IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CIVIL APPEAL NO. 32 OF 2021

BETWEEN:

(1) GREGORY CHOC
(2) FRANCISCA TZALAM CHOC

Appellants

and

(1) COY CREEK FARM LIMITED
(2) THE ATTORNEY GENERAL OF BELIZE

Respondents

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Before:

The Hon Madam Justice Hafiz-Bertram	President
The Hon Madam Justice Woodstock-Riley	Justice of Appeal
The Hon Mr. Justice Bulkan	Justice of Appeal

Appearances:

Ms. Pricilla J. Banner for the appellants.
Mr. Darrell Bradley for the first respondent
Ms. Agassi Finnegan, Senior Crown Counsel, for the second respondent.

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2023: 10 March
29 September

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JUDGMENT

[1] **BULKAN, JA:** Since 1492, European incursion in the Americas has been catastrophic for the continent's indigenous inhabitants. Contact was swiftly followed by expansion and consolidation of settlements along the length and breadth of the continental landmass and its accompanying island chains, with the result ranging from annihilation of entire Nations to a drastic reduction in the numbers of others. Those lucky enough to survive the foreign onslaught ended up ceding great swathes of territory, as they were pushed further and further inland. In all this, violence and

wars of conquest were not the only *modus operandi*, as disease, trade (however imbalanced the terms) and even the stealthy process euphemistically described as "effective occupation and administration together with the passage of time"[1] each played some part in the steady dispossession of the continent's indigenous peoples. Sadly, as the facts of this case reveal, this pattern has not yet played out. And in keeping with historical antecedents, indigenous peoples today are sometimes integrally involved in their own displacement.

[2] The specific dispute in this case centres around a small portion of land – variously put at between 5.5 acres and 6.43 acres – along the Punta Gorda/San Antonio Road in the Toledo district of Belize, to which there are competing claims of ownership. On one side is an American couple, owners of the first respondent Coy Creek Farm Limited, and on the other a Mayan couple – the appellants Francisca Tzalam and her husband Gregory Choc – residents of San Antonio village, with both parties claiming to have purchased it from one Ponciano Coy (hereafter the "vendor"), another resident of San Antonio village. The disputed portion forms part of a larger parcel originally held by the vendor, who apparently may have "sold" it twice.

[3] The parcel in question was originally held by the vendor pursuant to Location Ticket No. 1390/63, dated 14th May 1964. Therein it is described as "situate in the San Antonio Indian Reserve, Toledo District, and being Block No. 14, Toledo District, and containing approx. 22 acres…" Following a standard process, in 2014 the vendor surrendered the Location Ticket for a Minister's Fiat Grant, numbered 108/2014 and dated February 19, 2014, to which he was entitled having fulfilled the conditions of the Location Ticket. On the Grant, the property is described as "Block No. 1" containing 21.76 acres and located "along the Punta Gorda/San Antonio Road, near Mafredi Village, Toledo District".

[4] The appellants claim to have purchased 23 acres from the vendor sometime in 2013, evidenced by an unregistered Deed of conveyance executed on 1st June 2013. From a receipt annexed to one of the witness statements, the purchase price is stated to be BZ$23,000.00 (paragraph 2 of the Defence states it to be $25,000.00), though the consideration is recorded on the Deed as being BZ$4,000.00. According to the second-named appellant (hereafter 'Tzalam'), on an unspecified date in February 2013 she visited the Lands Department, but was told by an unnamed agent that they were not facilitating any land transactions in Maya communities in the

[1] *Cal and others v AG* (2007) 71 WIR 110 per Conteh C.J. at para [78].

Toledo district because of a directive and a court order, and there was a note on the wall to this effect as well. This was echoed by the first-named appellant (hereafter 'Choc'), who deposed in his witness statement that upon Tzalam's direction, he visited the Lands Department in Punta Gorda in February 2013 along with the vendor, where he observed a notice posted at the entrance not to dispose of any lands within certain Maya communities. Choc added that an agent confirmed that no land transactions were being processed. In passing I note that the evidence on this point is curious, suggesting that husband and wife made separate trips to the same Lands Department in February 2013, but I will not dwell on the implications of this apparent duplication of efforts. In any event, both appellants deposed that they also followed traditional practices in effecting this acquisition, informing the Village Council of their intent to do so, and they each maintained that they only intended to pursue "a private transaction within the Maya customary law sense". Thus, the appellants claim to have observed traditional practices in obtaining this land from the vendor while simultaneously attempting (unsuccessfully) to invoke national procedures which would give them a legal title, good against the world.

[5] Contemporaneously with the sale to the appellants, or at least not long afterwards, the first respondent entered into negotiations with the vendor, culminating in the purchase of the property held pursuant to the Minister's Fiat Grant No. 108/2014 in May 2014. This transaction was handled by an Attorney, who conducted the necessary title searches and duly registered the conveyance to the first respondent after being satisfied of the source of the title and the lack of any registered encumbrances.

[6] By 2015, both parties had taken possession of their respective portions, and before long an overlap of some 5 or 6 acres between the two areas surfaced. Macario Salam, a farmer residing in San Antonio Village and caretaker of the respondent's parcel, noticed sometime in mid-June 2016 that the boundary pegs had been moved, and shortly thereafter he saw the appellants on the piece which would have formed part of the respondent's land as originally bounded. This set off a back-and-forth between the parties lasting for more than a year as each side maintained their claim to the overlapping 5-6 acre portion, and the boundary markers were shifted several times according to the competing claims.

[7] For the first respondent's case, the caretaker Salam deposed that Choc told him that the pegs were moved on his (Choc's) instructions because the property was part of Mayan lands and belonged to him. Thereafter, Salam witnessed the appellants utilising the disputed portion,

cutting down trees and planting coconut trees. Upon the first respondent's directions, the property was re-surveyed in January 2017 and the boundary markers replaced at their original positions, but in July 2017 the markers were moved again and Salam deposed that he saw the appellants on that disputed portion regularly.

[8] For their case, both appellants deposed that when they saw Salam on the land which they knew to be theirs, they investigated further and discovered the Deed of Conveyance between the vendor and the first respondent, which property included part of the 23 acres they had purchased the year before. As this conflict had by then been going on without resolution for at least a year, Tzalam then brought it to the attention of the Village Council at a meeting in July 2017, following which the alcalde ordered Salam to refrain from any activity in the disputed area. It was shortly after this that the first respondent initiated these proceedings.

[9] As specified in the claim form, the first respondent sought a declaration of ownership of the parcel of land situate along the San Antonio Road, Toledo District, described as Block No. 1 and comprising approx. 21.76 acres, a permanent injunction restraining the appellants, their agents, servants or any person authorised by them from coming onto, occupying or otherwise dealing with the said parcel of land, and various heads of damages for the appellants' trespass on and damage to the land as well as mesne profits for the appellants' wrongful interference with and occupation thereof.

[10] In their defence, the appellants asserted ownership of the parcel of land purchased from the vendor, which transaction was effected only according to traditional practices because their attempt to do so at the Lands Department was unsuccessful. The appellants specifically denied trespassing on any land belonging to the first respondent, averring that at all times they only occupied their own property as purchased in 2013. They also denied moving any boundary markers or pegs, claiming that as far as they were aware, there were no markers on the property prior to the survey done in February 2017.

[11] The appellants also brought an ancillary claim against the Attorney General of Belize, reiterating that their 2013 conveyance could not be lodged at the Lands Department because the government's agents refused to accept it due to a directive issued in accordance with the judgment of the Supreme Court in *Maya Leaders Alliance v AG* (Claim No. 366 of 2008). However, by lodging the first respondent's conveyance in 2014, the appellants allege that the

Lands Department acted in violation of both the Court Order and subsequent directive, rendering the 2014 Deed unlawful, void and of no effect. By so acting, the appellants contend that the agents of the second respondent committed misfeasance in public office, causing them loss and prejudice.

[12] By way of relief in this counterclaim the appellants sought a Declaration of their ownership of the parcel of land purchased from the vendor pursuant to their June 2013 agreement, as well as an injunction restraining the first respondent from interfering with the property along with damages. No specific relief was sought against the Attorney General.

[13] Following a trial in which the respective parties tendered documents and were cross-examined at length, acting Chief Justice Arana (as she then was) found for the first respondent in relation to all its claims. After a detailed recap of the evidence and submissions, she concluded that the first respondent is the legal owner of the parcel of land purchased from the vendor and granted a declaration to this effect along with a permanent injunction restraining the appellants, their servants and agents from entering onto, occupying or otherwise interfering with the first respondent's land. Arana CJ (ag.) also awarded the first respondent damages for trespass, mesne profits for the appellants' wrongful interference with their land, and interest thereon.

[14] The trial judge also found that the appellants failed to prove the counterclaim. Arana CJ (ag.) concluded that at the time of the purported conveyance to the appellants in June 2013, the vendor did not have legal title to the property and was thus not in a position to transfer ownership to them. Further, assessing the evidence in the case, she found that the appellants were pursuing a standard legal transaction according to the Laws of Belize and not a traditional land transfer according to Maya custom, but were unsuccessful in their attempt. As such, they merely had an unregistered conveyance executed at a time when the vendor did not have legal title, so they in turn did not obtain legal title to the property and were trespassing on the property legally owned by the first respondent.

[15] Dissatisfied with this decision, the appellants appealed, raising 17 grounds of appeal where they contend that the trial judge erred. Many of these grounds are repetitive, collectively raising a far smaller number of issues. Indeed, the appellants' written arguments did not deal with each ground separately, but lumped them together in groups, and in like manner this judgment will

structure the analysis around the issues thus identified, which may mean examining multiple grounds together.

[16] The crux of the appeal is that the trial judge erred by concluding that the first respondent is the lawful owner of the 21.76 acres purchased from the vendor while they failed to obtain legal title to the portion they attempted to purchase. Flowing from this, the appellants contend that the trial judge erred by finding that they had wrongfully trespassed on the first respondent's land and awarding the relief that she did. Relatedly but distinctly, the appellants disagree with the trial judge for failing to find that the actions of the second respondent constituted misfeasance in public office. A final complaint, raised in the grounds and the written submissions but not argued at the hearing of the appeal, is that the trial judge erred by failing to provide any written reasons for her decision, though no specific relief is sought in respect of this ground. As thus distilled, four broad issues arise for determination, largely corresponding to the manner in which the appellants organised their written submissions, as follows:

(1) Who is the lawful owner of the disputed portion of land? (the "ownership" issue);
(2) Did the appellants commit acts of trespass on land belonging to the first respondent? (the "trespass" issue);
(3) Do the acts and omissions of the second respondent in connection with these transactions amount to misfeasance in public office? (the "misfeasance" issue) and
(4) Did the trial judge err by not providing adequate reasons for her decision (the "reasons" issue)?

I propose to consider each of these in like order in the remainder of this judgment.

(1) Ownership: who is the lawful owner of the disputed portion of land?

[17] I hope I do not mischaracterise the appellants' submissions by saying that from their perspective, resolution of this issue is intimately bound up with the character or nature of the land in dispute – specifically, their contention that it is located within traditional Mayan territory and is Maya communal property. Starting from the general position that communal property rights are legally acknowledged in Belize pursuant to two cases – the first being ***Cal v AG*** *(2007) 71 WIR 110*, a decision by Conteh C.J. in the Supreme Court, and the other ***Maya Leaders Alliance v AG***,

which was brought on behalf of all the villages of the Toledo region[2] – the appellants argue that judicial recognition in turn gives rise to certain legal obligations, outlined in the Consent Order of 22nd April 2015, agreed to in the second of the two cases. As evidenced by the Location Ticket held by the vendor, Ponciano Coy, the property in question fell within Maya communal territory and was thus subject to the Consent Order which applies to all lands, including private lands. In any event, the appellants argue, the land in question was *not* the private property of the vendor, and thus when the Lands Department registered the conveyance to the first respondent in 2014, this violated the terms of the court Order. Accordingly, the 2014 conveyance was of no effect and conferred no legal interest in any property on the first respondent.

[18] By contrast, the appellants continue, they participated in Mayan traditional processes at every stage, with their attempted use of the national system coming about only because of the lack of procedures governing customary indigenous lands. In fact, they submit, the ambiguity inherent in the existence of parallel systems left them vulnerable, and it was this vulnerability that motivated their attempt to safeguard their interest – though the trial judge made no attempt to resolve the contradiction inherent in utilising both traditional Maya procedures and the national statutory one. Nonetheless, they argue, since they adhered to the former, they are the lawful owners of the property in question, and the trial judge erred by failing to come to this conclusion.

[19] In response, the first respondent noted that no evidence was led to prove that the land in question is within the boundaries of San Antonio Village or indeed that it falls within any area designated as Maya communal lands. Whereas the appellants rely on the description of the land in the Location Ticket, the first respondent points to that in the Minister's Fiat Grant, in which the same property is stated to be "near Mafredi Village". Mafredi Village was not a party in either of the Maya Land rights cases cited by the appellants, and this, the first respondent argues, reinforces the uncertainty as to the location and nature of the disputed property. Further, the first respondent argues, in the absence of official demarcation of Maya communal lands pursuant to the Consent Order, there is no basis on which to conclude that this property falls within communal territory so as to undermine the title it obtained. In any event, the first respondent submits that the Consent Order does not apply to private property, such as the land in question that was held by the vendor, so he was not precluded from disposing of his interest, which he did successfully. For largely

[2] *Maya Leaders Alliance v AG* [2015] CCJ 15 (AJ), 87 WIR 178; [2016] 2 LRC 414 (CCJ).

these reasons, the first respondent submitted that the findings and conclusion of the trial judge on this issue should not be disturbed.

[20] To resolve this issue as to ownership, I propose to structure my analysis around the answers to the following four questions:

- What are the implications of judicial affirmation of Mayan customary land tenure in Belize?
- What is the effect of the 2015 Consent Order and related court orders that preceded it?
- What is the status or character of the disputed land? and
- What are the nature and effect of the respective transactions in this case?

Starting from a general position and becoming progressively more specific, the aim of these questions is to provide a framework for discussing the point in issue, namely that as to the legal ownership of the disputed land.

What are the implications of recognition of Maya customary rights?

[21] The first question as to the status of lands used and occupied by the indigenous Mayan peoples in Belize is necessary in order to ascertain the implications for the dispute before us. The appellants rely on the landmark *Cal* and *Maya Leaders Alliance* cases where it was judicially affirmed that Mayan customary land tenure exists in the Southern Toledo region. These cases unquestionably constituted major developments in the law, but as is evident from ongoing controversies, including the opposing positions taken in this case, the meaning and implications of Mayan customary rights remain shrouded in some uncertainty.

[22] At the outset, it is perhaps important to be reminded of a fundamental principle, which is that the received common law in the territory of Belize anchors the legal system of the country as a sovereign, political entity. While Mayan communal title is recognised and protected at common law,[3] it remains a specie of ownership unknown to English property law and exists alongside the national system of landholding. This fact does not detract from Mayan ownership of their land, but it does have implications for the nature of the title itself. As much as this may be galling to

[3] To date, Maya communal property rights in Belize have only been judicially recognised. Despite multiple undertakings in one form or another, no follow-up legislative action has been taken to implement such recognition.

the descendants of those who have occupied this territory for millennia, it is too late in the day to dispute the events accompanying colonialism and which led to the creation of this nation state. Indeed, this is the very point made by Byron P and Anderson JCCJ in *Maya Leaders Alliance*, where they acknowledge that despite general international recognition of the status of indigenous peoples as original sovereign entities over their ancestral land, sovereign authority over all lands is now vested in the government of Belize, a position captured by para 5 of the Consent Order.[4] This means that disputes such as this can only be resolved within the context of national law, whether found in statute, common law or the Constitution.

[23] Another fact to acknowledge is that the common law in its larger sense has always recognised the rights of indigenous peoples in one form or another. Jurisprudence on this issue has not developed in linear fashion, nor has recognition occurred at the same pace or on the same basis around the Commonwealth. Nonetheless, it is possible to identify foundational principles from judicial decisions upholding indigenous claims from across the diverse countries to which English common law was exported – some dating back for more than a century.[5]

[24] In Belize, judicial affirmation of indigenous rights came as long ago as 2007 in *Cal v AG*. Although a first instance decision, the judgment of Conteh C.J. remains to date the most fulsome treatment of Mayan communal property rights in Belize – and, one can fairly add, one of the most authoritative and sensitive on this subject to be found anywhere in the Commonwealth. In *Cal* Conteh CJ held, based on "overwhelming evidence" presented in the case, that Maya customary land tenure survives in Belize, more specifically in the area in question, namely the Toledo District of Southern Belize.[6] The main plank of the government's opposition to the claim was that territorial sovereignty acquired by the British crown and succeeded to by the independent government of Belize effectively extinguished any rights or interests in the land not granted by the Crown/State. Rejecting this argument, Conteh CJ applied the continuity doctrine, holding that the "mere acquisition or change of sovereignty did not in and of itself extinguish pre-existing title to or interests in the land."[7]

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[4] *Maya Leaders Alliance*, footnote 2 above at para. [78].

[5] For example, in New Zealand see *R v Symonds* [1840-1932] NZPCC 387, while more modern cases include *Mabo v Queensland (No. 2)* (1992) 107 ALR 1 (HC Australia) and *Delgamuukw v British Columbia* [1997] 3 SCR 1010. For a more detailed discussion, see Arif Bulkan, *The Survival of Indigenous Rights in Guyana* (UG 2014) at chapter 2.

[6] Above, footnote 1 at paras. [40]-[41].

[7] Ibid. at para. [77]; see also paras. [78], [84] and [92] of the judgment.

[25] In so finding, Conteh CJ was merely applying a longstanding principle in both international law and common law that draws a distinction between sovereignty (*imperium*) on the one hand – which confers political rights of control and government, including what is referred to at common law as the radical or ultimate title to land – and property (*dominium*) on the other – ownership of which is governed by private law. Importantly, a change in sovereignty has implications for government of the territory as a unitary whole, but it does not result in the dispossession of the inhabitants, whose private rights continue undisturbed. What Conteh CJ also held decisively was that these principles of continuity – traditionally applied to conquered and ceded countries (that is, where territory changed hands from one power to another) – also applied to settled territories, such as Belize. In his words: "It is however, logical, rational and fair to conclude that if the inhabitants of a *conquered* colony did not ipso facto lose their pre-conquest interests and rights in land, a fortiori therefore, the *indigenous* inhabitants of a *settled* colony could not have lost theirs without more, by the mere act of settlement or even by cession of their land to another or new sovereign."[8]

[26] As adverted to earlier, although recognised by the common law, native title is a distinct form of property ownership, described as "sui generis" in Canadian jurisprudence.[9] This unique nature results in certain differences from a title under English property law, also acknowledged in *Cal*. Applying longstanding common law precedent,[10] Conteh CJ held that when the Crown (and later its successor, the government of Belize) acquired territorial sovereignty, it became vested with the radical or ultimate title to all lands in Belize, which was however burdened by the pre-existing rights to and interests of the indigenous inhabitants in the land.[11]

[27] An important feature of this 'unique' form of ownership is that it is usufructuary in nature, meaning that it carries with it "the right to occupy the land, farm, hunt and fish thereon, and to take for their own use and benefit the fruits and resources thereof", which includes the right of usage for cultural and spiritual purposes.[12] Moreover, it is a communal title, governed by Maya customary law.[13] Thus while judicial affirmation by or within national law means that Maya customary

[8] Ibid at para. [82] (emphasis in the original).
[9] *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, per Lamer CJ at para. [112].
[10] *Calvin's Case* (1608) 7 Co. R. 1; *Amodu Tijani v Southern Nigeria* [1921] 2 A.C. 399 at 402-4.
[11] *Cal*, footnote 1 at para. [92].
[12] Ibid at paras. [67]-[68].
[13] Ibid at para. [68].

property is good against the world, how it is held and distributed internally is regulated by their own customary law and practices.

[28] Another unique feature of native title is its inalienable nature.[14] One possible explanation of this characteristic lies in its genesis as a parallel system, so to speak, which is acknowledged by the incoming sovereign and exists *solely* for the benefit of pre-existing inhabitants. Thus, the community itself continues to hold and control territory traditionally occupied by them and to use it internally as they wish, but the land cannot be sold. If they wish to relinquish it, they can only do so to the nation state. This feature was specifically acknowledged in *Cal*, as for instance through the evidence of expert anthropologists, whose testimony was relied upon and quoted extensively by Conteh CJ. Of importance for our purposes is the following passage from Professor Wilk, which forms part of his detailed testimony in the case:

> "…families can claim and retain plots over long periods of time in an arrangement that resembles private property. However, the village government would intervene if someone outside the village tried to buy one of these plots. Within the customary land management system of the Kekchi and Mopan Maya, **the usufruct rights of households do not permit individual farmers to sell single plots of land**. As demonstrated by Neitschmann (1999:9), **this norm against commodification of land remains extremely strong**."[15]

[29] At this point it should be clarified that when the consent order agreed to in *Maya Leaders Alliance* declared that Maya customary land tenure gives rise to both collective and individual property rights, this can only mean that individual rights exist *within* the framework of the collective, regulated internally by Maya traditional practices. In keeping with the established characteristics of native title, however, the formal title is a communal one, which is vested in the Village as a whole. This legal reality reflects a cultural feature of native/aboriginal title, observed and documented both in the case law[16] and by anthropologists, as for example in the passage quoted above.

[30] An obvious consequence of these principles is that the same parcel of land cannot be held under

[14] *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, per Lamer CJ at para. [113].
[15] Quoted in *Cal*, footnote 1 at para. [32] (emphasis supplied).
[16] *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010.

both systems simultaneously. Since the source and nature of a title under each system are distinctive, then any given parcel of land is either one or the other. If the source of title is Maya customary law, the form of ownership is communal, vested in the community as an entity, and by nature inalienable; if the source lies in the national system as derived from English common law, ownership is private and it can be freely transferred or otherwise alienated. However, given these distinctive characteristics, the two types of landholdings simply cannot exist simultaneously in relation to the same parcel of land.

[31] The strength of native title is another factor to consider. While indigenous rights would have survived a change in sovereignty pursuant to principles of both international law and common law, this did not guarantee their continued existence over the course of time. Whether by the exercise of raw dominance as settlers simply moved in and appropriated native lands, or whether by operation of law as the Crown seized and disposed of lands, extinguishment was a tragic but unavoidable reality of colonialism. In the past, wherever this may have occurred unlawfully, it is now a matter to be settled through negotiation and reparation, which is squarely the remit of the executive and achieved through mechanisms like national commissions. In the present, the common law provides guidance regarding how and by whom extinguishment may occur.

[32] As stated by Conteh CJ, "extinguishment of rights to or interests in land is not to be lightly inferred. There must … be clear and plain legislative intent and action to effect it."[17] This is a settled principle for which there is copious authority at common law. It captures two important aspects – one, that the sole authority which can lawfully extinguish private rights is the legislature, not the executive,[18] and second, that the enacting legislation must evince a clear and plain intention to have this effect.[19]

[33] Applying these principles to Belize, Conteh CJ found that land grants pursuant to the various crown lands ordinances culminating in the *National Lands Act*, CAP191, did not operate so as to extinguish pre-existing Maya communal property rights – but in fact, had the opposite effect given that s. 62 of the *Crown Land Ordinance* of 1872 expressly saved pre-existing rights.[20] According to Conteh CJ, those pre-existing rights must have included Mayan customary land tenure, since

[17] *Cal*, footnote 1 at para. [89].
[18] At common law see *AG v Nissan* [1970] A.C. 179 (HL).
[19] There is substantial authority for this – see, for example, *Ngati Apa v AG of New Zealand* [2003] NZCA 643, per Elias CJ at 668.
[20] *Cal*, footnote 1 at paras. [83]-[86].

nothing in it could be said to be repugnant to the Ordinance. Neither could the reservation system subsequently introduced have this effect, as its purpose was the opposite, namely to afford protection to indigenous peoples.[21]

[34] Thus while that litigation ended favourably for the claimants, in that they obtained declarations of ownership to the lands traditionally used and occupied by them within the boundaries established through Maya customary practices, the practical reality meant that all that was obtained up to that stage were general declarations. Specifics as to where precisely their traditional lands began and ended were undetermined, and one of the reliefs granted by Conteh CJ was an order that the government determine, demarcate and provide official documentation of the title held by the two claimant villages, while taking into account the rights of neighbouring villages.[22]

[35] In *Maya Leaders Alliance v AG*, the second of the two Maya land rights cases, these issues were not as exhaustively discussed at the apex level, since by that time the government of Belize conceded that the appellants – representing some 23 villages of the Southern Toledo region – had customary land tenure over Maya lands in the Toledo District, which constituted property protected by ss 3(d) and 17 of the Constitution. Once again, however, the government of Belize was found to be under a duty to take positive steps to recognise Maya customary land tenure and the land rights flowing therefrom, which included the need to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect those rights in the general law of the country, without detriment to other indigenous communities. These directives were earlier agreed to during the appeal by the government and encapsulated in a Consent Order entered into on 22nd April 2015. They also largely replicated the orders as originally granted by Conteh C.J. at first instance, but which had been discharged by the Court of Appeal on 25th July 2013. Thus, between 25/7/2013 and 22/4/2015, there was no court order restraining the government from dealing with lands used and occupied by Maya villages, but since April 2015 the initial injunction has been restored and remains in place.

[36] This is the point at which Maya communal rights stand. To recap, it is indisputable that Mayan customary rights to and interests in land survived the acquisition of sovereignty by the British. However, all that has been established by the aforementioned cases is the general entitlement

[21] *Cal*, footnote 1 at paras. [89]-[91].
[22] *Cal*, footnote 1 at para. [136].

of the country's Mayan peoples, with the specific areas of ownership still to be forensically identified and formally documented. The latter is a necessary undertaking, for it hardly needs stating that where landholdings are not precisely identified and reflected in official surveys, maps and deeds, that is a recipe for chaos. At a national level, landowners must know precisely the areas upon which they may build, occupy and otherwise use, failing which there would be endless conflict between neighbours. Similarly, as regards Mayan communal property, while judicial acknowledgment is an overdue and essential step, formal demarcation and titling must follow to ensure smooth co-existence with the rest of Belizean society.

What is the effect of the 2015 Consent Order?

[37] The second question to be resolved is ascertaining the scope and effect of the Consent Order, agreed to in April 2015 in *Maya Leaders Alliance*. Relying primarily on its terms by which the Government undertook to abstain from "registering any interest in land", the appellants contend in their written submissions that the Consent Order applies to all lands, including private land. Any other interpretation, they argue, would result in an absurdity, as it would allow agents of the government to facilitate innumerable land transactions and defeat the purpose of the undertaking. In response, both respondents submitted, relying upon the testimony of the Commissioner of Lands, that the undertaking was made between the government and the Maya people and cannot affect private land rights. Ms. Finnegan on behalf of the Attorney General vigorously argued that the fifth paragraph of the Consent Order, by acknowledging the constitutional authority of the government over all lands in Belize, was a clear indication that it was not meant to affect private rights and that any other interpretation could cause the government to act unconstitutionally.

[38] A preliminary hurdle in the way of the appellant's submission is that the Consent Order agreed to by the parties before the CCJ was not entered until 22nd April 2015, which was long after the issue of the Minister's Fiat Grant in February 2014 and the subsequent conveyance to the first respondent in May 2014. In the face of this chronology, Ms. Banner amended her written submissions by deleting any reference to "Consent", placing reliance instead on the earlier Order issued by Conteh C.J. at first instance in June 2010. However, this does not solve the problem because while a majority of the Court of Appeal in July 2013 dismissed the government's appeal against Conteh's finding of communal property rights in the Southern Toledo area, they set aside the consequential relief, including the injunction, ordered by him. This means that over the

material period between July 2013 and April 2015, which includes the time when the Minister's Fiat Grant was issued to the vendor and the property was conveyed to the first respondent, there was no injunction in place restraining the government from disposing or otherwise dealing with lands in the area.

[39] While this temporal factor ought to be sufficient to counter the appellants' argument as regards the Consent/court order, I agree with counsel for the appellants that injunction or not, the ongoing dispute over Maya land rights demanded caution on the part of the Lands Department in formalising land transactions in the relevant areas. At a minimum, the principles governing extinguishment mean that whether or not the government is injuncted, it cannot appropriate indigenous property without legislative authority and following the requisite standard. This does make it necessary to consider exactly what the government is prohibited from doing. As such, a useful starting point is the Consent Order, which is set out below in full:

1. *The judgment of the Court of Appeal of Belize is affirmed insofar as it holds that Maya customary land tenure exists in the Maya villages in the Toledo District and gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution.*
2. *The Court accepts the undertaking of the Government to adopt affirmative measures to identify and protect the rights of the Appellants arising from Maya customary tenure, in conformity with the constitutional protection of property and non-discrimination in sections 3, 3(d), 16 and 17 of the Belize Constitution.*
3. *In order to achieve the objective of paragraph 2, the Court accepts the undertaking of the Government to, in consultation with the Maya people or their representatives, develop the legislative, administrative and/or other measures necessary to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices.*
4. *The Court accepts the undertaking of the Government that, until such time as the measures in paragraph 2 are achieved, it shall cease and abstain from any acts, whether by the agents of the government itself or third parties acting with its leave, acquiescence or tolerance, that might adversely affect the value, use or enjoyment of the lands that are used and occupied by the Maya villages, unless such acts are preceded by consultation with them in order to obtain their informed consent, and are in conformity with their hereby recognized property rights and the safeguards of*

the Belize Constitution. This undertaking includes, but is not limited to, abstaining from:

a) issuing any leases or grants to lands or resources under the National Lands Act or any other Act;

b) registering any interest in land;

c) issuing or renewing any authorizations for resource exploitation, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.

5. *The constitutional authority of the Government over all lands in Belize is not affected by this order.*
6. *…*
7. *…*
8. *…*
9. *The Court retains jurisdiction to oversee compliance with this order and sets 30th April 2016 for reporting by the parties."*

[40] While the appellants point to the broad language in para. 4(b) of this Order, which forbids registration of any interest in land – "land" being unqualified – such breadth is more apparent than real. Sub-paragraph (b) cannot be read in isolation, for it is bounded by paragraph 4 itself, the terms of which are explicitly directed towards preserving the integrity of "lands that are used and occupied by the Maya villages". The only effective means of achieving this ultimate goal of identifying and protecting areas of Maya customary tenure is by demarcation and the award of titles to evidence ownership. However, given the rights and incidents of ownership under national law, private landholdings that exist within the general area would clearly be unavailable for demarcation and titling in favour of Mayan villages. It seems obvious that just as Maya communal rights are constitutionally protected by virtue of sections 3 and 17 of the Constitution, so too are the proprietary interests of all other landowners in Belize. This being the case, the embargo embodied in paragraph 4 obviously cannot extend onto private lands, as those areas are constitutionally protected from expropriation.

[41] Of course, it may reasonably be asked what would be the position if areas known to be traditionally used and occupied by Maya peoples are currently held pursuant to private, individual titles. As the appellants argued, leaving such areas out of the government's undertaking could

defeat the purpose of protection and possibly even render the judgments recognising ownership worthless. There is no doubt a *macro* issue as to the extent of proprietary rights over these areas (Southern Toledo and others where Mayans traditionally occupy) that remains outstanding, but this case raises a micro issue, involving a discrete dispute between two individual landholders. It is only by way of identification, delineation and demarcation in a holistic manner – as ordered by successive Mayan land rights cases – that the practical situation of Maya communal landholdings in general can be resolved. If private titles currently exist over areas regarded as communal Maya property according to traditional knowledge, this may mean that at some time in the past those communal rights were extinguished – whether lawfully or unlawfully – to facilitate the private grants. In any such case, the affected Villages would possibly be entitled to a remedy for their losses in the form of compensation or alternative grants, but ascertaining whether extinguishment occurred and, if so, what (if any) compensation may be due, are matters that can only be resolved by evidence. Moreover, piecemeal determination as conflicts arise is not a rational or tidy approach to resolving issues of historic and current dispossession. Pending such determination, therefore, the principle articulated in the preceding paragraph stands, namely that pursuant to the constitutional protection of *all* private property in Belize, any private rights that may exist within the general area are necessarily outside the embargo in paragraph 4. Further, the specific dispute this court is tasked with resolving is that between two landowners over the same parcel of land, both of whom invoked the national system.

[42] Another dimension to this sub-issue is whether either the embargo or general principles governing extinguishment precluded the Lands Department from issuing the grant to the vendor in February 2014. After all, the land conveyed to the vendor would have been classified as national, not private, prior to its issue. As emerged in the evidence, a location ticket constitutes a sales agreement, which would result in a title once the conditions are fulfilled. Significantly, any such grant is issued pursuant to legislative authority, as stated in clause 16 of the Location Ticket. The Lands Department thus considered itself legally bound to issue the Minister's Fiat Grant to the vendor once the consideration was paid by him. Whether such transactions constitute an unlawful extinguishment of Maya communal title is a question that can only be answered by detailed evidence as to the location and prior use of the property in question, which is absent in this case. Moreover, this is an issue that can only be pursued by the Village itself, as represented by its leaders, and not by an individual resident acting on her own and seeking to secure a personal title.

[43] To elaborate on the last point, the reason why contesting the legality of issuing a Minister's Fiat Grant is a matter for the Village is because Maya communal property is by definition collectively owned. That collective title vests in the Village. If, therefore, the allegation is that the Lands Department unlawfully issued a grant over Maya communal property, the only authority to make this claim is the owner of the property, that is, the village concerned. Further, as Professor Wilk testified in *Cal*, Alcaldes do not act on their own as Mayan communities operate on the basis of collective decision-making.[23] These facts highlight the complication of this case and the difficulty inherent in the appellants' contention, for it is by no means clear that the residents of San Antonio are agreed that the issue of grants (which constitute freehold title) violate their communal property rights – as the beneficiary of the grant in question is Ponciano Coy, himself a Mayan and resident of San Antonio. In other words, the appellants on their own cannot call into question the issue of the grant to Ponciano in February 2014; the only authority to do so is San Antonio Village – and it is by no means clear that the Village as a collective agrees with the appellant that the issue of such grants constitutes a violation of their communal rights.

[44] To summarise, therefore, private lands enjoy the same constitutional protection as Maya communal property and are thus not captured by the embargo in the Consent Order or by standard extinguishment principles. National lands are covered, but whether any specific parcel (including that which forms the subject-matter of this case) was wrongly converted to private property in the past is an issue for the Village as owner, which may only be resolved by evidence.

What is the character/nature of the disputed land?

[45] This brings us to the third question, which involves an inquiry into the nature of the disputed property. Once again, the parties are diametrically opposed in their respective positions. The appellants rely on the original location ticket, No. 1390/63, held by the vendor, which describes the land in question as "situate in the San Antonio Indian Reserve, Toledo District" as proof that the vendor's property which they purchased constituted national land and not private property. Reinforcing their position is the fact that San Antonio Village was one of the 23 villages represented in the *Maya Leaders Alliance* litigation, which ended in a concession from the government of Belize that Maya customary land tenure exists in the Maya villages of Toledo giving rise to constitutionally protected rights within the meaning of sections 3(d) and 17 of the

[23] Quoted in *Cal,* footnote 1 at para. [32].

Belize Constitution. In opposing this claim, the first respondent asserts that no evidence was led to prove that the disputed land is within the boundaries of San Antonio village or that it falls within any area designated as Maya communal lands. Further, the first respondent points to the Minister's Fiat Grant 108/2014, issued in respect of its parcel, on which the lands are described as situated "along the Punta Gorda/San Antonio Road, near Mafredi village, Toledo District". Unlike San Antonio, Mafredi village was not a party to either of the Maya land rights cases and thus is not a beneficiary of the declarations as to ownership.

[46] The fact that Mayan customary rights have been found to exist in the Southern Toledo district of Belize pursuant to two judicial decisions does not resolve this dispute between the parties. As discussed above, judicial affirmation was a milestone development for Belize's indigenous peoples, but as yet all that obtains are generalised declarations. In both *Cal* and *Maya Leaders Alliance*, the respective courts expressly acknowledged that the government is under an obligation to "delimit, demarcate and title" the areas of customary land tenure so as to afford them protection under the general laws of the country. While this demarcation process is currently underway it has not been completed, so as yet there is no clarity as to where the boundaries of these villages begin and end.

[47] As already noted, it is a standard practice borne of necessity and good sense that landholdings are precisely delineated on the ground and reflected in appropriate surveys, maps and deeds. For this reason, in *Maya Leaders Alliance* – the very case in which the existence of Maya customary land rights was acknowledged – the CCJ was unable to find a breach of the claimants' right to property. Despite the government's concession, the joint judgment of Byron P and Anderson JCCJ noted:

> "In this case, however, these Appellants face two substantial hurdles in successfully pursuing their claim relating to arbitrary deprivation of property. The first is that the nature of the property rights they enjoy is still to be precisely defined. The Consent Order records the undertaking of the Government to adopt affirmative measures to identify and protect those rights. In these circumstances it would be somewhat incongruous for this Court to award damages against the Government for breaching rights which the Maya accept are still to be identified. The second hurdle is related to the first. Until the rights are defined **this Court cannot satisfy itself as to the nature and extent of the entitlement of the particular Appellants before it**."[24]

[24] *Maya Leaders Alliance,* footnote 2 above at para. [35] (emphasis mine).

[48] In this case, the appellants' claim is not helped by the lack of evidence as to the location of the disputed property. While the Location Ticket originally issued to the vendor does refer to the property as situate in San Antonio village, the Minister's Fiat Grant for the same property describes it as situate "near Mafredi village". Ms. Banner downplayed this conflict as "neither here nor there", but I cannot afford to take the same cavalier approach. Anyone who has seen a Deed will know that the boundaries of property therein are described with great precision, referencing maps and/or surveys and often including measurements and coordinates. The appellants' dilemma is reflected in their Grounds of Appeal, in which the second paragraph alleges that the trial judge erred by failing to find that the properties in question "are located within Maya communal lands and are located in either San Antonio Village or Mafredi village". Such an imprecise claim highlights the factual uncertainty as to the location of the property in question, and in the context of property no judge could properly make a finding in those terms.

[49] Therefore, in the absence of clear and admissible evidence as to location, it cannot be said with certainty that the disputed property falls within Maya communal lands. In any event, as will be demonstrated in the following section, the source of the vendor's title conclusively settles any doubt as to the nature of the land in question. Accordingly, the view taken by the trial judge of the consent order cannot be disturbed.

The nature and effect of the transactions of the parties

[50] The foregoing discussion leads to the final question to be answered in determining the ultimate issue of ownership, namely, that of the nature and effect of the transactions in issue. Specifically, does the purported transfer by the appellants according to traditional Maya practices take precedence over and override the subsequent conveyance to the first respondent? The appellants submit that Tzalam is the lawful owner of the disputed land pursuant to traditional Maya customary practice. In their written submissions the appellants describe their approach to the transfer as "ambiguous",[25] but place the blame for this on the government's failure to implement mechanisms to protect Maya communal land rights.[26] They explain that the need to document land transactions arose because the government began issuing leases on Maya lands,[27] so the purpose of the conveyance was to transfer land from the vendor to Tzalam under

[25] Appellants' Submissions in Reply, para. [36].
[26] Appellants' Written Submissions, para. [38].
[27] Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at p 538.

Maya law.[28] Further, when it was suggested to Gregory Choc under cross-examination that their use of conveyancing documents, visiting the Lands Department and paying consideration implied that theirs was a private (as distinct from traditional) transaction, Choc answered inscrutably that "yes, you can say private in the common law sense. In the Maya customary law sense, it would not take the same meaning."[29]

[51] In assessing these contentions, a useful starting point would be to acknowledge certain unavoidable facts. First and foremost, land in Belize is either *national land* – available to be bought and sold within the national conveyancing system and subject to doctrines of real property law – or it is *Mayan communal land* – judicially recognised but as yet undefined, though certainly vested in the respective Villages and inalienable. Land cannot be both Mayan and national at the same time. Second, under Maya customary law, there is no tradition of utilising deeds, conducting surveys, or registering titles at the Lands Department. Indeed, how could there be? The national conveyancing system as exists now was introduced – or imposed – by a colonising power sometime in the 1800s. The pre-existing inhabitants of the area already had their own practices and systems and continued to follow those traditions. Third, there is a wealth of evidence confirming this exact position – that internal transactions are not conducted utilising the national conveyancing system but rather according to traditional and oral practices – coming not just from anthropologists[30] but more tellingly from the appellants themselves! Under cross-examination Choc agreed that the predominant form is oral dealings in traditional land,[31] while Tzalam stated quite clearly that utilising the Lands Department is not part of custom.[32]

[52] What, then, are the implications of having two systems? A central argument of the appellants is that the current situation is one of "ambiguity" – Ms. Banner advanced it in dramatic terms, describing it as "frightening" and the appellants and other Mayans as being "on a ledge", forcing them to have recourse to the national system to "safeguard" their interests. These are clever arguments, but they do not, nor can they displace, the reality. In the first place, the argument is misplaced. There is no denying that the process of implementation of the Maya land rights decisions has been painfully, frustratingly slow. But the primary impact of that sloth is upon Maya villages (as the landholder) vis-à-vis the rest of Belizean society. The lack of formal titles renders

[28] Ibid at p. 552.
[29] Ibid at p. 537.
[30] Such as in the passage quoted from Professor Wilk's testimony in *Cal*, quoted above at footnote 15.
[31] Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at 539.
[32] Cross-examination of Francisca Tzalam, Record of Appeal, Vol. 2 at 509.

communal lands vulnerable to extractive industries and other third-party users, and the violations they experience as a result have been comprehensively documented. For now, however, an important aspect of both land rights decisions is that they have resulted in injunctions prohibiting the government from dealing with national lands pending a comprehensive demarcation and titling exercise. Thus, as unsatisfactory as this 'ambiguous' situation is, Mayan villages do have a measure of protection in the extant court orders.

[53] As regards individuals, however, different considerations apply. In the absence of demarcation there is obvious ambiguity as to borders, but the foremost impact of this is on villages as owner, rendering its property vulnerable to encroachment by third parties or *outsiders*. However, the lack of formal titles does not and ought not to affect how Mayans (that is, *insiders*) distribute their communal property internally, between themselves. Put simply, Maya citizen A could transfer her family plot to Maya citizen B according to the Village's traditional practices; any dispute between A and B would be mediated and resolved by the community, with the alcalde playing a key role in that process, as described by Professor Wilk. At no point, however, would Maya citizen A or B need to obtain a Deed to prove ownership of their family plot between themselves, as their ownership is evidenced according to oral traditions.

[54] Thus, when the appellants claim that they sought to document their transaction to "safeguard" their interest, the question as *against whom it is being safeguarded* reveals the hollowness of the explanation. Threats from outsiders do not impact only on an individual within the village but threatens the community as a whole, because the land is communal property which vests in the entire Village. In such a case, therefore, the responsibility falls on the Village as a corporate entity – represented by its Alcalde and Council – to defend its borders (as they have done by bringing the two land rights cases). On the other hand, internal distribution and regulation of the communal property is governed by Maya custom and tradition, and no individual member of any Mayan village needs to have a Deed of Conveyance to "prove" their ownership of a specific family plot to other members of the Village. To return to Ms. Banner's argument, then, the ambiguity lies in the boundaries of Maya villages, and demarcation and titling are necessary to protect them from outside encroachment. But there is no ambiguity *within* their own Villages – or, if there is, that is a matter to be settled internally via their customs and not by the Lands Department.

[55] The foregoing interrogates the ***necessity*** of the appellants' reason that they sought to document their transaction with Ponciano Coy – a fellow Mayan – to safeguard their rights, by showing that

as between Coy and Choc, two Mayans, there was no need to do so via the national system. I next turn to the ***capacity*** of the Chocs to do so: namely, could they as individuals, as they claim, actually obtain a (private) Deed for a piece of communal land? In short, the answer is no. Given the distinct nature of these systems, it is simply not possible to move between them fluidly or elect which one to utilise. As mentioned above, land in Belize is either held under the national system (freehold or leasehold, freely alienable) or Mayan (communal, vesting in the Village as a whole, and inalienable). It cannot be both simultaneously. This means that it is not possible to transfer a family plot held within a communal area via registration at the Lands Department, for there are requirements to so doing – not the least of which is that the land in question must be surveyed, subdivided, and evidenced by Deed. Alternatively, if the land does have these characteristics, then it can no longer be described as communal, as it is then freely transferrable and ownership is of a completely different "estate" under the common law.

[56] What is more is that the appellants are well aware of this distinction, and were so at the material time. Both acknowledged that the instruments they prepared in their unsuccessful attempt to register the land was in relation to property described as "freehold" and "private".[33] According to Tzalam, the purchase from Ponciano was "a private transaction between me and the vendor".[34] Her husband, Choc – a law student at the time – testified that he was aware that un-subdivided land cannot be sold[35] and that a Minister's Fiat Grant means that the government owns the land.[36] Try as they did to maintain that it was a "private transaction but only in the Maya customary law sense"[37], it is impossible to have it both ways – either the land was communal, inalienable and only transferable among Mayans according to internal customs, or it was national and freehold in nature, alienable via standard procedures accessible by all persons in Belize. By utilising a Deed and visiting the Lands Department, the appellants tacitly acknowledged that what the vendor held was not communal property but a private, individual parcel which could be bought and sold within the national system.

[33] Cross-examination of Francisca Tzalam, Record of Appeal, Vol. 2 at p. 487; Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at pp. 527 and 531.
[34] Cross-examination of Francisca Tzalam, Record of Appeal, Vol. 2 at p. 501.
[35] Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at p. 535.
[36] Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at p. 566; Cross-examination of Francisca Tzalam, Record of Appeal, Vol. 2 at p. 504.
[37] Cross-examination of Gregory Choc, Record of Appeal, Vol. 2 at p. 537.

[57] Bearing all these factors in mind, what is the current position? As just established, the source of the title being in a Minister's Fiat Grant, this proves without a doubt that the property in question is private, freehold property – as acknowledged by the very Deed of Conveyance prepared by the appellants. It is only because of this fact as to its freehold nature was Ponciano Coy able to contemplate selling it for consideration, whether to a fellow Mayan or an outsider.

[58] Next, the appellants invoked national conveyancing practices but were unsuccessful in obtaining legal title given that the Deed was executed but never registered. As provided by s. 15 of the *Law of Property Act*, Cap190, an unrecorded Deed of Conveyance is not evidence of, nor can it confer, legal title. Moreover, at the time the Deed was executed in 2013, the vendor did not have legal title to the land, and so could not legally transfer it to the appellants.

[59] On the other hand, by February of the following year the vendor had made good on his Location Ticket and obtained a legal title to the lands in question, evidenced by Grant No. 108/2014 dated February 19, 2014. The subsequent transaction with James MacArthur was properly conducted by way of a Deed of Conveyance duly registered, and thus effectively passed title from the vendor to Coy Creek Farm Ltd. In the circumstances, therefore, and as found by the trial judge, the first respondent is indeed the legal owner of the 21.76-acre parcel of land purchased from Ponciano Coy, which includes the disputed portion.

(2) Trespass

[60] Flowing inevitably from the situation of disputed ownership are allegations of trespass, which in fact are the nub of the first respondent's action and on which it succeeded at trial. The appellants' appeal against this finding rests on two bases – one an argument of principle and the other evidential. As to the first, the appellants contend that the trial judge's finding of trespass against the appellants is based only upon her conclusion that they did not acquire ownership of the land, and not upon any positive finding of fact. On the second limb, they submit that there is no factual basis for the claim, insofar as no pictures, video or other hard evidence was led. The only proof comes from the testimony of the caretaker Macario Salam, whom they allege departed "almost entirely" from his witness statement under cross-examination. In light of this, the appellants argue that the first respondent failed to establish its claim of trespass and that the trial judge erred in coming to the contrary conclusion.

[61] Indeed, one pillar of the trial judge's reasoning in concluding that trespass is made out is her finding that the first respondent legally owns the disputed land. The portion of her judgment extracted by the appellants makes this clear, for here she states as follows:

> "The court has found that the Claimant legally owns the 21.76 acres it purchased from Mr. Coy. The court has also found that the Chocs do not own the 23 acres that they attempted to purchase from Mr. Coy. Therefore, the court finds that the Chocs were trespassing on the property legally owned by the Claimant company and I therefore grant the Claimant the relief sought."

[62] The appellants complain that this is an incomplete basis for the trial judge's conclusion because there was no positive finding of fact of acts of trespass by the Chocs. This argument, however, overlooks the nature of the defence, which never disputed the *fact* of going onto the disputed land but was rather an assertion of its *legal ownership* thereof. To give just one of many examples, under cross-examination by Mr. Bradley, Francisca Tzalam confirmed that she did forbid Salam, the caretaker of the first respondent's property, from coming onto her property. To be as accurate as possible, this was her testimony on this point:

> "Q. …So that when you went there, you would have told Mr. Salam he cannot come into this portion of the land which I Francisca Tzalam own?
>
> A. Yes, sir.
>
> Q. And this portion includes that 6 acres. So you would have told Mr. Macario Salam that he could not go into this 6 acre portion because dah fuh you?
>
> A. Of course, sir, that's mine.
>
> Q. No, I just dih try establish it.
>
> A. Yes, sir.
>
> Q. And … according to you, because it is your land, you would have had the surveyor mark out that area?
>
> A. Yes, sir.
>
> Q. And since this period, you have treated that area of land, the 6 acres, as if it is your land?
>
> A. Yes, sir."[38]

[63] There is no clearer admission of trespass than this. At no time did the appellants concede that they were 'trespassing', as it is their contention that they own the disputed portion. In other words, their position was the nuanced one that there could be no trespass since they were the legal owners:

[38] Cross-examination of Francisca Tzalam, Record of Appeal, Vol. 2 at pp. 492-3.

"Of course, sir, that's mine", Tzalam asserted. This is why, having found that the disputed area was in fact owned by the first respondent and not the appellants, the trial judge was able to conclude that the allegation of trespass was made out – because the appellant herself admitted to treating that disputed area as if it was hers. The trial judge thus cannot be faulted for reasoning in this way.

[64] The other limb of the appellants' disagreement with the trial judge's conclusion rests upon the evidence. Here the appellants contest the quality of the evidence – noting that James MacArthur (owner of Coy Creek Farm Ltd) resides abroad and relied upon the reports of his caretaker, Macario Salam, to prove the acts of trespass by the appellants. However, the appellants continue, Salam departed almost entirely from the evidence in his witness statement, because of the following statements he made under cross-examination:

- that he did not see the Chocs (that is, the appellants) remove any boundaries from the Coy property;
- that all discussions between himself and the Chocs were friendly; and
- he did not request that they leave or stop interfering with the property.

[65] It is true that Salam gave the answers extracted above, but it is quite another thing to conclude therefrom that he "departed almost entirely" from his evidence in chief. Such a characterisation seems more to be wishful thinking on the part of counsel than actual reality, for the totality of Salam's evidence was not fundamentally shifted and essential evidence of acts of trespass remain uncontested. While he did not see the appellants move any boundary pegs (in fact, this was never a claim he made in his witness statement), Salam's unshaken evidence was that it was Choc who told him that the pegs were moved on his (Choc's) instructions because the land was part of Mayan lands and belonged to him.[39] More pertinently, Salam testified under cross-examination that he did see the Chocs "interfere" with the disputed property,[40] he did see them enter onto Coy Creek property,[41] and even that he saw them planting coconut trees in the disputed area.[42]

[39] Witness statement of Macario Salam at para. [9].
[40] Cross-examination of Macario Salam, Record of Appeal, Vol. 2 at p. 398.
[41] Cross-examination of Macario Salam, Record of Appeal, Vol. 2 at p. 400.
[42] Cross-examination of Macario Salam, Record of Appeal, Vol. 2 at p. 402.

[66] That Salam's conversations with the Chocs were "friendly" and that he never once felt threatened or intimidated by them is of no moment to the issue of trespass. The tort of trespass to the land is committed by unlawful presence on land in possession of another, irrespective of whether any damage is caused.[43] A person trespasses on land by wrongful entry or, having entered lawfully, by remaining there after his permission expires.[44] Nowhere in this do conversations matter, nor is it a requirement that the landowner feel threatened or intimidated. Thus, whatever the nature of Salam's conversations with the Chocs, whether amicable or hostile, they do not impact on the latter's acts of trespass observed and deposed to by Salam.

[67] In the event that the appellants cite this "inconsistency" as to the nature of the conversations between Salam and the Chocs to undermine Salam's credibility (not an argument expressly made), it should be noted that the evidence on this aspect, if read carefully, seems to have been elicited somewhat unfairly because the witness initially deposed to multiple conversations whereas the cross-examination conflated them. In any event, it is a peripheral issue, and on the material fact of acts constituting trespass, Salam did not deviate. Having seen and heard the witness, the trial judge clearly accepted his testimony and acted upon it to find the claim proven. There is nothing in the record that undermines this conclusion; on the contrary, the evidence as a whole – some parts of which having been extracted above – supports the first respondent's claim without a doubt. Accordingly, the trial judge was justified in her conclusion and the appellants' contention that she erred on this point fails.

[68] This leaves for consideration the issue of damages. The trial judge made an award of damages for trespass by the appellants as well as for their damage to the first respondent's property and mesne profit for wrongful interference with and occupation of the said property, together with interest thereon. In so doing, the appellants contend that she erred in law, particularly since she did not specify any sum. Counsel for the first respondent has responded to this, somewhat laconically I might add, by asserting that if trespass is proven then damages flow automatically. This may be so, but surely some sum should be specified by the trial judge?

[69] A claimant is entitled to sue for trespass even where no loss is caused, and where trespass is proven damages do follow. In such cases, damages are said to be at large. But where, as here,

[43] Halsbury's Laws of England, Vol. 97A (2021); note footnote 3 and accompanying text.
[44] Ibid.

a claimant seeks damages for actual loss caused to their property, such loss needs to be particularised and proven. This the first respondent failed to do, and so the trial judge's unspecified award of damages for the damage to the first respondent's property cannot be upheld. Since, however, the finding of trespass stands, for this an award of nominal damages is possible.

[70] In determining whether an award of nominal damages should be substituted, I note what appears the general uncertainty as to the implications of Mayan communal property, evidenced by this and other cases litigated in recent times. While the first respondent had lawfully acquired his parcel from the vendor, the appellants – members of the Maya community in question – resorted to their oral traditions at one point. Unfortunately for them, those were insufficient to displace the legal consequences which flow upon the issue of a Deed of Conveyance. Moreover, for what it is worth, there was no mala fides on the part of the appellants. In all the circumstances, my view is that the declaration as to the first respondent's ownership, together with the injunctive relief, constitute adequate relief. As such, I would decline to make any order of damages, nominal or otherwise, against the appellants.

(3) Misfeasance

[71] In their counterclaim, the appellants contend that the acts and omissions of the second respondent in connection with these transactions amount to misfeasance in public office, a claim rejected by the trial judge. The crux of the appellants' appeal against this finding centres around the issue of a Grant Fiat to Ponciano Coy in February 2014 and the subsequent registration of the conveyance from Coy to the first respondent some months later. In so doing, the appellants contend, the agents and/or employees of the government either acted knowing that they had no power to do the acts complained of which would probably cause injury to the appellants or they acted with reckless indifference, causing loss to the appellants. By rejecting this claim, therefore, they complain that the learned trial judge erred in law.

[72] Both the Attorney General and Coy Creek Farm Ltd oppose this ground on the basis that the elements of misfeasance have not been made out, focusing in particular on the conduct element. In support, both respondents rely on the uncertainty in the evidence surrounding the appellants' claimed attempt at registering the Deed of Conveyance, such as doing so at the wrong office and on a date predating its execution. There were many reasons why officials at the Lands

Department in Punta Gorda would have been unable to register the Deed, not the least being that such transactions can only be done in Belmopan. As such, the respondents contend that the appellants have manifestly failed to establish that the relevant officials acted to the detriment of the appellants. While the evidence on this aspect does in fact fall short, the appellants' claim of misfeasance rests not on the refusal to register their conveyance in 2013 but on the issue of the Minister's Fiat Grant to Ponciano in February 2014 and the subsequent registration of the conveyance from Ponciano to the first respondent later that year. As such, this ground must be resolved from a different perspective.

[73] The modern exposition of misfeasance in public office is to be found in ***Three Rivers District Council and others v Bank of England [2000] 3 All ER 1***, where the criteria for establishing this tort as set out by Clarke J at first instance was adopted by the House of Lords on appeal. Lord Steyn identified the following as the essential ingredients of the tort:

(a) the defendant is a public officer;
(b) the exercise of power as a public officer;
(c) the defendant's state of mind is such as to constitute either targeted malice (that is, conduct specifically intended to injure a person or persons), or untargeted malice (i.e., knowledge that he has no power to do the act complained of and that the act will probably injure the claimant);
(d) the claimant has sufficient standing to sue;
(e) the element of causation, namely that the claimant suffered loss as a result of the defendant's acts or omissions; and
(f) foresight on the part of the defendant that his act or omission would probably damage the plaintiff.

[74] In Belize, this tort has been discussed most recently by the CCJ in ***Marin and Coye v AG*** [2011] CCJ 9 (AJ). Although the focus in *Marin* was on whether the government could be a claimant – a somewhat novel question given that the tort developed as a means of protecting individuals against the misuse of State power – in answering it in the affirmative the majority conducted a wide-ranging discussion of the tort, fully endorsing in the course thereof the key principles laid down in *Three Rivers*.

[75] The first of these principles is the rationale of the tort, which is to provide protection against the misuse of power by public officers. In *Three Rivers*, Lord Steyn explained this more fully as the

necessity in a legal system based on the rule of law for executive or administrative power to be exercised only for the public good and not for ulterior and improper purposes.[45] A second important element concerns the state of mind of the defendant, which requires the presence of bad faith.[46] Again in *Three Rivers* Lord Steyn explained that this may take one of two forms, either malice (a direct intention to injure a person or persons) or reckless indifference, which is constituted by knowledge that the public officer has no power to do the act complained of and that the act will probably injure the plaintiff. Both limbs involve bad faith – in the case of malice this is the exercise of power for an improper or ulterior motive; in the case of recklessness, it is the lack of an honest belief on the part of the officer that his/her act is lawful.[47] Finally, as stated by Anderson JCCJ in *Marin*, a high standard of proof is required to show malice and bad faith.[48]

[76] What emerges from the discussion above is that this tort requires a mental element – specifically that of bad faith. As outlined in the case law, this is a *subjective* state of mind[49] – which makes it incompatible with *institutional* conduct. As in this case, the Attorney General may be sued because of the government's vicarious liability for the acts of its agents or employees,[50] but since the tort is actually committed by an individual person misusing his or her authority while acting in bad faith, then that actor must be identified and their state of mind proven. This emerges clearly from Lord Steyn's disquisition in *Three Rivers*, but it is also echoed in the judgment of Anderson JCCJ in *Marin*, when he makes reference to the fact that the abuse of authority is really "a personal failing on the part of the public officer".[51]

[77] In ***London Borough of Southwark v Dennett*** [2007] EWCA Civ 1091, the dispute in question related to the inordinate delay by the Southwark local authority in completing a sale to the tenant of his flat. It was found in the course of the proceedings that the local authority was responsible for the delay in several ways – first by relying on an incorrect Survey to dispute the boundaries and later by seeking to withhold parking rights in the conveyance. One of the tenant's claims was for damages for misfeasance in public office, which was upheld by the trial judge. On appeal by Southwark, this finding was reversed, the Court of Appeal holding unanimously that in order to

[45] *Three Rivers* at page 7; see also *Marin* per Bernard JCCJ at para. [47] and Anderson JCCJ [125].
[46] *Three Rivers* at page 8.
[47] *Three Rivers* at page 7.
[48] *Marin* at para. [151].
[49] *Three Rivers* per Lord Steyn at pages 7, 11.
[50] See comments of Anderson JCCJ in *Marin* at [145].
[51] Ibid at [144].

prove this tort, the official exercising bad faith must be identified; since the tenant did not demonstrate who on behalf of Southwark acted in bad faith and what was their subjective state of mind, the trial judge erred by finding in favour of the tenant on this claim. In justifying this reversal, May L.J. explained the nature of this requirement clearly, as follows:

> "The whole thrust of the *Three Rivers case* was that knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the Claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established. To that end, they need to be identified."

[78] In similar vein, the failure of the appellants to identify who at the Lands Department acted to their detriment is a fatal flaw in their case as regards misfeasance. Their complaint remains one at large, namely that unnamed and unidentified "agents and/or employees of the Government" acted either with malice or reckless indifference. However, since those agents were not identified, their state of mind – an indispensable element of this tort – remains unproved, and thus the tort of misfeasance in public office is not established.

[79] There are other defects in the claim of misfeasance. The litany of problems attending to that transaction have been well-ventilated, chief among these being that the appellants attempted to have the Deed lodged at the Punta Gorda office, whereas conveyances can only be lodged in Belmopan; the evidence speaks to them visiting this office in February 2013, whereas the Deed was not executed until 1st June 2013. There are other impossibilities, such as the fact that the vendor Ponciano Coy had a title to 21.76 acres pursuant to a Grant issued in 2014, so it is entirely unclear what the Lands Department could have conferred in February or June of the preceding year. And all this is to say nothing of the difference in consideration between the receipt and what is stated on the Deed, which casts some doubt on the appellants' credibility. In all the circumstances, as both respondents submitted, the Lands Department can hardly be faulted, or less still found to have committed misfeasance in public office, for failing to register the appellants' conveyance, if indeed they were approached in June 2013.

[80] In relation to the issue of the Grant to Ponciano in February 2014 and the subsequent registration

of the Deed of Conveyance from Ponciano to Coy Creek Farm some months later, the case for misfeasance is similarly unproven. The central difficulty here lies in the failure of the appellants to identify who at the Lands Department performed these actions, which means that they also failed to establish the crucial element of bad faith, whether that was actual malice or reckless indifference. In the circumstances of this case, where the Lands Department was operating under the impression that the Consent Order does not preclude them from dealing with transactions on private lands, the necessity for proving the mental element ought to be clear. In light of this failure, the appellants have not proven the commission of misfeasance by the second respondent and the trial judge did not err by rejecting this counterclaim.

(4) Reasons for decision

[81] The appellants complain that the learned trial judge erred in law by failing to provide any reasons or any written reasons for her decision or with respect to issues which arose in the claim. The first respondent disputes this and counters that she clearly gave reasons which supported her findings of fact and law. Since the trial judge delivered a 131-page written ruling at the end of the trial containing her findings, it should be easy to ascertain whether this complaint has merit.

[82] Of this 131-page judgment, it appears that some 126 pages recount the evidence and submissions in the case. In the remainder, however, the learned trial judge clearly stated her conclusions and explained why she found as she did. On the claim itself, the learned trial judge explained the basis for concluding that the first respondent is the legal owner of the disputed property, from which the allegations of trespass were established given the nature of the defence. On the counterclaim, the trial specified the defects in the process adopted by the appellants, identifying elements of what she described as "overwhelming evidence" which led her to reject the counterclaim. It would therefore appear that the appellants are dissatisfied with the manner and style of the judge's approach, but there being no mandatory structure for judgments, there is nothing in the way of relief which this court can offer for this alleged error. In any event, the appellants have not claimed any relief in relation to this ground – not in their Notice of Appeal, the written submissions or at the hearing – so as it relates to the substantive issues, there appears to be no prejudice to the appellants caused by the trial judge's approach.

[83] However, as regards the remedies granted, the learned trial judge did not specify what sum in

damages was ordered in relation to the trespass, the specific damage to the first respondent's property, and mesne profits lost. This was indeed a material omission. Since the first respondent did not plead or particularise or otherwise lead evidence as to what losses were incurred by reason of the appellants' trespass, it is not known what sum must be paid or the process by which it would be ascertained now that the trial is concluded. Even if nominal damages flow for the mere fact of trespass, some sum must be specified to guide the parties. In these circumstances the award of damages at large is set aside and, as noted earlier, no order for damages can or will be made in substitution therefor. Going forward, trial judges will hopefully be attentive to the need to provide parties – both winners and losers – with specific directions on the relief ordered so that they can act accordingly.

(5) Conclusion and Disposition

[84] Wrapping up their joint judgment in *Maya Leaders Alliance*, Byron P and Anderson JCCJ noted:

> "The judicial conscience cannot but be moved by these expressions of indigenous concern for the damage to and the marginalization of Maya culture. We remind ourselves of the solemn pledge in the preamble to the Constitution to ensure that state policies protect the identity, dignity, and social and cultural values of Belize's indigenous peoples. This judgment, and the consent order of 22 April 2015, undoubtedly represent a form of reparation and satisfaction in the recognition of the customary land tenure rights of the Maya people in southern Belize, and in the judicial finding that those rights have been contravened by the Government of Belize. It also is a form of redress for the centuries of oppression endured by the Maya people since the arrival of the European colonisers."[52]

[85] There can be no denying that recognition by our highest court is a major victory for indigenous peoples, vindicating not just decades of struggle before various national and international bodies but more importantly centuries of oppression and marginalisation that they have suffered. However, as momentous as this victory is, follow-up legislative and administrative action is indispensable. Even *in Maya Leaders Alliance* itself, the CCJ could grant no relief in respect of the claimed violations of property, since the nature and extent of Mayan communal property rights were still to be identified and delineated. With no material progress since, the warm glow of the CCJ'S ruling has long since faded and Villages will not only have to be constantly vigilant but may be forced to relitigate as threats arise. As this case and an increasing number of others before us demonstrate, the situation on the ground with regard to indigenous landholding is

[52] *Maya Leaders Alliance,* footnote 2 above at para. [75].

fraught, with threats emanating externally and some degree of uncertainty among Villagers. I make these observations only to underscore the urgency of the situation and to highlight to the relevant functionaries the need for the ongoing process to be completed with despatch.

[86] As regards the dispute before this court, I conclude by briefly summarising the key findings. The disputed property is sourced in a Minister's Fiat Grant and is accordingly private property of a freehold nature – as implicitly acknowledged by the appellants themselves who tried to formalise their acquisition of one portion by a Deed of Conveyance. But since the vendor did not have title to the parcel at the time, the appellants failed to obtain legal ownership, whereas the first respondents succeeded in this the following year, by which time the vendor had regularised his position. The argument that the title obtained by the first respondent was defective because it was registered in violation of the Consent Order of April 2015 fails for a number of reasons, not the least of which is that the source of the plot in question being in a Minister's Fiat Grant means that it is private and not communal property. Flowing from this finding, and based on the evidence which establishes that the appellants admitted to being on the disputed portion and were seen thereon, they did in fact trespass on the property of the first respondent and the trial judge was correct in so finding. However, given that the first respondent did not particularise or otherwise establish what losses it may have suffered by reason of this trespass, the trial judge's order for damages and mesne profits is set aside. For the reasons articulated in the judgment, I decline to make any order for nominal damages, though the declaration as to ownership and injunctive relief granted by the trial judge are upheld.

[87] On the counterclaim, not only is there no evidence that there was bad faith in the issue of the grant to the vendor and subsequent registration of the conveyance to the first respondent, the appellants failed to identify which officer or officers carried out these transactions. As such, they did not prove that those acts were carried out either with targeted malice or reckless indifference, which is essential for proof of this tort. In the absence of proof of a subjective mental element on the part of the tortfeasor, the appellants failed to prove the claim of misfeasance in public office. Regarding the complaint that the trial judge failed to give reasons, the awards of unspecified damages, mesne profits and interest thereon are set aside on this ground, though apart from this the rationale for the learned judge's conclusions on the facts and the law are clearly evident in her judgment so that no further relief is required on that basis.

[88] In sum, therefore, the appeal is dismissed and the trial judge's orders of a declaration of ownership in favour of the first respondent, the injunction restraining the appellants from entering onto the first respondent's land, and for costs, all in the terms as set out by the trial judge, are upheld. However, the trial judge's order for unspecified damages and mesne profits in favour of the first respondent is set aside. The costs of this appeal are to be paid by the appellants to the respondents, to be agreed or assessed if no agreement.

Arif Bulkan
Justice of Appeal

[89] I have read the judgment of my learned brother, Bulkan JA, and I agree with the Orders made and his reasons for the dismissal of the appeal by the Court. There is nothing that I can usefully add.

Minnet Hafiz-Bertram
President

[90] I concur.

Marguerite Woodstock-Riley
Justice of Appeal