

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2018/0003

IN THE MATTER of an equitable claim in proprietary estoppel and/or unconscionable bargain and/or a constructive/resulting trust and/or unjust enrichment and/or restitution and for an injunction and a claim in trespass to land and the conversion of personal property, with counterclaim for injunction against trespass, and other relief, concerning plot 14/09/11, once the land of Susanna Gerald Dyett who died in 1990.

BETWEEN

Maureen Dyett

(the sole executrix of the late Mary Chapman)

Claimant

And

Mary Casarin

Defendant

APPEARANCES

Mr Jean Kelsick for the Claimant.

Dr David Dorsett for the Defendant.

2021 JUNE 28
JULY 12, 13
OCTOBER 1
NOVEMBER 22

JUDGMENT

On who owns a concrete house built by one sister on her late mother's land then owned by another sister

- 1 **Morley J:** This case concerns a family on Montserrat who have fallen out across three generations over a modest plot of land.
- a. Mary Chapman and Mary Casarin were sisters, of their mother Susanna Gerald Dyett, with seven siblings (Nathaniel, Charles, James, Sarah, Vilma, Geneve, and Dudley), all nine born in a small family home on plot 14/09/11, measuring 0.83 acres.
 - b. Chapman died on 30.03.17 and her executrix from 02.08.17 is her daughter Maureen Dyett, acting on behalf of her siblings Gwenneth, Clifford and Sandra, all being Chapman's children, while Casarin is their aunt¹.
 - c. After Susanna's death in 1990, intestate, Casarin applied for sole title to the property, which had been formally unclaimed by Susanna, supported by Geneve, it is argued unknown to the other siblings including Chapman, both saying by affidavits dated 25.07.90 Susanna had gifted Casarin the land in 1978, title being granted by the Land Registry to Casarin on 10.04.91.
 - d. Chapman had had a home in Parsons, which she had to abandon in 1997 owing to volcanic activity, and Casarin gave her permission to build on what had been their mother's land, by then owned by her.
 - e. With financial aid from the Government of Montserrat (GOM), to combat the eruption disruption, on 14/09/11 from 1997 Casarin built a concrete home, so too did her cousin Charles Daly who

¹ The parties will be referred to for ease of reading by first names or surnames to avoid name confusion, noting for example there are two Marys and two Charles, and no disrespect is intended by not writing out full titles, names, married names, and whether claimant or defendant.

had abandoned a home in Cork Hill, and so too did Chapman, being a generic 2-bed build promoted by GOM, later bequeathing her home to her children in her Will of 09.05.11. However, Casarin says she only gave Chapman permission for a temporary structure, so that a dispute has followed Chapman to her grave, now taken up by her daughter Maureen, as to who owns the house Chapman built, on the land officially owned by Casarin, but which had once belonged to their shared mother and on which they were both born.

- 2 Various forms of relief are claimed, which in simplest terms amount to Maureen saying it is unconscionable for Casarin to own Chapman's home and all of the family land at 14/09/11, hinting her application for sole title in 1990 so quickly after Susanna's death was dishonest, unannounced to her siblings, with Casarin buying off Geneve's support with a 100 year lease granted in 1999 to live in the old family home on 14/09/11. More particularly, in this action Maureen has argued whatever the rights or wrong of Casarin having sole title granted in 1991, she knew in 1997 Chapman was building a permanent home, at considerable expense, by valuation on 19.05.17 as a building worth \$230000ec, and Casarin should be estopped from owning it as it would be inequitable in all the circumstances.

The history of proceedings

- 3 Before looking deeper into the facts, the proceedings concerning plot 14/09/11 have been complicated by two previous suits and an oddity in the instant suit.
 - a. After Chapman began building in 1997, by 2001 the sisters had fallen out, police had been called to one fracas, and on 27.04.01 Casarin launched action against Chapman in essence for quiet enjoyment, being case MNIHCV2001/0010, which then led on 14.05.01 to legal proceedings concerning ownership of the land being launched against Casarin by Chapman, supported by brother Dudley, being case MNIHCV2001/0013, Chapman and Dudley becoming executors to Susanna's estate on 19.07.01. The argument in the latter suit was Casarin's sole title of 1991 should be set aside for fraud or mistake under **s140 Registered Land Act** Cap 8.01. A trial ended on 20.05.06 before Liegertwood-Octave J, who issued a judgment more than three years later on 29.04.09, confirming Casarin's acquisition of title, and awarding \$14000ec in costs to be

paid by Chapman toward Casarin's then advocates, Sylvester Carrott and Owen Roach. Appeal was lodged but withdrawn and no costs were paid, which thereafter remained outstanding.

- b. Moreover, using Counsel Dorsett, from 2014 Casarin then sued her cousin Daly as case MNIHCV2014/0010 for ownership of the concrete house he built on 14/09/11. In a separate decision of this judge, dated 12.04.17, it was determined on the unique facts the house was hers, based on what on balance had been found agreed in 1998, but he had a right to remain for life if paying fair rent from 10.02.13, having lived virtually rent free for 15 years.
- c. After Chapman sadly died on 30.03.17, which had been 13 days before the Daly decision, Maureen had sought to bury her mother's ashes, returning in May 2017 to Montserrat from where she lives in Toronto, staying at Chapman's home, and she says was met with hostility from Casarin to vacate, who in June 2017 then changed the locks. The antagonism which followed, including argument over whether Casarin had begun improperly to dispose of Chapman's personal property, led to these further legal proceedings, launched by Maureen on 18.01.18. At this time her advocate was David Brandt, who offered a different cause of action from the 2001 suit, namely, simpliciter, proprietary estoppel arising from the 1997 build.
- d. Counsel Dorsett was again instructed by Casarin, and quickly sought perfectly properly to argue *res judicata* arising from the Octave judgment in an effort to strike out the proceedings. He filed comprehensive argument on 23.06.18, though before the Court on 25.06.18 withdrew in curious circumstances. In parallel, Counsel Brandt was facing personal criminal proceedings in which Counsel Dorsett was assisting him. Between them it was agreed if Maureen paid the outstanding costs of \$14000ec, then the argument on *res judicata* would not be pursued as a preliminary point, thereby allowing Maureen's case to proceed to trial. It might be arguable the costs on the 2001 suit had to be paid for the 2018 suit to proceed, though this was never adjudicated. So, Maureen paid the costs on 28.08.18 to the Registry; however the Court later learned from Counsel Dorsett he was then paid this money, not perhaps Counsels Carrott and Roach.
- e. This Court cannot help but wonder about the propriety of this arrangement, which to a third party can appear possibly to be Brandt though Maureen paying Dorsett to drop an argument, in parallel

in a sense perhaps to help make some measure of reward owing to Dorsett while working for Brandt on his case, which raises a possible appearance of both being in breach of their duties to their clients in this case, namely that Brandt maybe used his client to help settle his own debt, while Dorsett maybe withheld a proper argument to advance his client's case in exchange for money from the opposing party, to which he may not be strictly entitled as in theory it perhaps should go to the original counsel, all of which can appear, rightly or wrongly, to be the lawyers helping each other as a conflict of interest regarding the parties. Whatever the truth, it looks terrible. To preserve public confidence in the Bar, insofar as I am able I wish to refer this oddity to the Montserrat Bar Association for deliberation as to whether misconduct may have arisen, by either counsels Dorsett or Brandt, and I hope the matter will settle happily to the satisfaction of all.

- f. In any event, Counsel Brandt was later remanded in custody on his personal matters, and so Maureen needed new counsel, choosing Jean Kelsick, who went on record on 04.03.20. He amended the pleadings to perfect what Counsel Brandt had largely always sought to say, and had in three previous appearances, but had not pleaded clearly. At this point Counsel Dorsett opposed amendment, and when overruled, so that the perfected amended fixed date claim was lodged on 02.06.20, he then on 15.10.20 renewed the strike out application for *res judicata*, despite having earlier agreed not to pursue it in exchange for the costs, by this time already paid.
- g. When Maureen filed an affidavit on 21.10.20 to complain, mentioning at para 7 when paying the costs she was struck by how Counsel Dorsett in parallel was representing Counsel Brandt in serious criminal proceedings, Dorsett then filed a counter affidavit signed by his office manager Benatha Andrews on 27.11.20, as arguably a self-serving statement in which she reports what Counsel Dorsett told her were the circumstances of the costs payment, adding it was 'scandalous' and 'oppressive' to mention the nature of the charges Brandt faced. Next, again curiously, on 16.12.20 Brandt then filed a complaining affidavit in support of what Dorsett was saying through Andrews about mention of his proceedings being scandalous, despite having been Maureen's attorney, now seeming to act against her interests in her suit. This has the appearance of Dorsett, who has been acting for Brandt in his criminal proceedings, seeking to protect Brandt's interests in those, while Brandt then to protect his own interests acts against his

earlier client possibly in breach of client-duty. Again, to preserve public confidence in the Bar, insofar as I am able I wish to refer this further oddity to the Montserrat Bar Association for deliberation as to whether misconduct may have arisen, by either counsels Dorsett or Brandt, and I hope the matter will settle happily to the satisfaction of all.

- h. The *res judicata* point was decided on 10.03.20, in which inter alia the decision reads ('Dyett' being Maureen):

...**NOTING** the argument Counsel Dorsett raises to justify rearguing *res judicata*, despite his previous agreement not to, is the amendment to the pleadings has created a wholly new case with new counsel, therefore not binding him to his earlier agreement in what was he suggests in essence a different case with former counsel;

NOTING there is unusual argument raised by Counsel Brandt by affidavit of 16.12.20, (which Counsel Dorsett reports was filed unilaterally, it appears in support of application by Counsel Dorsett of 27.11.20, notwithstanding Counsel Brandt had been Dyett's counsel), that Dyett in an affidavit of 21.10.20 has impermissibly mischaracterized criminal proceedings against him, in which he has been assisted by Counsel Dorsett, and which affidavit has been the subject of counter argument by Counsel Kelsick as to the propriety of it being filed in light inter alia of attorney-client privilege;

CONSIDERING nothing in this action turns on Dyett's comprehension, right or wrong, of what allegations Counsel Brandt faces, but which appear mentioned merely to contextualize her understandably pointed query about Counsel Brandt encouraging her to pay the \$14000ec which then went to Counsel Dorsett who was in a sense representing him in a parallel case;

CONSIDERING the amended pleadings did not create a wholly different case;

CONSIDERING it was disingenuous to suggest it, and that for lack of pleading proprietary estoppel, though argued three times by Counsel Brandt, Counsel Dorsett could pretend it was not part of the case offered by Counsel Brandt, being notionally blind and deaf to it for want of formal pleading, now accepting it is offered in the case amended by Counsel Kelsick;

CONSIDERING it is reasonable to suppose Counsel Brandt, of much experience, would by the time of trial have sought to cure the elementary defect in his pleadings, and it would likely have been permissible in light of the overriding objective to deal with cases justly, the technical nature of the deficiency, and the fact he had three times argued proprietary estoppel as the cause of action, so that it is wholly unreasonable for Counsel Dorsett to argue the case was only ever about his planned exploitation of defective pleading;

CONSIDERING it is likely unconscionable for Counsel Dorsett to renew *res judicata* strike-out having agreed to be paid from Dyett \$14000ec not to, such that he is estopped from so arguing it, which would otherwise be an abuse of the Court's process in contradicting the import of the agreed Order of 25.06.18 and possibly amount to misconduct;...

IT IS ORDERED that:

1 The application to strike out Dyett's claim as *res judicata* is dismissed, in the knowledge the decision of 24.04.09 will be available to be discussed during the trial, which trial Counsel Dorsett on 25.06.18 had agreed should occur....

3 There shall be no decision on the application to strike out portions of the Dyett affidavit of 21.10.20 and Brandt affidavit of 16.12.20, as being apparently irrelevant to any issue in this case, and therefore moot...

- i. Finally, the way was clear for trial, with Counsel Dorsett filing a defence and counterclaim on 21.04.21, so that after some late filings by Counsel Dorsett, with attendant complaint by Counsel Kelsick, the trial finally occurred on 28.06.21, 12.07.21 and 13.07.21, receiving evidence from Maureen, Daly, Casarin and Geneve, with closing argument on 01.10.21.
- j. By way of postscript it is with regret the Court notes Counsel Brandt before John J was convicted by a jury of offences in June 2021 and is currently serving a jail sentence.

The Octave Judgment

4 The Octave judgment of 24.04.09 is helpful and relevant, running to 16 pages. It made a number of findings, having heard evidence from Chapman, Dudley, Casarin and Geneve.

a. The argument advanced by Chapman was acquisition by Casarin in 1991 of sole title to 14/09/11 was achieved though fraud by Casarin and mistake by the Lands Registrar. Finding no mistake in the procedures followed by the Registrar, the Learned Judge further found Chapman could not meet the burden to show probability of fraud by Casarin, in particular noting:

- i. Casarin was reliable when saying Susanna had promised her the land, owing to Casarin from 1978 sending her money from Canada, usually \$200 at a time, further building a 2-bed concrete extension to the family home at expense prior to Susanna's death, known to her siblings, having given up further studies to become a nurse in order to earn to support Susanna and Casarin's four children then residing with Susanna;
- ii. More, in consequence and in any event, Casarin could invoke the doctrine of proprietary estoppel to acquire title by showing she had from 1978 acted to her detriment sending money, limiting her further study, and building the extension, thereby relying on Susanna's promise; and
- iii. Further, and distinctly, Chapman was not reliable when she said that in 1997 she did not know Casarin had already acquired ownership of the land, because she had told the Land Development Authority (LDA) when seeking the GOM grant of building materials valued at \$28000ec that the property she would build would be for 'lease/rent' to her by Casarin, supported by a letter from Casarin of 09.12.97 addressed to the LDA in these important terms:

'I Mary Casarin hereby confirm that I have consented to allow Mary Chapman of Parson Road to build on my land at Davy Hill registered area St.John, block #14-9, parcel #11 for a period of 8 years of [sic] the purpose of erecting a temporary dwelling house.'

b. As a result, the judgment found Casarin had evidently obtained title to 14/09/11, known to Chapman, because by the letter of 09.12.97, submitted by Chapman to the LDA, she knew Casarin was the owner, and so, the Learned Judge noting title had not been proved obtained by

Casarin by fraud or mistake, Chapman was ordered to take down a fence she had erected to separate out on the plot the house she had built, and not impede Casarin on the overall plot, plus pay costs (being \$14000ec as above).

- c. There was no specific finding Casarin owned Chapman's house, just the land, it appears it not having been argued, nor it appears was any argument advanced by Chapman she was not a tenant but had instead acquired ownership of the house she built by reason of a countering argument of proprietary estoppel arising from events beginning in 1997.
 - d. Weighing these findings, an argument arising in these proceedings is whether Maureen in the 2018 suit on behalf of Chapman's estate can now press for 'proprietary estoppel', or whether she is prevented by reason of the point not being argued in the 2001 suit, under the doctrine of 'issue estoppel', or having been decided in the Octave Judgment as *res judicata*.
- 5 Turning to whether the 2018 suit is *res judicata* owing to the Octave judgment, strictly it is not. The Latin narrowly means the issue has already been judicially decided. In my judgment the narrow doctrine does not arise because the point being argued here was not argued there. The 2001 suit sought to set aside the 1991 assignation of title and failed, as the Learned Judge had found Casarin seeking sole title in 1991 acceptable; the 2018 suit, supposing reluctantly Casarin the owner of plot 14/09/11 from 1991, under a different cause of action seeks to acquire ownership of the building and subplot because proprietary estoppel arose out of events from 1997, this being not raised and not adjudicated in the Octave judgment.
- 6 However, the more pointed question is whether 'issue estoppel' arises. Counsel Kelsick argues Counsel Dorsett cannot rely on it as he did not plead it, it being absent from para 8 of the defence. However, this argument seems weak, and too short, unlike Counsel Kelsick's usually thorough submissions, as Counsel Dorsett did raise in para 9 the doctrine of 'laches', being medieval French/Saxon referring to an argument in equity which invites estoppel of cases offered in a dilatory or neglectful manner, lacking diligence in pursuit of rightful claim, and for the purposes of this case I therefore accept para 9 raises issue estoppel in substance.

- 7 Issue estoppel is an expansion on the implications of *res judicata*. It postulates in a previous suit the issue ought to have been raised; and to do so later in fresh suit is to create proceedings abusive of the Court's processes, which are designed to decide disputes, wholly and finally, and not *ad seriatum*, one argument at a time, suit after suit, at possibly vast expense each time, making Court decisions unreliable and justice unaffordable. In **Virgin Atlantic Airways v Zodiac Seats 2013** UKSC 46, Lord Sumption laid down six general principles of the expanded doctrine, of which the last three are relevant here, noting at paras 17 and 21:

...Fourth there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties...Fifth there is the principle...which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, [sixthly], there is the more general procedural rule against abusive proceedings which may be regarded as the policy underlying all of the above principles...

...Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which were not raised in the earlier proceedings or were raised but unsuccessful, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

- 8 In my judgment issue estoppel does not arise for the following reasons:
- a. Arguably, the 2001 suit on these facts began too soon realistically to raise proprietary estoppel, being so shortly after beginning building in 1997, such that it is not unreasonable it was not yet then clear to the parties it could be raised, which instead requires a degree of having settled into occupation, to be perhaps usually measured as more than four years where a house has been built from nought.
 - b. As to whether as time passed the issue could have been raised by the time of the trial in 2006, in theory it could, though requiring amendment of pleadings, which may not have been allowed, and further, the lawyers and client were different, being Counsel Khari Markham representing Chapman for her benefit, not Counsel Kelsick so many years later representing Maureen acting for all Chapman's children.
 - c. Moreover, psychologically the suits of 2001 and 2018 are quite different, as the argument in 2001 was about Casarin having fraudulently obtained title to the family land without telling her siblings, raising scandal and brouhaha, which is wholly different to mounting in the same

suit a parallel patient measured argument, that even if Casarin may have obtained legitimate title, proprietary estoppel may yet follow: these two actions in the same suit would have sat at odds with each other.

d. In this sense, in this case, reflecting on the words of Lord Sumption:

- i. while it may be proprietary estoppel *'could'* have been raised in the 2001 action when it finally got to trial in 2006, I do not criticise it did not, and therefore do not find it *'should'* have been raised, as in the fifth principle;
- ii. concerning the fourth principle, I do not find *'some issue which is necessarily common to both'* suits was decided in the Octave judgment as the causes of action are so different, as are the relevant time periods, being largely 1978-1991 in the 2001 suit, and 1997-2017 in the 2018 suit;
- iii. and in all these circumstances, to allow this suit to proceed will not raise *'abusive proceedings'*, as under the sixth principle, but instead it would be an *'injustice'* to deny Maureen her day in Court on behalf of her siblings where she is leading quite different argument to her late mother.

9 I should mention I have found the legal arguments raised by Counsel Dorsett on issue estoppel to have been most instructive, and though I have ruled against him, I express the Court's thanks.

What happened in 1997

10 As Maureen's claim will now proceed to adjudication, the Court must look first at what happened in 1997 and after, assessing what was agreed between Chapman and Casarin, the burden being on Maureen to show her action succeeds on a balance of probabilities. Maureen has set out to show proprietary estoppel, and/or unconscionable bargain, and/or unjust enrichment, and/or a constructive trust, with request for an injunction against trespass for quiet enjoyment and restitution of some missing property said to have been taken by Casarin.

11 This judgment will not seek to go behind the decision of Octave J, and though there will follow observations on what happened, it does not intend to question the finding Casarin acquired lawful ownership of 14/09/11 in 1991.

- 12 As part of the case, Maureen has suggested there was a survey conducted by Casarin in 1990, assented to by her siblings as a shared project, formalised in writing by some in documents dated in late 2000, though which Casarin paid for, which points Maureen suggests to how Casarin acquiring title to plot 14/09/11 was wrongful. In my judgment, leaving aside how documents dated in 2000 can show what happened in 1990, in any event nothing can turn on this material as the Octave judgment has settled the issue that from 1991 Casarin was in lawful ownership of the plot.
- 13 Further Maureen has suggested Casarin made a dishonest claim on the GOM for materials to build her own concrete home on the plot from 1997, pretending she had had a home in Parsons destroyed by the volcano; however, no evidence has been produced to show this probably true, the burden being on Maureen, and while it may go to Casarin's credibility, it has not been proved.
- 14 Recalling the trial on 28.06.21, 12.07.21 and 13.07.21, it seems clear that in 1995 Chapman sought to return from Toronto to Montserrat owing to declining health, probably arthritis when the winter in Canada is so cold. The volcano from 1997 meant she needed a new home and sought to build on her mother's plot. I find it probable on enquiry she then learned it was owned by Casarin, accepting from the preponderance of materials she had not earlier known this; but I further find at first she was unfazed as Casarin agreed she could build, agreeing the same for their cousin Daly, while Casarin also built, the GOM then giving away materials to build homes. There appears an inclination by all three to benefit from generous government grants, creating to an extent free houses, leading to three new ones on the plot to add to the old family home. However, no one at this point foresaw the complexities which may arise later over strictly who owned what.
- 15 The plot belonging to Casarin, everything turns on what can be proved was agreed between the sisters when Chapman built. In her witness statement of 23.06.21, Maureen at para 10 says:

During the initial stages of her construction of her house...my mother told me that the defendant was visiting Montserrat from her home in Toronto. At the construction site she helped my mother pass blocks to the mason Cyril Daley, a family friend, who was building the house, assisted by my mother's brother Dudley Dyett. The defendant did not at any time when she was present

during the construction of the house indicate or say to my mother she could or should not build a concrete house.

While on 28.06.21 and 12.07.21 Maureen has given helpful and stoical testimony, it is clear she was never present for what was agreed between the sisters, nor watched the construction, and an obvious difficulty in para 10 is it is untestable hearsay, of what she heard from her mother, which, while the Court can consider it, has weak probative value, particularly if seeking to rely on it to show Casarin never said Chapman should not build more than a temporary dwelling.

- 16 More, it flies in the face of the letter from Chapman to the LDA of 09.12.97, as above, which bears repeating:

'I Mary Casarin hereby confirm that I have consented to allow Mary Chapman of Parson Road to build on my land at Davy Hill registered area St.John, block #14-9, parcel #11 for a period of 8 years of [sic] the purpose of erecting a temporary dwelling house.'

- 17 This note had followed an earlier note dated 10.10.97, which reads, citing an address in Toronto:

To whom it may concern, I Mary Casarin give my sister Mary Chapman permission to use the land situated at Davy Hill in Montserrat, W.I. For more information, contact me at the above [Toronto] address, Sincerely, Mary Casarin.

- 18 Clearly the October note was too vague to be reliable by any third party, as it does not cite where the land is, nor what permission is granted, which was then cured by the December note. Counsel Kelsick has argued the October note granted permission to build a permanent concrete home upon which proprietary estoppel and other reliefs may arise. However, I do not find this probably so; instead, that it is silent as to what permission was granted, and so I look for other information, which the December note provides.

- 19 When Casarin was asked about the origin of these notes, in evidence under cross-examination on 12.07.21 she was vague and inconsistent, which may have been confusion occasioned by her being elderly, or her being evasive.
- a. Of the October note, she said at first it had been delivered to her home, but then said she had typed it for Chapman after receiving a call on the phone when in Toronto from Chapman

asking for permission to build, which she agreed, but which had later not been accepted by the LDA.

- b. Of the December note, she said Maureen gave it to her to sign, then seemed to say she had it from Counsel Warren Cassell, then repeated it had been given to her by Maureen in Toronto, then suggested it was the idea of Counsel Brandt working with Counsel Cassell, then that the letter had been blank referencing only the LDA, brought to her by Maureen, and though she had not written it, she was firm what it said was true.
 - c. Though her evidence was unsatisfactory as to the origin of the notes, nevertheless she agreed each had her signature, each speaking to her mind at the time, and in this sense the notes speak for themselves as contemporaneous documents as to what was being agreed.
- 20 Turning to what was happening on the ground, there is clear evidence Chapman began building a concrete structure from 1998, taking a year, of which Casarin was aware while in Toronto, though from May 1998 she had seen it while on Montserrat also setting about constructing her own building. Geneve saw it as she said on 13.07.21, and Daly on 12.07.21, and I accept there were occasions Casarin helped with passing some blocks to place, during a time relations were good between the sisters. However, Casarin said in evidence her help, while limited, was only as to foundation work, being told by Chapman the upper structure would be wood, and had not known it had become concrete after returning to Canada. On learning, she felt could do little as Chapman was her sister, but concrete had not been agreed.
- 21 Of importance, in the evidence of Geneve, she recalled being present during, as between Casarin and Chapman, phonecalls in 1997 and in 1998 face to face conversation on Montserrat, where she heard Casarin made clear the home being built was to be temporary for 8 years, to be wooden, and then taken away after. This evidence being consistent with the December note, I accept it is probably true, and stands in support of Casarin, when to the contrary Maureen can only point weakly to hearsay from her mother, and some equivocal and minor construction assistance from Casarin with blocks, which has not been proved to be for more than some foundation material.
- 22 Overall, on the facts, reviewing the statements and evidence in Court from the four witnesses, what I find has probably happened, is as follows:

- a. Casarin went to Canada on 18.04.70, then working for Sears, leaving her four sons with her mother, born in 1960, 1962, 1967, and 1968, sending money home, at a time home facilities were rudimentary. With Susanna raising her sons, and Casarin helping financially, they grew close and sometime around 1978 Susanna did say Casarin should have the home, which was where her sons were raised and which she had financed improved. More, it must have occurred to Susanna, as to anyone, it would be impractical to leave her modest plot, originally without water or electricity, shared between her nine children, being a recipe for fractious embittering argument, with no resolution, as occurs in so many other cases. At least if one acquires it, the plot can improve, as Casarin had started, rather being stalled in disagreement. Geneve was aware, but not the other siblings, who neither informed as otherwise there would be a row, as indeed there was when in time they did find out during the volcano crisis she had title to the plot.
- b. Chapman asked to build on what she had learned was land now owned by Casarin, but did not imagine strict ownership would be enforced. Initially the agreement was vague, as the October note shows. However, focusing her thoughts, Casarin made it plain she expected, and Chapman agreed, a temporary structure for 8 years, as the December note says, but Chapman reneged when Casarin was away in Toronto, thinking ultimately she could push Casarin into some measure of shared ownership of what had been the family land. Relations began to sour when Casarin pressed for rent from Chapman of \$150ec per month, which she refused to pay and never has, while in tandem Chapman erected a fence to demarcate land it was becoming clear to Casarin she was pushing to make her own. In tandem relations soured with Daly, who also would not pay rent, though not having a claim to the plot as a sibling his circumstance was different to Chapman. Chapman became friendly with Cyril Daley, which led to further animosity, and in the end, each sister alleged assault and bad behaviour by the other, culminating in the two 2001 suits.
- c. At bedrock, Chapman, some other siblings, and her children led by Maureen, just do not accept Casarin could or should have acquired title, and then that she did not allow Chapman title to some of the plot as sisters sharing the family land. So to achieve this, Chapman pushed Casarin, attempting to set up a fait accompli, by building a permanent structure

which she could never take away, meaning she expected Casarin to just give in. But she did not. It is regrettable the Court did not have the pleasure to meet Chapman, as it imagines she was a determined dignified lady, just like her sister, both dug in and intractable on this matter, and it is most unfortunate the feud which arose has been so long and to life's end.

23 The question now arising is what interest if any did Chapman acquire in the house and land.

The Law

Proprietary estoppel

24 The first question is whether Chapman acquired an interest by reason of proprietary estoppel.

25 The doctrine is based on three main elements: first, a representation or assurance made to the claimant; second, reliance on it by the claimant; and third, detriment to the claimant in consequence of reasonable reliance, per Lord Walker in **Thorne v Major 2009** UKHL 18. However, here I am quite satisfied Maureen has not met the burden to show on balance there was a '*representation or assurance*' made by Casarin to Chapman she would acquire any permanent interest. Indeed, I go further and observe there is positive evidence which is on balance persuasive Casarin was at pains not to create a permanent interest and said so, this Court again recalling the LDA letter of 09.12.97 and the phone calls reported by Geneve.

26 Counsel Kelsick makes further argument at the very least Casarin stood by looking on, not discouraging, therefore acquiescing, allowing Chapman to act to her detriment, so that even if there was no uttered or written representation, constructively such behaviour can be an assurance.

27 In support, there is ancient dictum to this effect from Lord Eldon LC in **Dann v Spurrier 1802** 7 Ves 231,235-236: '*this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement.*' But as Lord Walker opined, such

a constructive assurance must be clear and unequivocal, observing at para 56 of the *Thorner* case: *'to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.'* As to the instant case, the 'context' of arguably looking on offered by Maureen is not 'clear enough', being in the teeth of the phone calls and LDA letter, while Casarin said in evidence, *'what could I do, she is my sister'*, offering insight into the reality of human interaction, not being lawyerly disputation, showing on realising Chapman was building a more permanent structure while Casarin was mostly absent, so that Chapman was simply ignoring what she had been told not to do, Casarin felt powerless to stop her.

- 28 In short, Chapman ignoring Casarin does not give her rights, and on balance she was always aware she was supposed to be paying a modest rent and in time to leave.

Unjust enrichment

- 29 The second argument is whether Casarin has enjoyed unjust enrichment, to be cured by acquisition of proprietary interest or financial recompense to Chapman's estate. This doctrine in the context of the case is the other side of the proprietary estoppel coin. It is correct Casarin has been enriched by Chapman building a house worth \$230000ec as at 2017, but the question is whether this unjust, in the sense of unconscionable in equity.

- 30 In **Samsoondar v Capital Insurance Company Ltd 2020** UKPC 312, the Privy Council recently opined at paras 18 and 19:

'It has now become conventional to recognise...that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence.

... Examples of unjust factors are mistake, duress, undue influence, failure of consideration, necessity and legal compulsion.'

- 31 While the first two elements are satisfied, on the facts the third is not. It is not unjust to be enriched by someone refusing to heed warning. There has been no duress, undue influence,

necessity nor legal compulsion. Counsel Kelsick has suggested there has been a failure of consideration, which might arise if there was an agreement, or contract, where a person acted to benefit another and was not paid, but here this has not happened as there was no agreement Chapman should act as she did. Counsel Kelsick strikes at the heart of this claim where in para 21 of his immensely helpful closing submissions he writes: *'The enrichment is undoubtedly unjust in that the Defendant lulled Mary into building the house and took no action (by way of a warning letter or an injunction) to stop the construction while it was underway, opting instead to stay quiet and then claim it as her own.'* This bold statement requires it to be found on balance Casarin lulled Chapman and then stayed quiet, when to the contrary the evidence shows she warned her, plain in the LDA letter of 09.12.97.

32 More, there is ancient authority from **Clare Hall v Harding 1848** 6 Hare 273 for the following:

'If a party in possession of an estate knowing that another claims the property will, with his eyes open, spend money on it I know of no case in which it has been held that he can in the absence of special circumstances keep the lawful owner out of possession unless he will reimburse the party in possession the expenditure he has made...'

In this case, I have found on balance Chapman's eyes were open spending money, and so reimbursement for her expenditure does not arise.

33 In short, while the enrichment may be unhappy to Maureen, in this case it was not unjust.

Constructive trust

34 The third argument is whether Casarin is obligated to hold Chapman's interests in the house and land under a constructive trust.

35 In **Williams v Central Bank of Nigeria 2014** UKSC 10, Lord Sumption said at paras 9 and 11:

'...the phrase 'constructive trustee'...comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee or they have

received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not.

[One such type of constructive trust] ...covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff. A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity.'

36 However, on the facts, there has been no evidence offered, let alone to show on balance, there was a fraud by Casarin over Chapman building on her land in 1997, or of some notional misapplication of trust assets. The irk of fraud was argued in the earlier action of 2001, as to how Casarin obtained title in 1990, but that was decided to her benefit in the Octave judgment of 2009.

37 More, Counsel Kelsick has helpfully referred to **AG St Kitts & Nevis v Mitcham 2005 ECSC Reports** where at para. 13 of its judgement the Court of Appeal led by Gordon JA adopted the following reasoning of Edmund Davies LJ in **Carl-Zeiss-Stiftung v Herbert Smith & Co 1969 2 All ER 367** at p. 381:

"...English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the Court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a sine qua non. ...Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call "want of probity", a feature which recurs through and seems to connect all those cases drawn to the Court's attention where a constructive trust has been held to exist. *Snell's Equity* (26th Edn.) at p. 201, expresses the same idea by stating that: "A possible definition is that a constructive trust is a trust imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties." It may be objected that, even assuming the correctness of the foregoing, it provides no assistance, inasmuch as reference to "unjust enrichment", "want of probity" and "the demands of justice and good conscience" merely introduces vague concepts which are in turn incapable of definition and which, therefore, provide no yardstick. I do not agree. Concepts may defy definition and yet the presence in or absence from a situation of that which they denote may be beyond doubt. The concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when

applying it to the many authorities cited to this Court. It is because of such a concept that evidence as to “good faith”, “knowledge” and “notice” plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do. Not even gross negligence will suffice.’

- 38 Citing this, Counsel Kelsick has written at para 27 of his closing submissions: ‘... *there can be no doubt there was a serious lack of probity on the Defendant’s part in her dealings with Mary over the construction of the latter’s house. There are potent reasons to infer that armed with the Octave Judgment, the Defendant saw a way of enhancing the value of her land and enriching herself by inveigling Mary into building the house, fully intending to lay claim to it later on. This view is supported by the calculating and grasping testimony of both the Defendant and Geneve that after 8 years the house became the Defendant’s property. Moreover, it would be unconscionable for the Defendant to keep the house and defeat Mary’s children inheriting it in accordance with Mary’s wishes.*’ Yet Casarin was not ‘armed’ with the Octave judgment until 2009 by when Chapman had long already built her house by 1998. And as for it being ‘*calculating and grasping*’ the house might belong to Casarin after eight years, it was not supposed to be a permanent construction, but instead temporary and removable. In this context, there is no ‘*lack of probity*’ arising from the interaction between the sisters in 1997 and their falling out soon after, largely as it became clear Chapman by permanent construction was pressing Casarin for an interest in land Casarin was at the time denying.
- 39 It follows, applying the three doctrines above and the reasoning offered, Chapman did not acquire a legal or equitable interest in the house and land owned by Casarin. In my judgment the real issue has always been the wider family have been upset Casarin acquired title to Susanna’s land in the first place, and thereafter Chapman tried to push her into giving her some, which Casarin warned her she would not do.
- 40 Had Chapman been alive today, given Casarin said ‘*what could I do, she is my sister*’, I would likely have concluded circumstances had evolved she had a right to stay in the house for her lifetime, being still unable to return to Parsons owing to the volcano, implicitly extending the lease beyond eight years per the LDA letter of 09.12.97, paying rent, which was never paid, not dissimilar to what occurred with cousin Charles Daly. In theory, Chapman owed Casarin

\$150ecpm as rent for the land from perhaps March 1998 to her death in March 2017, which would amount to \$34200ec, claimable against her estate, though under Casarin's defence and counterclaim filed on 21.04.21 back-rent has not been sought.

41 However, since Chapman's passing, her estate no longer has an interest by way of implied lease or otherwise in the house she built and the land she cordoned off. It follows Casarin has been since then entitled to restrict access to the property as she has sought to do, and to this extent I can declare regrettably Maureen, and any others as defined by Casarin, would be trespassers; though the Court would hope with the issue of ownership resolved, there may yet be some scope for Chapman's family to negotiate access at a continuing favourable rent. Further no damages for trespass have been sought by Casarin, and I can say, given this unhappy messy family circumstance awaiting clarity from the High Court, none would be awarded.

42 In short, I declare Casarin the legal and equitable owner of parcel 14/09/11, including of Chapman's concrete house.

Conversion and trespass damages

43 As part of the claim brought by Maureen, she alleges at some point in 2018, it seems between January and March, Casarin removed items belonging to the family without permission, selling them off or giving them away, in particular 2 x tvs, 2 x dvd players, 2 x sewing machines, 2 x high-end irons, a stereo, linens and crockery, clothing, hand bags, bathroom items, \$1500ec cash, a juicer, kitchen appliance laundry, cleaning materials, and various shed tools, all to the combined value of \$20886ec. She also claims Casarin damaged the house locks by changing them after Chapman died and the family was told they were trespassing, causing Maureen to have to fit new locks at a cost of \$1184.15ec.

44 Concerning the locks, it is apparent Casarin was entitled to change them if she owns the house, as I have found, so this claim is dismissed.

45 Concerning the missing items, the evidence is wholly indistinct, vague, and lacking in probative value as to Casarin being responsible for them going missing, no one giving evidence Casarin

was seen removing anything. Instead, Geneve testified she saw Daly enter the property, and Maureen, plus observed a blue dumper truck removing a fridge and freezer, though Casarin was not implicated. In these circumstances, I find to assert what happened and who responsible is merely speculation, not more, noting it is possible there may have been a burglary as the premises were long unoccupied, and the burden to prove Casarin on balance responsible was not met by Maureen.

- 46 Finally Maureen seeks damages for trespass and lost rental income, though none arises if the house is not owned by Chapman's estate. To the contrary, Casarin could claim damages for trespass, but did not, seeking only a declaration.

Costs

- 47 Concerning costs, Casarin as the successful party is entitled to claim them and I will listen to further argument on what sum. However, there are some costs recoverable by Maureen, arising out of the odd history of proceedings explained above, as follows, noting these are procedural matters largely arising from Counsel Dorsett's failed attempt to prevent the trial occurring:
- a. \$2500ec on the costs in the cause Order made by the Court of Appeal refusing Casarin leave to appeal and a stay of proceedings;
 - b. \$1500ec in costs on Casarin's failed application filed on 27.11.20 to strike out part of the Chapman's affidavit;
 - c. \$5000ec on the costs in the cause Order made by the High Court on 10.03.21 dismissing Casarin's second strike out application;
 - d. The total being \$9000ec, to be set off against Casarin's costs.

Disposition

- 48 For the foregoing reasons, the Court declares:
- a. Casarin owns the house Chapman built and all the land at parcel 14/09/11, legally and in equity, so that Maureen and any so defined by Casarin are hereafter unarguably trespassers.

- b. The claim by Maureen concerning missing items from Chapman's home, damages for trespass, lost rental income, and the changed locks is dismissed.
- c. Maureen is entitled to \$9000ec in costs concerning earlier procedural hearings, to be offset against Casarin being entitled to costs generally, to be discussed.

49 This has not been an easy case, producing one of my longest judgments, with so many points in issue. The Court is exceedingly aware this outcome will be very disappointing to Maureen and Chapman's wider family. I am indebted to both counsel for copious submissions, perhaps too many. The broader feature here is it behoves all to know what rights they will have before they build in concrete on land belonging to another, rather than building outside agreement expecting being dug in with a permanent structure will over time force ownership in their favour.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

22 November 2021