

EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2009/109

BETWEEN:

KIRSTEN RICHARDSON

Claimant

And

CHANDRA CARR

Defendant

**Appearances:**

Ms. Mishka Jacobs of Mc.W. Todman for the Claimant

Mr. Richard Rowe of Orion Law for the Defendant

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2013: April 4  
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**JUDGMENT**

[1] **Ellis J:** By Claim Form and Statement of Claim filed on 27<sup>th</sup> March 2009, the Claimant claimed against the Defendant:

1. Special damages in the sum of \$45, 603.00
2. A declaration that the Claimant is the legal owner of the storeroom
3. A declaration that the Claimant has an equitable interest in the apartment
4. An injunction to restrain the defendant by herself, her agents or otherwise howsoever from preventing the Claimant from accessing and removing from the premises all existing and non-perishable belongings
5. General damages
6. Costs
7. Such further and other relief as the Court deems just

[2] This claim arises out of an alleged breach of contract and unlawful detention of personal property belonging to the Claimant. The Claimant alleges that by oral agreement made in 1990s the Defendant agreed that in consideration for the Claimant occupying, maintaining and keeping in good tenable repairs the Defendant's property at Taddy Bay, Virgin Gorda while the Defendant was away I the US, the Defendant would reimburse the Claimant all of her expenses incurred in the maintenance of the said premises when she returned to live in the Territory.

[3] The Defendant filed an Amended Defence to the Claim and a Counterclaim in 29<sup>th</sup> September 2010 in which she claims:

1. The sum of \$25,239.00 as the costs of effecting repairs to remedy the damage to the Defendant/Counterclaimant's building
2. The sum of \$8640.00 as the estimated costs of repair and replacement of electrical works in the building
3. The sum of \$29,900.00 as the estimated costs of replacing the original landscaping on the property
4. The sum of \$33,305 as the total value of item removed from the Defendant/Counterclaimant's premises.
5. An order that the Claimant account for the income or profit generated from the use of the Defendant/Counterclaimant's property.
6. Interest
7. Costs.

[4] At the trial, the Claimant gave evidence on her own behalf and called three other witnesses. In addition to giving evidence on her own behalf, the Defendant also called three other witnesses.

[5] In order to succeed in their claims both the Claimant and the Counterclaimant must satisfy the court on a balance of probabilities of the merits of their case. In applying the standard the Court was guided by the dicta of Baroness Hale in **RE H B (Minors) 2008 EWCA Civ. 282 D-H**

*"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever*

*extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability...*

*Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established".*

[6] Having reviewed the witness statements of the Claimant and Defendant/Counterclaimant and after listening to their oral testimony and observing their demeanor during the trial, the Court was of the view that the Claimant was not a completely credible witness. At critical times her oral testimony during the trial revised her witness statement and the court is not satisfied on a balance of probabilities that either account is completely truthful. More significantly, her evidence was inconsistent with or contradicted by that of her own witnesses. These inconsistencies were germane to the issues to be decided and significantly impacted the credibility of the Claimant.

[7] Conversely, having had an opportunity to observe the demeanor of the Defendant/Counterclaimant, the Court is satisfied that she was sufficiently forthcoming and consistent in the responses. However there were a number of aspects of her claim which did not come up to proof and these are dealt with below.

## **COURT'S ANALYSIS/ FINDINGS**

### **THE CLAIMANT'S CASE**

[8] The Courts findings of fact are as follows:

The Court finds that sometime in 1994, the parties agreed orally as follows:

1. The Claimant would occupy and reside rent free on condition that the Claimant would monitor the property to prevent vandalism. The Claimant was to occupy the downstairs portion of the Defendant's home as a temporary living area for herself and her daughter.

2. While in occupation, the Claimant was pay the utilities consumed on the property and the annual property taxes.
3. No repairs or alterations were to be done to the premises without the express approval of the Defendant/Counterclaimant.

[9] The Defendant/Counterclaimant granted permission to the Claimant to improve the downstairs portion of the property to create a basic living space. She permitted her to use existing lumber (T1-11 plywood) the property to create partitioned rooms in the existing open floor plan. She was also permitted to install bathroom facilities including a toilet, shower. This would have necessitated installing the necessary plumbing fixtures and piping. The Defendant/Counterclaimant concedes that she agreed to reimburse the Claimant for the expenses incurred in installing the bathroom facilities.

[10] However in exceeding the scope of the permission granted, the Claimant proceeded to construct concrete wall partitions in the premises, creating two bedrooms, and a kitchen and bathroom area. She installed kitchen cupboards and tiled the concrete floor (with tiles belonging to the Claimant and which were on the property). The Court finds that these additional improvements were not agreed between the parties and exceeded the scope of the permission granted.

[11] The Court also finds that in carrying out this work the Claimant mainly utilized the services of personal friends who assisted her out of friendship.

[12] The evidence in the witness statement of **Haitram Ramgobin** is that he had carried out plumbing, electrical and refrigeration work at the premises occupied by the Claimant and that he charged her at cost which was sometime discounted. He stated that he would normally be paid in cash.

[13] During the trial this evidence was contradicted in his oral testimony. When cross examined, he indicated that while he had done the plumbing and electrical work – no specific charges were made because he did it as a friend. He apparently never invoiced her but indicated that she would sometimes give him \$20.00 to \$60.00. This renders wholly untrue the letter dated 8<sup>th</sup> January 2009 in which he provides an estimate of charges for work done between 1990 – 2008 at “Taddy Bay

Estate upon the request of Kristen Richardson" including the erection of the apartment under the porch as \$3000.00.

- [14] The evidence of **Fitzroy Dabreo** is that over the years he recounted doing many different chores and work on the premises including painting, roof repair, replacing stone work etc. there is no specific indication of any work being done in the downstairs portion of the property. During the trial he gave evidence which indicated that these services were rendered on a gratuitous basis. He indicated that he would assist the Claimant from time to time but that he did not really charge her for anything.
- [15] The Court was also provided with an Invoice No. 31604 dated 19<sup>th</sup> April 1994 and issued by an individual purporting to be **Alban Anthony** in which he claims the total cost of materials and labour for "working on new apartment" as \$5954.25. The invoice reflects that the sum of \$2500.00 has been paid and that a balance of \$3454.25 remains outstanding. There is another Invoice No. 288307 which appears to be issued on the same date and which appears to reflect similar information.
- [16] No clarification was proffered to explain the two invoices. Although the invoices are issued in the Claimant's name and reference that they are in respect of "working on new apartment", there is no further information which would identify the actual premises. Additionally there is no indication that the balance owed was in fact paid.
- [17] Further, the Court accepts the Defendant's evidence that, (as at the date of the invoice (April 1994)) she was still in residence having left the Territory in August of 1994. The Court is of the view that the work could not have been carried out at the time.
- [18] The manuscript note at the top of the second invoice does nothing to persuade the Court that it refers truthfully to expenditure incurred in respect of the improvements to the basement storeroom in the Defendant's house.

[19] Surprisingly, Alban Anthony was not called as a witness in this case. Given the prevaricating testimony of the Claimant and conflicting testimony of the other persons who are alleged to have worked on the property at her instance (including Mr. Ramgobin who it is alleged “erected the apartment under the porch”), the Court has serious doubts about the authenticity of the purported invoice and the veracity of claims made therein.

[20] In light of this, the Court has some difficulty in discerning the actual expenditure incurred in respect of the improvements to the downstairs portion of the Defendant’s property. The Claimant has not provided any breakdown demonstrating what sums were specifically expended in materials and labour in effecting those improvements. Save for the already impugned invoices from Alban Antoine, the Claimant has simply lobbed a plethora of receipts and invoices at the Court which do nothing to identify the specific endpoint and purpose to which the materials were put. Further given the evidence in this case the Court seriously doubts that any real expenses were actually incurred in regard to labour.

### Equitable Interest in the Apartment

[21] The Claimant seeks a declaration of an equitable interest in the apartment. Although not expressly pleaded as such, this claim would have to be grounded on the basis of proprietary estoppel.

[22] This doctrine stated in its simplest formation in **Re Basham Deed (1986) 1 WLR 11 at 1503** is as follows:

*“...where one person A has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right in or over B’s property, B, cannot insist on his strict legal rights if to do so would be inconsistent with A’s belief”.*

[23] The matters which a claimant must establish to found an equitable estoppel may be characterized as including certain conduct of the claimant, certain conduct of the defendant and certain qualities of the subject matter. In respect of the conduct of the claimant: the Claimant must have acted to his detriment upon an assumption or expectation that a particular legal relationship existed or would

exist between the claimant and the defendant or that the claimant would acquire some interest in the defendant's property.

[24] In respect of the conduct of the defendant: the defendant must have induced the claimant to adopt the assumption or expectation and encouraged the detriment of the claimant or at least failed to deny the assumption or expectation with knowledge that the Claimant was relying on it to the Claimant's detriment.

[25] As regards the subject matter: it must be clear that the assumption or expectation in respect of it was one that defendant could lawfully satisfy.

[26] Although no satisfactory particulars have been provided evidencing actual pecuniary expenses incurred by the Claimant, it is common ground that improvements were carried out in the downstairs portion of the Defendant's property which effectively created a two bedroom and one bathroom apartment. On the authority of **Calixtus Henry v Theresa Henry and Anor**<sup>1</sup> the Court accepts that

*"It is unnecessary to ascribe a dollar value to the detriment, or to compare the advantage with the detriment, as one does not buy the equity."*

[27] However in addition to general proof of detriment, the Claimant must also prove that in incurring this detriment, she acted in the belief that she already owned a sufficient interest in the property to justify the detriment or that she would obtain such an interest.

[28] The evidence in this case does not disclose that the claimant had any such belief. It is clear from the evidence that she improved the land in which she had no interest - merely the interest of a licensee or occupier. She would therefore have no equity in respect of her detriment. The dicta of the English Court of Appeal in **E&L Berg Homes Ltd. Grey (1979) 253 EG 47** is instructive.

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<sup>1</sup> HCVAP 2007/0027 Civil Appeal St. Lucia

[29] The reality is that the Claimant has provided no evidence that she acted to her apparent detriment in the belief that she already owned a sufficient interest in the property or that she would obtain such an interest.

[30] This Court is guided by the Privy Council dicta in **Knowles v Knowles**<sup>2</sup> where it was observed:

“In the opinion of their Lordships it would be unconscionable in this case to deprive George of his property when he had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them. While recourse to the doctrine of estoppel provides a welcome means of effecting justice when the facts demand it, it is equally important that the courts do not penalize those who through acts of kindness simply allow other members of their family to inhabit their property rent free. In *E & L Berg Homes Ltd v Grey* (1979) 253 EG 473, [1980] 1 EGLR 103 Ormrod LJ said at p 108:

“...I think it important that this court should not do or say anything which creates the impression that people are liable to be penalized for not enforcing their strict legal rights. It is a very unfortunate state of affairs when people feel obliged to take steps which they do not wish to take, in order to preserve their legal rights, and prevent the other party acquiring rights against them. So the court in using its equitable jurisdiction must, in my judgment, approach these cases with extreme care.”

[31] The essence of the doctrine for equitable estoppel is to do what is necessary to avoid an unconscionable result. In the Court’s view it would be almost impossible to decide how estoppel could be satisfied in these circumstances and on the evidence of this case. The Claimant’s claim in this regard is therefore dismissed.

[32] During the course of closing submissions Counsel for the Claimant urged the Court to consider an alternative equitable course which had not proposed in the Claimant’s pleadings. He conceded that the deficiency in the Claimant’s evidence would prove a difficulty for the Court and proposed that the Court make an order to have the improvements be valued so that an award can be made to compensate the Claimant for expenses incurred taking into account use and wear and tear.

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<sup>2</sup> [2008 UKPC 32

- [33] The court has several difficulties with this proposal. First, the Court finds the greater part of the actual improvements carried out by the Claimant exceeded the agreement of the parties. It is clear that in order to ground a claim for estoppel that an occupier must have been encouraged by the owner or must have acted in reliance on the assurance or encouragement. Mere expenditure with consent does not give rise to an estoppel, and one who voluntarily improves another's land without encouragement or promise of reward does so entirely at his/her own risk.
- [34] The Court accepts the evidence of the Defendant/Counterclaimant that she did not agree to the construction of permanent concrete partitioning wall, installation of kitchen cabinets or the tiling of the floor. There is no evidence that the Claimant was aware of, encouraged or otherwise acquiesced in the Claimant to carry out any improvements other than that which was expressly detailed in the Defendant/Counterclaimant's evidence. The Court is satisfied that on the authority of **Nicholas Lansiquot v Ignatius Leon**<sup>3</sup> that the Claimant cannot therefore seek to enforce any equitable rights in regard to all of those improvements.
- [35] The evidence does however disclose that there was agreement to install bathroom facilities and that the expenses incurred would be reimbursed by the Defendant/Counterclaimant.
- [36] In circumstances where the Court has concluded that no proprietary interest has been made out, but where there was clearly an agreement to compensate the Claimant, the Court must find some way of satisfying the equity in this case. However, the Court is not satisfied that compensating the Claimant for the current value of the bathroom improvements would achieve justice in this case.
- [37] In the court's view, achieving justice would require that the Defendant/Counterclaimant specifically perform her obligation under the bargain which mandated that Claimant be reimbursed for the actual expenses incurred in the effecting the improvements which were agreed. These improvements only included the installation of agreed bathroom facilities including a toilet and shower and the necessary plumbing attendant to this.

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<sup>3</sup> Civil Appeal No.29 Of 2005 St. Lucia per Rawlins JA at paragraphs 22-24

[38] In that regard, it is therefore for the Claimant to provide cogent proof of the actual expenses incurred (materials and labour) in effecting those specific improvements. She has failed to discharge her burden. Instead, the Court is satisfied that the documentary evidence of the actual costs incurred in effecting these improvements was by and large fabricated by the Claimant and/or her witnesses. This evidence was deficient, inconsistent with the oral testimony and evidenced an intention to deliberately mislead the Court. Because the Court had no confidence in the reliability of the evidence.

[39] In such circumstances, the Court declines to make the order sought by the Claimant.

### **Claim for special damages**

[40] The second major aspect of the Claimant's claim is for reimbursement of the sum of \$45,603.00. The particulars of this sum are set out at paragraph 11 of the Claimant's statement of claim and include:

1. Repairs and maintenance for the upkeep of property
2. Property taxes
3. Rental for Post Office Box
4. Value of the Claimant's belongings in the storeroom
5. Value of cultivation and agricultural produce
6. Payment to Virgin Tech for work done on the premises
7. Costs of hiring a truck to remove the Claimant's property from the premises.

[41] This claim is made at law and appears to arise out of the contractual agreement which the Claimant alleges was made between the parties in the 1990s in which the Defendant agreed for the Claimant to reside at the Defendant's property, maintain and keep it safe and in good repair until she returned. Upon her return, the Defendant would reimburse the Claimant for all expenses incurred on receipt of the bills.

- [42] The Defendant denies that the Claimant was obliged by contract or otherwise of maintain the property. She contended that the Claimant was only intended to prevent vandals or other squatters from entering on the property. She recounted that this became necessary as a result of an unfortunate previous experience where vandals entered and damaged her property.
- [43] It is common ground that at the time of the agreement, the parties were good friends. When it became necessary for the Defendant/Counterclaimant to travel overseas it is not surprising that she would turn to the Claimant for assistance in watching over her property. Given the Claimant's admitted fiscal challenges it is also not surprising that she willing acceded to taking up residence in the downstairs portion of the property.
- [44] What then was the scope of the agreement arrived at as between the parties? Given the conflicting position of the parties, it is left to the Court to determine the actual terms of the agreement having observed the witnesses and having heard their oral testimony. The Court was not satisfied that the Claimant's evidence was generally truthful in this regard. The Court accepts the Defendant's clear evidence which was not significantly traversed in cross examination that the intention of the parties was that the Claimant would use and occupy the downstairs portion of the property.
- [45] This makes sense because the Defendant was only initially intended to be out of the Territory for a brief time and had later clearly made arrangements for the upstairs portion of property to be rented to guests. The Court therefore finds that the Claimant had no permission to use or occupy the upstairs portion of the Defendant/Counterclaimant's dwelling house. The Court finds that the Claimant's admitted use of the property was without the knowledge and consent of the Defendant/Counterclaimant.
- [46] The Court also finds that Claimant had no permission to undertake the farming and animal husbandry activities in which she has admitted to have engaged. The totality of the evidence is that the Claimant exceeded the oral agreement of the parties.

## Repairs and Maintenance

- [47] The Claimant alleges that she spent over the course of her occupation of the property expenses totaling \$21, 516.00 in repairs, maintenance and upkeep of the property.
- [48] The Court is not satisfied on a balance of probabilities that the Defendant would have required or encouraged the Claimant to undertake the general repairs to the property. The Court is of the view that these repairs if they did occur were voluntarily undertaken by the Claimant and were not expressly authorized. Indeed given the Claimant's admitted financial difficulties it would be surprising if the Defendant could have encouraged or expected her to expend the substantial amount of resources claimed.
- [49] In any event given the Claimant's own evidence the Court is satisfied that if any repairs did in fact occur it is more likely that the costs would have been defrayed from the moneys earned from the Claimant's unauthorized use of Defendant's property either through rental income or farming activities.
- [50] In support of her claim for reimbursement the Claimant exhibited a veritable hodgepodge of receipts which in many cases do little to identify the actual work carried out; the destination or purpose of the several of the receipts include manuscript notes by an unknown author which purports to indicate that they refer to work done on the Defendant's property or at her instance. The receipts and invoices run the gamut from building materials to electrical and plumbing supplies. The documentation also includes itemized lists written in manuscript which sets out materials purchased and their cost.
- [51] In closing submissions, Counsel for the Defendant/Counterclaimant pointed to a number of incongruities in the documents exhibited. For instance they include charges for a "weed muffler, doctor's bill, an unexplained bill for pumping water from a cistern; legal fees; plumbing and electrical expenses incurred in 2007 and 2008 when she was asked to leave the premises in 2005. In addition there was an estimate for fencing of the premises, removal of sewerage and for deposit of water.

[52] The invoices, receipts, itemized lists do not satisfy the Court that they relate to materials purchased to secure the improvements to the Defendant's house at Paddy Bay Estate. This is notwithstanding the unverified and self-serving notations made on face of several of the receipts. This doubt is exacerbated by the untraversed testimony that the Claimant was during the time she occupied the Defendants property, actively engaged in constructing her own apartment building in Virgin Gorda. Indeed one of the exhibited receipts dated 2007 specifically references "Kristen Richardson Petty Pasture Apart #3", and further tips the balance of probability against the Claimant.

[53] In light of the conclusions drawn and given the Courts own doubts about the Claimant's veracity, the Claimant has failed to satisfy the Court on a balance of probabilities that they relate to actual maintenance and repairs effected on the Taddy Bay Estate. The court is therefore obliged to dismiss the Claimant's claim in this regard.

### **Property Taxes**

[54] The Claimant also claims reimbursement for the expenses incurred in payment of property taxes. The total sum claimed is \$10, 422.00. The Claimant exhibited a number of receipts issued over the course of 1994-2007.

[55] The Claimant's evidence is that when the annual property taxes became due she would pay them. She stated that the receipts were issued in the Defendant's name because she is the registered owner of the property.

[56] In her oral testimony, the Claimant denied that the taxes were in fact paid by anyone besides herself. Although in the witness box she was unable to recall the period over which these taxes were paid or even how much had been paid over the years, she recalled that there came a time when she was advised that the taxes were arrears. She stated that she first paid the sum of \$300.00 and continued paying towards those arrears until the balance was reduced.

- [57] She stated further that there came a time when the cost became too much for her for her to bear. When this occurred she used the moneys earned from her farming activities on the property to pay the tax.
- [58] The Defendant/Counterclaimant's denied any knowledge of the alleged arrears of taxes. Her evidence is that she paid the taxes until about 1997. She stated that the money was paid to the government tax collector in Virgin Gorda and although she claimed to have receipts they were not disclosed or produced in court.
- [59] She readily concedes that the Claimant paid the property taxes from 1997 but stated that it one of the conditions upon which the Claimant was permitted to take up residence on the property. She testified that it was part of the oral agreement that the Claimant would pay the taxes on the property as they fell due.
- [60] Part of the documents exhibited by the Claimant included two manuscript recordings of property tax paid and the period of payment. The total indicated here is \$9,822.00 and \$600.00. The first list purports to cover periods in 1993 when clearly no arrangement regarding taxes would have been extant. Some of the receipts are duplicated in one case she includes a receipt which is clearly in respect of her property at Petty Pasture.
- [61] The Court is satisfied on the evidence that the Claimant paid the property taxes in accordance with the oral agreement reached between the parties. That agreement prescribed that she would pay the annual property taxes as well as the cost of utilities consumed at the property during her occupation. The Defendant's evidence as to this agreement was not persuasively traversed in the either the Claimant's pleadings or in her evidence before this court.
- [62] Further and in any event the Court finds that on the Claimant's own evidence that the taxes would have been defrayed from the earnings garnered from the Claimant's unauthorized use of the Defendant's property, either through rental or agricultural sales.

[63] The Court therefore finds that the Claimant is not entitled to any award in regard to property taxes.

### **Rental for Post Box**

[64] The Claimant claims the sum of \$165.00 for the cost of rental of post box. Only one receipt has been provided evidencing payment of the rental. This is in the sum of \$25.00 which seems to have been paid in October 1997.

[65] The Defendant's defence is that this box was used by the Claimant and the family during the course of her occupation and even up to the date of trial.

[66] Neither of the parties has alleged that the rental payment formed part of their oral agreement. If payments were made, they appear to have been made voluntarily and in circumstances where the Claimant also utilized the box. There is no basis upon which this claim can or should have been maintained. There will therefore be no recovery in respect of this claim.

### **Value of the Claimant's belongings in the storeroom**

[67] The Claimant put a value of these items of \$5000.00. These items have not however been itemized, specifically described nor has their value been distinctly ascribed. The Claimant's evidence is that they included tools and other miscellaneous implements used in her gardening venture.

[68] It was actually the Defendant who was able to describe these items in her oral testimony. She recounts that the following remain on the property: shovels, hole digger, pick axe, crow bar, assorted plastic barrels, steel bars, louvered doors etc.

[69] In her Amended Defence, the Defendant also pleads that she never refused to give the Claimant whatever belongings that she had on the property. This was also confirmed in the closing submissions of her Counsel. Given that this matter went to mediation, the Court is surprised that

the return of these tools and other personal belongings could not have been effected much earlier in these proceedings.

[70] The Court will therefore order the return of all items belonging to the Claimant and found in the shed/storeroom on the property.

[71] The Claimant also seeks a declaration that she is the legal owner of the storeroom. It appears to be accepted that the storeroom was constructed by the Claimant in furtherance of her farming activities. This declaration is not opposed by the Defendant/Counterclaimant who simply asks that the storeroom be removed at the Claimant's expense.

[72] The Claimant will make arrangements and with reasonable notice to the Defendant and at her own cost, attend the Defendants premises to collect her belongings and remove the storeroom/shed from the property no later than 21 days from the date of this judgment.

#### **Value of agricultural produce on the property**

[73] The Claimant claims the sum of \$4000.00 in respect of this produce and her evidence suggests that many of the plants and tools remain on the property and are still being enjoyed by the Defendant today.

[74] Additionally and in any event it is common ground that the Claimant during the course of her occupation under took farming activities from which she was able to secure certain earnings. While the scope of this undertaking is matter of some dispute, the Claimant was unable to satisfy the Court on a balance of probabilities that these activities were undertaken with the express permission or encouragement of the Defendant.

[75] What appears to be clear is that there came a time when the Claimant determined that the Defendant had abandoned the property. In the Court's view the evidence reveals that she then took unilateral decisions which were more consistent with that of an owner rather than an occupier.

[76] Further, the Court notes that other than this bare claim, the precise description of these plant's trees and the particular values ascribed have not formed part of the Claimants pleadings. As with much of the Claimant's claim there was a critical dearth of evidence which would in any event be fatal to her claim.

[77] For the reasons indicated, this part of the Claimant's claim is also dismissed.

#### **Payment to Virgin Tech for work done on the premises**

[78] Claimant claims the sum of \$3000.00 in respect of payment which she made to Virgin Tech for work done on the property. The documentation submitted in support of this claim purports to be written and signed by the Claimant's witness Haitram Ramgobin but bearing the seal of Virgin tech Limited. It is a letter date 8<sup>th</sup> January 2009 and the sum claimed is in respect of work done over the period 1990 – 2008. This work includes the erection of the apartment under the porch, replacing solar heater panel, servicing water pump, clothes dryer, washing machine and refrigerator etc.

[79] For the reasons already indicated at paragraphs 12 -14 above, this claim is dismissed.

#### **Cost of hiring a truck to remove the Claimant's property from the premises .**

[80] During the course of the trial, Claimant did not put forward any legal basis upon which this claim could be maintained. It was not addressed in the Claimant's evidence or in submissions and to all intents was not pursued. This claim is therefore dismissed.

#### **THE DEFENDANT'S CASE**

[81] The Defendant/Counterclaimant's counterclaim sets out a number of claims for special damage. As a counterclaimant she is also required to satisfy the Court on a balance of probabilities on the merits of these claims. This requires that she provide proof by clear and convincing evidence that she is entitled to recover the sums claimed.

### **Costs of effecting repairs to remedy the damage to the Defendant/Counterclaimant's building**

- [82] The sum of \$25,239.00 is claimed as compensation for the damage caused to the building as a result of unauthorized use and repair of the building. Paragraph 2 of the Defendant/Counterclaimant's Amended Defence and Counterclaim particularizes the alleged damage. She alleges that the Claimant caused damage to the theroesal roof to be plastered with cement and covered with tar paper which caused the roof to be damaged and ultimately led to the contamination of the water in the cistern.
- [83] She also alleges that the Claimant removed and replaced a custom made hardwood door as well as custom kitchen cabinets which were in the property. She also alleges that the Claimant repainted the exterior and interior of the building without authorization. There are other miscellaneous claims including damaged and used tiles, guttering and drainage.
- [84] The evidence in this case does not disclose the age of the building in 1994 but it is clear that some 14 years had elapsed from the date when the Defendant/ Counterclaimant departed the Territory.
- [85] The Claimant readily admits that she caused the repairs to be carried out to the roof, that she removed and installed new kitchen cabinets, that she repainted the property. Her evidence is that these repairs became necessary because of wear and tear. In her words "the property was falling apart."
- [86] The Court has no difficulty, given the passage of time, in deducing that this would well have been the case. In the Court's view it is wholly implausible that the Defendant would have incurred effort and expense to carry out repairs which were wholly unnecessary in all the circumstances. The Court accepts the Claimant's evidence that the repairs to the roof were the result of her well intentioned though inept attempt to repair existing leaks in the roof. She claims and the Court

accepts that both the kitchen cabinets and the exterior front door were not damaged by her but through wear and tear.<sup>4</sup> The Court finds that this is inherently probable in all the circumstances.

[87] In regard to the alleged damage to the guttering and drainage or broken tiles, these are specifically denied by the Claimant and save for the bare allegation was not proven on a balance of probabilities by the Counterclaimant.

[88] As regards, the unauthorized construction carried out in the downstairs portion of the property it is clear that on the Counterclaimant's own admission that this would have constituted an improvement to the property. This improvement admittedly included the use of tiles which were on the property but which are nevertheless incongruously claimed as part of the counterclaim. During her oral testimony, the Defendant/Counterclaimant readily concedes to using those improvements to her benefit.

[89] It is clear that the Claimant has the burden of proving not only that nature of the damage suffered to the property but also amount of compensation claimed. The Court will not compensate a claimant for damages which are speculative, fanciful or unsupported by evidence. The ultimate goal of compensation would be to put the Claimant in the position that he would have been in but for the purported injury, loss and damage. The Claimant is to be compensated only in an amount equivalent to the actual loss suffered.

[90] In support of her claim the Defendant/Counterclaimant submitted an estimate cost of repairs and/or restoration from Princess Quarters Construction dated 6<sup>th</sup> November 2009. The description of proposed repairs includes alternative options which are unexplained but which vary significantly in price, as well the cost of repairs in respect of work which was not pleaded in the Counterclaimant's claim or established in evidence on a balance of probabilities.

[91] Further, it is clear that where property is damaged, the normal measure of damages is the amount by which its value has been diminished.<sup>5</sup> A claimant may however be entitled to recover the cost of

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<sup>4</sup> Paragraph 22- 23 of the witness statement of Kristen Richardson and paragraph 12 – 14 of the witness statement of Fitzroy Dabreo

<sup>5</sup> Jones v Goody (1841) 8 M&W 146

repair or restoration where this exceeds the diminution in value of his property. See: **Harbutt's Plastacine Ltd v Wayne Tank and Pump Co. Ltd. [1907] 1 Q. B. 447 at 467**. Ultimately it is the reasonableness of the proposed expenditure which is the critical issue. So that where the cost of repair is out of all proportion to the diminution in value, the latter will be taken as the measure.

[92] Even if liability could be established, the Counterclaimant has provided the Court with no assistance by which it can determine the reasonableness of the proposed expenditure vis-à-vis the diminution (if any) in the value of the property.

[93] For the reasons indicated the Court is therefore obliged to decline any award under this head.

#### **Costs of repair and replacement of electrical works in the building**

[94] The Defendant/counterclaimant alleges that the main fuse box had been rendered unsafe in the Claimant's efforts to illuminate the goyard with motion sensors and spotlights. Exterior lighting was therefore added without permission. She also claims that the fixtures in several of the rooms and the verandah are nonfunctional.

[95] This evidence was not traversed during the trial. The Counterclaimant did not however provide any evidence verifying at least in so far as the additional lighting is concerned that this led to a diminution in the value of the property. Instead, in support of her claim the Defendant/Counterclaimant submitted an estimate from Princess Quarters Construction Co. which has provided an estimate for what is termed the "upgrade of electrical for the entire house to include material and labour" in the sum of \$8640.00.

[96] The Court is obliged to reiterate the same concerns expressed in regard the Counterclaimant's claim for general repairs. The purpose of compensatory damages is to put a claimant in the same position as he would have been had the breach not occurred. Any damages awarded must be reasonable as between the parties. In this case the claim which is maintained would clearly put the Counterclaimant in a better position that she would have been and would clearly be unreasonable. The Counterclaimant's pleadings and evidence alleges only that electrical system had a damaged

fuse box; nonfunctioning light receptacles and unauthorized alterations. She has failed to satisfy the Court that there is any basis upon which the Claimant should be required to foot the cost of a complete electrical upgrade throughout the entire house.

[97] At best, the Counterclaimant would only be entitled to recover the reasonable cost of immediate and necessary remedial repairs provided that these repairs are not out of all proportion with the likely diminution in value. Unfortunately has provided the Court with no assistance with which it can determine the reasonableness of the proposed expenditure vis-à-vis the diminution (if any) in the value of the property.

[98] The Court is therefore obliged to refer this claim to assessment.

#### **Costs of replacing the plumbing**

[99] The Defendant/Counterclaimant claims a total sum of \$5400.00 for plumbing repairs and replacement. She claims that the cistern, shower valves and toilet tanks all need to be repaired. She also alleged that water lines were brought on to the property without permission and that the exterior drains were replaced with cement troughs with incorrect pitch for proper drainage.

[100] The estimate from Princess Quarters Construction provides an estimate for repairs to the cistern in the sum of \$4500.00. It is alleged that the damage resulted from the roof repairs which it is alleged contaminated the cistern finish. The estimate reflects the cost of draining, inspecting, therosealing and refilling the cistern.

[101] The Counterclaimant also seeks to recover the cost of repair of the plumbing valves in the sum of \$1125.00.

[102] The Claimant specifically denied the existence of any down spouts in the property. She also denied filling the gutters; plugging any drainage holes or that there was any problem with the cistern following the roof repairs in 2007.

[103] On the evidence before the Court the Counterclaimant did not satisfy the Court of the Claimant's liability in respect of alleged damage to the plumbing. In the case of the damage to the outside drainage the Counterclaimant was put to proof of the same and she has not discharged that burden. In the same way the Court is not satisfied on the slender evidence presented that the Claimant's roof repairs were the direct and proximate cause of the damage to the cistern.

[104] With respect to the alleged replaced valves in the upstairs bathrooms, the Court finds that it would have been implausible for the Claimant to have replaced perfectly functioning valves and fittings. Given the passage of time, the Court accepts Counsel for the Claimant's contention that logic dictates that these replacements would have been warranted in any event.

[105] The Claimant does however concede that she did bring water lines onto the property for the purpose of irrigating her farm and the Court finds that she would have done so without the authorization of the Counterclaimant. However the Counterclaimant has not on balance of probabilities demonstrated to the Court that this resulted in damage to the property which would have diminished its value. Further, she has provided the Court with no assistance by which it can determine the reasonableness of proposed expenditure vis-à-vis the diminution (if any) in the value of the property.

[106] The Counterclaimant seeks the removal of the irrigation system, waterlines and spigots which were brought onto the property and installed by the Claimant. The Court finds Counterclaimant is entitled to their removal and will order that the Claimant do so within 21 days of the date of this Order.

#### **Costs of replacing the original landscaping on the property**

[107] The Defendant/Counterclaimant claims that the original landscaping on the property was in her words "obliterated" by the Claimant in her pursuit of farming and animal husbandry. She claims the sum of \$29,900.00 to among other things repair the damage, debris and weeds which need to be removed to reestablish the lawn and garden areas; to repair stonewalls and paths and to remove the unauthorized irrigation system, sheds and fencing installed by the Claimant on the property.

- [108] In support of this claim, the Defendant/Counterclaimant asks the Court to rely on a document provided by McKenzie's Enterprises Limited which provides an estimate for replacement value of plants lost, general cleanup and restoration of garden paths and terraced walls.
- [109] Save for this estimate, nowhere in the Counterclaimant's own evidence is there any indication of the plants which were on the property and which are alleged to be lost or destroyed. Further, the Counterclaimant was unable to prove on a balance of probabilities that these alleged trees and plants were destroyed by the Claimant. This aspect of the Counterclaimant's claim is dismissed.
- [110] The same order is made in respect of the claim for restoration of the BBQ, garden paths and terraced walls. The Court accepts the Claimant's evidence that these walls were damaged as a result of earth tremors over the years and that she undertook inexpert remedial efforts to repair the same.
- [111] However, the Court has no doubt that the engaged in farming activities on the Defendant's land without authorization which included the rearing of livestock. Although the scope of the farming and the quantity of livestock are in dispute, it is clear that substantial work was carried out to install fencing, irrigation, and agricultural/work shed all of which were unauthorized.
- [112] During the course of the trial, only one timeworn photo was exhibited to demonstrate the previous condition of the property. This merely showed what appears to be one side of the house with very little indication of the actual landscape. More importantly, the Counterclaimant provided no evidence of the value of the land and buildings as at the time of her departure and whether or by what amount that value may have been diminished.
- [113] The only documentary evidence provided estimates the cost of removing the shed and fenced pens at \$1250.00 and the cost of removal of the agricultural debris at \$6000.00. The Counterclaimant has again provided that Court with no assistance by which it can determine the reasonableness of the proposed expenditure vis-à-vis the diminution (if any) in the value of the property. In light of this and for the reasons already indicated this bearing in mind that the Court has already ordered the Claimant to bear the expense of removing the agricultural shed on the

premises, the Court will also order her to remove all goat sheds and fenced pens and to clear the debris from the property. This is to be effected within 21 days of this judgment.

#### **Total value of items removed from the Defendant/Counterclaimant's premises**

- [114] The sum of \$33,305 is claimed as the replacement value for items which are alleged to have been removed from the property by the Claimant or her agents. At the time of her departure it does not appear that any inventory was taken of the personal items in the house and no documentation was exhibited either verifying proof of purchase or proof of ownership. However a detailed list was presented by the Counterclaimant in which she particularizes a number of alleged missing items with their estimated values.
- [115] For the most part the Counterclaimant was unable to persuade the Court on a balance of probabilities that these items were either present in the House at the time of her departure or were removed, or otherwise converted by the Claimant. It is apparent that in preparing this list the Counterclaimant would have relied mainly on her own recollection. Further, save for the fact that the Claimant admittedly occupied the upstairs portion of the premises the Claimant was unable to discharge her burden in proving that the majority of items were in fact removed by the Claimant.
- [116] Save for this evidence the Court is not satisfied on a balance of probabilities that items claimed were in fact removed by the Claimant or her agents. The Court cannot rely solely on the fact of the Claimant's unauthorized occupation to ascribe liability since the Counterclaimant admits that on at least one occasion during her absence, the premises had been occupied by lessees whom she authorized and briefly by her daughter and her friends.
- [117] The Court notes however that in so far as the major kitchen appliances: fridge, stove, and washing machine that there is evidence that these had been replaced by the Claimant during the time when she was in occupation of the upstairs portion of the house. The Counterclaimant gave evidence that the replaced items did not belong to her and that they were not in good working condition and had to be discarded.

[118] This evidence appears in part to be corroborated by the Claimant's own pleadings<sup>6</sup> and by the evidence of the Fitzroy Dabreo who testified that he helped the Claimant move a fridge, washing machine and a stove that she had upstairs to the downstairs apartment. He recalled leaving a second fridge and stove upstairs, but no washing machine.

[119] In **CLERK & LINDSELL ON TORTS (18th ed.)** at paragraph 14-11 conversion is defined in these terms:

- a. *"Anyone who without authority receives or takes possession of another's goods with the intention of asserting some right or dominion over them, or deals with them in a manner inconsistent with the right of the true owner is prima facie guilty of conversion, provided that there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith."*

[120] It is clear that it is the inconsistency which is the gist of the action. It is irrelevant that a defendant had no intention to deprive the owner permanently of the goods. **The Playa Large [1983] 2 Lloyd's Law Reports**

[121] On the evidence in this case, the Court therefore finds that the Counterclaimant is liable for the conversion of the Counterclaimant's fridge, stove and washing machine.

[122] The general rule is that a claimant whose property is irreversibly converted has vested in him a right to damages for conversion measured by the value of the property at the date of the conversion.<sup>7</sup> The evidence of Mr. Dabreo is that these items were removed by the Claimant just prior to the visit of the Counterclaimant's daughter.<sup>8</sup>

[123] During the course of her evidence the Defendant/Counterclaimant testified that not only were the values ascribed by her personally but that she did so on the basis of what can only be described as

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<sup>6</sup> Paragraph 4 (c) of the Claimant's Reply

<sup>7</sup> *Solloway v McLaughlin* [1938] AC 247 (PC); *BBMB Finance (Hong Kong) Ltd (Formerly Known As Bumiputra Malaysia Finance Ltd) v EDA Holdings Ltd (In Liquidation) And Others* [1990] 2 KHLR 74 (PC)

<sup>8</sup> This was on 10<sup>th</sup> March 2005 see: Paragraph 4 of witness statement of Lily Carr and paragraph 2 of witness statement of Hilary Sell

a "guesstimate" of their current market value. In respect of the washing machine; stove and fridge she claims the sums of \$900.00; \$600.00 and \$900.00 respectively.

[124] Absent any indication of the market value of these items at as at March 2005, the Court obliged to refer this claim for assessment unless the parties are able to arrive at an agreed value of the items.  
**An account for the income or profit generated from the use of the Defendant/Counterclaimant's property**

[125] It is common ground that during her occupation, the Claimant rented parts of the Defendant/Counterclaimant property and earned rental income as a result. It is also common ground that she carried out farming activities on the property which yielded earning from the sale of agricultural produce.

[126] There are two key points of dispute. First, the Claimant alleges that these activities were authorized by the Counterclaimant. This is vehemently denied by the Counterclaimant. Second, the extent and scale of the activities are also disputed with the Counterclaimant alleging that Claimant would have received substantial earnings. While the Claimant concedes to limited earnings, she contends that they were applied to the maintenance of the property.

[127] Having reviewed the evidence of all of the witnesses, the Court finds the Claimant purported to rent the property without the consent of the Claimant. On the Claimant's own evidence, she took a unilateral decision to rent the property when in her words she had "*no contact with Mrs. Carr-Merrill and the costs of maintaining her property mounting...*"

[128] The Court also finds that the Claimant engaged in farming activities which included growing agricultural produce as well as rearing farm animals without the permission of the Counterclaimant. Again, on the Claimant's own evidence she admits that, "*After the departure of the tenant, and at the end of the rental, I was back to the previous position of carrying the financial burden of maintaining the property all on my own. I was still not hearing from Mrs. Carr- Merrill. So I started a small garden on the premises.*"

[129] The Court does not accept the Claimant ever obtained the Counterclaimant express or implied permission to carrying out these activities. The evidence discloses that for much of the time that the Counterclaimant was away from her property, the Claimant considered that she abandoned the property and she therefore proceeded to deal with it as if she were the lawful owner. Without authorization she took up residence in the upstairs portion of the house and she permitted family and friends to reside there as well. She also carried out farming activities from which she earned income.

[130] In her Amended Counterclaim, the Counterclaimant seeks an order that the Claimant account for the income and profit generated her use of the property. The Court finds that the Counterclaimant's profit was wholly unauthorized at the time it was made and so remained. Since it is only actual consent that would have obviated the liability to account, the Court finds that the Claimant is liable to account for the profits earned.

[131] The power of the court to grant a restitutionary relief, whether for a full account of the wrongdoer's profits or otherwise, cannot be doubted. However in order to secure such a remedy, a Claimant must demonstrate on his pleadings and through the evidence that this is a remedy which is available and which would be of some utility.

#### **What then are these profits?**

[132] The Counterclaimant urges the Court to accept that over time the Claimant would have earned rental income estimated at \$144,000.00. She also contends that the Claimant would have earned the profits estimated at \$43, 200 for livestock sales and \$ 72, 000.00 for agricultural sales. These assessments are based not on any empirical or verified information but on the Counterclaimant's own self-serving analysis.

[133] These calculations have absolutely no evidentiary foundation. While it is clear that the Claimant did rent the property and conceded that she earned income in the amount of \$2400.00, the Counterclaimant has failed to prove on a balance of probabilities that the Claimant earned any money in excess of that amount. While the Court does not doubt the veracity of the evidence of

Kinta Donovan, the Court cannot deduce from this that the Claimant in fact secured rental income in excess of \$2400. 00 or to the extent claimed by the Counterclaimant.

[134] In the same way the Counterclaimant has provided no evidence of actual income or profits earned from the Claimant's farming activities. During cross-examination she conceded that she never actually saw what was produced from the land. She was unable to produce any proof of income earned. She referred instead to evidence (photographs; records at the Department of Agriculture and a possible witness all of which were not before the Court. Other than Claimant's own general admissions, the Counterclaimant's claim is based solely on inference and mere supposition.

[135] In the case at bar, the Court is therefore constrained to accept the Claimant's uncontroverted evidence as to the income earned from her use of the property. The Claimant has admitted that some income was earned. Save for the sum of \$2400.00 she has provided no further indication of the sums earned from her use of the Counterclaimant's property. It is however her testimony that this income was used to defray the cost of maintaining the property and for paying the property taxes. Consequently there could be no accountable profits.

[136] In light of this and in view of the fact that she had no tangible or cogent evidence as to profits earned, the Counterclaimant was obliged to apply under CPR Part 41.2 for directions. These directions would have led to an inquiry (an account) the purpose of which would be to determine the amount (if any) that must be paid by the Claimant to the Counterclaimant. Through this process, a party who is under an obligation to explain his treatment of property in which someone else has an interest will usually be ordered to submit accounts. The Counterclaimant did not engage this procedure and so the Court has no way of knowing what (if any) profits are owed.

[137] In the premises, although in principle the Claimant would be liable to account for any proved profits earned from her unauthorized use of the Counterclaimant's property, the Court is unable to make any further order and so the court has no way of knowing what if any profits are owed.

## CONCLUSION

[138] In the end the decisive factor in the determination of these claims is the burden and the standard of proof. The legal and evidential burden rests on the Claimant and Counterclaimant who must satisfy this Court on a balance of probabilities of the merits of their case. During the course of this trial both parties struggled with this burden with the result that they were both only partially successful on their claims.

[139] The Court is also cognizant that this matter was unsuccessfully mediated. Given the pleadings and the admissions made therein, the fact that the entire claim and counterclaim proceeded to trial is an indictment on both parties.

[140] Accordingly, the Court will exercise the discretion accorded to it under Part 64.6 of the Civil Procedure Rules 2000 and makes no order as to costs.

[141] In respect of those awards which have been referred to assessment. Such assessment will proceed on application to be made within 30 days of the date of this judgment.

Vicki Ann Ellis  
High Court Judge