

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

Claim MNIHCV 2014/0010

BETWEEN	MARY CASARIN	CLAIMANT
	and	
	CHARLES DALY	DEFENDANT

APPEARANCES

Dr David Dorsett appeared for the Claimant

Mr David Brandt appeared for the Defendant

JUDGEMENT

Overview

- 1 **Morley J:** In this case, the Claimant wants vacant possession of her land, occupied and built on by the Defendant since 1998, and some rent from him. The Defendant says he owes no rent and wants the Claimant to be compelled to buy him out for the value of the house he has built, or for her to sell him the bare plot.

- 2 The parties are cousins. Mary is 75, and Charles is 71¹. This unhappy situation arises, as so much does on Montserrat, because of the volcano.
- 3 Montserrat is a lush emerald gem of 40 square miles, a British Overseas Territory, set in the sapphire blue of the Caribbean. In the Soufriere Hills in the south there is a volcano. In recent years, since 1995, it has been active. Eruption has submerged the capital Plymouth, now abandoned, and pyroclastic flow claimed 19 lives in 1997.
- 4 The residents of Cork Hill were required to evacuate. Charles was one. He lost his home. Because of the emergency, and being cousins pulling together, in February 1998 Mary said Charles could live on a $\frac{3}{4}$ acre plot she owns in the north at Davy Hill². He has lived there ever since with his wife.
- 5 This case is about what was agreed between them in 1998. Little is in writing. Mary brought an action on 03.03.14, affidavits and documents have been filed³, and there was trial before me on 04.04.17⁴. One reason for bringing her action is that Mary, mindful of her age, is worried about the inheritance of her land by her children and therefore she seeks legal clarity.
- 6 It is an inescapable fact that Charles built a permanent house, from concrete, on the plot between February and November 1998. The plot and house are together worth about \$200,000⁵. It is agreed by Charles that Mary owns the plot. I am asked who owns the house and can Charles be compelled to leave?
- 7 Mary says that initially she agreed to lease Charles her plot from 10.02.98 for 5 years, at \$25per annum⁶, and that he could build a temporary home. However, using concrete, he built a permanent home. She agreed to change the length of the lease to ten years, to 2008, from when she has wanted \$500 per month rent for five years, which has never been paid. She says she has always expected that Charles must vacate the plot in 2013, (specifically from

¹ In this judgement, I will refer to the parties by their first names, to make the judgement easier to read, and no disrespect is intended.

² Parcel 14/9/11.

³ Claimant certified as true the statement of claim she filed in person on 03.03.14, Defendant filed an affidavit in reply on 03.06.14, and claimant filed an affidavit via counsel Dr Dorsett on 24.05.16.

⁴ With speeches taking an hour on 07.04.17.

⁵ Value assessed by Galloway & Associates as at 01.06.14 as being \$197555.27 on 0.83 acres, being parcel 14/9/11.

⁶ \$ refers to East Caribbean dollars, where, as at 08.04.17, 2.7 EC dollars is 1 US dollar.

- 10.02.13), giving her the house. She also says that Charles fraudulently altered a Land Development Authority (LDA) document of 10.02.98 to show their agreement was for 15 years when it had said 5 years, and forged her signature and initials on another LDA document of 10.03.98. She says he owes her unpaid rent of \$500pm for 9 years from 10.02.08 to date. She wants \$55000, and him and his wife gone.
- 8 Charles says the agreement was always for 15 years at \$25 per annum, he did not fraudulently alter the figure from 5 to 15, or ever forge her signature, she agreed to his building a permanent home, she pointed out where he could build it, and she specifically agreed to buy him out for the value of the house in 2013, or to sell him the bare plot. No evidence has been offered as to the value of the plot without the house. He stopped paying any rent in 2008, upset she had sought from then \$500 per month, when all that he was to pay was \$25 per annum. He says he only owes \$125, if anything, and she should pay him \$200000 if she wants him gone.
- 9 Though once friendly, Mary and Charles fell out long ago over his occupation of her land. They no longer speak. They live a distance of about 25m apart⁷. Charles has said he has not said a word to her since 2013, and not said much before. In addition, he has never once responded in writing to any of her letters concerning the plot, whether from Mary personally or from her lawyers, beginning in August 1998.
- 10 The sharp feature of this case is that I am asked to decide if Charles at 71, with his wife, must give up his home of 19 years and become homeless.
- 11 The burden is on Mary to the balance of probabilities. From all I have read and heard, I must assess from the evidence this question: what probably happened between Charles and Mary so long ago in 1998?

Findings

⁷ In court, Charles said the distance between the houses of him and Mary were from the witness box to the office of the Premier in the next-door building, which I assess to be about 25m.

- 12 Weighing the probabilities, my findings concerning the length of the lease are these: in 1998 the lease was always for up to 15 years at \$25 per annum; Charles did not change the 5 to 15 on the LDA document of 10.02.98⁸; Mary did sign and initial the LDA document of 10.03.98⁹; Mary did sign the receipt of 10.03.98¹⁰ for \$250, being for 10 years rent; moreover, the receipt of 10.03.98 is a repetition of the receipt of 10.02.98 which Mary disclosed to the Court in her filing on 24.05.16, then recording the payment was for '*lease of land 10/15 years*'¹¹, being a payment for the years '*1998 to 2008*', making it clear the lease was always for up to 15 years.
- 13 What probably happened is this:
- a. The volcano caused Charles to be evacuated from Cork Hill. Mary worked in Canada with an airline BWIA. Charles rang her to ask about using her land. She visited Montserrat in February 1998 and an agreement was reached. Charles agrees Mary was most generous. Mary supported that Charles should build something and even arranged for him to have some materials she owned. She returned to Canada in March 1998 sometime after 10.03.98.
 - b. The LDA document of 10.02.98, signed by Mary, for 15 years, records in apparently Charles' handwriting that a '*temporary*' dwelling of '*wood and concrete construction*' was permitted by Mary. She issued a receipt on 10.02.98 for the \$250, for 10 years, being all the money he had at the time in those difficult eruptive days, recording in her handwriting it was for '*lease of land 10yrs/15yrs*'. He reassured her that he would only stay about 10 years anticipating he would be allowed back to Cork Hill by then.
 - c. However, it seems that to get the full \$28000 LDA grant for concrete the LDA document of 10.02.98 needed amendment for a more permanent construction. Charles therefore returned to Mary with a typed proforma LDA document of 10.03.98, again recording an agreement for 15 years, and on which she then signed and initialed edits, deleting the

⁸ Exhibit MC1.1 – 'MC', documents from Mary Casarin filed on 24.05.16.

⁹ Exhibit CAD2 – 'CAD', documents from Charles Daly filed on 01.09.16.

¹⁰ Exhibit CAD1.

¹¹ Exhibit MC1.10 – bizarrely never referred to by counsel on either side, as if counsel had not read it.

words 'temporary' and 'wood'. She reissued and signed the receipt, now dated 10.03.98, recording the \$250 was for the period 'from yr 1998 to yr 2008'. Although she said she had had nothing to do with the receipt of 10.03.98, the letter 'm' for 'March' is strikingly similar to the letter 'm' she writes for her name "Mary", containing a top right loop. Though not an expert in handwriting, I find she probably wrote that receipt, just as it seems clear she did the receipt of 10.02.98, disclosed by her, noting in addition the handwriting appears the same on both. Mary knows the lease was always for 10/15 years.

- d. Charles' house was built between May and November 1998.
- e. In August 1998, Mary returned to Montserrat and observed Charles was about to build a second storey in concrete. She told him to stop. Lawyers Allen Markham & Associates wrote to Charles on behalf of Mary on 10.08.98 saying '*there is ostensibly some degree of misunderstanding as to the initial intention of the relevant the parties*'¹². Charles and his associate Shurwin McNicholls¹³ say the reason Mary said he should stop building was that she '*said*' in their presence '*she would not be able to pay him out*' for a larger house. Having considered the evidence, I find this is probably not correct. If she said anything, she probably said she was wary from the size of the house being built that he would want her to buy him out, which is not the same as that she would not have the money to buy him out. I find Mary was uneasy that the bigger the construction in concrete the more problematic it may be later to move Charles off. Specifically, she worried he might claim he could not be moved unless Mary paid him out, which to her mind was never their agreement. This is what has given rise to their falling out. It began to dawn on Mary, despite her generosity, she had let someone onto her land, who had no other home to go to, and the more permanent and bigger the structure he built, the more difficult it would be to require his departure without his wrongly demanding money. If Mary's concern had been about being unable to pay Charles out for a larger house, then I find this would probably have been in the lawyer's letter of 10.08.98. Instead, reference to '*ostensible misunderstanding*' proves to my mind that Charles and Mary were not agreed as to what

¹² Exhibit DD3 – DD (defendant's documents) filed on 03.04.17.

¹³ Affidavit filed 30.12.16.

he was allowed to do on the land, and more specifically this letter points to how Mary expected he would leave without expecting money.

- f. Moreover, it is self-evident it makes no sense for Mary to allow Charles to live free and then to charge her to leave. In 19 years he has only paid her \$250.
- g. And so Mary and Charles fell out sometime soon after when she became aware she may have difficulty moving Charles off the land, and they have exchanged hardly a word since. This suggests to me that Charles from the very beginning of construction has harbored the secretive view that his house, if built in concrete, would give him rights over the land, which he has quite deliberately not discussed with Mary, as he has not sought to clarify his situation for fear he hears what he does not want to. It explains why he has not ever responded to correspondence, and has never once asserted, before his affidavit of 03.06.14 in this action, that Mary had agreed to buy him out or sell the plot. To quote Dr Dorsett in the last line of his speech, '*this silence speaks volumes*'. To my mind the silence proves Charles knows there was never an agreement that Mary must buy him out.
- h. Mary was aware she had agreed to a 15 years lease, at \$25 per annum, but had been paid for 10. She had thought Charles would be gone within 10 years. It became clear Charles could not return to Cork Hill. Mary now wanted a market rent, notwithstanding she had originally agreed to \$25 per annum for the 15 years. She incensed Charles when she decided to seek \$500 per month, raising the rent from \$25 to \$6000 per annum, for the five years from 10.02.08 to 10.02.13, after which point she wanted him off the land. She makes her position clear in the following letters to Charles:
 - i. 05.01.05 – from Kelsick & Kelsick¹⁴, warning of increased rent from 10.02.08, and requirement to vacate on 10.02.13.
 - ii. 04.04.06 – from Kelsick & Kelsick¹⁵, warning as before.
 - iii. 08.12.07 – from Mary¹⁶, requiring increased rent and warning of requirement to vacate.

¹⁴ MC1.3, DD4.

¹⁵ CAD3.

¹⁶ DD6.

- iv. 16.04.09 – new lease from 14.03.08¹⁷, served formally on 16.04.09¹⁸, but unacknowledged by Charles.
- v. 20.08.10 – from Mary¹⁹, requiring increased rent.
- vi. 27.02.13 – from Kelsick & Kelsick²⁰, requiring the increased rent to be paid, and that Charles vacate the land as the period of the lease from 10.02.98 to 10.02.13 has now ended.

- i. There being no reply to any correspondence, ever, Mary brought this action on 03.03.14 for the unpaid rent and that Charles vacate.

14 It follows that I do not accept what Mary says about forgery and originally a 5 year lease; and equally as regards Charles, I do not accept Mary agreed to buy him out or sell him the bare plot. I understand why Mary would not be correct about agreeing a 15 year lease with concrete construction as she has thought this would mean she cannot move Charles out without paying him a large sum; and I understand why Charles would not be correct as to what was agreed in 1998, namely there being no agreement she must buy him out, as he fears being evicted in old age with nowhere to go.

15 However, the critical question remains: what was agreed in early 1998, and in particular as to what should happen after the 10/15 years ends?

An implied term

16 Cork Hill is the key.

17 I find that Charles began by asking for a 5 year lease, but persuaded Mary to allow him a longer lease for a rent of \$25 per annum (because he is family) to live on the land while waiting to go back to Cork Hill, which he thought would be within around 10 years, though best to grant the lease for 15 years to be on the safe side. In that time, he would build a modest house, with help from the LDA, which Mary would get when he left. In exchange, he would live virtually rent

¹⁷ MC1.8.

¹⁸ MC1.9.

¹⁹ MC1.5, DD8.

²⁰ MC1.6, DD9.

- free, paying a derisory \$25 per annum, (already paid for 10 years). The disadvantage to Mary of the non-payment of a market rent would be offset by his working free to build the house for Mary, assisted by government grant.
- 18 In short, I find it was agreed that Charles live virtually free for 15 years in exchange for building a house Mary now owns.
- 19 What has gone wrong is he cannot return to Cork Hill, and as time has gone by, as observed by an increasingly worried Mary, he has formed as he has grown old a settled intention to stay put. He has 'hunkered down', like a hermit crab in another's shell, ignoring all approaches by Mary.
- 20 I find it was an express term of their agreement that the 15 year lease would end early if Cork Hill was opened back up. In my judgement, it follows, and I find, that on a balance of probabilities it was an implied term of their agreement, though perhaps neither party gave it deep thought, that he could stay on the land if Cork Hill did not open back up.
- 21 The implied term was to the effect that from 10.02.13, either Charles could buy the house and land from Mary (valued in June 2014 at \$200,000), or rent it at market rate during his lifetime or until he returns to Cork Hill, (assessed in 2016 at \$500 per month²¹).
- 22 I find therefore that Mary owns the house and plot, and Charles owes Mary \$125 for the period 10.02.08 to 10.02.13, and \$500 per month from 10.02.13, being in total now \$25125. He must pay her \$500 per month hereafter, or the revised market rate, unless he buys the house and plot for its current value, which Mary must sell him if he seeks it. In this way, Mary will get a proper monthly market rent, and the house and plot will remain hers for inheritance. Alternatively, Charles has the option of compelling her to sell at market value so that he can remain in his home. In the event he neither buys her out nor pays a market rent, it is further implied he must vacate.

²¹ Per para 14 of Claimant affidavit of 24.05.16, said then to be the monthly mesne profit for the property.

23 I recognize that from 2005 Mary has been at pains to move Charles off the land from 2013. She does not want to sell. However, this is contrary to the implied term I have found existed in early 1998. By 2005, it had become apparent Cork Hill may have to remain abandoned for many more years, with volcanic eruptions continuing into 2010²². I can readily understand the anxiety this created. Mary had thought the land would be hers to use again from 2013, or even 2008, but from what was agreed in 1998 I find this would only be on the basis Charles returned to Cork Hill, though Mary has subsequently sought to ignore this.

24 In short, Cork Hill is the key because it means it was agreed Charles was always to be allowed to stay in Davy Hill until he could return.

Equity

25 Cork Hill remains of limits²³. It seems to me unconscionable to evict him at 71 (and his wife) from the house he built, for and now owned by Mary, while he cannot return to Cork Hill, through no fault of his own, and which was the point of his building a new home, namely to wait in Davy Hill with Mary's agreement.

26 I now consider the position in equity. If I am wrong and there was no implied term, so that under the terms of the lease Charles was required to vacate on 10.02.13 and become homeless, in my judgement this situation gives rise to an enforceable option in equity. That option is, identical to the implied term, to stay renting at market rate from 10.02.13 or to compel Mary to sell him the house and plot. It arises because Charles has acted to his detriment in creating his new home at Davy Hill, in the expectation, known full well by Mary (and considerably enriching her by increasing the value of her bare plot by building on it), that he is only doing this so long as he cannot go home to Cork Hill. That need for a home in Davy Hill, granted by Mary, has not changed, no matter they would prefer it not so. It's the volcano's fault, not the parties'. Proprietary estoppel arises. Because Charles continues to need a home, and to his detriment has built one with Mary's agreement, both in the knowledge in 1998, though then thought unlikely, that the volcano may mean Charles might never return to Cork Hill, this means that under the doctrine of proprietary estoppel Mary is 'estopped' from evicting

²² Judicial notice is taken of eruptions in December 2006, July 2008, and February 2010.

²³ Judicial notice is taken that Cork Hill remains in exclusion zone C, being out of bounds at night.

Charles, and he has acquired in equity the options as described: in sum, eviction at so great a profit to Mary and so great a loss to Charles would be inequitable.

Legal arguments

- 27 During the case, there was some discussion, though not in depth, about s22 *Stamp Act Cap 17.02*. The suggestion from Claimant counsel was that the Act precluded any party relying on the LDA documents and receipts because they are ‘inadmissible’ as ‘instruments not duly stamped’. I find however these documents are not ‘instruments’ which were required to be ‘duly stamped’. The lease was wholly a parole contract, its terms were unwritten, and the documents were merely background, and as such remain admissible, merely to aid understanding of what was orally agreed.
- 28 Defendant counsel argued that s17 *Limitation Act Cap 2.12* prevents recovery of rent owing from 10.02.08. The limitation period is six years. However, the action was filed on 03.03.14. Either the first \$25 per annum of the original agreement was not actionably due until 10.02.09, whereupon the action is within the period; or the first \$500 per month was not actionably due until 10.03.08, whereupon the action for that first \$500 is (just) within the period, and all the other monthly rental sums are actionable in any event.
- 29 Claimant counsel argued there was objective and subjective uncertainty as to what was agreed, meaning there was no contract. Per Viscount Dunedin in **May v Butcher, 1934 2 KB 17**, at 21, ‘*To be a good contract, there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties*’. Further, per Viscount Maugham, in **Scammell and Nephew Ltd v HC and JG Ousten AC 1941 251**, at 255, ‘*It is beyond dispute that if an alleged contract is partly oral and partly in writing it is necessary to take the whole of the negotiations into consideration for the purpose of seeing whether the parties are truly agreed on all material points, for if they are not there is no binding contract*.’ In addition, in **RTS Flexible Systems Ltd v Molkerei Alois Muller 2010 1 WLR 753**, ‘*The question whether there was a binding contract between the parties, and if so upon what terms, required consideration of what was communicated between the parties by words or conduct and whether it led objectively, in accordance with reasonable expectations on honest sensible businessmen, to a*

conclusion that the parties had intended to create legal relations, and had agreed all the terms which they regarded or the law required as essential for the formation of legally binding relations.’ However, for the foregoing reasons, I find there was clarity, namely Charles could stay until he could return to Cork Hill, and if not, after 15 years must pay a market rent or buy the house and plot.

- 30 If I am wrong about the implied term, then the doctrine of proprietary estoppel arises, as outlined by Lord Walker in **Thorne v Major 2009 UKHL 18**, at 29, when he said: ‘...the doctrine is based on three main elements...a representation or assurance made..., reliance on it... and detriment in consequence of reasonable reliance...’ Here the assurance was he could stay at Davy Hill if Cork Hill was out of bounds, and the detriment was he built a ‘home’, not just a house, in which he settled, with his wife, relying on that assurance, no matter that both parties had hoped it would be temporary: the hope does not undo the detriment. Further, per Walker LJ (as he then was) in **Gillett v Holt 2001 Ch 210** at 232 C, ‘...detriment is required...it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances’. And on these facts, it being he could build a home until he returns to Cork Hill, I find it would be unconscionable to evict him.
- 31 Insofar as any argument might be advanced (though this did not feature at trial), that a mere parole agreement cannot give Charles an interest in Mary’s land owing to s39 *Registered Land Act Cap 8.01*, which requires agreements affecting interests in land to be in writing, I find the section does not apply. This is because in building the house Charles has conducted part-performance of the parole agreement, and such part-performance, being to his detriment, makes the agreement enforceable, even though oral. Considering similar legislation in the UK, namely s40 *Law of Property Act 1925*, Lord Reid said in **Steadman v Steadman 1976 AC 536**, at 540, ‘if one party [Mary] to an agreement stands by and lets the other [Charles] incur expense or prejudice his position on the faith of the agreement being valid he [Mary] will not then be allowed to turn around and assert the agreement unenforceable’. In a sense, this

principle offered by Lord Reid is another articulation of the doctrine in equity of proprietary estoppel.

Conclusion

- 32 If only the volcano had not been so restless. If activity had ceased, it seems likely Charles would have returned to Cork Hill, Mary would have had a valuable property created by him, and both parties would have been happy. This was 'plan A'. But the volcano did as the volcano did. And plan A was thwarted by acts of God. Being thwarted, for the foregoing reasons 'plan B' arose, namely he can stay if he cannot return to Cork Hill and he rents or buys, as an implied term, or in equity as I find it would be unconscionable to throw Charles and his wife out.
- 33 Charles must engage Mary, and respond to her approaches. And pay a decent rent from 2013. This action might have been avoided had he talked with her or written even one letter in reply to her many. The Court observes they have become quite sullen with each other, and it is hoped, as they are family, this unhappiness will now cease in the face of what the Court considers is a fair resolution.
- 34 Now that there is legal clarity, I order, (unless the parties agree otherwise):
- a. The house and plot are to be revalued by Mary immediately to reflect 2017 as to sale value, and also as to rental value (to be applicable from 12.10.17);
 - b. Within three months, by 12.07.17, Charles must pay to Mary the \$25125 unpaid rent, (being \$125 from 10.02.08 to 10.02.13, and \$25000 from 10.02.13 to 10.04.17);
 - c. Within six months, by 12.10.17, Charles shall vacate if either he has not bought the house and plot from Mary or paid all the monthly rent of \$500 per month from 10.04.17;
 - d. The option to purchase the house and plot shall expire on 12.10.17; and
 - e. After 12.10.17, Charles shall be required to vacate, if he has not bought the house, if he falls behind the new monthly rent by six months.
- 35 Insofar as Charles continues at Davy Hill paying a market rent, possibly until his death, the parties are strongly recommended to have a formal written lease, including to deal with whether and how he will be required to return to his home in Cork Hill, if habitable after now so

very long, if Cork Hill opens up. So much of this action arises because so little was in writing, and proves a salutary tale as to why agreements are best written down.

36 At its simplest, the Court has found that in his elderly years Charles with his wife can stay if he pays Mary properly.

37 In all the circumstances, as the arguments of neither party have succeeded, the parties will bear their own costs.

The Hon. Mr. Justice Iain Morley QC

12 April 2017