix.

(b) **No Standing**

[232] It is settled law that a person who does not own rights that are owned by another may not litigate or assert those rights, referred to by the common law by the Latin expression *jus tertii*, translated as 'the right of a third party'.[185] That principle

[184] The qualification is necessary because it was the mother's evidence, at [18] of her Witness Statement, see at [203], that she thought she still owned her own property (which was part of the larger parcel that included the Property devised to the daughter) and had just found out she owned nothing.
[185] 'Merriam-Webster's Dictionary of Law' (2022) < https://www.merriam-webster.com/legal/jus tertii > accessed 18 October 2023.

was the reason for decision by this Court in *Prashad v Persaud*[186] in a comparable case where a son, the legal title holder, claimed to recover possession of property being occupied by his siblings who, in their Defence and Counterclaim, resisted the claim on the ground that the son held title in trust for their deceased father. In his Reply to that pleading the son took the objection that the defence by his siblings of the alleged equitable ownership of the father was impermissible in law. On the eve of the trial, in implicit acknowledgement of the objection as to their standing, the siblings applied to join the estate of the father and the trial judge refused the application for joinder. There was no appeal to the Full Court, to which an appeal lay against the interlocutory order refusing joinder. The son succeeded after trial on the merits and the siblings appealed to the Court of Appeal, against both the judgment and the earlier interlocutory order refusing joinder. The Court of Appeal allowed the appeal by the siblings including the purported appeal against the interlocutory order refusing joinder; it decided that the son held title in trust for the estate of the father and that his siblings were entitled to resist the claim on that basis.

[233] On appeal by the son to the CCJ, this Court reversed the Court of Appeal by affirming the principle that a party to litigation was not permitted to rely on the right of a third party; that it required the third party themselves to assert the right. In this case, this Court held, when the High Court heard and refused the interlocutory application to join the estate, the court should have gone on to strike out the Defence and enter judgment for the claimant.

[234] It follows, in the instant case, that the mother could have admitted the claim against herself, as executrix and personally, as she in fact did, from the outset or at any stage in the proceedings and the son simply would have had to accept it. Indeed, the mother's admission of the claim against herself did not affect the son's right or ability to defend the claim against him, which was a claim impeaching his otherwise indefeasible title to the Property, whatever may have been the

[186] [2022] CCJ 5 (AJ) GY.

merits of that defence. It is significant that the son does not assert any defence to the daughter's claim other than his assertion of ownership by the mother.

[235] Therefore, the son was never competent and never should have been permitted to argue that the joint tenancy had not been severed. The High Court should have made that determination and that would have been dispositive; it would have put an end to the fundamental issue in the High Court proceedings. The son's defence to the claim for execution of the devise in the will, with its purported averment of joint tenancy, should have been struck out or dismissed. The inescapable consequence of this is clear: the present appeal by the son to this Court should never have been possible on a proper application of the governing legal principles because he never had any true defence to the daughter's claim that she had a valid devise from her father and was entitled to an order for rectification of the land register showing title in the name of the son. It is a legal incongruity that he should be appealing to this Court and, notwithstanding that he has gotten away up to this point with arguing a case presented in a forged defence and resisting the claim for execution of the devise in the will, his appeal to the CCJ should hereupon be dismissed.

(c) **The Effect of the Mother's Admission on her Appeal**

[236] The mother's clear admission of the daughter's claim was recognised as such by the majority in the Court of Appeal and it was a foundation of the judgment. The mother, now represented by a different counsel, purportedly, has separately appealed against the very decision in favour of the daughter, given by the Court of Appeal, that the mother had told the High Court she wished to be given.

[237] How can that possibly be, in the face of the evidence the mother gave to the court renouncing her defence to the claim? That evidence has not been withdrawn and it would be phenomenal if it could be. It needs to be stated plainly: Counsel now arguing the purported appeal by the mother was not so bold as to submit that the

mother's testimony, that the defence attributed to her was a forgery, should be discredited or treated as not having been given (even if that is the very thing counsel is purporting to do!). Rather, counsel ingeniously attempted to find a way around that mountain by ignoring the testimony that the defence was forged and arguing, in effect, that the mother's evidence should be interpreted as no more than supporting the agreement between her and the husband as to how they would divide their lands 'later on' between their children and was not evidence of severance. This thesis was virtually the entire substance of counsel's argument of the mother's appeal.

[238] It was another remarkable aspect of this case that counsel, in relying on limited parts of the mother's evidence to support counsel's argument that the mother had not agreed to severance, simply ignored the huge impact of the denunciation by the mother of the entire false defence and witness summary. Counsel simply ignored that the mother conceded the validity of the devise to the daughter and beseeched the court to give the property to the daughter. Counsel simply ignored the evidence of undue influence, abuse of confidence, deception, and defalcation. Counsel simply ignored the abuse of process and fraud upon the court of which the mother accused the son, and these must be dealt with below. In the face of these facts, I have no hesitation in now deciding that the appeal presented on behalf of the mother is wholly incapable of succeeding and I would dismiss it at this juncture. Beyond this determination, there are further reasons for that course, and it is the duty of the Court to address these to preserve the integrity of the judicial process and the Court's own reputation.

(d) **Can the Executrix Oppose the Validity of the Will?**

[239] It is deeply troubling that it has escaped attention whether it is competent for the executrix/mother to bring this appeal by which, (if genuine) she is for the first time challenging in court the validity of the will. That challenge is inescapably the foundation of the present assertion that the Property the testator devised to the

daughter was owned not by the testator but by the executrix/mother personally and as her separate property. This puts the executrix in the conflicted position of advancing her self-interest to the prejudice of the estate and of a beneficiary to whom she owed a fiduciary duty to act fairly and in their best interests.

[240] An executor is the person appointed by the will to administer the property of the testator and to carry into effect the provisions of the will. The ordinary method of appointing an executor is for the testator to name in his will a specific person to be his executor.[187] An executor may assent to the vesting of estate property in beneficiaries to an estate[188]. Furthermore, for the purposes of administration, during the minority of a beneficiary or during the subsistence of any life interest, the executor is vested with powers of management in respect of the estate, including the power to raise money by mortgage, charge or sale of estate property[189]. It is understood that by virtue of occupying a position of trust and confidence, fiduciary obligations are placed on the executor[190].

[241] The principle that it is a breach of fiduciary duty for an executor to advance a personal claim to property in competition with the claim of the estate was vindicated in *Carter v Brine (No 2)*[191], a decision of the Supreme Court of South Australia. In that case the executor was the widow of the testator and also a beneficiary in a pension fund operated by trustees that the testator had left to his estate. The widow applied for payment from the fund to herself in her personal capacity, and this claim competed with any claim that she and the other executors could have made to the fund on behalf of the estate. She concealed from her fellow executors that they could have made a claim to the fund on behalf of the estate. It was held that she had acted in breach of her fiduciary duties and if this had caused loss to the estate and beneficiaries, she would have been liable to account.

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[187] R F D Barlow, R A Wallington, S L Meadway and others, *Williams on Wills* (11th edn, Lexis Nexis 2021) para 25.1.
[188] Administration of Estate Act, Cap 197 s 41(1).
[189] ibid s 45(1).
[190] *Commissioner of Stamp Duties v Livingston* [1965] AC 694, 707.
[191] (2015) I19 ITELR 145.

[242] The strength of the fiduciary duty owed by executors to beneficiaries is also shown by the case of *Re Stewart*[192] in which the executors had concealed notice of the death of the testatrix from the latter's estranged children, albeit the executors did so upon the specific directive of the testatrix herself. This was held to be a breach of the fiduciary duty owed to the children who were possible beneficiaries of the estate, because they could have made a claim to share in the estate. Indeed, the court went as far as treating the conduct of the executors as equitable fraud.

[243] There is no doubt that an executrix is a fiduciary, and, in the present case, it would mean assisting a clear breach of the fiduciary duty owed to the estate and the daughter by the executrix/mother, for this Court to permit her to compete with the estate and the daughter for ownership of the Property. It is repeated for emphasis that the fundamental assertion for both appellants is that by operation of the right of survivorship, on the father's death the mother and not the estate was the sole owner of the Property and the devise in the will was invalid. The duty of this Court not to lend assistance and, indeed, to prevent the incipient breach of fiduciary duty that is on foot with the prosecution of this appeal, would be further reason for dismissing the mother's purported appeal.

(e) **Fraud upon the Court**

[244] The famous pronouncement made by Lord Denning in *Lazarus Estates Ltd v Beasley*[193] endures, 'Fraud unravels everything'. Here a tenant alleged that the claim by a landlord as to the amount spent on repairs was fraudulent and the issue was whether the allegation of fraud could not be heard because it was an objection being taken after the time limited for objecting to the value claimed. The Court of Appeal reversed the trial judge, holding that no court will allow a person to

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[192] (2002) 5 ITELR 622.

[193] [1956] 1 QB 702 at 712 (Denning LJ): '*... No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...*' (emphasis added).

hold on to an advantage that he has obtained by fraud. The fraud that operated in that case was of one party upon another and it must follow that a court will respond with greater vigour in rejecting it when the fraud is upon the court, as in the instant proceedings.

[245] In these proceedings there was unchallenged testimony that the purported defence by the mother, filed in court, was a forgery and this amounted to nothing short of a fraud upon the court. The great weight that a court should give to this evidence is confirmed with the observation that counsel for the son did not challenge the mother's evidence that her signature on the joint defences were forgeries, and that the assertions in the witness summary as to what she would testify were false.

[246] The mother's witness statement, her oral testimony and her counsel's closing submissions to the High Court affirming the revelations all constituted cogent evidence of the falsity of the purported opposition by the mother to the claim. The consequences of the course that counsel took are well known: a court will treat unchallenged evidence of material facts as true[194]. The failure to challenge the testimony of the mother as to the fraudulent defence was completely the decision of counsel for the son, who should have been keenly advertent to the taint of the imputation that his client had used him, counsel, to file a false defence and witness summary. Counsel had every opportunity to cross-examine on the allegations.

[247] In this case, based on the unchallenged evidence, the High Court would have been perfectly entitled to make a finding of fraud upon the court and to conduct or direct an inquiry into that allegation. There is hardly more that needs to be said except that there can be no issue of pleading this fraud, being fraud upon the court. The rule and forensic requirement of pleading fraud relate to pleadings which are exchanges in adversarial proceedings between parties; they are statements made to inform the adverse party and the court of what is the case that is being made against the opponent. In the case of a fraud upon the court, in the same way as

[194] *Santiago Castillo Ltd v Quinto* [2009] UKPC 15, (2009) 74 WIR 217 (BZ); H M Malek, J Auburn and R Bagshaw (eds), *Phipson on Evidence* (17th edn, Sweet & Maxwell 2009) 354.

with contempt in the face of the court, because it is an injury to the court itself, the requirement of pleading this fraud does not arise.

[248] The concern by the judges in the Court of Appeal with the matter of fraud is recognised, but the fraud which engaged them was the fraud asserted as inherent and implicit in the fact that the son became registered owner not as a bona fide purchaser for value without notice, but intimately knowing that the Property was devised to the daughter and that it should have been transferred to her in the probating of the father's estate. No submission was made to the Court of Appeal that they should consider that, as an extension of that fraud, a further fraud had been perpetrated upon the court with the forged defence and false opposition to the daughter's claim.

(f) **Title Obtained by Fraud**

[249] Because of the order made by the Court of Appeal that the son must transfer the Property to the daughter which this opinion upholds, it is fair to make the following determination on the conclusion that the son obtained title by fraud. The appellants relied on the assertion that neither mother nor daughter pleaded fraud or advanced a case of fraud (except in relation to the application to the Land Registry to bring the Property under the new system of title). Counsel for the mother cited this Court's decision in *Todd v Price* [195] to support the case that it was wrong for a court to make a finding of fraud when it was not pleaded or even alleged against the affected party, so that this left them with no opportunity to defend against it. There is no doubting the soundness of the principle; however, it has no application to the present case. In that case the Court of Appeal, notwithstanding the pleadings, evidence and finding by the High Court that there was no fraud on the part of a bona fide purchaser for value without notice, reversed that finding on the basis that the purchaser had been grossly negligent in not making certain inquiries. As this Court decided, these were hardly the standard or expected inquiries so there was no gross negligence in failing to make

[195] [2021] CCJ 2 (AJ) GY.

them. In any case, this Court held it was wrong to equate gross negligence with fraud.

[250] In the instant case, while there was no elaborate pleading of fraud there was a clear averment in the daughter's affidavit in support of the Fixed Date Claim Form that the mother had failed to transfer the Property to the daughter and had instead transferred it to the son. That averment was in support of the pleading in the Claim Form claiming rectification of the Land Register showing title in the name of the son, on the ground that such registration had been obtained by fraud or mistake. In the claim for relief, at number (5),[196] the daughter sought an order for rectification of the land register on the ground that title in the name of the son had been obtained by fraud or mistake. The evidence that emerged in this case, from the mother, no less, fully supported the averment in the Claim Form and justified the order made in the Court of Appeal granting judgment against the son and ordering him to transfer the Property to the daughter.

[251] For completeness, the observation is made that even when fraud is not pleaded, if clear evidence of fraud emerges in a trial it is the duty of the court to consider that evidence to decide if it proves the occurrence of fraud. That was the principle of the decision in *East Caribbean Flour Mills Ltd v Boyea*[197] where it was decided that once a general allegation of fraud was made there was no need for detailed particulars if the substance of the allegation was provided in the evidence.

[252] The matter of a court finding fraud by a party when he has not cross-examined on the evidence of fraud, and when fraud was not pleaded, was addressed in the Privy Council decision from Belize, *Santiago Castillo Ltd v Quinto*[198]. The High Court had decided that there was fraud in the process of first registration of title to the subject land and the current title holder knew at the time it purchased the property of the fraud by its vendor, who had obtained first registration. The Court of Appeal reversed the High Court. On appeal to the Privy Council, counsel for the

[196] See at [199] above.
[197] VC 2007 CA 1 (CARILAW), (16 July 2007) at [43]-[44].
[198] (2009) 74 WIR 217 (BZ PC).

current title holder, the respondent, submitted that it would be wrong to make any finding that the principal of the respondent was a party to the vendor's fraud when no such allegation had been pleaded, nor any application made to cross-examine the respondent's principal. The Privy Council decided[199] that the allegations of fraud were spelt out in opposing counsel's skeleton argument served on the present title holder in advance of the hearing. As to the absence of cross-examination, the Board found it surprising that no application was made to cross-examine the principal, but the point had not been taken that he should have been cross-examined. In the circumstances, the Board decided, it was open to the High Court to make the finding of fraud.

[253] The principle to be gathered is that the failure to plead fraud does not operate unfairly if notice of the allegation of fraud is given to the affected party sufficiently in advance to meet the case of fraud. Further, the absence of cross-examination on the alleged fraud produces no unfairness if the affected party had the opportunity to cross-examine on the allegation of fraud and elected not to do so. The facts of the present case are more compelling, because the allegations amounting to fraud, though not so labelled by the mother, were strongly present in the affidavit and witness statement of the mother and in the written submissions of her counsel, Mr Richard Bradley, served on the son in advance of the hearing. The failure to cross-examine the mother on the allegations of fraud may well have been unspoken acceptance of the truth of her testimony and that there was no basis for challenging her evidence.

Conclusion

[254] In my opinion, the matter of severance is not an issue for this Court to consider and upon which to adjudicate because there was no *genuine* dispute on that issue before the lower courts or before this Court. The true position was that the devisee under a will brought a claim in court for an order to compel the execution of the gift. The executrix admitted the claim and the right of the devisee.

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[199] ibid at [48].

[255] The court below failed to appreciate that the denouncing of the defence that had been placed before it, was a clear statement that the defence was a forgery and a fraud and failed to dismiss the fraudulent defence as a nullity. Instead, the High Court decided what, as a matter of law, was an undefended and admitted claim by reference to the purported issue as to proof of ownership of the devised property, which was only an issue according to the fraudulent and null defence. It would be egregious, this artifice having clearly been exposed, for this Court to adjudicate the fraudulently advanced issue of ownership of the devised Property and not acknowledge the effect of the fraud.

[256] I am deeply conscious that none of what I regard as the existential matters, except for fraud by the son in obtaining title, was raised by the parties nor addressed in any court. A fundamental principle upon which courts deliver justice is that the parties must have the opportunity to be heard on the issues upon which it adjudicates. Because of the gravity of the issues I have identified, I would have called for a further hearing to give the respondents an opportunity to be heard. However, I consider there is hardly anything to be said on a further hearing to the conclusion I have reached that the son had no standing to argue that it was the mother who owned the Property on the father's death and not the estate; or to the conclusion that it was not permissible for an executrix in litigation against herself as executrix to compete for ownership of property with the estate which she had sworn to probate; or the conclusion that the unchallenged evidence of the mother that it was a forged signature on the purported defence filed in her name and in purported opposition to the daughter's claim constituted a fraud upon the court. But notwithstanding the doubt that anything material could be said at a further hearing, the better course may be to hold one.

[257] The alternative to doing so, which is to decide these appeals on the grounds upon which they were argued, perhaps may be justified because it avoids delay and because it produces the same result as that at which I have arrived based on the

existential matters. If that were so, I would be agreeable to concurring in the judgment authored by Anderson J.

[258] I would dismiss these appeals with costs of all parties in the courts below and in this Court to be paid by the appellant, Merickston Nicholson.

BURGESS J (concurring):

[259] There is unanimous agreement among us that this appeal should be dismissed, and the orders of the Court of Appeal affirmed. As I understand it, the only divide among us is the basis on which we should support the Court of Appeal's decision and orders.

[260] The foundation of the Court of Appeal's decision was that there was 'clear evidence that there was a mutual agreement and acts by the joint owners on the division of the property in question sufficient to determine that the joint tenancy was severed during the lifetime of the deceased'. I agree with the judgment of my brother, Jamadar J, that those findings and conclusions are sustainable and that the Court's decision should be supported on this basis.

[261] Before reading the judgment of Jamadar J, I was of the view that pursuant to s 38(2) of the Law of Property Act, and applying the principles in Hudson v Hathway, the equitable joint interest held by Anna and her husband had been released in favour of her husband prior to the execution of his will and that that was another basis on which the Court of Appeal's decision may also be supported. For all the reasons explored in the judgment of Jamadar J, I am no longer of that view.

Disposal

[262] For all the foregoing reasons, it is hereby ordered as follows:

(1) These appeals are dismissed.

(2) The orders of the Court of Appeal are affirmed.

(3) The Court hereby makes the following orders in relation to costs:

(a) Merickston Nicholson Jr shall pay to Franziska Nicholson and Anna Magdalena Ahrer Nicholson costs of these appeals before this Court.

(b) Merickston Nicholson Jr shall pay to Anna Magdalena Ahrer Nicholson and Franziska Nicholson costs in the High Court.

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess

/s/ P Jamadar

Mr Justice Jamadar