

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2021/0014

BETWEEN

[1] CHERYL BERTRAND
[2] SHAKIRA FRANCIS
(by her next friend, KARA MARIA FRANCOIS)

Appellants

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Paul Webster
The Hon. Mde. Esco L. Henry
The Hon. Mr. Gerhard Wallbank

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Horace Fraser for the appellant
Mr. Rene Williams, with him Mr. Seryozha Cenac and Ms. Karen Barnard for
the respondent

2022: Dec 7;
2023: May 22.

Civil appeal – Intestacy – Succession – Entitlement of children born out of wedlock to inherit from their deceased father’s estates on intestacy – Constitutional law – Fundamental rights and freedoms – Whether Article 579 of the Civil Code of Saint Lucia infringed sections 6, 10 and 13 of the Constitution of Saint Lucia – Standing to bring a constitutional claim for breach of fundamental rights and freedoms – Whether appellants had standing to bring a claim for breach of their fathers’ rights to freedom of expression and to protection from discrimination – Chose in action – Whether Article 579 deprived the appellants of the right of succession

to property or interest in property to which their deceased fathers were entitled – Application to amend a statement of case after the first case management conference – Rule 20.1 of the Civil Procedure Rules 2000 – Whether the learned judge erred by refusing leave to the appellants to amend their statements of case

The appellants, Shakira Francis (suing by her mother Kara Maria Francois as next friend) and Cheryl Bertrand (together “the appellants”) were both children fathered out of wedlock by married men. Their fathers died without making a will and they both claimed that they were entitled to a share in their deceased fathers’ estates on intestacy. By fixed date claims and supporting affidavits filed on 12th August 2020 in the High Court, the appellants contended that Article 579 of the Civil Code of Saint Lucia (“the Civil Code”) deprived them of the right to succession to their respective fathers’ property; and to protection of the law and equal treatment under sections 1 and 6 of the Constitution of Saint Lucia (“the Constitution”).

They pleaded that the impugned Article discriminated against their fathers and constituted a breach of their fathers’ freedom of expression. They also asserted that by virtue of the circumstances of their birth they had suffered direct loss by reason of these alleged constitutional breaches. They sought, *inter alia*, declarations that Article 579 was unconstitutional and costs. During the trial in the lower court, the appellants loosely articulated an application to amend their statements of case to assert that their rights (as opposed to their fathers’ rights) under section 13 of the Constitution to protection from discrimination had been violated and consequently their constitutional right to property had been infringed, by virtue of their fathers’ status as married men and their fathers’ exercise of their freedom of expression. In a judgment delivered on 30th June 2021, the judge refused leave to amend the claims and ultimately dismissed both claims.

Being dissatisfied with the judge’s ruling, the appellants appealed. The appellants submitted 5 grounds of appeal but the two main issues which arose on appeal were: (i) whether the learned judge erred by not granting leave to the appellants to amend their statements of case and (ii) whether the judge erred by holding that Article 579 of the Civil Code did not infringe sections 6, 10 and 13 of the Constitution and was therefore not unconstitutional.

Held: dismissing the appeal, affirming the judgment made in the lower court and ordering that each party shall bear their own costs of the appeal, that:

1. After the first case management conference, a party may change its statement of case only with leave of the court. The guiding principle is that amendments ought to be made if essential to the resolution of the real question in controversy and where the justice of the case so requires. When considering an application to amend a statement of case, the court should have regard to all relevant factors including how promptly the application was made, the stage of the proceedings, the prejudice or advantage to parties if the application is granted or refused, whether the opposing party may be compensated in costs, the effect on the trial date and the administration of justice. Ultimately, the court should aim to achieve fairness to the parties and further the overriding objective.

Rule 20.1 of the **Civil Procedure Rules 2000** applied; **George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson GDAHCVAP2014/0007** (delivered 24th November 2014, unreported) followed.

2. An examination of the trial judge's ruling reveals that she had regard to CPR 20 when considering the application to amend the statements of case. She considered the stage of the proceedings and the likely prejudice to the respondent. However, the judge's decision appeared to be predicated primarily on the fact that the application was not in writing. She therefore failed to have proper regard to other material considerations including the interest of justice, whether the respondent could have been compensated in costs, the impact granting the order would have had on the progress of the proceedings, the loss of judicial time and how it would impact the administration of justice. The judge further failed to consider that the application *qua* submission was made on the trial date or the procedure regarding how an amendment is formally effected. In so doing, the judge erred by failing to consider all the relevant substantive and procedural factors and the application to amend the statements of case fell to be considered afresh by the Court of Appeal.

Rule 20.1 of the **Civil Procedure Rules 2000** applied; **George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson GDAHCVAP2014/0007** (delivered 24th November 2014, unreported) followed; Paragraphs 2 and 3 of **Practice Direction No. 5 of 2011** applied.

3. On the facts, no application was made to dispense with the need for a written application and no order was made dispensing with that requirement. Moreover, the appellants failed to present to the court or the opposing party a draft with the wording of the proposed changes to the statements of case. The fact is that the application was made at an advanced stage of the proceedings and the respondent would have been taken by surprise. Further, any order granting leave would have had to include consequential orders for the statements of case to be re-verified and re-filed and the corresponding changes to the evidence would have been necessary. This would have likely led to a deferral of the trial date. Whilst it was arguable that the respondent could have been compensated in costs, a preliminary assessment of the appellants' prospects of success if the amendments were permitted suggests that their intended allegations were likely to fail. Thus, the relevant procedural and substantive factors weighed heavily against the appellants and the Court found that it was in the interest of justice to deny the oral application for leave to amend the statements of case.
4. Section 16 of the Constitution confers a cause of action for breach of section 10 of the Constitution exclusively on the person who claims that his right to freedom of expression has been, is being or is likely to be infringed. Only such a person may maintain an action for breach of such rights in relation to himself. On the facts, neither appellant had the requisite legal standing to maintain a claim for breach of her father's constitutional right to freedom of expression by virtue of Article 579.

Consequently, their contention that they were directly affected by reason of their inability to inherit from their fathers' estates on intestacy did not forge a connection between their fathers' enjoyment of their rights and any purported constitutional or other right of either appellant to inherit such property or interest in the same. The judge therefore did not err in holding that the appellants had no legal standing to pursue a claim for infringement of their fathers' constitutional rights to freedom of expression and that those as well as the incidental claims therefore failed.

Section 16 of the **Constitution of Saint Lucia** Cap. 1.01 of the Revised Laws of Saint Lucia, 2020 applied.

5. The learned judge however, did not go on to consider the other aspects of the appellants' freedom of expression case, i.e. that the breach of those rights of their fathers directly affected their 'right of succession to property', to 'an interest in property' of their fathers, or their 'ability to inherit property forming part of their fathers' estates'. With the appellants' freedom of expression claims having failed, so too would the claim for declaratory relief in relation to them. Thus, there being no breach of the fathers' rights to freedom of expression under section 10 of the Constitution, there was no corresponding breach of the appellants' right under section 6 not to be subjected to compulsory deprivation of property without adequate compensation. Moreover, even if the learned judge had considered the decision in **Vermeire v Belgium** and/or granted leave to amend the appellants' statements of case as requested, this would not have changed the outcome, that Article 579 of the Civil Code did not deprive the appellants of their right to succession to property or an interest in property to which their deceased fathers were entitled.

Vermeire v Belgium [1991] ECHR 12849/87 distinguished.

6. A chose in action is a term used to describe all rights of property which can be claimed or enforced only by action and not by taking physical possession. The appellants' use of the terminology 'right of succession to property or interest in property to which [the] deceased father is so entitled' and 'right to succession of property or interest in property of [the] father' signified that the declaratory relief sought was not limited to 'an interest in property' but also extended to a 'right to succession of property' which qualified as a chose in action. In her ruling, the judge did not address her mind to the issue of whether the appellants made out their claim to choses in action and in so doing, she erred, and it fell to the Court of Appeal to make a determination on the issue.

Flat Point Development Limited v Mary Dooley ANUHCVP2015/0029 (delivered 13th March 2019, unreported) followed.

7. Section 6 of the Constitution prohibits the compulsory acquisition not only of physical tangible things such as land, but also trust, contractual and beneficial contingent rights, provided that they are capable of being owned or held in possession. A chose in action would fit into this description if it is capable of being owned. On the facts, the appellants had not identified any chose in action owned by them. Moreover,

neither appellant alleged that the Crown had transferred the avowed chose in action to another person or that Article 579 had that effect. Consequently, neither appellant established that they had the requisite standing to pursue a claim for a breach of section 6 and they failed to prove that Article 579 had the effect of compulsory acquisition of any right of theirs to pursue a claim for an interest in their fathers' estates, being the choses in action to which they claimed ownership.

8. Constitutional provisions such as section 1 of the Constitution are introductory and prefatory in nature, are unenforceable and not justiciable. Notwithstanding, to the extent that they are declaratory of rights, regard is to be had to them in construing justiciable provisions in the Constitution. On the facts, the learned judge examined section 1 and its import in relation to the appellants' contention that it was justiciable. Although a judge is not expected to expressly analyze every possible legal point that is a spin-off from the main issues in a case, the appellants' contention that the learned judge failed to have regard to the declarations in section 1 in construing section 13 was not borne out by the contents of the judgment.

Olivier and another v Buttigieg [1966] 2 ALL ER 459 considered; **Matadeen v Pointu** [1998] UKPC 9 considered; **Jay Chandler v The State (No 2)** [2022] UKPC 19 considered.

9. Section 13(4)(c) of the Constitution makes an exception for the enactment of laws which afford different treatment to individuals in matters pertaining to devolution of property on death. An examination of section 13(4) of the Constitution demonstrates that the clause 'reasonably justifiable in a democratic society' qualifies only paragraph (d). It has no applicability to paragraph (c). Construing paragraphs (c) and (d) as disjunctive, better accords with the practice within courts of Commonwealth common law jurisdictions, including this Court. The learned judge was therefore correct to conclude that it was not necessary for her to examine whether Article 579 was 'reasonably justifiable in a democratic society.' Consequently, she did not err when she held that section 13(4)(c) and (d) do not have to be read conjunctively but disjunctively, and that section 13(4)(c) permits the enactment of a discriminatory law in certain exceptional instances, including in relation to devolution of property on death, as happened with Article 579 of the Civil Code.

Magaya v Magaya [1999] 3 LRC 35 considered.

JUDGMENT

Introduction

- [1] **HENRY JA [AG]:** This case raises interesting legal questions about the rights of inheritance of a child who is fathered by a married man, in circumstances where the child's mother is not his wife. The appellants fall into that category. In both instances,

the fathers passed away without making a will. Their daughters, Shakira Francis (“Ms. Francis”) (suing by her mother Kara Francois as next friend) and Cheryl Bertrand (“Ms. Bertrand”) (together “the appellants”) contend that they are entitled to a share in their deceased fathers’ estates on intestacy, notwithstanding a law to the contrary. They filed claims in the High Court challenging the constitutionality of that law – Article 579 of the **Civil Code of Saint Lucia** (the “**Civil Code**”).¹ The claims were consolidated and heard together.

- [2] Article 579 of the **Civil Code** makes provision for the offspring of single men and single women to inherit that deceased parent’s estate, if the parent dies intestate. Although ‘single woman’ is defined to include ‘a married woman living apart and separate from her husband,’ no corresponding provision is made with respect to married men living separate and apart from their wives, who fathered children out of wedlock. Instead, the definition given to ‘single man’ is ‘a man who has never been married.’
- [3] By fixed date claims and supporting affidavits filed on 12th August 2020 in the High Court, the appellants contended that Article 579 deprived them of the right to succession to their respective fathers’ property; and to protection of the law and equal treatment under sections 1 and 6 of the **Constitution of Saint Lucia**² (“the **Constitution**”). They pleaded that the impugned Article discriminated against their fathers and constituted a breach of their fathers’ freedom of expression. They asserted that by virtue of the circumstances of their birth they had suffered direct loss by reason of these alleged constitutional breaches. They sought declarations that Article 579 was unconstitutional on those bases. They contended further that Article 579 contravened the United Nations Convention on the Rights of the Child as it promotes unequal treatment of children. This latter point is not an issue in this appeal.

¹ Cap. 4.01 of the Revised Laws of Saint Lucia, 2020.

² Cap. 1.01 of the Revised Laws of Saint Lucia, 2020.

- [4] The appellants submitted that the distinctions between succession by children fathered by single men on the one hand, and out of wedlock to married men on the other hand were repugnant and not reasonably justifiable in a democratic society. They sought costs.
- [5] In the court below, the appellants loosely articulated an application to amend their statements of case to assert that their rights³ under section 13 of the **Constitution** to protection from discrimination had been violated and consequently their constitutional right to property had been infringed, by virtue of their fathers' status as married men and their fathers' exercise of their freedom of expression. The application was made during the course of oral submissions. The learned judge deferred her ruling on the application until delivery of the judgment and ultimately, she refused leave to amend the claim. She dismissed both claims.
- [6] The appellants have appealed the judgment. They submitted that the learned judge erred in law by not recognizing that the **Constitution** protects one's interest in property in the form of a chose in action. Another criticism is that the learned judge erred in law by ruling that section 13(4)(d) of the **Constitution** does not shift the burden to the Crown to prove that the restriction imposed by Article 579 is reasonably justifiable in a democratic society. The appellants argued that the learned judge did not apply her mind to their respective cases and thereby erred in concluding that Article 579 of the **Civil Code** is not unconstitutional. They were also of the view that the learned judge erred by failing to permit the amendment to their claims.
- [7] The Honourable Attorney General ("the respondent") argued that the learned judge correctly applied the relevant principles of law governing the amendment of a claim and did not err in refusing leave to amend the claim. He submitted that the appellants failed to establish their claims and the learned judge arrived at the correct decision.

³ Instead of their fathers' rights.

- [8] The appeals are dismissed for the reasons set out in this judgment. The costs order is not disturbed.

Grounds of Appeal

- [9] The appellants lodged five grounds of appeal, namely:
- (1) The trial in the court below became unfair when the learned trial judge failed to exercise her discretion to allow the appellants to amend their cases to claim that they suffered discrimination on the ground of sex because of their fathers' status as married men and their constitutional right to property was thereby breached.
 - (2) The learned trial judge misdirected herself because she did not apply her mind to the appellants' case that:
 - (a) they suffered sufficient direct loss as a result their fathers' status as married men; and
 - (b) Article 579 violates their fathers' freedom of expression resulting in sufficient direct loss to them due to their inability to inherit their fathers' estates

As a result of such misdirection, she erred in law in holding that their constitutional right to property and their fathers' right to freedom of expression were not infringed. Further, the learned judge failed to apply and analyze the cases relied on by the appellants to establish this point and this failure rendered the trial unfair.
 - (3) When she ruled that the appellants failed to prove ownership or interest of any property, the judge misconstrued the appellants' cases, misdirected herself and erred in law by failing to recognize that the law protects one's interest in property which is in the character of a chose in action.
 - (4) In construing section 13 of the **Constitution**, the learned trial judge misdirected herself and erred in law by failing to have regard to the directive

principles contained in section 1 of the **Constitution** and erred by not granting the declaration sought by the appellants.

- (5) The learned trial judge misdirected herself and erred in law by ruling that section 13(4)(d) does not shift the burden to the Crown to prove that a limitation imposed by law with respect to protection from discrimination is reasonably justifiable in a democratic society.

Issues

[10] The issues may conveniently be condensed. They are two-fold, namely, whether the learned judge erred by:

- (1) not granting leave to amend the statements of case (“the amendment issue”); and
- (2) holding that Article 579 of the **Civil Code** does not infringe sections 6, 10 and 13 of the **Constitution** and is therefore not unconstitutional (“the constitutionality issue”).

The Amendment Issue

[11] The appellants’ first ground of appeal is that the trial became unfair when the learned judge did not exercise her discretion to allow them to amend their claims. The record reveals that the hearing proceeded on the basis of the pleaded statements of case. However, during the course of argument, learned counsel for the appellants submitted that their constitutional right to property was breached and they suffered discrimination on the ground of sex because of their fathers’ status as married men. At that juncture, the learned judge reminded him that this was not pleaded and he accepted that it was not.⁴ In fact, in their pleaded cases, the appellants alleged that their fathers’ constitutional rights to freedom of expression and from discrimination were breached as a result of which they suffered indirect loss.

⁴ See transcript of proceedings in the Hearing Bundle at pg. 261 line 16 to pg. 262 line 14 in relation to discrimination; and pgs. 245 – 258 regarding breach of property rights related to discrimination and breach of the right to freedom of expression.

[12] In each fixed date claim form and supporting affidavit,⁵ declarations were sought that:

“the law embodied in Article 579 of the Civil Code of Saint Lucia is a breach of her father’s constitutional right of freedom of expression which in turns (sic) directly affects her right to the succession of property or interest in property of her father contrary to section 10 of the Constitution.” and

“Article 579 of the Civil Code discriminates against her father on the ground of his sex which militates against her ability to inherit property forming part of his estate contrary to Section 13 of the Constitution.” (Emphasis added)

[13] In her supporting affidavit, Ms. Bertrand asserted:

“13. ... I believe that it would be my father’s wish that any property or interest he has in property would be inherited by me and my brother. This right has been frustrated by a law which discriminates against children born out of wedlock to a married man and therefore prevents me and my brother from inheriting the estate of our father.

14. That Article 579 of the Civil Code also discriminated against me through my father on the ground of his sex. ...

....

16. That Article 579 of the Civil Code also goes against the constitution regard (sic) my father’s freedom of expression, that is, his freedom of choice. His choice to be married and to leave his marriage and form a union with my mother and have sexual relations while still being married resulting in him fathering children as a result of that choice.

17. That because of my father’s right to choose what lifestyle he will adopt and which he was free to do, Parliament by its enactment of Article 579 of the Civil Code seeks to stifle the expression of that choice by disinheriting his children from the succession for his estate, children who were born of innocence and did nothing to aid his choice.

18. That my father’s freedom of choice or freedom of expression is protected by the Constitution and Article 579 of the Civil Code seeks to interfere with that freedom which in turn directly affect my interest in my father’s estate.”⁶ (Emphasis added)

⁵ Filed on 12th August 2020 by Shakira Francis by her next friend Kara Maria Francois and Cheryl Bertrand, at paras. (3) and (4). See also paras. 20(c) and (d) and 21(c) and (d) respectively of the supporting affidavits of Cheryl Bertrand and Kara Maria Francois filed on even date.

⁶ At paras. 13, 14, 16, 17 and 18.

Ms. Francois made similar averments in her affidavit⁷ in relation to Shakira and her deceased father.

[14] During an extended exchange between the learned judge and learned counsel regarding his deviation in his submissions from the pleaded cases, he conceded the variance and asked the court to amend the statements of case. It is instructive to set out the relevant parts of the exchange between learned counsel and the learned judge to provide the context in which the application was made, how it was formulated and to highlight the submissions made by learned counsel in support.

[15] The dialogue appears in the transcript.⁸ The most relevant portions are:

“MR. FRASER: ...The other feature of the case, My Lady, that the Court should take cognizance of is the manner the claim is structured. The claim is so structured, the Claimants are saying my father’s constitutional rights have been breached and that breach directly affects me.

.....

THE COURT: So, how does the Claimant raise a breach of their father’s constitutional right in the context - -

.....

THE COURT: - - of being that, that they are, are saying that their rights have been breached, because he’s (sic) rights have been breached.

MR. FRASER: Yes, the rights have been breached.

THE COURT: But, he is not a party to this claim and if you look at - -

MR. FRASER: He’s not a party to the claim.

THE COURT: - - but, if you look at Section 16, its (sic) very clear as to how these claims are brought and so I, I was not sure how, how you intended, to deal with that submission that the father’s constitutional rights have been breached and therefore, by extension the child’s constitutional rights has, have been breached.

MR. FRASER: We, we looking, we looking at the impact; what we see is a connection between that breach and their loss, so they’re showing that that breach caused them loss and so therefore, they’re entitled to a remedy.

⁷ At paras. 13, 14, 16, 17 and 18.

⁸ Hearing Bundle pgs. 245 -258. See also pgs. 261 – 262.

THE COURT: But, Mr. Fraser, don't, don't you first have to establish that there has been a breach of the fathers' constitutional rights and that - -

MR. FRASER: Yes.

THE COURT: - - cannot be established by these Claimants.

MR. FRASER: No, My Lady, I, I, I, I disagree with that position, My Lady.

.....

THE COURT: ... what I am asking you is your submission is that the constitutional rights of their father's (sic) has been breached and therefore they have suffered loss. The question is, whether you can mount the challenge that way in light of Section 16, which to my mind then requires the Court to make a determination as to whether, in fact, the father's rights were breached; and he is not a party to this claim. He is the only one who can say that my rights have been, have infringed and I want redress from the Court. ... I'm not sure that I'm with you as to how you have submitted it. ... my question is ... whether you can mount the challenge the way you have in light of the breach of the father's constitutional rights.⁹

MR. FRASER: If we look at it that way, My Lady, or we look at it in a way to say that their constitutional rights have been breached, because of the fact that their father's had a certain status.

.....

MR. FRASER: - - the fact is if we say that the father status caused them to be discriminated against in terms of the various challenges to the freedom of expression, right to property and on the ground of sex, they're still directly affected and they're directly affected because of the father's status. So, there's no way you could eliminate the father out the scheme of things.

.....

THE COURT: So, you're not - - you've not said to me that the Claimants rights were breached, you said to me that the father's rights were breached and therefore indirectly, they have been affected.

MR. FRASER: Yeah, because their rights have been breached, because, because you go back to the father's status, their rights have been breached, because they're unable to, they're unable to succeed to the father's estate because of his status.

THE COURT: That's different from saying that his rights have been breached, though Mr. Fraser.

⁹ Hearing Bundle pg. 248.

MR. FRASER: All right, at this stage, I, I think I'll ask the Court to make that slight amendment and to look at it of the status of their father and their constitutional (sic) have been breached because of the status (inaudible).¹⁰

.....

MR. FRASER: ... My Lady, given the way the claim was structured and given to (sic) the amendment that is made, I, don't think this ground could be sustained.

.....

MR. FRASER: ... I don't think the ground could be sustained having regards to the amendment that was made.

.....

MR. FRASER: -- My Lady, made a certain point and I asked that the, the, argument be restructured to deal with only the father's status and so, the breach is a breach that their right because of the father's status, so it's no longer arguing that it is the breach of the father and so their (inaudible).

THE COURT: But, Mr. Fraser, -- and I have not ruled on that submission at all.

MR. FRASER: I know my Lady.

.....

MR. FRASER: ... the Court has jurisdiction in any matter from the Supreme Court Act, from the CPR to deal with these matters to put anything right so that the claim before it can make sense and for the Court to give a remedy even if the remedy is not asked or, or, or pleaded; the Court does have that power. And, so if in this case, to make sense of the argument that it has to be seen as we said the status which the breach is founded on, then the Court can do that even at this late stage."¹¹ (Emphasis added)

- [16] Counsel for the respondent Ms. Karen Barnard, objected to the application. She directed the court's attention to rule 20.1(3) of the **Civil Procedure Rules 2000** ("**CPR**") highlighting that an application for permission to change a statement of case may not be granted after the first case management conference unless the applicant satisfies the court that the change is necessary because of some change

¹⁰ Hearing Bundle pgs. 249-250.

¹¹ Hearing Bundle pgs. 256 -258.

in the circumstances, that was discovered after that case management conference.¹² She said that no such change of circumstances appears to exist.

[17] The learned judge signaled that she would make a ruling on the application in the judgment. In delivering the judgment at paragraph 66, she noted:

“During the course of oral arguments, the Court pointed out to Mr. Fraser, counsel for the claimants that the claimants’ case was that their fathers’ rights have been breached and therefore they have been affected but that he now seemed to be suggesting that the claimants’ rights have been breached because of the status of their fathers which was different from their pleaded cases. In response Mr. Fraser asked that he be permitted to amend the claim to read that the claimants’ rights have been breached because of the status of their fathers. As would be expected, the AG raised an objection...”

[18] The trial judge’s ruling on the application was succinct. She held:

“The short response is that the Court would not permit such an amendment as CPR 20 is clear as to how amendments to statements of case ought to be made. The defendant would have had no prior notice of such an amendment which is coming way after case management and therefore would not have had an opportunity to address the proposed amendment. In any event, application to amend the statement of case would have had to have been made by way of a written application and not orally at the hearing of the claims.”¹³

[19] Before this Court, learned counsel Mr. Fraser submitted that the CPR allows amendments to claim forms to be made at any time with the court’s leave. He failed to see how the respondent could have been taken by surprise by the oral application to amend. He reasoned that the respondent would have had notice of the way it was structured; and what was being sought was not an elaborate change of the wording of the claim. Furthermore, the court was empowered to make the amendment and issue consequential orders to address any prejudice to the respondent. In his opinion, that would not have necessitated any further witness statements or adjustment to the respondent’s statements of case.

¹² Hearing Bundle pg. 268 lines 3 – 11.

¹³ See para. 67 of the judgment.

- [20] Learned counsel contended that the Court of Appeal provided guidance in **Mark Brantley v Dwight C. Cozier**¹⁴ regarding how the court should approach an amendment application. Among the relevant considerations is the overriding objective of the CPR including the requirement for expeditious resolution of cases. He cited **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalack**¹⁵ noting that the Board opined that the court's function under the CPR is to do substantive justice on the merits of the case with the added imperative of deciding cases expeditiously in furtherance of the overriding objective. He stated that the learned judge gave no consideration to those factors and this failure fundamentally affected the outcome of the case and was unfair to the appellants.
- [21] For the respondent, learned counsel Mr. Rene Williams submitted that because the application was made orally, it was not clear what amendments were being proposed. He noted that CPR rule 20.1 deals with applications for amendment of claim forms. It stipulates that the court must consider a number of factors including the justice to the parties, whether a fundamental change is being proposed at the last minute, lost judicial time, the state of the proceedings, whether the proposed amendment will effect a useful purpose, and any adverse effect on the other party.
- [22] He noted that the case had proceeded up to that stage on the basis that the constitutional rights being considered were those of the appellants' fathers. The suggested amendments would have constituted a fundamental change and the respondent would not have been adequately compensated in costs if the application was granted. He acknowledged that the judge did not address whether the respondent could be compensated in costs and pointed out that the learned judge mentioned three factors in her ruling, namely that a) no prior notice of the application was given to the respondent; b) no written application was made and c) the respondent would therefore have had no opportunity to address the application. He

¹⁴ SKBHCVP2014/0027 (delivered 11th March 2019, unreported).

¹⁵ [2010] UKPC 15.

argued that based on the timing of the application and the nature of proposed amendment, the court was correct to give weight to those factors and refuse the application.

- [23] Citing **George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson**¹⁶ and **Comodo Holdings Limited v Renaissance Ventures Limited et al**¹⁷ learned counsel submitted that the Court of Appeal will not lightly interfere with the exercise of discretion by a trial judge unless it is plainly wrong. He distinguished the instant case from **Allert v Matheson** because in **Allert v Matheson** leave to amend was granted on an application made before the trial date was fixed. He concluded that the learned judge's decision should be upheld as she did not err in the exercise of her discretion.

Discussion

- [24] An application to amend a statement of case is governed by CPR Part 20. Those rules outline the circumstances in which a party may change its statement of case. The court's leave is required if the proposed change is to be made after the first case management conference and is at the court's discretion. Such discretion must be exercised judicially and within the parameters set out in the CPR.
- [25] This ground of appeal invites consideration of what exactly were the proposed amendments and whether the learned judge in the exercise of her discretion erred in principle by either having regard to irrelevant factors or by not taking into account or attaching too little weight to relevant ones and made a blatantly wrong decision as a result. **Dufour v Helenair Corporation Limited**¹⁸ is one of the leading cases which enumerates those criteria which are employed by an appellate court in reviewing a lower court's exercise of discretion. I bear them in mind as I examine this aspect of the case.

¹⁶ GDAHCVAP2014/0007 (delivered 24th November 2014, unreported).

¹⁷ BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported).

¹⁸ (1996) 52 WIR 188.

[26] CPR 20.1(1) and (2) outline the general provisions. Sub-rule (3) and a related Practice Direction ("PD")¹⁹ list the factors to be considered and are expressed in almost identical terms. Rule 20.1 provides:

"Changes to statement of case

20.1 –

1. A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.
2. The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.
3. When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –
 - a. how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;
 - b. the prejudice to the applicant if the application were refused;
 - c. the prejudice to the other parties if the change were permitted
 - d. whether any prejudice to any other party can be compensated by the payment of costs and or interest;
 - e. whether the trial date or any likely trial date can still be met if the application is granted; and
 - f. the administration of justice."

[27] The law regarding how a judge should approach an application for amendment of a statement of case is settled. The court's ultimate objective is achieving fairness to the parties. This involves making sure that the real dispute is resolved. The court must weigh several factors including the stage of proceedings at which the application is made and the likely prejudice to or potential advantage to be gained by either party based on the outcome.

¹⁹ No. 5 of 2011 at para. 4.

[28] In **Allert v Matheson**, this Court stated:

“In exercising its discretion the court should be guided by the general principle that amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing inconvenience to the other party and can be compensated in costs. ... The rules must be applied in a manner that is fair to both parties and should not be applied in an inflexible manner that will prevent a litigant from prosecuting its case based on mere technicality.”²⁰

[29] Blenman JA who penned the judgment, quoted approvingly the dictum of Brett MR in **Clarapede & Co v Commercial Union Association**²¹ where he said:

“...however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs;...”

She made clear that it is in the public interest to permit a party “to deploy its real case”²² if it has a realistic prospect of success and is relevant. The learned Justice of Appeal noted further that such an application is usually made by filing an application. The foregoing rules and principles are equally applicable in the instant case.

[30] In seeking to achieve fairness therefore, the court weighs many factors, including those in CPR 20.1(3) as well as “the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and importantly, whether the amendment will serve any useful purpose.”²³

²⁰ Supra n. 16 at para. 49.

²¹ (1883) 32 WR 262, 263 (as cited by Neuberger J in *Charlesworth v Relay Roads Ltd and others* [2000] 1 WLR 230 at pg. 235).

²² Supra n. 16 at para. 53.

²³ Supra n. 16 at para. 54.

- [31] An examination of the learned trial judge's ruling reveals that she had regard to CPR 20 when considering the application. However, she did not outline all of the factors listed at CPR 20.1(3) and she made no reference to the overriding objective to act justly. She took into account the stage of the proceedings at which the application was made and the likely prejudice to the respondent, occasioned by the suddenness of the application. She commented on the lack of notice to the respondent and that it limited his capacity to respond. These observations suggest that the learned judge had in contemplation the factors outlined at paragraphs (a) through (d) of CPR 20.1(3) even though she did not list them all and/or express an opinion on each one. It must be noted that her decision hinged partly on those considerations but also on a procedural flaw, in that, the application was not reduced to writing.
- [32] The learned judge failed to have proper regard to other material considerations including the interest of justice, whether the respondent could have been compensated in costs, the impact granting the order would have had on the progress of the proceedings, the loss of judicial time and how it would impact the administration of justice. She also failed to consider that the application *qua* submission was made on the trial date or the procedure regarding how an amendment is formally effected. In so doing, the judge erred by failing to consider all the relevant substantive and procedural factors and the application to amend the statements of case fell to be considered afresh by the Court of Appeal.
- [33] As to procedure, the general rule is that an application must be made in writing²⁴ and must be served on the other party at least 7 days before the court is to deal with it.²⁵ However, an oral application may be made if the court dispenses with the need for it to be in writing or if the CPR or a PD so permits.²⁶
- [34] PD No. 5 of 2011 outlines the procedure for seeking permission to change a statement of case. Paragraph 2 states:

²⁴ CPR 11.6(1).

²⁵ CPR 11.11(1). See also PD No. 5 of 2011.

²⁶ CPR 11.6(2).

“2. Applications to Change The Statement of Case Where The Permission Of The Court Is Required

- 2.1 The application may be dealt with at a hearing or, if Rule 11.14 applies, without a hearing.
- 2.2 When making an application to change a statement of case, the applicant should file with the court:
 - (1) the application and affidavit in support, together with
 - (2) a copy of the statement of case with the proposed changes.
- 2.3 Where permission to change has been given, the applicant should within 14 days of the date of the order, or within such other period as the court may direct, file with the court the amended statement of case.
- 2.4 A copy of the order and the amended statement of case should be served on every party to the proceedings, unless the court orders otherwise.” (Emphasis added)

[35] Paragraph 3 of the PD provides guidance regarding how an amendment is formally effected. The amended statement of case and the court’s copy of it are to be endorsed with a note recording the fact of the amendment, the name of the judicial officer who granted permission to amend and the date. The amended statement of case must show the original text and the amendments made, usually by coloured text, in accordance with the sequence specified in the PD. If the amendment effected a substantive change to the statement of case, it has to be re-verified by a statement of truth and served on the other parties to the claim.

[36] Neither the CPR nor the related PD authorizes the making of an oral application to amend a statement of case without the court’s permission. However, the court in its inherent jurisdiction and in the exercise of its discretion may entertain such an application. This is likely to be allowed if the proposed change is minor or does not affect the substance of the case, particularly if the other parties would not be prejudiced thereby and if the amendment is effected in the manner specified in the PD, with the appropriate endorsement and re-verification by a statement of truth. Each case in which an oral application is made would have to be considered on its merits.

- [37] I am satisfied from the foregoing review of the reasons for decision and the procedural requirements relative to such applications, that the learned judge erred by not considering all of the relevant substantive and procedural factors. Accordingly, it is necessary to exercise the discretion afresh at this level.
- [38] In the case at bar, no application was made to the learned judge to dispense with the need for a written application and no order was made dispensing with that requirement. Pursuant to CPR rule 11.6(2) this absence of permission from the court invalidates the application, without more. It cannot be gainsaid that the proposed changes would have introduced significant adjustments to the cause of action pleaded by the appellants in that they were seeking to make themselves (and not their fathers, as originally claimed) the subject of the alleged discrimination breach and introduce a new assertion that their constitutional rights were thereby breached because of their fathers' status.
- [39] Procedurally, the appellants committed a series of *faux pas* in the presentation of their application. The application was neither in writing nor structured in the sense contemplated by the CPR and PD. The appellants did not indicate which if any words had to be excised from or added to the statement of case to effect the changes. They did not file or present a draft of the proposed changes to the court or the opposing party pursuant to paragraph 2.2 of PD No. 5 of 2011, or any affidavit evidence in support as required under CPR 11.9 and the PD.
- [40] They did not even supply the court orally with a form of words to be adopted or adapted for the purposes of the proposed amendments. The appellants did not direct the court's attention to the specific paragraphs of the statements of case which were to be amended and how such changes would be captured in the evidence. Undoubtedly, their supporting affidavits would have needed to be supplemented to address any such change to the fixed date claim forms.

- [41] After the first case management conference, a party may change its statement of case only with leave of the court. As noted in **Allert v Matheson**,²⁷ the guiding principle is that amendments ought to be made if essential to a resolution of the real question in controversy and where the justice of the case so requires. In determining whether it is just to grant leave, the court will, among other things consider, how promptly the application was made, the stage of proceedings, the prejudice or advantage to the parties if the application is granted or refused; whether the opposing party may be compensated in costs, the effect on the trial date and the administration of justice, Ultimately, the court should aim to achieve fairness to the parties and further the overriding objective. In seeking to give effect to the overriding objective to act justly in any such case, the court has recourse to broad powers including the capacity to make an order under CPR 26.1(2)(w) to put things right on its own initiative or on application.
- [42] It is settled law that the court may in the interest of justice entertain and grant an oral application to amend a statement of case, provided that the procedural requirements for the filing of the requisite affidavit testimony and the amended statement of case are subsequently satisfied and validated by order of court. In doing so, the Court applies the same guiding principles rehearsed above.
- [43] Bearing the foregoing legal principles in mind, my assessment of the application in light of those factors highlights that it was made at an advanced stage of the proceedings, practically at the eleventh hour. The respondent would no doubt have been taken by surprise. The application was not fulsome and lacked crucial details such as the appropriate wording and their placement in the fixed date claim forms. In fact, the appellants merely made a bald submission and left it up to the learned judge to figure out what exactly was intended and to make the amendments to the statements of case to give effect to their ill-defined proposals for amendment. This is not the judge's function. An order granting leave to amend would have had to include consequential orders for the statements of case to be re-verified and re-

²⁷ Supra n. 16 at para. 70.

filed if they were to be effective. Corresponding changes to the evidence by the filing and service of supplemental affidavits would have been necessary. This would have likely led to a deferral of the trial date.

[44] The amendments would have changed the appellants' case in at least two material respects. In such a case, the respondent would have needed to amend his statement of case to meet the new cases. This would necessarily have returned the case to the case management track which would include filings of amended statements of case, supplemental affidavits and further submissions. In all likelihood, the trial date would have had to be deferred to accommodate those developments. An adjournment of the trial would have deprived other court users of judicial time and resources which had already been allocated to the parties.

[45] Furthermore, it appears from the record that the claims had been case managed some three months before trial, as evidenced by order of the court dated 23rd September 2020. It seems that with reasonable diligence by the appellants, the proposed changes could have been dealt with at an earlier date. No reasons were advanced as to why this did not happen. It is clear that the proposed changes were not even contemplated before the trial date. Significantly, they did not arise from a change in the factual background to the claims or any circumstances unknown to the appellants when the claims were case managed.

[46] A preliminary assessment of the appellants' prospects of success if the amendments were permitted suggests that their intended allegation of constitutional breach on the ground of discrimination was likely to fail. The simple reason for this conclusion is that section 13 of the **Constitution** creates exceptions to the prohibitions against discriminatory laws. One such exception is where the discrimination applies to cases involving devolution of property, as it does in this case.

- [47] On the facts, no application was made to dispense with the need for a written application and no order was made dispensing with that requirement. Moreover, the appellants failed to present to the court or the opposing party, a draft with the wording of the proposed changes to the statements of case... Whilst it was arguable that the respondent could have been compensated in costs, a preliminary assessment of the appellants' prospects of success if the amendments were permitted suggests that their intended allegations were likely to fail. Thus, the relevant procedural and substantive factors weighed heavily against the appellants and the Court found that it was in the interest of justice to deny the oral application for leave to amend the statements of case.
- [48] The appellants simply did not satisfy the mandatory and other procedural requirements for the grant of leave to amend their statement of case. Their several mis-steps were unorthodox and constituted non-compliance with the referenced provisions of the CPR and PD. Even at this appellate stage, the appellants have not applied for permission to make an oral application and dispense with the requirement for it to be in writing. They have not presented a draft of the proposed changes or any formulation of words to effect those changes. Surely, this must be the bare minimum of what is contemplated and expected by the CPR and PD.
- [49] In view of the numerous mis-steps by the appellants in presenting their application, I am satisfied that they not only failed to fully or substantially comply with the procedural requirements for the presentation of their application, but substantively their application is deficient for the reasons outlined above. The appellants' position is not assisted by the fact that the intended allegation of constitutional breach on the ground of discrimination was likely to fail. As demonstrated by the foregoing analysis, the relevant procedural and substantive factors weigh heavily against them and favour the respondent. I am of the considered opinion that the interest of justice is best served by denying the oral application for leave to amend the statements of case and I would refuse the appellants leave to amend their statements of case. I would therefore dismiss this first ground of appeal.

The Constitutionality Issue

Freedom of Expression and Right to Property

- [50] In their second ground of appeal, the appellants contended that the learned judge erred by finding that they had not established in relation to their fathers, any breach of the constitutional protection to freedom of expression and with respect to the appellants that, consequently their constitutional right to property was not infringed.
- [51] In relation to the alleged breach of property rights, they maintained that they were able to demonstrate that they had suffered direct loss from the consequences which flow from the application of Article 579. They submitted that the court would have been able to give effect to their real case if the amendments were granted. They cited **Vermeire v Belgium**,²⁸ **Tileston v Ullman**²⁹ and **Doe v Bolton**.³⁰
- [52] On this score, the Attorney General countered that the changes proposed by the appellants would have been fanciful and the judge was therefore justified in denying the application to amend. He relied on **The Attorney General of Saint Lucia v Darrel Montrope**³¹ in which it was held that fanciful amendments that disclose no realistic prospects of success would not be allowed.
- [53] He argued further that **Vermeire**, **Tileston** and **Doe v Bolton** do not deal with any alleged breach of the right to freedom of expression and do not support the appellants' position that there has been a breach of either section 6 or 13 of the **Constitution**. In any event, **Vermeire** is distinguishable from the instant case because while the article under consideration in that case prohibits discrimination on the grounds of 'birth or other status,' section 13 of the **Constitution** does not. The European Court of Human Rights ("ECHR") finding that the impugned law violated article 14 of the European Convention on Human Rights ("European

²⁸ [1991] ECHR 12849/87.

²⁹ 318 U.S. 44 (1943) U.S. Supreme Court.

³⁰ 410 U.S. 179 (1973) U.S. Supreme Court.

³¹ SLUHCVP2019/0021 (delivered 9th July 2020, unreported).

Convention”) and was discriminatory, was in the premises well-grounded. The same was not sustainable in relation to Article 579 of the **Civil Code**.

Discussion

[54] This ground of appeal raises two questions. Firstly, did the learned judge err in law by finding that the appellants failed to prove that their fathers’ freedom of expression and by extension the appellants’ constitutional property rights had been infringed by Article 579 of the **Civil Code**. Secondly, did she fail to consider and apply the cases cited by the appellants and if so, might her determination have been different had she done so.

[55] In this context, it is critical to note that the appellants sought three distinct reliefs for the alleged breaches of sections 6, 10 and 13 of the **Constitution**. Those provisions respectively provide protection from compulsory acquisition of property without adequate compensation, and guarantee the enjoyment of freedom of expression and protection from discrimination. Section 6 of the **Constitution** is invoked in relation to each and arises discretely as a corollary to the freedom of expression (and discrimination, aspirationally) claims.

[56] Section 6(1) states:

“(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

[57] Section 10(1) provides:

“10. PROTECTION OF FREEDOM OF EXPRESSION

(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.”

[58] Section 13(1) states:

“13. PROTECTION FROM DISCRIMINATION ON THE GROUNDS OF RACE, ETC

- (1) Subject to the provisions of subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.” (Emphasis added)

[59] The related declaratory remedies claimed by the appellants were:

“2. A Declaration that the perforce of Article 579 of the Civil Code of Saint Lucia is a deprivation of her right to succession to property or interest in property to which her deceased father is entitled contrary to Section 6 of the Constitution.

3. A declaration that the law embodied in Article 579 of the Civil Code of Saint Lucia is a breach of her father’s constitutional right of freedom of expression, which in turn directly affects her right of succession to property or interest in property of her father, contrary to Section 10 of the Constitution.

4. A declaration that Article 579 of the Civil Code of Saint Lucia discriminates against her father on the ground of his sex, which militates against her ability to inherit property forming part of his estate, contrary to Section 13 of the Constitution.”³²

[60] With respect to the alleged breach of the fathers’ freedom of expression right and their claim to protection from discrimination, the learned judge held that only someone who alleges an infringement of his or her rights under sections 2 to 15 of the **Constitution** may apply to the High Court for redress under section 16, except where the challenge relates to unlawful detention. She ruled that the appellants were accordingly precluded from claiming such redress for breach of their fathers’ constitutional right to freedom of expression under section 10 of the **Constitution** or from discrimination under section 13 of the **Constitution**.

[61] Although the appellants have not appealed against the judge’s findings on the discrimination aspect of the case, they maintained that if the amendments were

³² Paragraphs (2), (3) and (4) of the fixed date claim forms filed by the appellants on 12th August 2020; paragraphs 21(b), (c) and (d) of Cheryl Bertrand’s supporting affidavit filed on 12th August 2020 and paragraphs 20(b) (c) and (d) of Kara Francois’ affidavit filed on 12th August 2020.

granted, they would have prevailed. This argument must also be considered. I turn first to the appellants' contentions that the learned judge's failure to consider the cases relied on by them, led her into error. In the High Court, they cited **Minister of Home Affairs v Fisher**,³³ **Sepet and another v Secretary of State for the Home Department**,³⁴ **National Legal Services Authority v Union of India and others**³⁵ and **Quincy McEwan and Ors. v Attorney General of Guyana**³⁶ in respect of the freedom of expression aspect of their claims.

[62] The learned judge summarized their contentions regarding those cases at paragraphs 44 and 45 of the judgment. She noted the appellants' submissions that in **Fisher** and **Sepet**, the court remarked that a constitution is a living instrument and underscored the importance of giving a generous interpretation to constitutional provisions. The appellants relied on **National Legal Services Authority v Union of India and others** and **Quincy McEwan** for the learning that freedom of expression applies not solely to a person's spoken opinions, but to the totality of their ideas however articulated, whether by attire, conduct, words or otherwise. The judge concluded that those cases were not helpful to the appellants.

[63] As regards their discrimination claim, the appellants advanced **Josine Johnson and Yuclan Balwant v The Attorney General of Trinidad and Tobago**³⁷ and **Nadine Rodriguez v Minister of Housing of the Government and another**³⁸ as legal authority. In **Josine Johnson**, the applicable regulations were held by the Board to be discriminatory on the ground of sex, where they affected female police officers but not male police officers regarding their decision to marry. The appellants relied on **Nadine Rodriguez** for the proposition that if it is established that a law produces a discriminatory effect it is not necessary to establish a discriminatory intent by the relevant authority.

³³ [1980] AC 319.

³⁴ [2003] UKHL 15.

³⁵ Writ Petition (Civil) No. 400 Of 2012.

³⁶ [2018] CCJ 30 (AJ) 1.

³⁷ [2009] UKPC 53.

³⁸ [2009] UKPC 52.

[64] I make the observation that the legal principles emerging from the foregoing cases are neither controversial nor determinative of the issue of whether the appellants' pleadings disclosed a justiciable claim on freedom of expression grounds; or for deprivation of property (or interest in property) arising therefrom. The record reveals that contrary to the appellants' assertions, the judge considered those cases but found that they were not helpful to the disposition of either claim. Their contention that the learned judge did not consider them is not borne out.

[65] Section 16 of the **Constitution** on which the learned judge relied, is an enforcement provisions that outlines how an aggrieved person may obtain redress for breach of the fundamental rights sections in the **Constitution**. It provides:

“16. ENFORCEMENT OF PROTECTIVE PROVISIONS

(1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.” (Emphasis added)

[66] The subsection is clear and unambiguous. It is a provision that has been applied in numerous cases in Saint Lucia. It indisputably confers a cause of action for breach of section 10 of the Constitution exclusively on the person who claims that his right to freedom of expression has been, is being or is likely to be infringed. Only such a person may maintain an action for breach of those rights in relation to himself. This principle is of universal application. It was highlighted and applied in two of the cases relied on by the appellants - **Tileston**³⁹ and **Doe v Bolton**⁴⁰ - both of which emanate from the US Supreme Court.

[67] In **Tileston**, a doctor purported to prosecute a claim on his patients' behalf by challenging a Connecticut statute which forbade their course of contraceptives.

³⁹ Supra n. 29.

⁴⁰ Supra n. 30.

The patients were not parties to the claim. The doctor alleged that the impugned statutes contravened the fourteenth amendment⁴¹ to the US Constitution. The Supreme Court ruled that there was no basis on which it could hold that he had standing to maintain the claim on his patients' behalf and dismissed the doctor's appeal, holding that he had no standing to litigate that constitutional question.

[68] In contrast, in **Doe v Bolton**, a pregnant woman who had been denied an abortion joined with certain physicians, nurses, clergymen, social workers and corporations in a claim challenging the constitutionality of a Georgia law that proscribed an abortion unless the woman's life was endangered by the pregnancy, the fetus would be born with a serious defect or the pregnancy resulted from rape. The US Supreme Court held that the pregnant woman's case presented a live justiciable controversy and that she had standing to sue.

[69] In the case of the physicians, the court ruled that even though they had not been charged with any abortion violations, they too had advanced a justiciable case and had the requisite standing to sue, because they had been consulted by pregnant women and the criminal statutes would directly operate against them if they procured an abortion in violation of the statutory prohibitions. They therefore asserted a 'sufficiently direct threat of personal detriment.' The Supreme Court made the point that not only pregnant women, but also physicians were a) the objects of the threatened criminal sanctions under the impugned Georgia statute and b) it is their constitutional rights to privacy which had been or were likely to be violated.

[70] While the decisions in **Tileston** and **Doe v Bolton** are not binding on this Court, they illustrate an elementary and widely-applied principle of law, that is, that challenges to legislation alleging breaches of constitutional fundamental rights provisions are maintainable only at the instance of the aggrieved party, save where

⁴¹ Which among other things prohibits the states from depriving any person of life, liberty, or property without due process of law; and from denying anyone within a state's jurisdiction equal protection under the law.

the alleged breach relates to the detention of a person. The US Supreme Court's decision in both cases is in line with a long line of precedents from this jurisdiction and indeed the learned judge's determination in the instant case.

[71] Suffice it to say that the principles extracted from the cases cited by the appellants in the court below, do not negate the fundamental point that neither appellant advanced a pleaded case in relation to the alleged breach of their fathers' freedom of expression right (or entitlement to protection from discrimination), which either appellant had legal standing to pursue. It is worthy of note that while the appellants cited **Tileston**, **Doe v Bolton** and **Vermeire** in the court below, they did so in relation to the property right and property interest elements of their cases and not with respect to freedom of expression (or discrimination). In any event, as demonstrated by the earlier analysis of **Tileston** and **Doe v Bolton**, they do not assist the appellants.

[72] In relation to the other cases, while they have wide applicability to constitutional claims generally, the learned judge's non-reliance on them on the issue of legal standing and her evaluation of them is unimpeachable. The reality is that the appellants do not possess the requisite legal standing to maintain a claim that their fathers' constitutional right to freedom of expression (or to protection from discrimination) has been, is being or is likely to be infringed by Article 579. Their assertion that they are directly affected by reason of their inability to inherit from their fathers' estates on intestacy does not in law forge a connection between their fathers' enjoyment of freedom of expression (or protection from discrimination) and any purported constitutional or other 'right' of theirs to inherit property, that creates in their favour a justiciable case for breach of section- 6 or 10 (or 13) of the **Constitution**.

[73] On the facts, neither appellant had the requisite legal standing to maintain a claim that her father's constitutional right to freedom of expression (or to protection from discrimination) has been, is being or is likely to be infringed by Article 579.. The

judge therefore did not err in holding that the appellants had no legal standing to pursue a claim for infringement of their fathers' constitutional rights to freedom of expression (or to protection from discrimination) and that those as well as the incidental claims therefore failed.

- [74] The judge's determination that the appellants could not bring a claim for an infringement of their fathers' constitutional right to freedom of expression (or to protection from discrimination) and that those claims therefore failed, accords with the established legal principle that a claimant alleging breach of a fundamental constitutional right or freedom, must be able to satisfy the court that she has a relevant personal interest in the claim. The learned judge's ruling is unassailable.
- [75] This is not the end of the matter. The learned judge did not go on to consider the other aspect of the appellants' freedom of expression, i.e. that the breach of those rights of their fathers directly affected their 'right of succession to property', to 'an interest in property' of their fathers, or their 'ability to inherit property forming part of' their fathers' estates. I now do so. Suffice it to say, that to the extent that the appellants have fused their freedom of expression claims to their purported 'right to succession to property or an interest in property' and their 'ability to inherit property forming part of [their fathers'] estate',⁴² whether the remedy is available or not, depends on the success of the underlying cause of action.
- [76] It is self-evident that the freedom of expression claims having failed, so too must the claim for declaratory relief in relation to them, including for a declaration that the alleged freedom of expression breaches affect the appellants' interests in their fathers' property, their right to succession to it or their ability to inherit it. I would find that there being no breach of the fathers' right to freedom of expression under section 10 of the **Constitution**, there is no corresponding breach of the appellants'

⁴² See paragraph (3) of Cheryl Bertrand's and Shakira Francis' (by her next friend Kara Francois) fixed date claim forms filed on 12th August 2020; paragraph 21(c) of Cheryl Bertrand's supporting affidavit filed on 12th August 2020 and paragraph 20(c) of Kara Francois' affidavit filed on 12th August 2020.

constitutional right under section 6 of the **Constitution** not to be subjected to compulsory deprivation of property without compensation.

[77] The appellants also pursued a separate constitutional claim under section 6 of the **Constitution**, for declaratory relief that Article 579 effectively deprived them of their right to succession to property or an interest in property to which their deceased fathers are entitled. **Tileston, Doe v Bolton** and **Vermeire** were cited by them. They relied further on **Maya Leaders Alliance et al v The Attorney General of Belize**.⁴³ The learned judge found that the appellants had not established any right to an interest in property and wholly dismissed their claim to declaratory relief as to interests, rights and entitlement to inherit property.

[78] The appellants submit that had she considered **Vermeire** and/or granted the requested amendments, she would have concluded otherwise. The learned judge did not address that case in the judgment. She did however engage - learned counsel on it during his oral submissions. It therefore falls to me to examine **Vermeire**.

[79] **Vermeire** is a case from the Belgium courts involving a claim by a woman who was born out of wedlock. The applicant, Mrs. Astrid Vermeire launched a challenge on 10th June 1981, in the Belgian courts, to the law of succession on intestacy on the ground that it discriminated against her and precluded her from inheriting from her paternal grandparents' estates, merely because she was born out of wedlock.

[80] The law of succession on intestacy in Belgium, in relation to children born out of wedlock had evolved from total incapacity to inherit, to conditional capacity in appropriate cases on application to the court. The changes were made up to the death of Mrs. Vermeire's grandmother and after her grandfather's death as set out in article 724 of the Belgian Civil Code. In 1987, all such distinctions were removed.

⁴³ CCJ Appeal No. BZCV 2014/002.

[81] Article 724 of the Belgian Civil Code provided as follows at those relevant times:

“The legitimate heirs shall acquire as of right the possessions, rights and legal actions of the deceased, subject to the obligation to pay all the debts of the estate. Illegitimate children, the surviving spouse and the State must obtain a court order for possession in accordance with the procedures to be specified.” [Wording in force at the time of the grandmother’s death (16th January 1975)]

“The legitimate heirs shall acquire as of right the possessions, rights and legal actions of the deceased, subject to the obligation to pay all the debts of the estate. Illegitimate children and the State must obtain a court order for possession in accordance with the procedures to be specified.” [Wording in force at the time of the grandfather’s death (22nd July 1980)]

“The heirs shall acquire as of right the possessions, rights and legal actions of the deceased, subject to the obligation to pay all the debts of the estate. The State must obtain a court order for possession in accordance with the procedures specified below.” [Law after 31st March 1987]

[82] The ECHR had to rule on Mrs. Vermeire’s allegation that the law was discriminatory in light of article 14 of the European Convention. That article provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” (Emphasis added)

[83] The ECHR held that the impugned law was discriminatory in relation to Mrs. Vermeire, with respect to succession to her grandfather’s estate but not in relation to her grandmother’s. In making this distinction, the ECHR took into account that although the grandmother’s estate was not administered until after 1979, succession to it took place effectively on the date of her death and devolved to her ‘legitimate’ heirs at that time, while the grandfather’s estate passed on his death in 1980. By that time, the ECHR had interpreted the inheritance law to remove distinctions between treatment of children born out of wedlock and those born in wedlock.⁴⁴

⁴⁴ See *Marckx v Belgium* (Application No. 6833/74).

- [84] The ECHR justified its treatment of the grandmother's estate by giving effect to its duty to enforce the principle of legal certainty, which prevented the Belgian State 'from reopening legal acts or situations that antedated the delivery of the judgment.' There could therefore be no unravelling of the succession to the grandmother's estate at that late stage.
- [85] **Vermeire** is distinguishable from the instant case in at least two respects. Firstly, section 13 of the **Constitution** does not create in Saint Lucia, an avenue for challenging a law for discrimination on the basis of birth or other status, as is permissible by article 14 of the European Convention. Secondly, unlike the appellants, Mrs. Vermeire's father had never married and the law that she challenged applied equally to all children born out of wedlock and affected all rights of inheritance on intestacy through both parents' lineage.
- [86] Having regard to the substantive distinguishing features between **Vermeire** and the instant case, in particular the 'birth' exception in article 14 of the European Convention, no legal principles or helpful parallels can be extracted from **Vermeire** and applied in this case to assist the appellants. Accordingly, in my considered opinion, even if the learned judge had considered **Vermeire** and/or granted leave to amend the statements of cases as requested, this would not have changed the outcome. I am satisfied that the appellants' arguments on this point do not advance the appellants' case. For all of those reasons, I would dismiss the second ground of appeal.

Chose in Action

- [87] At the heart of the third ground of appeal is the appellants' claim to declarations that contrary to the **Constitution**, Article 579 effectively deprived them of their right of succession 'to property or interest in property' to which their deceased fathers were entitled. The crux of this ground of appeal is that the learned judge misconstrued this aspect of their case by mis-interpreting the nature of the proprietary interest the appellants were claiming. They argued that while they claimed an interest in the

nature of a chose in action, the learned judge misunderstood and treated their claim as being for a direct interest in the properties belonging to the deceased.

- [88] In their fixed date claim forms and supporting affidavits, they described the interest as a 'right of succession to property or interest in property to which [the] deceased father is so entitled' and a 'right to the succession of property or interest in property of [the] father.'⁴⁵ The appellants averred that their deceased fathers owned real estate and other property at the time of their deaths. Ms. Bertrand asserted that her father as an heir to Pierre Celestin's estate was entitled at law to succession of such interest and that she and her brother would be entitled to 'the succession of our father's interest in that estate but for Article 579.' Ms. Francois exhibited land registers in respect of properties registered in Norman Francis'⁴⁶ name.
- [89] Learned counsel Mr. Fraser submitted that the appellants were not thereby asserting that they own property which they lost, but rather that they were entitled to an interest in those properties in the nature of choses in action, by virtue of the law of succession. Placing reliance on **Grape Bay Limited v Attorney General of Bermuda**⁴⁷ he argued that the law protects interests in property that are held as choses in action.
- [90] Learned counsel Mr. Williams submitted that the learned judge quite properly ruled that the appellants had not established a breach of section 6 of the **Constitution** because they had not proved that they held any interest in the referenced properties or that there had been any compulsory acquisition of any such interest or property. As to what is a 'chose in action' he cited **Flat Point Development Limited v Mary Dooley**⁴⁸ and **Daphne Gumbs v Administrator of the Estate of James Fahie**

⁴⁵ See paragraph (2) of the fixed date claim forms filed on 12th August 2020, paragraph 20(b) of Kara Francois' affidavit in support of fixed date claim form filed on 12th August 2020 and paragraph 21(b) of Cheryl Bertrand's affidavit in support of fixed date claim form filed on 12th August 2020.

⁴⁶ Shakira Francis' father.

⁴⁷ [1999] UKPC 43.

⁴⁸ ANUHCVP2015/0029 (delivered 13th March 2019, unreported).

(deceased) et al⁴⁹ in which ‘things in action’ otherwise called a ‘choses in action’ was described as a right with respect to property that is enforceable by court action and not by entering into possession. Similarly, with respect to unadministered estates, a beneficiary, whether by will or under intestacy, has a right to the proper administration of the estate and not to an interest in the subject property.

[91] Learned counsel Mr. Williams relied also on **The Attorney General v McKenzie Frank et al**⁵⁰ in which this Court found that the appellants had demonstrated no immediate entitlement to the subject land but only an eligibility by reason of their status. This Court and subsequently the Board, declared that the compulsory acquisition provision of the Antigua Constitution may be properly invoked only in cases where ‘(a) property rights already exist; and (b) such rights have been compulsorily taken possession of or compulsorily acquired.’

[92] In the instant case, the learned judge applied **The Attorney General v McKenzie Frank et al**. She also considered the decision in **Maya Leaders Alliance**. She concluded that in order to find a breach of section 6 of the **Constitution**, the court must be ‘in a position to assess the nature and extent of the claimants’ entitlement to any property they claim that they have been deprived of.’ She reasoned that neither Ms. Bertrand nor Ms. Francis had established that they owned any property or the precise present and immediate right or interest they have in any property. She held therefore that they failed to establish any interest in the property described in their testimony and partially evidenced by the extracted land registers.⁵¹

Discussion

[93] This third ground of appeal brings into sharp focus the question whether the appellants pleaded and presented evidence that they held choses in action in respect of the referenced properties which were compulsorily acquired in violation

⁴⁹ BVIHCV2013/0070 (delivered 6th March 2020, unreported).

⁵⁰ ANUHCVP2018/0006 (delivered 26th June 2020, unreported) at para. 78. See also *MacKenzie Frank and another v Attorney General of Antigua and Barbuda* [2022] UKPC 25 at para. 54.

⁵¹ See para. 100 of the judgment.

of section 6; whether the constitutional protection under section 6 extends to choses in action and whether the learned judge engaged with such assertions in her judgment or erred in law on this point. It is the law that a legal chose in action is 'a right of action which could be enforced in a court of law;' while an equitable chose in action is 'a right which could only be enforced in the court of chancery, e.g. an interest in a trust fund or legacy.'⁵² In other words, it is a legal or equitable right to take legal action to enforce or secure a legal or equitable benefit or right that arises under a contract, trust, tort or otherwise.

- [94] In **Flat Point Development v Dooley**⁵³ Blenman JA adopted the following definition of 'chose in action' as coined by the learned authors of **Chitty on Contracts**:

"The term "things in action" or as they are still called choses in action, is used to describe "all rights of property which can only be claimed or enforced by action, and not by taking physical possession."⁵⁴

- [95] Ellis J (now Ellis JA) did not attempt a definition of 'chose in action' in **Daphne Gumbs v Estate of James Fahie et al**. Rather, she explained that while an estate remains unadministered, a beneficiary under it is entitled merely to an expectation of proper administration of that estate and no distinct proprietary interest.

- [96] The appellants' use of the terminology 'right of succession to property or interest in property to which [the] deceased father is so entitled' and 'right to the succession of property or interest in property of [the] father' in their claim forms and evidence, signify that the declaratory relief they claim is not limited to 'an interest in property' but extends to a 'right to succession of property.' In view of the referenced definition and description of 'chose in action,' I am satisfied that the expression 'right to succession of property' qualifies as a thing in action in the hands of a legitimate beneficiary of an estate, since a beneficiary who has a right to succession may take action in a court of law to compel administration of an estate and thereby enforce such right.

⁵² Roger Bird, *Osborn's Concise Law Dictionary*, 7th Edn., pg. 73.

⁵³ *Supra* n. 48 at para. 42.

⁵⁴ H.G. Beale, *Chitty on Contracts*, (Sweet & Maxwell: 1999) 28th Edn., Vol.1, para. 20-001.

- [97] The appellants' use of the term 'interest in property' signals clearly that they have made a claim to an interest in their deceased fathers' unadministered estates. They deny this. In this regard, they submitted that 'the learned judge misdirected herself and therefore erred in law by failing to recognize that the law protects one's interest in property which is in the character of a chose in action when she ruled that the appellants failed to prove ownership or interest of any property which was not the appellants' case.' (Emphasis mine) The learned judge dealt with the proprietary interest issue at paragraphs 96 – 100 of the judgment.
- [98] Paragraphs 96 and 97 treated exclusively with property rights albeit undefined, relative to the Mayan customary land tenure which engaged the Caribbean Court of Justice ("CCJ") in **Maya Leaders Alliance**. In paragraphs 98 to 99, the learned judge examined and applied dicta emanating from **The Attorney General v McKenzie Frank et al** in which this Court was invited to determine whether the claimants, in relation to lands in Barbuda, had an 'interest in or right to or over property' which was compulsorily acquired contrary to section 9 of the Antigua and Barbuda Constitution.
- [99] In both cases, the courts were concerned with allegations of interest in or rights to property and were not required to and did not entertain contentions about interest in choses in action. The learned judge limited her examination of the issue at hand to the learning in those cases. She held:
- "... in order for the court to find a breach of this right, it must be in a position to assess the nature and extent of the claimants' entitlement to any property they claim they have been deprived of. Neither claimant has proven ownership of any property or the precise, present and immediate right or interest they have to any property. On this basis, I am unable to find a breach of section 6 of the Constitution."⁵⁵

⁵⁵ See para. 100 of the judgment.

[100] The learned judge having not addressed her mind to the issue of whether the appellants made out their claim to choses in action, thereby erred, and it falls to this Court to make a determination on it. Section 6 of the **Constitution** expressly prohibits the compulsory acquisition of property including ‘interests in or rights over property.’

[101] Critical to an analysis of what constitutes a breach of this provision is an understanding of what property is protected and what amounts to acquisition. ‘Property’ and ‘acquisition’ are defined in section 6(8) of the **Constitution** as follows:

“(8) In this section—

“property” means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional;

“acquisition” in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right.” (Emphasis added)

[102] The foregoing definitions establish that the **Constitution** protects from compulsory acquisition without compensation not only rights and interests in physical tangible things such as land, but also trust, contractual and beneficial contingent rights provided that it is capable of being owned or held in possession. A chose in action would fit within this description if it is capable of being owned, it having been explained in **Flat Point Development v Dooley** that a chose in action is not capable of being possessed. With respect to the prohibited acquisition, the definitions make clear that it may arise by transferring the property or right to another; extinguishing or destroying it or by curtailing or limiting it. In any such case, the ‘property’ must exist and be owned by the party bringing the claim. In the case of the ‘right’, it must exist in contract, trust, law, or otherwise and subsist or be futurist or it may be conditional or absolute.

- [103] Contrary to the appellants' submissions, the Board did not hold in **Grape Bay** that a chose in action is 'property' under section 13(1) of the Bermuda Constitution, which is similar to section 6 of the **Constitution** of Saint Lucia. It made no finding whether the rights to open a franchise were choses in action (as they were said to be). The Board noted Grape Bay's concession that it could not bring itself within section 13(1) because none of its property had been compulsorily acquired, but that instead it sought to invoke section 1(c) by claiming that that introductory provision protects against many types and manifestations of deprivation of property (such as choses in action) which were not exhaustively outlined in section 13(1).
- [104] Without ruling on the merits of those arguments, the Board held that the impugned legislation did not have the effect of depriving Grape Bay of any property within the meaning of section 13(1) of the Bermuda Constitution. The appellants in this case are in a similar predicament, in that they have not identified any chose in action owned by them, within the meaning of section 6(1) of the **Constitution**. They submitted that their 'property' claims arise and are connected to some right relating to property under the law of succession. They have pointed to no common law principle or legislation, contract, trust or any other legal basis from which such rights flow, be they conditional or absolute, present or future.
- [105] In Ms. Bertrand's case, she averred that her father died as a natural heir to the estate of the late Pierre Celestin in respect of properties located at Dauphin being Block 1449B Parcels 454 and 455. It is worth noting that she did not indicate whether any interest in that estate devolves to her father's estate, either by will or on intestacy, and if so, by what law or other mechanism a right in relation to it is conferred on, or vested in her. She said merely that under normal circumstances, she stood to inherit an interest in her father's interest.
- [106] For her part, Ms. Francis averred that Mr. Norman Francis was seized of immoveable and other properties on his death that form part of his estate. She produced 3 copies of land registers which reflected that Norman Francis was

registered as owner of those properties. Like Ms. Bertrand, she did not point to any principle of law by which Mr. Francis' ownership was converted to a chose in action in her hands.

[107] The appellants argued that any purported chose in action claimed by them arises under the present state of the law of succession. In actuality, they have no right of succession to their respective fathers' estates under the existing law and never did under any former legislation. In fact, in view of Article 579, they have no interest under the law of succession, by virtue of any chose in action, that would confer on them legal standing to invoke section 6 of the **Constitution** in relation to their fathers' estates.

[108] Moreover, neither Ms. Bertrand nor Ms. Francis alleged that the Crown transferred the avowed chose in action to another person or that Article 579 had that effect. They acknowledged that the amendment to the **Civil Code** changed the law by making it possible for children born to single men and single women to inherit on intestacy of the deceased single man or single woman. They accordingly accepted that the amendment made no similar provision in the case of children fathered out of wedlock by married men. These admissions belie the appellants' claims that their constitutional right not to be deprived of property without compensation has been violated by the Crown through the enactment of Article 579 of the **Civil Code**.

[109] Although the appellants' pleadings are capable of being construed as a claim to ownership of choses in action, it is no part of their cases that the Crown abolished, limited or deprived them of such, be it a right which existed at the relevant times, or to which they were entitled or which was likely to manifest in the future, either conditionally or absolutely. I would hold therefore that they have neither established that they have the requisite legal standing to pursue a claim for breach of section 6 of the **Constitution** as alleged and they have not proven that the Crown's enactment of Article 579 amounts to compulsory acquisition of any right of theirs, to pursue a claim for an interest in their fathers' estate, being the choses in action

to which they claim entitlement or ownership. I would therefore dismiss the third ground of appeal.

Protection from Discrimination

[110] The fourth and fifth grounds of appeal concern the interpretation of section 13 of the **Constitution**. Those grounds are best dealt with together. By ground four, the appellants contend that the learned judge misdirected herself and erred in law when construing section 13 of the **Constitution**, in that she had no regard to the directive principles outlined in section 1 of the **Constitution**. In ground five, they contended that the learned judge erred in law by ruling that section 13(4)(d) of the **Constitution** does not shift the burden of proof to the Crown, to prove that the restriction imposed by Article 579 is reasonably justifiable in a democratic society.

[111] The relevant portions of section 13 of the **Constitution** are subsections (1), (3) and (4). Subsection (1) is set out above. Subsection (3) defines 'discriminatory' and provides:

“(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

[112] Subsection (4) contains important qualifications to this fundamental right. The parts which are material for present purposes are paragraphs (c) and (d) which state:

“(4) Subsection (1) shall not apply to any law so far as that law makes provision-

(a) ...

(b) ...

(c) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage,

divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description;
(d) whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.”

[113] At the trial, it emerged in testimony that Article 579 was amended by the Parliament in 1988 and 1991 to allow children born out of wedlock to inherit from their mothers’ and unmarried fathers’ estates on intestacy. Extracts from the Hansard of 12th November 1991 were produced. The then Attorney General is noted as saying that the amendment was being introduced to remove the disparity between rights of inheritance by children of unmarried mothers and children of unmarried fathers. He added that it being a matter of succession, the man having died he would be unable to identify his children and therefore certain safeguards were introduced to require that all pertinent factors be taken into account in such cases, including whether the birth certificate recorded the father’s name.

[114] As to the appellants’ criticism that the directive principle in section 1 of the **Constitution** did not inform the learned judge’s interpretation of section 13, they cited **Quincy McEwan**⁵⁶ and **Matadeen v Pointu**⁵⁷ as authority for the proposition that the principles set out in section 1 must be factored into the interpretation of the fundamental rights provisions such as section 13. They noted that in **Mc Ewan** for example, the CCJ declared that ‘in adjudicating complaints of human rights infringements regard must be had to statements of principle found in the preamble to the Constitution.’⁵⁸ They argued that even though section 1 is not justiciable it contains important principles that should have been considered, but were not.

⁵⁶ Supra n. 36.

⁵⁷ [1998] UKPC 9.

⁵⁸ Supra n. 36 at para. 61.

- [115] Learned counsel Mr. Fraser submitted on the appellants' behalf that while section 13(4) permits derogations from the strict prohibition against discrimination in certain circumstances, Parliament has by the **National Insurance Corporation Act**⁵⁹ eliminated such derogations with respect to the status of children. He pointed to the definition of 'child' in that Act, which is expressed to include 'a step-child, an adopted child and any child whether legitimate or not.' Learned counsel stated that even in the face of this fundamental change in its attitude towards children, Parliament has by Article 579 maintained restrictions in relation to married men and succession to their estates on intestacy by children fathered by them out of wedlock. He contended that this disparity in Parliament's treatment of those societal issues is unreasonable and not reasonably justifiable in a democratic society. For completeness and context, I make the observation that the definition in the Act is limited to children 'under the age of 16 who are wholly or partly maintained by the insured.'
- [116] Learned counsel said that the derogation allowed by section 13(4)(c) in relation to devolution of property on death, is qualified by the phrase 'reasonably justifiable in a democratic society' that appears in section 13(4)(d). By extension, Article 579 which places restrictions on the ability of a person to inherit property must satisfy this requirement of being reasonably justifiable in a democratic society, and the burden fell to the Crown to establish that it does.
- [117] Learned counsel Mr. Fraser submitted that based on the comments by the former Attorney General memorialized in the Hansard, there is no justification for the existing distinction in the law with respect to succession by the offspring of married men on the one hand and those of single men on the other, as it serves no useful purpose. He urged this Court to overrule the learned judge's ruling that Article 579 is not unconstitutional and invited it to correct the alleged disparity by striking down the definition of 'single man' and 'single woman' and by removing the word 'single' where it appears in front of 'man' or 'woman' in Article 579.
- [118] The respondent contended that the learned judge applied the correct principles of law in interpreting section 13 of the **Constitution** including giving appropriate

⁵⁹ Cap. 16.01 of the Revised Laws of Saint Lucia, 2020.

consideration to section 1. Learned counsel Mr. Williams argued that the court's function in construing legislation, including the **Constitution**, is limited to interpreting the law in accordance with Parliament's intention, based on the meaning of the language used in the text. He added that the court is not authorized to impose its moral and political views into the interpretation exercise. He cited **Matadeen v Pointu** and **Jay Chandler v The State (No 2)**⁶⁰ in which those principles were enunciated.

Discussion

[119] It is now settled law that constitutional provisions such as section 1 of the **Constitution** are introductory and prefatory in nature, are unenforceable and not justiciable. Notwithstanding, to the extent that they are declaratory of rights, regard is to be had to them in construing justiciable provisions in the **Constitution**. In rendering her decision in the instant case, the learned judge alluded to this by incorporating similar sentiments from **Olivier and another v Buttigieg**⁶¹ in which Lord Morris of Borth-y-Gest opined:

"It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble."⁶²

[120] The learned Law Lords of the Privy Council elaborated on this principle in **Matadeen v Pointu**⁶³ by noting:

"... the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and

⁶⁰ [2022] UKPC 19.

⁶¹ [1966] 2 ALL ER 459.

⁶² Ibid at pg. 461.

⁶³ Supra n. 57.

constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used.”⁶⁴

Likewise, in **Chandler**, the Board remarked:

“The Board has a well-established approach that its task is to interpret the words of a Constitution and that judges are not to substitute those words that they think the Constitution should be...”⁶⁵

[121] In arriving at her decision, the learned judge examined section 1 of the **Constitution** and its import in relation to the appellants’ contention that it was justiciable. Significantly, she quoted the foregoing extract⁶⁶ from **Buttigieg** and applied the learning in arriving at her decision. Among other things, she noted that section 1 is ‘declaratory of every person’s entitlement of rights and freedoms subject to limitations to that entitlement as are contained in the sections that follow.’⁶⁷ The clear inference is that she had these principles in mind when she made her determination regarding the constitutional breach elements of the claims.

[122] It must be noted that a judge is not expected to expressly analyze every possible legal point that is a spin-off from the main issues in a case, especially if it was not advanced as being controversial by one of the parties. The appellants’ contention that the learned judge failed to have regard to the declarations in section 1 in construing section 13 is not borne out by the contents of the judgment. I therefore reject that assertion and would dismiss the fourth ground of appeal.

Burden of proof – discrimination

[123] The appellants argued for a particular interpretation of section 13(4)(d) of the **Constitution**. They submitted that paragraphs (c) and (d) of subsection (4) of section 13 of the **Constitution** must be read conjunctively and it therefore follows that Article 579 does not pass the test of being ‘reasonably justifiable in a

⁶⁴ Ibid at para. 7.

⁶⁵ Supra n. 60 at para. 55.

⁶⁶ See para. 80 of the judgment.

⁶⁷ See para. 78 of the judgment.

democratic society' in accordance with paragraph (d) and it is accordingly unconstitutional. They contended that the learned judge was wrong to hold that paragraph (c) was not to be read conjunctively with paragraph (d). They added that the learned judge erred by holding that paragraph (d) does not shift the burden to the Crown to prove that the discriminatory effect of Article 579 in relation to devolution of property on death, is reasonably justifiable in a democratic society.

[124] Relying on **Magaya v Magaya**,⁶⁸ a case decided by the Zimbabwean Supreme Court, the respondent submitted that section 13(4)(d) of the **Constitution** permits derogation from such constitutional restraint where the impugned law allows for different treatment of persons in case of 'devolution of property on death.' They noted that in **Magaya**, the court was considering a similar provision to section 13(4)(c) of the **Constitution** and it held that the Zimbabwean Constitution permitted exceptions from adherence to gender equality in legislative instruments in matters concerning devolution of property on death.

[125] The provision in the Zimbabwean Constitution provides:

“23(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters — (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case...” (Emphasis added)

[126] The Supreme Court of Zimbabwe Court ruled:

“... these provisions do not forbid discrimination based on sex. But even if they did on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments, there are exceptions to the provisions.”

⁶⁸ [1999] 3 LRC 35.

Discussion

- [127] Section 13(4) of the **Constitution** contains four separate paragraphs that incorporate exceptions from the restriction against the enactment and enforcement of discriminatory laws. The exceptions in paragraphs (a) and (b) respectively relate to the appropriation of public revenues or other public funds and with respect to non-citizens. The exceptions in paragraph (c) are with respect to adoption, marriage, divorce, burial, devolution of property on death and similar matters. Paragraph (d) creates exceptions in relation to laws which create discriminatory consequences for persons who by virtue of their sex, race, place of origin, colour, creed or political opinions may be subjected to any disability or restriction or might be accorded certain privileges or advantages in special circumstances that are reasonably justifiable in a democratic society.
- [128] It is not disputed that section 13(4)(c) of the **Constitution** makes an exception for the enactment of laws which afford different treatment to individuals in matters pertaining to devolution of property on death. It is expressed in language that is similar to section 23(3) of the Zimbabwe Constitution which was interpreted in **Magaya**. An examination of section 13(4) of the **Constitution** demonstrates that by sentence structure, context, syntax and legislative drafting practice, the clause 'reasonably justifiable in a democratic society' qualifies only paragraph (d). It has no applicability to paragraph (c) which imposes the exception regarding devolution of property on death. The appellants have advanced no legal authority to support their submission to the contrary.
- [129] Construing the referenced paragraphs as disjunctive, better accords with good reason, practicality, context and practice within courts of Commonwealth common law jurisdictions, including this Court. Furthermore, although the decision in **Magaya** is not binding on this Court, that court's rationale in arriving at its decision commends itself to me and I would adopt it. I am of the considered opinion that the learned judge was correct to conclude that it was not necessary for her to examine whether Article 579 was 'reasonably justifiable in a democratic society.' For these reasons, I

am satisfied that she did not misdirect herself or err when she held that section 13(4)(c) and (d) do not have to be read conjunctively but disjunctively, and that section 13(4)(c) permits the enactment of a discriminatory law in certain exceptional instances, including in relation to devolution of property on death, as happened with Article 579 of the **Civil Code**. I would therefore dismiss the fifth ground of appeal.

Costs

[130] The learned judge relied on CPR 56.13(6) and made no order as to costs. Applying the same rule, I would make no order as to costs.

Disposition

[131] Accordingly, I would make the following orders:

- (1) The appeal against the learned judge's decision is dismissed and the judgment is wholly affirmed.
- (2) The parties shall each bear their own costs of the appeal.

[132] I am grateful for the assistance provided by learned counsel.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

Gerhard Wallbank

Justice of Appeal [Ag.]



By the Court

Deputy Chief Registrar