IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA124/2019
[2019] NZCA 623

BETWEEN	CEDRIC ROBERT SANDERSON CHRISTIE AND CAITRIONA DEVINE Appellant
AND	SOPHIE FLORENCE FOSTER Respondent

Hearing: 17 October 2019

Court: French, Lang and Mander JJ

Counsel: M J Wenley for Appellants
V T Bruton QC for Respondent

Judgment: 5 December 2019 at 3.30 pm

JUDGMENT OF THE COURT

A The respondent's application for leave to adduce further evidence is granted.

B The appeal is allowed.

C The cross-appeal is dismissed.

D The decision of the High Court relating to the respondent's claim of undue influence is quashed. The respondent's application to set aside the appellants' notice of objection to jurisdiction in respect of that claim is dismissed.

E The respondent's proceeding in the High Court is dismissed.

F The respondent must pay the appellants costs calculated for a complex appeal on a band B basis with usual disbursements.

G **The costs order made in the High Court is quashed. An order that the respondent must pay the appellant costs on a 2B basis with disbursements in respect of the High Court proceedings is substituted.**

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Is it possible for this proceeding to be heard in the Republic of Ireland? And, if so, is New Zealand or Ireland the more appropriate forum?

[2] Those were the key issues before Associate Judge Andrew in the High Court and now before us on appeal. The issues arise in the context of a family dispute between siblings over their late mother's will. The mother was domiciled in Ireland and her estate contains assets situated in both Ireland and New Zealand.[1]

[3] The appellants Mr Christie and Ms Devine are Irish solicitors. They are the trustees and executors appointed under the disputed will. For ease of reference, we refer to them as the Irish executors.

[4] In the High Court, the Associate Judge held that in so far as this proceeding related to land in New Zealand, it could only be heard in New Zealand.[2] He accordingly set aside the primary protest to jurisdiction filed by the appellants who are based in Ireland.

Background

[5] This proceeding was filed by the respondent Ms Sophie Foster. Sophie who is aged 60 lives in New Zealand.[3] She is the youngest of three children born to Gordon and Gwendolen (Gwen) Foster. The other two children Michelle and Robert both live in Ireland. What evidence there is before the Court suggests that Sophie and Michelle have been estranged for most if not all of their adult lives. Unlike Sophie and Robert, Michelle has no family of her own and is a welfare beneficiary. Also, according to the evidence before us, Michelle has struggled with mental health issues from an early age and has never held a job for any length of time.

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1 It appears there may also be some assets in England but neither party sought to attach any significance to them for the purposes of this appeal.

2 *Foster v Christie* [2018] NZHC 3103, [2019] NZAR 315 [High Court Judgment].

3 For ease of reference, we refer to all members of the Foster family by their first names.

[6] The three children were born in England but the family moved to Ireland in 1966. In 1986 Sophie and her then husband emigrated to New Zealand where Sophie has resided ever since.

[7] Gordon and Gwen visited New Zealand on several occasions and purchased land in this country. As at the date of Gordon's death in December 2010, there was a property called Rosa House which was registered in the names of Gordon, Gwen and Sophie as joint tenants. For present purposes, the most important legal consequence of a joint tenancy is the right of survivorship. In a joint tenancy, if one of the joint tenants dies, that tenant's interest in the property does not become part of their estate. Instead, the interest of the deceased joint tenant automatically accrues to the remaining joint tenant(s).[4] Accordingly, on Gordon's death, the title to Rosa House passed to Gwen and Sophie by survivorship. It did not form part of his estate.

[8] Joint tenancy can be contrasted with a situation where co-owners hold their respective interests in the property as tenants in common. In this latter situation, on the death of one co-owner, their interest in the property becomes part of their estate to be disposed of in accordance with their will.

[9] Returning to the narrative, in early 2011, following Gordon's death, Gwen decided to move to New Zealand. She funded the purchase of another New Zealand property at Omaha. It was registered in her name and Sophie's name as joint tenants. In November of that year, Gwen returned with Sophie to Dublin. According to Sophie's evidence, her mother always intended to return to New Zealand and the purpose of the visit was simply to sell the family home in Ireland and pack up her belongings for forwarding to New Zealand.

[10] However, that did not happen. Gwen never returned to New Zealand. According to Sophie, Michelle deliberately thwarted her mother's plans and pressured her into staying in Ireland. Sophie further contends that subsequently under Michelle's undue influence, Gwen changed lawyers and took various actions that were

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[4] For a discussion of the relevant principles, see *Gateshead Investments Ltd v Harvey* [2014] NZCA 361, [2014] 3 NZLR 516 at [9]–[16].

adverse to Sophie's interests. The evidence filed by Sophie portrays Michelle as unstable and deceitful.

[11] The first actions Sophie points to are the withdrawals of sums of money on international money transfer between December 2011 and July 2015 from a New Zealand ASB bank account that was in the joint names of Sophie and Gwen. It is common ground that all the money in the account belonged to Gwen. Sophie contends the withdrawals were orchestrated by Michelle. The total withdrawn is said to amount to NZD 902,305.

[12] On 6 September 2013, Gwen unilaterally severed the joint tenancies of the two New Zealand properties Rosa House and Omaha. The severance was registered and thereafter the titles showed Gwen and Sophie as tenants in common in equal shares. The decision to sever the joint tenancies was made after several requests to Sophie to sell Omaha.

[13] The appellants say Gwen took this action because Sophie refused to sell Omaha. Sophie denies this. She claims she was concerned the requests to sell were either being made by Michelle purporting to send emails under Gwen's name having taken over her computer, or if they were coming from Gwen it was because that was what Gwen was being told to do by Michelle. Sophie proposed mediation so she could be satisfied a sale was really what Gwen wanted. She further claims Michelle refused to allow Gwen to mediate and therefore there was an impasse.

[14] On 15 September 2014, Gwen instructed solicitors to register a caveat against Sophie's half interest in Rosa House and Omaha on the basis of a constructive trust. Gwen swore an affidavit prepared in anticipation of a caveat challenge. In the affidavit, Gwen says she wanted her capital out of the Omaha property and because Sophie would not co-operate she severed the joint tenancies. The affidavit also states that the basis of the alleged constructive trust is that Sophie did not contribute to the purchase price of either Rosa House or Omaha and it was not intended she have an ownership right.

[15] Sophie says it was only when she was notified of the caveats that she became aware the joint tenancies had been severed. She then lodged a caveat over Gwen's half share of Rosa House on 20 November 2014. The interest or estate claimed to support the caveat is recorded as being an implied trust whereby Sophie is the beneficiary and Gwen a trustee. An implied trust was also the basis of a later caveat lodged by Sophie over Gwen's half share in Omaha.[5]

[16] On 5 January 2016 in Ireland Gwen executed what was to be her last will. As already mentioned, the will appointed the appellants Mr Christie and Ms Devine as executors and trustees. The will made no provision for Sophie. The primary beneficiary under the will was Michelle. Michelle was given the family home in Dublin, an investment portfolio and a 75 per cent share of the residue. Robert received €230,000, to be paid out of Gwen's property situated in New Zealand as well as a 25 per cent share of the residue. There was no specific devise of the New Zealand realty which on the appellants' analysis therefore forms part of the residue.

[17] Gwen died aged 92 on 30 January 2016 in Ireland.

[18] In her affidavit, Sophie says that the timing of the last will, her mother's age and medical history and the contents of the will leave her in "no doubt" that the will was procured by Michelle by undue influence. In the same vein, she also has no doubt that the transfers of the joint tenancies into tenants in common in equal shares was "the result of Michelle's insistence, persistence and persuasion and was not Gwen's desire, intention or free will".

[19] As Mr Wenley counsel for the appellants put it, Sophie's narrative is that she is the victim of Michelle's greed and jealousy aided by lawyers who were unable to identify who the client was or deal with conflict. He says the counter narrative is that the severance was a considered act by Gwen acting under legal advice to try and retrieve the Omaha property (wholly funded by her) from the operation of a joint tenancy in response to Sophie's refusal to allow it to be sold. If severance had not

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[5] The records show that Sophie's current husband also lodged a caveat over Gwen's half share in Rosa House at the same time as Sophie's caveat was lodged. He does not appear to have lodged a caveat over Omaha. Sophie's caveat in respect of Omaha was lodged on 2 May 2016, that is after her mother's death.

occurred, Sophie would have taken full title to both properties simply by executing a transmission exhibiting Gwen's death certificate. That would have been contrary to the original core plan of her parents that Sophie would have one New Zealand property. For her part, Michelle has not yet had an opportunity to respond to the allegations made against her, other than to say they are hurtful and are denied.

[20] After her mother's death, Sophie filed caveat proceedings in the High Court in Ireland to prevent probate being granted to the Irish executors.

[21] Subsequently, on 18 December 2017, Sophie filed the current proceedings in New Zealand against the Irish executors as first defendant and Michelle as second defendant. The statement of claim pleaded two causes of action:

(a) Gwen did not have testamentary capacity when she signed the will and the will was procured by Michelle's undue influence. The remedy sought was an order that the Irish executors provide an unredacted copy of the 5 January 2016 will and any other wills made by Gwen which they hold.

(b) Undue influence in relation to the severance of the joint tenancies and the withdrawal of the money from the ASB bank account. The remedies sought included orders setting aside the severance, removing Gwen's caveats and directing the Registrar General of Land to transfer both properties to Sophie as well as an order that any funds still held in New Zealand from the ASB account vest in Sophie and an inquiry be held into the withdrawals.

[22] The statement of claim also contained an assertion that the severance of the joint tenancies was contrary to "the long-standing estate planning arrangements of Gordon and Gwen that when the survivor of them died, [Sophie] would inherit their New Zealand realty and assets in accordance with their long-standing plans to benefit their three children broadly equally".

[23] A month after Sophie filed the proceedings in New Zealand, Robert filed proceedings in the Irish High Court, the defendants being named as Mr Christie, Michelle and Sophie. Robert's proceeding amongst other things challenges the validity of the will on the grounds of Michelle's undue influence. Orders setting the will aside and restraining the Irish executors from administering it are sought, together with orders for an inquiry into the estate and a refund of any monies wrongfully taken by Michelle. Importantly, Robert also seeks an order for mediation between the parties as regards the estate and/or assets and/or administration of the estate.

[24] As they were entitled to do under r 6.27(2)(e) of the High Court Rules 2016,[6] Sophie's lawyers effected service of the New Zealand proceeding on the Irish executors and Michelle in Ireland without first obtaining the leave of the New Zealand High Court.

[25] In response the Irish executors and Michelle filed appearances under protest to jurisdiction in accordance with r 5.49 of the High Court Rules. This prompted Sophie to file an application to set aside the protests to jurisdiction.

[26] The basis of the protests to jurisdiction was that in all the circumstances, Ireland and not New Zealand was the more appropriate country in which the matters in dispute should be determined and that Sophie would have a fair opportunity to prove her claim and receive justice in Ireland including claims for testamentary promise and inadequate provision from Gwen's estate under the Succession Act 1965 (Éire).

[27] According to an affidavit filed by the appellant Mr Christie, the Succession Act regulates the status of the will. The Act confers jurisdiction on the High Court of Ireland to void a will for lack of capacity or undue influence. Like the New Zealand Family Protection Act 1955, it also confers jurisdiction to make provision from an estate for the benefit of a child of the deceased. Section 117(1) and (2) of the Succession Act states:

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6 The rule allows service without leave when the subject matter of the proceeding is property situated in New Zealand.

> Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
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> The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

[28] The filing of the protests to jurisdiction in New Zealand triggered r 6.29 of our High Court Rules. The rule is headed "Court's discretion whether to assume jurisdiction" and provides that, if service of a proceeding has been effected out of jurisdiction without leave and the Court's jurisdiction is protested under r 5.49, then the Court must dismiss the proceeding unless the party effecting service — in this case Sophie — establishes two things:[7]

(i) a good arguable case the claim falls within r 6.27 (which as mentioned above Sophie's claim clearly did); and

(ii) the court should assume jurisdiction by reason of the matters out in r 6.28(5)(b) to (d).

[29] The matters requiring to be established in r 6.28 (5)(b) to (d) are that:

- There is a serious issue to be tried on the merits.
- New Zealand is the appropriate forum for the trial.
- Any other relevant considerations that support an assumption of jurisdiction.

The decision of the Associate Judge

[30] It is trite law that claims relating to land must be determined by the law of the country in which the land is situated, in this case New Zealand. The appellants

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7 High Court Rules 2016, r 6.29(1)(a)(i) and (ii).

accept this. They also accept it is a consideration favouring New Zealand as the more appropriate forum. However, their argument both in the High Court and before us was that it was a consideration outweighed by other countervailing factors and it was a consideration that needed to be tempered by reference to the fact that Irish Courts were familiar with the equitable principles underpinning Sophie's claim and so more than capable of applying the relevant New Zealand law.

[31] The Associate Judge made the following key rulings:

(a) The Irish executors had standing to challenge the jurisdiction, notwithstanding the fact they have not yet obtained probate due to Sophie's caveat.[8]

(b) The High Court of Ireland adjudicating on an application under the Succession Act (Éire) could potentially make an award in favour of Sophie as to Gwen's half shares in the two properties and the Irish executors would then be bound to carry out that order.[9]

(c) However, only the New Zealand Court had jurisdiction to hear Sophie's undue influence claim because it involved land located in New Zealand.[10]

(d) Sophie's application to set aside the protests to jurisdiction in respect of the claim of undue influence in relation to severance of the joint tenancies was accordingly granted.[11]

(e) Both the Irish and New Zealand Courts have jurisdiction in relation to the claim concerning the will and the funds originally held in the joint ASB account.[12]

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8 High Court Judgment, above n 2, at [40].
9 At [76].
10 At [46]–[65].
11 At [88(a)].
12 At [36].

(f) In relation to those claims and having regard to the criteria in r 6.28(5)(b) to (d) Ireland was the more appropriate forum.[13]

(g) Sophie's application to set aside the protests to jurisdiction in relation to those claims was accordingly dismissed.[14]

(h) Sophie was directed to file an amended statement of claim confining the causes of action in any amended pleading to the claim concerning the New Zealand land.[15]

(i) Had the Judge found the Irish Court had jurisdiction in relation to the land claim, he would have held the Irish court was the more appropriate forum to hear and determine that claim as well.[16]

(j) Because the New Zealand firm of solicitors and counsel representing the appellants were involved in actioning the severance of the joint tenancies and were likely to be required to give evidence, they should cease acting in these proceedings except in relation to any appeal.[17]

Appeal and cross appeal

[32] Following delivery of the High Court judgment, the appellants sought leave from the Judge to appeal to this Court, principally on the ground he had erred in deciding that only a New Zealand court had jurisdiction over the land claim.

[33] In the appellants' submission, the Judge had applied the wrong test. The critical determining factor should have been whether it was possible for the Irish courts to make an effective order to grant the relief sought, namely the transfer of the New Zealand realty to Sophie. Once the Judge had concluded it was, then he should have moved to address the issue of whether New Zealand or

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13 At [66]–[79].
14 At [88(b)].
15 At [88(d)].
16 At [79].
17 At [80]–[87] and [88(f) and (g)].

Ireland — the courts of both countries having jurisdiction — was the more appropriate forum.

[34] According to the appellants, the Judge also erroneously conflated the law governing in which jurisdiction a matter should be heard (as required by the High Court Rules) with which country's law should apply to land. The Judge failed to consider that while succession to land is governed by the law of the place where the land is situated, that would not preclude the High Court of Ireland from applying New Zealand law if a party sought its application in the context of a claim against Gwen's estate.

[35] It was said the appeal could be reduced to two propositions:

(a) The place where the land is situated (the lex situs) is determinative of the choice of law but that is only one factor in deciding the convenient forum issue.

(b) Whether the foreign court can order effective relief is a pre-requisite to a consideration of the convenient forum.

[36] The appellants required leave to appeal under s 56 of the Senior Courts Act 2016 because the decision of the Associate Judge was an interlocutory decision.

[37] The respondent opposed leave being granted but if leave was to be granted, sought leave to cross-appeal on three issues: the standing of the Irish executors, the ability of the Irish Courts to grant Sophie an effective remedy and the finding that if the Irish Courts had jurisdiction, Ireland was a more convenient forum for the realty based claims.

[38] The Judge was satisfied that leave to appeal and cross-appeal should be granted.[18] He also ordered that the High Court proceeding be stayed pending determination of the appeal.

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[18] *Foster v Christie* [2019] NZHC 459.

[39] It appears that at some stage, Sophie filed an amended statement of claim as directed. We have not been provided with a copy but assume it was substantially similar to the original statement of claim but with the deletions directed by the Judge.

[40] Finally, in this section of the judgment, we record four further matters.

[41] The first is that Michelle is not a formal party to the appeal and the second is that there is no appeal against the order regarding legal representation.

[42] The third matter is that in response to a submission that an Irish Court could not order the removal of the caveats placed by Gwen on Sophie's half share in the two properties, counsel for the appellants Mr Wenley told us the caveats could be removed by the simple expedient of Sophie lodging a document for registration.[19] The appellants have no intention to maintain the caveats and the caveats would therefore lapse, rendering a court order unnecessary.

[43] The final matter is that if any of Sophie's claims would now be time barred in Ireland, Mr Wenley told us he was authorised to give the appellants' undertaking not to raise a time bar limitation defence or laches.[20]

Application to adduce further evidence

[44] Shortly before the fixture allocated for the hearing in this Court, Sophie's counsel Ms Bruton QC sought leave to adduce further evidence. The further evidence consisted of an affidavit by Sophie exhibiting a copy of a second amended statement of claim to be filed in the High Court along with copies of land transfer records.

[45] The appellants did not oppose the application and we granted leave accordingly.

[46] The second amended statement of claim pleads two new causes of action in addition to the original claim of undue influence. The new causes of action are

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19 Thereby triggering the procedure under s 143 of the Land Transfer Act 2017 (NZ).

20 The undertaking does not apply to an application under s 54(3) of the Land Transfer Act.

"proprietary estoppel" and "institutional constructive trust." In the circumstances, we considered it was appropriate to decide the issues on appeal by reference to all three causes of action and heard argument on each of them.

[47] While the appellants did not oppose the further evidence being admitted, they did however express strong concerns about a statement in the affidavit that Sophie intends to file applications in the High Court for the appointment of Perpetual Trust Ltd as temporary administrator under s 7 of the Administration Act 1969, the joinder of Perpetual Trust and Robert as parties, and the removal of the Irish executors as defendants. Mr Wenley argued there was no need for a temporary administrator and to do so simply for the object of preventing the executors from defending a claim against the estate and replacing them with a defendant of Sophie's choice was improper. He took no issue with Robert being joined and indeed is critical of Sophie for not having joined him at the outset but says that like Robert, Gwen's personal representatives are also essential parties to any proceeding affecting the title or ownership of land in New Zealand.

[48] We share those concerns. If the applications have now been filed despite the stay and despite this appeal against the assumption of jurisdiction by the High Court, they should not have been. We take no account of them. And in any event for reasons which will become apparent, they make no difference to the outcome.

The second amended statement of claim

[49] We now briefly summarise the three causes of action in the second amended statement of claim.

Proprietary estoppel

[50] The first is described as proprietary estoppel. It is alleged that promises were made by Gwen and Gordon that Sophie would inherit their New Zealand assets and that in reliance on those promises, both Sophie and her current husband performed work and services for Gwen and Gordon, including work on the various pieces of land they owned. Particulars of the alleged promises and work and services are provided.

[51] The pleading then goes on to aver that but for the severance of the joint tenancies and the lodging of Gwen's caveats, Rosa House and Omaha would have passed to Sophie upon Gwen's death, and that in the circumstances it would be unconscionable for Gwen's estate not to be held to the representations that Sophie was to inherit the New Zealand realty. Then follows an assertion that the two properties are beneficially owned by Sophie and that the half share of each which was transferred to Gwen's name as a consequence of the purported severance is held on trust for Sophie.

[52] The following remedies are sought:

(a) Orders that the properties do not form part of Gwen's estate and are held on trust for Sophie.

(b) Removal of the caveats registered by Gwen.

(c) An order that the Registrar General of Land transfer the half share of each property in the name of Gwen to Sophie.

(d) An order that the net income derived from both properties since Gwen's death belongs to Sophie.

Institutional constructive trust

[53] The second cause of action is described as an institutional constructive trust.

[54] The same paragraphs concerning promises and work and services pleaded in relation to the proprietary estoppel claim are repeated, followed by a pleading that Sophie and Gwen shared a common intention that on Gwen's death, Sophie would inherit the property at Omaha and Rosa House if Gwen still owned them. The claim goes on to aver that Sophie and her current husband acted in reliance and to their detriment on the basis of the common intention and that it would be unconscionable if on Gwen's death the common intentions were not given effect to.

[55] The same pleading asserting Sophie's beneficial ownership of Gwen's half share as appears under the heading of proprietary estoppel is then repeated.

[56] The remedies sought are the same remedies as claimed in proprietary estoppel.

Undue influence

[57] The third cause of action is undue influence in relation to the severance of the joint tenancies.

[58] The pleading repeats all the previous paragraphs and asserts that Gwen's purported severance of the joint tenancies and the lodging of the caveats was not the product of her free will and was caused by Michelle's undue influence, particulars of which are then provided.

[59] The remedies sought are:

(a) An order setting aside the severance of the joint tenancies and an order that the properties have passed to Sophie by survivorship.

(b) Removal of Gwen's caveats (not opposed by the Irish executors).

(c) An order directing the Registrar General to transfer the two properties to Sophie.

[60] We also record there is no challenge to the Judge's ruling that Sophie's claims relating to matters other than Rosa House and Omaha must be heard in Ireland. The second amended statement of claim is confined to Rosa House and Omaha.

[61] We turn now to address the issues raised both by the appeal and the cross appeal, commencing with the cross-appeal issue about standing.

Did the Judge err in finding the Irish executors have standing when probate is not yet obtained?

[62] The Irish executors have applied for probate, but their application is currently stayed as a result of Sophie's caveat.

[63] As the Associate Judge noted, there is some irony in the fact that Sophie having chosen to bring the New Zealand proceedings against the Irish executors and serve them, now claims they do not have any standing to protest the jurisdiction.[21]

[64] On appeal, Ms Bruton submitted the Associate Judge was wrong to find standing. She contended that in all the circumstances there is no certainty the Irish executors will ever get probate and as a matter of law without a grant of probate, the only power an executor has is the power to bury the body of the will-maker. Ms Bruton further contended the appropriate stance for the executors was to remain neutral and that if a protest to jurisdiction was to be advanced it should have been Michelle who bore the carriage of the argument.

[65] It is however well established that an executor derives their title and authority from the will, not from any grant of probate. That was clearly stated in the Privy Council decision of *Chetty v Chetty,*[22] and has been followed in New Zealand.[23] As was explained in *Chetty*, on the death of the will-maker, the latter's rights of action vest in the executor, and that accordingly the executor may institute proceedings in their capacity as executor before he or she proves the will.[24]

[66] It follows we agree the Associate Judge was correct when he held the appellants' authority vested from the time of Gwen's death and probate if granted will be mere confirmation of that.[25]

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21 High Court Judgment, above n 2, at [37].
22 *Chetty v Chetty* [1916] 1 AC 603 (PC) at 608.
23 For example, *Pacific Coilcoaters Ltd v Interpress Associates Ltd* [1998] 2 NZLR 19 (CA) at 27; and *Miah v AMP Life Ltd* [2018] NZHC 1634 at [11]; and see further Lindsay Breach *Nevill's Law of Trusts, Wills and Administration* (13th ed, LexisNexis, Wellington, 2019) at [19.2].
24 *Chetty v Chetty,* above n 22, at 608–609.
25 High Court Judgment, above n 2, at [40].

Did the Judge err in finding only a New Zealand court had jurisdiction to determine Sophie's claims relating to Omaha and Rosa House?

The Judge's reasoning

[67] The approach taken by the Judge was that before he could assess which of the competing forums was the more convenient forum under r 6.28, he first had to determine that both forums had jurisdiction to hear Sophie's land related claims. He found they did not. Only the New Zealand courts had jurisdiction.

[68] On the face of it, this would seem inconsistent with his other finding that the High Court of Ireland adjudicating on an application under the Succession Act (Éire) could potentially make an award in favour of Sophie as to Gwen's half shares in the two properties and the Irish executors would then be bound to carry out that order.

[69] However, in ruling that an Irish court would be precluded from entertaining Sophie's land claims, the Judge considered himself bound to apply a common law rule known as "the Moçambique rule".[26]

[70] The rule is derived from a 19th century decision of the House of Lords from which it takes its name.[27] The House of Lords held that English courts have no jurisdiction in proceedings primarily concerned with title to or possession of immovable property situated outside England.

[71] The land at issue in this case is of course situated in New Zealand, not outside it. However, the Associate Judge found the Moçambique rule "applies both ways".[28] By that he meant it applied not only to preclude New Zealand courts from having jurisdiction to hear a proceeding involving land situated overseas, but also to preclude a foreign court (here an Irish court) having jurisdiction over land situated in New Zealand. The Judge said it was established that under New Zealand common

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26 At [9], [46]–[56].

27 *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). For a discussion of the history of the Moçambique rule, see Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) vol 2 at 1314–1317 *[Dicey]*.

28 High Court Judgment, above n 2, at [54].

law, New Zealand courts "will not recognise a foreign court asserting jurisdiction over land in New Zealand, particularly when questions of title are concerned".[29]

[72] The Moçambique rule is subject to two exceptions, these being the "in personam exception" and "administration of an estate exception" which we go on to discuss at [79]–[109] below, but the Judge held neither of those exceptions applied in this case.[30]

Analysis

Overview

[73] The question of whether the Judge was correct to hold there is only one available forum (namely New Zealand) requires consideration of the following three issues:

(a) Did the Associate Judge misapply the Moçambique rule?

We hold he did because (a) the rule when applied by New Zealand courts only governs claims concerning land in a foreign country, not land in New Zealand and (b) in any event Sophie's claims are within the established exceptions to the rule. The exceptions are engaged because the correct analysis is that Gwen and hence her estate own the legal title to a half share of each New Zealand property and the essence of what Sophie is claiming is that Gwen's conduct has given rise to an equity of sufficient strength to support in personam claims. Those are very much issues for the administration of Gwen's estate.

(b) Should the Associate Judge independently of the Moçambique rule have held the Irish courts did not have jurisdiction because only a New Zealand court can grant the relief sought? (This being the cross-appeal.)

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29 At [52].
30 At [55]–[56] and [60].

We hold no, because we are satisfied that through its control of the Irish executors an Irish court would have the ability to grant Sophie an effective remedy.

(c) Can we be satisfied that an Irish court would hold it had jurisdiction to consider Sophie's claims when they relate to land in New Zealand?

We hold yes.

The Moçambique rule

[74] In modern times, the Moçambique rule has been widely criticised as an anomalous historic relic.[31] It is said to be out of step with what is now internationally acceptable, as well as being illogical and productive of injustice. There have been calls for it to be abolished in New Zealand and for proceedings relating to foreign land to be dealt with solely under the High Court Rules relating to jurisdiction and forum conveniens.[32]

[75] The criticisms appear to be well founded. However, we are satisfied this is not the case to decide whether the Moçambique rule should still be good law in New Zealand. That is because in our view, the rule has only ever applied to foreign land and not to land situated in New Zealand. To put it another way, it is not a domestic exclusive jurisdiction rule and cannot be the basis for a New Zealand court to hold that an Irish court would have no jurisdiction. None of the cases and texts cited to us by counsel support that approach.

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31 *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 (HL) at 536 (and the texts cited therein) and David Goddard and Campbell McLachlan "Private International Law: litigating in the trans-Tasman context and beyond" (New Zealand Law Society seminar, 2012).

32 In the United Kingdom, the Moçambique rule has been abolished in part by the Civil Jurisdiction and Judgments Act 1982 (UK), s 30(1). This permits its courts to entertain proceedings for torts affecting immovable property situated outside of the relevant 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". The application of the Moçambique rule as between the United Kingdom and other European Union member states has been affected by the Brussels I Regulation (Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1) art 22(1), and the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L/339/3 (signed 30 October 2007, entered into force 1 January 2007)) art 22(1), which both provide that the courts with exclusive jurisdiction in proceedings concerning immovable property are "the courts of the Member State in which the property is situated", subject to limited exceptions.

[76] The authority the Associate Judge relied on to justify his "both ways" approach was a 1931 decision of this Court in *Re Butchart*,[33] and the principle of international comity which he said was the underlying rationale of the Moçambique rule. However, in our view, neither supports a "both ways" approach.

[77] *Re Butchart* was a case concerning land in New Zealand which was part of the estate of a testator domiciled in Scotland. All that this Court held was that the applicable law was New Zealand law and therefore the testator's widow and daughter were entitled to bring a claim under the Family Protection Act. The Court certainly proceeded to adjudicate on the Family Protection Act claim itself but the issue of whether a Scottish court applying New Zealand law would also have had jurisdiction was never discussed because it was not an issue before the Court. The decision does not say anything about a New Zealand court arrogating to itself an exclusive jurisdiction.

[78] As regards international comity, it is highly debatable whether this is a proper justification for the Moçambique rule.[34] But in our view even if it is an underlying rationale, it would not warrant the unprecedented approach taken by the Judge. Comity is invoked for the purpose of declining what is considered to be an inappropriate intrusion into the jurisdiction of another state. It does not logically follow that comity requires a New Zealand court to in effect make that decision for Ireland. In our view, comity is irrelevant.

Exceptions to the Moçambique rule

[79] In any event, even if we are wrong and the Moçambique rule can be invoked by a New Zealand court to preclude the jurisdiction of another court in relation to New Zealand land, we would find that this case comes within the two established exceptions to the rule.

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33 High Court Judgment, above n 2, at [53] citing *Re Butchart (deceased)* [1932] NZLR 125 (CA).
34 See for example *R Griggs Group Ltd v Evans* [2004] EWHC 1088, [2005] Ch 153 at [74].

The in personam exception

[80] As already mentioned, the first of these established exceptions is known as the "in personam exception". Under this exception, a domestic court has jurisdiction to entertain a claim affecting ownership of foreign land if the claim is against a defendant subject to its jurisdiction and there exists between the parties a personal obligation or equity relating to the land arising out of contract, or trust, or from fraud or other unconscionable conduct.[35] If the exception applies, the court in its equitable jurisdiction can act on the conscience of the defendant by ordering the defendant to transfer or otherwise deal with the land according to the forms of the local law where the land is situated. The defendant signs the requisite documentation for fear of being held in contempt of court but the effect is to alter the ownership of foreign land all the same. Where there is a contract or equity between the parties, the Court will enforce it.[36] Cheshire, North & Fawcett provides that:[37]

> If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the claimant, the court … will not shrink from ordering him to convey or otherwise deal with foreign land.

[81] The equitable jurisdiction in personam touching land abroad is said to have existed for at least 250 years.[38]

[82] In our view, correctly analysed, the estoppel and constructive trust claims in Sophie's second amended statement of claim fall squarely within the in personam exception.

[83] As already mentioned the first cause of action is pleaded as proprietary estoppel. It is based on alleged promises made by Gwen and services undertaken in reliance on the promises.

[84] Contrary to a submission made on behalf of Sophie, the use of the word "proprietary" does not take this out of the category of an in personam claim for

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35 *Deschamps v Miller* [1908] 1 Ch 856 at 863.

36 *Ewing v Orr Ewing* (1883) 9 AppCas 34 (HL) at 40.

37 Paul Torremans and James J Fawcett (eds) *Cheshire, North & Fawcett Private International Law* (15th ed, OUP, Oxford, 2017) at 485.

38 *R Griggs Group Ltd v Evans*, above n 34, at [67], and *Ewing v Orr Ewing*, above n 36, at 40, both citing *Penn v Baltimore* (1750) 1 Ves Sen 444.

the purposes of the Moçambique rule. The underlying principle of all equitable estoppel is to prevent a party from going back on their word when it would be unconscionable to do so.

[85] What is in essence being claimed in this case is that, although Gwen and hence her estate holds legal title to a half share of the land, an equity has arisen between Gwen and Sophie in Sophie's favour as a result of an antecedent agreement and conduct. It is a concept familiar to Irish law as it is to New Zealand law.[39] So too is the concept that if Gwen's conscience was affected in the sense that she has a personal obligation to Sophie, then that also binds Gwen's personal representatives.

[86] What then of the fact that what Sophie is ultimately seeking is legal and beneficial ownership of Gwen's half share? Contrary to a submission made by Ms Bruton, we do not accept this makes it a claim "against the land" and takes it outside the in personam exception.

[87] The first point is that even if a court were to find that an equity has arisen, it has a discretion as to how that equity is to be satisfied. The court is not necessarily bound to order an expectation-based remedy. In any event, we do not accept the Irish courts are unable to order an effective expectation-based remedy. The Irish courts can grant relief in respect of the New Zealand land through its control of the Irish executors.

[88] The same analysis applies to the second cause of action described as an institutional constructive trust. It too is based on promises and services with the added element of a common intention all of which is said to make it unconscionable for Gwen's estate to retain beneficial ownership of the property. Sophie is thus seeking to vindicate her equitable rights and therefore under the in personam exception the Irish courts would not be precluded from hearing the claim due to a jurisdictional bar based on the Moçambique rule.

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[39] Ronan Keane *Equity and the Law of Trusts in Ireland* (3rd ed, Bloomsfield Publishing Plc, London, 2017) at [26.01]–[26.02], [27.29]–[27.74].

[89] In the present case, the Associate Judge acknowledged the existence of a presumption that equitable claims operate in personam.[40] However, he then went on to say that the courts have recognised this is not always true and gave as an example the decision of this Court in *Schumacher v Summergrove Estates Ltd*.[41] The Judge cited *Schumacher* as authority for the proposition that an institutional trust claim was outside the in personam exception because it did not rest upon an antecedent obligation such as a contract or fiduciary duty but was rather a proprietary interest through a constructive trust.

[90] That however is not correct. *Schumacher* concerned an appeal from a decision of Woolford J.[42] In his decision, Woolford J had held that the in personam exception *did* apply to a claim of institutional constructive trust.[43] His ruling on that point was not challenged on appeal and was not disturbed by this Court. The appeal was solely concerned with forum conveniens issues and extracts quoted from the judgment by the Associate Judge in this case concern choice of law issues, not jurisdictional bars.

[91] We acknowledge that in another High Court decision, *Burt v Yiannakis*, a different High Court judge, Asher J, held that an institutional constructive trust asserted in relation to an interest in immovable property should be regarded as a claim in rem for the purposes of the Moçambique rule.[44] He reasoned that if in essence the claimant is asserting an interest in real property, that involves doing indirectly that which a court cannot do directly, namely to assert jurisdiction over foreign land.[45] However, if that reasoning were correct, it would mean the in personam exception could seldom if ever apply because that is invariably the effect of the exception.

[92] In *Burt v Yiannakis*, Asher J's comments were made in the context of a dispute between spouses and a finding that specific provisions of the Property (Relationships) Act 1976 prevented equitable claims to immovable property located overseas from being heard in New Zealand.[46] That context may well have influenced Asher J in

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40 High Court Judgment, above n 2, at [58].
41 *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412.
42 *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387, [2014] 3 NZLR 599.
43 At [17].
44 *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739.
45 At [78]–[81].
46 At [24]–[48] and [73]. This was said to be the combined effect of ss 4 and 7.

making the comments he did about the position at common law, comments which were of course obiter, that is, not necessary to decide the case. In any event, we prefer the analysis of Woolford J in *Schumacher* and the cases on which he relied namely *Re Polly Peck International Plc* and *Webb v Webb*.[47] In this case, as in those cases, what is being alleged is a personal obligation arising out of unconscionable conduct and it is irrelevant that the ultimate purpose of the claimant is to obtain ownership of immovable property.

[93] The third cause of action in this case — and the only realty claim that was before the Associate Judge — is a claim of undue influence. It relates to Gwen's severance of the joint tenancies. Like the other two causes of action, it also is an equitable claim but unlike the other two, it is not based on allegations of unconscionable conduct by Gwen.

[94] The Associate Judge found the claim was outside the in personam exception because as he put it "the typical remedy" for undue influence is the setting aside of the impugned transaction and in his view unlike the signing of a contract or loan agreement in relation to the properties, severance of the joint tenancies was "something which directly affects the ownership of the land itself".[48] Accordingly, "[j]ust as in *Schumacher*, the interest is directly proprietary".[49]

[95] Although the reliance on *Scumacher* was misplaced, we accept that on its face the undue influence claim arguably involves a more direct challenge to the underlying title to the land than the other two causes of action. However, undue influence is still essentially an in personam claim. A further and more fundamental difficulty for Sophie in relation to this claim is that as pleaded it appears misconceived and could never result in the severance being set aside. We explain why.

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47 *Re Polly Peck International Plc (in admin) (no 2)* [1998] 3 All ER 812 (CA); and *Webb v Webb* [1999] QB 696.

48 High Court Judgment, above n 2, at [62].

49 At [62].

[96] A joint tenant has the right to unilaterally sever the joint tenancy at any stage during their lifetime.[50] Gwen exercised that right with the result that she and Sophie each became a registered proprietor as to a one-half share on each of the titles.

[97] Section 51(1) of the Land Transfer Act 2017 provides that on registration under the Land Transfer Act of a person as the owner of an estate or interest in land, the person obtains a title to the estate or interest that cannot be set aside. This is the indefeasibility principle at the core of New Zealand's system of land registration.

[98] Indefeasibility is subject to a number of exceptions and limitations. And there are certainly several New Zealand cases where courts having found a registered interest in land has been obtained as a result of undue influence have ordered a transfer of that interest.[51] All of them have however involved the situation where the unduly obtained registered interest is held by the "influencer" and the transfer ordered as a remedy is a transfer *to* the person whose will has been overborne.

[99] The question then arises as to how the doctrine of undue influence could be used to impeach an otherwise indefeasible legal title in circumstances where (a) the registered proprietor of the legal title was not the influencer but rather the very person whose will is alleged to have been overborne and (b) the person whose will is alleged to have been overborne benefitted from the transaction — Gwen acquired a property right — and (c) the alleged influencer did not benefit or at least not in a direct way. Michelle's direct benefit derives from the will. Gwen could have left her half share to Sophie in the will or indeed could have sold it during her lifetime.[52]

[100] Under the Land Transfer Act, there could only be two bases on which the registered interest Gwen received as a result of the severance could be "set aside". The first is fraud,[53] and the second is by virtue of the court's in personam jurisdiction recognised as an exception to indefeasibility under s 51(4) of the Land Transfer Act.

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50 Land Transfer Act, ss 48.

51 *Toman v Toman* HC Wellington CIV-2009-485-765, 11 August 2009; *Sinclair v Sinclair* [2019] NZHC 2640; and *Round v Round* [2017] NZHC 428.

52 It is we accept arguable that an indirect benefit might suffice as an operative benefit in an otherwise valid claim for undue influence but points (a) and (b) are in our view fatal.

53 Land Transfer Act, ss 6, 52(1)(a).

[101] In her submissions, Ms Bruton argued that undue influence is a species of equitable fraud and therefore the fraud exception to indefeasibility applied. It is however highly doubtful following the Privy Council decision of *Assets Co Ltd v Mere Rohi* that equitable fraud qualifies as fraud for this purpose.[54] But even assuming it does, it is beyond argument that the title of a registered owner cannot be defeated on the ground of fraud unless that registered owner was party or privy to the fraud or the fraud was committed by their agent.[55]

[102] Gwen was not a party or privy to any fraud and nor is it suggested that Michelle was her agent. A claim for rescission of the severance based on fraud equitable or otherwise is therefore in our view untenable.

[103] As regards the Court's in personam jurisdiction being invoked as an exception to indefeasibility, this Court, in *Nathan v Dollars & Sense Finance Ltd*, endorsed the view that an in personam claim for that purpose must have three elements:[56]

(a) It must not be inconsistent with the objectives of the Torrens system.

(b) It must involve unconscionable conduct on the part of the current registered proprietor.

(c) It must be a recognised cause of action.

[104] Sophie's claim of undue influence does not contain all three elements. In particular, it does not involve any element of unconscionable conduct on the part of Gwen or her agent.

[105] We therefore agree with Mr Wenley that the severance of the joint tenancies could not have been challenged on the grounds of undue influence either in law or equity during Gwen's lifetime and there is no available challenge against her estate

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54 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).

55 Land Transfer Act, ss 6 and 52(1)(a).

56 *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [137]. This finding was not affected by the subsequent decision of the Supreme Court in *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557.

that would entitle Sophie to reverse the severance. The proper target of any undue influence claim is the will.

Administration of an estate exception to the Moçambique rule

[106] Finally, we consider the second exception to the Moçambique rule. It was to the effect that an English court does have jurisdiction to determine questions of title relating to foreign immovables for the purposes of administering an estate if the estate also includes movables and immovables in England. The usual justification for the existence of this exception is said to be that an English court can make its adjudication effective indirectly through its control of the executors or the other assets situated in England. It is an essentially pragmatic exception, to be applied broadly.[57]

[107] The reason the Associate Judge found the second exception did not apply to give the Irish Court jurisdiction was because he considered the claim Sophie was making in relation to the land had nothing to do with Gwen's estate. Rather, the claim was that it was Sophie's by virtue of survivorship.

[108] We disagree. Although Sophie seeks to characterise her claims as nothing to do with the will or the estate, that is not in our view a sustainable position.

[109] Gwen is undoubtedly the legal owner of a half share in each property. Under s 71 of the Administration Act, probate granted by the High Court of Ireland can be re-sealed in New Zealand. That would enable the Irish executors to register a transmission of Gwen's half share into their names. That cannot be prevented by Sophie's caveat on the titles. As submitted by Mr Wenley, the Irish executors would then become the legal owners of the land but hold it subject to Gwen's last will and any modifications made to the distribution/disposition of Gwen's estate by the High Court of Ireland pursuant to the Succession Act (Éire) or otherwise including any equitable claims regarding beneficial ownership. We appreciate that Sophie is desirous of keeping the New Zealand realty out of the estate because of inheritance and capital gains tax issues but those matters cannot distort the legal analysis which in our view is clear cut.

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[57] *Nelson v Bridport* (1846) 8 Beav 547.

Should the Associate Judge independently of the Moçambique rule have held the Irish courts did not have jurisdiction because only a New Zealand court can grant the relief sought? (Cross-appeal)

[110] The grounds of this part of the cross-appeal overlap to a significant extent with the issues arising in our consideration of the Moçambique rule. It will be recalled that in our discussion of the rule, we have concluded that an Irish court would have the ability to grant Sophie an effective remedy through their control of the executors. That means this cross-appeal ground must also fail. However, in deference to the arguments that were raised, we set them out in more detail.

[111] It was common ground that the effective remedy is the registration of a transfer of an interest in New Zealand land. And that Ms Bruton submitted was beyond the powers of an Irish court to grant. She said in so far as the Associate Judge made statements to the contrary, they were wrong. In Ms Bruton's submission, only the New Zealand High Court has jurisdiction to make the in rem orders that Sophie seeks, which jurisdiction arises under the High Court's equitable jurisdiction and the provisions of the Land Transfer Act.

[112] Ms Bruton further contended that the appellants' argument about the ability to obtain effective relief in Ireland is based on an incorrect premise that Sophie's claims arise in the administration of the estate. They do not. Rather, Ms Bruton argued, they arise because of trusts created by agreement during Gwen's life which vest the land in Sophie upon Gwen's death. Sophie is not seeking relief against the estate.

[113] Ms Bruton also argued the Judge was not entitled to make findings about the ability of Irish law to accommodate Sophie's claims without having some expert evidence on Irish law before him and without any evidence that Sophie is bringing claims under the Succession Act (Éire).

[114] We have already addressed the issue as to whether the claims concern the estate and need say no more on that point.

[115] We acknowledge as emphasised by Ms Bruton that the New Zealand Registrar General of Land is not subject to Irish jurisdiction. But the Irish executors most

certainly are. An Irish court could order the executors to sign the necessary documentation to convey legal title of Gwen's half share in the two Zealand properties to Sophie and an Irish court would be able to supervise the execution of such an order.

[116] Whether Sophie chooses to pursue a claim under the Succession Act in addition to or as an alternative to her current claims in equity is obviously entirely over to her. But whatever choices she may make, we are satisfied that expert evidence is not required to establish that the Irish High Court is capable of applying New Zealand law to the current realty-based claims. The Irish courts are familiar with equitable doctrines such as estoppel, constructive trusts and undue influence.[58] Those doctrines are an integral part of Irish law and in so far as the New Zealand version of those doctrines differs in any respects, it would not be a difficult task for an Irish court to apply the New Zealand version. It would also be open to an Irish court to apply the provisions of the Family Protection Act when dealing with the New Zealand realty as part of the residual estate if necessary.

[117] It follows that in our view, separate proceedings in New Zealand are not required to achieve an effective order.

Can we be satisfied that an Irish court would hold it had jurisdiction to consider Sophie's claims when they relate to land in New Zealand?

[118] The final question is whether we can be satisfied the Irish Court would hold it had jurisdiction in relation to these claims when they involve land in New Zealand.[59] The parties did not provide us with any expert evidence, for example, as to the status of the Moçambique rule in Irish law.

[119] The usual approach is that in the absence of expert evidence, it is assumed the law of the other country is the same as New Zealand.[60] That approach is sometimes criticised as unrealistic. However, we are comfortable that it is a reasonable approach

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58 Ronan Keane, above n 39, at chs 13, 27 and 28.

59 New Zealand is not a member of the European Union and therefore the Brussels Convention mentioned by the Associate Judge does not apply: High Court Judgment, above n 2, at [51].

60 *Dicey*, above n 27, at 333-332.

to take in the circumstances of this case, having regard to the leading Irish text which provides that:[61]

> The effect of the *Moçambique* decision is that the court has no jurisdiction when the action concerns:
>
> (a) the title to, or right of possession of, land abroad; *or*
>
> (b) the recovery of damages for trespass to land abroad.
>
> …
>
> There are three exceptions to the exclusion of jurisdiction — three cases where an Irish court will not decline jurisdiction merely because the action is founded on a disputed claim to title to foreign land. Therese are (*a*) actions founded on a personal obligation to the plaintiff; (*b*) questions affecting foreign land arising incidentally in Irish proceedings; and (*c*) admiralty proceedings in respect of trespass to foreign land.

Exception (b) is later said to arise in cases where an estate or trust is being administered which includes local property and foreign immovables, and perhaps also in the context of statutory provisions relating to matrimonial property.[62]

Conclusion on jurisdictional bar

[120] We conclude the Associate Judge did err in finding that only a New Zealand court had jurisdiction to hear Sophie's claims relating to Rosa House and Omaha. In our view, there is no jurisdictional bar to an Irish court hearing this proceeding. There being two available forums, the question then becomes whether Sophie has established that New Zealand is the more appropriate forum.

Is New Zealand or Ireland the more appropriate forum to try this proceeding (forum conveniens)?

[121] The factors to be taken into account in determining forum conveniens are well established and relevantly include:[63]

- The relative cost and convenience of proceeding in each jurisdiction.

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61 William Binchy *Irish Conflicts of Law* (Butterworths (Ireland) Ltd, Ireland, 1988) at 402–403 (footnotes omitted). We note that a second edition of this textbook is due to be released in August 2020.

62 At 407.

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

- The location and availability of documents and witnesses.
- The existence of litigation in another jurisdiction and the state of those proceedings.
- Whether the law governing the dispute to be resolved is New Zealand law.
- Where any judgment obtained will fall to be enforced.
- Whether the defendants' 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.
- Procedural advantages in one jurisdiction.
- A decision in another jurisdiction that it is forum conveniens.

[122] In this case, the subject matter of the proceeding is located in New Zealand and the law governing the claim will be New Zealand law. Those are strong factors favouring New Zealand as the natural forum. It is also significant that Sophie resides in New Zealand as do several of the witnesses she intends to call regarding the acquisition of the two properties and the services she and her husband provided.

[123] Those considerations are not however decisive and in our view they are very much outweighed by the countervailing factors pointing to Ireland as the more appropriate forum.

[124] Even Ms Bruton accepted albeit provisionally that if we were of the view that the Irish courts had jurisdiction over the realty claims, then probably the New Zealand proceedings should await the outcome of the caveat proceedings in Ireland.

[125] In our view, the common sense of the matter is that all the litigation including all of Sophie's claims (relating to both personal property and land in New Zealand) and the two extant Irish proceedings to which she is a party — being the applicant in one and a defendant in the other — should be heard and determined by the same court.

And that can only be the High Court of Ireland. Only the High Court of Ireland can deal comprehensively with the interests of all three children and all issues including undue influence.

[126] Sophie has not yet done so but she has the right as does Robert to seek further provision from the whole of Gwen's estate under the Succession Act (Éire). That seems to us the obvious course of action for them both to follow in addition to the proceedings challenging the validity of the last will. Sophie also has the right to bring her claims of estoppel and constructive trust in Ireland.

[127] Both Michelle and Robert live in Ireland. The alleged wrongdoing on which Sophie (and indeed Robert) rely all occurred in Ireland. And the key witnesses — the Irish solicitors who acted for Gwen in connection with the severance of the joint tenancy, the execution of her affidavit and the will, as well as the health professionals who attended on her and the people who interacted with her during the critical period — also all live in Ireland.

[128] In our view, it is in the overall interests of justice and the parties that the proceeding be tried in Ireland. Separate proceedings in New Zealand are not necessary and nor are they desirable in all the circumstances.

Costs

[129] Mr Wenley submitted that if the appeal were to be allowed and the cross appeal dismissed, then we should make an award of indemnity costs in both this Court and the High Court to avoid the Irish executors, and Michelle and Robert as beneficiaries being financially impacted. It is, he said, important to take into account that the Irish executors had a duty to protect estate assets against attack. Further, in his submission, the cross-appeal raised propositions that were untenable and had an "Alice Through the Looking Glass" quality. He said the failure to join Robert as a party was also an irregularity which should bear on costs.

[130] We agree that the successful appellants are entitled to costs on the appeal and the cross-appeal. However, in our view indemnity costs are not warranted. While the arguments raised by the respondent have failed, we would not categorise

them as so hopeless as to be in the indemnity costs category. The failure to join Robert has not caused any prejudice.

[131] Costs are to be calculated on a complex appeal on a band B basis with usual disbursements.

[132] As regards costs in the High Court, the Judge made an award of costs in favour of the respondent on a 2B basis with disbursements. In light of this judgment, those costs should be reversed and we so order.

Outcome

[133] The respondent's application for leave to adduce further evidence is granted.

[134] The appeal is allowed.

[135] The cross-appeal is dismissed.

[136] The decision of the High Court relating to the respondent's claim of undue influence is quashed. The respondent's application to set aside the appellants' notice of objection to jurisdiction in respect of that claim is dismissed.

[137] The respondent's proceeding in the High Court is dismissed.

[138] The respondent must pay the appellants costs calculated for a complex appeal and cross-appeal on a band B basis with usual disbursements.

[139] The costs order made in the High Court is quashed. An order that the respondent must pay the appellant costs on a 2B basis with disbursements in respect of the High Court proceedings is substituted.

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