

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P276 of 2022

CLAIM NO. CV2018-02410

BETWEEN

PARBATIE SIEWNARINE

First Appellant/First Defendant

ROSABELLE HEERALAL

Second Appellant/Second Defendant

SATTIE HUGGINS

Third Appellant/Third Defendant

AND

DIANA SIEWNARINE

First Respondent/First Claimant

VICTORIA SIEWNARINE

Second Respondent/Second Claimant

PANEL

C. Pemberton JA

G. Lucky JA

M. Dean-Armorer JA

Date of Delivery: Thursday 16 April 2026

Date of Hearing: Monday 9 June 2025

Appearances

For the Appellants: Mr. R Dowlath instructed by Ms. Ramdial

For the Respondents: Mr. B. Sobrian instructed by Ms. B. Kassinath

JUDGMENT

I have read the Judgment of Pemberton J.A. and I agree and have nothing to add.

/s/ Gillian Lucky

Justice of Appeal

I have read the Judgment of Pemberton J.A. and I agree and have nothing to add.

/s/ Mira Dean- Armorer

Justice of Appeal

Delivered by C. Pemberton JA

BACKGROUND

1. This is an appeal against the decision of the trial judge given orally on October 14, 2022 but reduced to writing on November 26, 2024 that the Respondents/Claimants, Diana Siewnarine (“DS”)¹ and Victoria Siewnarine (“VS”)², were entitled to be registered as the proprietors of one half (½) share interest in the property situate at No.2 Ninth Street, Dinsley Gardens (“the said property”).

CHRONOLOGY

| No | Particulars of Event | Dates |
|----|---|----------------|
| 1 | The deceased, Jewan Siewnarine (“the deceased”) and the First Appellant/First Defendant, Parbatie Siewnarine (“PS”) were married on 16/04/1972 (Marriage Certificate ROA Vol 2 pg. 114). | April 16, 1972 |

¹ First Respondent/First Claimant.

² Second Respondent/Second Claimant.

| | | |
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| | DS and VS are the daughters of the deceased (Birth Certificate ROA Vol 2 Pgs. 117-118). PS is not the mother of DS and VS. The Second Appellant/Second Defendant, Rosabelle Heeralal (“RH”) and Third Appellant/Third Defendant, Sattie Huggins (“SH”) are the sister and niece of PS respectively. | |
| 2 | By Memorandum of Transfer registered in Vol. 2238 Folio 65 the deceased and PS became the fee simple owners of that the property situate, <i>in the Ward of Tacarigua in the Island of Trinidad comprising Three Thousand Four Hundred Square Feet to be the same more or less delineated and coloured pink in the plan registered in Volume 2238 Folio 77 being portion of the lands described in the Crown Grant in Volume 10 Folio 411 and also described in the Certificate of Title in Volume 303 Folio 349 and shown as Lot 768 in the General plan filed in Volume 2145 Folio 193 and bounded on the North by lands of T'dad Sugar Estates limited on the South by the Road Reserve 25.6 feet wide and on the East by a Buffer Strip of T'dad Sugar Estates Limited and on the West by lot 7 67 and also known as No.2 Ninth Street West, Dinsley Gardens Trincity, Trinidad and Tobago (the said property) as joint tenants (ROA Vol. 2 pg. 115).</i> | January 28, 1975 |
| 3 | The deceased called a meeting with his family and friends. At that meeting, he informed them that he was diagnosed with cancer. | Sometime in 2007 |
| 4 | DS took the deceased to the law offices of Devesh Maharaj & Associates. The deceased met with an | Sometime in March 2012 |

| | | |
|----|---|-------------------|
| | associate Angela Mohammed. In the presence of DS, the deceased gave certain instructions. | |
| 5 | The deceased acknowledged receipt of a valuation of the said property by affixing his signature on a letter of acceptance for receiving same (Letter at ROA Vol 2 Pg. 126). | July 20, 2012 |
| 6 | The deceased executed a Memorandum of Transfer ("2012 MOT") purporting to transfer his interest in the said property to DS and VS. The MOT was executed in the presence of Angela Mohammed and legal secretary Umwatie Rekha Seunarine (ROA Vol 2 Pg. 132). | November 2, 2012 |
| 7 | The deceased died (Death Certificate- ROA Vol 2 Pg. 119). | December 22, 2012 |
| 8 | PS made a Lost Grant Application to replace Certificate of Title Vol 2238 Folio 79. By order of the Registrar (pursuant to section 136 RPA), the Certificate of Title Vol 2238 Folio 79 was cancelled and Certificate of Title Vol. 5551 Folio 85B was issued to PS (endorsed as the sole proprietor of the said property). This was indicated in a letter to PS from Counsel for DS on March 4, 2016 (ROA Vol. 3 Pg. 55). | April 18, 2013 |
| 9 | The death of the deceased was endorsed on the Certificate of Title Volume 5551 Folio 87 (ROA Vol. 2 Pg. 143). | May 8, 2013 |
| 10 | The 2012 MOT was stamped. | January 29, 2015 |
| 11 | By Memorandum of Transfer ("2015 MOT") executed on March 24, 2015 PS (as registered proprietor) transferred the said property to herself for life, and thereafter RH and SH. The 2015 MOT | March 24, 2015 |

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|----|---|-------------------|
| | was lodged for registration in December 2015 (ROA 2 Vol. 2 Pg. 137). | |
| 12 | Ms. Shahana Ali attorney-at-law (in in the law office of Devesh Maharaj & Associates) took conduct of the matter. By letter dated May 21, 2015, the Legal Officer to the Registrar General's Department informed Ms. Ali that the Minister of Legal Affairs approved the late registration of the 2012 MOT (ROA Vol 2 Pg. 129) subject to the payment of the late registration fees and penalties. The 2012 MOT was later sent to the Registrar General's Department for registration. | May 21, 2015 |
| 13 | A rejection notice for the registration of the 2012 MOT was sent to the law office of Devesh Maharaj & Associates stating that the Certificate of Title Vol. 2238 Folio 79 was cancelled pursuant to a Lost Grant Application. A new Certificate of Title Vol. 5551 Folio 87 was issued. | August 27, 2015 |
| 14 | A new search was conducted with respect to the said property. PS cancelled Certificate of Title Volum 2238 Folio 79 as the registered proprietor of the said property by virtue of the death of the deceased. | October 6, 2015 |
| 15 | The 2015 MOT was stamped. | November 25, 2015 |
| 16 | By letter, DS informed PS that the deceased executed the 2012 MOT gifting the said property to DS and VS. DS also called on PS to deliver possession of Certificate of Title Vol. 5551 Folio 85B to same (Letter-ROA Vol. 3 Pg. 55). | March 4, 2016 |
| 17 | The 2015 MOT was registered in the Certificate of Title Volume 5879 Folio 11 Inst. No 3 (ROA 2 Vol. 2 Pg. 134). | July 13, 2016 |

| | | |
|----|--|-------------------|
| 18 | A new search was done by attorneys for DS and VS confirming that PS registered the 2015 MOT on July 13, 2016. | November 14, 2016 |
| 19 | DS and VS filed a caveat, which was registered as Instrument #10 in Volume 6074 Folio 57 (Paragraph 11 of the Defence- ROA Vol. 1 Pg. 97) Not before us. | April 23, 2018 |
| 20 | <p>DS and VS filed their fixed date claim form and statement of case claiming a number of declarations including that-</p> <ul style="list-style-type: none"> [i] DS and VS are the owners of ½ undivided share in the said property; [ii] DS and VS are entitled to be registered as proprietors of all the share and interest of the deceased in the said property by virtue of the 2012 MOT; [iii] The endorsement on the Certificate of Title in Volume 5551 Folio 87 that PS is registered as proprietor of the said property therein by virtue of the death of the deceased on the December 22 2012 be expunged; [iv] PS is the owner of only an undivided ½ share and/ or interest in the said property; and [v] The 2015 MOT is null and void and be expunged from the records of the Registrar General's Department. | July 6 ,2018 |

THE ISSUES

2. Four (4) issues arise out of this appeal for determination by the Appellate Court,
 - I. **Whether the trial judge erred or was plainly wrong to find that the act of preparing and executing the 2012 Memorandum of Transfer was**

effective to sever the joint tenancy between the deceased and PS over the land, the subject matter of this claim, which is registered under the Real Property Act.

- II. Whether the trial judge erred or was plainly wrong to find that the legal effect of the unregistered 2012 Memorandum of Transfer was that it extinguished PS's right of survivorship and entitled PS to a ½ share in the encumbered property.
- III. Whether the trial judge erred or was plainly wrong to find that the principles governing claims *in personam* were relevant to the facts of this case, thereby entitling DS and VS to redress and if so, what type of redress.
- IV. Whether the trial judge was plainly wrong to find on the evidence that PS's actions did not constitute fraud.

DISPOSITION

3. The trial judge's judgment and orders on the issues I, II and III, are hereby overturned and the orders consequent thereon are set aside. The trial judge's decision in relation to issue IV is upheld. In the premises, the appeal will be allowed for the reasons detailed hereunder. Costs usually follow the event but we shall hear the parties on that issue.

ISSUE 1: *Whether the trial judge erred or was plainly wrong to find that the act of preparing and executing the 2012 Memorandum of Transfer was effective to sever the joint tenancy between the deceased and PS over the land, the subject matter of this claim, which is registered under the Real Property Act?*

Findings of the Trial Judge

4. The trial judge held that the 2012 MOT manifested the deceased's clear intention to sever the joint tenancy and create a tenancy in common. The trial judge found that the deceased did everything necessary to enable DS and VS to take legal title in ½ of the property including retaining attorneys to prepare and execute the 2012 MOT and handing over the duplicate of the original Certificate of Title to the said attorneys for endorsement of the 2012 MOT. The trial judge relied heavily on **Gamble v Hankle**.³

The Submissions

5. We are grateful to the Parties' very useful submissions but ask that we refer to them as we find necessary.

Submissions of the Respondents

6. The 2012 MOT, had the effect of severing the joint tenancy and transferred the deceased's interest in the said property to DS and VS in equity. The deceased did everything necessary to effect the transfer and DS and VS were equipped to achieve the transfer of the legal interest of the deceased. Counsel relied on the Jamaican case of **Gamble v Hankle**⁴ and the Australian case of **Corin v Patton**⁵ to support the position.

Submissions of the Appellants

7. The trial judge failed to properly apply the provisions of **the Real Property Act**⁶ ("**the RPA**"). In so doing, the trial judge erred when concluding that the 2012 MOT manifested the deceased's clear intention to sever the joint tenancy between the deceased and PS. Counsel pointed to certain defects in the trial judge's reasoning which ultimately undermined the conclusion,
[i] the 2012 MOT was done without notice to PS, the other joint tenant;

³ 2007 Jamaica Law Report 115.

⁴ [2007] JLR 115.

⁵ [1990] HCA 12.

⁶ Chap 56:02 of the Laws of the Republic of Trinidad and Tobago.

- [ii] an unregistered MOT does not transfer an interest in land unless registered;
 - [iii] the unity of interest was not destroyed upon the execution of the 2012 MOT but was destroyed on the death of the deceased;
 - [iv] the trial judge ignored the principle in **section 44 of the RPA** which mandated that an interest in land only passes upon registration of the MOT;
 - [v] the trial judge failed to consider **section 18 of the Registration of Deeds Act**,⁷ which requires all deeds of gift to be registered within one (1) year from the date of execution;
 - [vi] the 2012 MOT was not submitted to BIR for the payment of stamp duty until January 29, 2015 some two and half years after execution; and
 - [vii] the 2012 MOT was not submitted for registration until May 27, 2015.
8. Counsel found reliable support in **Joanne Shand (also called Joanne Chin A Fat Shand) and Dwight Grant and Ors**,⁸ and **Lutchmin Heera-Narine and Ors v Rajesh Heera**.⁹

Discussion, Analysis and Conclusion

9. In considering whether the joint tenancy was severed in this case, there must be an intention to exclude the right of survivorship on the part of persons who want to continue in co-ownership of land.¹⁰ In **Williams v Hensman**,¹¹ Sir Page Wood VC explained that the expression of this intention must be considered in light of the three (3) ways in which a joint tenancy can be severed, firstly by an act of a joint tenant operating upon his own share; secondly mutual agreement; and thirdly, mutual conduct.

⁷ Chap 19:06 of the Laws of the Republic of Trinidad and Tobago.

⁸ CV2018-04823 (delivered on 6th June 2023).

⁹ CV2018-02963 (delivered on 28th August 2020).

¹⁰ Rosie Gangoo v Jassodra Gangoo and ors Civil Appeal No. 131 of 1999 per Nelson JA, p 3.

¹¹ (1861) 70 ER 862, per Sir Page Wood VC, p 886.

10. Clearly, by executing the 2012 MOT the deceased sought to alienate his interest in law **without notice to PS** by engaging in ‘*an act of a joint tenant operating upon his own share*’ which falls into the first method prescribed by Sir Page Wood VC.
11. The deceased’s actions must be considered in the context of the two systems of conveyancing that exist in Trinidad and Tobago. These systems are the common law system governed by the **Conveyancing and Law of Property Act (“the CLPA”)**¹² and the **Torrens System** as set out in the **Real Property Act (“the RPA”)**.¹³ **Macedo v Stroud**,¹⁴ neatly illustrates the differences in the effect of the application of the law in both systems of conveyancing.
12. Three (3) months prior to death, the deceased executed a Deed of Conveyance and Memorandum of Transfer purporting to convey/transfer certain properties to his daughter by way of gift. The executed conveyance and memorandum were delivered to his attorney with instructions to keep and not register them. These instructions were obeyed. The JCPC held that on the one hand, the executed conveyance of the lands under the common law system operated to convey to the daughter the properties, even though they were not registered. On the other hand, the JCPC found that since the Memorandum of Transfer, though executed but not registered pursuant to the **Real Property Ordinance**, or delivered to the daughter for that purpose, there was an imperfect gift of the properties to which equity could not give effect.
13. In our context I shall set out the relevant law. **Section 37 of RPA** provides:

37. Every certificate of title duly authenticated under the hand and seal of the Registrar General shall be received, both at law and in equity, as evidence of the particulars therein set forth, and of their being entered in

¹² Chap. 56:01 of the Laws of the Republic of Trinidad and Tobago.

¹³ Chap. 56:02 of the Laws of the Republic of Trinidad and Tobago.

¹⁴ [1922] 2 AC 330.

the Register Book, and shall, except as hereinafter excepted, be conclusive evidence that the person named in such certificate of title, or in any entry thereon, is seised of or possessed of or entitled to such land for the estate or interest therein specified, and that the property comprised in such certificate of title has been duly brought under the provisions of this Act; and no certificate of title shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application or in the proceedings pursuant thereto by the Judge or by the Registrar General.

14. **Section 38 of the RPA** provides:

*38. Every grant and certificate of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act so soon as the same shall have been marked by the Registrar General with the page and volume as embodied in the Register Book, and **every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act shall be deemed to be so registered so soon as a memorial thereof as hereinafter described shall have been entered in the Register Book upon the leaf constituted by the grant or certificate of title of such land, and the person named in any grant, certificate of title, or other instrument so registered as the proprietor of or having any estate or interest shall be deemed to be the proprietor thereof.***

15. **Section 40 of the RPA** provides:

40. Every instrument presented for registration shall be registered in the order of time in which the same is produced for that purpose; and

instruments registered in respect to or affecting the same estate or interest shall, notwithstanding any express, implied, or constructive notice, be entitled in priority the one over the other according to the date of registration and not according to the date of each instrument itself, and the Registrar General, upon registration thereof, shall on demand deliver the duplicate grant or certificate of title with the necessary endorsements thereon to the person entitled thereto; and so soon as registered, every instrument drawn in any of the several forms provided in the First Schedule or in any form which for the same purpose may be authorised in conformity with the provisions of this Act, shall for the purposes of this Act be deemed and taken to be embodied in the Register Book as part thereof.

16. **Section 44 of RPA** provides:

44. No instrument, until registered in manner herein provided, shall be effectual to pass any estate or interest in any land under the provisions of this Act or to render such land liable to any mortgage charge or encumbrance; but upon the registration of any instrument in manner herein provided, the estate or interest specified in such instrument shall pass or, as the case may be, the land shall become liable, in manner and subject to the covenants, conditions, and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature, and should two or more instruments executed by the same proprietor, and purporting to transfer or encumber the same estate or interest in any land, be at the same time presented to the Registrar General for registration and endorsement, he may either register and endorse that instrument which is presented by the person producing the grant or certificate of title, or may refuse to register either instrument until an order determining the relative rights of the several claimants shall have been made by the Court or a Judge.

17. **Section 45 of the RPA** provides:

45. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,...

18. **Section 141 of the RPA** provides:

141. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which, such proprietor or any previous proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

19. The fundamental objective of these provisions is to provide indefeasibility of title to persons holding interests in land, adhering to three fundamental principles of the Torrens System, **The Mirror Principle, The Curtain Principle and the Insurance Principle** that operate together to provide conclusive evidence of title. It is intended that the certificate of title reflects every dealing with the title

for that land described therein. The Certificate of Title gives with certainty, the history of ownership of a parcel of land, as reflected in the memorials endorsed at the back of it. This system of conveyancing ensures that persons seeking to deal with the land in any way do not engage in unnecessary investigations and title searches to identify how the current owners came to hold title, as is required under **the CLPA**¹⁵. Any reliance on the memorials reflected on a Certificate of Title is unaffected by notice of any unregistered interest whether such exists in law or equity.

20. Registering an instrument of title is therefore paramount to achieving indefeasibility of title. The importance of registration is buttressed by Nelson JA (as he then was) in **Gangoo** where the Learned Judge opined, *“if the legal joint tenancy was severed, a record of such severance had to be entered on the register or certificate of title”*.¹⁶ Thus, any intention to sever a joint tenancy, must be made manifest by registration of all instruments evincing such an intention.
21. Although the trial judge cited **section 44 of the RPA**, there was a failure to consider the conjoint effect of that section with other relevant sections of **the RPA, sections 37, 45 and 141**. In particular, **section 141 of the RPA** makes it clear that *‘No person... shall be affected by notice, direct or constructive, of any trust or unregistered interest’*. This failure led to a lack of appreciation and/or ignoring the fact that the joint tenancy could only have been severed and title could only pass to DS and VS after registration of the 2012 MOT. The vital unity of interest was not destroyed on execution of the 2012 MOT but on the death of the deceased.
22. For the sake of completeness, one considers whether the joint tenancy was severed in equity. In **Milroy v Lord**¹⁷ the Court of Appeal stated,

¹⁵ Ch 56:01 of the Laws of the Republic of Trinidad and Tobago.

¹⁶ Rosie Gangoo v Jassodra Gangoo and ors Civil Appeal No. 131 of 1999 per Nelson JA, p 15.

¹⁷ [1862] EWHC J78.

*(The question) is not whether the intending donor has divested himself of his estate or interest in the land, or has done all that lies in his legal power to do so. For obviously it was within his legal power himself to cause the immediate registration, notwithstanding that it is voluntary. **The question is whether by his acts he has placed the intended donee in such a position that under the statute the latter has a right to have the transfer registered, a right the donor or his executors, cannot defeat or impair.***

23. In the present case, the deceased provided DS and VS with a copy of the 2012 MOT. The evidence was that the deceased executed the 2012 MOT with the full knowledge of DS and VS and provided his attorneys with a duplicate of the original Certificate of Title and instructions to register the 2012 MOT. Based on the authorities cited, there was alienation by equity.
24. However, DS and VS have two hurdles to cross in establishing a claim in equity: first, the delay in failing to register the 2012 MOT after the twelve (12) month period as contemplated by **section 18(1) of the Registration of Deeds Act**; and second, that PS is not bound by any claim in equity by virtue of **section 141 of the RPA**. The latter hurdle is more difficult to cross save and except if fraud can be proved. I shall consider fraud later in this judgment.
25. In line with the JCPC's decision in **Macedo**, and which I must follow, the 2012 MOT amounted to "*an incomplete instrument which was not binding for want of consideration. As such, and as it is voluntary...it is no more than an imperfect gift of which a Court of equity will not compel perfection.*"
26. As a result of the above analysis, I can come to no other conclusion but this:
The trial judge erred and was plainly wrong to find that the act of preparing and executing the 2012 Memorandum of Transfer was effective to sever the joint tenancy between the deceased and PS over the land, the subject matter of this claim, which is registered under the Real Property Act. The appeal is therefore allowed on this issue.

ISSUE 2: *Whether the trial judge erred or was plainly wrong to find that the legal effect of the unregistered 2012 Memorandum of Transfer was that it extinguished the PS's right of survivorship and entitled PS to a ½ share in the encumbered property?*

27. In answer to this issue, it is not necessary to repeat what was said in terms of the law quoted and the preceding analysis. It is clear that the 2012 MOT did not sever the joint tenancy in law or in equity.
28. The trial judge erred and was plainly wrong to find that the doctrine of survivorship did not apply. After the deceased's death was endorsed on the certificate of title, PS was the sole proprietor of the said property and entitled to deal with the said property as she saw fit.
29. In conclusion, **the trial judge erred and was plainly wrong to find that the legal effect of the unregistered 2012 Memorandum of Transfer was that it extinguished the PS's right of survivorship and entitled PS to a divided ½ share in the encumbered property.** The appeal is allowed on this issue.

ISSUE 3: *Whether the trial judge erred or was plainly wrong to find that the principles governing claims in personam were relevant to the facts of this case, thereby entitling DS and VS to redress and if so, what type of redress?*

Findings of Trial Judge

30. It was the trial judge's view that this was a case *in personam*. The trial judge found that based on the evidence that PS's actions in receiving the March 2016 letter and ignoring it constituted unconscionable behaviour within the case of **Cashmere Capital Limited v Crossdale Properties Limited and others**.¹⁸

¹⁸ [2009] NZCA 185.

31. The trial judge also considered PS's demeanour and tone while giving her testimony in coming to her conclusion.

Submission of the Respondents

32. DS and VS contended that the facts in the case of **Smith Lewis v Anjan Sookdeo**¹⁹ are highly indistinguishable from the case at bar making the principle of no use to the present case. Further, the act of PS was clearly unconscionable.

Submissions of the Appellants

33. PS, RH and SH appealed this finding on the basis that the learned judge misapplied the principles in the case of **Smith Lewis v Anjan Sookdeo (supra)**. PS's, RH's and SH's only submission on this ground was the reliance on paragraph 39 of the case. There was no further discussion.

Discussion, Analysis and Conclusion

34. The circumstances surrounding the unregistered and registered Memoranda of Transfer, including the intention of the deceased, the acts of PS and DS and VS, play a crucial role in ascertaining a critical point in this appeal, which is what redress, if any, DS and VS are entitled to.
35. Under the Torrens System, a registered proprietor's title is indefeasible, meaning that in most circumstances, the title cannot be challenged, even in the face of a prior equitable interest. In the case of **Frazer v Walker**,²⁰ Lord Wilberforce in dealing with the English position opined that registration under the Land Transfer Act was immune from adverse claims, other than those specifically excepted. It was made pellucidly clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor in a claim *in personam*, founded in law or equity, for such relief as a court acting *in personam* may grant.

¹⁹ Civil Appeal No. 236 OF 2012.

²⁰ [1967] 1 All ER 649 at 655.

36. In the Trinidad and Tobago context, Mendonça JA grappled with this in **Smith Lewis v Anjan Sookdeo**,²¹ where at paragraph 19, the learned Judge stated that:

The RPA is based on the Torrens system of registered conveyancing. The central feature of that system is that registration confers upon the registered proprietor an indefeasible title. This in essence means that the registered proprietor's title cannot be defeated by prior unregistered interest and his title is subject to only what appears on the register.

37. I associate myself with those remarks and apply them to the case at bar.
38. This stated position is subject to the *in personam* exception, which allows a party to bring a personal legal claim against the registered proprietor. This was also enunciated in paragraphs 20-25²² as follows:

20. Although that is the central feature of the Torrens system, it is nevertheless subject to certain exceptions. As the Privy Council observed in British American Cattle Co. v Caribe Farm Industries Ltd. and anor [1998] 4 LRC 547, (at 552-3)

“Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause. The principle is well stated in relation to the State of Victoria by the Board in Gibbs v Messer [1891] AC 248 at page 254:

‘The main object of the Act, and the legislative scheme for the attainment of the object, appear to them to be equally plain.

²¹ Civil Appeal No. 236 of 2012.

²² Civil Appeal No. 236 of 2012.

The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.'

*That principle has been repeatedly affirmed in the various jurisdictions most recently in relation to the law of New Zealand by the Board in *Frazer v Walker* [1967] AC 569.*

To achieve this objective, it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor. However, it is well established that there are certain exceptions..."

21. Sections 45 and 141 of the RPA are of relevance having regard to the issues raised in the Court below. While speaking to the conclusiveness of registration under the RPA, these sections recognize certain exceptions. They are as follows:

...

*22. Section 45 provides that the registered proprietor of the land or any interest therein shall hold the same subject to such mortgages, encumbrances, estates or interest as may be notified on the register but otherwise free from all other encumbrances, liens, estates or interests whatsoever. The section however recognizes certain exceptions to this and these are: (i) cases of fraud; (ii) in the case of a registered proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of the RPA; (iii) any rights subsisting under any adverse possession (see *Civ Appeal No. 268 of 2014 Republic Bank Ltd, v Manichand Seepersad and ors*); (iv) the rights of any tenant under a term not exceeding three years; (v) where there is an omission or misdescription of any right of way or other easement created in or existing upon the lands and*

(vi) where lands are included in the grant or other instrument evidencing the title of the proprietor by wrong description not being a purchaser or mortgagee thereof for value or deriving title from or through a purchaser or mortgagee thereof for value.

23. Section 141 also recognizes the fraud exception. It provides that except in the case of fraud no person contracting or dealing with or proposing to take a transfer from the proprietor of any estate or interest shall be required to enquire or ascertain the circumstances under which the proprietor or any previous proprietor came to be registered. The section also provides that no one dealing with proprietor shall be affected by direct or constructive notice of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge of any such trust and registered interest is in existence shall not of itself be imputed as fraud.

24. In this case fraud was raised but rejected by the Judge and there has been no appeal from that finding. It is clear that in the circumstances of this matter that those provisions quoted above gave to the appellant an absolute title incapable of being challenged on the ground that Mr. Sookdeo has an unregistered lease to the occupied parcel of land. This is so whether or not Mr. Lewis had actual or constructive notice of the unregistered lease or assignment.

*25. Apart from the limited statutory exceptions noted above to the indefeasibility of the registered proprietor's title, there is one other exception that has some relevance to this appeal in view of the estoppel raised by Mr. Sookdeo. This is the exception that has been described as the in personam exception. In our view if the respondent is to enjoy any success in this appeal it would be by virtue of this exception. This exception was recognized by Lord Wilberforce in *Frazer v Walker* [1967] 1 ALL ER 649, a case which involved the Torrens system in New Zealand similar to that contained in the RPA. Lord Wilberforce stated (at p 655):*

"...their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952, confers on a registered proprietor a title to the interest in respect of which he is registered which is (under s.62 and s.63) [which are similar to ss. 45 and 143 of the RPA] immune from adverse claims, other

than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized in the courts of New Zealand and of Australia...”

39. For our consideration, the question then is, whether or not the *in personam* exception arises? In the case of **Regal Casting v Lightbody**,²³ Tipping J set out at page 433 four matters to consider before allowing a case *in personam* to succeed. First, a claimant must show that there is a cause of action on a legal or equitable basis giving entitlement to seek the assistance of the Court, indefeasibility issues aside. Second, a claimant must show it will be unconscionable for the registered proprietor to rely on the indefeasibility of the title. Third, the *in personam* claim must not be contrary to the policy and purposes of the Torrens system. Fourth, the remedy must be such that it is consistent with the principles of the Torrens system.

Discussion, Analysis and Conclusion

40. Indefeasibility of title and remedies open to persons injured by way of ejection or recovery are governed by **sections 141, (indefeasibility of title already discussed) and 143 of the RPA**. Combined, they go to the heart of the principle of indefeasibility of title, a key feature of the Torrens System of land registration. The effect of these sections is that once there is a proprietor holding a certificate of title registered in accordance with the provisions of **the RPA**, the registered proprietor's title is considered indefeasible except in the stated exceptions, fraud being one such exception and the exception that is relevant to this case.
41. **Section 141** also speaks to the fact that no person is to concern himself with how the proprietor came to be vested with the lands prior to. The effect of the section shows that the register can be relied on by a purchaser and that it is a

²³ [2009] 2 New Zealand Law 26 Reports, p 433.

true reflection of the interests and ownership of the title of the land. A principle that is consistent with the Torrens System as opposed to lands held under common law.

42. The effect of **section 141** in this case, is that the indefeasibility of registered title will stand even if PS as the proprietor knew of DS's and VS's unregistered interest. The only exception to that according to this section is fraud, which if found may satisfy the first condition necessary to support a claim *in personam*.
43. The trial judge found as a fact that there was no fraud perpetrated by PS. Let us forget, fraud and unconscionable conduct are distinct concepts. As stated in **Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd**,²⁴ fraud involves an act of dishonesty which is not required for a finding of unconscionable conduct. What then could there be to satisfy the first ground?
44. As far as the second condition of unconscionable behaviour is concerned, we have scoured the evidence and have had difficulty to find any suggestion of this. All we can say is that the finding is unsupported by the evidence. Having fallen short of satisfying the fraud requirement, was it open to the trial judge, given the totality of the evidence to make a finding of unconscionable behaviour?
45. There was no clear evidence that PS knew the deceased's intentions. What is clear is that the deceased made certain promises to his two daughters, with no participation by PS in that decision-making process or communication of the decision to her. PS, incidentally found out about their existence well into her marriage which lasted for over 30 years and at a time after his illness was discovered. Merely citing PS's demeanour and tone while giving evidence are not enough especially when the witness's evidence was not contradictory or contradicted in any way. There has to be more to prove unconscionable behaviour. A bosom feeling is not enough. Evidence wins cases. I say no more!

²⁴ [1926] AC 101.

46. Third, **section 142 of the RPA** makes it clear that once land is registered under this Act and remains uncanceled in the Register books, this shall be conclusive of title. For my part, to allow an *in personam* claim in this case will be contrary to the policy and purpose of the Torrens System of conveyancing. *In personam* claims are not intended to evade the clear provisions of the legislation.
47. Fourth, on the issue of consistency of redress with the principles of the Torrens System in the form of damages for DS and VS, **section 150(1) of the RPA** is critical. Damages may lie against the Registrar General or against the person against upon whose application such land was brought under the Act or against the person who applied to be registered as proprietor in respect of these lands. The latter is of import here. To exercise that right of action, six years must not have elapsed between the date of the deprivation of the right, that is the date that the right accrued and the date that the right was sought to be exercised.
48. The evidence is that the date and year of the registration of the MOT, the act upon which the accrual of the right to bring the action, would have been founded and relied upon by DS and VS was 2016. That is when time began to run. The action for recovery was filed in 2018, well within the limitation period.
49. Notwithstanding that an action for damages may lie if brought within the limitation period, when all the conditions are looked at in the round, I do not think that there is enough to secure the Respondents' success if a claim *in personam* is to be allowed. This is not a claim that ought to be pursued. Being able to bring the claim within the limitation period alone is not enough. There must first and foremost be a claim to be pursued and in this case, the claim must not compromise the basic principles of the Torrens System.
- Therefore, in answer, **the trial judge erred and was plainly wrong to find that the principles governing claims *in personam* were relevant to the facts of this case.** This ground of appeal succeeds.

ISSUE 4: *Whether the trial judge was plainly wrong to find, on the evidence, that PS's actions did not constitute fraud?*

50. Although not addressed directly by the Parties on appeal, it is prudent to consider whether the steps taken by PS to be endorsed as sole proprietor over the subject property and to register a Memorandum of Transfer in favour of sister, niece and herself amounted to fraud.

The Pleadings

51. The case for DS and VS was based entirely on allegations of fraud. Fraud must be specifically pleaded and proved. What were the circumstances in which fraud is said to have occurred and what were the particulars of fraud alleged by DS and VS. What was PS's defence.

52. Some facts are repeated so far as they relate to this issue.

The Respondents/Claimants' Statement of Case – Particulars of Fraud

53. The case lay in PS's non-response to the letter of March 10, 2016:²⁵

a. By letter dated March 4, 2016 and posted by registered mail on March 10, 2016, PS received actual/constructive notice that:

'[DS and VS] are the owners of one half (½) share and/or interest in the said property and that they required her to deliver the new Certificate of Title for the said property for the completion of registration of [the 2012 Memorandum of Transfer], and for the endorsing of their interest on the new Certificate of Title'.

b. PS did not respond to the letter and did not provide the new Certificate of Title.

²⁵ ROA Vol 1, Statement of Case, 89.

- c. Despite receiving notice of DS and VS's ½ share and interest in the subject property, *'[PS] falsely and/or fraudulently represented to her Attorneys at Law and the Registrar General's Department ... that she was the sole proprietor of the said property'*.
- d. Despite receiving notice of DS and VS's ½ share and interest in the subject property, *'[PS] knowingly, carelessly and/or recklessly transferred all of the said property to herself for life and after her death to [RH and SH]'*.

The Appellants/Defendants' Defence

- 54. On April 16, 1972, Mr Siewnarine married PS.²⁶ In 1975, they purchased the subject property together as joint tenants, the Certificate of Title for which is registered as Volume 5551 Folio 87.²⁷
- 55. In 2007, PS discovered, for the first time, that Mr Siewnarine had two daughters.²⁸ The events that led to this discovery were that in 2007, Mr Siewnarine invited relatives to his home to socialise. PS saw two (2) young ladies at the gathering who she did not know. Mr Siewnarine did not introduce them to her. At that gathering, a relative told her that those young ladies were Mr Siewnarine's daughters. At that time, they appeared to PS to be over twenty (20) years old.
- 56. It was at the 2007 family gathering that Mr Siewnarine announced that he had rectal surgery. After Mr Siewnarine's surgery DS and VS visited once a month. However, they did not assist physically or financially. PS took care of Mr Siewnarine on her own.²⁹

²⁶ ROA Vol 1, Defence, 94, [6].

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*, [6].

57. After complaining bitterly about severe headaches, Mr Siewnarine was finally diagnosed with a 3.5 cm tumour in his head.³⁰ He was treated with radiation. From that point onward, Mr Siewnarine varied from incoherent to quarrelsome as the headaches intensified. This continued until his death on December 22, 2012.³¹
58. PS cancelled the Certificate of Title in Volume 2238 Folio 79. On May 8, 2013, the Registrar General endorsed Mr Siewnarine's death on the New Certificate of Titled registered in Volume 5551 Folio 87 and PS was registered as the sole proprietor of the property.³² She was therefore entitled to register Memorandum of Transfer No. 3, transferring the property to herself for life and after her death to RH and SH.³³
59. PS denied evading service. She admitted to receiving the letter dated March 4, 2016.
60. PS denied that Memorandum of Transfer No 3 was procured by fraud or that the DS and VS were unjustly kept out of their interest in the said property.³⁴

The Evidence

The Witness Statements

Diana Siewnarine (the First Respondent /First Claimant)

61. DS's witness statement repeats in large part, the matters alleged in the Statement of Case. However, from it we learned that she took Mr Siewnarine to the Firm in March 2021 and she followed up with the Firm regarding the registration of the 2012 Memorandum of Transfer after Mr Siewnarine's death. However, it did not illuminate the allegation of fraud.

³⁰ *ibid.*

³¹ *ibid.*

³² ROA Vol 1, Defence, 94, [7], [8].

³³ *ibid.*, [10].

³⁴ *ibid.*, [11].

Victoria Siewnarine (Second Respondent/ Second Claimant)

62. VS's witness statement corroborated her sister's witness statement and like her sister's it did not further their claims of fraud.

Umwatie Rekha Seunarine

63. In her witness statement filed on behalf of DS and VS, Ms Seunarine deposed that in or around March 2012, Mr Siewnarine visited the Firm on a number of occasions, accompanied by either an elder woman or a younger girl. According to her, *'the older woman who accompanied Mr Siewnarine was his wife, Mrs Siewnarine, and the younger girl was his daughter from another relationship, Diana Siewnarine'*. However, she never noticed the three of them come to the Firm together.

64. In November 2012, Ms Seunarine accompanied the attorney from the Firm to Mr Siewnarine's home to witness the execution of the 2012 Memorandum of Transfer. According to her,

Ms Mohammed presented Mr Siewnarine with the Original Memorandum of Transfer. Ms Mohammed read the Memorandum of Transfer aloud for Mr Siewnarine and thereafter he read the said document himself in Ms Mohammed's and my presence. He proceeded to sign the Memorandum of Transfer. Ms Mohammed signed the document as the Attorney at Law and I signed as witness. Sometime during the course of our visit Mr Siewnarine asked Mrs Siewnarine to leave the room. He wanted to speak with Ms Mohammed alone.

65. Ms Seunarine did not list PS as being present in the room when the 2012 Memorandum of Transfer was either read or executed.

Parbatie Siewnarine (First Appellant/First Defendant)

66. After they got married, Mr Siewnarine and PS lived with his parents, then hers before purchasing the subject property.³⁵ According to her, her mother and sister helped them make up the deposit for the purchase.³⁶ Mr Siewnarine took a mortgage to pay the balance of the purchase price.³⁷ Throughout their marriage, she was a housewife and he was the sole breadwinner.³⁸

67. With respect to the execution during the March 2012 visit to the offices of the Firm and the 2012 Memorandum of Transfer, PS denied knowledge of the visit. She spoke to her first encounter with the Respondents in these terms:

18. I remembered that sometime shortly before Jewan died that three young ladies came to visit him. Two of them were well dressed in black and white and the other was casually dressed in a jeans. They came in the afternoon and about an hour before they came Jewan told me that he was expecting two friends to visit him in a while. When I let them into the house I showed them to his bedroom and I left them alone. They did not tell me what they came for neither did Jewan tell me. I did not know that one of the young ladies was an Attorney at Law and Jewan never told me that he intended to transact any business with the property.

68. With respect to new Certificate of Title registered in Volume 5551 Folio 87,

19. After Jewan died on the 22nd December, 2012 and we completed his Bandara I searched through Jewan's papers. I found a photocopy of the Certificate of Title Volume 2238 Folio 79 with my name and Jewan's name on the front of it. I decided to check with the Registrar General Department to find out if that document was all that was needed to show ownership of the house.

³⁵ ROA Vol 3, Parbatie Siewnarine's witness statement, 145, [3].

³⁶ ROA Vol 3, Parbatie Siewnarine's witness statement, 145, [4].

³⁷ *ibid.*

³⁸ *ibid.*, [5].

20. *My sister Rosabelle accompanied me and we spoke to a Clerk who advised us that the document which I had was a photocopy and that she checked the Vault for the Original Certificate of Title and it was not there. The Clerk told me that the records showed that the Certificate of Title was last withdrawn on by First Citizens Bank. We went to First Citizens Bank and checked with them but the Certificate of Title could not be found. The Clerk then advised me that if I was satisfied that I could not find the Original when I searched through all of Jewan's papers that I could make an application for a Lost Grant to cancel the old Certificate of Title and that a new one would be issued to replace it. I was also informed that I had to apply to remove Jewan's name from the document.*
21. *The Clerk gave me a list containing the procedure to be followed to make the Application for a Lost Grant and to remove Jewan's name and told me that I could either go to an Attorney at law or to a Commissioner of Affidavits to get assistance in preparing the application. I went to ... a Commissioner of Affidavits ... with whom I dealt with before. She prepared the application for me for both the Lost Grant and the removal of Jewan's name and I thereafter proceeded to file it. On the 8th May, 2013 the Registrar General cancelled the old Certificate of Title and issued a new Certificate of Title with my name only on the front of it.*

69. With respect to Memorandum of Transfer No 3, PS explained that her sister, RH, and niece, SH were always good to her and so she wanted them to have the property when she died.³⁹ On March 24, 2015 she executed that Memorandum of Transfer.

³⁹ ROA Vol 3, Parbatie Siewnarine's witness statement, 145, [22]

70. With respect to letter dated March 4, 2016, PS explained that after receiving it, she took it to her attorney who advised her that to ignore the letter since it did not affect the validity of Memorandum of Transfer No 3.⁴⁰

The Cross-Examination

Diana Siewnarine

71. Under cross-examination, DS attempted to assert that PS was aware of the transfer prior to the March 4, 2016 letter.⁴¹ However, the Court intervened.
72. When asked what PS did wrong, DS asserted that PS transferred the property *'the full property to herself'* knowing that Mr Siewnarine wanted to give his share of the property to DS and VS.⁴² DS did agree with Counsel for PS, RH and SH that that source of knowledge was the letter of March 4, 2016 letter which came after DS executed Memorandum of Transfer on March 24, 2015.⁴³ Although DS continued to assert that Mr Siewnarine intended his share of the subject property to DS and VS, she agreed that on March 24, 2015, PS was the sole proprietor of the subject property and that as the sole proprietor PS could deal with the property as PS saw fit.⁴⁴

Victoria Siewnarine

73. VS agreed that if PS got proprietorship of the property legally, she would be entitled to deal with the property as she wished.⁴⁵ However, she asserted that PS committed fraud before prior to the March 2016 letter being sent,

The purpose for sending that letter in 2016 was to complete daddy's wishes but the fraud [was] her knowing prior to 2016 of daddy's wishes and

⁴⁰ ROA Vol 3, Parbatie Siewnarine's witness statement, 145, [23].

⁴¹ ROA Vol 1, Transcript of Proceedings, 28, lln 27 - 28.

⁴² *ibid*, 39, lln 22-27.

⁴³ *ibid*, 39, lln 28 – 34.

⁴⁴ *ibid*, 40, lln 11 – 31.

⁴⁵ *ibid*, 48, lln 30 – 34.

*therefore proceeding to get these documents that you are showing me where she is the sole proprietor, that is the fraud that we are alleging.*⁴⁶

74. When asked why this assertion was not pleaded in their statement of case, or stated in her witness statement, VS said that she was one, not a lawyer, and two that her witness statement,

*Included things that [she] was a part of first hand and it is my knowledge that [DS] would have accompanied daddy as well as his wife to the lawyer's office, so I would not have included that in my witness statement because I would not have been there in person with them.*⁴⁷

75. It is noteworthy that neither in her witness statement or in cross examination did DS say that PS accompanied Mr Siewnarine and herself on any of their visits to the Firm and it certainly was not pleaded.

Umwatie Rekha Seunarine

76. Under cross examination Ms Seunarine agreed that although she averred that she witnessed the execution of the 2012 Memorandum of Transfer, she did not swear the affidavit of execution until May 2015.⁴⁸ When asked whether it would surprise her to know that the pleadings and witness statements filed on behalf of DS and VS did not state that PS visited the Firm, Ms Seunarine answered that she could not say.⁴⁹

Parbatie Siewnarine

77. PS remained unfazed and consistent during cross examination. She maintained that when Mr Siewnarine and herself purchased the property, he told her that whenever one of them passed away the property would go to the other person.⁵⁰ During their forty-year marriage they never discussed the matter

⁴⁶ ROA Vol 1, Transcript of Proceedings, 49, lln 12 – 18.

⁴⁷ *ibid*, 50, lln 3 – 7.

⁴⁸ *ibid*, 52, lln 30 – 34.

⁴⁹ *ibid*, 54, lln 1 – 8.

⁵⁰ *ibid*, 61, lln 3 – 7.

further.⁵¹ She denied that she ever visited the Firm.⁵² She maintained she did not witness the execution of the 2012 Memorandum of Transfer.⁵³ Mr Siewnarine did everything on his own. He did not include her or tell her about his transferring his share of the property to DS and VS.⁵⁴ She agreed with Counsel for DS and VS that she did not hand over the documents requested by them since she was following the advice of her lawyer.⁵⁵

The Findings of Trial Judge

78. The trial judge rejected the notion that the March 4, 2016 letter was meant to “remind” PS of Mr Siewnarine’s intentions with respect to the property. She opined that *‘such a reminder would have been too significant an indicium of purported fraud not to have been pleaded, or to not have found its way into the [witness statements of DS and VS]’*.⁵⁶ She declined to make a finding of fact that PS had notice of the 2012 Memorandum of Transfer prior to the March 4, 2016 letter.
79. She found that PS did have notice of the 2012 Memorandum of Transfer, but held that ignoring that notice *‘did not cross the threshold of the actual dishonesty required for the Court to make a finding of fraud such as to invalidate the title of a registered proprietor’*.⁵⁷ According to the trial judge therefore, the transfers effected by PS were actions that she was legally entitled to take.
80. The trial judge concluded by observing that, *‘if such notice is to be imputed as fraud, then indefeasibility of title- the bedrock of the registered lands and Torrens systems- would be undermined’*.⁵⁸

⁵¹ ROA Vol 1, Transcript of Proceedings, 61, lln 8 – 12.

⁵² *ibid*, 61, lln 13 – 28.

⁵³ *ibid*, 61, ln 29 to 64, ln 8.

⁵⁴ *ibid*, 69, ln 14 to 70, ln 3.

⁵⁵ *ibid*, 71 – 75.

⁵⁶ Supplemental Record of Appeal filed on February 10 2025, Trial Judge’s Reasons, [58].

⁵⁷ *ibid*, [60].

⁵⁸ Supplemental Record of Appeal filed on February 10 2025, Trial Judge’s Reasons, [61].

Discussion, Analysis and Conclusion

81. According to **section 45 of the RPA**, a proprietor holds his interest in land subject only to the interests notified in on the Certificate of Title. The only exception to this where fraud is proved.

82. **Section 141 of the RPA** provides that knowledge that an unregistered interest exists shall not in itself be imputed as fraud.

83. Pursuant to **section 143 (b) of the RPA**,

No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases:

(b) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud; or as against a person deriving, otherwise than as a transferee bona fide for value, from or through a person so registered through fraud.

84. The Counsel for PS, RH and SH referred to the Privy Council’s decision in **Waimiha Sawmilling Company, Limited (In Liquidation) v Waione Timber Company, Limited Respondents**.⁵⁹ In **Waimiha**, the Board was required to consider the meaning of a provision similar in wording to **sections 45 and 141 of our RPA**. The Board underscored that unless the conduct in question comes within the meaning of “fraud” as used in those provisions and can be imputed to the proprietor, their title succeeds. The JCPC endorsed the New Zealand Court of Appeal decision of **Fels v Knowles**.⁶⁰ In **Fels**, the Court of Appeal (NZ) emphasised that upon the registration title, the proprietor has an indefeasible title against all the world, which can only be defeated by **actual fraud**.

85. In **Waimiha**, the JCPC also considered what constitutes actual fraud,⁶¹

⁵⁹ [1926] A.C. 101.

⁶⁰ 26 N. Z. L. R. 604.

⁶¹ [1926] A.C. 101, 106 – 107.

Now **fraud clearly implies some act of dishonesty**. Lord Lindley in *Assets Co. v. Mere Roihi* [1905] A. C. 176, 210. states that:

"Fraud in these actions" (i.e., actions seeking to affect a registered title) "means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

*If the designed object of a transfer be to cheat a man of a known **existing right**, that is fraudulent, and so also fraud may be established by a **deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear**. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. **The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.***

(emphasis mine)

86. The JCPC also clarified that *'if knowledge of the interest itself does not affect a registered proprietor **knowledge that steps are being taken to assert that interest can have no more serious effect'***.⁶² (emphasis mine)

87. In **Sumintra Narine (in her personal capacity and in her capacity as legal personal representative of George Boodoo) v Joseph Boodoo**,⁶³ Blackman J observed that:

Now for a litigant to succeed on the ground of fraud, the fraud alleged must not only be distinctly alleged but must also be distinctly proved. The mere

⁶² [1926] A.C. 101, 108.

⁶³ HC 643/1991.

inclusion on the pleadings of a formidable array of allegations of fraud is not sufficient.

Where fraud is alleged in a civil case the standard of proof as in all other civil cases is on a balance of probabilities. Nevertheless, in such cases there must be a high degree of probability that the fraud has been perpetrated by the person against whom it is alleged.

What constitutes fraud in a civil case such as the present one? In Roberts v. Toussaint 6 W.I.R. 431 at p. 433 (h) Wooding, C.J. defined it as: "...some dishonest act or omission, some trick or artifice, calculated and designed to cheat some person of an unregistered right or interest."

88. Therefore, the threshold for establishing fraud is high.
89. According to Hamel-Smith JA in **Baby Khan v Farouk Khan and Ors**,⁶⁴ *'whatever form the pleadings may take, the facts must be such that they establish an intention ... to dishonestly deprive [another] of their land'*.
90. The trial judge was therefore right to find that PS did have knowledge of the 2012 Memorandum of Transfer. However, **section 141 of the RPA** makes clear that knowledge of an unregistered interest is not enough to establish fraud.
91. DS and VS failed to go the step further to prove that the registration of Memorandum of Transfer No 3 was an act of fraud. DS and VS failed to prove that PS accompanied Mr Siewnarine to Firm when instructions were given with respect to the 2012 Memorandum of Transfer. This was not pleaded and although DS asserted that she took Mr Siewnarine to the Firm, she did not say either in her witness statement or under cross examination that PS also accompanied them. The first time that VS gave evidence to that effect was under cross examination. She could not explain why it was omitted from the statement

⁶⁴ Civ. App No. 101 of 1997.

of case or her witness statement. Ms Seunarine was employed at the Firm when the affidavit was drafted and executed. According to her evidence, through her work at the Firm and by looking at documents drafted by the Firm for Mr Siewnarine, she came to know that the elder woman accompanying Mr Siewnarine on occasion was PS, his wife. Ms Seunarine provided no independent evidence corroborating this. Notably, she never saw PS, DS and Mr Siewnarine at the Firm at the same time.

92. DS and VS also failed to prove that PS was in Mr Siewnarine's bedroom when the 2012 Memorandum of Transfer was read aloud and executed. PS was adamant that she was not in the bedroom with them when that transaction occurred.
93. DS and VS also sought, for the first time at trial, to assert that PS knew Mr Siewnarine's intention to transfer his ½ of the property to DS and VS prior to her execution of Memorandum of Transfer No 3 so that the March 2016 letter was meant to serve as a reminder of what PS already knew. The trial judge made no finding with respect to this allegation.
94. In my opinion, it was open to the trial judge to find that PS had no previous knowledge of Mr Siewnarine's intention since, that allegation was not pleaded, nor was it averred to in the witness statements of DS and VS. That was a gross omission. Further, when DS and VS introduced this allegation at trial, they provided no explanation regarding the circumstances in which PS would have come to have advance knowledge of Mr Siewnarine's intentions. In the face of PS's consistent testimony that Mr Siewnarine did not discuss his share of the property with her and further that he made decisions on his own without her, the allegation could not stand. PS's testimony in this regard is in fact supported by the fact that DS and VS did not challenge PS's account of the real and monetary property dispersed to DS and VS by Mr Siewnarine without PS's knowledge.

95. DS and VS failed to discharge the burden of proving that PS intended to deprive DS and VS of a ½ share in the subject property. PS testified that her dealings with the property after Mr Siewnarine's death were geared toward showing her ownership of the house and providing for her sister and niece. These are transactions that were well within her right of survivorship over the subject property.
96. **The trial judge was correct and not plainly wrong to find that PS did not perpetrate fraud by causing a new Certificate of Title to be registered with herself endorsed as sole proprietor and to effect the registration of the 2015 Memorandum of Transfer, notwithstanding that PS had notice of the 2012 Memorandum of Transfer executed by Mr Siewnarine.**
97. From the above, it is clear that the answers to the issues are as follows:
1. **The trial judge erred and was plainly wrong to find that the act of preparing and executing the 2012 Memorandum of Transfer was effective to sever the joint tenancy between the deceased and PS over the land, the subject matter of this claim, which is registered under the Real Property Act.**
 2. **The trial judge erred and was plainly wrong to find that the legal effect of the unregistered 2012 Memorandum of Transfer was that it extinguished the PS's right of survivorship and entitled PS to a divided ½ share in the encumbered property.**
 3. **The trial judge erred and was plainly wrong to find that the principles governing claims *in personam* were relevant to the facts of this case.**
 4. **The trial judge was not plainly wrong to find that PS did not perpetrate fraud by causing a new Certificate of Title to be registered with herself endorsed as sole proprietor to effect the registration of the 2015**

Memorandum of Transfer, notwithstanding that PS had notice of the 2012 Memorandum of Transfer executed by Mr Siewnarine.

COSTS

98. Mr. Dowlath informed the Court that the value of the claim was fixed at the Case Management Conference on December 8, 2020 at \$325,000.00 making the prescribed costs to be paid by the losing party, the sum of \$54,000.00. Costs to a successful Appellant are assessed at 2/3 of those costs payable at the High Court, if the costs are on the prescribed scale. The Court offered the parties an opportunity to confer. The parties did not agree and has left the issue to the Court.

ORDER

99. In the premises, I now make the following order:

- 1. That the appeal be allowed.**
- 2. The orders of the trial judge on issues 1,2,3 are set aside.**
- 3. The findings of the trial judge on issue 4 are upheld.**
- 4. That the order of costs in the High Court be set aside in terms of who is responsible to pay the costs.**
- 5. That the Respondents do pay the Appellants' costs as follows:**
 - 1) In the High Court, the sum of \$54,000.00.**
 - 2) In the Court of Appeal, following the 2/3 rule, the sum of \$36,000.00.**

I wish to gratefully acknowledge the thorough assistance of Judicial Research Counsel,

Ms. Koya Ryan

Mr. Avinash Sahabideen

Ms. Sherisse de Freitas

Ms. Riyana Gibson

Ms. Jael Reid

/s/ C. Pemberton J.A.

Justice of Appeal