

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2022/0003

BETWEEN:

LLOYD RHENFORD RYAN

Appellant

and

**NEVILLE BLAKE
(Representative of the Estate of Agnes Ryan)**

Respondent

Before:

The Hon. Mr. Trevor M. Ward
The Hon. Mr. Davidson K. Baptiste
The Hon. Mde. P. Nicola Byer

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

Appearances:

Appellant in person
Mr. Jean Kelsick for the Respondent

2025: October 2;
2026: May 18.

Civil appeal - Real property – Registered land – Joint proprietorship – Severance – Application for severance on the basis of mistake – Whether joint proprietorship can be severed or terminated without the consent of all proprietors – Sections 101(3) and 140 of the Montserrat Registered Land Act (Cap. 8.01) – Ex parte applications - Full and frank disclosure - Duty of applicant to disclose material facts - Substituted service – Whether service by advertisement in a local newspaper constitutes effective notice to a party known to be residing outside the jurisdiction – Purpose of service - Fresh evidence on appeal - Principles for admission of fresh evidence on appeal – Ladd v Marshall criteria – Whether evidence is “fresh” if it came into existence after the order under appeal

The appellant appealed against the order of the High Court dated 20th September 2012 by which Astaphan J (Ag.) directed that the certificate of title registered as Block 14/12 Parcel

11 in the St. John's Registration Section, standing in the joint names of the appellant, Lloyd Ryan, and his mother, Agnes Ryan ("the deceased"), be severed and that the deceased be entered on the register as sole proprietor absolutely.

The proceedings below originated from an application filed by the deceased on 24th January 2012 pursuant to section 140 of the Montserrat Registered Land Act (Cap. 8.01) ("the Act"), seeking rectification of the register on the basis that the appellant's inclusion on the title constituted a "mistake". The appellant contended that he had no effective notice of the proceedings, that the proceedings were ex parte in substance, and that the learned judge lacked jurisdiction to extinguish his registered proprietary interest absent compliance with section 101(3) of the Act. He further asserted that the deceased failed to comply with the duty of full and frank disclosure by not informing the court that she knew he resided in the United States and had previously communicated with him directly.

The appellant also contended that the joint proprietorship had been created for valuable consideration in the sum of EC\$5,000.00 and denied that there was any agreement for him to relinquish his interest in the property. He disputed the deceased's assertion that his name had been placed on the title solely to facilitate financing for his university education, relying on documentary evidence showing that his studies had been funded through scholarship assistance. The respondent, appearing as representative of the estate of the deceased, opposed the appeal and maintained that the appellant's name had been placed on the title only temporarily to facilitate his educational pursuits, and that there had been an understanding between the parties that his interest would later be removed. The respondent further argued that the substituted service order had been properly complied with, that the appellant had adequate notice of the proceedings, and that the learned judge was entitled to order severance pursuant to section 140 of the Act and under common law principles governing severance of joint tenancies, including the principles articulated in **Williams v Hensman**.

Both parties sought leave to adduce fresh evidence on appeal. The appellant relied on, among other things, transfer documentation evidencing payment of consideration for his interest in the property, scholarship records from the University of the West Indies, and documentary material said to demonstrate continuing communication between himself and the deceased during the relevant period. The respondent sought to adduce affidavits and documentary material generated after the 2012 order, including land transfer documents, wills, receipts, and evidence of repairs to the property.

Held: allowing the appeal; granting the appellant's application to adduce fresh evidence; dismissing the respondent's application to adduce fresh evidence; setting aside the order of 20th September 2012; remitting the matter to the High Court for consequential directions; and awarding costs to the appellant, that:

1. The appellant satisfied the requirements for the admission of fresh evidence, whereas the respondent did not. The appellant's case was that he was completely unaware of the 2012 proceedings altogether and therefore had no fair opportunity to place relevant evidence before the court. The proposed evidence went to the central factual premises upon which the severance order appears to have been

obtained and was plainly material and apparently credible. By contrast, the respondent sought to rely on documents and affidavits generated years afterwards, which constituted subsequent evidence rather than fresh evidence within the contemplation of the first limb of the applicable test.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Golden Meditech Stem Cells (BVI) Company Limited v Blue Ocean Creation Investment Hong Kong Ltd** BVIHCMAP2023/0022 (delivered 9th July 2025, unreported) followed.

2. The proceedings below were ex parte in substance and the duty of full and frank disclosure was engaged and breached. Publication in a local newspaper in Montserrat was not reasonably likely to notify a defendant known to be residing in the United States. Formal compliance with the order for substituted service was not, in itself, sufficient, where the mode of service lacked practical efficacy. The deceased failed to disclose material matters including her knowledge of the appellant's overseas residence, her ability to contact him directly, the absence of evidential support for claims of failed communication, and the existence of consideration for the appellant's interest. Those matters deprived the court of a fair picture of the case.

Rule 7.8A of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** considered; **Abela and others v Baadarani** [2013] UKSC 44 applied; **Flavio Maluf v Durant International Corp et al** BVIHCMAP2021/0025 (delivered 13th January 2022, unreported) followed.

3. Section 140 of the Act did not empower the court to extinguish the appellant's registered joint proprietary interest. The rectification jurisdiction under section 140 is confined to correcting errors arising from fraud or mistake in the registration process itself and is not a mechanism for altering substantive proprietary rights in the absence of such mistake. The deceased's application did not identify any mistake in the creation or registration of the joint proprietorship but instead sought to remove the appellant's name on the basis of an alleged agreement between the parties. Such circumstances did not fall naturally within the concept of rectification for mistake or even fraud contemplated by section 140.

Section 140 of the **Montserrat Registered Land Act (Cap. 8.01)** considered; **NRAM Ltd v Paul Morgan Evans and Another** [2017] EWCA Civ 1013 applied; **Francis Chitolie et al v St. Lucia National Housing Corporation** SLUHCVP2020/0022 (delivered 13th January 2022, unreported) followed.

4. Any severance of the joint proprietorship required compliance with section 101(3) of the Act, which had not occurred. Section 101(3) contemplates a consensual act carried out in the prescribed form and entered upon the register. The statutory regime governing registered land is a comprehensive statutory code, and where the statute prescribes a particular method by which a proprietary interest may be altered, that method must ordinarily be followed. There was no evidence that the prescribed instrument had been executed or registered by both joint proprietors.

Accordingly, the purported severance of the joint proprietorship cannot be regarded as having been effected in accordance with the statutory scheme governing registered land.

Section 101(3) of the **Montserrat Registered Land Act (Cap. 8.01)** considered; **Mums Incorporated v Cayman Capital Trust Co** 2000 CILR 131 applied; **Williams v Hensman** (1861) 70 ER 862 distinguished; **Keithley Lake et al v Richard Vento et al** AXAHCVAP2016/0012 (delivered 20th June 2019, unreported) distinguished.

5. The order of 20th September 2012 could not stand and the appellant's registered interest remained intact. The order was obtained in proceedings which were ex parte in substance, in circumstances where the appellant did not receive effective notice and where the duty of full and frank disclosure was engaged but not discharged. Further, the learned judge was not entitled, on an application framed under section 140 of the Act and on the facts then presented, to direct what effectively was the termination of the joint proprietorship and the removal of the appellant's name from the register absent compliance with section 101(3) of the Act. Consequently, the appellant's registered interest was not lawfully extinguished by that order.

JUDGMENT

- [1] **BYER JA [AG.]**: By notice of appeal filed on 23rd March 2022, and by subsequent amended notice of appeal filed on 16th October 2024,¹ the appellant, being the defendant in the court below, appealed against the order of Astaphan J (Ag.) made on 20th September 2012 by which the learned judge directed that the certificate of title registered as Block 14/12 Parcel 11 in the St. John's Registration Section, standing in the joint names of Agnes Ryan and Lloyd Ryan, be severed and that the name of Agnes Ryan be entered on the said certificate as sole proprietor absolutely. Given the significant lapse of time between the order below and the filing of the appeal, the appellant thereafter applied for an extension of time within which to appeal. That application, together with related applications was heard on 25th November 2024, and by judgment delivered on 11th March 2025 Ventose JA, with

¹ On 1st July 2025, the appellant purported to file an amended Notice of Appeal which, in substance, repeated the statements and grounds of appeal in the Amended Notice of appeal filed on 16th October 2024. However, the matters set out therein were not framed as grounds of appeal. Accordingly, for ease of reference and clarity, the court will rely on the grounds as stated in the amended Notice of appeal filed on 16th October 2024.

whom Ward JA and Farara JA [Ag.] agreed, granted the application for an extension of time, and ordered that the notice of appeal filed on 16th October 2024 be deemed properly filed, and dismissed an application to strike out the appeal. The respondent filed a notice of opposition on 29th July 2025, contending that the order ought to be upheld on the basis of an oral agreement entered into between the appellant and his deceased mother Agnes Ryan (the deceased) that the appellant would relinquish his interest in the property upon certain conditions which will be discussed later in this judgment and waived any statutory rights thereto.

- [2] By application filed on 18th September 2024, the appellant sought leave to adduce fresh evidence on the appeal, consisting of certain documents relating to the disputed property. Those documents comprised: (i) a copy of a transfer of land dated 4th July 2019 purporting to transfer the parcel from Agnes Ryan to Neville T. Blake; (ii) an application for a land certificate filed by Neville T. Blake dated 17th July 2019; (iii) a land certificate issued in the name of Neville T. Blake dated 17th July 2019; (iv) a cancelled land certificate previously in the name of Agnes Ryan; (v) a prior transfer of land dated 22nd July 1985 relating to the same parcel; (vi) copies of earlier applications for land certificates; (vii) a receipt and Western Union money transfer said to evidence consideration for the transfer; and (viii) email correspondence with the High Court concerning the availability of the transcript of the proceedings below. The application was supported by the affidavits of the appellant, Ms. Agatha Felix (his sister), and Ms. Elizabeth Gerald (his aunt), all filed on 18th September 2024. He later filed a supplementary affidavit on 23rd April 2025 exhibiting photographs of damage to the downstairs portion of the dwelling situated on the subject property and WhatsApp images relating thereto, email correspondence with officers in the Ministry of Health and Social Services concerning government subsistence and care arrangements for the deceased, a bank statement, documents relating to a caution lodged against Block 14/12 Parcel 11, a statutory declaration by the appellant, copies of the 2011 and 2012 court documents and orders in the proceedings below, a University of the West Indies

letter confirming scholarship funding, a letter from Royal Bank of Canada confirming his employment, and a copy of his notice of appeal.

- [3] By application filed on 29th July 2025, the deceased's personal representative, the respondent herein, sought an extension of time to file the respondent's notice and an application for leave to adduce as fresh evidence in the appeal, documents which included several affidavits sworn by himself and the deceased, which had not been filed in the original 2012 severance proceedings but in later proceedings including in support of the respondent's unsuccessful application to strike out the present appeal, together with documents relating to the transfer of land, land certificates, the deceased's last will, the appellant's claim form in civil claim MNIHCV2020/0024 filed on 13th August 2020, various receipts, and a payroll said to evidence repairs carried out by him to the house situated on Block 14/12 Parcel 11. Both the appellant's application and the respondent's application to adduce fresh evidence were granted *de bene esse* allowing the appeal to be argued. Judgment was reserved, with the Court indicating that the admissibility of the proposed fresh evidence would be determined in the judgment. Before addressing those applications and the substantive appeal, it is, however, essential to set out the background to the appeal.

Proceedings in the Court Below

- [4] On 24th January 2012, the deceased made an *ex parte* application ("the January 2012 application"), supported by affidavit, seeking an order and declaration pursuant to section 140 of the **Montserrat Registered Land Act**² ("the Act") that the registration of the property comprised in Block 14/12 Parcel 11, in the name of the deceased and the appellant was a mistake.
- [5] By order dated 19th April 2012, the High Court ordered the deceased to place a notice in two consecutive issues of the local newspaper for the appellant (the

² Cap. 8.01 of the Laws of Montserrat.

defendant to the application) to show cause within 30 days why the property registered in the joint names of Agnes Ryan and Lloyd Ryan should not be severed.

- [6] On 26th July 2012, without any indication as to why, counsel for the deceased filed a second application with affidavit in support seeking the exact same relief as contained in the ex parte application filed on 24th January 2012 and exhibited the advertisement that had been published.
- [7] By order dated 20th September 2012 ("the September 2012 order"), Astaphan J (Ag.) granted the application and recited therein that notice of the application had been placed in the newspaper and that the appellant had not shown cause as to why the severance should not be granted and accordingly directed that the Certificate of Title registered as Block 14/12 Parcel 11 in the St. John's Registration Section be severed, and that the name of the deceased was to be recorded therein as sole proprietor of the said property absolutely.

The Appeal

- [8] Dissatisfied with the order of the learned judge, the appellant's notice of appeal set out what purports to be the following 12 grounds:

"1. Appellant, Lloyd Ryan held joint absolute ownership with the Respondent (deceased) for Block 14/12, Parcel 11 situated at Challenger's Road, in the Parish of St Peter, St. John's, in the Island of Montserrat pursuant to the Montserrat Land Registered Ordinance.

2. Under the Revised Registered Land laws of Montserrat, "where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently: (a) disposition may be made only by all joint proprietors; and (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving jointly." Section 101(3) of the Montserrat Registered Land Act refers: Joint Proprietors, not being trustees, may execute an instrument in the prescribed form signing that they agree to sever the joint ownership, and the severance shall be completed by registration of the joint proprietors in common in equal shares and filing the instrument.

3. I did not expressly or otherwise gave (sic) permission to the Respondent(deceased) to transfer and/or sever any ownership of Block 14/12, Parcel 11 in whole or part to anyone.

4. That Block 14/12, Parcel 11 was illegally transferred to Neville Theophilus Blake by the Respondent (deceased) on the 9th day of July 2019.

5. The Respondent (deceased) knew that I resided in the United States of America at the commencement of the claim and thereafter.

6. In or around April of 2011 the Respondent, (deceased) Agnes Ryan sent money to the Appellant Lloyd R Ryan via Western Union Money Transfer while I was recovering from major surgery. The Respondent (deceased) had knowledge of my address and whereabouts in the United States at all times.

7. Paragraph 7 of an affidavit filed by the Respondent (deceased) in the High Court, Montserrat in part says "any mails I send to him "Lloyd Ryan" are returned unopened. No evidence of the unopened mails addressed to appellant marked "returned to sender" has been offered as evidence to the court.

8. Paragraph 7 of an affidavit filed by the Respondent (deceased) in the High Court, Montserrat in part says, "telephone calls to his known telephone number are never answered." "Lloyd Ryan." No evidence of telephone call logs of the claimant's local or international telephone calls" have been offered as evidence to the court.

9. Through an email request at the High Court, Montserrat and subsequent response, no transcript for the said matter was available save for a paper writing with one sentence provided to me by the Registrar.

10. In civil proceedings the parties have a duty to provide full and frank disclosure of all material facts that are known to him/her or could have been known had he/she made proper inquiries.

11.The Respondent (deceased) concealed important information, namely, land transfer documents verifying joint ownership and title of Block 14/12, Parcel 11 was derived in consideration of \$EC5,000.00.

12.The Respondent's (deceased's) failure to inform the Court of material facts seems to have been a fraudulent misrepresentation of fundamental facts in this matter as she failed to inform the Court that the joint ownership of the said property was in consideration of \$EC5,000.00. Information would have to be interrogated to determine where the truth lies."

Issues for Determination

[9] Although it was clear that the grounds of appeal were framed in a manner that did not strictly conform to a traditional presentation of grounds of appeal to this Court (the appellant acted in person throughout the proceedings), it was however clear from what was stated by the appellant that there are two distinct issues which can be distilled and to which I must address my mind. These are:

- (1) Whether the January 2012 application before the learned judge below was “ex parte” in substance, such that it engaged a duty of full and frank disclosure, and if so whether that duty was complied with. This therefore encapsulates paragraphs 5,6,7,8,10,11 and 12 above.
- (2) Whether, as a matter of law, the learned trial judge was entitled to make the September 2012 order and order the severance of Block 14/12 Parcel 11 in the circumstances of the case. This issue encapsulates paragraphs 1 to 4 above.

[10] Having said so, it would therefore appear that “ground” 9 above is not a complaint that would ground a reason for appeal as opposed to a comment as to what was provided by the Court office to him upon the request made for a transcript.³ Indeed having had sight of the document that purported to be the judge’s notes, it is clear that the actual circumstances of what occurred before the court below is unavailable for consideration by this court. Be that as it may, I will deal with the substantive complaints noted by the appellant.

[11] As indicated previously, both the appellant and the respondent engaged the court in applications for leave to adduce fresh evidence. I therefore turn first to the fresh evidence applications, and thereafter to the substantive issues.

³ Supplementary Bundle filed on 13th November 2024, pages 39-40.

Applications to Adduce Fresh Evidence

The Applicable Principles

- [12] On the applications for leave to adduce fresh evidence, the principles applicable to the same are well known to the court and have been the subject of numerous decisions of this Court.
- [13] Fresh evidence will ordinarily only be admitted on appeal where the criteria in **Ladd v Marshall**⁴ are satisfied. Namely, first that the evidence could not have been obtained for use at trial with reasonable diligence; second, that the evidence would probably have an important influence on the result of the case, though it need not be decisive; and third, that the evidence is apparently credible, though it need not be incontrovertible.
- [14] In applying those principles, the Court must have regard to the nature of the proceedings below and the justice of the particular case. In the instant case, where the order under challenge was obtained on what appeared to have been on an ex parte basis, in that the appellant was not present (although there was evidence that notice of the application was given by way of advertisement) the Court must also consider whether the well-established duty of full and frank disclosure was engaged in the present circumstances and whether that will impact the present application for leave to adduce fresh evidence. It is trite law that the duty of full and frank disclosure requires an applicant who seeks what amounts to ex parte relief, to disclose all material facts, including matters adverse to his or her case, so that the Court may make an informed decision in the absence of the affected party.
- [15] Therefore, in my mind it follows that, where a party seeks to adduce fresh evidence in order to challenge an order allegedly obtained where one party claims that they did not receive actual notice and in circumstances where material non-disclosure is in fact a fundamental aspect of the case, the first limb of **Ladd v Marshall** cannot

⁴ [1954] 1 WLR 1489.

be approached in an abstract or overly technical manner. The question must therefore become not merely whether the evidence existed at the time, but whether the party had a fair opportunity, exercising reasonable diligence to place it before the Court in the first place. With that in mind, I will now consider the applications of the parties.

The Appellant's Application to Adduce Fresh Evidence

- [16] The proposed evidence of the appellant consists principally of: a transfer document said to show that the appellant's interest in the property was acquired for consideration in the sum of EC\$5,000; documents said to show that the appellant's studies were funded by scholarship (and not by a loan guaranteed by the placing of his name on the deceased's title); and material said to evidence continuing communication between the appellant and the deceased, including a stamped envelope and telephone records.

- [17] In my judgment, the appellant's application satisfies the requirements for the admission of fresh evidence.

- [18] As to the first limb of **Ladd v Marshall**, the appellant's case is not simply that he failed to obtain available material through inadvertence or lack of diligence. His case is that he was completely unaware of the 2012 proceedings altogether. He says that he was resident in the United States at the time; that the application proceeded in his absence; and that he did not know that an order was being sought to extinguish his registered interest in the property.

- [19] In those circumstances, the issue is whether the evidence could, with reasonable diligence, have been obtained for use at the hearing by a person who alleges that they had no actual notice of the hearing and therefore was unable to participate in it. In my view, that question must plainly be answered in the negative.

- [20] Reasonable diligence presupposes knowledge of the proceedings, or at least a fair opportunity to become aware of them and to respond. Where a party is genuinely unaware that what was commenced as an ex parte application which was then served without the court, on the face of the order, being satisfied that the “service” would have come to the attention of the party, it is in my mind artificial to say that he ought, by diligence, to have placed relevant evidence before the Court. One cannot reasonably expect a litigant to marshal evidence for proceedings of which he had no knowledge.
- [21] This conclusion is further strengthened by the nature of the appellant’s allegations. He contended that not only had the deceased not disclosed the transfer document between himself and the deceased which clearly showed that the creation of the joint proprietorship had been made pursuant to the payment of the sum of EC\$5,000 but further and in my mind more fundamentally, that there was material supporting the appellant’s assertion that the deceased had in fact been in contact with him during the period when the application was filed and determined.
- [22] If those matters were indeed material and were not disclosed, that goes directly to the fairness and reliability of the process by which the September 2012 order was obtained. In such a case, it would be unjust to apply the first limb of **Ladd v Marshall** as if the appellant had been present, represented, and simply failed to adduce the evidence. In the appellant’s case, the evidence was not omitted through lack of diligence but was never deployed because he had no actual notice of the proceedings in which to do so.
- [23] I therefore accept that, on the particular facts alleged, the first limb is satisfied.
- [24] As to the second limb, I am satisfied that the proposed evidence would probably have an important influence on the result of the case. The September 2012 order having proceeded on a particular factual matrix would be fundamentally undermined by the proposed evidence.

- [25] If the transfer document that the appellant wishes to rely on clearly establishes that the appellant acquired his interest for valuable consideration, that would have materially affected the foundation of the original application. It would in my mind be irrefutable evidence that his interest was not nominal, temporary, or merely administrative, but proprietary in substance. Likewise, if the scholarship documents show that his education was funded independently of any loan arrangement based upon the temporary use of the property to which he was added as owner, in my mind that would also undermine the explanation advanced by the deceased for the gravamen of the application, that is, that the reason for placing the deceased on the title was to obtain funding for educational pursuits and that his remaining on the title had been rendered otiose by his completion of his studies.
- [26] Similarly, if the communication records show that the appellant and the deceased remained in contact, and that in fact the deceased was in contact with the appellant shortly before the application was filed in 2012, this in my mind would have material bearing upon the propriety of proceeding in the absence of the appellant or even proceeding without directing that there should have been service outside of the jurisdiction directly on the appellant and thus the adequacy of the steps taken to bring the matter to his attention, and the reliability of any suggestion that he could not reasonably be contacted.
- [27] The proposed evidence is therefore plainly material. It is not peripheral, collateral, or merely colorable. It goes to the central factual premises upon which the severance order appears to have been obtained. I am accordingly satisfied that the second limb is met.
- [28] As to the third limb, the evidence is apparently credible. The transfer document is said to be a formal land transfer witnessed by a solicitor and notary public. The scholarship confirmation is said to emanate from the University of the West Indies. The communication material includes documentary records. At this stage, the Court

is not required to determine the ultimate truth of those matters. It is sufficient that the evidence is apparently reliable and not inherently incredible.

[29] I would therefore admit the appellant's proposed fresh evidence.

[30] I add that this conclusion is also consistent with the broader interests of justice. The appellant seeks to challenge an order made in his absence which affected a registered proprietary interest. Where he advances a reasonably arguable case that he had no actual notice of the proceedings and that the order may have been obtained without full disclosure of material facts, the Court should be slow to exclude evidence going to the heart of that complaint.

The Respondent's Application to Adduce Fresh Evidence

[31] The respondent sought to rely on a body of affidavit and documentary evidence, including material concerning how he acquired the property, his subsequent status as registered proprietor, the Will of the deceased appointing him sole executor and beneficiary, and documents evidencing expenditure on repairs and maintenance to the dwelling house on the property.

[32] In my judgment, the respondent's application being of a different ilk than the appellant, does not reach the necessary threshold to be considered fresh evidence for which the application should be granted.

[33] As to the first limb of **Ladd v Marshall**, a substantial part of the respondent's proposed evidence concerns matters occurring after 2012. The respondent's own evidence is that much of the material now sought to be adduced was created, sworn or filed long after the order under appeal. The affidavits relied upon were filed in June 2024, November 2024, May 2025 and July 2025. The certificate of exhibits was likewise filed in July 2025. Other documents include a land certificate dated 17th July 2019 and a will dated 15th May 2020.

- [34] In saying so, it was clear from the arguments of the respondent that it was not disputed that all of the evidence sought to be adduced came into existence after the September 2012 order. This without more runs afoul of the settled consideration under the first limb.
- [35] As was made clear by this Court in **Golden Meditech Stem Cells (BVI) Company Limited v Blue Ocean Creation Investment Hong Kong Ltd**,⁵ applying **WWRT Limited v Carosan Trading Limited et al**,⁶ evidence sought to be introduced on appeal may include evidence existing at the time of the hearing but unknown or difficult to obtain. It does not, however, contemplate evidence which did not exist at the time of the hearing below or a change of circumstance post decision.
- [36] In my mind, that is the complete answer to the present application. The respondent seeks to rely not on material which existed in September 2012 but could not with diligence have been procured, but on documents and affidavits generated years afterwards. That is not fresh evidence within the contemplation of the first limb. It is subsequent evidence.
- [37] Furthermore, as this Court stated in **Golden Meditech**, relying on **Lam Wo Ping et al v Chen Jian Yun et al**,⁷ an applicant cannot circumvent the first limb by seeking to rely on later findings, later assertions or later created materials, as opposed to underlying facts existing at the relevant time. The respondent's reliance on these later affidavits and documents falls squarely within that prohibited category.
- [38] To the extent that some documents pre-date the order below, such as the 1985 transfer, there is no evidence before this Court explaining why those documents could not, with reasonable diligence, have been placed before the learned judge in 2012. The burden lies on the applicant, and it has not been discharged.

⁵ BVIHCMAP2023/0022 (delivered 9th July 2025, unreported).

⁶ BVIHCMAP2022/0002 (delivered 20th July 2022, unreported).

⁷ BVIHCMAP2023/0006 (delivered 20th August 2024, unreported).

[39] On that basis, I find that the respondent has failed to meet the threshold requirement of the first limb of **Ladd v Marshall**. Having failed on that limb, with the limbs of fresh evidence application being cumulative,⁸ even failing on one ground results in the entire application failing.

[40] The application for leave to adduce fresh evidence on behalf of the respondent is therefore refused.

Issue 1 – Whether the January 2012 application was *ex parte* in substance, such that it engaged a duty of full and frank disclosure, and if so whether that duty was complied with

Appellant's Submissions

[41] The appellant submitted, in essence, that the proceedings were *ex parte* in substance. Although an order for substituted service was made on 19th April 2012, he contended that publication in a local newspaper could not amount to effective notice to a person whom the deceased knew to be residing in the United States. He further submitted that the deceased had the means to contact him directly, as was evidenced by the Western Union transfer sent to him in April 2011 from the deceased while he was recovering from surgery.⁹ On that footing, he argued that the September 2012 order was obtained without his knowledge and without any real opportunity for him to be heard.

[42] The appellant further submitted that the deceased's affidavit in support of the order for severance which made certain allegations of no communication with the

⁸ Premier Exports London Ltd v Piyush Rajwani [2022] EWHC 1188 at paragraph 21; Geminis Investors Ltd v Goods Technology Starting International Ltd BVIHCP2022/0020 consolidated with Geminis Investors Ltd v Good Technology Starting International et al BVIHCP2022/0043 (delivered 23rd August 2023, unreported).

⁹ Appeal Bundle, Affidavit in support of application to adduce fresh evidence filed 18th September 2024, pages 9 to 10 (filed on 4th September 2025).

appellant¹⁰ were clearly wrong and untrue. He contended that the failure by the deceased to disclose that she was well aware where the appellant lived and had been in contact with him herself, rendered the application materially deficient having presented a false narrative to the court upon which it made certain determinations.

[43] The appellant further argued that once the matter is properly understood as having proceeded ex parte in substance, the well-established duty of full and frank disclosure arose. In support of that proposition, he relied on **R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac**¹¹ and **Brink's Mat Ltd v Elcombe**.¹² He submitted that those authorities established that an applicant must disclose all material facts, including matters adverse to the application, that are to be materially assessed by the court and not by the applicant, and that the duty extends to facts which would have been known had proper inquiries been undertaken. He also relied on **Stanford International Bank Ltd; Janvey v Wastell; Serious Fraud Office v Wastell and anr**,¹³ in which the court, in a judgment of Hughes LJ, emphasised that an applicant on an ex parte application must put before the court the points that the absent party would likely have made if present.

[44] The appellant therefore maintained that there were several matters of clear materiality which were not disclosed and that those matters went directly to both the appropriateness of substituted service and the merits of the relief ultimately granted.

Respondent's Submissions

[45] The respondent, by contrast, submitted that the application cannot properly be described as ex parte once the Court had made an order for substituted service

¹⁰ Appeal Record from Court Below, Affidavit of the deceased in support of application filed 24th January 2012, page 3 (filed on 15th June 2022).

¹¹ [1917] 1 KB 486.

¹² [1988] 1 WLR 1350.

¹³ [2010] EWCA Civ 137; [2011] Ch 33; [2010] 3 WLR 941.

which had been complied with by the deceased at the time. It was accepted that even though the application may initially have been brought without notice, the order of 19th April 2012 regularised the position by its direction that notice of the proceedings was to be published locally.

[46] The respondent submitted that when substituted service was effected, it did not require service of the originating application or supporting affidavit, nor did it require any further steps beyond mere publication of the notice of the application itself. The respondent's case was that the deceased did what the court ordered her to do, that publication was duly undertaken, and that the appellant thereafter failed to participate. On that basis, it was argued that the appellant was afforded an opportunity to respond but elected not to do so.

[47] The respondent further submitted that the affidavit did, in fact, disclose the material facts, including that the appellant resided overseas, that there had been difficulties in contacting him, and the basis upon which severance was sought. Accordingly, counsel for the respondent as the executor of the estate of the deceased, disputed both the characterisation of the matter as *ex parte* and the suggestion that there had been any breach of a duty of candour to the court which would permit this Court to interfere with the findings of the court contained in the September 2012 order.

Discussion

[48] In my judgment, the analysis must begin with the nature and the purpose of substituted service. Substituted service is not an end in itself. It is a procedural mechanism by which the court permits notice to be given by an alternative method where ordinary service cannot practicably be effected. The juridical foundation of such an order is that the alternative method chosen has a reasonable prospect of bringing the proceedings to the knowledge of the person to be served.

[49] The fundamental importance of service of originating process or the notice of the same must also be borne in mind. The purpose of service is to bring proceedings to

the attention of the person whose rights may be affected so that he may respond before any determination is made. This principle was emphasised by the Supreme Court of the United Kingdom in **Abela and others v Baadarani**¹⁴ and by this Court in **Flavio Maluf v Durant International Corp et al.**¹⁵ In that latter decision, Farara JA (Ag.) observed at paragraph 93:

“It is so well-established, so as to be trite, that **the purpose of service of documents in civil proceedings is to bring the claim form and other statements of case setting out the allegations of fact and the legal basis for the claim brought by a claimant, to the attention of the defendant.** The significance of this requirement for service of originating process is a fundamental pillar in ensuring open litigation in a free and democratic society, and to give meaning to the imperative for justice to be dispensed openly and according to law, buttressed and circumscribed by applicable rules of court which have, as their overriding objective, courts dealing with cases justly and ensuring that the parties are, as far as it is practicable, on an equal footing.” (My emphasis added).

- [50] That statement reflects the broader procedural principle that a party whose legal rights may be affected must, so far as practicable, be afforded notice and an opportunity to be heard. It follows that any order permitting substituted service must be approached with caution, since it authorises the court to proceed in circumstances where conventional methods of service have not been effected.
- [51] The Civil Procedure Rules themselves reinforce this approach. Rule 7.8A of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the “CPR”) which was the applicable rule at the time of the application, provided that where service in the ordinary manner is impracticable, the claimant may apply for an order that the claim form be served by a method specified by the court. Such an application must be supported by affidavit evidence specifying the proposed method of service, explaining fully why ordinary service is impracticable, and demonstrating that the proposed method is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim. The rule therefore places

¹⁴ [2013] UKSC 44.

¹⁵ BVIHCP2021/0025 (delivered 13th January 2022, unreported).

emphasis not merely on the impracticability of ordinary service, but also on the likelihood that the alternative method will bring the proceedings to the attention of the person to be served.

[52] These procedural requirements reflect the same underlying principle identified in the United Kingdom authorities. In **General Medical Council v Boukalis**,¹⁶ it was recognised that service by advertisement is exceptional and should only be ordered where there is good reason to believe that the advertisement will come to the attention of the person concerned. Likewise, **Abbey National plc v Frost**¹⁷ underscores the need for care before authorising substituted service and the requirement that the method adopted be one which will, in all reasonable probability, be effective to bring knowledge of the proceedings to the defendant.

[53] Accordingly, both the rules of court and the authorities demonstrate that substituted service is justified only where two conditions are satisfied. First, that ordinary service is genuinely impracticable. Secondly, that the alternative method proposed has a realistic prospect of bringing the proceedings to the defendant's attention. It is against those principles that the facts of the present case must be assessed.

[54] Those principles are of obvious significance here. Firstly, it must be said clearly that the deceased made no application for service on the appellant. In the affidavit in support of the ex parte application at paragraph 7 she had this to say, "He [the appellant] now resides in the United States of America and has stop (sic) communicating with me any mail I send him are returned unopened. Any calls to his last known telephone number are never answered." That was the extent of the statement of the deceased and was the obvious reason why she purported to proceed ex parte. Thus when the matter came to court on the 19th April 2012 there is no indication that any of the circumstances surrounding the whereabouts of the appellant were interrogated by the court as it is not stated therein and indeed the

¹⁶[2002] EWHC 2138 (Admin).

¹⁷[1999] 2 All ER 206.

learned judge recites in the order that reliance for the order was placed on the same affidavit with its bald statement of non-contact, upon which an order was made which amounted to an order of substituted service. However, on the contrary, the factual materials now relied upon indicate that the appellant, was in fact residing in the United States, as stated by the deceased but more importantly that at the relevant time had been in contact with the deceased up to, certainly the year before by the existence of the Western Union transfer of April 2011. That circumstance was plainly material to any application seeking permission to proceed by advertisement in a local newspaper and a fact that the court should have been aware of at the time of making any order for such service.

[55] Thus, it is clear that the court, on its own volition, made the order to have the application served by way of advertisement in a local newspaper in Montserrat. At that point it was incumbent upon the court to satisfy itself that service by advertisement in a local newspaper in Montserrat was, at the very least, a method of notification that had practical efficacy. Where a person is known to be living abroad, publication in a local newspaper cannot automatically be assumed to constitute notice in any meaningful sense. Contrary to the posture of the respondent, it is clear in my mind that formal compliance with the order for substituted service was not, by itself, sufficient to answer the anterior question whether the substituted mode was appropriate to notify the person concerned. A court order authorising substituted service does not transmute an inherently ineffective mode of communication into effective notice merely by force of form.

[56] This conclusion is reinforced by the evidential difficulties in the account as laid out in the affidavit of the deceased that was filed in support of the application for severance.¹⁸ None of the assertions in paragraph 7 of the affidavit of the deceased were in fact substantiated by any documentary proof which would have been easy enough to obtain especially as it related to the return of unopened mail. Although it

¹⁸ Appeal Record from Court Below, Affidavit of the deceased in support of application filed on 24th January 2012, pages 2-3, paragraph 7 (filed on 15th June 2022).

must be recognised that the absence of such supporting material does not necessarily establish bad faith, it does however, materially weaken the proposition that direct means of contact had been exhausted or had genuinely proved impracticable.

- [57] I therefore do not accept the respondent's submission that the appellant simply elected not to participate in the proceedings in the court below. That submission assumes the very matter in issue, namely that he had effective notice and a real opportunity to respond. If the method used was not one reasonably likely to come to his attention, then his nonappearance cannot fairly be characterised as a voluntary choice to abstain.
- [58] In my judgment, the better view is that, notwithstanding formal compliance with the order of 19th April 2012, the proceedings remained *ex parte* in substance. The severance order of 20th September 2012 was made without the appellant being effectively notified and without his participation. That being so, the deceased at the time of the application was under the strict duty of full and frank disclosure applicable to *ex parte* applications.
- [59] The content of that duty is well settled. In **R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac**, it was made clear that an applicant who seeks relief in the absence of the other side must make full and fair disclosure of all material facts. The principle is not satisfied by putting forward only those matters which support the application. The court, deprived of adversarial testing, depends on the applicant to present the case with scrupulous fairness.
- [60] The modern formulation of the principle is found in **Brink's Mat**. There, the Court explained that material facts are those which are material for the judge to know in dealing with the application. The duty is not confined to facts which the applicant personally considers decisive. Materiality is for the court. Further, the duty extends not only to matters actually known, but also to facts which would have been revealed

had proper inquiries been made. The obligation therefore requires both candour and diligence.

[61] The point was expressed with particular force by the Chancellor in **Stanford International Bank Ltd; Janvey v Wastell; Serious Fraud Office v Wastell**, where he said, in substance, that an applicant must put on the absent party's defence hat and ask what points that party would make if present, and must place those matters before the court. That observation is especially apposite here, where the absent party's position went not merely to some incidental matter, but to the existence and extent of his claimed proprietary interest.

[62] Applying those principles, I am satisfied that there were a number of material matters which were either not disclosed or not adequately disclosed.

[63] First, the deceased's knowledge of the appellant's residence abroad, and more importantly her apparent ability to contact him by means other than newspaper advertisement, were plainly material to the information that was disclosed to the court. If the court had been told, with full candour, that the appellant was in the United States and that the deceased had previously remitted money to him there, the court would inevitably have had to consider whether some direct overseas method of service, or some other targeted means of notice, should have been attempted or ordered before resorting to local advertisement.

[64] Secondly, the evidential basis for the alleged failure of direct contact was itself material. Assertions that letters were returned unopened and calls were unanswered, unsupported by objective proof, were not merely incidental omissions. They went directly to the evidential sufficiency of the allegations that the deceased could not contact the appellant and hence the reason that the said application was filed as an ex parte application. A court considering whether to permit a party's proprietary rights to be adjudicated in his absence was entitled to know not only that such assertions were being made, but what evidence supported them.

[65] Thirdly, the appellant's refusal to 'sign the land back over to the deceased' as stated in the affidavit of the deceased should have triggered the court's inquiry into that refusal and indeed at the very least the examination of the title document of the parties. The mere fact that the title document was not an exhibit to the affidavit of the deceased either at the initial filing on 24th January 2012 or the later 'refiling' on 26th July 2012 where its disclosure would have shown that the joint tenancy was created upon payment of a sum was a matter of obvious materiality. The deceased sought relief which, in substance, affected the continued existence of the joint title. If the absent party's position was that he had paid for a share in the land and that there was never an agreement to relinquish his interest, that was not a peripheral issue. It was central. Even if what was shown on the face of the title document could not be proved conclusively at that interlocutory stage, the existence of that fact itself was something the court should have been told.

[66] This conclusion is, in my judgment, further reinforced by the material now before this Court on the appellant's application to adduce fresh evidence. Although the title document itself was not exhibited in the proceedings below, the transfer documentation which is now exhibited indicates that the appellant paid a sum of EC\$5,000 in consideration for his interest in the property and bears the notarised signatures of both parties. While this material was not available to the learned judge in 2012, it is nevertheless illustrative of the very matter which ought to have been disclosed, namely that the creation of the joint tenancy was not merely formal or administrative in nature but was supported by consideration. That circumstance underscores the obvious materiality of the omitted information and serves to emphasise the centrality of the appellant's asserted proprietary interest to the relief sought.

[67] In my judgment, these were not immaterial or collateral matters. Each went either to the legitimacy of proceeding without actual notice or to the merits of the relief

sought in the appellant's absence. In combination, they deprived the court of a fair picture of the case.

[68] I accept that not every failure of disclosure necessarily leads inexorably to the setting aside of the order obtained. **Brink's Mat** recognises that the court retains a discretion and may consider, among other things, the seriousness of the non-disclosure, whether it was innocent, and whether the same order would likely have been made even had full disclosure occurred. But in the present case the undisclosed or inadequately disclosed matters were of such importance that one cannot confidently conclude that the same course would have followed.

[69] Had the court been fully apprised that while the appellant was living in the United States, the deceased had at least previously used a direct means of sending funds to him; that cognizance had been given to the fact that the alleged failures of contact were unsupported by objective proof; and that the title deed would have shown the consideration paid by the appellant for the transfer into joint names, there is a real possibility that the court would either have refrained from issuing an order for substituted service by local advertisement, required some attempt at direct service, or at the very least approached the substantive relief with materially greater caution.

[70] For those reasons, I conclude that the January 2012 application was for all intents and purposes ex parte in substance. The substituted service by advertisement did not, on the facts now considered, amount to effective notice to a defendant known to be residing abroad. The duty of full and frank disclosure was therefore engaged. That duty was not discharged. Material facts bearing both on the propriety of substituted service and on the merits of the application were omitted or inadequately presented.

[71] It follows that the appellant's complaint under this issue is made out. The identified failures seriously undermine the propriety of the September 2012 order and provides a proper basis for it being set aside.

- [72] That conclusion on this first issue is sufficient to dispose of the matter in its totality but for completeness I also will consider whether the learned judge was entitled to make the September 2012 order, in any event.

Issue 2 – Whether, as a matter of law, the learned trial judge was entitled to order the severance of Block 14/12 Parcel 11 in the circumstances of the case

Appellant's Submissions

- [73] The appellant submitted that the property was conveyed on 18th July 1985 to himself and the deceased as joint proprietors under the Act, thereby creating absolute joint proprietorship. On this basis, the appellant contended that any severance of that joint proprietorship could only occur in accordance with the statutory mechanism prescribed under section 101(3) of the Act which requires execution and registration of the prescribed instrument by all joint proprietors to convert the joint proprietorship into a proprietorship in common.
- [74] The appellant further contended that he never executed such an instrument and never consented to any severance of the joint proprietorship. Accordingly, he argued that the September 2012 order, which purported to sever the joint proprietorship and ultimately led to the transfer of the property to the respondent herein, was unlawful and ineffective. In support of this submission, the appellant relied upon the decisions in **Edwards v Edwards**¹⁹ and **Mums Incorporated v Cayman Capital Trust Co**,²⁰ which emphasise that dispositions affecting registered land must comply strictly with the statutory framework governing registered titles and cannot be affected unilaterally by one joint proprietor without the consent of the other.

¹⁹ Antigua and Barbuda Civil Appeal No. 15 of 2005 (delivered 14th March 2007, unreported).

²⁰ 2000 CILR 131.

[75] The appellant also challenged the statutory basis upon which the January 2012 application was brought. The deceased had relied on section 140 of the Act, which concerns rectification of the land register in cases involving mistake or fraud. The appellant submitted that this provision was misapplied, as the circumstances relied upon by the deceased did not amount to a 'mistake' or 'fraud' within the meaning contemplated by the Act. In that regard, the appellant relied upon the reasoning in **NRAM Ltd v Paul Morgan Evans and Another**,²¹ which illustrates that the rectification jurisdiction is confined to correcting genuine errors in the register and does not provide a mechanism for altering substantive proprietary interests absent such error.

[76] The appellant further disputed the factual basis of the deceased's case. The deceased contended that the appellant's name was placed on the title merely to facilitate a student loan and that there was an agreement that his name would be removed upon completion of his studies. The appellant denied that any such arrangement existed and relied upon documentary evidence, including records from the University of the West Indies, which clearly showed that he attended university on a scholarship rather than personal financial means by way of a loan. On this basis, the appellant argued that the alleged agreement was unsupported by credible evidence and could not form the basis for the waiver of his statutory rights as joint proprietor.

Respondent's Submissions

[77] The respondent advanced a different analysis. The respondent, as the executor of the estate of the deceased, submitted that the appellant's name was placed on the title solely as a temporary measure to assist with financing his education, and that there was a clear understanding between the parties that his name would be removed once his studies were completed. The respondent relied on the deceased's affidavit evidence in support of this alleged undertaking although it did

²¹ [2017] EWCA Civ 1013.

appear that he had no direct knowledge of this agreement and solely relied on what had apparently been told to him by the deceased.

[78] The respondent further contended that the appellant had adequate notice of the proceedings leading to the September 2012 order. It was submitted that the court having authorised substituted service through publication in two consecutive issues of a local newspaper, the appellant's failure to participate in those proceedings was the result of his deliberate evasion rather than any procedural deficiency.

[79] In addition, the respondent argued that the trial judge was entitled to make the order severing the joint proprietorship under section 140 of the Act²² and under applicable common law principles governing severance of joint tenancies. In this regard, reliance was placed upon the well-known authority of **Williams v Hensman**,²³ which identified three recognised methods by which a joint tenancy may be severed. The famous formulation is as follows:

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

²² Section 140(1): "Subject to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained made or omitted by fraud or mistake (2) the register shall not be rectified so as to affect the title of a proprietor who....acquired the land, lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

²³ (1861) 70 ER 862.

been effected, as happened in the cases of *Wilson v. Bell* and *Jackson v. Jackson*.”

- [80] The respondent also relied upon **Keithley Lake et al v Richard Vento et al**²⁴ in support of the proposition that severance may arise through conduct demonstrating an agreement or intention inconsistent with the continuation of a joint tenancy.
- [81] The respondent therefore submitted that section 101(3) of the Act is not the exclusive method by which severance may occur. According to this argument, the statutory provisions must be read alongside the common law principles governing joint tenancies, and the court was entitled to give effect to what was alleged as the parties' underlying agreement by ordering the removal of the appellant's name from the title.
- [82] The respondent further contended that the appellant effectively waived any statutory protection under section 101 of the Act by agreeing that his name would be placed on the title only temporarily. It was submitted that the appellant's refusal to remove his name from the title upon completion of his studies amounted to repudiation of that agreement thereby justifying the court's intervention.
- [83] Finally, the respondent argued that the appellant has pursued the wrong procedural remedy. It was submitted that the appropriate course would have been to seek rectification of the land register rather than bring the present appeal, and that the proceedings therefore amount to a collateral attack upon the register. The respondent also contended that the appellant's delay in challenging the 2012 order and the subsequent 2019 transfer renders the present appeal an abuse of process and would cause prejudice to the respondent, who has expended substantial resources refurbishing the property.

²⁴ AXAHCVP2016/0012 (delivered 20th June 2019, unreported).

Discussion

- [84] As a preliminary matter, it is necessary to state that this Court has already concluded that the September 2012 order was obtained in circumstances where the proceedings proceeded ex parte and without proper participation by the appellant. On that basis alone, the order is liable to be set aside as a matter of procedural fairness.
- [85] In those circumstances, the analysis which follows is properly to be regarded as arising in the alternative, and addresses whether, even if the order were not set aside on procedural grounds, the learned judge was entitled as a matter of law to order the severance of the joint proprietorship in the manner contended by the respondent.
- [86] Having considered the parties' submissions, the starting point must be the statutory framework governing registered land. Section 101 of the Act regulates the disposition of land held in joint proprietorship. The provision reflects the fundamental characteristic of a joint tenancy, namely the unity of ownership between the joint proprietors. Indeed section 101(1)(a) restricts the ability of one joint proprietor to dispose of the property without the participation of the other.
- [87] Section 101(3) of the Act sets out the mechanism by which a joint proprietorship may be converted into a tenancy in common. The exact wording of section 101(3) of the Act is as follows:
- “(3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint relationship, and the severance shall be completed by registration of the joint proprietors as proprietors in common in equal shares and by filing the instrument.”
- [88] The provision requires the execution and registration of the prescribed instrument by the joint proprietors. The statutory language therefore contemplates a consensual act carried out in the prescribed form and entered upon the register.

- [89] In this regard, the reasoning in **Mums Incorporated v Cayman Capital Trust Co** underscores the importance of adherence to the statutory scheme governing registered land. The decision affirms that the Act establishes a comprehensive system regulating the creation, transfer and alteration of proprietary interests in land, and that such interests cannot be modified except in accordance with the procedures prescribed by the statute.²⁵ Indeed in considering a factual matrix which almost mirrored the case at bar, the court of appeal of the Cayman Islands in its discussion on the impact of the provisions of the Registered Land Law on the issue of joint proprietorship under section 100 which is in the exact terms of the Act held that that even though the concept of joint proprietorship bore a “strong resemblance to the tenure of joint tenancy” under the common law, the main point of departure was that under the common law, one joint owner could take a position that would be inconsistent with the continued existence of the joint tenancy and the same would be considered severed while under the Act such actions could only be done with the consent of all the parties as prescribed by the Act.
- [90] Similarly in **Edwards v Edwards** the court emphasised that a disposition affecting registered land which is made without the consent of a co-proprietor is inconsistent with the statutory protections afforded by the Act. The statutory framework is designed to safeguard the integrity of the register and to ensure that proprietary interests are altered only through recognised statutory mechanisms.²⁶
- [91] However, it must be remembered that the application of the deceased before the court below was not to sever the joint tenancy in the sense that she agreed that the appellant had an independent interest in the land but rather that his name should not be there at all and the ownership of the land should revert to the deceased in her sole name. Thus, her reliance on section 140 of the Act requires careful scrutiny.

²⁵ 2000 CILR 131 at paragraph 30.

²⁶ Antigua and Barbuda Civil Appeal No. 15 of 2005 (delivered 14th March 2007, unreported) at paragraphs 13 to 14.

Section 140 confers a jurisdiction upon the court to order rectification of the register where an entry has been made by mistake or fraud. Indeed, by subsection 1, the court is empowered to order rectification of the register where it is satisfied that any registration including a first registration had been obtained, made or omitted by fraud or mistake. However, as explained in **NRAM Ltd v Paul Morgan Evans and Another**, the rectification jurisdiction is confined to circumstances where the register contains an error arising during the registration of the title including first registration. It is not a mechanism for altering substantive proprietary rights in the absence of such a mistake.

[92] This limitation is further underscored by the reasoning of this Court in **Francis Chitolie et al v St. Lucia National Housing Corporation**,²⁷ where in considering the parameters of the Land Registration Act of St Lucia where section 98 confers the power to rectify for fraud or mistake, the Court held that the statutory power of rectification is not an open-ended jurisdiction to revisit or undo interests merely because one party asserts an underlying entitlement inconsistent with the register. Rather, this Court by the judgment of Farara JA (Ag.), emphasised that rectification is confined to cases where the alleged mistake or fraud occurred in the process of adjudication or registration itself, and not to disputes concerning the substantive merits of competing claims to ownership or alleged informal arrangements between parties. In that case, this Court rejected the contention that an alleged failure in the adjudication process or a party's omission to assert a claim could be re-characterised as a 'mistake' for the purposes of rectification.

[93] In the present case, the deceased's application did not identify any mistake in the creation or registration of the joint proprietorship itself. Rather, the application sought effectively to remove one of the joint proprietors from the register, on the basis of an alleged agreement between the parties. Such circumstances do not fall

²⁷ SLUHCVP2020/0022 (delivered 13th January 2022, unreported). Upheld in the Privy Council in [2023] UKPC 43.

naturally within the concept of rectification for mistake or even fraud contemplated by section 140.

- [94] The respondent's reliance upon common law authorities concerning severance, including **Williams v Hensman** and **Keithley Lake v Richard Vento**, must also be considered in the context of the statutory regime governing registered land. Those authorities describe the common law methods by which a joint tenancy may be severed in systems of unregistered land. However, where land is subject to a statutory system of title registration, those principles must yield to the requirements of the governing statute.
- [95] The Act establishes a comprehensive statutory code for the disposition of registered land. Where the statute prescribes a particular method by which a proprietary interest may be altered, that method must ordinarily be followed. To permit severance through informal arrangements or unilateral acts outside the statutory framework would undermine the certainty and reliability that the system of land registration is intended to secure.
- [96] The respondent's argument that the appellant waived his statutory rights under section 101 by agreeing to the temporary placement of his name on the title is likewise difficult to sustain on the evidence before the Court. The existence of such an agreement is strongly disputed by the appellant, and the documentary evidence relied upon by the appellant, including scholarship records relating to his studies, casts doubt upon the respondent's assertion that the joint proprietorship was created solely to facilitate a student loan.
- [97] In any event, even if such an understanding existed, it is doubtful that an informal agreement could displace the statutory protections afforded to a registered joint proprietor. The Act confers legal rights that attach to the registered title, and those rights cannot ordinarily be extinguished except in accordance with the procedures prescribed by the statute.

- [98] The Court must therefore approach the matter on the basis that the appellant was, at all material times, a registered joint proprietor of the property. In those circumstances, any severance of the joint proprietorship required compliance with the statutory mechanism set out in section 101(3) of the Act.
- [99] No evidence has been produced that the prescribed instrument required under that provision was executed or registered with the participation of both joint proprietors. Absent such compliance, the purported severance of the joint proprietorship cannot be regarded as having been effected in accordance with the statutory scheme governing registered land.
- [100] Thus, even if the Court is wrong in its preliminary conclusion concerning the procedural invalidity of the September 2012 order, it would follow that the order, insofar as it purported to terminate the joint proprietorship and to completely to remove the appellant's interest in the property, was not compliant with the statutory framework of the Act. The subsequent transfer of the property in 2019, which depended upon that termination, cannot therefore operate to extinguish the appellant's proprietary interest.
- [101] Accordingly, and in the alternative, the appellant's interest in the property, as a registered joint proprietor, must be regarded as having remained intact notwithstanding the orders made in 2012 and the subsequent transfer in 2019.

Conclusion

- [102] For all of the foregoing reasons, I am satisfied that the appeal must be allowed. The order made on 20th September 2012 cannot stand. It was obtained in proceedings which were ex parte in substance, in circumstances where the appellant did not receive effective notice and where the duty of full and frank disclosure was engaged but not discharged. Further, and in any event, the order was not supportable as a matter of law under the statutory scheme governing registered land in Montserrat.

The learned judge was not entitled, on an application framed under section 140 of the Act and on the facts then presented, to direct what effectively was the termination of the joint proprietorship and the removal of the appellant's name from the register absent compliance with section 101(3) of the Act.

[103] I also reject the respondent's contention that the appeal should fail by reason of delay, prejudice, or the subsequent dealings with the property. Those matters may bear upon the practical consequences of the orders now to be made, but they cannot validate an order which was improperly obtained, and which lacked a proper legal foundation, nor can expenditure on repairs or the subsequent transfer of the property cure the defect in the September 2012 order or extinguish the appellant's registered interest if that interest was never lawfully removed in the first place.

[104] In those circumstances, the proper course is to set aside the order of 20th September 2012. It follows that the direction that the certificate of title for Block 14/12 Parcel 11 in the St. John's Registration Section be severed, and that Agnes Ryan be entered as sole proprietor absolutely, must be vacated. The legal consequence is that the appellant's registered interest was not lawfully extinguished by that order.

[105] I should make clear, however, that this Court is not in a position on the present appeal to make definitive findings upon every issue which may arise as between the parties or their successors in title concerning the present state of the register or any consequential relief that may be required in light of the 2019 transfer. Those are matters which may require further consideration in the court below, with the participation of all persons whose interests may be affected, and upon such evidence and submissions as may properly be advanced. What this Court determines on this appeal is that the foundation upon which the 2012 severance order rested cannot be sustained.

[106] In the premises, I would make the following orders:

- (1) The appellant's application to adduce fresh evidence is granted.

- (2) The respondent's application to adduce fresh evidence is dismissed.
- (3) The appeal is allowed.
- (4) The order of the learned judge dated 20th September 2012 is set aside.
- (5) The matter is remitted to the High Court for such consequential directions, including any question of rectification or consequential relief affecting the register, as may be appropriate and just in light of this judgment.
- (6) The appellant shall have his costs on the appeal, to be assessed by a judge of the High Court if not agreed within 21 days.

[107] I would add only this. The present appeal concerns a registered proprietary interest in land. The statutory system governing such interests is intended to provide certainty, transparency, and protection to those whose names appear on the register. That system cannot properly function if a registered proprietor may be deprived of his interest without effective notice and without strict adherence to the procedures prescribed by law. It is for that reason that the appeal succeeds.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Davidson K. Baptiste
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar