IN THE COURT OF APPEAL OF BELIZE, A.D. 2013

CIVIL APPEAL No. 40 of 2010

ELENA USHER Appellant

v

(1) OSBERT ORLANDO USHER Respondents
(2) CLAUDETTE A. GRINAGE

AND

CIVIL APPEAL NO. 2 of 2011

ELENA USHER Appellant

v

OSBERT ORLANDO USHER Respondent

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BEFORE:

The Hon. Mr. Justice Manuel Sosa - President
The Hon. Mr. Justice Dennis Morrison - Justice of Appeal
The Hon. Madam Justice Minnet Hafiz-Bertram - Justice of Appeal

M Marin Young for the appellant
F Lumor SC and Mrs. R Magnus Usher
for the respondents

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26 and 27 March and 28 June 2013

SOSA P

[1] As regards Civil Appeal No 40 of 2010, I am in agreement with the other members of the Court that the appeal of the appellant, Elena Usher should be:

i) dismissed to the extent that it seeks the setting aside of the order of Muria J dismissing the claim against the second-named respondent, Claudette A Grinage; and

ii) allowed, in full, to the extent that it seeks the setting aside of the portions of the order numbered 1), 2) and 3) but only in part to the extent that it seeks the setting aside of the portions of the order numbered 6), 7) and 8); and

that an order which is just and equitable in all the circumstances should be made in favour of the appellant. I am in further agreement with the other members of the Court that the cross-appeal of the first-named respondent, Osbert Orlando Usher, should be allowed in part. As regards Civil Appeal No 2 of 2011, I agree with the other members of the court that the appeal should be dismissed. I have read, in draft, the judgment of Hafiz-Bertam JA and concur in the reasons for judgment given, and the orders proposed, in it.

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SOSA P

MORRISON JA

[2] I too have had the great advantage of reading, in draft, the judgment of Hafiz-Bertram JA in Civil Appeals Nos 40 of 2010 and 2 of 2011. I agree with the judgments, as well as the orders proposed by Hafiz-Bertam JA for the disposal of both appeals.

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MORRISON JA

HAFIZ-BERTRAM JA

Introduction

[3] These two appeals are from the decisions of the learned trial Judge Muria. Elena Usher, the Appellant in both appeals was the wife of Osbert Orlando Usher. I will refer to the Appellant, Elena Usher as the wife and Osbert Orlando Usher as the husband although they are divorced. In Civil Appeal No. 40 of 2010, the decision under appeal is dated 3rd November, 2010 and is in relation to a claim by the wife for an alteration of property rights pursuant to **section 148A** of the **Supreme Court of Judicature (Amendment) Act (No. 8 of 2001).** The wife has appealed against the orders made by the learned trial Judge and seeks the following relief:

a) That the Court sets aside the orders made by the Supreme Court; and

b) That the Court makes an order that "reflects the Appellant's interest, if any, in all the properties real and personal that were the subject matter of Supreme Court Action No. 420 of 2005 that is just and equitable in all the circumstances.

[4] In Civil Appeal No. 2 of 2011, the decision under appeal is dated 24th November, 2010 and concerns two separate applications under claim No. 788 of 2010 which was issued after judgment was given in the property rights matter. The first application was for an interim injunction by the wife to restrain the husband from preventing her from removing and relocating plants, equipment, machinery, hardware and implements from Gran's Farm Land. The second application dated 23rd November, 2010 was by the husband to strike out the wife's claim and notice of application on the basis of *res judicata* and as an abuse of the court's process.

[5] I think it would be prudent to consider the property rights matter first and thereafter, consider, Civil Appeal No. 2 of 2011.

Factual Background - Civil Appeal No. 40 of 2010

[6] The background to the proceedings in the court below and this court is instructive. The learned trial Judge from paragraphs 6 to 14 of his judgment stated a brief background of the parties and their marital relationship. I do not believe any of these matters are in dispute and I respectfully adopt what has been stated by the trial Judge. The parties met on 22nd January, 1980 whilst they were students studying dentistry in Guatemala City. On 18th December, 1983 their first child was born. They started to live together in January of 1984. They were married on 12th August, 1990. Their second

child was born on the 11th March, 1991. The wife has a child by a previous relationship who was born on 17th December, 1977 and was six years old at the time of the commencement of the parties relationship. The child was a member of the household and supported by the parties.

[7] The husband completed his studies in 1985 and returned to Belize where he opened his dental practice. The wife remained in Guatemala to complete her studies. During this time, she visited Belize on her vacations and continued her cohabitation with the husband. The wife did not complete her studies. She came back to Belize in July of 1985 and continued to cohabit with the husband. She worked for three months and thereafter took care of her family and started a horticulture business sometime later.

[8] The parties were separated when the wife was forced to leave the matrimonial home on 14th June, 2005. She was unhappy with the marriage as the husband had a paramour and at the same time remained with her. The youngest child who was sixteen years old at the time went to live with the wife.

[9] The wife commenced divorce proceedings on 17th November, 2005 and a decree nisi dissolving the marriage was granted on 31st October, 2007. On the 8th December, 2009 the decree absolute was granted.

<u>The proceedings in relation to alteration of property rights</u>

[10] On 17th November, 2005 the wife commenced proceedings by way of Originating Summons under the provisions of section 16 of the **Married Women's Property Act** and section 148A of the **Supreme Court of Judicature (Amendment) Act (No. 8 of 2001).** The wife in an amended originating summons dated 28th May, 2007 sought the following relief:

1.a) A Declaration under section 16 of the Married Women's Property Act, Chapter 176 and or under Section 148A of the Supreme Court of Judicature (Amendment) Act No. 8 of 2001 that the Applicant is beneficially entitled to a one-half share or interest in the properties listed in the Schedule below.

b) A Declaration that the Applicant is beneficially entitled to one-half share or interest in the personal properties owned by the parties.

c) A Declaration that the transfer of freehold premises 5.059 acres situate at the North End of Drowned Caye, Belize District as shown on Plan of subdivision Survey by Gilberto A. Perez dated January 13th, 2005 registered in Register No. 24 Entry No. 8540 to Claudette Anasellie Grinage, caused by or at the behest of the First Respondent is, pursuant to section 149 of Chapter 190 of the Laws of Belize, void as a transaction prejudicing the Applicant.

d) A Declaration that the transfer of freehold premises known as 4.702 acres situate at Cross Caye, Stann Creek District as shown on Plan of Subdivision Survey by J. H. Hertular dated 7th April, 2005 registered in Register No. 7 Entry No. 8873 to Claudette Anasellie Grinage caused by or at the behest of the First Respondent is, pursuant to section 149 of Chapter 190 of the Laws of Belize void as a transaction prejudicing the Applicant.

2. An Order that the aforementioned properties should be sold and the net proceeds of sale be shared equally between the Applicant and the First Respondent; and or

3. In the alternative an Order that the aforementioned properties be settled or transferred equally or equitably between the Applicant and the First Respondent as the Court may determine.

4. a) An order that one-half of the net proceeds of sale of the following vehicles be shared equally or equitably between the Applicant and the First Respondent, namely –

(1) Chevy 15 seater van.
(2) GMC Pick-up Truck.
(3) Plymouth Voyager Mini-van.

b) An Order that one-half of the amounts standing as credit in the following bank accounts be paid to the Applicant, namely -

i. Savings Account at Holy Redeemer Credit Union, Hydes Lane, Belize City, Belize in the name of Osbert Usher.
ii. Checking/Savings Account at Atlantic Bank Limited, Freetown Road, Belize City, Belize in the name of Osbert Usher.

SCHEDULE

(1) All that piece or parcel of land containing 10.15 acres situate along the south side of the Western Highway, near Mile 14 (Minister's Fiat Grant No. 813 of 1998).

(2) All that piece or parcel of land containing 9.593 acres situate along the Western Highway, near Mile 14, Belize District (Minister's Fiat Grant No. 398 of 1999).

(3) All that piece or parcel of land containing 13.46 acres situate along the Western Highway, near Mile 14, Belize District (Minister's Fiat Grant No. 822 of 1998).

(4) All that piece or parcel of land situate on Western Highway containing approximately 5 acres (Leasehold), near Mile 14 Western Highway.

(5) All that piece or parcel of land situate at Petticoat Alley, Belize City, being Lot No. 1097, containing a two storey house thereon.

(6) All that pieces or parcels of land situate at Nos. 14 and 16 Magazine Road, Belize City, Belize containing a structure and a nursery, respectively.

(7) All that piece or parcel of land situate on Long Caye.

(8) All that piece or parcel of land containing one acre situate at Honey Camp, Orange Walk District, Belize.

(9) All that piece or parcel of land containing 50 acres in Hope Creek Village, Stann Creek District.

(10) All that piece or parcel of land situated at No. 3580 Sittee Street, Belize City, Belize containing a three storey building thereon.

(11) All that piece or parcel of land situated on the Hummingbird Highway, Cayo District, Belize.

(12) All that 5.059 acres situate at the North End of Drowned Caye, Belize District as shown on Plan of subdivision Survey by Gilberto A. Perez dated January 13th, 2005 registered in Register No. 24 Entry No. 8540; and

(13) All that 4.702 acres situate at Cross Caye, Stann Creek District as shown on Plan of Subdivision Survey by J.H. Hertular dated 7th April, 2005 registered in Register No. 7 Entry No. 8873.

The Order of the trial Judge which is under appeal

[11] The Order of the learned trial judge is stated at paragraph 147 of his judgment. He stated that for reasons set out in his judgment the order of the court is:

1. Elena is entitled to one-third (1/3) share of the matrimonial home at No. 3580 Sittee Street, Belize City, valued at $300,000.00 which comes to $100,000.00.

2. Elena is entitled to and should be paid the sum of $15,000.00 to reflect her contribution to Osbert's Dental Practice.

3. Elena is entitled to and should be paid the sum of $5,000.00 to reflect her contribution to Gran's Farm bar and plant nursery.

4. The title to property at No. 14 Magazine Road valued at $125,000.00 shall be transferred to Elena. Osbert is to continue the repayment of the $150,000.00 Atlantic Bank Ltd. loan charged on the said property.

5. The Chevy Cheyenne Pick-up truck is to be transferred to Elena.

6. The Claim of Elena in respect of the other properties, real and personal, are refused save and except the properties mentioned in paragraphs 1 to 5 (both inclusive) of this order.

7. Elena and Osbert to pay their own costs. The second respondent's cost must be paid by Elena, based on $50,000.00 being the value of the claim against her, pursuant to Appendix B (Prescribed Costs) of the Supreme Court Civil Procedure Rules.

8. The interim maintenance order granted on 31 October 2007 shall cease, upon Osbert complying with the orders in paragraphs 1, 2 and 3 of this order.

The legislation

[12] The wife made her application under two statutory provisions for the relief sought as shown above. These provisions are section 16(1) of the **Married Women's Property Act**, and section 148 A of the **Supreme Court of Judicature Act.** The learned judge below did not rely on section 16 in making his decision. He found that section 16 does not confer power on the courts to alter property rights that have been already ascertained. The orders made in the court below were therefore made pursuant to section 148 A which provides:

> 148A.(1) Notwithstanding anything contained in this Part or in any other law, a husband or wife may during divorce proceedings make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

(2) In any proceedings under subsection(1) above, the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) In addition to making a declaration under subsection (2) above, the court may also in such proceedings make such order as it thinks fit altering the interests and rights of either the husband or the wife in the property, including: -

(a) an order for a settlement of some other property in substitution for any interest or right in the property; and

(b) an order requiring either the husband or the wife or both of them to make, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The court shall not make an order under subsection (3) above unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(5) In considering whether it is just and equitable to make an order under subsection (3) above, the court shall take into account the following:

(a) the financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the nonfinancial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, including any

contribution made in the capacity of housewife, homemaker or parent;

(c) the effect of any propose order against the earning capacity of either the husband or the wife;

(d) the age and state of health of both the husband and the wife, and the children born from the marriage (if any);

(e) the nonfinancial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage (if any);

(f) the eligibility of either the husband or the wife to a pension, allowance, gratuity or some other benefit under any law, or under any superannuation scheme, and where applicable, the rate of such pension, allowance, gratuity or benefit as aforesaid;

(g) the period when the parties were married and the extent to which such marriage has affected the education, training and development of either of them in whose favour the order will be made;

(h) the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother;

(i) any other fact or circumstances that in the opinion of the court the justice of the case requires to be taken into account.

[13] Barrow JA in the case of **Thomas Vidrine v Sari Vidrine, Civil Appeal No. 2 of 2010,** a decision of this court, gave an overview of the property jurisdiction in Belize in matrimonial causes. A comparison was done of section 16 of the **Married Women's Property Act** and section 148A of the **Supreme Court of Judicature Act** and the learned Judge highlighted

the difference between the two statutory provisions. The section 16 application is not in the nature of matrimonial proceedings whereas the section 148A is done in matrimonial proceedings. The opening words of section 148A shows that the application may be made "in respect of property acquired by the husband and wife jointly during the subsistence of the marriage or acquired by either of them during the subsistence of the marriage." The learned judge said that it is clear from the opening words used in this section that it is only in respect of property acquired during the marriage that the court may exercise its jurisdiction.

[14] The jurisdiction conferred on the Supreme Court under section 148A during divorce proceedings are declaration and alteration of rights in property acquired during the subsistence of the marriage.

[15] The Belize legislation differs from English legislation and in some respects is similar to Barbados and Australia legislation. In the **Vidrine case,** Barrow JA discussed very comprehensively the difference of Belize legislation to the English legislation and he stated that while Belize legislation follows the Australian and Barbadian legislation, it also departs from the legislation of those jurisdictions. I respectfully agree with the learned judge in that judgment and I have nothing more to add. The court is requested to re-visit one issue in the judgment which I will address later.

Two step-process in property alteration under s. 148(5)

[16] In the **Vidrine case,** Barrow JA, with whom Mottley P. and Sosa JA concurred, said at paragraph 70 of his judgment that a two step process should be followed in a property alteration application in Belize. These steps are:

(i) identify and value the property acquired during the subsistence of the marriage; and

(ii) consider and evaluate the matters listed in subsection 5 where the factors are stated which the court shall take into account in considering whether it is just and equitable to make an alteration order.

The Appeal

[17] At the hearing of this appeal, the wife made an application to add to ground three of her appeal, an additional ground, numbered ground 3.3. The reason being that section 148:08 which provides for the setting aside of a transfer of property was not brought to the attention of the trial Judge. Learned Senior Counsel, Mr. Lumor did not object. The Court pursuant to its powers under section 19(2) of the **Court of Appeal Act** allowed the application to amend. The amended Notice of Appeal was issued on the 27th March, 2013.

[18] I will now look at the grounds of appeal in order to determine whether this court can exercise its discretion afresh in relation to the alteration of property rights.

Ground 1.

That the Learned Trial Judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act in holding that the Drowned Caye and Cross Caye properties were not acquired during the subsistence of the marriage and therefore not subject to section 148 of the Supreme Court of Judicature Act ("SCJA") in relation to the Appellant's claim.

[19] The learned trial judge at paragraph 55 of his judgment ruled that when considering what properties were acquired during the subsistence of the marriage, the relevant period is the date of the marriage and the date the parties ceased to live and cohabit together. He said the end date is the date of separation as was held in the case of **GW v RW [2003] 2 FLR 108.** The learned trial judge stated that the Drowned Caye and Cross Caye properties were acquired by the husband one year and ten days after the parties separated on 14th June, 2005. As such, at paragraph 64 of his judgment, the learned judge found that on the authorities of **Miller v Miller/McFarlane v McFarlane [2006] UKHL 24** and **GW v GW** and other authorities cited at paragraph 57 of his judgment, the two properties were acquired long after the parties separated and are *therefore not properties acquired during the subsistence of the marriage. They are therefore not matrimonial properties and not subject to distribution*

[20] In my respectful opinion, the learned trial judge erred in finding that the end of the marriage is the date of separation. The authorities relied on by the trial Judge do not assist the court in the interpretation of the phrase, 'during the subsistence of the marriage'. In **GW v GW** Nicholas Mostyn QC said that in assessing the duration of the marriage the court has always looked at the position de facto rather than de jure. For example, the end of marriage is always taken as the date of separation rather than the date of

decree absolute. However, he accepted that in the case of **Foley v Foley [1981] 2 FLR [1981] 2 FLR 215** the Court of Appeal said that there is a distinction to be drawn between years of cohabitation and years of marriage but dismissed the ruling saying that the decision is 22 years old and that Eveleigh LJ relied on public opinion which recognized that there is a stronger claim founded upon years of marriage rather upon years of cohabitation. In **GW case** the wife had filed a petition for divorce which was later dismissed after the parties reconciled. The judge in making a determination on the duration of the marriage said that in his judgment, a period of estrangement where there has been a formal separation should not count as part of the duration of the marriage. In my opinion, since section 148A makes no provision for cohabitation, the **GW case** cannot be applied to the interpretation of 'during the subsistence of the marriage'.

[21] The learned trial judge also relied on **Miller/McFarlane v McFarlane** where Lord Mance said at paragraph 74 that assuming the focus is on assets acquired during the marriage, rather than the husband's overall means, it seems to him natural in that particular case to look at the period of separation. Lord Mance in the said paragraph 174 of his judgment was looking at the date at which he should measure the increase in value of the parties assets during the marriage. He asked himself three questions before deciding based on the circumstances of the case that it should be the date of separation. The questions are:

> *1) Should this be up to the date when the parties ceased effectively to live as married partners as Mr. Mostyn considered in his judicial capacity in GW v RW (Financial Provision: Departure from Equality) at paragraph 34? Or should it be up to a later date such as the date of trial, or even in a case where an appellate court thinks it right to re-exercise the discretion, up to the date of the appellate decision?*

[22] It can be seen from the questions asked that there was no construction of statutory provisions similar to that of section 148A or at all. The judge was considering the increase in value of shares between separation and trial which was contributed to by the husband's further investment of time and effort independently on its face of any contribution by the wife. It was under such circumstances that the judge concluded that it was natural to look at the period until separation.

[23] I do not think it necessary to look at all the English authorities cited by the learned judge since the decisions were made based on the circumstances of each case and whether there should be departure from the principles of equality. The principle of equality is not applicable to the Belize statutory provisions and this was fully expounded by Barrow JA in **Vidrine**. The principle of equality will be further discussed later on in this judgment.

'Marriages' as opposed to 'common law union'

[24] Learned Senior Counsel, Mr. Lumor contended that the **Vidrine case** appears to silently discriminate against "marriages" as opposed to "common law unions" which the amended act sought to avoid. The reason being that a strict interpretation was given to 'during the subsistence of the marriage'. He contends that marriage ends upon separation and not on divorce. This argument in my respectful view is misconceived. The amendment to the Act, **section 148I** which makes provisions for common law union, sought to give the same rights in relation to property and maintenance. However, common law union cannot be equated with marriage as the principles applicable to both institutions are different. I think it would be helpful to look at the principles applicable to marriage and common law union as this would show that the legislation does not give the

two regimes equal rights although they are given the same rights in terms of property and maintenance.

Principles applicable to marriage and common law union

[25] A marriage is formal and it can only be dissolved by a court of competent jurisdiction or when one of the parties dies. In the case of **Hyde v Hyde and Woodmansee [1866] LR 1 P & D 130** at 133, Lord Penzance stated the common law definition of marriage as, *'The voluntary union for life of one man and one woman, to the exclusion of all others.'* This definition has been applied and acted upon by the courts ever since. Lord Nicholls of Birkenhead in **Bellinger v Bellinger [2003] UKHL 21 at 46** stated *that 'Marriage is an institution, or a relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex.'* A married man or woman cannot marry someone else whilst married. This would be bigamy which is a criminal offence. In a common law union, there is no formality and the union comes to an end upon separation by the parties. There is no restriction on common law spouses to cohabit with more than one partner.

[26] A married person can make an application for division of matrimonial property solely on the basis of the fact of marriage, whereas in a common law union, the parties have to co-habit for five years before such application can be made to the court. As for the initiation of the claim before the courts, married persons have to make the application during divorce proceedings. The court has no jurisdiction to entertain an application after the dissolution of a marriage. In a common law union on the other hand, the application has to be made after separation on the condition that the parties have lived together for five years or more.

Interpretation of 'during the subsistence of the marriage'

[27] Section 148 speaks of declaration of title during the subsistence of the marriage. Learned counsel, Mrs. Marin-Young submitted that it is implied that marriage subsisted until a decree absolute is pronounced. Learned counsel relied on the **Vidrine case** and **Lucas v Lucas [1991] FCR 901.** In the case of **Lucas,** Balcombe, Woolf and Staughton, L JJ in determining whether the wife could apply under the Matrimonial Homes Act 1983 for an exclusion order, after a decree absolute, held that she could not do so since the legislation applies only during the subsistence of the marriage. It can be seen here that the marriage ends upon dissolution of the marriage. In the **Vidrine** case, Barrow JA said that the concept 'during the subsistence of the marriage' must be given a strict meaning and I am in agreement with that interpretation. In my opinion, any other interpretation would lead to the court usurping the functions of the legislative by inventing a totally different concept. The word 'cohabitation' was not used in section 148. If the legislature had so intended it would have substituted for the words 'during the subsistence of the marriage, the words 'within the ambit of matrimonial relationship' or 'during the period of cohabitation'. The word "subsistence" is a simple word and it means 'to be in force or in effect' as shown in the Oxford Dictionary, Tenth Edition. In the case of **Waters v Waters [1967] 3 All ER 417** the learned judge interpreted 'subsistence' to mean that the marriage continues to exist until it is validly dissolved by a court of competent jurisdiction or where one of the parties dies.

[28] Further, it can be seen from the discussion above that the principles applicable to marriage and common law union are not equal. As such, I respectfully disagree with learned senior counsel, Mr. Lumor that the general legislative purpose for division of matrimonial property can be gleaned from the provisions of section 148I which makes provisions for

common law union property rights. This provision is a parallel regime and it would be absurd to seek assistance from this section to interpret when a marriage comes to an end.

[29] A marriage ends upon dissolution by a court of competent jurisdiction and not upon separation. See **Vidrine case** and **Lucas case**. What comes to an end upon separation is cohabitation and it is my respectful opinion, that the subsistence of the marriage does not depend on cohabitation of the parties. Accordingly, the **l**earned trial judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act in holding that the Drowned Caye and Cross Caye properties were not acquired during the subsistence of the marriage.

Ground 2

The learned trial Judge erred in failing to set aside as void the transfer of leasehold premises known as 4.702 acres situate at Cross Caye, Stann Creek District and also 5.059 acres situate at the North End of Drown Caye, Belize District to the Second respondent which was made to defeat an anticipated order or to defeat any such order pursuant to section 148:08 of the Supreme Court of Judicature Act, or alternatively failed to declare as void the transfer of title to the Second Respondent , Claudette A. Grinage, caused by or at the request of the First Respondent, as void pursuant to section 149 of the Law of Property Act, Chapter 190 of the Laws of Belize as a transaction prejudicing the Appellant.

[30] When this matter was heard before the trial judge, the wife had sought to set aside the transfers of the Cross Caye and Drowned Caye properties by invoking **section 149 (1)** and **(3) of the Law of Property Act, Cap. 190 (LPA)** which provides:

> *149(1) Except as provided in this section, every transfer of property made, whether before or after the commencement of this Act*, with intent to defraud creditors, *shall be voidable, at the instance of any person thereby prejudiced.*
>
> *149(3) This section shall not extend to any estate or interest in property transferred for valuable consideration and in good faith or upon consideration and in good faith to any person not having, at the time of the transfer, notice of the intent to defraud creditors.*

[31] The learned trial judge found that there was no evidence of fraud in this case. Further, that there is no evidence that the husband sold and transferred the two properties knowing that the value of the two properties exceeded the purchase price of $20,000.00. The learned trial judge held that the second respondent obtained the two properties lawfully and validly and without any prejudice to the wife.

[32] Learned counsel, Mrs. Marin Young submitted that this court should review the evidence of the wife, the husband and the second respondent and this will show that the transfer was calculated to prevent the wife from making a claim to the two properties.

[33] Learned Senior Counsel, Mr. Lumor submitted that no intent to defraud was pleaded and no particulars were given in relation to the husband and the second Respondent. Further that no documentary evidence or oral testimony was given by the wife to establish intent to defraud on the part of the husband and no evidence of notice of intent to defraud was given by the wife to establish the allegation against the second respondent.

[34] The wife in her amended Originating Summons claimed that the husband transferred the Drowned Caye and Cross Caye properties to the second respondent caused by or at the behest of the husband pursuant to **section 149** and it is void as a transaction prejudicing the wife. “Intent to

defraud" was not pleaded and particulars were not given in the pleadings against the husband. Further "notice of intent to defraud" was not pleaded and particulars were not given in the pleadings against the second respondent.

[35] In the case of **Atlantic Bank Corporatio Ltd. v Development Finance Corporation and Novelos's Bus Line Ltd (In Receivership) [2012] CCJ 6 (AJ),** which was cited by both parties, the court at paragraph 46 of its judgment in relation to the issue of fraud stated that, "*In the absence of Atlantic pleading that DFC was privy to any intent to defraud of NBLL, this issue should not have been investigated at all."* In the case at bar, the learned trial judge as in the **Atlantic Bank case** investigated the issue of fraud although there was no pleading of intent to defraud by the husband or notice of intention to defraud by the second Respondent. As such, I will review the evidence that was before the learned Judge when he made the finding that there is no evidence of fraud.

[36] The learned trial judge found that the two Caye properties were not matrimonial properties but went on to look at section 149 for argument's sake. At paragraph 120 of his judgment he said that it would be '*a hard road to hoe for her to establish to the satisfaction of the court the requirements of section 149(1) of the Law of Property Act. The allegation of fraud or an intention to defraud must be established by evidence. There was none in this case.* The trial judge having looked at the purchase price of Drowned Caye as $3,288.35 and that Cross Caye was a lease when it was transferred to the second respondent (both sold for $20,000.00) concluded that it could hardly be said that the properties were obtained by the second respondent from the husband by fraudulent means. The Judge also took into consideration that the valuations by both the wife and husband for the said properties were done in 2007 and the properties were sold in 2006. As such, the learned trial judge found that there is no

evidence that the husband sold and transferred the two properties knowing that the value of the two properties exceeded the purchase price of $20,000.00.

[37] There is no dispute that the purchase price of Drowned Caye from the Government of Belize was $3,288.35. A lease was issued to the husband on 11th October, 2006 at an annual rent of $175.00. He purchased the property on 23rd August, 2006 for $3,288.35. It was after paying the purchase price, the second Respondent received the title dated April 26th, 2007. This was not a transfer of title from the husband to the second respondent. The Minister's Fiat was issued to the second respondent. As for the Cross Caye property which was swamp, a Land Rent Statement shows that as of 11th October, 2006, the husband had the leasehold interest and the annual rental was $236.00. This was a leasehold from the Government of Belize and the husband transferred the leasehold to the second respondent on 22nd November, 2006.

[38] The valuations of the Drowned Caye and Cross Caye properties were done on request by the husband on 28th October, 2007, which was after the sale and the Appraiser valued the said properties at $100,000. and $200,000. respectively. The appraisal by the wife of the Drowned Caye property was done on 10th June, 2007 at $450,000. The Cross Caye property was a lease at the time it was transferred, but was appraised as freehold on 21st of October, 2007 at a market value of $875,000.00. The Appraiser also stated in his report that in his opinion the market value as at 23rd July, 2006 is $870,000.00. but was being assessed as freehold title. The learned trial Judge was not convinced by these valuations which were done in 2007, after the sale which occurred in 2006. Further, he had no evidence before him to show that the husband had knowledge that these two properties, which were both swamps, were worth more than $20,000.00. at the time of the transfer. It follows that the second

respondent could not have notice of the intent to defraud when there was no intent to defraud by the husband. I see no reason for interfering with the finding of fact by the learned trial Judge. Accordingly, it is my opinion that the trial judge was correct in not declaring as void, the transfer of the Cross Caye Lease and the obtaining of the transfer of title in Drowned Caye, from the Government of Belize to the second respondent.

Section 148:08 of the Supreme Court of Judicature Act

[39] The second challenge under this ground is that the learned trial Judge erred in failing to set aside as void the transfer of the two Caye properties to the second respondent which was made to defeat an anticipated order or to defeat any such order pursuant to section 148:08 (1) of the **Supreme Court of Judicature Act (SCJA)**. This section which provides for the setting aside of a transfer of property was not brought to the attention of the trial Judge. The grounds of appeal were amended at the hearing before this court to include this section. Section 148:08 (1) provides:

> *148:08 (1) In cases where sections 148:01 to 148:07 apply, the court may on application by an interested party or on its own motion, set aside any instrument transferring property from a spouse to a marriage to any other person, or from a party to a union to any other person, or may restrain the making of such an instrument or disposition by or on behalf of, or by the direction and in the interest of, such spouse or party to a union, which is made or is intended or proposed to be made to defeat an existing or anticipated order in any proceedings under the said sections, or which, irrespective of intention, is likely to defeat any such order.*
>
> *(2) An instrument or disposition made contrary to subsection (1) is void.*

[40] Learned counsel, Mrs. Marin Young submitted that though the wife had only invoked s. 149 of the **LPA** in her originating summons, the Learned trial Judge was not barred from invoking section 148:08 (1) of the **SCJA** to set aside the sale of the two Caye properties and in failing to exercise his discretion thereunder, the learned trial judge erred. Learned senior counsel, Mr. Lumor submitted that since the wife invoked section 149, the learned Judge did not have to consider section 148:08 and I am in agreement with this argument. In my opinion, the Learned trial Judge did not have to exercise his discretion pursuant to section 148:08 since section 149 of the LPA was squarely put to him for consideration and he determined that issue in favour of the husband. As such, there was no failure by the learned trial judge to consider section 148:08. I would dismiss this ground of appeal.

[41] I would like to add that even if the learned Judge had considered section 148:08, an order would not have been made to set aside the instruments regarding the two Caye properties since he found at paragraph 101 of his Judgment that the husband sold these properties in 2006 to help him with the mortgage payments on Gran's Farm. The wife in her evidence had confirmed that as a result of the large mortgage payments on Gran's Farm Loan, the family experienced financial difficulties up to the time of separation. As such, it is unlikely that the Learned Judge would have made a finding that the transfer of the properties is likely to defeat an order where section 148:01 to 148:07 apply. The learned Judge obviously accepted the husband's evidence that he was strapped for cash and that the $20,000. deposited on the 20th July, 2006 by him in his Barclays account was the proceeds from the sale of the properties. This deposit is shown by the August 2006 Bank Statement which is exhibited as No. 123. The deposit as shown by the bank statement increased the balance from

$16,000. to $36,000.00. On 24th July, 2006 there was a withdrawal of over $20,000.00 from the said account as shown by Exhibit No. 123.

Ground 3

That the Learned Trial Judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act, in making the orders he did as to the properties that comprise Gran's Farm in that they are unjust and inequitable in all the circumstances, in that he failed to take into consideration the Appellant's indirect contribution or failed to give sufficient weight to them and also to weigh all the other factors enumerated under section 148 of the Supreme Court of Judicature Act.

[42] The learned trial judge ordered that Elena is entitled to and should be paid the sum of $5,000.00 to reflect her contribution to Gran's Farm, bar and plant nursery patch. Gran's farm is approximately 33.2 acres and the trial Judge accepted that the approximate value is $2,500.000. The parties had a restaurant and bar on Gran's farm which is no longer operational. The learned judge at paragraph 109 of his judgment said that the wife described Gran's Farm as a 'nascent business" but she also accepted that it is debt-ridden with mortgage payments which took a strenuous toll on the family's financial resource which came from the husband's dental practice. Gran's farm is presently mortgaged to Atlantic Bank to secure a loan of $525,000.00. Presently, the principal plus the interest is $656,000.00. The Judge at paragraph 100 of his judgment found that this loan is still outstanding at the date of the parties separation and at paragraph 102 stated that the wife confirmed in her evidence that the husband had to pay the bank loan on Gran's Farm entirely from the income from the Dental Clinic Practice. She also stated that as a result of the large mortgage

payment on Gran's Farm Loan, the family experienced financial difficulties up to the time of separation.

[43] The learned trial Judge after considering the evidence found that the wife helped in purchasing items for Gran's Farm bar and helped to promote Gran's Farm at Tourism Village in Belize City. He also accepted that she rendered some assistance with the plant nursery at Gran's Farm from which she benefitted by accessing nursery plants for her own business at No. 14 Magazine Road. Further, that the husband spent about $700,000.00 to develop Gran's Farm over a period of 16 years. The Learned trial judge also found at paragraph 132 of his judgment that Gran's Farm is a *"sitting in debt*" and closed and any apportionment of the share in Gran's Farm to each party, if that is just and equitable to do so, carried with it a corresponding obligation over the debt hanging over this property. However, he did not consider it just and equitable that the Court should subject the wife to a further obligation over Gran's Farm financial debt. He felt that the husband should continue to shoulder that burden. The learned trial judge also stated that the contribution, as shown on the evidence, on the part of the wife on Gran's Farm can be fairly accommodated in the final order of the court.

Failure to weigh all the factors under section 148:05

[44] I am in agreement with the arguments made by learned counsel Mrs. Marin Young that the learned trial Judge fell into error when he failed to sufficiently weigh the wife's indirect contributions as wife, mother, business partner and in weighing all the other factors under section 148:05 of the SCJA when he awarded her $5,000.00 in compensation for her contribution to the restaurant and bar and nursery at Gran's Farm. The learned trial judge concerned himself mainly with the debts on Gran's farm and did not ascertain the value of the equity on the said farm. He had an approximate

value of $2.5 million and a loan of $656,000.00. There was clearly evidence of an equity on Gran's Farm.

Ground 4

That the Learned Trial Judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act, in pronouncing the value of the Appellant's contribution to the Respondent's dentistry as $15,000.00 including the building and land where he operated his dental clinic at No. 16 Magazine Road, without any proper valuation, and in that it is unjust and inequitable in all the circumstances in that he failed to take into consideration or to sufficiently weigh the indirect contribution made by the Appellant and the other factors under section 148 of the Supreme Court of Judicature Act.

[45] The learned judge at paragraph 90 of his judgment found that the wife assisted with banking deposits for the husband's dental practice. At paragraph 93 of his judgment he found that the wife did do some, though not all, of the purchasing of the equipment and materials for the husband's dental clinic. The learned judge was satisfied that the wife rendered some limited assistance to the husband's dental clinic business.

[46] The judge also found that No. 16 Magazine Road is one of the sources of income for the husband from which he is able to meet his financial obligations to the parties, including those of the wife. As such, he stated that it would not be just and equitable to make any award against this property. He went on to say that in light of the case of **Miller v Miller /Farland v Farland** the husband as the advantaged party by being allowed to keep this property that was acquired during the marriage relationship, should compensate the wife by repaying the Bank loan on No. 14 Magazine Road property for the benefit of the wife.

[47] The evidence of the husband as shown by the record and as pointed out by Mrs. Marin Young in her submission is that there is presently no mortgage on No. 14 Magazine Road. The trial judge therefore, made a factual error in arriving at his decision. This evidence can be found at Volume 6, page 1195 of the record of appeal.

[48] The trial judge as can be seen by his finding took into consideration the indirect contributions by the wife in relation to the operation of the business, that is, the dental clinic. He failed to take into consideration the value of the property and consider all the factors under section 148:05.

Ground 5

That the Learned Trial Judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act, declaring that Long Caye, Honey Camp, Hope Creek Village, the Hummingbird Highway, the 5 acres Leasehold near Mile 14 Western Highway properties should not be included as matrimonial property for distribution under section 148 of the Supreme Court of Judicature Act.

[49] The learned trial judge found that the wife's claim that she and the husband own these properties does not have the support of the documentary and oral evidence. That there is no evidence from her of any contribution, whether directly or indirectly to the acquisition, conservation or improvement of these properties. He found that the evidence shows that the husband owns all the properties. At paragraphs 74 of his judgment, he found that the properties are not matrimonial properties and as such must be excluded in the distribution in the case.

[50] The learned trial judge said that the wife's case on the properties is simply that she and her husband own the properties because they were acquired "during our marriage". He said that section 148A do more than simply stating that it was so acquired, in light of subsections (4) and (5) which require the court to be "satisfied that … it is just and equitable to make the order". At paragraph 73 of his judgment he stated that the parties contribution referred to in the said subsections is to property and this is emphasized in **Cox v Cox** in relation to section 57(3) (a) and (b) of the **Barbados Family Act 1981**.

When properties acquired

[51] It is uncertain when Long Caye property was acquired. The evidence shows that in February of 2003, the husband in an Individual Financial Statement listed this property as one of his assets at a value of $35,000.00. The learned trial judge said that the evidence of the husband is that he does not have title to the Long Caye property. There is no evidence that this is a matrimonial property.

[52] Honey Camp was acquired under a lease from the Government of Belize. It was purchased on 20th December, 1996 for $5,165.00. Since this property was purchased during the subsistence of the marriage, and there is no evidence which shows that it is not part of the marital acquest, I disagree with the learned trial judge that this is not a matrimonial property.

[53] Hope Creek which is 49.019 acres of land was leased from the Government of Belize in 1999 which would run up to 27th September, 2029. The annual rental is $150.00. This leasehold was acquired during the subsistence of the marriage and the value of same according to the husband's individual financial statement dated February, 2003 is 100,000.00. The learned trial judge found that this land was used to

secure a loan for Alfredo Thompson's (the wife's eldest son) education. It is property acquired during the subsistence of the marriage and therefore it is matrimonial property.

[54] Hummingbird Highway according to the evidence of the husband was acquired in 1993 and is undeveloped. This was acquired during the subsistence of the marriage and should have been considered by the learned trial Judge as being part of the marital acquest.

[55] In relation to the 5 acres Leasehold near Mile 14 Western Highway there is no evidence to determine whether it is matrimonial property.

Conclusion

[56] The learned trial judge erred in law in declaring that Honey Camp, Hope Creek and Hummingbird Highway are not matrimonial properties for distribution under section 148 of the Supreme Court of Judicature Act. He was however, correct in finding that Long Caye and the 5 acres Leasehold near Mile 14 are not matrimonial properties.

Ground 6

That the Learned Trial Judge erred in law in the exercise of his discretion under section 148 of the Supreme Court of Judicature Act, in regards to Lot No. 3580 situate at Sittee Street, Belize City and the adjacent lot thereto, in that it is unjust and inequitable in all the circumstances to hold as he did in that he failed to sufficiently weigh the other indirect contribution made by the Appellant and to also factor in the other factors under section 148 of the Supreme Court of Judicature Act;

[57] The learned judge at paragraph 114 of his judgment stated that the parties were joined together in wedlock and the husband brought her to live in the Sittee Street home for fifteen years, with five years before that living at various locations. He said that she raised the children and attended to the husband's needs in the home. Further the wife contributed to the upkeep and maintenance of the Sittee Street house as a family home. The learned judge at paragraph 139 found that one-third of the matrimonial home to the wife and two-third to the husband is a just and equitable division.

[58] There is nothing in the judgment of the learned trial judge which shows that in the exercise of his discretion he has considered section 148:05 (c), (d), (f), (g), (h) and (i). In my opinion, he failed to consider all the factors under section 148(5).

Ground 7

That the decision is unjust and inequitable in all the circumstances in that the Learned Trial Judge erred in that he failed to sufficiently weigh the other indirect contributions made by the Appellant and to take into consideration the other factors enumerated under s. 148:05 of the SCJA in regards to all the properties listed in the Appellant's claim.

Ground 8

That the judgment of Learned Trial Judge is against the weight of the evidence

[59] These two grounds can be disposed of together. The learned trial judge in my respectful opinion, has failed to sufficiently weigh the indirect contributions by the wife and to consider all the factors under section 148:05. As such, the order made by the Judge is against the weight of the evidence. I do not find it necessary to repeat the errors made by the learned trial Judge as shown in the previous grounds.

Fresh exercise of Discretion

[60] It can be seen from the discussion on the grounds of appeal that the learned trial judge made errors of law by not sufficiently considering some of the factors and at times not considering the factors at all under section 148 subsection 5. Mrs. Young submitted that this court should exercise its discretion afresh to ensure that any declaration or alteration of interest in regard to the assets acquired during the marriage is fair and equitable. I do agree with this submission taking into consideration the evidence in this case and the order made by the learned trial judge. There were errors made in both law and fact. In such circumstances, the appellate court may exercise its own discretion in substitution for that of the learned trial judge. See the case of **Bellenden (Formerly Satterthwaite) v Satterthwaite [1948] 1 All ER** 343 at 345 which was relied on by Barrow JA in **Vidrine v Vidrine**. Asquith LJ said:

> *We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact, plainly wrong, that an appellate body is entitled to interfere.*

<u>The first step: Identifying and valuing the matrimonial properties</u>

[61] There is no agreed list of the properties and their values by the parties. learned counsel, Mrs. Marin Young during the hearing of this appeal prepared a list of the properties and stated their values (with the exception of the 5 acres Leasehold near Mile 14) that were before the trial court from

both parties, which were not *ad idem*. The properties that were considered by the learned trial judge, were given approximate values. The judge did not get into any details as to how he chose a value for the properties. Ideally, it would have been proper to get all the properties valued for the hearing before the trial judge but that did not happen. I will accept the values stated by the learned trial judge unless in the interest of justice where there is a great disparity between the values given by the parties, consider the value which is more realistic. The husband had stated values in his financial statement in order to obtain loans from the bank, which is more likely than not, overstated and the learned trial judge in some instances had accepted this evidence as the approximate value of the property. In such instances, I will take the values stated by the wife in her evidence which seem to be more realistic as she had some of the properties appraised.

Cross Caye and Drowned Caye not in existence

[62] These properties are no longer in existence and the sale price of $20,000.00 as found by the learned trial judge was utilized to pay the mortgage on Gran's Farm. As such, I cannot include these properties in the asset pool for distribution although they were found to be matrimonial properties.

Properties that cannot be included in the asset pool for lack of evidence

[63] There is no evidence to support the claim that the following two properties are matrimonial properties:

(i) A parcel of Leasehold land situated on Western Highway containing approximately 5 acres near Mile 14 Western Highway as there is no evidence as to when it was acquired; and

(ii) Long Caye property as there is no evidence regarding the date of acquisition.

Properties to be added to the asset pool which were not considered by the trial Judge as matrimonial properties

[64] The properties that were not included in the asset pool by the learned trial judge because of his finding that they were not matrimonial properties, that I would include are Honey Camp, Hope Creek and Hummingbird Highway.

Properties in the asset pool and their values

[65] There are eight properties that will be included in the asset pool for distribution namely, Gran's Farm, Petticoat Alley, No. 14 Magazine Road, No. 16 Magazine Road, Honey Camp, Hope Creek, Hummingbird Highway and Sittee Street. All of these properties are in the title of the husband and were acquired during the subsistence of the marriage. The husband made all the financial contributions to these properties and the wife made non-financial contributions.

Gran's Farm

[66] Gran's Farm consist of 33.2 acres of land and was acquired between 1998 and 1999. It consists of the following three parcels of land:

> (1) All that piece or parcel of land containing 10.15 acres situate along the south side of the Western Highway, near Mile 14 (Minister's Fiat Grant No. 813 of 1998).

(2) All that piece or parcel of land containing 9.593 acres situate along the Western Highway, near Mile 14, Belize District (Minister's Fiat Grant No. 398 of 1999).

(3) All that piece or parcel of land containing 13.46 acres situate along the Western Highway, near Mile 14, Belize District (Minister's Fiat Grant No. 822 of 1998).

[67] The wife's value is $1,858,575.00 which was stated in the Account's report of Gustavo E. Matus (See page 595 of Volume 3 of the record). The husband's value is $2,500,000.00 which is taken from the husband's personal financial statement to Atlantic Bank as shown at pages 297 to 299 of volume two of the record. I will not accept the trial judge's approximate value of $2.5 million as stated in the husband's financial statement for reason already stated above. The value to be put on Gran's Farm is the value of $1,858,575.00 as stated in the evidence of the wife.

Petticoat Alley

[68] This is a two storey house situated at Petticoat Alley that is being rented. I will accept the trial judge's estimated value of $200,000.00 which I believe he took from the husband's financial statement. The wife did not state a value for this property and as such I accept the value shown in the husband's records.

No. 14 Magazine Road – Wife's nursery

[69] No. 14 Magazine Road is a parcel of land which houses the plant nursery for the wife. The judge placed an approximate value of $125,000.00 on this property which again he took from the financial statement of the husband. In that statement, the husband stated a value of $150,000.00. I accept the value stated by the trial judge which is $125,000.00.

No. 16 Magazine Road – Dental Clinic

[70] The property at No. 16 Magazine Road is a concrete building where the husband is operating his Dental Practice Clinic and has been doing so since 1995. The husband in his financial statement places the value at $575,000.00. The wife's valuation report (page 899 of volume 4 of the record) shows the value as $450,000.00. The trial judge accepted the value of $450,000.00. I accept that value which is more realistic for reasons already stated.

Honey Camp

[71] This is a one acre lease land which is undeveloped which was acquired in 1995. The evidence shows the value of this land to be $5,156.00.

Hope Creek

[72] This is a parcel of land containing 50 acres in Hope Creek Village, Stann Creek District. The value of this property as shown by the husband's financial statement (page 302 of Volume 2 of the Record) to Atlantic Bank is $100,000.00. The wife has no value of this property. I therefore, accept the husband's value of this property as $100,000.00.

Hummingbird Highway

[73] This is a parcel of land on the Hummingbird Highway. The value of this property as shown by the husband's financial statement (page 302 of Volume 2 of the Record) to Atlantic Bank is $125,000.00. The wife has no value of this property and as such I accept the value stated by the husband.

Matrimonial Home – Sittee Street

[74] This is a parcel of land containing a three storey building situated at 3580 Sittee Street, Belize City and it was the matrimonial home. The husband places a value of this property at $500,000.00 as shown in his financial statement to Atlantic Bank Ltd. (pages 297 to 299 of volume 2 of the record). The wife's valuation report which is at page 899 of volume 4 of the record shows the value as $300,000.00 and this was accepted by the trial Judge. I believe the wife's value to be more realistic since the evidence shows that this property has a major defect as it leans. The trial judge described this property, quoting the Valuator, as the "Leaning tower of Pisa". I accept the value of this property to be $300,000.00.

Personal Properties

[75] The personal properties were not argued under appeal and I will not include same in the asset pool. I would uphold the order of the trial judge in this regard.

Liabilities

[76] There is evidence that Gran's Farm is mortgaged. At the date of trial the principal owing was $640,000.00. The interest which is 12% per annum at the date of trial was $78,000.00. The total liability on this property being $718,000,00.

[77] I will include the following which was raised by the husband in his Notice dated 30th November, 2010 as liabilities of the parties:

1. The sum of $300,000.00 loan which does not include interest which the husband borrowed from Holy Redeemer Credit Union as a loan to finance the legal education of the son of the marriage and other debts.
2. The sum of $36,975.61 owed as arrears of income and business tax on the husband's dental practice.

[78] I do not propose to consider the other items raised in the Notice as: (i) the step-son in a sense had become a child of the marriage and I need not say more on that issue; (ii) I am not satisfied on the evidence that a loan was taken from the brother.

[79] I will set out in a table below the properties and the gross value, the liabilities of the parties and the net assets which will be considered for distribution:

Gross Value of Assets

Property	Value BZ$
Grans's Farm ……	1,858,575.00
Petticoat Alley ……..	200,000.00
No. 14 Magazine Road (Nursery) ……	125,000.00
No. 16 Magazine Road (Dental Clinic) ……	450,000.00
Honey Camp ……	5,156.00
Hope Creek …….	100,000.00
Hummingbird Highway	125,000.00
Sittee Street (Matrimonial Home) ……	300,000.00
Total	**$3,163,731.00**

Total Liabilities

Gran's Farm	718,000.00
Holy Redeemer Credit Union Loan	300,000.00
Income and Business Tax arrears	36,975.61
Total	**$1,054,975.61**

Net Value of Assets

Gross Value	3,163,731.00
Less Liabilities	1,054,975.61
Total	**$ 2,108,755.39**

Second Step: Consideration and evaluation of the matters specified

Financial Contributions

[80] The husband made all the financial contributions to the properties. There is no dispute that the wife made no financial contribution to the acquisition, conservation or improvement of the properties.

Non-financial contributions

[81] The two areas of non-financial contribution to be considered are section 148 subsection (5) (b) and (e). Subsection 5(b) provides for the consideration of the nonfinancial contribution made by the wife in the acquisition, conservation or improvement of the property, including any contribution made in the capacity of housewife, homemaker or parent. Sub-section 5(e) provides for the consideration of the nonfinancial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage. Barrow JA in **Vidrine v Vidrine** at paragraph 82

of his judgment pointed out the difference between these two sections, which is that 5(b) is in relation to contributions in relation to property while under 5(e) the contribution is not in relation to property but, in relation to role of wife and mother and in raising the children.

Sub-section 5(b) non-financial contributions in relation to properties

[82] The non-financial contribution by the wife which was not considered by the court below is that during construction of the house at Sittee Street, which is the matrimonial home which was completed in 1990, the wife helped with purchasing of materials for the house, the transportation of materials and general fetching and carrying for the construction process. I believe this is so because the husband, as stated by the judge, accepted that the wife is entitled to her share in the property.

[83] As stated by the learned trial judge in relation to the matrimonial home at Sittee Street the non-financial contributions by the wife were in the capacity of housewife, homemaker and parent. She raised the children and attended to the husband's needs in the home. Further, the evidence shows that she contributed to the upkeep and the maintenance of the house as a family home.

[84] The learned trial judge did not consider the non-financial contribution for the other matrimonial properties which includes the Gran's Farm and No. 16 Magazine Road which are business properties. The authorities cited by Mrs. Marin Young shows that a housewife's attention to the home and children should be recognized in a substantial way as it freed the husband to earn income and acquire assets. In the case of **In the Marriage of Napthali [1988] 13 Fam LR 146,** cited by Mrs. Marin Young, it was held that *the purpose of section 79(4) (b) of the Family Law Act 1975 was to give*

recognition to the housewife who by her attention to the home and the children freed her husband to earn income and acquire assets. The contribution made by the wife as homemaker should be recognized not in a token way but in a substantial way. ***Mallett v Mallet (1984) 9 Fam LR 449; (1984) FLC 91-50,*** *applied.*

[85] See also ***In the Marriage of Ferraro*** [1992] Fam CA 64 (9 November 1992) cited by Mrs. Marin Young where the Full Court at para 178 said:

> *There can be no doubt that this was a significant matter in this case. The issue here is not whether the wife made direct contributions to the conduct of the business. His Honour found that she had not. The facts are that the husband, particularly in the latter years, devoted his full time and attention to his business activities and thus the wife was left with virtually the sole responsibility for the children and the home. That latter circumstance is significant not only in relation to the evaluation of the wife's homemaker contributions under para (c) but is important under para (b) because it freed the husband from those responsibilities in order to pursue without interruption his business activities. In addition, the wife by her joint ownership made the contributions referred to previously. It is, however, important to ensure that there is no double counting under the two separate paragraphs*.

I will take the wife's non-financial contributions under this factor into consideration for all the matrimonial properties. She was housewife, homemaker and parent.

Sub-section 5(e) non-financial contributions in the role of wife and raising the children

Role as wife

[86] In relation to the property at No. 16 Magazine Road, which is the husband's dental practice the wife made banking deposits for the business and she did some purchasing of the equipment and materials for the said dental practice. Further, that she did some decorations and landscaping at the dental clinic.

[87] The wife also helped in purchasing items for Gran's Farm bar and to promote Gran's Farm at Tourist Village in Belize City. She also, rendered some assistance with the plant nursery at the farm from which she benefitted by accessing nursery plants for her own business at No. 14 Magazine Road.

[88] It can be seen from the finding of the judge that he did not apply the non-financial contributions to all the assets acquired during the marriage. He was looking at a specific property. Learned counsel, Mrs. Marin Young submitted that the non-financial contribution made by the wife need not have been made to a specific property. That the wife may have contributed in her role as wife to the welfare of the family enabling her husband to attend to his other businesses which enabled him to earn enough to provide for the family and finance the acquisition of the assets.

[89] The evidence before the trial Judge was that the wife was hard working. She contributed in many ways as is borne out by the evidence leaving the husband to focus on his dental practice which enabled him to finance the acquisition, improvements and conservation of the properties acquired during the marriage. In **Vidrine v Vidrine,** Barrow JA in looking at this factor had

this to say: "*I remind myself of the need to give due regard to the value of a contribution in this role, not mere token regard, and to be alert to the possibility that performance in that role, without reference to any property, is capable of amounting to a contribution equal to a financial or other contribution made by the husband to property."* I find the wife's contribution in her role as wife was very substantial as she freed her husband to focus on his business.

Role as mother

[90] The wife also made contributions in her role as mother to the children of the marriage. After separation in June 2005, she continued her role as a mother to the youngest child of the marriage until he left for university abroad. The evidence shows she gave up her studies in dentistry to look after her family. I will take this factor into consideration.

5(c) Earning capacity of the parties

[91] The learned judge in his judgment made no finding as to the earning capacities of the parties. The evidence shows that the husband has a dental practice and the wife has her plant and nursery business. The husband seems to be successful in his dental business and earns far more than the wife. The wife is making enough in her business to maintain herself. She is currently using the profits of her business to repay a loan of $50,000.00 which she got to start her business and also for her personal care and maintenance. No real weight was placed on this factor. However, I will consider that the husband is a professional and his earning capacity is greater than that of the wife.

5(d) – age and state of health of the parties

[92] Neither the Judge nor the parties placed any real weight on this factor. The wife is now 51 years of age and she owns no real property. She has no savings and has no home of her own as she resides with her sister-in-law whilst the husband occupies the matrimonial home. I would take this factor of the parties' age into consideration. The court has no evidence as to the health of the parties.

5 (f) the eligibility of either of the parties to a pension

[93] No weight was placed on this factor by the judge or the parties and the court has no evidence of this factor.

5 (g) – duration of marriage and the extent to which education was affected

[94] The learned trial judge made no finding on the duration of the marriage and the extent to which the marriage has affected the education, training and development of the wife. He did however, say at paragraph 114 of his judgment that the husband brought the wife to the matrimonial home and lived there for fifteen years and five years before that at different locations. In the background of his judgment he stated that the parties lived together as husband and wife since February 1985 and in 1990 they were legally married. They separated on 14th June, 2005 and a divorce petition was instituted on 17th November, 2005. A decree nisi dissolving the marriage was granted on 31st October, 2007 and made absolute on 8th December, 2009. The learned trial judge also stated in his background that the wife did not complete her university studies in Guatemala. She returned to Belize in 1985 to be with her husband and she concentrated on taking care of her family but no weight was placed on this factor in making any order.

[95] In my opinion, this was a long marriage of 19 years and the parties co-habited for some 23 years. Further, it has been shown by the evidence that the wife gave up her education to take care of her family. I would add this factor as a consideration.

5 (h) - need to protect the position of a woman

[96] The wife during the marriage was a housewife, homemaker and mother. At present she has her plant nursery business and the children are now grown. Learned counsel, Mrs. Marin-Young submitted that the wife sacrificed her professional development for the sake of caring for her children and as such she had been made more financially vulnerable and was left dependent on her husband. It is a fact that the wife was totally dependent on the husband until she was able to develop her horticulture business. I do not believe that she needs to be protected in her position as a woman and in her role as a mother. I have taken into consideration her role as a mother above.

5(i) – any other fact or circumstances that the justice of the case requires

[97] The learned trial judge did not in his judgment identify any other fact or circumstances that were required to be taken into consideration. I will consider that the husband who is a dentist by profession has other business skills as he was able to acquire other properties apart from the matrimonial home and start other businesses, thus increasing their assets.

Global or asset by asset approach

[98] Learned counsel, Mrs. Marin Young submitted that in long marriages the global approach is far more equitable as there is a qualitative analysis. Whereas in short marriages there is an asset by asset approach and a quantitative analysis is done. Learned Counsel relied on the authority of **In the Marriage of Norbis [1985] 161 CLR.** In a recent case of **Sebastian v Sebastian No. 5 (2013) FamCA 191**, which cited the **Norbis case**, it is stated that the two approaches were explained by the Full Court ***In the Marriage of Zyk and Zyk*** **[1995] FLC 92 -644, at p 82-509 to 82- 510** as:

> *The global approach enables the Court to assess the contributions aspect of the section 79 exercise in an overall way by considering the parties' contributions to their property as a whole although factoring into that exercise the circumstance, if it be so, that they may have made varying contributions to the total property at trial or which formed part of the history of their property during the marriage. It is the generally preferred and the generally adopted approach. It enables a broad approach to be taken to the varying contributions of the parties over the years of their marriage and in particular it usually has the advantage of more easily dealing with and giving proper recognition to paras. (b) and (c) contributions. However, where the contributions to the components of the total property are disparate, caution needs to be exercised in this approach and the overall conclusion tested against the requirement that the orders be "just and equitable". Lenehan is an example of a case where difficulties arose for that reason.*
>
> *The asset by asset approach enables the Court to assess separately the parties' contributions to particular assets or groups of assets. It is the less preferred approach largely because it can at times be an artificial exercise and also because it can create difficulties in the*

proper evaluation of paras. (b) and (c) contributions. But there are a number of circumstances where it may be appropriate to do so, for example an inheritance received post separation, or where the financial relationship of the parties during the marriage was such that they treated some property as exclusively the property of one party to which the other made no, at least no para. (a) contributions to it. It may be convenient in cases like that to treat that property separately rather than assess the overall contributions of the parties to the totality of their property.

[99] At paragraph 179 of the judgment, the learned judge stated that the High Court has confirmed that either approach is acceptable, with the choice of approach being a discretionary matter to be decided on the facts of the case. The court then referred to the judgment of Justices Mason and Deane in ***Norbis v Norbis*** **[1986] HCA 17; [1986] 161 CLR 513** where it is stated at p 523 that:

For ease of comparison and calculation it will be convenient in assessing the overall contributions of the parties at some stage to place the two types of contributions [financial and homemaker/parent] on the same basis, i.e. on a global or, alternatively, on an "asset-by-asset" basis. Which of the two approaches is more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient. It follows that the Full Court is quite entitled to prescribe that approach as a guideline in order to promote uniformity of approach within the Court.

[100] The properties for consideration in this case were all acquired during the subsistence of the marriage. The duration of the marriage is 19 years and the parties cohabited for some 23 years. The marriage I would say is a long term marriage. In this case, the learned trial Judge adopted an asset by asset approach to the assessment of the properties that he considered as matrimonial properties. He stated no reason as to why he adopted this approach. However, I will not concern myself with the trial Judge's approach as section 148 does not state which method is to be used when the factors are being considered for the alteration of property rights and it was not an issue between the parties. However, I think this court should look at the circumstances of this case and apply the approach that would be just and equitable. In my opinion a global approach will be more convenient since the parties were married for over 15 years and cohabited for 23 years. All the properties for consideration were acquired during the period when the parties were cohabiting. If there were properties to be considered that were acquired after separation, then I would have treated those properties differently, that is, on an asset by asset basis. That situation does not arise in this case because the Cross Caye and the Drowned Caye properties were sold to pay Gran's Farm mortgage. Further, in this case the husband has made all the financial contributions and the contributions of the wife are that of a homemaker, housewife and parent. This is not a case where the type of contributions differs in relation to the properties. As such, it is my opinion that the global approach is appropriate in this case.

Altering the rights and interest of the husband in the properties

[101] Section 148 A (3) provides that the court can make an order altering the interest and rights of either party. Before doing so, pursuant to sub-section (4) the court must be satisfied that in all the circumstances, it is just and equitable to do so. I am satisfied based on my assessment of the

factors under section 148A(5) that it is just and equitable to make that order. The Act requires an evaluation of the contributions of the parties and this has been done above. I recognize that in 5(b) both parties have made a great contribution to the acquisition, improvement and conservation of the matrimonial assets. The wife has made a greater non-financial contribution as a homemaker and parent and the husband has made all the financial contributions. I have taken into consideration her contributions under subsection (e) without there being any double counting. The husband has throughout the marriage supported the family financially and he has increased the assets of the marriage through his professional skill as a dentist and as businessman by acquiring properties and opening business such as Gran's Farm (which was closed at the date of trial), renting of Petticoat alley and a restaurant at the matrimonial home (Red Roof) which is now closed. The wife has assisted the husband with his dental business, Gran's Farm business and the Red Roof business. I must mention that the husband in the court below had agreed to transfer No. 14 Magazine Road to the wife and he had also agreed that the wife is entitled to a share in the matrimonial home situated at Sittee Street.

[102] The wife in her claim in the court below has sought a half-interest in all the properties. Learned counsel, Mrs. Marin-Young in her submissions in reply contended that with the amendment to the Family Law Act in Australia, Parliament had given greater emphasis to the equality and partnership concepts in marriage. She did a comparison of **Mallett v Mallett (1984) 156 CLR 605** and **In the Marriage of Ferraro [1992] Fam CA 64.** Both of these cases show that the homemaker contribution "*should not be recognized in a token way but in a substantial way".* Learned Counsel submitted that the **Ferraro case** highlighted at paragraphs 236 and 237 that before the amendment to the Australian Family Law Act 1975, the contribution as homemaker and parent had to be in direct correlation to the acquisition, improvement or conservation of the property but that has now

changed since the introduction of section 79(4) (c) which requires the court to take into account in considering what orders to make, the "*contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and children to the marriage, including any homemaker or parent."* Paragraphs 236 and 237 relied on by learned counsel is reproduced below:

> *236. Secondly, it is important for the recognition by the Full Court that since the 1983 amendments "it may well be that .. there has been a shift in the evaluation by the Court of the domestic role of homemaker and parent." That appears to be part of a wider recognition of that role per se, that greater recognition being more freely permitted since the 1983 amendments and the more realistic recognition of the indirect but nevertheless significant contribution to the acquisition of assets under para (b).*
>
> *237. Thirdly, it suggests that the homemaker contribution cannot and should not be confined to matrimonial or "personal assets" but is also a contribution to business assets: see also Albany (1980) FLC 90-205; Napthali, supra, and Dawes, supra*

[103] Learned counsel, further submitted that **Mallet v Mallet** was made prior to the amendment made in 1983, so that decisions made post 1983, such as was discussed **In the Marriage of Ferraro** at paragraph 238, shows *that Parliament had, with the 1983 amendment, given greater emphasis to the equality and partnership concepts in marriage.* She contended that Barbados has not similarly amended their Family Law Act but Belize section 148:01 (b) and (e) recognizes this domestic contribution both in correlation to the acquisition of property and independently.

[104] I have read paragraph 238 in its entirety and find that it was not suggested in the **Ferraro case** that this is what Parliament intended but, in fact that there should be an evaluation of the contributions made by the parties in the individual case but against an evolving social and legislative background. Paragraph 238 states:

> *In Mallet's case, Gibb, C.J. at CLR 610 referred to the circumstance that Parliament had not provided that a wife's homemaker contribution and the husband's financial contribution are deemed to be equal. It is equally true to say that the Parliament has not provided that they cannot or may not be equal. It is a matter of evaluating those contributions in the individual case but against an evolving social and legislative background. The evolving legislative background is the changes in 1983. There is also, we think, an evolving social background which gives greater emphasis to the equality and partnership concepts in a marriage and, no doubt, this evolutionary process will continue. Dawes and Harris illustrate the shift towards a greater societal recognition of the worth of domestic labour and towards giving real substance to the phrase "substantial and not token" rather than paying lip-service to it.* (emphasis added).

[105] It would have been easy for this court and any other court to apply equality in difficult matrimonial cases if Parliament had so stated. For now, that is not the law. Instead, looking at the Belize legislation and the Australian legislation, there has to be a consideration of all the factors applicable to the case. In fact, **In the Marriage of Ferraro**, relying on the case of **Mallet,** the court did not apply the principle of equality, but the doctrine of "special contributions" which seems to be applicable in big

money cases. A perusal of cases in Australia shows that judges have different views about "special contributions" and as such it is not taken into consideration in some cases. It seems that the law in Australia is not settled in relation to "special contributions".

[106] Fogarty, Murray, and Baker JJ, **In the Marriage of Ferraro** said that the argument for the appellant is that the proper exercise by the trial Judge should have been equality, but in their view that was a difficult argument having regard to the width of the discretion under section 79. Further, that essential to that submission is a consideration of the process of evaluation and comparison of the disparate role of the partners to the marriage. At paragraph 241 they said that in the **Mallet's case** the well known passage of Wilson J suggests that an evaluation of the quality of those roles needs to be undertaken but that is an unenviable task which would not normally be entered upon in the day to day conduct of proceedings under section 79. However, *case law has established that there may be* ***special factors****, such as the homemaker having performed her responsibilities without the assistance of her frequently absent husband or breadwinner having applied outstanding entrepreneurial skill to the building of a business, which justify the court considering the contribution to be above the normal range or to be considered as an "extra" or* ***"special contribution****". The second part of any such exercise is a comparison of the performance of those disparate roles against the background of the distribution of the property of those parties.*

[107] The learned judges following that statement said at paragraphs 243 and 244 the following:

> *243. The legislation provides little guidance beyond what can be concluded from the 1983 amendments. The oft repeated statement that the homemaker role is to be assessed "in a*

substantial and not in a token way" does not, in reality, advance the issue far.

244. The principal authority in this regard is still the Mallet's case which represents an emphatic rejection of the presumption of equality in the type of case with which we are concerned.

[108] The learned judges after looking at the skill of the husband in **Ferraro case** which produced assets in the high range and where the wife was a homemaker, found that the submission that the trial judge should have exercised his discretion by an outcome of equality is unsustainable. They arrived at this conclusion by looking at two obvious difficulties, the first being that section 79 provides a range of discretion and the second is that *even allowing for the 1983 amendments and the changes in perception demonstrated by such cases as Dawes, Napthali and Harris, the decision of the High Court in Mallet is binding on this Court and its application appears fatal to that submission.* See **Mallet's case** discussed in **Vidrine v Vidrine.**

[109] The parties in this case did not raise any issue of 'special contributions' and I do not intend to approach this case using that doctrine. But, I thought it necessary to clarify the argument that Parliament has moved towards equality since the wife in her declaration in the court below had claimed a half-interest in all the assets. In my opinion, a half-interest is not appropriate under the circumstances of this case.

[110] I have considered the factors under section 145(5) and it is my opinion that it is just and equitable to alter the interest of the husband pursuant to section 148(3) and it is just and equitable that there be a division of the properties in the ratio of 60% to the husband and 40 % to the wife, being a global award of the real properties acquired during the subsistence of the marriage. I would not disturb the order of the learned trial judge in relation to the motor vehicles and the other personal assets as these were

not the subject of the appeal and the court has no value of these assets. The net value of the properties in the asset pool is $2,108,755.39. The wife's share of 40% amounts to $ 843,502.16. The husband's portion of 60% amounts to $1,265,253.23. I would make an award to the wife in the form of property and monetary award. I would not be inclined to order a sale of Gran's Farm as it has been brought to the attention of this court that there may be some sentimental reasons why the property was not sold so as to pay off the huge mortgage debt on same. In any event, the husband has enough equity in Gran's Farm and other assets to raise the monetary award which I would make.

[111] Accordingly, the following is the Order I would make:

(i) The appeal be dismissed against the second respondent.

(ii) The appeal be partly allowed against the husband and the order of the trial judge is set aside in relation to the real properties. The trial judge's order in relation to the personal properties is upheld.

(iii) The wife to receive 40% of the net total assets being $843,502.16. This would take the following form:

(a) The title to the property at No. 14 Magazine Road (the nursery) valued at $125,000.00 to be transferred to the wife by the husband within eight weeks.

(b) The title to the property at Petticoat Alley valued at $200.000.00 be transferred to the wife by the husband within eight weeks.

(c) The husband to pay the wife the sum of $ 518,502.16 within 150 days of the date of this judgment.

(iv) The maintenance ordered by the trial judge to continue until compliance with the order of this court.

(v) The wife to pay the costs of this appeal to the second respondent to be taxed, if not agreed within 21 days of the date of this judgment. This order as to costs should be provisional in the first instance, but become final and absolute on a date being seven full days after the delivery of reasons for judgment, unless application for a contrary order is filed before that date. I would also order that if such an application is filed, the matter of costs be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of filing of the application. Also, the wife to pay the costs for the second respondent in the court below, in the terms as provided by the learned trial Judge.

(vi) The husband to pay the costs of the wife in this appeal, to be taxed, if not agreed within 21 days of the date of this judgment. This order as to costs should be provisional in the first instance, but becomes final and absolute on a date being seven full days after the delivery of reasons for judgment, unless application for a contrary order is filed before that date. I would also order that if such an application is filed, the matter of costs be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of filing of the application.

The Second Appeal - Civil Appeal No. 2 of 2011

Backgrounds Facts

[112] On 12th November, 2010 the wife, by Claim No. 788 of 2010 claimed for an order that the husband return all plants, equipment, machinery, shelves, shed, shade cloth of "The Green Patch" or that he gives her access to remove and relocate the same. In the alternative, the wife claimed damages for conversion. In her statement of case, the wife stated that she is the proprietor of a shop called "The Green Patch" since 1998, and a nursery where she grows plants and seedlings for sale at the shop. At paragraph 2 of her claim she stated that she operated her nursery on Gran's Farm since 1996 up to present, with the permission of her husband and built plant sheds and sheds to store her plants and seedlings. Also, she stored her gardening and landscaping implements thereon and installed an irrigation system to water the plants situated on Gran's Farm.

[113] The wife stated that when she made the claim in Supreme Court Action No. 420 of 2005 for alteration of property rights, she did not make a claim on the stock and equipment of "The Green Patch" and on 3rd November, 2010 Justice Muria ruled that the husband was the absolute owner of Grans Farm. As such, on the 4th November, 2010 the wife requested through her attorney, three months so as to relocate her plants, equipment and machinery of "The Green Patch" that is situated on Gran's Farm. On 11th November, 2010, the husband's attorney wrote to the wife's attorney and informed her that the wife would be denied access to Gran's Farm pending her appeal of the decision of Muria J in Supreme Court Action No. 420 of 2005. On the said day at 3:00 p.m. the husband told the wife's employees that they cannot enter Gran's Farm and access her equipment and plants.

[114] The wife claimed that without access to the farm, she was unable to access her plants and seedlings, equipment, shades, shelves, pottery, irrigation system, lawnmowers, weed whackers, post hole diggers, machetes, and sundry equipment. As such, she stated that she was unable to supply her shop "The Green Patch" with stock and to provide the landscaping and gardening services.

[115] The wife further claimed that she has been wrongfully denied her plants, equipment, machinery and implements causing her loss and damages as she was unable to conduct works she has been contracted to do, and she was unable to restock her shop at No. 14 Magazine Road.

[116] It is against this background that she made the application for an interim injunction, seeking an order for the return of the items or in the alternative, damages for conversion, damages and cost. The husband thereafter, made an application for that application to be struck out as an abuse of the court's process.

The Applications

[117] There were two applications issued under Claim No. 788 of 2010 and the ruling of the learned trial judge therein is the subject of this appeal, Appeal No. 2 of 2011.

Application by the wife for Interim Injunction

[118] The first application was made by the wife for an interim injunction and was dated the 12th November, 2010. She applied for an interim injunction

to restrain the husband, his servants or assigns from preventing her, her agents and servants from removing and relocating the plants, equipment, machinery, hardware and implements of “The Green Patch” which is situated at Mile 14 on the Western Highway.

[119] The grounds of the wife’s application were:

(a) She has a good cause of action against her husband and a good chance of success;
(b) The plants and seedlings are perishable and may die unless they are properly maintained;
(c) The wife is afraid that her equipment, machinery and implements will fall in disrepair and without which she is unable to operate her business “The Green Patch” and will lose the goodwill of the said business;
(d) That if she could not access her plants, implements and machinery, she would have to close down and terminate the services of her employees, her contracts for services to landscape and maintain private properties, causing irreparable harm to her business.

[120] The wife supported her application with an affidavit sworn to on 12th November 2010, in which she deposed of the claim she made for a beneficial interest in the properties legally owned by her husband in Claim No. 420 of 2005 and exhibited the documents in that case, which I need not mention since that appeal has been dealt with above. At paragraph 3 of her affidavit she deposed that In Action No. 420 of 2005, the husband in his affidavit in defence acknowledged her ownership of “The Green Patch” shop and nursery but at no time made any claim for same. The wife further deposed that the learned Muria J in his judgment referred to the nursery on Gran’s Farm, however, “The Green Patch” was never part of Gran’s Farm. She deposed that she has in excess of 20,000 plants and seedlings,

an irrigation system that has to be operated with a pump to water the plants, shade cloths, ground covers, plant shelves, plant pottery and plant sheds which are all removable and are not permanently imbedded in the ground of Gran's Farm. She exhibited the letter Mrs. Young received from Mrs. Usher in which she stated that no access would be granted to her pending the appeal. At paragraph 12 she deposed that if the 20,000. plants and seedlings are not watered and cared for, they will die. As such, she requested that her application be granted.

Application by the husband for the Claim and the Interim Injunction application be struck out

[121] The husband's application which was the second application was dated the 23rd November 2010 and was made pursuant to Rules 11.6 (1) of the **Supreme Court (Civil Procedure) Rules 2005 (CPR)** and he sought the following orders:

1. That the Claim by the wife and the Notice of Application for the interim injunction dated 12th November, 2010 are *res judicata* and be struck out as an abuse of the court's process.

2. Any further orders including costs.

[122] The grounds of this application by the husband include the following:

1. The application was brought pursuant to CPR 26.3(1) (c) and under the inherent jurisdiction of the court.
2. The issue of the nursery on Gran's farm had already been decided between the parties in Action No. 420 of 2005 in the judgment of the

court delivered on 3rd November, 2010 and therefore, the cause of action is ***res judicata***, frivolous and vexatious and an **abuse of the process** of the court.

[123] The application was supported by the affidavit of the husband sworn to on 23rd November, 2010 in which the husband referred to the judgment of Muria J where the learned judge dealt with Gran's Farm. He also referred to the order made by the learned Judge in respect of Gran's Farm.

The ruling of the trial judge in respect of both applications

[124] The learned trial judge refused the application for the interim injunction and further, it was struck out. The claim was also struck out and he ordered that the husband is entitled to costs in both applications.

Relief sought

[125] The wife has appealed that part of the ruling of the learned trial judge Muria where he stated that the application for the interim injunction is refused and it is struck out and that the husband succeeds in both applications and is entitled to his costs. The relief sought by the wife is to set aside the orders made by the learned trial Judge.

Grounds of Appeal

[126] There are two grounds of appeal namely:

1. The judgment of the learned trial judge is against the weight of the evidence; and

2. The learned trial judge erred in striking out Claim No. 788 of 2010 on the basis that the claim was *res judicata* since the wife's landscaping implements and machinery and stock in trade were not part of the Supreme Court Action No. 420 of 2005 and did not form part of any order therein.

Determination of grounds of appeal

[127] Both grounds of appeal can be conveniently disposed of together. The issue being whether the claim was *res judicata* for the reasons stated by the learned trial judge. I will look at the evidence which the learned trial Judge considered in making his order to strike out the claim.

[128] The ruling of the learned trial judge in relation to the application by the wife for the interim injunction and the application by the husband for the striking out of that application is dated the 24th November, 2010. Muria J in the ruling made two points before proceeding to determine the issues raised therein. The first being that in Action No. 420 of 2005 the name "Green Patch" nursery was used as a reference to the wife's business at No. 14 Magazine Road. Further, there was a "plant nursery" at Gran's Farm which the claimant helped to plant and nursed. The second point the learned trial judge made was that there was never any suggestion of another separate plant nursery at Gran's Farm.

[129] The learned trial judge further stated that throughout the trial there was never any mention of a "Green Patch" belonging to the wife at Gran's Farm. He stated that her claim was that she worked tirelessly in helping to plant, nurse and develop the plant nursery at Gran's Farm as part of the development of Gran's Farm. Muria J stated that he accepted the wife's

evidence and hence the reason he awarded her compensation for her contribution to the work she did at Gran's Farm.

[130] The learned judge at paragraphs 3 and 4 of the ruling reiterated that there was never any mention of a "Green Patch Nursery" at Gran's Farm and also there was no mention of a separate "Green Patch Nursery" belonging to the wife. The learned judge was quite puzzled as to why this was not revealed at trial. He came to the conclusion that the wife *deliberately kept that fact under her hat in order to bolster her case that she "worked tirelessly" in the plant nursery for the benefit of Gran's Farm development*. The learned judge further stated that the wife's claim in this action actually confirms the husband's position that she went to Gran's Farm for her own benefit and not to "work tirelessly" for the development of Gran's Farm. Muria J also stated that a more plausible and cogent reason for not bringing out the fact of a separate nursery at trial, was that it would have weakened her claim for 50% interest in Gran's Farm.

[131] The learned trial judge rejected Mrs. Marin Young's submission that "Green Patch Nursery" at Gran's Farm was not part of the wife's claim in Action No. 420 of 2005. He stated that the "Green Patch Nursery" business of the wife, as well as her other assets, were all a necessary part of the dispute between her and her husband and it should have been disclosed in order for the court to resolve the dispute justly and fairly. Muria J. said that it is his view, that it was late in the day for the wife to utilize such an argument to seek an injunctive relief. The learned judge relied on the principle in **Henderson v Henderson (1848) 3 Hare 100** as extended in **Johnson v Gore Wood [2002] A.C. 1** which does not permit a party who ought to have raised an issue but failed to do so in order to raise it at a later stage. He found that to do so would be an abuse of process. He also stated that it goes further than that, as it is his view, that there was a deliberate act by the wife, not to raise the issue of her separate "Green Patch" nursery at

Gran's Farm because it would weaken or would have adversely affected her claim as to her contribution to the development of Gran's Farm. The learned trial judge found that the action of the wife was an abuse of process. For that reason at paragraph 8 of his ruling, he refused her application for an interim injunction on the basis that it was an abuse of process and he also struck out the said application.

[132] It is my opinion, that the learned trial judge was correct in his assessment of the evidence before him which is that the wife's case in relation to Gran's Farm was that she worked tirelessly in helping to plant, nurse and develop the plant nursery at Gran's Farm which was a part of the development of Gran's Farm. The learned trial judge considered this evidence which he accepted and awarded her compensation for the work she did at Gran's Farm. The compensation also included her work at Gran's Farm Bar. I see no reason to upset the findings of Muria J. as the wife's landscaping implements and machinery and stock in trade were not excluded as matrimonial properties by her in Action No. 420 of 2005. The learned trial Judge in my opinion, correctly stated that the "Green Patch Nursery" business of the wife, as well as her other assets, were all necessary part of the dispute between her and her husband in Action No. 420 of 2005.

[133] Further, it is my opinion that Muria J having properly considered the evidence, was correct in striking out the claim for an abuse of process. The learned trial judge dealt with the striking out of the substantive claim at paragraph 9 of his judgment where he stated that the authorities cited by counsel for both parties would cause him to grant that order also. He relied on the principles in the **Henderson case** and **Greenhalgh v Mallard** which I respectfully adopt.

[134] The court in **Greenhalgh v Mallard [1947] 2 All ER 255** stated that:

> *But, if he has chosen to rely on, and put his case in, one of those ways, he cannot in my view, thereafter bring the same transactions before the court and say that he is relying on a new cause of action.*

[135] The court in that judgment went on to say that in such circumstances, a claimant can be met with a plea of *res judicata* or that the statement of claim may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the court.

[136] In **Henderson v Henderson** Wigram V-C at page 114 stated the rule as thus:

> *I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contrast, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but of every point which properly belonged to the subject of litigation*

and which the parties, exercising reasonable diligence, might have brought forward at the time.

[137] For these reasons, I would dismiss the appeal (No. 2 of 2011) and would order that the order of the learned trial judge be upheld.

[138] I would order the wife to pay the costs of the husband in this appeal and the court below, to be taxed, if not agreed within 21 days of this judgment. I would order that this order as to costs should be provisional in the first instance, but becomes final and absolute on a date being seven full days after the delivery of reasons for judgment, unless application for a contrary order is filed before that date. I would also order that if such an application is filed, the matter of costs be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of filing of the application.

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HAFIZ-BERTRAM JA