

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

**SAINT LUCIA
SLUHCVP2023/0012**

BETWEEN:

FREDERICK HENRY

Appellant

and

MARIE KETRA ALBERT

Respondent

Before:

Hon. Mde. Margaret Price Findlay

Justice of Appeal

Hon. Mr. Eddy Ventose

Justice of Appeal

Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Horace Fraser for the Appellant

Mr. Henry Joseph for the Respondent

2024: July 3;
August 20.

Civil appeal – Order for reimbursement of cost of improvements to property – Article 372 of the Civil Code of Saint Lucia – Article 372 neither pleaded nor relied on in the court below – Whether the order made by the judge for reimbursement of the cost of the improvements to the property was open to him on the respondent's pleaded case – Whether the learned judge erred or committed a miscarriage of justice in making the order for reimbursement pursuant to Article 372 – Failure of the judge to invite parties to make submissions on the issue and elements of Article 372 – Good faith and necessity requirement – Whether the judge's failure to consider and to make findings of good faith and necessity undermines the order for reimbursement of cost of improvements

This is an appeal against the judgment and orders of a judge of the High Court whereby the learned judge, having dismissed all of the respondent/claimant's causes of action at law and in equity, ordered the appellant to reimburse the respondent for the cost or value of

improvements made by the respondent to a house situate on a parcel of land in the Quarter of Dennery in Saint Lucia ("the property"), such costs or value to be assessed by a quantity surveyor to be agreed by the parties, and, in the absence of agreement, appointed by the court upon application.

The house on the property was initially primarily a wooden structure with a concrete portion and was owned by the appellant's sister, Fredrica Henry. Fredrica died in April 2021. However, prior to her death she transferred title to the property to the appellant by virtue of a Deed of Donation executed on 20th January 2015 and registered 12th February 2015. The respondent is the niece of Fredrica Henry. She asserted that she had lived in the house on the property with her children for about 30 years along with Fredrica. The respondent's case before the High Court was that she had, pursuant to an oral agreement with Fredrica, carried out, at her expense, substantial renovations and improvements to the house on the property, transforming it into a totally concrete structure. However, the renovations and improvements were carried out by the respondent at a time when the appellant had already become the registered owner of the property by virtue of the Deed of Donation.

On 11th March 2022, the respondent filed an amended fixed date claim form and amended statement of claim in the court below against the appellant seeking a declaration that she had an equitable interest in the property; an order that the appellant acted fraudulently in obtaining title to the property; a declaration that the appellant held the concrete house on trust for the respondent; equitable estoppel; damages for breach of trust; further or alternatively restitution on constructive trust on the building costs; an account and/or restitution of the balance of the EC\$26,000.00 given to the appellant by the respondent for payment to the contractor or alternatively such amount and relief as the court thinks fit to satisfy the respondent's equitable interest; and any further or other relief as the court deems fit and just.

By a judgment dated 9th May 2023, the learned judge dismissed the respondent's claims and causes of action in fraud, breach of trust, revocation of a Deed of Donation, and for an equitable interest in the property including equitable estoppel. The judge, however, went on to make an order that the appellant (the defendant below) should reimburse the respondent the sums expended on improvements to the house on the property.

In making the order for reimbursement of the costs of improvements, the learned judge relied on the provisions of Article 372 of the Civil Code of Saint Lucia (the "Civil Code"). The learned judge made the said order notwithstanding, as he recognised in the judgment, that the respondent had not specifically pleaded 'any matter as it relates to the provisions of Article 372'. Furthermore, in making the order for reimbursement of the cost or value of the improvements, the learned judge did not specifically invoke, consider or rely on the powers of the court under section 17 of the Eastern Caribbean Supreme Court (Saint Lucia) Act ("the Supreme Court Act") which permits the High Court of Justice to grant all remedies or relief whatsoever to which any of the parties appear to be entitled in respect of every claim properly brought forward by him or her or them respectively in the cause or matter, in order to determine all matters in controversy between the parties completely and finally, and to avoid all multiplicity of proceedings.

By way of notice of appeal filed on 26th May 2023 the appellant appealed the judge's decision. The appeal essentially concerns one question, that is, whether the order made by

the judge for reimbursement of the cost or value of the improvements to the property was open to him on the respondent's pleaded case and, if it was, did the learned judge err in making the said order pursuant to Article 372. This singular ground of appeal is premised upon four points or grounds of misdirection, or errors of law allegedly made by the learned judge. The respondent has not cross-appealed against any of the decisions and orders of the judge dismissing her various claims and causes of action. She seeks simply to oppose the appeal and to have the decision and order for reimbursement of the costs and value of the improvements upheld by this Court.

Held: allowing the appeal; setting aside the order of the learned judge at sub-paragraphs 3 and 4 of paragraph [83] of the judgment in the court below; and awarding costs to the appellant on the appeal and in the court below, such costs to be assessed by a judge or master if not agreed within 21 days, that:

1. It is common ground that the respondent did not plead or rely on Article 372 of the Civil Code in her claim in the court below. Likewise, there was no mention of Article 372 in the pleadings nor in the closing submissions of either party. Moreover, there was no pleading that the improvements had been carried out in 'good faith' or that the said improvements were necessary, each of which are key elements which must be pleaded in order to found any remedy, primary or alternative, for an order of compensation or reimbursement under Article 372. Consequently, in the face of no pleaded case for reimbursement of the cost of improvements whether under Article 372 or otherwise, the learned judge, however well-intended, assisted the respondent in an impermissible manner when he embarked upon a consideration of Article 372 and made the order for reimbursement of the costs of the improvements in favour of the respondent. Furthermore, it was not open to the judge to do so without, at minimum, first inviting written submissions from the parties on the issue of compensation for the improvements and on the application of Article 372 and the elements of 'good faith' and 'necessity' to the evidence or to the facts of the case. In failing to do so, the learned judge committed a serious breach of the rules of natural justice as to a fair trial and decided the case on an issue which was not pleaded or relied on by the respondent, leading to a miscarriage of justice. Accordingly, the appeal ought to be allowed and the order discharged.

Chen v Ng [2017] UKPC 27 applied; **George W. Bennett Bryson's and Co Ltd trading as Bryson Shipping v. George Purcell trading as Hortico Landscaping and Nursery** ANUHC VAP2011/0033 (delivered 28th February 2018, unreported) followed.

2. Notwithstanding the wide jurisdiction and powers granted to the High Court by section 17 of the Supreme Court Act essentially to grant and to fashion such remedy as a party appears to be entitled to in respect of their claim, so as to completely and finally determine all matters in controversy between the claimant and the defendant to the proceedings, in this matter the judge erred in making the order for reimbursement. The main thrust of the respondent's claim was that she was entitled to ownership of the property or alternatively she had an equitable proprietary interest therein, subject to which equitable interest, the appellant took title to the property by virtue of the Deed of Donation. All these claims and causes of action were dismissed

by the court below and the respondent did not appeal against any of these orders. There could therefore be no basis for the court below to invoke its undoubted jurisdiction and powers under section 17 of the Supreme Court Act. Moreover, even where it is permissible for a court to resort to its powers and jurisdiction under section 17, they must be exercised in a manner which is fair to both parties to the litigation and in full observance of the foundational principles of natural justice and due process which underpin our system of justice. This the learned judge had failed to do rendering the reimbursement order a miscarriage of justice which order ought, in the circumstances, to be discharged.

Section 17 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** Cap 2.01 of the Revised laws of Saint Lucia considered.

3. It is crucial for the assessment and determination by a court when applying or seeking to apply Article 372 that it considers, on the evidence before it, whether the 'improvements' made were carried out in good faith and whether they were necessary. In the instant case, the learned judge, having set out in full the provisions of Article 372, did not undertake any analysis of its provisions and, most importantly, did not identify and consider the crucial elements of 'good faith' versus 'bad faith', or of necessity. There was no attempt made to analyse the evidence or the facts as found by him and to apply them to either of these two elements. There was also no mention and no consideration of the provisions of Article 2066 whereby 'good faith' is to be presumed, or any consideration of the burden of proof and whether it had been discharged to the requisite standard in a civil case. The approach to this issue by the learned judge falls short of the standard required of a court when considering the application of a statutory provision such as Article 372, and in reasoning to a conclusion and making an order affecting the rights of a party to civil litigation. The effect of this failure is that the findings and order for reimbursement of the cost of the improvements cannot stand and must be set aside.

George St. Ville v Editon Francis Civil Appeal No.13 of 1967 (delivered 16th March 1968, unreported) considered.

4. The conclusion of this Court that the order cannot stand is further reinforced by the fact that the scope of the order made is much wider than the findings of the judge with regard to the agreed-upon improvements to the property. The order for reimbursement was not limited in its scope to specific improvements which the respondent had carried out at her expense as agreed with or permitted by either the deceased, Fredrica Henry, or the appellant as the then owner of the property, or both. Instead, the order made was so broad in its terms so as to encompass, on any reasonable reading, all 'the improvements to the house'. This is contrary to the judge's findings that the improvements were made gratuitously; exceeded what had been agreed; and those actually made by agreement were nothing more than 'minor

renovations'. Specifically, the order made lacks in particularity and specificity which improvements the respondent actually made, which of those improvements she is to be reimbursed pursuant to the order, and for which the quantity surveyor is to conduct an assessment of their 'value'. This rendered the order made too wide and so lacking in specificity as to be unfair to the appellant, and unworkable and impractical for any sensible and accurate assessment of value by a quantity surveyor. Accordingly, the said order is inaccurate and unworkable to such an extent as to lead to further litigation and the reopening of factual and other issues which should have been dealt with at the trial.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal from the judgment and orders of a judge of the High Court of Justice dated 9th May 2023 (after a trial on 20th September 2022), by which the learned judge ordered the appellant to reimburse the respondent the cost or value of improvements made by the respondent to the house (immovable property) situate on land registered as Block 1440B Parcel 102, in the Quarter of Dennery in Saint Lucia ("the property").
- [2] By the judgment the learned judge, having dismissed the respondent's claims and causes of action in fraud, breach of trust, revocation of a Deed of Donation executed on 20th January 2015 and registered 12th February 2015 ("the Deed of Donation"), and for an equitable interest in the property including equitable estoppel, went on to make an order that the appellant (the defendant below) shall reimburse the respondent the sums expended on improvements to the house on the property.
- [3] The property was previously owned by the appellant's sister, Fredrica Henry, who is the aunt of the respondent. Fredrica Henry died in April 2021. Prior to her death, Frederica Henry had, in 2015, transferred title to the property to the appellant by virtue of the Deed of Donation. The respondent conducted renovations and improvements to the house on the property, transforming it from primarily a wooden

structure with a concrete portion, into a totally concrete structure. The renovations and improvements were carried out by the respondent at a time when the appellant had already become the registered owner of the property by virtue of the Deed of Donation.

[4] In making the order for reimbursement of the costs of improvements, the learned judge relied on the provisions of Article 372 of the **Civil Code of Saint Lucia** (the “**Civil Code**”).¹ The learned judge made the said order notwithstanding, as he recognised at paragraph [82] of the judgment, that the respondent had not specifically pleaded ‘any matter as it relates to the provisions of Article 372’. In deciding to make the order, the learned judge ‘formed the view that the appropriate relief would be that the value of the improvements to the property be assessed by a quantity surveyor agreed to by the parties’, and for the appellant to pay the assessed value of the improvements so made to the respondent. In furtherance of this order, the learned judge made the further order that were the parties unable to agree on a quantity surveyor to assess the value of the improvements, either party may apply to the court for the appointment of a suitable quantity surveyor or for further directions.

[5] It was common ground between the parties in this appeal that the respondent (the claimant below) had not in her pleaded case or in her written and oral submissions before the court below, specifically cited or relied on Article 372 of the **Civil Code**, nor had she argued in the alternative that she was entitled to an order for reimbursement of the costs of improvements to the house on the property or that the said improvements had been carried out by her in good faith and that they were necessary within the meaning of that term in Article 372. Furthermore, in making the order for reimbursement of the cost or value of the improvements, the learned judge did not specifically invoke, consider or rely on the powers of the court under section 17 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** (“the **Supreme**

¹ Cap 4.01 of the Revised Laws of Saint Lucia 2021.

Court Act)² which empowers a court to grant ‘all remedies or relief whatsoever to which any of the parties appear to be entitled in respect of every claim properly brought forward by him or her or them respectively in the cause or matter’, in order to determine all matters in controversy between the parties ‘completely and finally’, and to avoid all multiplicity of proceedings. I shall return to section 17 later in this judgment.

The Appeal

[6] In his notice of appeal, the appellant detailed several findings of fact and of law in the judgment which are being challenged on appeal. However, many of those identified are findings and conclusions in the appellant’s favour and against the respondent’s claim and from which there has been no appeal or cross-appeal by the respondent. With that said, this appeal essentially concerns one question, whether the order made by the judge for reimbursement of the cost or value of the improvements to the property was open to him on the respondent’s pleaded case and, if it was, did the learned judge err in making the said order pursuant to Article 372.

[7] In his notice of appeal, the appellant relied on one ground of appeal. This singular ground is premised upon four points or grounds of misdirection, or errors of law allegedly made by the learned judge. This ground is as follows:

“The learned trial judge, having dismissed the respondent’s claim went on to order that the appellant reimburse the respondent for the money expended in making the improvements to the appellant’s house. In doing so the learned trial judge misdirected himself and therefore erred in law because:

- (a) The respondent did not plead and particularise an alternative claim for compensation in accordance with Article 372 of the Civil Code.
- (b) The matter was tried and determined without either party being invited to address the court on the issue of improvements. This is a breach of the rules of natural justice.

² Cap 2.01 of the Revised Laws of Saint Lucia 2021.

(c) These (sic) was a failure on the part of the learned trial judge to make findings regarding whether the respondent's actions were in good faith or in bad faith, and whether the improvements made to the house were necessary before entering the order. The order was therefore entered outside the scope of Article 372 of the Civil Code.

(d) The respondent failed to put before the court below specific details of the estimate of expenditure and works done on the house and the established value of the total renovation works. The entering of the order for payment for the improvements is in effect of (sic) an order to re-open the case and would be a gift given to the respondent of a second chance to prove her case."

[8] As mentioned above, the respondent has not cross-appealed against any of the decisions and orders of the judge dismissing her various claims and causes of action. She seeks simply to oppose the appeal and to have the decision and order for reimbursement of the costs and value of the improvements upheld by this Court.

The Claim

[9] The claim below is set out in the amended Fixed Date Claim Form ("FDCF") and amended statement of claim filed on 11th March 2022. It is the respondent's claim that she had a legal and equitable interest in the 'concrete house' on the property having expended money for carrying out substantial improvements and renovations to the previously existing partially wooden and partially concrete dwelling house thereon owned by the appellant's sister, Fredrica Henry, now deceased. The said building works and renovations had been carried out by her with the full knowledge and approval of Fredrica Henry, and with the knowledge and concurrence of the appellant. Exhibited to the claim is a copy of a valuation report of the current concrete dwelling-house on the property which out the value at EC\$300,160.00.

[10] The respondent's pleaded case was that at the request of the appellant's sister, Fredrica Henry, she agreed verbally to build her a house on the land, which land at the time belonged to Fredrica. She built the house in good faith and lived in it with her (the respondent's) children continuously for about 30 years, during which time she cared for Fredrica and tended to her personal affairs.

- [11] The respondent also brought ancillary claims for breach of trust against the appellant for 'not providing an account for unjust enrichment' of the sum of EC\$26,000.00 which she pleaded had been provided by her to and received by the appellant to be used in the construction of the concrete house on the property. She asserted that the Deed of Donation by which the property upon which the concrete house was constructed was transferred to the appellant was wrongfully and fraudulently obtained by the appellant from his sister Fredrica Hennry, a matter which she only discovered in February 2020 following a search at the Land Registry. However, her attempts through lawyers to have the Deed of Donation revoked were unsuccessful. She also claimed that she had acted to her detriment by her reliance on the expectation that the property would become hers 'based on the representation made by Fredrica Henry'. She also pleaded that the appellant's acquisition of title to the property was subject to her interest in the concrete house of which he (the appellant) was aware.
- [12] It was the respondent's pleaded case that the appellant was estopped from denying that the house was constructed by her in reliance on the agreement between Fredrica Henry and herself, of which the appellant was fully aware, and pursuant to which agreement she had engaged a contractor and built the concrete house (in replacement of the uninhabitable wooden house previously on the land). Accordingly, it would be unjust to allow the appellant to deny the agreement made between the appellant and his sister Fredrica Henry.
- [13] The respondent's pleaded case was also that in February 2015, after the transfer of title in the property from Fredrica Henry to the appellant, the latter contacted her and advised her that she could commence building the concrete house on the property.³ This resulted in the respondent handing over to the appellant an initial sum of EC\$26,000.00 to pay the contractor. In this respect, the respondent pleaded that the appellant owed her both fiduciary and common law duties; had failed to account to her for the ES\$26,000.00; and had failed to protect the respondent's interest in

³ Amended Statement of Claim filed 11th March 2022 at paragraph 17.

the property. Accordingly, the respondent pleaded her case in deceit, fraudulent and/or negligent misrepresentation and/or breach of fiduciary or common law duty causing her to sustain loss 'in that she [is] no longer the owner of the property'.⁴

[14] The respondent sought the following reliefs:

- (1) a declaration that she is the legal and equitable owner of the concrete house erected on the property;
- (2) an order that the appellant acted fraudulently in obtaining title to the property upon which the concrete house is erected;
- (3) an order declaring that the appellant holds the concrete house on trust for the respondent;
- (4) the appellant be estopped from denying the existence of the agreement between his sister and the respondent;
- (5) further, damages for breach of trust equivalent to the current value of the property;
- (6) further and alternative to (5) that the appellant do transfer by Deed the property to the respondent;
- (7) further to (5) and alternative to (6) restitution on a constructive trust on the building costs;
- (8) an account and/or restitution of the balance of the EC\$26,000.00 given to the appellant by the respondent for payment to the contractor;
- (9) alternatively, such other amount and relief as the court thinks fit to satisfy the respondent's equitable interest;
- (10) further or other relief as the court deems fit and just;

⁴ Ibid at paragraph 23.

(11) further and other costs as the court deems just.

The Defence

- [15] In his defence to the claim, filed on 22nd March 2022, the appellant, inter alia, pleaded that it was his sister Fredrica Henry, who was residing in the house at the relevant time, and who 'permitted the respondent to do the renovations to the house' on the property. The house was always a 'family house' where he and his siblings grew up before they each went their separate ways living elsewhere, leaving Fredrica as the sole sibling living there.⁵ However, it had been agreed amongst the siblings and their mother that the house should be given to Fredrica. The appellant denied the alleged verbal agreement between his sister Fredrica and the respondent to the effect that the house would be transferred to the respondent.
- [16] Specifically regarding the improvements to the house, the appellant pleaded in his defence that the house consisted of a wooden and concrete structure, and it is the respondent who 'volunteered to replace the wooden part of the structure to make the house more comfortable when she is visiting'.⁶ Furthermore, the assertion that the respondent built an entirely new structure was false, as the kitchen, bathroom and one bedroom were not renovated. It was also pleaded by the appellant that it was the respondent who, without the permission of Fredrica Henry or himself, broke down parts of the existing house with a view to renovating those parts. It was also pleaded that to the extent that the respondent voluntarily renovated parts of the existing house on the property, she 'made a gift to the said Fredrica Henry' and did not thereby acquire any ownership interest in the house or the property.
- [17] Regarding the Deed of Donation, the appellant pleaded that it was Fredrica Henry's decision to transfer title to the property to him, and she did so voluntarily in January 2015, therefore any allegation of fraud is unfounded.⁷

⁵ Defence filed on 22nd March 2022 at paragraph 4.

⁶ Ibid at paragraph 7.

⁷ Defence filed on 22nd March 2022 at paragraph 9.

[18] With regard to the respondent's pleaded case concerning the handing over of the sum of EC\$26,000.00 to the appellant for payment to the building contractor, the appellant pleaded that the respondent attended his home on 20th January 2017 with a carpenter for the purpose of making a payment of that sum to the carpenter. A note of this was made by the appellant in his notebook, and the carpenter signed acknowledging receipt of the said sum. Accordingly, the appellant denied the claim and pleaded that it ought to be dismissed with costs.

The judgment below

[19] In the judgment, the learned judge dismissed the respondent's claims in fraud, breach of trust, for revocation of the Deed of Donation, and for an equitable interest in the property including equitable estoppel.⁸ In essence the learned judge dismissed all claims and causes of action pleaded and relied on by the respondent in support of her claim.

[20] In doing so, the learned judge made certain key findings and reached certain important conclusions. He found that, based on the evidence, the title to the property had already passed to the appellant prior to the respondent commencing any improvements to the then existing house on the property. Accordingly, even if there was evidence of some assumption or expectation by the respondent created by Fredrica Henry in respect of the house or the future ownership of it, 'the [respondent's] claim would still fail because the deceased [Fredrica Henry] no longer had title to the house. The expectation or assumption could not have been lawfully satisfied by the deceased'.⁹ This finding has not been appealed by the respondent.

[21] The judge found that the respondent's pleaded assertion that the Deed of Donation did not expressly include the house on the property was wrong since the said Deed

⁸ SLUHCV2021/0380 Marie Ketra Albert v Frederick Henry (delivered 9th May 2023, unreported) at paragraph 83(1) and (2).

⁹ Ibid at paragraph 36.

specifically mentioned that the transfer of title included the dwelling-house erected thereon.¹⁰

- [22] The judge also did not accept the respondent's case based on an equitable or other legal interest in the house or the property, or on the doctrine of equitable estoppel. He found at paragraph [38]:

“... it does not appear from the evidence that the [respondent] has established the existence of an expectation or assumption of which the [appellant] had knowledge that she held which encouraged or induced her to act to her detriment and thereby resulting in her acquisition of an interest equitable or otherwise in the house which the [appellant] was estopped from denying.”

- [23] Specifically regarding the improvements to the house on the property, the learned judge found that the respondent had undertaken these improvements ‘gratuitously’ and had enjoyed the right of occupancy of the house as a bare licensee which license was terminable upon the death of Fredrica Henry.¹¹ The judge also accepted that in carrying out the improvements to the house, the respondent had ‘*done more than she was permitted to do*’. The judge also found that ‘*in large measure*’ the actual improvement carried out by the respondent exceeded what had been agreed. Accordingly, he found that it would be ‘*inappropriate in the circumstances*’ for the respondent to be compensated for the full extent of her improvements, since ‘*one who voluntarily improves another’s land without encouragement or promise of reward does so entirely at their own risk*’.¹² Again, the respondent has not appealed any of these findings and conclusions of law.

- [24] Furthermore, the judge concluded that there was an absence of any promise or inducement made to the respondent that she would have acquired an interest in the property ‘by virtue of undertaking the improvements to the house’; and that she had acted to her detriment ‘to the extent that she caused an entirely new structure to be

¹⁰ SLUHCv2021/0380 – Marie Ketra Albert v Frederick Henry (delivered 9th May 2023, unreported) at paragraph 37.

¹¹ Ibid at paragraph 39.

¹² Ibid at paragraph 40.

erected' on the property. This finding is consistent with the judge's earlier finding that the respondent had, in carrying out the improvements to the house, in large measure exceeded what had been agreed with the deceased, Fredrica Henry. This finding is also supported by the evidence of the building contractor, Mr. Michael Henry, who (as the judge noted) testified that he had been engaged by the respondent to demolish the existing house (of wood and concrete sections) and to replace it with a new concrete structure, which he described not as a renovation but building a new house. In doing so, he (Mr. M. Henry) merged the new concrete structure with the existing concrete bathroom located at the back of the house.¹³

[25] The judge also found that there was no agreement to reimburse the respondent for her expenses incurred in effecting the improvements to the house. Importantly, the learned judge also concluded that there was no evidence that the appellant had been 'aware of, encouraged or otherwise acquiesced in the [respondent] carrying out any improvements other than... minor renovations. Therefore, the [respondent] cannot seek to enforce any equitable rights in respect of these improvements.'¹⁴ (Underline mine). This finding has also not been challenged on appeal.

[26] Thus, the principal finding as to the extent of the improvements with respect to which any question of reimbursement of expenditure by the respondent could arise for consideration, was that they were 'minor renovations'. What 'minor renovations' actually entailed was not spelt out or otherwise identified or particularised by the learned judge in the judgment. Yet the order made, against which the appellant has appealed, is for the respondent to be reimbursed or compensated by the appellant with respect to the sums expended in making '*the improvements*' to the house on the property and, in the view of the learned judge, the respondent being compensation for the 'value of the improvements', a concept different from the actual cost of improvements.

¹³ SLUHCv2021/0380 – Marie Ketra Albert v Frederick Henry (delivered 9th May 2023, unreported) at paragraph 43.

¹⁴ Ibid at paragraph 45.

[27] The learned judge considered the principles upon which the respondent could recover her expenditure on improvements to the house on the property, short of any legal or equitable interest therein. At paragraphs [51] and [52] of the judgment, the learned judge reasoned:

“[51] Having assessed the evidence in the round, the court has concluded that it would be inconceivable for the [respondent] to have commenced and undertaken what was in effect major repairs and extensive renovation to a building that belonged to a third party of her own volition and without any promise or assurance of having some interest or benefit therein.

[52] Notwithstanding the conflicting evidence and pleadings with respect to who gave the assurance it seems safe to conclude from the evidence that there had been some discussion between the [respondent], the deceased [Fredrica Henry] and the [appellant] regarding the improvements to the preexisting building on the property.”

[28] And at paragraph [53]:

“[53] However, in the court’s view, the [appellant] had by his own admission, and in the court’s estimation done very little, if anything significant and definitive, to compel the [respondent] to cease carrying on the works to the extent to which she did. In fact, the [appellant] lived on the lot adjoining the property. In the court’s view, this fact by itself ought to have made the [appellant] aware of the extent of the works being carried out on the building. In the court’s view, the [appellant] has failed to show demonstrably that he did everything that was necessary and expedient to stop the [respondent] from carrying on the extensive improvements to the property.”

[29] Also, at paragraph [54], the learned judge found it inconceivable that the appellant would be in a position to deny the existence of any assurance given to the respondent and that it would be reasonable to infer from his conduct that he was aware of such assurances. This notwithstanding the appellant acquired title to the property thereafter and permitted the respondent to effect and to carry out substantial improvements to the house on the property. Therefore, it was *“reasonable to infer from the conduct of the parties that the respondent must have placed reliance on some assurance given to her that she would have acquired some*

interest in the property if not the building erected thereon upon which she acted to her detriment.”¹⁵

[30] With respect, this reasoning and conclusion inferred by the learned judge is in direct conflict with his earlier reasoning and conclusion that the evidence did not disclose that the respondent had been given the assurance by the deceased, Fredrica Henry, that by expending her own money to effect the improvements to the house she would have acquired some legal or equitable interest in the property. It also runs contrary to the judge’s finding that, to a large extent, the improvement made by the respondent to the house, exceeded what had been agreed with the deceased, Fredrica Henry, and/or the appellant, and, further, that the improvements were done gratuitously, for which she cannot be compensated.

[31] This line of reasoning led the learned judge to conclude at paragraph [56]:

“[56] In the premises, it seems fair to conclude that the [respondent] acquired an equitable interest in the property. Accordingly, it is undeniable that an equity has arisen in the [respondent’s] favour under the doctrine of proprietary estoppel in respect of the property.”

[32] Again, and respectfully, this conclusion runs contrary to the ultimate finding by the learned judge at paragraph [58] and the order at paragraph [83] dismissing the respondent’s claim based on some equitable interest in the property, including on equitable estoppel.

[33] At paragraph [58], the learned judge posits two ‘dilemmas’ in relation to his foregoing reasoning and findings. The first is that any inducement or promise made to the respondent was made by the deceased, Fredrica Henry, and not the appellant who was by then the owner of the property. This, in the judge’s opinion, led to the conclusion that ‘any claim that the [respondent] intended to pursue in equity ought to have been against the estate of the deceased’, and not against the appellant. The

¹⁵ SLUHCV2021/0380 Marie Ketra Albert v Frederick Henry (delivered 9th May 2023, unreported) at paragraph 55.

second dilemma is that title to the property had already passed to the appellant prior to the respondent having acted to her detriment by effecting the improvements to the property. Accordingly, the learned judge opined:

“In the court’s view, the [respondent] was unable to establish or set up any equity against the [appellant]. Unfortunately, it is on the forgoing basis that the court is inclined to find that no proprietary estoppel has been established in favour of the [respondent] in the property or as against the [appellant].”

- [34] Having dismissed the respondent’s claims to an equitable interest in the property and to proprietary estoppel, the learned judge went on to consider ‘in the event that the court is incorrect in its analysis of the facts and application of the law’, Article 372 of the **Civil Code**. At paragraph [59] he states:

“[59] If in the event that the court is incorrect in its analysis of the facts and application of law in this regard, then it may be worthwhile to consider the provisions of Article 372 of the Civil Code. In which case, the court would [be] incapable of finding that any equity had arisen in favour of the claimant [the respondent].”

- [35] The learned judge set out Article 372 in full. He went on to consider and analyse the decision of this Court in **Lansiquot v Leon**,¹⁶ where it was found that pursuant to Article 372 it was fair to order the property owner to keep the improvements made thereto, as they were of a substantial nature and could not be removed without causing deterioration to the land. Accordingly, the Court held that the respondent should be paid for the improvements at their actual value as determined by an assessor appointed by agreement or by the court.

- [36] Notwithstanding that the judge recognised and was cognisant that the respondent had not pleaded ‘any matter as it relates to the provisions of Article 372’, he went on to find at paragraph [62] that it would be:

“... unconscionable and manifestly unjust for the [respondent] not to recover the sums expended on effecting the improvements. Additionally, although not pleaded with any specificity, the evidence in the case disclosed the existence of a [sic] state of facts akin to that contemplated by the provisions of the said Article 372. In the circumstances, it is the court’s considered view that the claimant ought to be compensated.”

¹⁶ SLUHCVP2005/0029 Nicholas Lansiquot v Ignatius Leon et al (delivered 2nd July 2007, unreported).

[37] In doing so, the learned judge did not analyse the provisions of Article 372 or the requirements of good faith and necessity for its application leading to an award of compensation for the cost of the improvements to the subject property. The learned judge simply ordered that the respondent be reimbursed for the sums expended in making the improvements to the house, and that the appropriate relief would be that 'the value of the improvements to the property be assessed by a quantity surveyor agreed by the parties', and for the appellant to pay the assessed sum to the respondent.¹⁷

[38] I now turn to consider the sole ground of appeal - that the learned judge erred in going on to order the appellant to reimburse the respondent for the cost or value of the improvements to the house on the property. In doing so, I will consider the merits of each of the four errors of law relied on by the appellant in its notice of appeal.

Did the judge err or commit a miscarriage of justice in making the reimbursement order for improvements to the house on the property?

Appellant's Submissions

[39] The appellant argued that the learned judge having correctly rejected or dismissed the respondent's claim in equity, improperly and incorrectly resorted to the law of improvements in Saint Lucia based on Article 372 of the **Civil Code**. In doing so, the learned judge fell into grave error. The appellant contends that firstly Article 372 was not pleaded by the respondent, as acknowledged by the learned judge at paragraph [62] of the judgment. Secondly, the appellant was not given an opportunity to address the court on Article 372 resulting in a grave breach of the rules of natural justice. In this regard, the appellant submits that a trial judge is not entitled to decide a case on a ground not canvassed before him by either party to the proceedings nor put to the party affected by it either in evidence or in cross-examination.

¹⁷ SLUHCv2021/0380 Marie Ketra Albert v Frederick Henry (delivered 9th May 2023, unreported) at paragraphs 62 and 63.

- [40] Another central plank to the appellant's appeal is that, in any event, the learned trial judge failed to address his mind to and to make findings regarding whether the respondent's actions in carrying out the improvements to the house on the property, were done in 'good faith' and whether the improvements were necessary, both of which are threshold requirements under Article 372. The appellant also submits, that in doing so, the order for reimbursement of the cost of the improvements to the house on the property, was made by the learned judge outside the scope of Article 372 and therefore cannot stand. The appellant accepts, however, that, pursuant to Article 2066 of the **Civil Code**, good faith is always to be presumed.
- [41] On the issue of proof of good faith, the appellant points to the respondent's pleaded case that she did the renovations/improvements on the basis that her aunt, Fredrica Henry, was going to leave the property to her, as evidence of bad faith. The learned judge found that the aunt, Fredrica, had made no such express verbal promise, as is evidenced by the fact that she transferred or donated the property to the appellant by virtue of the Deed of Donation. Thus, reasons the appellant, no such express promise having been made by Fredrica, the improvements carried out by the respondent were not done voluntarily but done with an expectation, unsupported by any actual promise or assurance. This argues the appellant, is evidence of bad faith, which evidence the learned judge ought to have considered and assessed had he embarked upon a proper consideration of the provisions of Article 372, which he failed to do.
- [42] It is also the case for the appellant that upon a proper assessment of the respondent's pleaded case and the evidence given at trial, in particular, the admission by the respondent in cross-examination (at page 43 lines 13-20 of the transcript) that her aunt, Fredrica Henry, had made no promise to her regarding the house, is also evidence of bad faith which the learned judge failed likewise to consider and to assess.

- [43] Moreover, contends the appellant, the learned judge erred when he made an order pursuant to Article 372, without also determining the issue of whether the improvements were necessary, there being no evidence of this before the court below.¹⁸
- [44] The appellant also submits that, in any event, the respondent did not put before the court below specific details or evidence of the expenditure on the improvements to the house nor the value of such improvements or renovation works. This is indisputable. It is further submitted that the effect of the order made by the learned judge is to re-open the case and is a gift of a second chance for the respondent to prove its case. Moreover, the respondent made a failed attempt to put before the court below a valuation of the entire property done by Desmond Auguste and Associates, having not complied with the requirement of CPR Part 32 relating to expert evidence. No valuation specific to the renovation works was done or tendered into evidence by the respondent. This point must be taken, submits the appellant, in circumstances where there was no order directing a bifurcated trial and both parties were required to put before the court all the evidence which it intended to rely on to prove its case.¹⁹
- [45] It is also submitted by the appellant that the learned judge's assessment of the evidence in relation to the improvements was plainly wrong and ought to be set aside.²⁰
- [46] During the course of the hearing, the Court drew the attention of counsel for both parties to the provisions of section 17 of the **Supreme Court Act** dealing with the jurisdiction and powers of the High Court and Court of Appeal to grant remedies in every cause or matter pending before the Court. In particular, the power to 'grant and shall grant, either absolutely or upon such terms and conditions as the High

¹⁸ Appellant's Skeleton Arguments filed on 26th January 2024 at paragraph 2.5.

¹⁹ Emmanuel Rock v Theresa Jolly Civil Appeal No.10 of 2006 (delivered 17th May 2007, unreported).

²⁰ Ming Siu Hung and others v J.F. Ming Incorporated and another [2021] UKPC 1.

Court or Court of Appeal may think just, all the remedies or relief whatsoever to which any of the parties appear to be entitled in respect of any and every claim properly brought forward by him or her or them respectively in the cause or matter; so that, as far as possible, all matters in controversy between those parties respectively may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided.'

[47] Mr. Fraser's, learned counsel for the appellant, submissions regarding the powers of the High Court under section 17, of the **Supreme Court Act** may be summarised as follows:

(1) the issue of compensation for or reimbursement of the cost of improvements was not a matter pleaded and was not in controversy at the trial, such that it could or ought to have been cross-examined on and addressed by the appellant;

(2) under the laws of Saint Lucia, the matter of improvements to property must be dealt with and resolved under Article 372, which exists for the very purpose;

(3) the judge pegged his order for reimbursement of the cost of the improvements on Article 372, which unquestionably (and as conceded by learned counsel for the respondent) was never pleaded and not relied on by the respondent in his closing address to the court below at the conclusion of the trial;

(4) in any event, the learned judge did not address his mind to either the element of 'good faith' or necessity' required for the operation of Article 372 nor did he analyse the evidence in relation to either of these requirements, leading to the there being no proper finding based upon Article 372 warranting the making of the order for reimbursement;

(5) the only attempt to put before the court below some evidence of valuation was ruled inadmissible as it did not comply with CPR Part 32 and, in any event, that was a valuation of the entire property and not of the improvements; and

(6) there was no evidence of the cost or expenditure of the respondent on the improvements before the trial court and there was no basis upon which the judge could properly assess which were improvements made by the respondent with the agreement of either Fredrica Henry or the appellant, such as to inform an order requiring such improvements to be valued by a quantity surveyor agreed to by the parties or, absent their agreement, as selected by the court below.

- [48] In Mr. Fraser's submission, the Court ought to allow the appeal; set aside the orders made by the learned judge for the appellant to reimburse the respondent the cost of the improvements made to the house by the respondent and for the value of those improvements to be assessed by a quantity surveyor agreed by the parties or absent their agreement, by the court; and order the respondent to pay the appellant's costs in the court below and in the appeal.

Respondent's Submissions

- [49] In response to the primary ground of appeal the respondent, while conceding that Article 372 had not been pleaded or relied upon by the respondent in her claim and closing submissions at the conclusion of the trial, submitted that although the court below did dismiss several of its claims, it did not dismiss them all. In particular, the judge did not dismiss the respondent's claim for restitution on a constructive trust on the building costs; and for such other amount as the court thinks fit to satisfy the claimant's equitable interest. The respondent relies on the findings of the learned judge at paragraph [62] of the judgment (set out at paragraph [36] above) that it would be 'unconscionable and manifestly unjust for the claimant not to recover the sums expended on effecting the improvements'; and 'the case disclosed the existence of a state of facts akin to that contemplated by the provisions of the said Article 372'.
- [50] It is also submitted by the respondent that the respondent's claim for restitution (at relief number 7) permitted the court below to consider the provisions of Article 372 and whether the respondent had satisfied the requirements of good faith and necessity warranting an order that she be reimbursed the cost or value of the improvements which she had, undoubtedly, made to the house on the property. As to the requirement of 'necessity', the respondent argues that this limb of Article 372 was clearly made out on the evidence before the court. This evidence discloses that the old house on the property was in a dilapidated condition and the respondent proceeded with what in essence was the reconstruction of a new concrete house thereon for the benefit of the deceased, Fredrica Henry, and the respondent and

her children who, as her case goes, lived there for over 30 years. Moreover, the reconstruction of the concrete house was carried out by her with the full knowledge of the deceased, Fredrica Henry, and the appellant, whom, by virtue of becoming the new owner of the property, now benefits from the money which she, the respondent, expended on those improvements, including the enhanced value of the property.

[51] The respondent also submits that in making the findings at paragraph [62], the learned judge must also have concluded that there was no evidence of bad faith against the respondent who would, in turn, benefit from the relief under Article 372. Moreover, by virtue of Article 2066 'good faith' is always to be presumed, and it is for he who alleges bad faith to so prove. This, the respondent submits, was for the appellant to prove and he has failed to do so.

[52] Moreover, the respondent argues, the evidence given by the appellant's son, Cameron Henry, of his father telling him of a meeting between Fredrica Henry, the appellant, and the respondent concerning the renovation works (dealt with by the judge at paragraph [52]), is evidence that the respondent acted in good faith in carrying out the renovations. I would merely comment that this seems to have been hearsay evidence which ought not to have been admitted at the trial.

[53] The respondent also cited the decision of the Quebec court in **Gagnon v Loubliere**²¹ concerning article 412 (equivalent of Article 372) of The Quebec Civil Code, as making it clear that "an individual's right to compensation under this article is dependent on his good faith which consists in his belief that he is really the possessor". While this point or argument was not further advanced by learned counsel for the respondent in his oral presentation before this Court, I will say, respectfully, that it is unclear at best how this principle is being said to apply in relation to the property in the instant case, title to which was never in the name of the respondent and her case at its highest is that the appellant's sister Fredrica

²¹ [1925] SCR 334.

Henry (deceased) had assured her or promised her that the house on the property would be hers, the evidence of which promise or assurance the learned judge did not accept.

[54] The respondent also submits that in making the findings at paragraph [62] the learned judge “acted in the fairest manner and within the rules of natural justice by ordering an independent surveyor to assess the value of the improvements.”²² Indeed, the respondent submits that the judge had the power and it was within his discretion in rendering judgment to make an order for quantum of the sums expended on or the value of the improvements made by the respondent to the house on the property to be assessed by a quantity surveyor.

[55] Regarding the court’s powers under section 17 of the **Supreme Court Act**, Mr. Joseph, learned counsel for the respondent submitted that while Article 372 was not specifically pleaded or relied on by the respondent in the court below, it was open to the learned judge on the evidence and on his findings, in particular, at paragraph [62] of the judgment, to make the order which he did for the appellant to reimburse the respondent for the cost or value of the improvements. There was ample evidence for the judge to do so. Moreover, he had the jurisdiction and power to embark upon a consideration of this issue and to make the order under section 17 as a remedy which, on the evidence, the respondent appeared to be entitled to in respect of her claim and as the justice of the case required.

Analysis and Conclusion

(1) Article 372 not pleaded or relied on – breach of natural justice

[56] It is common ground between the parties that the respondent did not in her claim below plead nor did she rely on Article 372 of the **Civil Code**. Indeed, there was no mention of Article 372 in relation to the resolution of the issue of improvements to the property in the pleading or in the closing submissions. Also, and importantly, the respondent did not plead in her Amended Statement of Claim that the improvements

²² Respondent’s skeleton argument filed on 23rd February 2024 at paragraph 2.8.

which she carried out to the property had been made in 'good faith', albeit, pursuant to Article 2066, good faith is always to be presumed. Likewise, there was no pleaded case that the said improvements were necessary. These are the key elements which must be pleaded in order to found any remedy, primary or alternative, for an order of compensation or reimbursement under Article 372.

[57] In my judgment, the respondent's reliance on reliefs number (7) and (9) of the FDCF does not avail her in answer to this ground of appeal. Relief (7) is for a restitution order based on constructive trust. The respondent's claim based on a constructive trust is a claim in the alternative that the appellant 'holds the property' on trust for her. This cause of action was not upheld by the learned judge and, as such, cannot be the basis upon which an order for reimbursement of the cost of improvements can be made under Article 372. Further, relief (9) is for an amount or sum which in the court's determination would satisfy 'the claimant's equitable interest'. The learned judge dismissed all equitable claims, including equitable estoppel and, specifically, any claim that the respondent had any equitable interest in the property or in the house on the property; the house being immovable property is by definition 'land' under the Land Registration Act.

[58] In the face of no pleaded case for reimbursement of the cost of improvements whether under Article 372 or otherwise, was it open to the judge below to embark upon a consideration of Article 372 having at paragraph [62] expressly recognised that the respondent had not specifically pleaded any matter relating to the provisions of Article 372? Furthermore, was it open to the judge to do so without first inviting further submissions from the parties on the issue of compensation for the improvements and on the application of Article 372 and the elements of 'good faith' and 'necessity' to the evidence or to the facts of the case as found by him?

[59] In my considered view, the learned judge committed a serious error of law and principle when he embarked upon a consideration of Article 372 in the context of the pleadings and this case, and in making an order pursuant to the provisions of

Article 372 without, at minimum, first inviting written submissions on this issue from the parties. In doing so and in making the order, the learned judge committed a serious breach of the rules of natural justice and to a fair trial. A consideration of Article 372 and its application to the pleaded case for the respondent and to the facts and evidence before the court below, was as central and as fundamental as it could be to the decision reached by the learned judge and the making of the order for reimbursement of the cost of the improvements. These matters go to the case which the appellant as defendant had to meet and to the matters and issues which would inform his counsel's cross-examination of the respondent (as claimant) and her witnesses.

[60] In relation to this latter point which goes to the fairness of the trial, the appellant relied on the decision of the Privy Council in **Chen v Ng**,²³ at paragraphs 51,52,53 and 57. At paragraph 57, the Board, having treated with the general rule that a court ought not to decide a case on the basis of relevant evidence not put to a witness in cross examination, especially where that issue is central to the proceedings, held that 'it would not be fair to let the rejection of Mr. Ng's evidence stand, given that the two grounds upon which the Judge reached his decision were not put to Mr. Ng'.

[61] The decision of this Court in **George W. Bennett Bryson's and Co Ltd trading as Bryson Shipping v. George Purcell trading as Hortico Landscaping and Nursery**²⁴ is also important to how the issue of fairness ought to be viewed by an appellate court. This case dealt with the fundamental rule that fairness dictates that a party is bound by their pleadings or by their pleaded case, and the court, in the proper discharge of its duty to decide cases, is bound to do so based on the pleaded case, that is to say, the pleaded causes of action. In that case the critical issue, as identified by the Court of Appeal in its judgment, was 'whether the trial judge erred in grounding his decision in breach of contract when Mr. Purcell did not plead breach of contract as a cause of action, neither did he pursue that in his claim'. This was a

²³ [2017] UKPC 27.

²⁴ ANUHCVP2011/0033 (delivered 28th February 2018, unreported).

case in which it was clear that the issue on which the parties were joined was that of bailment, not breach of contract.²⁵ The Court in its decision emphasised the importance of pleadings in framing and setting out in concise terms the case which the opposing party to the proceedings has to meet. It stressed the fundamental principle that a party is bound by his pleadings unless he is permitted or allowed to amend them. The ‘function of pleadings is to give fair notice of the case which has to be met’, and it is the duty of the court to decide the case based on the pleadings.

[62] In **Bryson Shipping**, this Court held that it was ‘fundamentally unfair to Bryson’s Shipping for the learned trial judge to find in favour of Mr. Purcell on the basis of a breach of contract without that cause of action having been specifically pleaded, as it deprived the parties of the opportunity to make their case on that issue.’²⁶ This failure was referred to in the judgment as ‘a grave error’ on the part of the trial judge resulting in a miscarriage of justice.²⁷ In allowing the appeal, this Court held:

“[40] In our opinion, the learned judge overstepped his mandate in crafting and ruling on an issue not pleaded by Mr. Purcell nor addressed by the parties, namely breach of contract, and using it as a basis upon which to grant Mr. Purcell’s claim, thereby essentially assisting him in an impermissible manner. The learned trial judge, no matter how well-intentioned, went beyond the grounds raised by Mr. Purcell and responded to by Bryson’s Shipping and thereby determined the claim based on matters that were not properly before him.”

[63] In my judgment, this fundamental rule and principle applies with equal force in the instant matter and the learned judge, however well-intended, assisted the respondent in an impermissible manner when he embarked upon a consideration of Article 372 and made the order for reimbursement of the costs of the improvements in favour of the respondent. I have reached this conclusion notwithstanding the wide jurisdiction and powers granted to the High Court by section 17 of the **Supreme Court Act** to essentially grant and to fashion such remedy as a party appears to be entitled to in respect of their claim, so as to completely and finally determine all

²⁵ ANUHCVP2011/0033 (delivered 28th February 2018, unreported) at paragraph 29.

²⁶ Ibid at paragraph 33.

²⁷ Ibid at paragraph 34.

matters in controversy between the claimant and the defendant to those proceedings.

[64] In the instant matter, the respondent made no claim pursuant to Article 372 regarding the improvements. Indeed, the main thrust of the respondent's claim was that she was entitled to ownership of the property or alternatively she had an equitable proprietary interest therein, subject to which equitable interest, the appellant took title to the property by virtue of the Deed of Donation. All these claims and causes of action were dismissed by the court below and the respondent has not appealed against any of these orders. There was therefore no basis, in my opinion, for the court below to invoke the court's undoubted jurisdiction and powers under section 17 of the **Supreme Court Act**. This the learned judge did not do, and he made no reference whatsoever to the court's jurisdiction and powers under section 17.

[65] Furthermore, even where it is permissible for a court to resort to those powers, they must be exercised in a manner which is fair to both parties to the litigation and in full observance of the foundational principles of natural justice and due process which underpin our system of justice. As mentioned above, the learned judge did not invite submissions from the parties on what was essentially a new issue not canvassed before him during the trial and in relation to which he did not have the benefit of assistance from counsel for the parties. Having identified that issue whilst preparing his judgment, it behooved the learned judge to invite submissions on it by counsel before reaching a conclusion on it, and one which was adverse to the appellant. In failing to do so, the learned judge decided the case on an issue which was not pleaded or relied on by the respondent, leading to a miscarriage of justice for which the only remedy is to allow the appeal and discharge the order made.

[66] This conclusion is dispositive of the appeal. However, for completeness I will go on to consider the other bases upon which the appellant contends that the order ought to be set aside.

(2) The failure to consider and to make findings of good faith and necessity

- [67] Article 372 of the **Civil Code** was considered by this Court in **George St. Ville v Editon Francis**.²⁸ In that case, Lewis CJ, opined on the meaning and import of 'good faith' and of the term 'necessary'. He opined that 'there can be little doubt if land is cleared, and valuable economic crops planted thereon this would be a way to augment the value of the land' making them 'improvements'. In the instant matter, there can be no doubt that the substantial renovations carried out by the respondent to the house on the property, essentially replacing a predominantly wooden and dilapidated structure with a concrete structure, qualifies as improvements to the property. The critical question, however, is whether the learned judge assessed the evidence and determined whether these improvements were carried out by the respondent in 'good faith' or in bad faith, and whether they were necessary. These are crucial issues for assessment and determination by a court when applying or seeking to apply Article 372. They are crucial since, were it to be found that the improvements were made in bad faith or they were not necessary, 'the improvements belong to the owner without indemnification'.²⁹
- [68] Specifically regarding the requirement of 'good faith', it is common ground that 'good faith' is always to be presumed by virtue of Article 2066. Accordingly, there was a presumption of good faith operating in relation to the steps taken by the respondent in carrying out the improvements to the house on the property. This notwithstanding, the appellant submits that he who alleges must prove. In my view, where Article 372 is pleaded and is squarely before the trial court for consideration, the burden falls to the party alleging 'bad faith' to disprove the presumption of good faith rendered by Article 2066. In the instant matter, that would be the appellant.
- [69] From a reading of paragraph [59] of the judgment, it is clear that the learned judge, having already dismissed the causes of action relied on by the respondent in her Amended Statement of Claim, posited that if he was incorrect in his analysis of the

²⁸ Civil Appeal No.13 of 1967 (delivered 16th March 1968, unreported).

²⁹ Ibid per Lewis CJ at page 4.

facts and application of the law, it may be worthwhile to consider the provisions of Article 372. Having set out in full the provisions of Article 372, the learned judge did not undertake any analysis of its provisions and, most importantly, did not identify and consider the crucial elements of 'good faith' versus 'bad faith', or of necessity. There was no attempt made to analyse the evidence or the facts as found by him and to apply them to either of these two elements. There was also no mention and no consideration of the provisions of Article 2066 whereby 'good faith' is to be presumed, or any consideration of the burden of proof and whether it had been discharged to the requisite standard in a civil case. Likewise, the learned judge did not consider the requirement of 'necessity' in the context of the evidence before the court and whether this requirement had been satisfied by the respondent such as to engage the provisions of Article 372.

[70] The appellant has in his submissions pointed to certain pieces of the evidence which he argues were indicative of 'bad faith' on the part of the respondent when effecting the improvements to the house on the property, and also to evidence which he submits ought to have been considered and weighed when determining whether the improvements were 'necessary'. However, it is not necessary for the purposes of this appeal, for this Court to consider and weigh such evidence. This was the task for the trial judge, and one which he failed to discharge. Instead, the learned judge simply remarked that it was 'unconscionable and manifestly unjust' for the respondent not to recover the sums expended on effecting the improvements; and that the evidence in the case 'disclosed the existence of a state of affairs **akin to that contemplated** by the provisions of the said Article 372'. (Emphasis mine). The judge did not refer to any specific piece of evidence nor did he seek to define the 'state of affairs' to which he was referring.

[71] In my respectful view, the approach to this issue by the learned judge falls short of the standard required of a court when considering the application of a statutory provision such as Article 372, and in reasoning to a conclusion and making an order affecting the rights of a party to civil litigation. It is also a fundamental principle,

which falls squarely within the conceptual arena of ‘fairness’ for the losing party to be informed and to be made aware of the bases upon which he or she lost or are the subject of an adverse judgment or order. The effect of this failure is that the findings and order for reimbursement of the cost of the improvements cannot stand and must be set aside.

- [72] That the said order cannot stand is further reinforced by the fact that the scope of the order actually made is much wider than the findings of the judge with regard to the agreed upon improvements to the property. Firstly, at paragraph [31] the learned judge found: “It is unclear from the [respondent’s] pleadings and evidence whether the discussion regarding the improvements to the house occurred between the [respondent] and the deceased [Fredrica Henry] or between the [respondent] and the [appellant] or both of them.” At paragraph [36] the learned judge concluded that “title to the property had already passed to the [appellant] prior to the [respondent] commencing any improvements to the house.” And at paragraph [38]:

“Assuming that the [appellant] had in fact given permission to the [respondent] to undertake the improvements, it does not appear from the evidence that the [respondent] has established the existence of an expectation or assumption of which the [appellant] had knowledge that she held which encouraged or induced her to act to her detriment and thereby resulting in her acquisition of an interest equitable or otherwise in the house which the [appellant] was estopped from denying.”

- [73] The learned judge expressly found at paragraph [39] that the respondent had undertaken the improvements ‘gratuitously’. At paragraph [40] he found that the respondent had done more than she was permitted to do by way of improvements to the house. The judge also found at paragraph [40], that it was inappropriate for the respondent to be compensated for the full extent of the improvements to the house on the property; that ‘in large measure the actual improvements carried out by the [respondent] exceeded what had been agreed’; and that ‘one who voluntarily improves another’s land without encouragement or promise of reward does so entirely at their own risk’. Finally, at paragraph [45] the learned judge made the finding that the improvements to the house on the property which the evidence

discloses the appellant had been aware of or encouraged or otherwise acquiesced in the respondent carrying out, were nothing more than 'minor renovations'.

[74] Notwithstanding these findings and conclusions, the learned judge went on to make an order for reimbursement not limited in its scope to specific improvements which the respondent had carried out at her expense as agreed with either the deceased, Fredrica Henry, or the appellant as the then owner of the property, or both, but which is so broad in its language as to encompass, on any reasonable reading, all 'the improvements to the house'. Surely, this cannot be either fair or correct, as a matter of principle. Moreover, the order made is so lacking in particularity and specificity regarding which improvements the respondent actually made, which of those improvements she is to be reimbursed and for which the quantity surveyor is to conduct an assessment of their 'value'. In my judgment, this rendered the order made too wide and so lacking in specificity as to be unfair to the appellant and unworkable and impractical for any sensible and accurate assessment of value by a quantity surveyor. Accordingly, the said order is inaccurate and unworkable to such an extent as to lead to further litigation and the reopening of factual and other issues which should have been dealt with at the trial.

[75] In this respect, the respondent was required and ought to have led evidence at the trial of the actual improvements she carried out to the house on the property and, importantly, the sums which she spent in carrying out the said improvements. This is especially so, if indeed she had pleaded a claim for reimbursement of the cost of improvements under Article 372, whether as a secondary or alternative claim. This she clearly failed to do. It is not generally acceptable for a party who has not led such evidence to be permitted a second bite at the cherry, leading to an unnecessary and costly second round of litigation. This is certainly not in keeping with the overriding objective and is to be roundly condemned.

[76] In reaching this conclusion, I do not accept as being the correct principle, that a judge, having not made an order for bifurcation of a trial, cannot at the end of the

trial and in rendering judgment on liability, make an order consequential on a finding of liability and for the quantum of compensation or reimbursement to be the subject of a second trial limited to that issue only. The inherent power and discretion of the court to do so is illustrated by the case of **Emmanuel Rock v Theresa Jolly**³⁰. In that case an order for further proceedings post-trial, similar though not identical to the order made in the instant matter, was made by the trial judge and upheld by this Court. There the trial judge made a bifurcation order after a trial and judgment, which order permitted the parties to file additional evidence for a separate assessment of special damages. While 'second bites at the cherry' so to speak are clearly to be discouraged in civil litigation where there is no order for bifurcation, the order in that case was upheld by this Court (with further directions for the conduct of the new trial to determine quantum only). The order was upheld on the basis that the defendant had suffered no prejudice in relation to the claimant's claim for special damages since he had been given adequate notice of it; and, further, the defendant could suffer no prejudice from the judge's bifurcation order itself. The judgment of the Court in that case was given by Rawlins JA (as he then was). At paragraph [39] it is stated:

"It could be deduced from the foregoing statements that it is desirable that, where no prior bifurcating order was made, liability and quantum of damages should be determined after one trial and in a single judgment or order. Notwithstanding that it lies within the discretion of a judge, a bifurcating order with directions to the parties to file additional evidence for a separate assessment hearing should very rarely be made at a stage as late in the process as was done in the present case. Such an order should not be made where a party would suffer prejudice thereby."

Disposition

- [77] For the reasons set out above, this appeal ought to be allowed, and the orders made by the learned judge at sub-paragraphs 3 and 4 of paragraph [83] of the judgment in the court below are set aside. The appellant is entitled to his costs in the court below and in the appeal on the general rule that costs follow the cause.

³⁰ Civil Appeal No. 10 of 2006 (delivered 17th May 2007, unreported).

[78] I would therefore make the following orders:

- (1) The appeal is allowed.
- (2) The orders made by the learned judge at sub-paragraphs (3) and (4) of paragraph [83] of the judgment below are set aside.
- (3) The respondent shall pay the appellant's costs of the appeal and in the court below to be assessed by a judge or master if not agreed by the parties within 21 days of the date of delivery of this judgment.

I concur.

Margaret Price Findlay
Justice of Appeal

I concur.

Eddy D. Ventose
Justice of Appeal

By the Court

Deputy Chief Registrar