THE COURT OF APPEAL OF BELIZE AD 2022

CIVIL APPEAL NO 8 of 2019

FRANZISKA NICHOLSON Appellant
(as beneficiary under the Will dated 31st May,2005 of Merickston Laurenzco Nicholson, deceased)

v

ANNA MAGDALENA AHRER NICHOLSON 1ST Respondent
(in her personal capacity and as Executrix of the Last Will And Testament of Merickston Laurenzco Nicholson, deceased)

MERICKSTON NICHOLSON 2ND Respondent
(as a person having a beneficial interest under the Estate)

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Before:

The Hon Madam Justice Hafiz-Bertram	President (Ag)
The Hon Madam Justice Woodstock-Riley	Justice of Appeal
The Hon Mr. Justice Foster	Justice of Appeal

D Bradley with A Sylvester for the appellant.
The first respondent unrepresented.
E Perera for the second respondent.

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18 October 2021 and 19 May 2022

MAJORITY REASONS FOR JUDGMENT

WOODSTOCK RILEY, JA

[1] This was the re-hearing of the appeal by the Appellant Franziska Nicholson (Franziska) from the decision of the High Court dismissing her claim for:

(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 "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*."

[2] At the hearing of the Appeal the decision was given allowing the Appeal. We undertook to give our reasons for that decision and do so now.

Factual and Procedural History

[3] Merickston Nicholson (the deceased) died on 16th February 2009 leaving a Will executed on 31st May 2005 in which he appointed his wife the First Respondent Anna Magdalena Ahrer Nicholson (Anna Nicholson) Executrix and made certain devises to his said wife and children including his daughter the Appellant Franziska Nicholson (Franziska). He devised inter alia

"*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….*"

"*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*."

[4] Franziska filed a Fixed Date Claim Form against Anna Nicholson and Franziska's brother Merickston Nicholson the Second Respondent (Merickston Jnr.) dated 10th January 2018 and an Amended Fixed Date Claim Form dated 6th June 2018 and Affidavit of the Claimant dated 29th December 2017, a Second Affidavit of the Claimant dated 26th March 2018, a Third Affidavit of the Claimant dated 26th April 2018, an Affidavit of the Claimant dated 13th June 2018, and a Witness Statement of the Claimant dated 17th August 2018.

[5] The following witness statements were admitted as examination- in -chief:

1. Witness Statement of the Appellant dated 17 August 2018;
2. Witness Statement of the First Respondent dated 24 October 2018; and
3. Witness Statement of the Second Respondent dated 29 August 2018.

All three witnesses were cross-examined.

[6] The evidence of Franziska was essentially that:

(i) Anna Nicholson as the named executrix appointed by the Will of the deceased, did petition the Court to have the Will probated on the 26th May, 2009 and in the Devolution of the Inventory of the Estate, Anna Nicholson acknowledged that:

(1) (As the Will stated) she was entitled to 500 acres; and

(2) *That Franziska Nicholson the Claimant was entitled to "1,000 acres of land adjacent to the developed area known as "the Common Area" and the house which Franziska Nicholson built on "The Common Area".* A copy of the Petition for Probate dated 26th May, 2009 with the supporting documents was produced in evidence at the Trial.

(ii) In accordance with the agreement between her parents and as specified in the Will, Franziska was to receive 1,000 acres and the house on the Common Area which she built. However she did not receive this specific devise. Instead Anna Nicholson only transferred Block 11 – Parcel 302 comprising 500 acres.

(iii) In accordance with the said Will of her late father she was also to receive 500 acres from Parcel 303 which comprised 1,000 acres (the other 500 acres was for Anna Nicholson). Instead Anna Nicholson vested in herself the entire 1,000 acres and later transferred what should have been her 500 acres of the 1,000.00 acres to Merickston Jnr.

(iv) In addition to the terms of the Will and the Petition to Probate Franziska relied on an "agreement" made on 2nd July, 2006 in which both her mother Anna Nicholson and her late father signed a document declaring that "the Property known as Villa Franziska" on the ground of Maruba Resort belongs to Franziska; A sketch plan on which Anna Nicholson identified Parcel 302 to "Sisi" (Franziska), Parcel 303 for 500 acres known as A to Anna Nicholson and Parcel 303 for 500 acres known as B to Franziska; A document signed by Anna Nicholson dated 4th November 2005 "*let it be known that the building named Maya Jungle Loft on the grounds of Maruba Resort…..is the property of Franziska Nicholson. It is not part of Maruba but can be used if authorized by Franziska as a Signature Suite for accommodating guests of Maruba Resort*".

(v) The property Franziska claimed, though acquired in the joint names of her mother and father was severed during the lifetime of the deceased by the mutual agreement, acts and course of dealing of the joint tenants.

(vi) That the Law of Property Act (LPA) applied.

[7] A Defence dated 2nd March 2018 and an Amended Defence dated 16th April 2018 and a Second Amended Defence dated 10th July 2018 had been filed. An Affidavit of the First Defendant dated 17th August 2018, a Witness Summary of the First Defendant dated 29th August 2018, and a Witness Statement by the First Defendant dated 24th October 2018. The Second Defendant filed a Witness Statement dated 29th August 2018.

[8] The Defence indicated

(i) The properties referred to in the claim did not form a part of the estate of the late Mr. Merickston Nicholson.

(ii) Merickston Jnr. stated that he is the owner of the Property and that it was he who constructed the building.

(iii) That the parcel of land was held jointly between Mr. Merickston Nicholson and his wife Mrs. Anna Nicholson and this joint tenancy was never terminated by the owners. That the property deposed to Franziska in the Will could not have been disposed of by the late Mr. Merickston Nicholson since it did not legally form part of his estate.

(iv) Relied on the Registered Land Act (RLA) and registration of the property and section 103 that where any land is owned jointly by two or more persons, no such person shall be entitled to any separate share in the legal estate in the land, and on the death of any such person, his interest shall vest in the surviving owner.

(v) That the First Defendant (who at the time was the sole owner of Parcel No 303, Block 11 in the Belize Rural North II Registration Section) transferred the property in toto to the Second Defendant on

the 13th April, 2010. Merickston Jnr. maintained, that he is free to utilize his building as he so chooses.

Anna Nicholson

[9] While the above reflects what was stated in the joint Defence filed, Anna Nicholson's evidence ultimately supported Franziska's case and it is important to look at that closely and in that regard I set it out in some detail.

[10] In her Affidavit filed 17th August 2018 Anna Nicholson had noted:

> "*I wish to say and acknowledge that prior to his death my husband the late Merickston Laurenzco Nicholson and I discussed and agreed on how the parcels of land at and around Maruba Resort near Mile 40 ½ on the old Northern Highway, Belize District, which he bought in our joint names, should be divided among our four children*.
> *It was based on that Mutual Agreement that my husband later specified in his Will which he made with his lawyer Mr. Rogers in my presence and in the presence of the girls, my daughters, on exactly how the property was to be shared.*
> *We agreed that Franziska should get 1,000 acres adjacent to the developed area of the Resort (which we called 'The Common Area').*
> *I have as the Executrix of my husband's Will carried out most of the Agreement.*
> *However Franziska has only received 500 acres. Instead I made the mistake of giving my son Merickston Jr. (Nicky) Franziska's other 500 acres which I would now like to have corrected/rectified so that Franziska will be allowed to survey her parcel and receive title to her other 500 acres.*
> *Franziska is entitled to receive a separate freehold Title to her house known as the Mayan Loft which she had built with my late husband's permission on the "Common Area".*

The Court case should be settled immediately and Franziska should receive all that she is entitled to under the Agreement made between my late husband and I, the terms of which are noted in a sketch that I made at the time and described in detail in the Will of my husband deceased."

[11] In her Witness Statement dated 24th October 2018, which was accepted as her evidence in chief, Anna Nicholson 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 the contents and would not have signed it if my son Merickston Jnr. 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 10th July 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 it. I do not agree with the contents of this affidavit and wish to disassociate myself from it.*

4. *My husband the late Merickston Laurenzo Nicholson acquired parcels of land at and around Maruba Resort Jungle Spa Limited located near Mile 40 ½ Old Northern Highway, Belize District in our joint names (hereafter "the Maruba Properties").*

5. *My husband and I during his lifetime discussed how we should divide the Maruba Properties among our children later on. Based on those discussions we mutually agreed how the Maruba Properties should be divided among our children, namely Franziska, Merickston, Alexandra and Veronica.*

6. Based on the agreement my husband and I made, he made a Will dated the 31st of May 2005. I wish that his Will be followed and respected by our children. If that is not possible then I wish the Court will decide this claim according to my husband's and my mutual agreement. …

…

…

9. I have now come to understand that somehow the remaining 500 acres intended for the Claimant along with the house build on it has been transferred to the Second Defendant my son Merickston Jr. All along, I thought that the 500 acres and the house devised to the Claimant Franziska were given to her. I do not understand how 500 acres and the house could have gone to Merickston Jr the Second Defendant.

10. It is a mistake that the Second Defendant my son ended up with Franziska's 500 acres of land and her house she built on it. If it is my signature that is on any document purporting to transfer to my son the Second Defendant the 500 acres and the house Franziska built on it, then I do not have any recollection how my signature could be on them.

*11. On several occasions my husband and I discussed and agreed on the division of the Maruba Properties that both of us decided to give to our four children. For instance, at a board meeting of Maruba Resort Spa Limited, one of the businesses on Maruba Properties, Motion 5 of the meeting records the house Franziska is claiming as belonging to her. A copy of Minutes of Meeting is now produced shown to me marked "**AN2**".*

12. Also, my husband and I made a signed declaration in writing on July 2, 2006, that the house Franziska is claiming, otherwise known as "Villa Franziska", on the grounds of Maruba Resort Jungle Spa Limited belongs to Franziska the Claimant, and that Villa Franziska is not a part of Maruba

*Resort Jungle Spa Limited. A copy of Declaration is now produced shown to me marked "**AN3**".*

13. *Furthermore, my husband and I prepared a type written letter dated November 4, 2005, in which we made our intentions clear that the house Franziska is claiming which is a building also named 'Maya Jungle Loft' on the grounds of Maruba Resort Jungle Spa Limited, formerly known as Maruba Resort, which building is located next to the pool, is the property of Franziska. In that said letter which I signed, my husband and my intentions are clear that Franziska's house is not part of Maruba Resort Jungle Spa Limited. A copy of Letter is now produced shown to me marked "**AN4**".*

14. *Moreover, I indicated by a sketch the locations and portions of land of the Maruba Properties to be given to each of the four children. On that said sketch plan I wrote that Franziska is to get Parcel 302 which is 500 acres, as well as 500 acres from Parcel 303. A copy of Sketch Plan is now produced shown to me marked "**AN5**".*

…
…
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23. *… …. . I really want my son to transfer to Franziska the Claimant her 500 acres and give her back possession of her house.*

24. The 500 acres of land of the Maruba Properties that Merickston Jr should transfer to Franziska is Parcel 10-11-10-303 which is 455.09 hectares (approximately 500 acres).

…

….”

[12] At trial Anna Nicholson gave evidence and was cross examined by the attorneys for Franziska and Merickston Jnr. She confirmed the statements in that Affidavit and Witness Statement.

> “*I indicated by a sketch plan the locations and portion of land of the Maruba properties to be given to each of the four children. On the said sketch I wrote that Franziska is to get Parcel 302 which is 500 acres, as well as 500 acres from Parcel 303*.”

Anna Nicholson confirmed the agreement between her husband and herself on the division of the jointly owned property was during her husband’s lifetime.

> Q. *“…you and your husband came to an agreement while he was alive*?”
> A. “*Yes*’”
>
> Q. *“….did your husband agree that Franziska Nicholson, that that was her house*?”
> A. “*Oh, yes*”.
> Q. “*And did you also agree yourself that that is her house*?”
> A. “*Oh, yes*.”
>
> A. “…..*That was a mistake that I gave it Merickston*.”
> THE COURT: “*So you mistakenly transferred the entire 303 to Merickston Jr?”*
> *A. “Yes.”*
>
> In answer to Merickston Jnr.’s Counsel

Q. "*One final question, Ms. Anna, just something I need to clear up. You would agree with me since the title, this Land Certificate for Parcel 303 was in both your name and your husband's name. And we've established jointly, your husband whether it be through his estate, cannot transfer the property without you because you own fifty percent of that property, correct*?"

A. "*No*."

HIGH COURT JUDGMENT

[13] In her written decision the Trial Judge identified a "*Preliminary Issue by 2nd Defendant – Beneficiary's right to bring a claim*" and noted at paragraph 4

"*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 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, see:* ***Re Diplock [1948] Ch.465 and Re Tilley's Will Trusts [1967] Ch.1179***."

5. "*The right to trace only applies to volunteers; those who have not purchased for valuable consideration without notice, as Merickston has. Ergo, if the Claimant can prove that all or part of what Anna conveyed to Merickston was in fact properly and specifically bequeathed to her under the Will she is allowed to claim its recovery. She is even allowed to be indemnified out of the estate for any expenses incurred because of the wrongful conveyance.*

[14] The Trial Judge went on to note:

Paragraph 7. "*There is but one issue in this claim:*

1. *Whether Anna wrongfully transferred estate property to Merickston*."

[15] On the issue of Severance of Parcel 303:

Paragraph 8 - "*There could be no doubt that Parcel 303, (the Parcel) part of which is claimed by Franziska as the Property, was jointly owned legally by the Testator and Anna at the time of Testator's death. Since the legal title could not be severed according to law, the question now is whether the equitable interest in the Parcel was severed before the Testator died. The effect of severance is that when the Testator died, Anna, 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 Testator's estate. If there was no severance then the interests, both legal and beneficial, would vest in Anna alone and Anna could do with the Parcel, including the Property, whatsoever she desired*.

Paragraph 10 - *"At the time of the Testator's death the Parcel was unregistered. The application to register the Parcel under the Registered Land Act (the RLA) was dated 14th April, 2009, and made in the joint names of the Testator and Anna, the Testator having died the 16th February, 2009. This means that the first registration of the Parcel was made after the Testator had already died."*

Paragraph 15 – *"Counsel for the Claimant invoked The Law of Property Act (the LPA)."*

Paragraph 18 – "*Counsel for the Defendant, on the other hand, drew the Court's attention to section 11 of the RLA which provides that*:

> "*From the date of any Order made by the Minister under section 4, all dealings relating to any land in the compulsory registration area named in the Order shall be made in accordance with this Act, and*

no dealing made otherwise than in accordance with this Act shall have any validity or effect."

Paragraph 20 – "*The distinction is important because severing a joint tenancy under RLA is very different to that of the LPA. As expressed in section 103 (2) of the RLA*."

Paragraph 21 – "*Neither the Claimant nor the Defendants offered any evidence which could properly inform the Court of the status of the Property i.e. when it had in fact been declared to be a compulsory registration area*."

Paragraph 22 – "*Proof in this situation is not simply that the parcel had not be registered under RLA at the time of the testator's death. It requires proof of when the area had been declared for compulsory registration through the production of the Minister's Order or otherwise. This is most unfortunate for the Claimant since it leaves the Court no choice but to find that she has not proven her case to the requisite standard. There is no need for the Court even to consider whether the joint tenancy had in fact been severed according to either the LPA or the RLA because neither has been proven to be applicable. For this reason the Claim must fail*."

THE APPEAL

[16] Grounds of Appeal – In this Appeal Franziska appeals against the Trial Judge's decision as follows:

(1) The Learned Trial Judge erred in law and misdirected herself in holding that the applicable law to determine whether or not severance of joint tenancy had taken place is section 103 of the Registered Land Act, Chapter 194 and not section 38(2) of the Law of Property Act, Chapter 190.

(2) The Learned Trial Judge erred in law and misdirected herself in holding that the Appellant was required to prove when the area of the disputed property

was declared a compulsory registration area through the production of the Minister's Order.

(3) When the Court's attention was drawn to section 11 of the Registered Land Act [18], the Learned Trial Judge erred in law and misdirected herself when she failed to take judicial notice of the Government Gazette and the Order (Instrument) published therein on 25th March, 2008.

Particulars

i) The Learned Trial Judge is required by the Interpretation Act, Chapter 1 and the Evidence Act, Chapter 95 to take judicial notice of the Government Gazette and instruments having the force of law.

ii) If the Learned Trial Judge had taken judicial notice of the Order of the Minister published in the Gazette of 25th March 2008, she would have determined that the proper law for the severance of joint tenancy is section 38(2) of the Law of Property Act and that the acts of severance of the joint tenancy took place in the year 2005, prior to the year 2008, before the declaration of the area.

(4) The Learned Trial Judge misdirected herself and erred in law when she found in paragraph 10 of her decision that "*there was nothing specifically pleaded and no action was taken to impugn the application for registration or the registration itself…*"

Particulars

i) The allegation of fraud was pleaded and particularized in the Appellant's affidavit. In proceedings commenced by Fixed Date Claim Form, the Fixed Date Claim Form and the Second Affidavit constitute the pleading.

ii) The Respondent did not take any objection to the form of the claim.

iii) There was no basis for the Learned Trial Judge to find that the allegation of fraud was not specifically pleaded.

iv) There was also no basis for finding that "*no action was taken to impugn the application for registration or registration itself*". The Fixed Date Claim Form is that action.

v) The Learned Trial Judge ought to have evaluated the evidence of fraud which included forgery of Dr. Nicholson's (deceased) signature.

(5) The Learned Trial Judge also erred in law and misdirected herself by failing to evaluate the evidence tendered at the trial.

Particulars

i) Though the Respondents filed a joint defence, the First Respondent obtained a separate representation of counsel from the Second Respondent.

ii) The testimony of the First Respondent contradicted the joint defence of the Respondents.

iii) The First Respondent testified that she was misled and influenced by her son, the Second Respondent.

iv) As the Learned Trial Judge noted in paragraph 9 of the decision, the 1st Respondent testified that "*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 signing it*."

v) Though the First Respondent's defence was not amended to accord with her testimony, it was still incumbent on the Learned Trial Judge to consider her evidence given on oath during the trial especially her assertion that the transfer of the property, Block 11 Parcel 303, to the

Second Respondent was done by mistake which was in addition to the Appellant's pleaded fraud and mistake.

[17] Anna Nicholson did not make any Submissions in the Appeal. Notably she did not contradict, withdraw or resile from her evidence that was before the High Court. That evidence therefore stands.

[18] **Ground 1** of the Appeal is not sustainable as the Trial Judge did not in fact hold that the RLA applied and not the LPA, she held it was not necessary to consider that issue. (The Trial Judge did in another decision cited **No. 76 of 2015 Leonora E aka Lorna Bodden et al v Elizabeth Bernadette Gentle** note that the LPA applied to unregistered land in the determination of severance).

[19] It is useful to look first at Ground 3 of the Appeal and the issue that the Trial Judge ultimately based her dismissal of Franziska's claim on, the absence of proof of when the area in question had been declared for compulsory registration and from when the provisions of the RLA would apply.

[20] It was conceded that the date of when the property in question was declared Registered land was not brought to the Trial Judge's attention. Whether she 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. That fact being that the Minister's Order was published on the 25th March 2008. In the circumstances the basis for the Trial Judge determining that the claim must be dismissed because there was no evidence of registration falls away. The Submission by the Second Respondent's Counsel that whatever the law was previously the Court should look at what the law is at the time of the trial is not accepted.

[21] The claim was that the property was severed by agreement and actions in 2005 and 2006. In considering whether there was in fact a severance of the property in 2005/2006 the requirements at that time are what should be considered, which would not

be the requirements of the LRA which did not apply to the property at that time. The provisions of the LPA should be considered.

[22] There was reference by the Trial Judge, and a ground of appeal, with regard to there being "*nothing specifically pleaded and no action taken to impugn the application for registration or the registration*." The evidence discloses the Appellant did impugn the registration and the signature of the deceased on a document dated after his death. Interestingly Merickston Jnr. also questioned that signature. In fact Merickston Jnr. in answer to "*It couldn't have been signed by your father could it*?" A: "*No*" and he stated regarding the signature on the document "*I cannot guarantee if it is or isn't, it doesn't look his though. It looks like my brother-in-law"*. In fact the Second Amended Defence indicated they were not involved with the application, did not prepare or present and once they found out that the application had been filed, filed a police report. Ultimately the Trial Judge's decision did not rest on that issue nor the determination of the Appeal.

Severance of Joint Tenancy

[23] There is not much dispute on what is required to prove severance. The legal authorities cited by both parties acknowledge mutual agreement by the joint tenants to apportion the property can constitute a severance.

[24] Counsel for Franziska had cited:

(i) The Common law position on severance was stated by Page Wood V.C in **Williams v Hensman (1861) 1 J & H 54** quoted extensively by Plowman J. In Re: Draper's Conveyance case (1969) 1 Ch. 486 at page 491:

"*A joint tenancy may be served (severed) in three ways:*
In the first place an act of any 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 survivorship only in the event of no severance having taken place of the share which is claimed under the

jus accrescendi…..*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 interest of all were mutually treated as constituting a tenancy in common*."

(ii) **Halsbury Law of England** – 4th Edition Volume 39 (2) at Section 198

"*The joint tenancy may be severed whether by one joint tenant as to his own share or generally by all the joint tenants."*

"It is still possible to sever a joint tenancy in an equitable interest, whether or not the legal estate is vested in the joint tenants."

"The rules as to severance of a joint tenancy in personal estate do not seem to differ from those which were formally applicable to real estate and, apart from severance by notice, the same rules seem to apply whether or not the legal estate is vested in the joint tenants."

At section 201. "*Severance of joint tenancies by mutual agreement or conduct. If joint tenants enter into a mutual agreement to hold as tenants in common, there is a severance*[1]*, even though it takes effect only in equity. Subsequent conduct of all the joint tenants may effect a severance*."

"*A unilateral declaration of intention to sever, if communicated to the other joint tenants, may be sufficient to effect a severance*."

(iii) **Law of Property Act CAP 190**, at Section 38 (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*

[1] *An agreement by joint tenants for disposal of the property by their respective wills, followed by the making of wills accordingly, operates as a severance: Re The Wilford's estate, Taylor v Taylor (1879), 11 ChD 267; Re Heys, Walker v Gaskill [1914] Pn192. The agreement need not be specifically enforceable: Burgess v Rawsley [1975] Ch 429, [1975] 3 All ER 142, CA.*

sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants.

Provided that, where legal estate (not being settle 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."

Evidence of Severance

[25] The issue therefore is the application of the facts of this case to the principles. The Trial Judge did not evaluate or make any determination of the factual evidence on the issue of severance. In fact as she noted "*there is no need for the Court even to consider whether the joint tenancy had in fact been severed*". There is therefore merit in Ground 5 of the Appeal.

[26] 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.

[27] That the tenancy was severed during the life time of the deceased was evidence certainly from Franziska and Anna Nicholson.

(i) The evidence of Franziska and Anna Nicholson was that there was an agreement between the joint owners as to the division of the jointly owned property. That agreement would be contrary to the assertion that the joint tenancy continued and would fall to Anna by right of survivorship. While the deceased is not here to speak the surviving owner says so. There could be not much more powerful evidence than that. The Second Respondent sought to categorize that as mere discussions, however the evidence did not rest on that alone and subsequent conduct confirms and supports such an agreement between the joint owners.

(ii) Terms of the Will of 31st March 2005

It was accepted that the provisions of a Will cannot sever a joint tenancy, however the terms of the Will are additional evidence of the Agreement made between the joint owners and that the deceased considered the property his to give. Anna's compliance with the terms of the Will with regard to all other property was noted.

(iii) Declaration in writing 2006

The joint owners signed a document acknowledging that the house claimed by Franziska was hers. This also squares with the reference to the house in the Will.

(iv) Company documents

The minutes of the meeting produced was further indication of the conduct and intention of the deceased and Anna Nicholson.

(v) The evidence of Anna Nicholson was pivotal. She was the other joint tenant. There was no need to speculate on what were the joint tenants' intentions, Anna Nicholson's evidence was of an agreement to divide the property, that the terms of the Will reflected that agreement and she confirmed in her written and oral evidence that the 1,000 acres should go to Franziska and that the transfer to Merickston Jnr. was a mistake.

The Court is to decide if there was severance and it is Anna's evidence that there was.

(vi) Sketch of area

Anna Nicholson confirmed the writing on the sketch of the area produced was hers and indicates that 302 and part of 303 to make 1000 acres should go to Franziska.

[28] The weight given by the Trial Judge to the fact that the evidence of Anna Nicholson as First Defendant contradicted the defence and that the defence was not amended was misplaced. It should be noted that Anna's Counsel did state to the Court at the beginning of the trial with regard to the defence "*we will disassociate ourselves*".

[29] The reference to the Supreme Court (Civil Procedure) Rules 10.5. was also misplaced. The Rule which requires that the defence must set out all the facts on which the defendant relies to dispute the claim was not relevant to the situation before the Court. The evidence Anna Nicholson gave was not being relied on to dispute the claim. It ultimately supported the claim. This certainly can happen in Trial when evidence elicited on cross examination supports the Claimant. The Trial Judge is not in a position to discount such evidence. Here Anna Nicholson voluntarily gave evidence in support of the claim. It is evidence. It was also not a surprise or ambush of Merickston Jnr. The trial was held on 27th November 2018 and Anna's Affidavit and Witness Statement indicating clearly her position were filed on 17th August 2018 and 24th October 2018 respectively.

[30] The evidence of Merickston Jnr. at the Trial must also be noted:

> Q. "*You do not dispute that your mother wanted Sisi, who is Franziska, right to get first of all Parcel 302, which is what she got. Am I correct so far?*"
>
> A. "*Yes*."
>
> Q. "*And that she also wanted as far as Parcel 303 is concerned that Franziska should get half of it, 500 acres, which she wrote as B in the sketch? Right isn't that correct*?"
>
> A. "*At the time when she wrote that that may have been what she wanted to do*."

Q. "*But in the sketch your mother also made it clear that (she) the Claimant should get another 500 acres from 303. Isn't that correct*?"

A. "*That may have been my mother's intentions*."

Q. "*Now let's turn to the house now, isn't it a fact that both your mother and your father acknowledged that that house belong to your sister Franziska*?"

A. "*From time to time*."

Apart from relying on Rule 10.5 Merickston Jnr. was not able to discredit and did not address the direct evidence of Anna Nicholson that supported Franziska's claim.

[31] 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 property in question sufficient to determine that the joint tenancy was severed during the lifetime of the deceased. That the house referred to as Franziska's is hers and she is entitled to the 1,000 acres devised to her.

[32] The Trial Judge's decision to dismiss the claim and award costs to the First and Second Respondents is set aside.

Order

[33] (1) An Order that the Appellant 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 Appellant 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 “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 Respondent, 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 Respondent, as Executrix of the Probated Will of the said deceased, execute a vesting Assent (transfer of title) to the Appellant of the remainder of the said 1,000 acres and the said house devised to the Appellant under the Will of Merickston Laurenzco Nicholson.

(5) That the Second Respondent transfer the parcel 10.11.10.303 which is 455.09 hectares to the Appellant within six weeks of the date of promulgation of this decision . Failing which the Registrar of the Supreme Court to effect the said transfer.

(6) An Order directing that the Second Respondent to account for all the rental income collected in respect of the Appellant's house from 13th April 2010.

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

[34] Damages claimed in paragraph 6 of the Claim were not proven at the trial and not addressed on Appeal. In that regard no order is made.

[35] **Costs** – to the Appellant on the hearing of the Appeal before us to be paid by the Second Respondent to be agreed or assessed and in the Court below costs to the Appellant from the Estate.

_____
WOODSTOCK RILEY, JA

[36] **FOSTER, JA**

I have read in draft the reasons given by Woodstock Riley JA for our judgment and I concur with those reasons and the Orders given.

_____
FOSTER, JA

DISSENTING JUDGMENT

HAFIZ BERTRAM, P (Ag)

Introduction

[37] This appeal was heard on the 18 of October 2021 and it was allowed by a majority decision. The main issue concerns severance of jointly held property and I disagreed with my colleagues that there was severance. I have read the reasons for judgment by my learned sister Woodstock-Riley JA, with whom Foster JA agreed. I am not in agreement with those reasons and the orders of the majority. I would have dismissed the appeal with costs to the second respondent.

The Parties to the Appeal

[38] The Parties have a close family relationship. Franziska Nicholson (Franziska) was the Claimant below and the Appellant in these proceedings. She is the daughter of the first Respondent, Anna Magdalena Ahrer Nicholson (Anna). Franziska is sister of the second respondent, Merickston Nicholson (Merickston Jr).

[39] Franziska is a beneficiary under the Will dated 31 May 2005 of her father, Merickston Laurenzco Nicholson (the Testator). The Testator died on the 16 February 2009 and his Will was admitted to probate on the 25 June 2009. Anna is the wife of the Testator and is sued by Franziska in her personal capacity as the widow of the Testator and as the Executrix of the estate. Merickston Jr. was joined as a person having a beneficial interest under the estate.

The issues

[40] The Claim raised several issues: (i) Pleadings; (ii) Whether property wrongfully transferred to Merickston Jr. by mistake or fraud; (iii) The application of (a) The Law of Property Act Cap. 190 or (b) The Registered Land Act Cap. 194; (iv) Whether joint tenancy of Parcel 303 comprising 1000 acres bought in the joint names of the Testator

and Anna severed by mutual agreement or acts and course of dealing of the joint tenants thus creating a tenancy in common of the beneficial interests in the property (v) Whether this Court should determine the issue of severance for the first time.

Background Facts

[41] Franziska claimed that Anna wrongly transferred property, being 455.09 Hectares (approximately 1000. Acres) Parcel ID 11-101-303, ("Parcel 303") bought by the Testator in the joint names of himself and Anna, to Merickston Jr., which was devised to her under the Will of the Testator. Anna and Merickston Jr. denied the claim in their joint Defence.

[42] The pleadings were not straightforward as ought to have been. The learned trial judge, Young J, did not have a trial bundle and had to take judicial time to sort out the pleadings, affidavits and witness statements to be relied upon by the parties for the trial. Pleadings filed in March 2018 were disregarded and also affidavits with the exception of the affidavit of Franziska which supported her fixed date claim.

[43] The following were agreed upon as pleadings:

1. Amended Fixed Date claim form filed on the 6 June 2018, supported by affidavit by Franziska filed on 13 June 2018;
2. Second Amended Defence of Anna and Merickston Jr dated 10 July 2018.

Witness statements

[44] The Witness Statements filed by the parties and admitted as examination- in-chief were:

1. Witness Statement of Franziska dated 17 August 2018;
2. Witness Statement filed by Anna dated 24 October 2018;
3. Witness Statement of Merickston Jr. dated 29 August 2018.

All three witnesses were cross-examined.

The Amended Fixed Date Claim dated 6 June 2018

[45] Franziska by the amended fixed date claim form dated 6 June 2018 claimed for:

(1) An order that she is entitled as devisee under the will of the Testator to 1000 acres of land adjacent to a developed area known as "The Common Area" and known as Maruba Resort Jungle Spa, situated immediately North of the 40 ½ Post of the Old Northern Highway near Maskall Village, Belize District;

(2) An Order that she is entitled as devisee under the Will to the house which she built on the Common Area being a two-storey concrete house with a loft, known as "Maya Jungle Loft", also called "Villa Franziska";

(3) A declaration that the property, which comprised several parcels of land in the said Maskall Area, including the said developed "Common Area" where the Maruba Resort Jungle Spa and Parcel 303 – Block 11 (Parcel 303) in the Belize Rural North (1000 acres) are located, which was acquired by the Testator in the joint names of himself and his wife Anna, was severed during the lifetime of the Testator by the mutual agreements, 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 Anna as Executrix of the Probated Will of the Testator, execute a Vesting Assent (Transfer of Title) to her of the said 1000 acres and the house devised to her under the Will of the Testator;

(5) An Order for rectification of the Register for Parcel ID 11-101-303 in which 455.09 Hectares (approximately 1000 acres) which was transferred from the Estate of the Testator, to Merickston on 13 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 under the Will be transferred to her;

(6) Damages against Merickston for trespass of her 500 acres and interference with her house which he wrongfully took possession and control of and has without the consent or permission of her, 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 Merickston to account for all the rental income collected in respect of her house;

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

Second Amended Defence of the First and Second Defendants – dated 10 July 2018

[46] Both respondents in their joint defence disputed the claim. Merickston Jr. stated that the properties referred to in Franziska's claim did not form a part of the estate of the Testator as Parcel 303 was held jointly between himself and Anna. Further, the joint tenancy was never terminated by Anna and the Testator.

[47] Anna stated that she owned Parcel 303 absolutely and she was entitled to transfer it to Merickston Jr. or any person she chooses. Merickston Jr. maintained that he is the rightful owner of Parcel 303 which was transferred to him on the 13 April 2010.

Anna's witness statement contradicted her defence

[48] An affidavit sworn on 17 August 2018 was filed by Musa & Balderamos (Franziska's attorney) for Anna in support of Franziska's claim. This was not considered by the trial judge at the trial, as it did not form part of the pleadings.

[49] The witness statement dated 24 October 2018, was filed by Mr. D. Bradley for Anna. This evidence contradicted Anna's Amended Defence which was filed jointly with her son, Merickston Jr.

[50] The crux of her evidence was that she made a mistake in transferring Parcel 303 to her son. It is to be noted that when Anna filed her defence she did not admit any part of the claim and did not state mistake as a defense. There was no amendment to the joint Amended Defence.

Evidence pertinent to the case

Franziska's affidavit

[51] Franziska supported her claim with her affidavit sworn on 13 June 2018. She exhibited a copy of the Will of the Testator and referred to the Third and Fifth devise of the Will which states:

> "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, irrespective of whether there are any other children born or adopted of our marriage before or after the execution of this will. Should my wife precede me in death, I leave 55% of this area to my daughters Veronicka Anna Nicholson and Franziska Gerlinda Nicholson, of the remaining 25% shall be given to my son Merickston Laurenzco 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."

[52] Franziska deposed that the remaining 1000 acres together with the house which she built on the "Common Area" was expressly devised to her. That it was a well-known fact in the family that the parcels of land in the Maskall Area of the Belize District acquired by the Testator, in the joint names of himself and their mother, Anna, as agreed by their parents, would be apportioned between Anna and the children, namely, Alexandra, Veronica, Merickston Jr (Nicky) and herself. This arrangement she stated would be later confirmed in the Will of the Testator.

[53] She stated that following the death of the Testator, the Will was probated by Anna who transferred the agreed parcels of land to three of her siblings. But, 500 acres of her agreed portion of 1000 acres devised to her was wrongfully transferred by Anna to Merickston Jr.

Franziska exhibited a copy of the Land Registry report showing that on the 13 April 2010, Anna transferred to Merickston Jr. 455.09 Hectares (approximately 1000. Acres) Parcel ID 11-101-303 (Parcel 303). She said that Merickston Jr. has asserted ownership of the said land and has denied her ownership and control over the property.

[54] Franziska deposed that Merickston Jr. has wrongfully taken possession and control of her house on the property which was devised to her by the Testator under the Will. That the house which is a two story building had a loft. Merickston Jr. has closed off the loft with a concrete ceiling and converted her living room into a bedroom and has been renting out her house for US$4000. per week. She stated that the arrangement she had with him was that she would keep the fees for bookings that she made in the USA for guests staying at Maruba Resort. That since October 2017, Merickston Jr. has refused to accept her bookings and has demanded from the guests that they must pay him all fees for accommodation in advance. As a result she suffered loss and damage.

Franziska's Witness Statement dated 17 August 2018

[55] Franziska's witness statement was admitted as her evidence-in-chief. It repeated and added further evidence. In that statement, Franziska said that in the late 1970's the Testator, her father, bought several parcels of land along the Northern Highway near Maskall Village, Belize District in the joint names of himself and her mother, Anna. In the early 80's about 500 acres of the land was cleared and developed. A Tourist Resort , which she designed, was built called "Maruba Resort". She and her sister, Alexandra were the first managers of the resort.

[56] Further, with the permission of her father, the Testator, she was able to design and have constructed her own house on the developed area which became known as "The Common Area." She stated that it was called the "Common Area" because the Testator always said the land was for the entire family and each of his children would eventually own their plot or parcel of land. It was acknowledged by both parents, Anna and the Testator that the house which she built and called "the Mayan Jungle Loft" because of the special design with a high ceiling, would be her personal property. The property was also called "Villa Franziska."

[57] According to Franziska she had moved to Houston because she had to receive treatment for cancer and it was agreed by her parents and understood by all her siblings that she could make reservations from Houston for the rental of her house as a special guest suite and for her to get the income.

[58] In 2003, Franziska stated that Maruba Resort evolved into a company business incorporated as "Maruba Resort and Jungle Spa Limited", with her parents, Anna and the Testator, and their four children, Alexandra, Veronica, herself, and Merickston, as shareholders. She exhibited the list of shareholders.

[59] Franziska stated that in January 2005, the Testator was diagnosed with colon cancer and had to be flown out to a hospital in Texas for treatment. That prior to the Testator's surgery, she and her sister Alexandra visited the Testator. He and Anna had stayed with Veronica. Merickston Jr, her brother stayed behind at the resort in Belize. She stated that on that visit the Testator and Anna discussed in the presence of all three daughters how the land in Belize on the Northern Highway near Maskall which was held in their joint names, should be apportioned among the children. She further stated that the Testator did not want any quarrelling to take place among them or between Anna and the children. The Testator therefore, proposed exactly how the land should be divided and shared among them and Anna agreed with him.

[60] Franziska further stated that the Testator and Anna mutually agreed that Anna would get and be in charge of the 500 acres on the developed area of the resort, if she survived him. If not, it should be divided among the children. Further, the Testator and Anna agreed that 1000 acres adjacent to the developed area would be for her. Also, in relation to the remaining lands they further agreed that Alexandra would receive 750 acres, Veronica 1000 acres and Merickston 700 acres.

[61] Following the agreement, Franziska said that Anna prepared a sketch plan noting exactly what was agreed between her and the Testator. It was noted on the sketch plan, at the foot that she "Sisi" which is her nickname would receive 500 acres from parcel 302 and 500 acres from parcel 303. The other 500 acres from Parcel 303 was the developed area where the resort was located and was for Anna. This Sketch Plan is exhibited as "F.N. 1".

[62] Franziska further stated that the agreement as per the sketch plan was later confirmed in the specific devise in the Will made by the Testator on 30 May 2005. Thereafter, the Testator's health declined due to his underlying medical problems and by 2006, he had lost his vision and on 16 February 2009, he passed away. Anna who was the Executrix for the Will applied for probate which was granted on 25 June 2009. Among

the application papers signed by Anna, there was the devolution in the inventory in which she acknowledged that Franziska was entitled to receive 1000 acres of land adjacent to the developed area and the house but she had built on the grounds of the "Common area". The inventory dated 26 May 2009 was attached.

[63] Franziska said that after Anna received the grant of probate, she applied for certificate of title for various parcels of land and provided each of her siblings with their respective parcels of land. Anna transferred only Parcel 302 comprising 500 acres to her when the agreement was that she was to receive 1000 acres. The other 500 acres was to come from half of parcel 303 which Anna marked as "B" on her sketch plan. That instead of transferring the 500 acres from Parcel 303, Anna transferred the entire 1000 acres in Parcel 303, (Anna's 500 acres where the resort was located and Franziska's 500 acres), to her brother, Merickston Jr.

[64] Franziska stated that Parcel 303 comprised 1000 acres and was bought by the Testator in the joint names of himself and Anna under and by virtue of an Indenture made on the 30 July 1977 recorded in Deeds books volume 10 of 1977 folios 601 -604. She checked at the Lands Department in Belmopan and discovered that on the 14 April 2009, Merickston Jr. had filed a fraudulent application purporting that it was signed by the Testator and Anna for a First Certificate of Title to Block 11-Parcel 303. This application dated 14 April 2009.

[65] The Land Certificate dated 13 June 2009 for Parcel 303 was issued to Anna and the Testator and certified that they held the parcel of land jointly. At paragraph 13 of the witness statement, Franziska stated that the illegal shenanigans carried out by Anna and Merickston Jr. is shown in the Land Registry report dated 14 April 2009. The Testator and Anna's names were deleted and the land certificate dated 13 June 2009 also deleted. Merickston Jr. was issued with a certificate of ownership as sole proprietor of Parcel 303 on 13 April 2010. She stated that Merickston Jr. with the connivance of Anna wrongfully appropriated her 500 acres of parcel 303.

[66] Franziska stated that Merickston Jr. later took over her house which she built as her home with the permission of her father, and which was acknowledged as her property not only by her father when he was alive but also her mother and her siblings including Merickston Jr. Further, that Merickston Jr. destroyed her original architecture of the house and converted her living room into bedrooms so that he could collect more rent for it. Franziska further deposed that Merickston Jr. has also changed the name of the resort business to "Belize Boutique Resort and Spa."

Anna's Witness Statement dated 24 October 2018

[67] Anna in her witness statement stated that she was not in agreement with the Witness Summary filed for her by Mr. Perera and she replaced same with the Witness Statement filed by Mr. Bradley, her new attorney-at-law. Further, that the affidavit filed on 10 July with a signature purporting to be her's was not shown to her. As such, she disassociated herself from that affidavit. The affidavit filed by Anna is not dated 10 July. (Submissions of counsel for the appellant stated that Anna was referring to her amended defence).

[68] Anna stated that the Testator and herself acquired parcels of land at and around Maruba Resort Jungle Spa Limited located near Mile 40 ½ Old Northern Highway, Belize District, in their joint names ("the Maruba Properties"). That the Testator during his lifetime discussed how they should divide the Maruba Properties among their children later on. Based on those discussions they mutually agreed how the said properties should be divided among their children, namely, Franziska, Merickston, Alexandra and Veronica.

[69] Based on the agreement, Anna stated that she and her husband made a Will dated the 1 May 2005. She was the executrix of the Will probated by the Supreme Court on the 25 June 2009. She stated that by the 5th devise of the Will, the Testator gave, devised and bequeathed 1000 acres of a 1500 acre parcel of land from the Maruba properties to Franziska and the remaining 500 acres to herself. Further, by the 5th devise

the Testator gave, devise and be bequeathed the house to Franziska which she built on the Common area. The house is located on the 1000 acres intended for her. She had been given 500 acres of the 1000 acres already and 500 acres remain to be given to her.

[70] At paragraph nine of the witness statement, Anna stated that she has now come to understand that the remaining 500 acres intended for Franziska along with the house that she built on it has been transferred to her son, Merickston Jr. Further, she thought that the 500 acres and the house devised to Franziska were given to her and she cannot understand how the 500 acres and the house could have gone to Merickston Jr.

[71] She stated at paragraph 10 of her witness statement that it was a mistake that Merickston Jr was given Franziska 500 acres of land and her house she built on it. Further, if it is her signature that is on any documents purporting to transfer to her son the 500 acres and the house, then she does not have any recollection how her signature could be on them.

[72] Anna stated that on several occasions, the Testator and her discussed and agreed on the division of the Maruba properties that both of them decided to give their children. She stated that at a board meeting of Maruba Jungle Resort Spa Limited, one of the businesses on the Maruba properties, Motion 5 of the meeting records that the house belongs to Franziska. The Minutes of Maruba Jungle Resort & Spa on 26 December 2004 shows at Motion 5 that "*Franziska's house can be used for time sharing and rentals."*

[73] Further, Anna's evidence is that the Testator and her made a signed declaration in writing on the 2 of July 2006 that the house Franziska is claiming does not form a part of Maruba Resort Jungle Spa Limited. Even further, Anna stated that the Testator and herself prepared a typewritten letter dated 4th of November 2005, that the house is the property of Franziska. At paragraph 14 of her witness statement, she stated that she indicated by a sketch plan the locations and portion of the land of the Maruba Properties to be given to each of the children. She wrote on the sketch plan that Franziska is to get parcel 302 which is 500 acres, as well as 500 acres from parcel 303.

[74] Anna stated that all her daughters were present when the Testator signed his Will and she wants the Testator's request to be followed. Anna also gave oral evidence that she thought she still owned her 500 acres and her house at the Maruba Properties and she just recently found out that she owned nothing and that her son, Merickston Jr. owns them. She further stated that she transferred by mistake large sums of money to her son and she cannot remember why she did so. Also, she would have liked to settle this matter with Franziska but does not have the funds in her account to pay her off.

[75] In cross examination, Anna said she transferred Parcel 303 to Merickston Jr by mistake. That the 500 acres in the common area includes her house and she would like to keep that for the entire family and she thinks she made a mistake there also.

Witness statement of Merickston Jr. dated 29 August 2018

[76] The evidence of Merickston Jr as shown in the witness statement dated 29 August 2018, is that the Testator's interest in Parcel 303, Block 11 containing 455.09 hectares (1000 acres) was not legally or beneficially severed during his lifetime therefore the property could not be devised under the Will. He exhibited a copy of the Land Certificate dated 15 June 2009 which shows the Testator and Anna held Parcel 303, jointly.

[77] He stated that after the death of the Testator on 16 February 2009, Anna, the remaining owner of Parcel 303, applied to the Registrar of Lands to remove the name of the Testator and submitted the application for "Deletion on death of a Joint Proprietor." This is shown at MN2. Thereafter, Anna as sole owner of Parcel 303 transferred Parcel 303 to him on 13 April 2010. He denied that there was fraud or mistake in the registration of his interest. Further, the Registrar of Lands is not a party to this claim and has not made any claim against him on account of fraud or mistake.

[78] Merickston Jr. stated that the Testator did not sever the joint tenancy of Parcel 303 and none of the assertions made by Franziska are sufficient to sever the joint tenancy. Further, any discussions if it had taken place, were mere discussions.

[79] Merickston Jr. addressed the Sketch Plan and stated that it was prepared after the Testator's death. As such it cannot be an act of severance prior to his death. Further, in relation to the house, the documents relied upon are not sufficient to sever the joint tenancy as neither joint owner took any steps to transfer property or the house. Further, it was the Testator who built the house and he, Merickston Jr. remodeled the building and did aesthetic improvements.

[80] Merickston Jr. accepted that the Testator executed the Will and devised certain properties including Parcel 303, but stated that whilst those may have been testamentary wishes, those were ineffective in law because Anna became the sole proprietor of Parcel 303, upon his death. He also addressed the loss claimed by Franziska at paragraph 25 of his witness statement and denied she suffered any loss. That Maruba Resort Jungle Spa Belize Ltd. would have incurred loss, if any.

The judgment of the trial judge

[81] The trial judge dismissed Franziska's claim with costs as agreed. The judge stated that there was only one issue in the claim and that is whether Anna wrongfully transferred estate property to Merickston Jr. She accepted that Parcel 303 was jointly owned legally by the Testator and Anna at the time of the death of the Testator. The judge also correctly stated that the legal title could not be severed according to law. She considered the question as to whether the equitable interest in parcel 303 was severed before the death of the Testator. However, she was unable to decide on severance as she did not have the declaration to show when Parcel 303 fell under the Registered Land Act.

[82] The trial judge correctly addressed the effect of severance at paragraph 8 of her decision where she stated:

> "The effect of severance is that when the Testator died, Anna, 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 Testator's estate. If there was no severance then the interest, both legal and beneficial, would vest in Anna alone and Anna could do with the parcel, including the property, whatsoever she desired."

Application to register Parcel 303 and finding of trial judge

[83] The trial judge accepted the evidence that Parcel 303 was unregistered at the time of the Testators death. Further, that the application to register Parcel 303 under the Registered Land Act (the RLA) was dated the 14 April 2009 and was made in the joint names of the Testator and Anna. She correctly stated that this means that the first registration of Parcel 303 was made after the Testator's death. The judge referred to Section 42 of the RLA which provides for delayed registration of three months without a fee. Thereafter a penalty is incurred. At paragraph 10 of the decision, the judge found that the registration under the RLA is valid since there was "… *nothing specifically pleaded and no action was taken to impugn the application for registration or the registration itself* …"

[84] The trial judge considered the evidence as to what transpired after the first registration of Parcel 303. She noted that an application had been made to the Registrar of Lands to remove the Testator's name from the register on the basis of his death. Thereafter, Parcel 303 was transferred by Anna to Merickston Jr. as a gift. The judge stated that section 26 of the RLA explains the effect of Merickston's registration. That is, he has absolute title. The judge noted also that section 26 is expressed to be subject to section 30 of the RLA. The judge explained at paragraph 13 of her judgment the effect of the registration is that Anna was holding Parcel 303 as trustee for sale. The court said:

"This all means that if, after the Testators death, Anna continued to hold the parcel as a Trustee for sale with the Estate of the Testator she would not have had the right to give it away to anyone. So, anyone who received it as a volunteer, did so

subject to the rights of the estate and of the beneficiary who was entitled to receive the legacy. Merrickston would, not have the same protection that a purchaser for value would ordinarily have."

The issue of severance not determined by the trial judge

[85] At paragraph 14 of the judgment, the judge stated that to determine the status in which Anna held Parcel 303, after the Testators death, the court has to enquire as to whether the equitable joint ownership of the parcel had in fact been severed before the Testator's death. The trial judge was referred to the Law of Property Act (LPA) by the attorney for Franziska who argued that since parcel 303 was not registered until after the Testator's death the applicable Act was the LPA. The judge noted that the LPA allows for the severance of the equitable interest held in joint property in one of two ways, that is, (a) By giving statutory notice in writing to the co-tenant **or** (b) by other acts effectual to severe the joint tenancy. The statutory notice need not be in any form, but it must be given *inter vivos*.

[86] The attorney for Franziska had urged upon the court below that the Testator through his actions and eventually by his gift to Franziska under the Will made it clear that he had severed the joint tenancy. Franziska relied on Anna's testimony that she and the Testator had had discussions and made an agreement as to how Parcel 303 was to be divided and that Anna indicated on a sketch plan the details of the agreement made between them.

[87] The Judge was also referred to the declaration signed by Anna and the testator on 2 July 2006. This states that the property known as Villa Franziska belongs to her and is not part of the resort but could be used as such with Franziska's consent. The judge noted that this appears to be the same house that the Testator refers to in the Will. In relation to the Will, the judge found that there was no severance by the Will since it takes effect upon the death of its maker.

[88] Counsel for Merickston on the other hand referred the court to section *11 of the RLA* which provides that:

> "From the date of any Order made by the Minister under Section 4, all dealings relating to any land in the compulsory registration area named in that Order shall be made in accordance with this Act, and no dealing made otherwise than in accordance with this Act shall have any validity or effect."

[89] Counsel submitted that even if the parcel had not been registered under the RLA at the time the joint tenants purported to sever, once the area in which it was situated had been declared registered land, then the RLA was applicable. The trial judge accepted this interpretation since section one of the Act provides:

> "This Act may be cited as the Registered Land Act and shall apply to any area declared by the Minister under section 4 to be a compulsory registration area."

[90] The trial judge considered the distinction of severance between the RLA and the LPA. She referred to section 103(2) of the RLA which provides:

> "Provided that where a legal estate (not being settled land) is vested in joint owners beneficially, and any owner desires to sever the beneficial interests, he shall give to the other owners a notice in writing of such desire **and** do such other acts or things as would, in the case of personal estate, have been effectual to sever the beneficial interest, …

[91] Having said the above, the judge did not determine the issue of severance because of lack of evidence as to when the property had been declared a compulsory registration area. The judge accepted the arguments for Merickston Jr. that it was for Franziska to prove the severance and the applicable law. At paragraph 22, the judge said that, "*Proof in this situation is not simply that the parcel had not been registered under the RLA at the time of the testator's death. It requires proof of when the area had been declared for*

compulsory registration through the production of the Minister's Order or otherwise." As a result, the court found that Franziska has not proven her case.

[92] As such, the judge stated that there was no need to consider whether the joint tenancy had in fact been severed according to the LPA or the RLA because neither has been proven to be applicable and therefore, the claim failed.

Grounds of Appeal

[93] Franziska appealed the whole decision of Young J dated 5 February 2019, perfected on 12 March 2019. The grounds of appeal were:

1. The judge erred in law in holding that the applicable law to determine whether or not severance of joint tenancy had taken place is section 103 of the Registered Land Act, Chapter 194 (RLA) and not section 38(2) of the Law of Property Act, Chapter 190 (LPA);

2. The trial judge erred in law in holding that Franziska was required to prove when the area of the disputed property was declared a compulsory registration area through the production of the Minister's Order;

3. When the court's attention was drawn to section 11 of the Registered Land Act, the trial judge erred in law when she failed to take judicial notice of the Government Gazette and the Order (Instrument) published on the 25 of March 2008;
4. The trial judge erred in law when she found in paragraph 10 of her decision that "*there was nothing specifically pleaded and no action was taken to impugn the application for registration or the registration itself ..."*

5. The trial judge erred in law by failing to evaluate the evidence tendered at the trial.

Ground 1: - *Whether the judge erred in holding that the applicable law to determine whether or not severance of joint tenancy had taken place is section 103 of the Registered Land Act, Chapter 194 (RLA) and not section 38(2) of the Law of Property Act, Chapter 190 (LPA).*

[94] Learned counsel for Franziska referred to paragraph 20 of the judgment of the trial judge where she stated the distinction between the RLA and LPA. He submitted that under the circumstances of the case, it is the LPA which should determine severance in this case.

[95] In my view, it is absolutely clear, from the judgment of the trial judge that there was no finding as to the applicable law in relation to severance. The reason for not doing so was the lack of information before the court as to when Parcel 303 became a registered area under the RLA. Section 11 of the RLA provides:

> "**From the date of any Order** made by the Minister under Section 4, all dealings relating to any land in the compulsory registration area named in that Order shall be made in accordance with this act and no dealing made otherwise than in accordance with this act shall have any validity or effect."

[96] The trial judge did not have the date of the Order made by the Minister as provided under section 11 of the RLA and therefore did not make a determination as to the applicability of the RLA.

Ground 2: - *The trial judge erred in law in holding that Franziska was required to prove when the area of the disputed property was declared a compulsory registration area through the production of the Minister's Order.*

[97] Counsel for Franziska submitted that the judge at paragraph 21 of her judgment stated neither Franziska nor the Defendants offered any evidence which could properly inform the court of the status of Parcel 303, that is, when it had in fact been declared to be a compulsory registration area. Further, that the defendants raised this issue quite early in their second amended defence and in submissions made on the narrow issue of severance before the trial. Counsel argued that there was nothing in the second amended defense that raised that issue as to when the property was declared to be a compulsory registration area. Further, it was incumbent on the defense to prove when the area of the disputed property was declared a compulsory registration area and that the severance, if any, occurred after the area was so declared.

[98] Mr. Perera for Merickston Jr. in response submitted that it was for Franziska to prove her case. The documents should have been provided to the trial judge and the court would accept the evidence as true.

[99] I am in agreement with the trial judge that it was for Franziska, as the Claimant, to prove that Parcel 303, was within an unregistered area, since she claimed a declaration that it was acquired by the Testator in the joint names of himself and Anna and severed during the lifetime of the Testator by the mutual agreements, acts and course of dealing of the joint tenants thereby creating a tenancy in common. Further, that it was the LPA that applied.

Ground 3: *When the court's attention was drawn to section 11 of the Registered Land Act, the trial judge erred in law when she failed to take judicial notice of the Government Gazette and the Order (Instrument) published on the 25 of March 2008.*

[100] Counsel for Franziska submitted that the judge is required by the *Interpretation Act*, Chapter 1 and the *Evidence Act*, Chapter 95, to take judicial notice of the Government Gazette and instruments having the force of law. Further, if the judge had taken Judicial Notice of the Order of the Minister published in the Gazette of 25 March 2008, she would have determined the proper law for the severance of joint tenancy is section 38 (2) of LPA and that the acts of severance of the joint tenancy took place in the year 2005, prior to the year 2008, before the declaration of the area.

[101] Mr. Perera for Merickston in response submitted that the judge cannot misdirect herself by failing to consider the date of compulsory registration if it was not brought to her attention by Franziska through the evidence or in their submission. Further, even if the matter were to be considered under the LPA, there will be no severance of the joint tenancy since the reasons raised by Franziska as substantiating the severance are insufficient.

[102] It is my view, that the learned judge could not have taken judicial notice of the gazette if it was not brought to her attention. The judge would be expected to take judicial notice of the Gazette only if presented to the court at the time of trial.

Ground 4: *Whether there were pleadings impugning the application for registration or registration of Parcel 303*

[103] The trial judge in addressing the issue of whether Anna wrongfully transferred estate property to Merickston Jr. and by extension the issue of registration of Parcel 303, stated at para 10 of her judgment that:

"10. The Court notes that, the Defendants pleaded at paragraph 29 of their Second Amended Defence that they "*were not involved with the application for the First Registration. They did not prepare or present the application. Once they found out that the application had been filed they filed a police report* ……" Senior Counsel for the Claimant, with restraint, refers to the application as "*dubious*." It certainly seems contrary to the contents of the Will, which the Testator is accepted as having signed and which has never been contested. There was nothing specifically pleaded and no action taken to impugn the application for registration or the registration itself, therefore, the registration stands as valid.

[104] The trial judge as shown in the background above, addressed the good pleadings and weeded out the bad pleadings that were before the court. The judge addressed with each counsel what should be the pleadings in the case.

[105] The Court did not consider pleadings and affidavits filed by Anna and Merickston Jr. prior to the Second Amended Defence dated 6 June 2018. On 10 July, they put in a defence and also affidavits both dated 10 July. The trial judge was confused and stated it is either defence or affidavits. These pleadings addressed pleadings filed on 26 March and hence the judge stated those pleadings were not good. The trial judge further stated that whatever are in the affidavits should be in witness statement. Witness statements were filed by all three parties. Mr. Bradley who represented Anna at trial did not file a further amended defence.

[106] Despite the agreement as to what constituted pleadings, at the settlement of the record for the appeal, all the pleadings before amendment and all affidavits formed part of the list. In this appeal, it is my view, that the Court should consider only those pleadings that were considered by the trial judge.

Relief claimed in relation to fraud or mistake

[107] It is noted that Franziska claimed under the amended Fixed Date Claim Form, at paragraph 5, the following relief:

> "(5) An Order for rectification of the Register for Parcel ID 11-101-303 in which 455.09 Hectares (approximately 1000 acres) was transferred from the Estate of the Testator, to Merickston on 13 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 under the Will be transferred to her;"

[108] The amended affidavit sworn on 13 June 2018, in support of the Amended Fixed Date Claim Form, did not address the relief claimed at paragraph 5 above. The witness statement dated 17 August 2018 by Franziska, at paragraph 12 states that:

> "12. On checking at the Land Department in Belmopan I discovered that on 14 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.
> A copy of the Fraudulent Application marked **'F'** is attached dated 14 April, 2009.
>
> A Land Certificate dated 13 June 2009, for Block 11-Parcel 303 was issued to Merickston Nicholson and Anna Nicholson by the Lands Department. Curiously although the Original Indenture dated 30 July 1997 for the said 1000 acres stated that the land was conveyed to my father and mother "as purchasers" the Land Certificated dated 13 June 2009, certified that they held the parcel of land "jointly."
> A copy of the Land Certificate dated 13 June 2009, marked "G" is attached."

[109] At paragraph 13, Franziska stated that her mother and brother carried out illegal shenanigans. See para 15 also. There were no pleadings as to mistake or fraud in relation to registration which should have been specifically pleaded. Raising it in relief is not sufficient. Even if it was pleaded, the evidence does not prove mistake or fraud.

Counsel for Franziska referred to old pleadings not before the trial judge for consideration

[110] Learned counsel for Franziska, in written submissions contended that the fraud was pleaded and particularized in Franziska's affidavit. He referred to proceedings commenced by "*Fixed Date Claim Form and the Second Affidavit constitute the pleadings of fraud in this case."* He relied on paragraphs 10 and 11 of the second affidavit of Franziska sworn on 26 March 2018, where she stated Merickston Jr forged the Testator's signature and both defendants fraudulently transferred Parcel 303.

[111] The older pleadings referred to by counsel for Franziska were not pleadings considered by the trial judge. The judge clearly weeded out the old pleadings with counsel present. For argument sake, even if they were good pleadings, fraud has not been proven by Franziska. In relation to the amended pleadings considered by the trial judge, there were no particulars of fraud pleaded. In my view, the trial judge was correct in finding that "There was nothing specifically pleaded and no action taken to impugn the application for registration or the registration itself, therefore, the registration stands as valid."

Ground 5 – *Whether the trial judge erred by failing to evaluate the evidence tendered at trial*

[112] Learned counsel submitted that though Anna's Defence was not amended to accord with her evidence, it was still incumbent on the trial judge to consider the evidence given under Oath during trial especially her assertion that the transfer of Parcel 303 to Merickston was done by mistake which was in addition to Franziska's pleaded fraud and mistake.

[113] Further, counsel argued that to dismiss summarily this evidence on the ground that it contradicted her defence and which she testified she had no recollection of signing, is contrary to the letter and spirit of the overriding objective of the CPR which is to enable the court to deal with cases justly. Counsel referred to paragraph 3 of Anna's witness statement dated 24 October 2017, where she stated that "*there is an affidavit dated 10 July 2018 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 it. I do not agree with the contents of the affidavit and wish to disassociate myself from it."* According to counsel she was referring to the amended defence of the first and second defendants dated 10 July 2018.

[114] Anna had signed a Certificate of Truth in relation to her joint amended defence when Mr. Perera was her attorney-at-law. This is a serious allegation and no attempt was made at trial to raise this issue of Anna not seeing the Amended Defence. I note also with some concern that there is an affidavit on the record which was sworn on 17 August 2018 and filed by Musa & Balderamos, the Claimant's attorney, for the first Defendant, Anna. The judge did not consider this affidavit. She considered the witness statement filed by Mr. Bradley.

[115] In my view, the trial judge could not have turned a blind eye to the pleadings which is just as important as evidence. The second defendant, Merickston Jr. was ambushed after pleadings were filed. The judge considered Anna's evidence in the witness statement and evidence in cross-examination and concluded that it contradicted her amended Defence, in which she disputed the claim by Franziska on the ground that Parcel 303 did not form a part of the estate of the Testator as it was held jointly between herself and him. There was no attempt by Anna to withdraw the Amended Defence on the basis that when she signed the Certificate of Truth, the contents of the Amended Defence was not shown to her. The judge was not asked to determine any issue concerning the Certificate of Truth or an affidavit not shown to Anna.

[116] Further, the overriding objective of the CPR is to enable the court to deal with cases justly and this includes that the parties should be on equal footing. Merickston Jr needed to be given an opportunity to answer these new assertions stated in Anna's witness statement.

[117] Also, it is troubling that in cross examination of Anna, she did not accept that her defense contradicts her evidence as stated in her witness statement. At page 464 of Vol 2, she said that as far as she is aware, she said the truth in her defense. Anna signed the certificate of truth as stipulated by 10.5(8) which states that "*The defendant must verify the facts set out in the defence by a certificate of truth in accordance with Rule 3.12."*

[118] Anna had not withdrawn her amended defense at the time she raised mistake in her witness statement in relation to the transfer of Parcel 303, and other serious allegations against Merickston Jr. At this time, she was represented by Mr. Bradley. In my view, the trial judge correctly addressed this issue of the pleadings at paragraphs 23 – 25 of her judgment. The judge determined that Anna's evidence contradicted her pleaded defence. The evidence was therefore, not disregarded. She relied on Rule 10.5 and 10.7 of the *Supreme Court (Civil Procedure) Rules, 2005* (CPR) as to the duty of a defendant to set out his case and the consequences of not setting out his case. Rule 10.5 puts a duty on a defendant to set out its cases. It states:

> "10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim. Service of copy of defence. Defendant's duty to set out case.
>
> (2) Such statement must be as short as practicable.
>
> (3) In the defence, the defendant must say –

(a) which (if any) allegations in the claim form or statement of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or statement of claim-

(a) the defendant must state the reasons for doing so; and (b) 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.

(6) If, in relation to any allegation in the claim form or statement of claim the defendant does not – (a) admit it; or (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation."

[119] Anna complied with the rules and set out her defence. She did not admit the claim but gave reasons as to why she had the right to transfer Parcel 303 to Merickston Jr.

[120] The consequences of not setting out a defence is provided by Rule 10.7 which provides:

"10.7 (1) 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.

(2) The court may give the defendant such permission at the case management conference.

(3) The court may not give the defendant such permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference."

[121] Anna contradicted her defence in evidence without seeking the court's permission to amend it as provided by Rule 10.7 of the CPR. She stated in her witness statement that she found out of her mistake at that time so she had ample opportunity to amend her defence. Young J at paragraph 25 of her judgment stated that Anna had not amended her defence and no leave had been sought to rely on the new assertions. These assertions are as shown in Anna's witness statement and evidence in cross-examination claiming she made a mistake not only with Parcel 303 but property which she stated was mistakenly transferred to her son. This includes money from her bank account. The trial judge was therefore, correct in not considering the new assertions made by Anna.

Whether this Court should consider severance of the joint tenancy

[122] In my view, it was open to the trial judge to consider the evidence before her in order to determine if it was sufficient to amount to severance under the LPA since clearly the RLA would have been inapplicable as no statutory notice was given by the Testator to Anna to sever the joint tenancy. Further, there is now before this Court, the Declaration from the Ministry of Natural Resources showing that the property was declared a registered area on the 25 March 2008. The discussions relied upon by Franziska in relation to Parcel 303 occurred before 25 March 2008. Franziska has attached to the written submissions before this Court, the declaration from the Ministry of Natural Resources showing that the property was declared a registered area on the 25 March 2008, under section 4 of the Registered Land Act ('the Declaration'). This was not before the trial judge.

[123] I agree with the majority that this Court should determine whether there was severance of the joint tenancy in accordance with section 38(2) of the LPA.

The law on severance of joint tenants

[124] The authorities relied upon by the appellant in support of the arguments on severance by mutual agreement are: **Halsbury's Laws of England** 4th Ed. Reissue Volume 39 (2) paragraph 201, and **Burgess v Rawnsley** [1975] Ch 429, [1975] 3 All ER 142, CA.

[125] At paragraph 201 of **Halsbury's Laws of England** 4th Ed. Reissue, Volume 39 (2), states:

> "**201 Severance of joint tenancies by mutual agreement or conduct**. If joint tenants enter into a mutual agreement to hold as tenants in common, there is severance, even though it takes effect only in equity. Subsequent conduct of all joint tenants may effect a severance, but the mere fact that the joint tenants employ the land for the purpose of a partnership business does not sever the joint tenancy …
>
> A unilateral declaration of intention to sever, if communicated to the other joint tenants, may be sufficient to effect a severance."

[126] Before looking at severance itself, joint tenancy, and tenancy in common will be briefly addressed. Joint tenants is where two or more persons simultaneously hold an interest in the same parcel of land as joint tenants. In the instant matter, Anna and the Testator held Parcel 303 as joint tenants. There are two distinguishing features of this form of co-ownership. These are (a) the right of survivorship and (b) the four unities which should be present for a joint tenancy to exist.

The right of survivorship

[127] The right of survivorship (or *jus accrescendi*) is a significant incident of a joint tenancy. When one joint tenant dies the whole of the estate remain with the surviving joint tenant(s). The right of survivorship cannot be defeated as long as the co-owners remain joint tenants.

[128] However, a joint tenant is free to sever a joint tenancy. If severance occurs during the lifetime of a joint tenant, a tenancy in common in equal shares will be created. It is then that the interest in the jointly held property will devolve in accordance with the provisions of that person's Will or otherwise be distributed under the laws of intestacy. In this case, the Testator had a Will but any gift from the joint tenancy will fail if there was no severance during his lifetime.

The four unities

[129] There is no dispute that Parcel 303 was a jointly held property. The four unities below had to be present for the joint tenancy to exists:

(a) The Unity of Possession – Each co-owner is entitled to possession of the whole property; (Anna and the Testator, as joint tenants did not have an individual share).
(b) Unity of Interest – The interest of each joint tenant must be the same in nature, extent and duration.
(c) Unity of title – All the joint tenants must derive their interest from the same document.
(d) Unity of time – The interest of joint tenants must vest at the same time.

All the unities existed in the title held by Anna and the Testator in relation to Parcel 303.

Joint tenancy distinguished from tenancy in common

[130] There is no right of survivorship in tenancy in common. The only unity which is essential for there to be a tenancy in common is unity of possession. Tenants in common own an individual share but yet it is an undivided share in the property. Upon the death of a tenant in common, the share of a tenant in common passes to the beneficiary or beneficiaries under his Will or persons entitled to his property under the rules governing intestate succession.

Methods of severance of joint tenancy

[131] Parcel 303 was unregistered land. It is now registered land and Merickston Jr. has title to this property for over nine years. The mutual agreement which the appellant relies upon occurred when Parcel 303 was unregistered. Therefore, the methods of severance under the **Law of Property Act**, is applicable. I am not in agreement with counsel for Merickston Jr., Mr. Perera that the **Registered Land Act** is applicable. Section 38 of the LPA provides for joint tenancies and right to sever a joint tenancy in equitable interest. It 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 the sever the 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 interests 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 tenants 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**, ……"

[132] According to section 38 of the LPA, there can be no severance of the legal joint tenancy. However, the equitable interest of the joint tenancy can be severed by acts or things. Severance in equity is the act of converting a joint tenancy to a tenancy in common in equal shares. In this case, there is no evidence that the Testator sent a notice in writing to Anna to sever the tenancy in accordance with the proviso of section 38(2) of the LPA. If such a notice was sent, it had to show an intention to bring about severance immediately and not in the future. For instance, in the case of **Harris v Goddard** [1983] 1 WLR 1203, the general prayer in a divorce petition asking the Court to exercise its jurisdiction under the Matrimonial Causes Act did not operate as a notice to sever the joint tenancy in equity.

[133] The other acts or things in the proviso to section 38 would include mutual agreement. At common law, there are three ways in which a joint tenancy can be severed. These are stated in the classic statement on severance by the Vice-Chancellor, Sir W Page Wood, in **Williams v Hensman (1861) 1 J & H 54:**

"A joint tenancy may be severed in three ways: In the **first place an act** of any 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 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 interest 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 cases of **Wilson v Bell** and **Jackson v Jackson**."

[134] In summary, the three methods of severance are: (1) alienation by one of the joint tenants of his share in the property; (2) by mutual agreement between the joint tenants and (3) by a course of dealing between them.

[135] The effect of severance is to give the severing joint tenant a share equal in size to the share of each of the other tenant(s). Parcel 303 consist of 1000 acres and if there was severance Anna and the Testator would have become equitable tenants in common in equal shares. Therefore, Franziska was required to prove that there was an agreement between the Testator and Anna of severance of the joint tenancy in equity thereby creating a tenancy in common in equal shares, 500 acres each, yet undivided share as there was no evidence of alienation of any portion of Parcel 303.

[136] The Testator had not alienated (the first method of severance) any part of Parcel 303 during his lifetime. He could have done so by some act even unilaterally without the consent of his wife, Anna. In the case of **Sunshine Dorothy Thomas et al v Beverley Davis** [2015] JMCA Civ 22, relied upon by the respondent, it was the first method, an act (unilateral alienation by one of the joint tenants) and the second method, mutual agreement which applied to sever the joint tenancy.

Was there severance by mutual agreement?

[137] The Court has to examine the evidence relied upon Franziska to determine whether there was severance by mutual agreement or other acts or things as would have been effectual to sever the tenancy in equity. Her evidence is that there was a mutual agreement between her parents to sever the joint tenancy of Parcel 303. In relation to this method, once there is a common intention to sever, there need not be a discussion about shares. In the instant case, as mentioned above, it would be equal shares.

[138] Further, there is no need for a mutual agreement to be in writing but there must be an intention to sever. Even further, the agreement need not be expressed but, can be inferred from a course of dealing eg. acts of parties or negotiations. In the case of **Burgess v Rawnsley** relied upon by the appellant, Mrs. Rawnsley agreed to sell Mr. Burgess, her share of a house they bought together. It was an oral agreement which was not enforceable to sell the property. In other words, it was unenforceable for want of writing. However, the intention to sever was present. The courts considered that severance had occurred and an undivided share was severed *inter vivos.*

[139] In the instant matter, I respectfully part ways with the majority that there was an agreement to sever the jointly owned property, Parcel 303. In view my view, the evidence which I will discuss below, was insufficient to establish severance.

Mutual agreement

[140] Franziska at paragraph 5 of her witness statement stated that there was a mutual agreement between her parents that her mother, Anna would get an be in charge of 500 acres of the developed area of the resort and they both agreed that 1000 acres adjacent to the developed area would be for her, Franziska. This evidence in my view, does not establish severance between the Testator and Anna of Parcel 303, which is

1000 acres. Anna was treated only as a beneficiary and as if the joint tenancy of Parcel 303 did not exist.

The Sketch Plan

[141] At paragraph 6 of her witness statement, Franziska stated that Anna noted on a sketch plan that Sisi (Franziska) will receive 500 acres on Parcel 302 and 500 acres from Parcel 303 "known as B". The evidence is that following the agreement between Anna and the Testator, Anna prepared the sketch plan noting exactly what was agreed between her and the Testator. It was noted on the sketch plan, at the foot that she "Sisi" which is Franziska's nickname would receive 500 acres from parcel 302 and 500 acres from parcel 303. The other 500 acres from 303 marked "A" was the developed area where the resort was for Anna.

[142] Franziska in her witness statement said Anna prepared the sketch plan. In cross-examination Franziska was unaware as to who prepared the Sketch Plan. She knows that her mother's handwriting is at the bottom of the Sketch Plan. She accepted that it was not drawn by her father. Merickston Jr. in cross-examination testified that he received the sketch plan in 2007 before his father passed away. It is his handwriting within the map itself. The bottom part is Anna's handwriting as to who get what portion.

[143] The Sketch Plan is not a document prepared by the Testator and Anna. Also, it does not show an intention to sever the joint tenancy of Parcel 303 by either the Testator or Anna. This document addressed all properties owned by the Testator, including the jointly held property. As such, it is my view that it cannot support severance of Parcel 303.

The Testator's Will

[144] Franziska's evidence was that the Agreement as per the sketch plan was later confirmed in the specific devise in the Will made by the Testator on 30 May 2005. A copy

of the Will was exhibited. There was no dispute by the parties that the Testator's Will by itself cannot sever the jointly held property (Parcel 303) with Anna.

[145] In relation to the issue of severance, I disagree with the argument by counsel for Franziska that the terms support severance. The terms of the Will, in my view, cannot support severance when there was no evidence of severance. On the contrary, it shows that the Testator treated all properties as belonging to him. He devised 500 acres of Parcel 303 to Anna and stated that if she dies before him, then the properties would be shared as stated in the Will. Anna was treated as a beneficiary and not as joint owner of Parcel 303.

[146] The Testator having addressed severance at the top of the Will, did not put in the Will that the joint tenancy of Parcel 303 had been severed and thereby he was entitled to devise his share of Parcel 303. At the Second Clause, the Limiting Clause, it states:

> **"**SECOND: It is my intention to dispose of all property I am entitled to dispose of by Will, other than my disposable interest if any, in any property held in joint tenancy, if any to be exercised by specific articles of this will."

[147] The Testator, at no time addressed the jointly held property, Parcel 303, and severance of same. Anna's agreement with the Will cannot support severance of the property. Mutual wills can amount to severance. There is no Will by Anna and one which should have been made at the same time when the Testator made his Will. It was only the Testator who prepared a Will which addressed various properties known as the "Maruba Properties", including the entire jointly held property. As such, the gift in the Will of the jointly owned property fails because there was no severance.

[148] Further, the provision in the Will for Franziska to get the house is a gift for the future and not evidence of severance between the Testator and Anna. The gift therefore failed.

[149] The Testator bequeathed 500 acres of Parcel 303 (Undeveloped portion) to Franziska in the Will, without evidence of severance and shares. Even if there was severance, it had to be assumed that it was equal shares. Parcel 303 is 1000. acres. How is it the Testator sought to give Franziska the house which sits on Anna's 500 acres of Parcel 303, the "Common Area"? This shows that the Testator treated all the properties as solely owned by him.

[150] Even further, there is no evidence that Franziska should be given title to any specific portion in the "Common Area" (developed portion of Parcel 303). Parcel 303 consist of many resort buildings, including the house that Franziska claimed, the Mayan Jungle Loft. Unless there was severance, if one of the joint tenants dies, the property passes to the survivor under the principle of survivorship to Anna.

Handwritten Declaration by Testator and Anna made on 2 July 2006 – The Villa

[151] Exhibit FN3 to Anna's Witness statement shows that the Owners of Maribu Resort, being the Testator and Anna, signed the following handwritten document:

> "Let it be known by Merickston Nicholson and Anna Nicholson, that the property known as Villa Franziska on the grounds of Maruba Resort Jungle Spa belongs to Franziska Nicholson. The property is not part of the Maruba Jungle Spa.
>
> The Property can be used as part of the Resort as approved by Franziska Nicholson.
>
> Owner of Maruba Resort
> Anna M. Nicholson
> M. L. Nicholson."

[152] This Declaration is that the house known as the Villa belongs to Franziska and is not part of the Resort. However, with the approval of Franziska it can be so used. This is a business arrangement. This house is located on Parcel 303 and Merickston Jr has title to this property. Neither the Testator nor Anna severed their joint tenancy and gifted Anna a portion of Parcel 303 where the house is located.

Minutes of Maruba Jungle Resort & Spa

[153] The Minutes of Maruba Jungle Resort & Spa on 26 December 2004 shows at Motion 5 that "*Franziska's house can be used for time sharing and rentals*." It was recognized there that Franziska owns the house but no efforts were made by the Testator nor Anna to convey the property to her. Instead it was used for the Resort business. The Company did not own Parcel 303 and the Resolution of Maruba Jungle Resort & Spa as shown in Franziska's witness statement, does not support severance.

Document from Company signed by Anna dated 4 November 2005

[154] This document was prepared on the letterhead of Maruba Resort Jungle Spa and dated 4 November 2005. It states:

> "To whom it may concern:
> Let it be known that the building named Maya Jungle Loft on the grounds of Maruba Resort, located next to the two swimming pools, is the property of Franziska Nicholson. It is not part of Maruba but can be used if authorized by Franziska as a Signature Suite for accommodating guests of Maruba Resort.
>
> Sgd. Anna M. Nicholson
> Merickston L. Nicholson"

[155] In my view, this document which was signed by Anna and not by the Testator does not show the intention of the Testator nor Anna to sever Parcel 303.

Evidence insufficient to establish severance

[156] There was no evidence that the Testator during his lifetime severed in equity the joint tenancy with Anna, thereby creating a tenancy in common in equal shares of Parcel 303, the property in dispute. The mutual agreement and other acts relied upon by Franziska are insufficient to establish severance.

[157] Parcel 303, the jointly held property by Anna and the Testator was under the unregistered area. It later fell under the registered area and had to be registered after the Testator's death. On 14 April 2009, an application was made to the Lands Department for the issue of a First Certificate of Title to Parcel 303. At that time the property had fallen under the Registered Land Act and had to be registered within a month. It is unclear from the evidence who made that application.

[158] The Land Certificate dated 13 June 2009 for Parcel 303 was issued to Anna and the Testator and certified that they held the parcel of land jointly. At this time, the Testator was deceased. Anna, as sole survivor of the joint tenants was entitled to Parcel 303 on the principle of survivorship *(jus accrescendi*). Anna transferred Parcel 303 to her son, Merickston. On 13 April 2010, Merickston was issued with a certificate of ownership as sole proprietor of Parcel 303.

[159] Maruba Resort and Jungle Spa Limited, the family business, is located on a portion of Parcel 303. The Company was never and is not the owner of Parcel 303.

[160] The 500 acres of Parcel 303 devised to Franziska under the Will is undeveloped. This portion adjoins the developed area. The house Franziska is claiming is located on the developed area, the Common Area. The Fifth devise in the Will shows that the Testator devised to Franziska the house which sits on the Common Area which is the developed area. Franziska in cross-examination said that the Testator had never sub-divided Parcel 303 and the property at the time of the hearing remained undivided. There is no evidence as to what portion of land on which the house is located would go to

Franziska. No Transfer was ever done either by the Testator or Anna to transfer the house to Anna.

[161] The Will of the Testator are his wishes in relation to all the properties owned by him which included the jointly owned property, Parcel 303 which was not his to give by Will, unless it was severed.

Conclusion

[162] For all these reasons, I would have dismissed the appeal with costs to the second respondent, Merickston Jr. to be taxed if not agreed.

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HAFIZ-BERTRAM, P (Ag.)