

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA P. No. 66 of 2018

CV 2013-01674

In the Matter of the Wills and Probate Act Chap 9:03

In the Matter of the Administration of Estates Act Chap 9:01

**In the Matter of inherent Jurisdiction of the Court Under the Supreme Court of
Judicature Act Chap 4:01**

**In the Matter of the Real Property Act Chap 56:02 and in Particular Section 119
thereof**

**In the Matter of the Succession Act Chap 9:02 and in particular part VIII Sections 94-
116 thereof**

AND

**In the matter of an agreement dated January 27, 2012 registered as
DE201200614096, deed dated January, 27, 2012 registered as DE201200558003
and deed of rectification dated June 7, 2012 and registered as No.De201202078032
(ALL) of arrangement, settlement and compromise between the Claimant of the
First Part and First, Second, Third and Fourth Named Co-Defendants of the Second
Part**

AND

**In the Estate of Seeram Seejattan (Also known as Peter Seejattan) deceased late of
De Gannes Village, Siparia, Trinidad who died on the 21st day of March, 2008)**

BETWEEN

DR. RAMRAJ DEONARINE

(Putative Executor of the last Will and Testament of the deceased)

APPELLANT

AND

LAURA SEEJATTAN

(By her Lawful Attorney Terance Seejattan also known as Terrance Seejattan)

TERANCE SEEJATTAN also known as TERRANCE SEEJATTAN

GINA MARIE SEEJATTAN

LISA MARIE CASCARANO

APPELLANTS

AND

LAURALEE RAMCHARAN

RESPONDENT

**PANEL: ARCHIE C.J.
 JONES J.A.
 PEMBERTON J.A.**

APPEARANCES:

**Mr. H. R. M. Seenath S.C. and Mr. K. Neebar instructed by Mr. H. Ramnath on
behalf of the Appellants**

**Mr. S. Jairam S.C. and Ms. S. Lakhan instructed by Ms. S. Jairam on behalf of the
Respondent**

Date of Delivery: September 4th, 2020

I have read the judgment of Jones J.A. and I agree.

**Ivor Archie
Chief Justice**

I too agree.

**Charmaine Pemberton
Justice of Appeal**

JUDGMENT

Delivered by Jones J.A.

1. This appeal concerns the estate of Seeram Seejattan also known as Peter Seejattan, deceased (the deceased). The deceased died on the 21st March 2008 leaving property in Trinidad and Tobago and in the United States of America (USA). By his will the deceased appointed the first appellant Dr. Ramraj Deonarine (Deonarine) sole executor. The will directed Deonarine to sell all his property, real and personal, pay all funeral and testamentary expenses and then distribute the remainder to the second to fifth appellants his four children, Laura Seejattan, Terrance Seejattan, Gina Marie Seejattan and Lisa Marie Cascarano herein, (collectively referred to as the Beneficiaries and individually by their first names) in specified shares. Deonarine and the Beneficiaries are also collectively referred to as the Appellants.
2. On May 15, 2009 Deonarine applied for probate of the deceased's estate. By a series of letters the Respondent, Lauralee Ramcharan (Ramcharan), by her Attorneys, wrote to Attorneys for the Appellants indicating that she was

the common law wife of the deceased. She claimed to have an interest in the assets of the deceased. In particular she claimed an interest in two pieces of real property by virtue of the doctrines of trust and donatio mortis causa. She also advised that as a result of the deceased's failure to make adequate financial provision for her she was in a position to make a claim for reasonable financial provision pursuant to the Succession Act. She further indicated that unless the Beneficiaries were willing to settle her claims on the estate amicably she would institute proceedings to enforce her interest and sought an undertaking that the application for probate be withdrawn.

3. The probate application was not withdrawn. Thereafter a series of caveats were filed by Ramcharan. On the 21st July 2011 a warning to the last caveat filed by Ramcharan was issued by Deonarine in proceedings L 1378/2009 and on 26th July 2011 an appearance to the warning was entered by Ramcharan. By the appearance Ramcharan alleged entitlement to the estate of the deceased based on her being a cohabitant of the deceased and having contributed towards the acquisition of the properties forming the assets of the deceased's estate.
4. Meanwhile discussions between Ramcharan and the Beneficiaries resulted in both sides alleging that an agreement had been arrived between them with respect to the distribution of the deceased's estate. This appeal concerns the written agreement alleged by Ramcharan to have been signed by the Beneficiaries. Ramcharan alleges that the written agreement was presented to the Beneficiaries by her American attorney, David Farbstein, (Farbstein) and executed in the presence of a witness Krishna Harry (Harry) who made statutory declarations to this effect.
5. The written agreement comprised several documents. The first was an undated agreement; the second, an agreement of arrangement, settlement

and compromise, the third a deed of arrangement and finally, the fourth, a deed of rectification which sought to rectify the deed of arrangement by including paragraphs in the recital. For the purpose of this appeal these documents, referred to by the Judge and in the pleadings as the compromise documents, will collectively be referred to as the written agreement.

6. Essentially the written agreement provided for two things: for the appointment of Ramcharan as the legal personal representative of the deceased's estate in the USA and for the distribution of the deceased's estate in Trinidad and the USA in a manner not consistent with the distribution under the will. The written agreement also provided that it be governed by the laws of Trinidad and Tobago.

7. In addition the written agreement contained the following clause:

“INDEPENDENT ADVICE

13. This Agreement has been prepared on the instructions of both the common law wife and the children, and the children acknowledge that they have been recommended to take independent advice about it but have decided of their own free will to execute this Agreement and not to take independent advice about it even though both Gina and Lisa have taken independent advice prior to the execution of this Agreement”.

8. On April 19 2013 Ramcharan commenced these proceedings against Deonarine, as the putative executor of the last will and testament of the deceased, and the Beneficiaries. By the claim Ramcharan contended that she was the common law wife of the deceased and, by paragraph 22 of her statement of case stated that by this litigation “she simply seeks the imprimatur of the Court to give effect to their arrangement, settlement and

compromise as set out in the [written agreement] and to have an immediate distribution of the deceased's estate in accordance with the [written agreement]."

9. By her statement of case Ramcharan sought declarations to the effect that the will not be admitted into probate on condition that she and the Beneficiaries had entered into a compromise with respect to the division, distribution and allocation of the deceased's estate and that the compromise took immediate effect to vary the distribution of the deceased's estate.

10. She also sought orders that the will not be admitted to probate; the contentious probate proceedings No. L/1378 of 2009 be struck out; Deonarine be relieved of his duties as executor and she be appointed the legal personal representative of the deceased in Trinidad and Tobago and the USA and that she be at liberty to administer the estate in accordance with the written agreement and all the costs incurred be paid out of the estate.

11. Deonarine and the Beneficiaries were represented by the same attorneys but filed separate statements of case. They both deny that Ramcharan was the common law wife of the deceased. The Beneficiaries admit entering into an agreement with Ramcharan with respect to the deceased's estate but deny that the agreement was in the terms as alleged by Ramcharan. In particular they deny signing the written agreement produced by Ramcharan. By way of their counterclaim the Beneficiaries allege fraud on the part of Ramcharan with respect to the written agreement, deny having had independent legal advice and seek orders that the written agreement be declared null and void and set aside.

12. The Judge determined that Ramcharan was the common law wife of the deceased but found that she had failed to establish that she was a cohabitant for the purpose of the Succession Act. The Judge declared that the estate held a 50% interest in one of the properties in Trinidad and Tobago, Laura Valley, on trust for Ramcharan. With respect to Ramcharan's claim for an order that the will not be probated the Judge noted that there was no challenge to the validity of the will. She was of the opinion that the executor ought to be allowed to apply for the grant of probate.

13. With respect to the written agreement the Judge refused to make any order. According to the Judge there was no reason why Ramcharan could not seek to enforce the agreement after the grant of probate. In those circumstances she held that the claim and the counterclaim must fail; the caveats preventing the grant of probate should be removed and Ramcharan should seek to enforce the written agreement after the grant of probate. The Judge ordered that the Beneficiaries pay to Ramcharan the costs of the counterclaim and the Appellants pay to Ramcharan 1/14 of the costs of the claim.

14. At the end of the day therefore the only relief granted by the Judge on the claim and counterclaim was that Ramcharan was entitled to a 50% interest in Laura Valley and costs. Not surprisingly both parties have appealed the Judge's orders.

15. Deonarine and the Beneficiaries appeal the order giving Ramcharan a half share in Laura Valley. They submit that the Judge was wrong to conclude that Ramcharan was the common law wife of the deceased; that there was a common intention trust formed by Ramcharan and the deceased and that Ramcharan contributed to the development of Laura Valley. Further they submit that the Judge failed to recognize or to be guided by the legal fact that from the time Ramcharan entered her appearance to the warning by

section 61 of the Succession Act and section 70 of the Wills and Probate Act the proceedings fell into the realm of contentious probate business. They submit that since Ramcharan had raised no contentious matter within the meaning of contentious business the claim ought to have been dismissed.

16. Ramcharan appeals the Judge's dismissal of her claim and the order for costs. She contends that the Judge erred in: (i) not enforcing the written agreement given her finding that there was no evidence of fraud and that the beneficiaries had the benefit of legal advice; and (ii) determining that Ramcharan failed to establish that she was a cohabitant under the Succession Act and that she was not entitled to an interest in the other assets acquired by the deceased. She further contends that the Judge was plainly wrong in not granting the reliefs sought and in doing so failed to give due weight to the totality of the evidence and the unchallenged evidence of Ramcharan. Ramcharan has not challenged the Judge's determination that the caveats preventing the grant of probate be removed.

17. Before embarking on an examination of the submissions of the parties in order to put the Judge's findings into context it is appropriate to first consider the issues for the Judge's determination at the trial. Much of the difficulty in this case arises from the Judge's identification of these issues.

18. According to the Judge the issues were:
 1. whether Ramcharan was in a cohabitational relationship with the deceased for the purpose of the Succession Act;
 2. whether the marriage between Ramcharan and Terrance was a sham and whether they ever cohabitated;
 3. whether the documents comprising the written agreement were in fact signed by the parties;
 4. whether Ramcharan was entitled to the Siparia property pursuant to the doctrine of Donatio Mortis Causa;

5. whether a common intention trust arose in favor of Ramcharan in respect of the properties owned by the deceased in Trinidad; and
 6. whether by virtue of the written agreement Ramcharan should replace Deonarine as the Legal Personal Representative of the estate of the deceased and whether the will should be set aside in favor of the written agreement.
19. In concluding that these were the issues for her determination the Judge fell into error. In truth and in fact the case posited by Ramcharan in her statement of case, and confirmed by her plead at paragraph 22 of her statement of case, was simply to enforce the written agreement. Ramcharan, by the action, never sought relief based on her cohabitation with the deceased or her contributions to the acquisition of the assets of the deceased.
20. Insofar as facts in support of either of these two matters were raised on the pleadings they were either simply as justification for the positions taken in the written agreement or a recital of the contents of letters written by Ramcharan's Attorneys to the Appellants' Attorney. The issue of the marriage between Ramcharan and Terrance and whether it was a sham or not was as a result of an allegation made by the Beneficiaries in response to Ramcharan's claim to be the common law wife of the deceased.
21. In these circumstances while there was an issue of fact as to whether Ramcharan was in a cohabitational relationship with the deceased it was not an issue of fact that needed to be determined in order to grant relief on either the claim or counterclaim. More to the point there was no issue before the Judge of whether Ramcharan was in a cohabitational relationship with the deceased for the purpose of the Succession Act.

22. Similarly the question of whether Ramcharan was entitled to property pursuant to the doctrine of donatio mortis causa or whether a common intention trust arose in favor of Ramcharan in respect of the properties owned by the deceased in Trinidad were not issues for the Judge's determination. These were simply points raised by the Attorneys for Ramcharan in letters sent to the Appellants' Attorney before the action commenced and recited as part of the narrative of what had occurred prior to the filing of the claim.
23. Insofar as the Judge found that they were issues in the case and made findings in that regard she erred. The issues raised on the statements of case before the Judge were simply whether Ramcharan was the common law wife of the deceased, the validity of the written agreement and whether it should be enforced. In these circumstances the questions of whether the Judge erred in her determination that Ramcharan failed to establish that she was a cohabitant under the Succession Act and that she was not entitled to an interest in the other assets of the deceased, raised by Ramcharan before us, do not arise as issues for our determination on this appeal.
24. The issues for our determination therefore are:
- (i) on the appeal: (a) did the Judge err in not dismissing the claim on the basis that it did not contain any issue that could be entertained as contentious probate business; (b) was the Judge wrong to conclude that Ramcharan was the common law wife of the deceased and entitled to a 50% interest in Laura Valley based on a common intention trust;
 - (ii) on the cross – appeal: (a) was the Judge plainly wrong in not granting the reliefs sought by Ramcharan and by doing so failed to give due weight to the totality of the evidence and the unchallenged evidence of Ramcharan.; and (b) did the Judge err in

not enforcing the written agreement given her finding that there was no evidence of fraud and that beneficiaries had the benefit of legal advice.

The appeal

Did the Judge err in not dismissing the claim on the basis that it did not contain any issue that could be entertained as contentious probate business.

25. The Appellants submit that the Judge failed to recognize or to be guided by the legal fact that from the time Ramcharan entered her appearance to the warning, by section 61 of the Succession Act and section 70 of the Wills and Probate Act, the proceedings fell into the realm of contentious probate business. They submit that Ramcharan having raised no contentious matter within the meaning of contentious business the claim ought to have been dismissed.
26. In this regard the Appellants have missed the point. While the facts as pleaded only addressed the enforcement of the written agreement the claim also sought relief more properly the subject of contentious probate proceedings. The real question therefore was not whether the claim should have been dismissed but rather whether, on the claim as presented, Ramcharan was entitled to relief that was more properly the subject of contentious probate proceedings.
27. Section 61 of the Succession Act has not as yet been proclaimed. The relevant section therefore is section 70 of the Wills and Probate Act Chap. 9:03 (the Act). Insofar as the claim as instituted by Ramcharan specifically seeks an order that the contentious probate proceedings No. L/1378/2009

be dismissed or struck out it is obvious the claim filed by Ramcharan does not purport to be the contentious probate proceedings commenced by the warning issued by Deonarine. This is confirmed by the averments contained in paragraph 22 of Ramcharan's statement of case and by Ramcharan at the hearing before us.

28. The Appellants' submission is based on the premise that section 70 of the Act prevents the institution of other, non- probate, claims by a person who has filed a caveat and entered an appearance to a warning issued pursuant to that caveat. The effect of the Appellants' submission is that once an appearance to a warning is entered the person entering the appearance is prevented from commencing any action other than a contentious probate action. If the submission is correct the consequence of it is that an appearance to a warning prevents any subsequent litigation, no matter the relief sought, by the person entering the appearance unless that litigation is a contentious probate action. That cannot be the intention of section 70 of the Act.

29. **Section 70** of the Act states:

“All procedure for obtaining proof of a Will in solemn form and all proceedings in any application subsequent to appearance being entered in answer to the warning of a caveat, and all applications for revocation or amendment of any probate or administration or by or against executors or administrators or by or against the Administrator General under the probate jurisdiction of the Court, shall be deemed contentious business.”

30. To treat with this submission, and to put these proceedings into context, it is necessary to examine the probate jurisdiction of the Court as established by the Act. The Act declares itself to be an act relating to the execution of

wills and the granting of probate and letters of administration. **Section 3 of the Act** establishes the jurisdiction of the court to treat with probate matters. It provides:

“The Court shall have jurisdiction to determine the validity and admissibility to probate of the Will or the granting of administration of the estate of any person domiciled in Trinidad and Tobago and of the estate in Trinidad and Tobago of any person, wherever domiciled, dying seised or possessed thereof or entitled thereto, and to revoke any probate or administration in any suit instituted either by an executor or administrator or any person claiming under a Will to have it established or to have the trusts of it carried into effect under the decree of the Court or by any person claiming adversely to a Will or administration to have it declared void, and the registration of it prevented or recalled, or claiming to have administration revoked.”

31. With respect persons dying domiciled in Trinidad and Tobago or domiciled elsewhere but with property in Trinidad and Tobago it is section 3 that gives the Court its jurisdiction to determine the validity and admissibility to probate of a will or the granting of letters of administration of the estate of persons domiciled in Trinidad and Tobago and the power to revoke and declare void any probate or letters of administration granted in that estate.
32. By the Act the probate jurisdiction of the court is invoked in two ways. Non-contentious or common form business, that is, the procedure to be followed where there is no contention to the right to obtain the grant or where there is no longer any contention in this regard and for lodging caveats against the grant of probate or administration. Rules detailing the procedure to be followed with respect to this category are contained in the Non-Contentious Business Rules found at the First Schedule to the Act.

33. The other method of invoking the jurisdiction of the probate court is by way of contentious probate business. While not specifically defined by the Act section 70 establishes the parameters of contentious probate business. In accordance with section 70 contentious probate business commences once an appearance has been filed to a warning issued pursuant to the filing of a caveat. This appearance is a precursor to the commencement of litigation. Unlike non-contentious business the procedure to be followed for contentious probate business is not contained in in the Act but rather is to be found in the Civil Proceedings Rules 1998 as amended (the CPR) at Part 72.
34. Part 72 contains specific requirements for the institution of contentious probate proceedings and invoking the probate jurisdiction of the court. **Part 72.1** deals with the scope of the Part. It states:
- “(1) This Part applies to probate causes and matters, including applications for the rectification of a will, and the other provisions of these Rules apply to those causes and matters subject to this Part.
- (2) In this Part “probate proceedings” means proceedings for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being proceedings which is non-contentious or common form probate business; and “will” includes a codicil.”
35. To interpret section 70 in the manner suggested by the Appellants, that is, to limit any action filed by a party who has entered an appearance to a warning to contentious probate business results in an absurdity. It cannot be that once a person commences the procedure leading to contentious

probate business no other action, other than contentious probate business, can be brought by that person. The section must be interpreted within the context of the purpose of the Act. It must be read to mean all proceedings in any application dealing with the granting of probate or letters of administration made subsequent to an appearance being entered in answer to the warning of a caveat shall be deemed contentious business. This interpretation accords with Part 72 of the CPR which limits the application of the rule to Probate business.

36. Adopting this interpretation it follows that an action brought by a person who has entered an appearance to a warning in probate proceedings, which seeks relief other than that available in probate proceedings, is not liable to be dismissed because it did not include any issue that fell within the context of contentious probate business. In this regard therefore the action does not fall to be dismissed simply because it does not treat with contentious probate business.

37. The difficulty that arises here is that, despite her confirmation by paragraph 22 of her statement of case that the claim simply seeks the enforcement of the written agreement, in her claim Ramcharan includes relief more properly the subject of a probate action namely: orders that the will not be admitted to probate; seeking the removal of Deonarine as the executor and his replacement by Ramcharan as Legal Personal Representative and that the contentious probate proceedings be struck out or dismissed. As we will see later in this judgment when we deal with her cross-appeal this has ramifications with respect to the type of relief available to Ramcharan in this suit. As indicated earlier, these proceedings not being contentious probate proceedings, the real question is whether Ramcharan, can by this suit obtain relief more properly available in contentious probate proceedings

Was the Judge wrong to conclude that Ramcharan (i) was the common law wife of the deceased and (ii) entitled to a 50% interest in Laura Valley based on a common intention constructive trust;

38. The finding that Ramcharan was the common law wife of the deceased was a finding of fact by the Judge. It was a contested fact- raised in Ramcharan's statement of case and challenged by the Beneficiaries. The Appellants are therefore required to show that in coming to this conclusion the Judge was plainly wrong: **Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd [2014] UKPC 21**. The Appellants have not done so.
39. The Judge considered the evidence, including the evidence that Ramcharan was married to Terrance, and concluded that the evidence was overwhelming that Ramcharan occupied the position of a wife living in the same premises as the deceased until his deportation from the USA in April 2007. On the face of the evidence as a whole this was a finding that the Judge was entitled to make. There was evidence in support of this finding and she was entitled to accept this evidence and reject the evidence led on behalf of the Appellants in this regard. In the circumstances this challenge fails.
40. The Judge however fell into error when she determined that the estate of the deceased held a 50% of the interest in the property known as Laura Valley on trust for Ramcharan. This was not an issue for her determination. Nor was it relief sought by Ramcharan in her statement of case.
41. Before us, in response to the submission by the Appellants that she abandoned her claim as set out in the appearance to the warning,

Ramcharan submits that by her statement of case she set out two alternative claims. The primary claim being the enforcement of the compromise documents and the alternative claim being that she was the common law wife and co-habitant of the deceased. She submits that this alternative claim is to be garnered from the documents attached to her statement of case. Further she submits that, given her claim “for further and/or other relief as to the Court shall seem just”, by virtue of part 8.5(1) of the Civil Proceedings Rules 1998 as amended (the CPR) the Judge had great latitude to grant any other remedy to which she was entitled.

42. There is no merit in either of these submissions. **Part 8.5(1) of the CPR** simply identifies what is to be contained in a claim form. In particular the rule states that the claim form must: “specify any remedy that the claimant is seeking (though this does not limit any power of the court to grant any other remedy to which he may be entitled)”. Ramcharan submits that by virtue of the words in brackets the court is empowered to grant any relief consistent with what is disclosed in the statement of case. I do not agree. The words contained in the brackets in rule 8.5(1) cannot confer on a Judge the power to grant remedies. Nor do they purport to do so. The words there are simply a reminder that in certain cases the failure to specify a remedy may not limit the remedies that a court may grant. They do no more than that.
43. The case of **Kirin- Amgen Inc. v Transkalyotic Therapies Inc. and others [2002] IP&T 331** is of assistance here. The issue in this case was whether the claimant was entitled to relief, not specifically sought, pursuant to the words ‘further and other relief’. The claim had been brought pursuant to the English equivalent to our CPR. Unlike our part 8.5(1) the English rule did not contain the words in brackets. However a sub –rule (5) of the English rule stated that: “the court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim.”

44. Neuberger J, as he then was, applied the learning on the application of the words “further or other relief” set out in **Daniell’s Chancery Practice (8th Edition 1914)**. In summarizing this learning he stated at page 339:

“In summary, it appears to me that where there is a claim for 'further or other relief', then, unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. Firstly, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise.”

Neuberger J’s statement seems to me to be an accurate representation of the applicable law even in light of the words contained in brackets in Rule 8.5(1).

45. Further **part 8.6 of the CPR** states:

- “(1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.
- (2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case.”

It is clear by this rule that what is required is for the facts relied on to be included in the statement of case and for the documents annexed to be in support of those pleaded facts.

46. The problem here is the manner in which the case is pleaded by Ramcharan. She admits that what she refers to as her alternate claim, that is her claim arising from her relationship with the deceased, only arises in the letters written by her Attorneys annexed to her statement of case. It is only in those letters that any claim to an interest in any property by virtue of the doctrines of trust and donatio mortis causa or her intention to make a claim for reasonable financial provision pursuant to the Succession Act is raised. While in some instances the contents of the letters are repeated in the statement of case it is only for the purpose of relating what the letters say and not an averment of the facts stated in the letters. These facts therefore do not form a part of the statement of case as required by part 8.6.
47. In these circumstances Ramcharan cannot benefit from her use of the words 'further and or other relief' in her statement of case. The relief sought by her 'alternate claim', and in particular her claim to an entitlement to Laura Valley is not a claim of the type pleaded. Given the terms of the written agreement sought to be enforced by her 'primary claim' the relief sought by the 'alternate claim' is inconsistent with the relief actually sought. In addition the facts relied on are not supported by the allegations in the pleaded case.
48. Insofar as the Judge found that these claims were part of the pleaded case and made findings in that regard the Judge fell into error. In particular insofar as the Judge was of the opinion that she was entitled to make the order that the estate of the deceased held 50% of the interest in the property Laura Valley on trust for Ramcharan she got it wrong this was not an issue for her determination.
49. Accordingly, on the appeal, in declaring that the estate of the deceased held 50% of Laura Valley in trust for Ramcharan the Judge fell into error. The

Appellants however were not entitled to an order that the claim be dismissed by virtue of it not being a contentious probate action.

The cross appeal

(i) Was the Judge plainly wrong in not granting the reliefs sought by Ramcharan by failing to give due weight to the totality of the evidence and the unchallenged evidence of Ramcharan and (ii) Did the Judge err in not enforcing the written agreement given her finding that there was no evidence of fraud and that the Beneficiaries had the benefit of legal advice.

50. Given the overlap in the submissions made by Ramcharan it is more appropriate to treat with both of these challenges together. The difficulty faced by Ramcharan in her cross -appeal is that it assumes two things (a) that a finding by the Judge that there was no evidence of fraud and that the Beneficiaries had the benefit of legal advice required the Judge to enforce the written agreement; (b) that the enforcement of the written agreement would entitle Ramcharan to all the relief sought by her. She is wrong on both counts.

51. The Judge granted none of the relief sought by Ramcharan. The issues of fact for the Judge's determination were whether Ramcharan was the common law wife of the deceased and the validity of the written agreement. With respect to the validity of the written agreement the factual issues raised by the counterclaim were (a) with respect to fraud, whether the documents comprising the written agreement were signed by the Beneficiaries and (b) whether the Beneficiaries had the benefit of independent legal advice. These were the issues upon which the Judge was required to give due weight to the totality of the evidence. The other issue

for the Judge's determination was whether the written agreement was enforceable.

52. The relief sought by Ramcharan however was wider than the ambit of her claim as pleaded. As pleaded the claim was for the enforcement of the written agreement, nonetheless, some of the relief sought had no reference to the written agreement and, as we have seen, were orders properly the subject of a probate action. These were the orders that the will not be admitted to probate; the removal of Deonarine as the executor of the estate of the deceased and his replacement by Ramcharan as Legal Personal Representative; and that the contentious probate proceedings be struck out or dismissed.
53. In order to put Ramcharan's submissions into context it is first necessary to examine the Judge's reasoning that led to her final determination. On the one hand in dealing with the counterclaim the Judge seems to have accepted the contents of Harry's statutory declaration that he witnessed the signatures of the Beneficiaries to the written agreement and the evidence that the Beneficiaries had the benefit of the advice of attorney at law Fabistein. Based on these two factors the Judge concludes that there might have been little merit in the grounds of lack of independent legal advice and of fraud.
54. On the other hand immediately after making this determination the Judge states:

"However, having regard to my ruling on the merit of the claim, it would be open to the [Beneficiaries] to launch a full attack on the [written agreement] should [Ramcharan] seek to enforce them following the grant of probate. Accordingly, it is my view that the issues canvassed by the Counterclaim should not be decided in these

proceedings, but following the grant of probate. Accordingly, it is my view that the Counterclaim should be dismissed.”

55. The issues canvassed by the counterclaim concerned the enforcement of the written agreement. The issues raised for the Judge’s determination on the counterclaim were whether Ramcharan was guilty of fraud and whether the Beneficiaries had the benefit of independent legal advice. With respect to fraud the Beneficiaries not only disputed that they signed the documents in the presence of the witness but they also alleged that the documents signed by them had fewer pages than the one presented to the court by Ramcharan and, in particular, did not contain any confirmation that Ramcharan resided with the deceased; any agreement that Deonarine be removed as applicant for the probate of the deceased’s will and that Ramcharan be appointed legal personal representative of the estate; or that any of the Trinidad properties, or any part of them, be transferred or conveyed to Ramcharan.

56. The case presented by Ramcharan was that, by virtue of the unanimous agreement of the Beneficiaries as evidenced by the written agreement, the will ought to be set aside and she take the place of Deonarine as the legal personal representative of the estate of the deceased. Before the Judge and before us Ramcharan relied on the case of **Crowden v Aldridge [1993] 1 WLR 433** in support of this submission.

57. The Judge determined that **Crowden** was not authority for the position that the beneficiaries had the power to change the executor. She was of the view that the case did “not go as far as to hold that the legatees had the power to replace the executor of the will...” According to the Judge “to take this step would be equivalent to taking a step unsupported by statute or any other authority. Statute has provided measures by which the Legal

Personal Representative can be replaced and the unanimous direction of legatees is not one of them.” In this regard the Judge cannot be faulted.

58. In **Crowden** the issue was whether by unanimous agreement the beneficiaries could require the executor to change the manner of distribution of the assets. It was held that they could. This was an application made after the grant of probate. In this regard therefore Crowden does not support the submission that beneficiaries can by agreement remove an executor prior to probate being granted. It does however support the position that despite the dispositions in a will an executor will be bound by the unanimous agreement of the beneficiaries with regard to the disposition of the estate of a deceased even though the disposition maybe contrary to the wishes of the testator as expressed by the will.
59. This accords with the Judge’s final determination. The effect of which was that as far as the written agreement sought to replace Deonarine as executor a matter of law it could not do so but that as far as it related to the distribution of the estate, on the basis of Crowden, if enforceable the written agreement would bind the executor and affect the manner in which the estate was to be distributed. In these proceedings however she was not prepared to make a final decision on the enforceability of the written agreement. In her opinion it was more appropriate to bring such an action after probate had been granted. In other words the Judge was not prepared to make such an order until after the estate of the deceased had been formally vested in Deonarine as the executor of the estate of the deceased.
60. Ramcharan relies on section 25 of the Act as giving the Judge the power to remove Deonarine as executor. She submitted that, in accordance with the section, there existed special circumstances that would permit the court to

appoint someone other than the executor named in the will to administer the estate.

61. The special circumstances relied on by Ramcharan were:
- (1) the Beneficiaries' unanimous agreement and approval of Ramcharan;
 - (2) the Beneficiaries' confidence in Laura as set out in the written agreement
 - (3) the avoidance of possible further litigation, expense and delay;
 - (4) the willingness of Ramcharan to take the burden of administration
 - (5) Deonarine's willingness, as stated in the witness box, that if Ramcharan wants everything she can have everything and
 - (6) Ramcharan's familiarity with the estate both in Trinidad and the USA.
62. With respect to Deonarine's willingness to relinquish his role as executor the Judge noted that if this was the position the Act already made provision for an executor to relinquish the role of executor. In this regard the Judge was correct. Insofar as the Act permits the removal of an executor named in a will it is by section 12 of the Act. **Section 12** provides for the removal of an executor in three specific situations: where the executor: (a) survives the testator but dies without proving the will; (b) is cited to take out probate and does not appear to the citation; and (c) renounces probate of the will.
63. The Judge was of the opinion that any special circumstances envisaged by section 25 must be read in the context of the whole of the section "and must be in the nature of an insolvency of the estate that is to say a complete collapse the estate.... nothing less would motivate the court to exercise its discretion to vary the stated wishes of one, who being deceased, is incapable of appealing my order. In my view there is no reason why

[Ramcharan] cannot seek to enforce the [written agreement] following the application and the grant of probate as per *Crowden v Aldridge*”.

64. The fact is that section 25 of the Act is not applicable. **Section 25** states:

“Where any person shall die intestate or without having appointed any executor, or shall have appointed an executor but such appointment shall fail, or the executor named by the Will shall be under the age of twenty-one years, or shall be absent from Trinidad and Tobago and shall not have proved the Will, or where any person shall die out of Trinidad and Tobago but leaving any estate within Trinidad and Tobago; administration in respect of such estate shall be granted to the person entitled thereto: Provided that if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit.”

65. Ramcharan relies on the proviso. The proviso however only applies where one of the six situations identified by the section arises. It therefore applies where (i) a person dies intestate; or (ii) without appointing any executor; or (iii) where having appointed an executor the appointment fails; or (iv) the executor is under 21 years; or (v) the executor is absent from Trinidad and shall have not proved the will; or (vi) where the person dies out of Trinidad and Tobago but leaving any estate in Trinidad and Tobago.

66. If any of these situations occur then the court, in the exercise of its probate jurisdiction, has the power to grant letters of administration to a person

entitled under the Act. In such a case section 30 of the Act will apply. Section 30 deals with the order of persons entitled to administration. However, in accordance with the proviso in section 25, if the estate is insolvent or special circumstances apply the probate court may in its discretion appoint someone else as the administrator of the estate of the deceased. That is the effect of section 25 of the Act. None of the six situations apply in this case. In any event, by these proceedings, Ramcharan does not seek to invoke the probate jurisdiction of the court.

67. In determining that section 25 of the Act did not apply the Judge came to the correct conclusion but for the wrong reason. Section 25 of the Act does not allow for the removal of an executor by unanimous agreement by the beneficiaries. Insofar as the Act allows the removal of an executor it is pursuant to section 12 of the Act. None of the circumstances outlined in section 12 of the Act apply here.
68. In any event this relief was not available to Ramcharan for two additional reasons (a) none of the documents comprising the written agreement contained any agreement by the parties that Deonarine would be replaced by Ramcharan as the legal personal representative of the deceased's estate. In this regard the agreement simply treated with the appointment of Ramcharan as the personal representative of the deceased's estate in the USA and the distribution of the deceased's estate and the incidence of the costs of administering the estate; and (b) this was an order that was only available if the probate jurisdiction of the court had been invoked. As we have seen earlier Ramcharan did not invoke such jurisdiction.
69. In these circumstances insofar as the Judge refused to grant Ramcharan any relief that had the effect of removing Deonarine as the executor of the deceased's estate and replacing him with Ramcharan as the legal personal representative she was correct. For similar reasons neither was Ramcharan

entitled to any relief that sought to give her powers as the legal personal representative of the estate of the deceased.

70. The Judge was also not wrong in failing to grant the orders that the will not be admitted to probate and that the contentious probate proceedings be struck out or dismissed. These were all orders within the category, and more properly the subject, of contentious probate business and not available to Ramcharan on this suit.

71. This therefore leaves us with the validity and the enforcement of the written agreement. In this regard Ramcharan submits that the Judge ought to have enforced the written agreement on her determination that the statutory declaration of Harry completely destroyed any possibility of fraud and the uncontroverted evidence that the Beneficiaries had the benefit of the advice of Attorney at Law Fabistein. This submission too cannot succeed.

72. The issues of fact for the Judge's determination on the validity of the written agreement were not simply whether the Beneficiaries signed the deed of arrangement in Harry's presence but there was also the question of whether the documents signed by them were the same documents as presented to the court by Ramcharan. Somewhat similarly the question raised on the counterclaim was not whether the Beneficiaries had legal advice but rather whether they had independent legal advice. The Judge made no finding on either of these two issues. In any event her conclusion was not that there was no merit in the Beneficiaries' claim but rather according to her: "It seemed that there might have been little merit in the grounds of the lack of independent legal advice and of fraud."

73. By way of an aside and of note here is the evidence of the existence of a clause in the written agreement that seemed to have acknowledged that at least two of the Beneficiaries did not have independent legal advice and the evidence that Fabstein, the Attorney at law whom the Judge determined provided the legal advice, was Ramcharan's Attorney.
74. In these circumstances Ramcharan's submission that the Judge erred in not enforcing the written agreement given her determination that there was no evidence of fraud and that the Beneficiaries had the benefit of legal advice cannot succeed. The Judge made no final determination with respect to the fraud pleaded by the Beneficiaries or the issue raised by the Beneficiaries on the lack of independent legal advice. The question of the receipt by the Beneficiaries of independent legal advice and their allegation of fraud therefore remained at large.
75. Before us Ramcharan submits that, on the basis of the evidence before us, it is open to us to make a final determination on these two issues. I do not agree. This is not a case where we are called upon to draw inferences from primary facts found by the Judge. In the instant case the Judge has failed to find sufficient primary facts to allow us to draw inferences from them. Under normal circumstances the appropriate order in such a case would be that the issue be sent back to the High Court for such a determination. This was the position taken by the Privy Council in the case of **Chin v Chin (2001) 58 WIR 335**.
76. The question here is whether this is an appropriate order to make in the circumstances of this case. It seems to me that given the fact that: (a) as a matter of law, even if there was unanimous agreement between the parties as evidenced by the written agreement, Deonarine could not be replaced as the executor of the deceased's estate: and (b) even if enforceable as a matter of law the written agreement could only affect the manner in which

Deonarine is to distribute the estate; in those circumstances the more prudent course is to await the grant of probate before seeking to enforce any written agreement between the parties with respect to the distribution of the estate. In this regard therefore to send these two issues back to the High Court for resolution will serve no useful purpose. In these circumstances the Judge's determination that the enforcement of the written agreement await the grant of probate cannot be faulted.

77. Finally, for completeness, a word on the orders for costs sought by Ramcharan in her statement of case. Ramcharan seeks orders that she be at liberty, as the legal personal representative of the deceased to pay or deduct all reasonable charges costs, disbursements and/or fees incurred, advanced or paid by her as the legal personal representative in administering or taking steps to administer the estate. Alternatively she seeks an order that her costs and the Appellants' costs be paid on an indemnity basis or certified fit for her senior and junior counsel and instructing attorney or such order as to costs in the discretion of the court be paid out of the estate of the deceased or out of the proceeds of the estate of the deceased before any distribution is made to her and the Beneficiaries.
78. Ramcharan is not entitled to either of these orders. As pleaded the statement of case raises no facts that specifically relate to the costs orders sought by Ramcharan except perhaps insofar as they may have been a part of the written agreement sought to be enforced by her. In any event she has not by this action been appointed the legal personal representative of the deceased's estate. More fundamentally however an order that costs be paid out of the estate of the deceased is an order more properly made in contentious probate proceedings. It is available where there are special circumstances which make it appropriate that the Court depart from the general rule that costs follow the event. Not only are there no such

circumstances in this case but, more fundamentally, this is not a probate action. The decision of the Judge in not granting these costs orders cannot therefore be faulted.

79. Accordingly the appeal is allowed and the declaration made by the Judge that the estate holds a 50% interest in the property known as Laura Valley is set aside. The cross appeal is dismissed and the orders made by the Judge dismissing all the relief sought by Ramcharan is affirmed. In accordance with the determination of the Judge it is ordered that the caveats filed by Ramcharan be removed and the question of the validity of the written agreement, referred to in the statement of case and by the Judge as the compromise documents, insofar as it relates to the distribution of the estate of Seeram Seejattan also known as Peter Seejattan deceased await the grant of probate in his estate.

Judith Jones
Justice of Appeal