IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-003027
[2018] NZHC 3103

BETWEEN	SOPHIE FLORENCE FOSTER Plaintiff
AND	CEDRIC ROBERT SANDERSON CHRISTIE and CAITRIONA DEVINE First Defendants
AND	MICHELLE FOSTER Second Defendant

Hearing: 5 November 2018

Appearances: V Bruton QC for the Plaintiff
M J Wenley for the First Defendants
No appearance for the Second Defendant

Judgment: 29 November 2018

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by me on
29.11.18 at 3:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
The Small Law Firm, Auckland
V Bruton QC, Auckland
Willis Legal Lawyers, Napier

Introduction

[1] Sophie Foster, the plaintiff, is the youngest daughter of the late Gwendolen Foster (Gwen) who died in the Republic of Ireland in July 2016.

[2] In these proceedings, brought against the executors of Gwen's estate (the first defendants), Sophie challenges Gwen's 2013 severance of the joint tenancy of two New Zealand properties, owned in the name of herself and Sophie. The effect of the severance was to secure to Gwen a legal and beneficial ownership of a half share in each of the properties and to negate any interest passing by survivorship, to Sophie.

[3] Sophie claims that the severance was invalid; it was not the exercise of Gwen's free will and was caused by undue influence of her sister, Michelle Foster (the second defendant). Sophie seeks an order reversing the severance.

[4] The legal work for the severance was carried out by Willis Legal, solicitors of Napier.[1] Willis Legal say that they were acting as agents on instructions from Christie & Co, solicitors of Ireland, the firm acting on behalf of the first defendants. The first defendants are solicitors of Christie & Co.

[5] There are related proceedings before the Courts in Ireland. Sophie has filed a caveat seeking to block the grant of probate of Gwen's will to the first defendant. Proceedings have also been brought by Robert Foster, brother of Michelle and Sophie, contesting the will under the Succession Act 1965 (Ireland) (the equivalent to the New Zealand Family Protection Act 1955).

[6] The first defendants have protested the jurisdiction of the Court to hear and determine the proceedings. They contend that the Republic of Ireland is the most appropriate country in which the matters in dispute should be determined and that Sophie can bring a claim under the Succession Act 1965 (Ireland).

[7] Sophie now seeks to set aside the protest to jurisdiction. She also seeks an order that Willis Legal must immediately cease to act in these proceedings on the

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1 Formerly Willis Toomey Robinson.

grounds that members of that firm will need to be cross-examined in relation to the issue of undue influence, and on the instructions they received from Gwen, and possibly Michelle, in relation to the severance. Sophie claims that Gwen did not have independent legal advice in relation to the severance. She says that in reality Willis Legal were instructed by Michelle and/or Christie & Co, Michelle's lawyers.

[8] The critical issues I must determine are:

(a) whether the first defendant executors have standing, in advance of the grant of probate, actively to protest the jurisdiction;

(b) whether, as Sophie contends, that only the New Zealand Courts have jurisdiction over the New Zealand realty; and

(c) the issue of *forum non conveniens,* which has particular application to the redacted wills claim and the claim in relation to the proceeds from the ASB joint account; and

(d) ongoing legal representation by Willis Legal – should they immediately cease to act in these proceedings?

Relevant legal principles

[9] This case is, of course, all about land in New Zealand. In accordance with New Zealand common law, domestic courts have no jurisdiction in proceedings primarily concerned with title or the right to possession of immovable property situated outside the jurisdiction of New Zealand, unless the action is based on a contract or equity between the parties (the *in personam* exception), or the proceeding concerns the administration of an estate or trust and extends to other property within the jurisdiction.[2] This rule, called the *Moçambique* rule, derives from the House of Lords decision in *British South Africa Co v Companhia de Moçambique.*[3]

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2 *Laws of New Zealand* Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [36]; and *Burt v Yiannakis* [2015] NZHC 1174 at [52].

3 *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL); see also *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 and *Burt v Yiannakis*, above n 2.

[10] At issue is the application of the rule in the context where the land is situated in New Zealand i.e. within our jurisdiction and the defendants, all Irish nationals, say the proceedings should be tried before a foreign Court, namely the High Court of Ireland.

[11] Following the filing of the protest to jurisdiction under r 5.49, the issue of forum must be determined under r 6.29. The relevant parts of r 6.29 read:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
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> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d);

[12] As already noted, the subject matter of these proceedings is land situated in New Zealand. I accept therefore the submission of Ms Bruton QC that the proceedings were properly served out of New Zealand without leave pursuant to r 6.27(e).

[13] Rule 6.28(5) provides:

> **6.28 When allowed with leave**
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> …
>
> (5) The court may grant an application for leave if the applicant establishes that –
>
> (a) the claim has a real and substantial connection with New Zealand; and
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> (b) there is a serious issue to be tried on the merits; and
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> (c) New Zealand is the appropriate forum for the trial; and
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> (d) any other relevant circumstances support an assumption of jurisdiction.

[14] As to whether there is a serious issue to be tried on the merits, the Court must be satisfied that there is a sufficiently strong factual basis to support the legal rights asserted.[4]

[15] Sophie, in this case, must also establish that New Zealand is the most appropriate forum for the trial.[5] As the Court of Appeal in *Wing Hung*[6] held:

> [45] In considering whether another forum is more appropriate, the Court looks for the forum with which the proceeding has the most real and substantial connection. Relevant factors include issues of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business.
>
> [46] We accept that other relevant considerations also bear on the issue of appropriate forum. These include the cautious approach already discussed to the subjection of foreigners to the jurisdiction of a New Zealand court; whether other related proceedings are pending elsewhere; whether the New Zealand court would provide the most effective relief or whether a foreign court is in a better position to do so; whether the overseas defendants will suffer an unfair disadvantage if a New Zealand court assumes jurisdiction; and any choice of jurisdiction previously agreed by the parties.

[16] In *Wing Hung* the Court of Appeal further held that the presence of a cause of action which fell outside r 6.27 did not mean that the entire proceeding had to be dismissed as the party effecting service could still seek to rely upon r 6.29(1)(b). Alternatively, the protest to jurisdiction could be dismissed on terms requiring the plaintiff to file an amended statement of claim which excluded any such causes of action.[7]

Factual background

[17] Following the death of her husband Gordon in 2010, Gwen moved to New Zealand from Ireland and purchased an apartment in a retirement village. In July 2011 she executed a will, prepared by Cook Morris Quinn solicitors of Auckland, in which she made various legacies with the residue to be shared amongst her children equally.

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4 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2011] 1 NZLR 754; [2010] NZCA 502 at [37].
5 At [43].
6 At [45]-[46].
7 At [69].

[18] There are two New Zealand properties in dispute, one at Mairangi Bay, Auckland and the other at Omaha.

[19] Up until September 2013, the two properties were owned by Sophie and Gwen as joint tenants. Sophie contends that the joint tenancies, with rights of survivorship to her, reflected her parent's wishes that she would inherit the New Zealand realty with the remainder of the parent's estate in Ireland being shared amongst the other two siblings. This equated to a broadly equal sharing amongst the three. Sophie also says that her parents recognised the absence of an inheritance tax in New Zealand, in contrast to the position in Ireland.

[20] In August 2011 Gwen decided to return to Dublin. Sophie says she intended to pack up her Dublin house and to say farewell to Ireland. Gwen never returned to New Zealand.

[21] In December 2011 the sum of $728,025 was withdrawn from an ASB term deposit in the joint names of Gwen and Sophie. Further sums were withdrawn from the joint ASB accounts during the first six months of 2012 and then again in 2013 and 2014.

[22] In her statement of claim, Sophie seeks an order that all of these funds previously held in the joint ASB accounts be vested in her.

[23] Throughout 2012, Sophie became increasingly concerned at the influence that Michelle appeared to be exerting over Gwen. There is reference in the evidence to attempts to mediate and resolve differences within the family.

[24] On 6 September 2013 Gwen signed a Private Individual Client Authority and Instruction for an electronic transaction in relation to the severance of the joint tenancies for both properties. The client identification section of the authority has been completed by Mr Cedric Christie, one of the first defendants and solicitor of Ireland. He certified that Gwen appeared to be of sound mind. The New Zealand based conveyancing solicitor who attended to the severance, was Mr Callinicos of Willis Legal.

[25] The severance of the joint tenancies was registered on the respective titles on 10 September 2013.[8]

[26] In September 2014 Sophie travelled to Ireland for Gwen's 90th birthday celebration. About the same time caveats were registered by Gwen against Sophie's interests in both the New Zealand properties. On 26 September 2014 Gwen signed an affidavit in support of an application that caveats lodged against the properties not lapse. The affidavit was drafted by Mr Wenley of Willis Legal. The affidavit was sworn in front of a solicitor in Ireland.

[27] No notices to lapse the caveat or any proceedings in relation to the caveats have ever been brought.

[28] In November 2014 Sophie received a letter from Willis Legal advising that they acted for her mother and that upon her instructions they had severed the joint tenancies of both properties and caveated the resulting half shares held in her name. That was more than 12 months after the severance had been registered.

[29] On 5 January 2016 Gwen signed her last will, prepared by Christie & Co. On 30 January 2016 Gwen passed away. Sophie receives nothing under the will. Michelle is the primary beneficiary, with a smaller provision made for Robert. A bequest to Robert of €230,000 is to be paid out of the New Zealand property, being the two properties at issue in these proceedings.

[30] In August 2017 Sophie filed caveat proceedings in the High Court of Ireland in relation to the grant of probate to the executors, namely the first defendants.

[31] In early 2018 Robert issued a plenary summons in the High Court of Ireland contending that Gwen's last Will was void and invalid.

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8 The right to severe a joint tenancy unilaterally was confirmed by the High Court in *Samuel v District Land Registrar* [1984] 2 NZLR 697 and the law is now conveniently restated in s 48 of the Land Transfer Act 2017.

The competing positions of the parties

[32] Ms Bruton submitted that it is a fundamental principle of private international law that disputes over real property must be determined and enforced in *lex situs* – where the property is situated. Questions of succession to land are governed *by lex situs*, not the law of the domicile.[9]

[33] In the proceedings Sophie seeks an order setting aside Gwen's purported severance of the joint tenancy with the effect that the realty passes to Sophie by survivorship and does not form part of Gwen's estate. It is contended that this is a claim concerning New Zealand realty, that New Zealand law applies and that a New Zealand Court alone has power to enforce a judgment in Sophie's favour. Ms Bruton submitted that the High Court in Ireland has no jurisdiction over New Zealand realty and the resealing of probate granted in Ireland will not confer on the Irish Court any jurisdiction in respect of the New Zealand realty. Any potential claim that Sophie has under the Family Protection Act 1955 to relief from the New Zealand realty must also be determined in New Zealand under that legislation.

[34] The first defendants contend that the exception to the *Moçambique* rule applies, namely that the claim of undue influence is an *in personam* claim, thus conferring jurisdiction on the Irish Courts, and thus creating a *forum non conveniens* issue. The Irish Court, where there are already two related proceedings, is the most appropriate forum for resolution of all disputes.

Decision and analysis

[35] For the purposes of my analysis I shall treat the statement of claim as containing three separate causes of action: an alleged lack of testamentary capacity and undue influence in relation to Gwen's last will (the relief sought being the provision of unredacted copies of all relevant wills); the claim of undue influence in relation to the severance of the joint tenancies (i.e. the New Zealand realty) and a claim of undue influence in relation to the funds transferred from the joint ASB account to Gwen (and now held in the trust account of the Small Law Firm).

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9 *Re Butchart (deceased)* [1932] NZLR 125 (CA).

[36] I find that the issue of jurisdiction arises only in relation to the claim in respect of the joint tenancies, that is the claims relating directly to the New Zealand land. In relation to the other two causes of action which do not affect New Zealand land, there is in my view no jurisdiction issue but rather one of *forum non conveniens*.

Issue 1 –Standing

[37] There is some irony that Sophie, having chosen to bring the proceedings against the first defendants, now claims that they do not have any standing to protest the jurisdiction. However, in fairness to Ms Bruton, Sophie's position is that the first defendants ought to be neutral on all matters in dispute and to the extent that any protest to jurisdiction might properly be advanced, that should be the responsibility of Michelle, the second defendant.

[38] Ms Bruton contends that given the ongoing litigation in Ireland challenging the validity of the will, the first defendants as executors have no standing unless and until they have confirmation of their authority. In support of that submission she relies upon the decision of this Court in *Leary v Grout*[10] where it was held that the executors of a disputed Will did not have standing; instead, their powers were held by a temporary administrator appointed by the court.

[39] However, I find that the decision of Venning J in that case was confined to situations where a temporary administrator has in fact been appointed. Venning J accepts the general proposition that an executor derives title from the will rather than from the grant of probate (describing that proposition as "obviously correct").[11] However, the general statement of law was, on the facts of that case, subject to the operation of the Administration Act provisions dealing with temporary administrators. In my view, where no temporary administrator has been appointed, the general statement of law should be given effect to.

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10 *Leary v Grout* [2014] NZHC 2495.
11 At [17].

[40] I find that the first defendant executors do have standing in this case to challenge the jurisdiction. Their authority vested from the time of Gwen's death and probate, if granted, will be mere confirmation of that.[12]

[41] Ms Bruton also submitted that Michelle, by filing her memorandum of 6 June 2018 seeking an extension of time in which to file a statement of defence, has already submitted to the jurisdiction of New Zealand Courts such that the protests of both defendants should be dismissed.

[42] Michelle filed her memorandum on the day that her statement of defence was due. She did not expressly raise any jurisdiction issue but rather sought an adjournment for at least six months. She stated that she did not have a solicitor in either Ireland or New Zealand and that she was eager "to take the opportunity to refute hurtful and questionable" assertions.

[43] Michelle subsequently filed an appearance under protest to jurisdiction dated 18 July 2018. It lists as the address for service as the offices of Willis Legal, Solicitors Napier (for the attention of M J Wenley). It is virtually identical to the appearance under protest filed by the first defendants.

[44] I reject the submission of Ms Bruton. Michelle's memorandum was clearly filed at a time when she did not have the benefit of legal advice and it would be wrong, in the circumstances, to conclude that such memorandum constitutes a formal submission to the jurisdiction of the New Zealand Courts.

[45] The memorandum was clearly not intended to be a statement of defence, although it did contemplate the filing of one, and the better interpretation is that Michelle required more time to determine what particular response she should make to the statement of claim. This case is similar to *Air Nauru v Niue Airlines Ltd*[13] where it was held that the filing of an address for service and an appearance in court when there was a different plaintiff did not constitute a submission to the jurisdiction. The

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12 *Alexander Leaimoth & Ors Williams, Mortimer and Sunnucks* on Executors, Administrators and Probate (21 ed, Sweet & Maxwell, London 2018) at [5.05]. See also Andrew Alston *Garrow and Alston: Law of Wills and Administration* (5th ed, Butterworths, Wellington 1984) at [1.8].

13 *Air Nauru v Niue Airlines Ltd* [1993] 2 NZLR 632.

steps that the defendant in that case had taken were consistent with the intention to protest to jurisdiction.

Issue 2 – jurisdiction

[46] In *Schumacher v Summergrove Estates Ltd*[14] the Court of Appeal held that controversies over immovable property should ordinarily be decided in the country where the property was, that being the sovereign state where power over the property resided and to whose authority's considerations of comity and effectiveness invited deference.

[47] The same Court in *Americhip Inc v Dean*[15] held that a domestic court alone has power to enforce a judgment on a claim to immovable property. That case concerned funds allegedly embezzled from Americhip in the United States being traced to the purchase of property in New Zealand, resulting in a constructive trust claim over the property by Americhip. The Court, in finding that the claim should be heard in New Zealand, proceeded on the basis that because a New Zealand Court would not recognise or enforce a judgment from a foreign country relating to ownership of immovable property, a foreign jurisdiction would be unlikely to assume jurisdiction to adjudicate Americhip's claim.

[48] Despite some criticism of its justification, it is clear that the *Moçambique* rule still applies in New Zealand.[16] Asher J in *Burt v Yiannakis*[17] observed that the concept of comity of nations and respect for local law as it applies to the land of other nations underlies the concept of the rule. A further justification is that given its long-lived application, it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence. His Honour also held that s 7(1) of the Property (Relationships) Act 1976 and its implicit exclusion of immovable property can be seen as a recognition by the legislature of the ongoing application and relevance of the rule.

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14 *Schumacher v Summergrove Estates Ltd*, above n 3, at [30].
15 *Americhip Inc v Dean* [2014] NZCA 380, [2014] NZAR 1137.
16 *Burt v Yiannakis,* above n 2, at [54].
17 At [54].

[49] The UK Supreme Court in *Lucasfilm Ltd & Ors v Ainsworth*[18] referred to the earlier decision of the House of Lords in *British South African Co v Companhia de Moçambique*[19] case as the "authoritative foundation" for the rule. It also recognised that the rule has for a long time been subject to the exception, that where there is a contract, or an equity between the parties, the courts of equity will enforce it.[20] The Court further noted that the essence of the *Moçambique* decision is that jurisdiction in relation to land is local (that is, the claim has a necessary connection with the particular locality) as opposed to transitory (where such a connection is not necessary) and that it is contrary to international law, or comity, for one state to exercise jurisdiction in relation to land in another state.[21]

[50] In England, part of the *Moçambique* rule was abolished by s 30(1) of the Civil Jurisdiction and Judgments Act 1982. That section provides:

> The jurisdiction of any court in England… to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.

[51] In *Lucasfilm Ltd & Ors v Ainsworth,*[22] the UK Supreme Court also analysed art 22(1) of the Brussels Convention. This is of some relevance here because of course the Republic of Ireland is a member of the European Union. The Brussels Convention provides that the Courts of the relevant EU member states in which the property is situated have exclusive jurisdiction, regardless of domicile:

> In proceedings which have as their object rights *in rem* in movable property or tenancies of movable property.

[52] I interpret the jurisprudence as establishing that under New Zealand common law the New Zealand Courts will not recognise a foreign court asserting jurisdiction over land in New Zealand, particularly when questions of title are concerned, unless the *in personam* exception apply. If it does apply, then there may be an issue of *forum non conveniens*.

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18 *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39.
19 *British South Africa Co v Companhia de Moçambique*, above n 3.
20 *Penn v Lord Baltimore* (1750) 1 Ves Svn 444.
21 *Lucasfilm Ltd v Ainsworth*, above n 18, at [56].
22 At [74]-[75].

[53] There is support for this interpretation in the decision relied upon by Ms Bruton, namely *Re Butchart (deceased)*.[23] In that case the testator was domiciled in Scotland and by his will gave all of his estate, including land in New Zealand, to a niece. The Court of Appeal held that the validity of a will affecting an immovable such as land, and the rights of succession thereto, including the testator's capacity to deal with the whole estate insofar as consisting of such land, is governed by the *lex situs* and not by the law of domicile. As a result, the Family Protection Act 1908 (New Zealand) applied to a will insofar as it affected land situated in New Zealand, and whether the testator was domiciled in New Zealand or elsewhere.

[54] On this approach, the *Moçambique* rule applies both ways, namely when the land at issue is situated overseas or in New Zealand. Given the underlying rationale for the rule, it makes sense to do so.

[55] In my view therefore the real issue in this case, as it relates to the severance of the joint tenancies, is one of jurisdiction rather than a question of *forum non conveniens.* In applying the *Moçambique* rule, the central issue is whether or not undue influence, in the context of this case, is an *in rem* or *in personam* claim.

[56] I also find that the exception to the rule related to the administration of estates has no application here. The claim Sophie makes in relation to the land is that it does not form part of Gwen's estate; it is hers by virtue of survivorship. The issue of the administration of Gwen's estate may have some relevance to the issue of *forum non conveniens* but not, in my view, in relation to jurisdiction. Mr Wenley relied on the *in personam* exception for the purposes of his jurisdiction argument rather than the administration of an estate exception.[24]

[57] I now turn to address the critical issue of the nature of the claim of undue influence in this case.

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23 *Re Butchart (deceased)*, above n 9.

24 I acknowledge, however, that in terms of his *forum non conveniens* submissions, Mr Wenley contended that all proceedings, including those relating the administration of Gwen's estate, were related and should be heard together.

[58] The presumption is that equitable claims such as undue influence operate *in personam*. However, the Courts recognize that this is not always true. A good example is the discussion in *Schumacher* of whether a constructive trust is proprietary or not.[25] In determining how they should approach the question of jurisdiction, the Court of Appeal held:

> [36] We make two points. First, as Auld LJ observed in *MacMillan*, the underlying principle at work is that of comity between nations, and distinctions in classification of claims should not inhibit this principle. Because consensus matters a court engaged in classification looks for the "true issue" in the case, anticipating that courts of the *lex situs* will agree, and hence defer. It follows that it is an error to dwell on "particular notions or distinctions" of domestic law. Second, and for the same underlying reason, private international law concerns itself more with the distinction between immovable and movable property than the classification of claims. Courts anticipate that the lex situs, which ultimately controls immovable property, may decline to enforce or supervise orders of a foreign court.

[59] Having reached that conclusion, the Court of Appeal turned to examine the nature of the interest claimed. They concluded that Ms Schumacher's claim did not rest upon an antecedent obligation, such as a contract of fiduciary duty but was rather a proprietary interest through a constructive trust. This meant that the claim had to be heard in Ireland; the *in personam* exception did not apply.

[60] I accept Ms Bruton's submission that the claim in this case is in substance an *in rem* and not an *in personam* claim. The exception in the *Moçambique* rule therefore does not apply. The New Zealand Courts and no others, have jurisdiction.

[61] The approach of Asher J in *Burt v Yiannakis*[26] is instructive. In that case, Asher J held that a claim to a constructive trust in a relationship property context is a claim for an interest in property, and is therefore first and foremost a proprietary claim. He concluded therefore that the *in personam* exception to the *Moçambique* rule cannot be said to apply to a *Lankow v Rose* type constructive trust claim brought in respect of a foreign immovable in a relationship property context.

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25 *Schumacher v Summergrove Estates Ltd,* above n 3, at [37].

26 *Burt v Yiannakis*, above n 2.

[62] The typical remedy for undue influence is the setting aside of the impugned transaction.[27] The undue influence being alleged in this case is not the signing of the contract or loan agreement in relation to the properties, it is the severance of the joint tenancies, something which directly affects the ownership of the land itself. Just as in *Schumacher,* the interest is directly proprietary.

[63] The language used in the pleadings supports this interpretation; the relief pleaded is for the severance of the ownership of the title to be set aside. Sophie is claiming to be the sole registered proprietor of the land; she asserts full legal and beneficial ownership to the exclusion of all others. She seeks an order that the title be amended by the District Land Registrar. This is very much a proprietorial claim.

[64] There is also authority that a claim of undue influence can give rise to a direct proprietary interest. For example, in *Round v Round* Palmer J held that the appropriate remedy for undue influence which caused an elderly father to transfer his house to his son, was to vest the property back in the father's ownership.[28]

[65] As noted above, the issue of jurisdiction as I have analysed it, relates only to the joint tenancy claims (being the realty claims). I now turn to address the issue of *forum non conveniens* which has particular application to the other causes of action, namely those relating to the will (and the application seeking unredacted copies) and the funds originally held in the joint ASB bank account.

Issue 3 - Forum non conveniens

[66] I acknowledge that the application of the *Moçambique* rule in this case is a difficult exercise. I accept that it is likely that the concept of undue influence in Irish law is not materially different from that of New Zealand.[29] I also acknowledge the authorities that I have referred to primarily deal with the issue of whether a New Zealand Court has jurisdiction to make orders in relation to overseas properties; although I consider the Court of Appeal's acceptance in *Americhip* that foreign courts

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27 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington 2009) at [22.11].

28 *Round v Round* [2017] NZHC 428 at [99].

29 No evidence was adduced on the point and no relevant jurisprudence cited.

are unlikely to assume jurisdiction over immovable property in New Zealand instructive in assessing whether, as claimed here, only a New Zealand Court has jurisdiction in relation to the two properties.

[67] In accordance with r 6.29(1) the onus is placed on Sophie, as the plaintiff, to justify subjecting the foreign resident defendants to the New Zealand jurisdiction.[30]

[68] In the event that I am wrong to conclude that the exception in the *Moçambique* rule does not apply or that in the absence of evidence from Sophie as to the position of the Irish Courts she has failed to justify subjecting the defendants to New Zealand jurisdiction, I will also address the question of *forum non conveniens* in relation to Sophie's realty based claims. It logically follows that if both the New Zealand Courts and the Irish Courts have jurisdiction in this case, then it is necessary to address the question of the appropriate forum. I will do so on the basis that all three claims should be subjected to a *forum non conveniens* analysis.

[69] In terms of r 6.28(5), it is clear that Sophie's claim in relation to the two properties has a real and substantial connection with New Zealand. I also conclude that there is a serious issue to be tried on the merits. I reject the submissions of Mr Wenley that the severance of the joint tenancies could not have been challenged during Gwen's lifetime and that because there was no advantage or benefit to the alleged perpetrator of the undue influence (Michelle), there is nothing to rescind or reverse.

[70] The question of whether a transaction or the exercise of a power is the exercise of freewill by a person can, as a matter of principle, be challenged during that person's lifetime or after they have died.[31]

[71] In relation to the issue of advantage or benefit to the perpetrator of the undue influence, there is clear evidence that Michelle derived a benefit from satiating her alleged jealousy of her sister, Sophie, and in ensuring that the New Zealand assets did not pass to Sophie by survivorship. Furthermore, to the extent that Michelle receives

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30 Laws of New Zealand: *Conflict of Laws: Jurisdiction and Foreign Judgments* (online ed) at [25]; see also *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR6.29.01].

31 *Round v Round* [2017] NZHC 428.

a share of the estate residue, Michelle will clearly benefit by the severance of the joint tenancies, if they are not declared invalid.

[72] In respect of the claim for an unredacted copy of the wills and the claim of undue influence in relation to the ASB joint account funds, I find, on the evidence adduced, that these are serious issues to be tried. However, neither of those two claims has a real and substantial connection with New Zealand; on the contrary, and in relation to the wills' claim in particular, there is a much greater connection with Ireland. The will at issue was made in Ireland and involved Irish solicitors and the alleged perpetrator of the undue influence was and is located in Ireland. The funds, previously held in the ASB joint account, are now in Ireland.

[73] I turn to address the question of whether New Zealand is the appropriate forum for the trial (rule 6.28(5)(c)). The following factors are relevant:[32]

> (1) the relative cost and convenience of proceeding in each jurisdiction;
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> (2) the location and availability of documents and witnesses;
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> (3) the existence of litigation in another jurisdiction, and the state of those proceedings;
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> (4) whether all relevant parties are subject to New Zealand jurisdiction, so that all issues can be resolved in one hearing;
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> (5) whether the law governing the dispute to be resolved is New Zealand law;
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> (6) the existence of a contract which contains an agreement to submit to a particular jurisdiction or a clause relating to the appropriateness of a particular forum;
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> (7) the strength of the plaintiff's case;
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> (8) where any judgment obtained will fall to be enforced;
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> (9) whether the defendant's objection to jurisdiction or application for a stay is brought to gain a tactical advantage, and not because a trial in the other forum is genuinely desired;
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> (10) procedural advantages in one jurisdiction;
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> (11) a decision in another jurisdiction that it is *forum non conveniens*.

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32 *Laws of New Zealand* Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [30].

[74] In this case the various factors are somewhat finally balanced. However, overall I conclude that Ireland would be the most appropriate forum. There is obvious merit in the submissions of Mr Wenley that it makes real sense for all related litigation to be heard and determined together. This includes all of Sophie's claims, and the two extant Irish High Court proceedings. In such a case the High Court in Ireland would have jurisdiction over the whole of Gwen's estate, including the New Zealand properties. I acknowledge that the Irish Court would be applying New Zealand law in relation to Sophie's realty claims but I doubt that the distinction between a joint tenancy and a tenant in common, is unknown to Irish law.[33]

[75] I also accept the submission of Mr Wenley that both Sophie and Robert would have the right to seek further provision from the whole of Gwen's estate pursuant to the Succession Act 1965 (Ireland) and that the Irish High Court would presumably take all relevant factors into account (including whether or not there was undue influence).

[76] Probate granted by the High Court of Ireland can be resealed in New Zealand by virtue of s 71 of the Administration Act 1969. Accordingly, the High Court of Ireland in adjudicating on an application under the Succession Act 1965 (Ireland) could potentially make an award in favour of Sophie as to the remaining half share in the New Zealand property. The executors would then be bound to carry out that order. The executors would reseal probate in New Zealand and then register a transmission to their names as executors of the New Zealand property. There would then be a transfer of the property to Sophie.

[77] I acknowledge that the undue influence of which Sophie complains, is separate and distinct to the claim made by Robert, in his challenge to probate. The time period to which the two claims relate to is also different. However, in substance Sophie is really claiming that there has been a continual pattern of improper and inappropriate influence by Michelle extending over a number of years, including in 2013 when the joint tenancies were severed and the in the period leading up to the making of the last

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[33] There was no evidence before me that issue nor on the issue of whether an Irish Court would assume jurisdiction in this case.

will in January 2017. The hearing of all of the evidence in one trial at the one time does make sense.

[78] I accept that a number of the witnesses Sophie intends to call at trial are resident in New Zealand. This of course includes Sophie herself. However, the alleged undue influence and the associated lack of independent legal advice, took place in Ireland and Sophie's claim is likely to turn very much on the particular events in Ireland and the testimony of the key Irish witnesses, rather than those in New Zealand who were not present at the time of the alleged wrongdoing.

[79] In conclusion on the issue of *forum non conveniens*, I find that both the redacted will claim and the claim in relation to the joint ASB account proceeds, should be heard and determined in Ireland. If I am wrong on my finding about jurisdiction, I would also conclude that Sophie's realty based claims should be heard and determined in Ireland.

Issue 4 - legal representation – can Willis Legal continue acting for the first defendants?

[80] Sophie seeks an order that Willis Legal, the solicitors currently representing the first defendants, must immediately cease to act in these proceedings. The grounds for the application, based on the rules of professional conduct in the Lawyers and Conveyancers Act – Conduct and Client Care Rules 2008, are as follows:

(a) The key issue in Sophie's undue influence claim (and in undue influence claims generally) is whether the transaction/exercise of the power was the freewill of the person ostensibly carryout the transaction for exercising the power. The presence of independent legal advice is one of the factors to be taken into account in determining whether undue influence is proven.[34]

[34] *Green v Green* [2015] NZHC 1218 at [100](h).

(b) Gwen did not have independent legal advice. Willis Legal, in carrying out the severance of the joint tenancies, were, in reality, instructed by Michelle and/or Christie & Co of Ireland, Michelle's lawyers;

(c) Willis Legal were not "just agents" for Christie & Co but were in direct contact with Gwen and received instructions directly from her.

(d) If the trial takes place in New Zealand, counsel for Sophie will wish to cross-examine both Mr Callinicos and Mr Wenley (both Willis Legal partners) as to "purported instructions" from Gwen and instructions from anyone else and what steps (if any) they took to address the concerns raised by Sophie about Gwen, her mother being improperly influenced by Michelle.

[81] Sophie further submitted that the fact that Willis Legal have protested the jurisdiction of a New Zealand Court and are objecting to their removal adds to her concerns that they were previously acting on the instructions of and for the benefit of Michelle, and continue to do so now. The protest to jurisdiction filed by Michelle dated 18 July 2018 was, it is contended, drafted by Willis Legal for Michelle; the stated grounds of protest are identical to those of the first defendants. Furthermore, the address for service of Michelle is Willis Legal, for the attention of Mr Wenley.

[82] In opposing the application, Mr Wenley contended that there is no evidential foundation for the contention that either Willis Legal or Christie & Co were acting on the instructions, or under the influence of, Michelle in relation to the severance of the joint tenancies. Willis Legal received a Client Authority and Instruction for an electronic transaction duly signed by Gwen in the presence of Mr Christie and certified by him that she was of sound mind. Sophie's application, it is contended, is essentially a tactical one without merit; the steps taken to sever the joint tenancy were entirely transparent and correct for the purposes of the Land Transfer Act 1952. Furthermore, disposal of the jurisdiction issue without a further hearing where different counsel are instructed is entirely consistent with r 1.2 of the High Court calling for the "just, speedy, and inexpensive determination of" the proceeding.

[83] Mr Wenley acknowledged that Willis Legal had received some instructions from Gwen although they came via Christie & Co in Ireland. However, he submits that Willis Legal relied very much on Christie & Co given that Gwen was in Ireland. Mr Callinicos has an Irish wife and met Gwen in Ireland. Mr Callinicos has also spoken on the phone to Gwen. He has also had a telephone conversation with Michelle. Mr Wenley also accepts that he prepared the affidavit sworn by Gwen in anticipation of challenge being brought to the caveat that she, Gwen, lodged over Sophie's 50 percent interest in the two properties. Mr Wenley further advises that Michelle rang him on one occasion but has had no other communication with her. He was critical of a failure by Sophie and her legal advisors to have made any enquiries with Willis Legal about the issues now being raised, or to have discussed these with him in advance of the application now being made.

[84] I find that Sophie's application should be granted and that Willis Legal must cease acting from now on in this litigation. I accept that Willis Legal have been in a somewhat difficult position and my finding is in no way a criticism of their role to-date, including the representation by Mr Wenley in the proceedings thus far.

[85] However, there are in my view legitimate matters that Sophie is entitled to pursue including the role of Willis Legal in the alleged lack of independent advice for Gwen. I also accept the indication from Ms Bruton, senior counsel, that she wishes to cross-examine both Mr Callinicos and Mr Wenley about their role, including the drafting and swearing of the affidavit by Gwen in anticipation of Sophie seeking to remove the caveats over the two properties. In these circumstances, it would clearly be inappropriate for Willis Legal to continue acting. My finding is reinforced by Mr Wenley's acknowledgement (properly made) that Willis Legal did not always act just as the agents for Christie & Co but did have some direct contact with Gwen and also with Michelle.

[86] In accordance with r 13.5.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the Court has a discretion to allow a lawyer to continue acting in circumstances where he or she might give evidence of a contentious nature. I have thus far in the proceedings allowed Mr Wenley to act but I find that he should no longer continue to do so.

[87] If I am wrong in my conclusion on jurisdiction, meaning all of Sophie's claims should be dismissed at this juncture, then my decision on legal representation may well have been moot and/or decided differently. However, as long as proceedings remain in the New Zealand jurisdiction, I direct that Willis Legal must cease acting for the first defendant.

Result

[88] I order as follows:

(a) The application to set aside the protest to jurisdiction in respect of Sophie's claim of undue influence and in relation to the severance of the joint tenancies is granted. It is only a New Zealand Court that has jurisdiction to determine those claims.

(b) The application to set aside the protest to jurisdiction in relation to Sophie's claim to funds held in the ASB accounts held jointly by Sophie and Gwen (paragraph 16.17 of the Statement of Claim and paragraph (g) of the Prayer for Relief), is dismissed. It is the High Court of Ireland that is the most appropriate forum for the determination of those claims.

(c) Sophie's statement of claim of 18 December 2017, to the extent that it contains the causes of action relating to Gwen's wills (the claim for provision of unredacted copies) and the claim of undue influence in relation to the funds previously held in the joint ASB account, is dismissed.

(d) I direct that Sophie is to file an amended statement of claim by **21 December 2018** confining the causes of action in any amended pleading to the claims relating to the New Zealand realty.

(e) The Registry is to arrange for a case management conference by telephone on a date **after 1 February 2019**.

[89] I acknowledge that the outcome of this decision is that there will be related proceedings in both the New Zealand and Irish High Courts. How, the value of the New Zealand realty is substantial and if Sophie's claim is upheld, it would mean that the two properties do not form part of Gwen's estate. In the circumstances, it also makes sense in terms of policy and practice that any direction to the District Land Registrar to amend the titles, comes directly from a New Zealand Court.

[90] In relation to costs, in the ordinary course Sophie, having succeeded, would be entitled to costs and on 2B basis. If the parties cannot agree on costs, then memoranda are to be filed within 14 days.

Associate Judge P J Andrew