REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando Sub-Registry (Virtual Hearing)

Claim No**. CV2017-01254**

BETWEEN

Lenore Hoss

1st Claimant

Clayton Hoss

2nd Claimant

AND

Stephanie Alexander Hoss

(Appointed Administrator Ad Litem of the Estate

of the deceased **Wilhelm Lothar Hoss**

Pursuant to Order dated 7th March, 2017)

1st Defendant

AND

Stephanie Alexander Hoss

2nd Defendant

Dario Hoss

(By his next friend Carol Alexander

appointed pursuant to Order dated 9 April 2019)

3rd Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 19 July 2021

Appearances

Mr. Shivan Seunarine, Attorney-at-Law for the Claimants

Mr. Carl Mattis, Attorney-at-Law for the Defendants

Judgment

A. Introduction

1. The passing of Wilhelm Hoss ("the 1st Defendant") at age 84 left his widow Stephanie Hoss ("the 2nd Defendant") and their infant son Dario ("the 3rd Defendant") residing with his ex-wife Lenore Hoss ("the 1st Claimant") in the home at 77 Forres Avenue, Cocoyea ("the property") they first shared as a married couple. Prior to Wilhelm's death, they all lived in this same home with Wilhelm, his new wife Stephanie and son Dario occupying downstairs and his ex-wife Lenore upstairs.

2. After Wilhelm's death in 2016, the 1st Claimant found the living arrangements to be untenable. She filed this Claim with her adult son Clayton Hoss ("the 2nd Claimant"), who resides in Germany. They seek, based on Deeds and a Consent Order entered into between Lenore and Wilhelm, to dispossess Stephanie and Dario and to have the property transferred from the 1st Defendant's estate to Clayton. The documents referred to ("the Agreements") are as follows:
    a. 2003 Deed of Agreement – DE 200304221043 executed on 8 December 2003 by Wilhelm and Lenore around the time of construction of their home. This Deed of Agreement acknowledged that Wilhelm financed purchase and construction of the property held in Lenore's sole name in fee simple and "settled their rights and entitlements" in relation to same. This addressed what should happen on their death and in the event of a divorce. They were divorced within three years after that.
    b. 2015 Consent Order – Entered by Rampersad J when Lenore and Wilhelm, the Claimant and Defendant respectively in CV2012-00983 ("the 2012 Claim") agreed on the Trial date 25 May 2015 to a settlement of the Claim and Counterclaim. The salient term of the settlement was that Lenore would transfer her fee simple title in the property to Wilhelm "subject however to the terms and conditions" contained in the 2003 Deed of Agreement.

c. 2015 Deed of Conveyance – DE 201502810837 executed on 13 October 2015 whereby Lenore's fee simple title to the property was transferred to Wilhelm.

3. The 1st Claimant, Lenore, also relies on equitable interests she claims to have in the home as a basis for the possession and transfer of property reliefs. Specifically, the 1st Claimant contends that, during the first twenty-one years of her marriage, Wilhelm insisted that she not work while they raised their son Clayton. She therefore forfeited earning money to purchase her own property. They lived in Germany.

4. Lenore relied on Wilhelm's promise to purchase property in Trinidad and construct a home on it for her when they returned there to live. The purchase of the property in her name was a fulfillment of that promise, which the 1st Claimant says she relied on to her detriment. Hence her claim to equitable ownership despite having transferred the Fee simple title to Wilhelm in 2015.

5. The 1st Claimant previously canvassed these equitable interests in the 2006 Divorce proceedings between herself and Wilhelm in High Court SM-266 of 2005, wherein they both settled property interests based on the terms of the 2003 Deed of Agreement. The equitable interests were once more raised as the basis for the proceedings referred to above in CV2012-00983, initiated by the 1st Claimant that resulted in the 2015 Consent Order.

6. Additionally, the 1st Claimant seeks damages and injunctive relief for the distress and anxiety she suffered due to the 2nd Defendant's trespass, harassment and intimidation.

7. Having considered the long history of this matter and the submissions on both sides, the Court's determination is that the Claimants have failed to prove any basis in law or equity for the dispossession of the 2nd and 3rd Defendants. Further,

there is no legal or equitable basis for transfer of the property to the 2nd Claimant. The property possession and transfer aspect of the Claim will be dismissed.

8. However, on a balance of probabilities, the 1st Claimant has proven the allegations of intimidation. There being no reliable evidence quantifying the injury suffered, a nominal award of damages to be paid by the 2nd Defendant will be granted to the 1st Claimant. Injunctive relief in the same terms as the undertakings given at an early stage of these proceedings will remain in force.

9. This Judgment explains the reasons for these determinations.

B. Issues

10. There are two main categories of issues. Firstly, those relevant to the property possession and transfer claim and secondly, those relevant to the tort claims seeking remedies for distress and anxiety caused to the 1st Claimant.

11. Determination of these issues requires consideration of certain sub-issues as follows:
    a. Property Interests
        i. On an interpretation of the Agreements, what are the ownership and possession rights of the parties?
        ii. Is the 1st Claimant estopped by her agreement to the 2015 Consent Order which settled the 2012 Claim from relying on the same equitable interests canvassed in the 2012 Claim as the basis for the relief herein?
    b. Trespass to the Person, Harassment and Intimidation
        i. There being no evidence filed by the 2nd Defendant contradicting the 1st Claimant's witness statement and oral testimony, have the torts alleged been proven?
        ii. If so what quantum of damages should the Court award?
        iii. Will continuation of the interim undertaking herein be appropriate regarding the Claim for injunctive relief?

C. Procedural History and Background Facts

12. The first hearing in this matter was on an application for an interim injunction filed by the Claimants shortly after they filed the Claim in April 2017. The application was intended to obtain urgent protection for the 1st Claimant, Lenore, who alleged she was being harassed by the 2nd Defendant, Stephanie.

13. At the Hearing on 29 June 2017, Stephanie's Attorneys orally tabled counter allegations as to harassment of their client by Lenore. The counter allegations were included in a Defence filed later on, in July 2017, but there was no counter-claim. The Claimants' application for interim relief was resolved by consent with both Stephanie and Lenore undertaking as follows:

"The Second Defendant undertakes to the Court that **until further order**:

(a) She will not use or threaten violence against the First Claimant and will not instruct, or encourage or in any way suggest that any other person should do so.

(b) She will not interfere with, intimidate, harass, pester, slander, insult or assault the First Claimant and will not instruct, or encourage or in any way suggest that any other person should do so.

(c) She will not obstruct whether by herself, her servants and/or her agents the First Claimant's entry to and/or exit from the upstairs portion of the Property situate at No. 77 Forres Avenue, Cocoyea (hereinafter referred to as "the Property) and will not instruct, or encourage or in any way suggest that any other person should do so, except for the purpose of and only to the extent necessary to repair, maintain or upkeep the corridor leading to the upstairs portion of the Property and/or the fixtures or fittings in the said corridor save that such repair/ maintenance and/or upkeep shall only be undertaken at reasonable intervals.

(d) She will not destroy any crops or plants on the Property and will not instruct, or encourage or in any way suggest that any other person should do so.

(e) She will permit the First Claimant, whether by herself, her servants and/or agents, to access the backyard of the Property but only for the limited purposes of:

(i) obtaining water; and

(ii) accessing the water lines and plumbing for the upstairs portion of the Property.

(f) She will not conduct any illegal activities upon the Property and will not instruct, or encourage or in any way suggest that any other person should do so.

(g) She will not damage or cause or permit damage to be caused to any property belonging to, or under the control of, the First Claimant at the Property.

(h) She shall allow the First Claimant whether by herself, her agents and/or servants to pass over and remain in the front yard of the Property.

(i) She shall not interfere and/or cause and/or encourage and/or suggest to anyone to interfere with the electricity supply to the upstairs portion of the Property."

"The First Claimant undertakes to the Court that **until further order**:

(a) She will not use or threaten violence against the Second Defendant and will not instruct, or encourage or in any way suggest that any other person should do so.

(b) She will not interfere with, intimidate, harass, pester, slander, insult or assault the Second Defendant and will not instruct, or encourage or in any way suggest that any other person should do so.

(c) She will not whether by herself, her servants and/or her agents obstruct the Second Defendant's entry to and/or exit from the downstairs portion of the Property and will not instruct, or encourage or in any way suggest that any other person should do so.

(d) She will not enter into the backyard of the Property and will not instruct, or encourage or in any way suggest that any other person should do so, except for the limited purposes of:

(i) obtaining water; and

(ii) accessing the water lines and plumbing for the upstairs portion of the Property.

(e) She will not remove any items from the shed located at the back of the Property which forms part of the downstairs portion of the Property.

(f) She shall not interfere and/or cause and/or encourage and/or suggest to anyone to interfere with the electricity supply to the downstairs portion of the Property.

(h) She will not conduct any illegal activities upon the Property and will not instruct, or encourage or in any way suggest that any other person should do so.

(i) She will not damage or cause or permit damage to be caused to any property belonging to, or under the control of, the Second Defendant at the Property." [Emphasis added]

14. At this initial stage, case management commenced with an Order that Dario, the child of Stephanie and Wilhelm's marriage, who would also be affected by any orders regarding possession of the property, be joined as a party to the proceedings. Child advocates initially represented him as directed by the Court.

15. After filing a Defence and Counterclaim for the Defendants, the Attorneys who represented them ceased to act. As their reason for taking this step was that the 2nd Defendant could no longer afford to retain them, time was given for the Defendants to seek legal aid representation.

16. There were several adjournments to allow time for these efforts. However, the legal aid application was not approved. Eventually alternate counsel was retained. This retainer came after the Defendants had already failed to comply with directions to file Witness Statements. As a result of the automatic sanction under Rule 29.13 of the Civil Proceedings Rules, 1998 (as

amended), only the Claimants were sworn in at the Trial on 24 August 2020 to give evidence and be cross-examined based on their Witness Statements.

17. The Claimants testified under cross-examination in a manner consistent with their pleadings and witness statements. They were not discredited. In particular, as it related to the 1st Claimant's allegations of torts committed against her by the 2nd Defendant, her testimony under cross-examination was strong and convincing. On a balance of probabilities, the Claimants established that Stephanie committed the tortious acts. However, the evidence as to medical ailments suffered by Lenore and exacerbated by Stephanie's actions, was not convincing in the absence of any medical expertise.

18. At the end of the Trial, the parties were directed to file an additional bundle to include all the documents from the prior civil proceedings in CV 2012-00983. This was required as an essential source of information on the intentions of the parties to the Agreements to be interpreted by the Court.

19. Parties were also required to file written closing submissions, which concluded on 15 June 2021.

20. The long history that led to the filing of the Claim dates back to 1981 when Wilhelm, a German national, met Lenore in Trinidad. They had one child each prior to the marriage, namely Lenore's son Clevelan Doughty and Wilhelm's daughter Heidi Hoss. They were married and resided in Germany for 21 years, raising their son Clayton who is now middle aged and continues to reside in Germany.

21. Lenore and Wilhelm made plans to return to Trinidad to live. Lenore therefore looked for properties on her visits to Trinidad. In 1999, she located the subject property, which Wilhelm then purchased, in her name. At that time, a Deed of Conveyance No 15813 0f 1999 was executed. Lenore became

the sole registered owner of the property "in fee simple subject to the exceptions and reservations" in the Deed, which had to do with mines and mineral substances.

22. In or around 2003, Wilhelm and Lenore began construction of a home on the property, financed by Wilhelm. Around that time, Wilhelm gave Lenore the 2003 Deed of Agreement that they both duly executed.

The 2003 Deed of Agreement

23. At the time of the 2003 Deed of Agreement, the 1st Claimant was still the Fee simple owner of the subject property and continued to be so after the execution of the Deed. The Deed of Agreement expressly made provision for settlement of the interests of Lenore and Wilhelm in the event of a Divorce. There was also provision on what would become of the property on the death of each of them.

24. The pre-agreed terms settling Lenore and Wilhelm's interests in the property were set out in the 2003 Deed of Agreement to include:

    Clause 1 – Lenore, referred to therein as "the wife", continued to be the fee simple owner of the subject property with the right to occupy the upstairs for the term of her life.

    Clause 4 – Upon Lenore's death, the title or ownership of the property would be transferred to her son Clayton Hoss subject to clause 5 and subject to the payment of half the value of the property to her elder son Clevelan Doughty "as set out in the last will and testament of the wife of even date".

    Clause 5 – Wilhelm, referred to therein as "the Husband" had the sole right to occupy the ground floor of the property and after his death, his son Clayton Hoss would be entitled to occupy "the entire downstairs".

25. Wilhelm filed divorce proceedings against Lenore in May 2005 and a decree absolute was granted on 12 July 2006. During the divorce proceedings, both

sides applied for property settlement orders. Lenore was not satisfied with the terms of the 2003 Deed of Agreement. They compromised these property settlement applications by agreeing that Lenore would receive certain payments and that the terms of the 2003 Deed of Agreement would remain in force to govern interests in the property.

26. Based on their divorce settlement, Lenore and Wilhelm continued to reside at the property, which was their prior matrimonial home. Lenore resided upstairs. Wilhelm resided downstairs. Around 2009, he brought Stephanie, who was then around eighteen years old, to reside with him. They later married and in 2011, Stephanie accompanied Wilhelm on a trip to Germany.

27. The Defence herein, filed by Stephanie as 2nd Defendant and on behalf of the Estate, included a fact that was not disclosed in the Claimants' pleadings. This was that on the visit to Germany, Stephanie obtained a signed document from Clayton agreeing that whatever interest he eventually obtained in the property, based on the 2003 Deed of Agreement, he would transfer it to her.

28. The effect of this would have been that upon the death of Lenore and Wilhelm, it would be Stephanie and not Clayton who would inherit the property. In response, the Claimants in their Reply pleadings admit that Clayton signed the document. However, Clayton contends that he was forced to sign it by his father and in any event, the document has no legal efficacy.

29. Lenore's pleading at paragraph 18 of her Statement of Case for the 2012 Claim, was that around the same time in 2011, she "*came to understand that the defendant [Wilhelm] had plans and was making efforts to transfer my rights as well as his in the property to a third party*".

30. She therefore filed the 2012 Claim against Wilhelm seeking to set aside the 2003 Deed of Agreement and to have a new Deed granted affirming her status as the fee simple owner of the property. She also sought a declaration that Wilhelm was "not entitled to the property" and limiting him to a "non-transferable" life interest in the property.

31. In or around 2013, the third Defendant was born to Wilhelm and Stephanie, while the 2012 Claim proceedings were still in progress. Wilhelm counter-claimed for a declaration that Lenore held the property on trust for him because it was only purchased in her name based on her misrepresentation that Wilhelm, as a German national, could not own land in Trinidad. Further to the foregoing, he sought a transfer of the property from Lenore to his name and wanted to limit her rights to the property to a life interest in the upstairs portion.

32. On the Trial date for the 2012 case, the parties arrived at a settlement. The settlement was embodied in the 2015 Consent Order. Lenore agreed to transfer the property to Wilhelm, subject to the terms of the 2003 Deed of Agreement. There was also provision in the Consent Order that "*The Deed of Agreement to be rectified accordingly*." There was never any rectification of the said Deed.

The 2015 Consent Order and Conveyance Deed

33. Thereafter, the 2015 Deed of Conveyance was executed. It included in the recitals firstly, a statement of the applicable exceptions and reservations, which were the same mineral related matters referred to in Lenore's 1999 Deed. Secondly, the recitals set out a reference to the Consent Order, which was to be a condition. The Deed stated thereafter:

> "*NOW THIS DEED WITNESSETH that in pursuance of and obedience to the recited Order and in consideration of the premises the Claimant as Beneficial Owner HEREBY CONVEYS unto the Defendant* ***ALL her share estate and interest*** *of and in the assured lands save and except the*

substances but together with all houses and buildings thereon and all other appurtenances thereto belonging and provisions ***TO HOLD the same unto and to the use of the Defendant in fee simple subject to*** *the exceptions and reservations and* ***the conditions***" [Emphasis added]

34. Wilhelm died shortly thereafter on 18 March 2016. The Claimant's case, un-contradicted by any evidence from the Defendants, is that Stephanie who remained living downstairs with her son then subjected Lenore to trespass to her person, harassment and intimidation. This included acts of verbal abuse, destruction of crops, and removal of personal items. There is an allegation that Stephanie broke a lock to an area in the downstairs portion of the property that purportedly stored the 1st Claimant's personal property. The Defendant denies that her entry into this area was illegal as it does not form part of the upstairs portion the 1st Claimant was entitled to occupy.

35. Lenore retained counsel and pre-litigation proceedings commenced with the sending of an eight-page pre-action protocol letter to Stephanie in August 2016. The letter essentially detailed Lenore's case that Stephanie had to vacate the premises because Clayton was entitled to occupy downstairs based on the 2003 Agreement. The filing of this Claim on 11 April 2017 followed. After it was served, there was an amendment in June 2017 to include increased acts of aggression by Stephanie who was heard saying, "They want to fight me for my own thing".

36. The increased actions of trespass, harassment and intimidation said to have been committed by Stephanie after she received the initial Claim that were added to the amended Statement of Case included instances of verbal abuse, threats of injury, a threat to her life and incidents of tampering with Lenore's lock and water supply. Lenore pleads that Stephanie threatened to injure her with a brick on 19 May, 2017, threatened to cut her on 22 May, 2017 and would bodily block her passage through a shared corridor when Lenore is exiting the property.

37. As aforementioned, there was initial accord after the first hearing in June 2017 based on interim undertakings by Lenore and Stephanie not to harass each other.

D. Law and Analysis

Property Interests and Possession –Interpretation of Agreements

38. The Claimants' contention is that, on a proper interpretation of the Agreements, Wilhelm, upon his death, ceased to be the owner of the subject property. Accordingly, they contend that the subject property did not form part of his estate and that the downstairs was to be transferred to his son, Clayton, the 2nd Claimant. The Claimants further underscore that the 2015 Deed of Conveyance was clearly made subject to the 2003 Agreement.

39. The position of the Defendants, as set out in the Defence and repeated verbatim in the submissions, is more convoluted. This is so as the Defendants have put forward a number of possible alternate interpretations of the Agreements. The bottom line that can be gleaned from all the alternates is the Defendants' contention that any provisions of the 2003 Deed of Agreement that are incompatible with the fee simple property ownership conveyed to Wilhelm in 2015, ceased to be of any effect.

40. The merit to the Defendants' interpretation is borne out on an application of the rules of interpretation very helpfully elucidated on in the submissions of counsel for the Claimants. Additionally, counsel for the Defendant in filing his submissions, attached therewith a useful authority on the concept of ademption of heritable property. This concept also lends clarity to the interpretation of the Agreements.

41. The main reference cited by Counsel for the Claimants on the principles to be applied in interpreting the Agreements is Chitty on Contracts[1] as follows:

"12-042 The object of all construction of the terms of a written agreement is to discover therefrom the ***common intention*** *of the parties to the agreement…"*

"12-043 The task of ascertaining the common intention of the parties must be approached objectively: the question is not what one or other of the parties meant or understood by the words used, but:-

"… the meaning which ***the whole document*** *would convey to a* ***reasonable person having all the background knowledge*** *which would reasonably have been available to the parties in the situation in which they were at the time of the contract" [Emphasis added]*

"12-118 [As a corollary to the parole evidence rule]…where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party…"

"12-119 The more modern view is that the words do not have to be vague, ambiguous or otherwise uncertain before extrinsic evidence will be admitted. Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable man against the background of the transaction in question, the court is free (subject to certain exceptions) to look at all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words which are ambiguous but even to conclude

[1] Volume 1, Chitty on Contracts, 13th Edn

that the parties must, for whatever reason, have used the wrong words or syntax…"

42. The salient guidance is that the Court's focus in interpreting the agreements is on identifying the intention of the parties. Firstly, this is based on the plain meaning of the words, as they would have been understood by a reasonable person equipped with full knowledge of the matrix of background facts.

43. Secondly, in the event that the meaning of the words is obscure, recourse can be taken to extrinsic sources of information that will assist with gleaning the intended meaning.

44. Additionally, as suggested by Counsel for the Claimant, three documents, namely the 2003 Deed of Agreement, the 2015 Consent Order and the 2015 Deed of Conveyance can be treated as "one fluid instrument". This is so because they are all tied together by the wording of the 2015 Deed of Conveyance.

45. There are some aspects of the Agreements that are so clear and precise that no alternate meaning can be applied to them. Most critically there is the provision of the 2015 Deed of Conveyance describing the extent of the property interest that Lenore transferred to Wilhelm. It is "all her share and interest" and it is transferred for Wilhelm to hold the "fee simple" subject to the 2003 Agreement.

46. The ordinary meaning of this is the entire fee simple interest held by Lenore since 1999 was transferred to Wilhelm. This is important as it indicates what the intention of the parties must have been bearing in mind, the legal implications of this type of interest in property. The main implications of the fee simple ownership of property relate to endurance and hereditability. **Megarry and Wade's Law of Real Property, Fifth Edition pgs 39 – 40** explains:

"*Originally this was an estate which endured for so long as the original tenant or any of his heirs (blood relations, and their heirs, and so on) survived. ….In the case of the fee simple and the fee tail, the word "fee" denoted (i) that the estate was an estate of inheritance, i.e. an estate which on the death if the tenant was capable of descending to his heir and (ii) that the estate was one which could continue forever*".

47. In a more contemporary definition Kodilinye, in **Commonwealth Caribbean Property Law, Fourth Edition** at page 2 said that:

"*The fee simple estate is the closet one can come to actual ownership of land. The estate comprises the right to use and enjoy the land for the duration of the life of the grantee and those of his heirs (both lineal and collateral) and successors. A fee simple estate is freely transferable, by inter vivos disposition or by will. …It is accepted in the modern law that a fee simple is equivalent to permanent ownership of land*."

48. It is clear, therefore, from the literal meaning of the words used in the 2015 Conveyance that Lenore, by inter vivos disposition, transferred to Wilhelm the type of enduring estate that he did not have before under the terms of the 2003 Deed of Agreement. Instead of being limited to a right akin to a licence to occupy the ground floor, he became, in 2015, the permanent owner of the property. His interest became one that would pass to his heirs, including Stephanie and his infant son Dario.

49. Accordingly, upon the death of Wilhelm, it is clear on the plain meaning of the wording of the transaction that the interests in the property were, as set out at paragraphs 13 to 15 of the Defence, as follows:

"13. At the time of his death, the subject property was vested in the name of the deceased by virtue of the 2015 Deed, subject to the First Claimant's right of occupation. Upon the deceased's death, and by reason of his intestacy, the subject property vested in law in the Administrator General and shall so remain until divested by a grant of

Letters of Administration to the First Defendant, subject always to the First Claimant's right of occupation.

14. The subject property, forming part of the deceased's estate, is to be distributed to, or held in trust for, the Second Defendant as surviving spouse (1/2 share); and the Second Claimant, one Heidi Hoss and one Dario Ayden Stephan Hoss ("Dario") as issue of the deceased (1/2 share), subject to the First Claimant's right of occupation.

15. By reason of the matters aforesaid, the First Defendant will contend that the First Claimant is entitled to occupy the upstairs portion of the property for the term of her life; and the Second Claimant is entitled, together with the Second Defendant, Heidi Hoss and Dario, as beneficiaries of the deceased's estate, to a share and interest in the subject property."

50. Even if the literal wording were not sufficient to convey this meaning, the same interpretation would result from looking at the agreements from the perspective of a reasonable person who has knowledge of all the background facts. These background facts include:
    - In or around 2010 Wilhelm remarried. By 2011, he and his new bride Stephanie, the 2nd Defendant made clear to the 2nd Claimant, Clayton that Wilhelm wanted her to inherit the property, which he had paid for in full. In other words, he wanted Stephanie instead of Clayton to be the owner of the property after both he and Lenore passed.
    - In that year 2011, Lenore knew that Wilhelm wanted to transfer interests in the property to "a third party." She felt the 2003 Deed of Agreement was not sufficient to prevent such a transfer so she commenced litigation to revoke it and gain a more secure title.
    - Wilhelm counterclaimed to have the fee simple transferred to him.
    - The outcome in 2015 was the Consent Order whereby Lenore transferred the fee simple to Wilhelm.

51. In the context of this factual matrix, no reasonable person could view the 2015 transaction as merely a change of names with no real transfer of an enduring estate that Wilhelm could pass to his heirs. The clear intention of the parties on a literal interpretation and also when the background facts are taken into account is that a permanent and hereditable estate in the property was transferred.

52. There remains to be determined what could have been the intention of the parties in making the transfer of the fee simple to Wilhelm subject to terms of the 2003 Deed of Agreement. As aforementioned, it could not have been that all legal interests remain as they were before with Lenore holding a superior interest in the property which she could dispose of once more *inter vivos* or pass to her heirs.

53. The meaning of this aspect of the Agreements cannot be based solely on the literal wording, as some terms of the 2003 Deed of Agreement are so inconsistent with the 2015 Deed of Conveyance that they cannot have been intended to remain in force. It is for this reason that the Consent Order approved by the Court in 2015 mandated that the 2003 Deed of Agreement had to be rectified. There was no rectification. However, the 2003 Deed of Agreement must be read as though it had been rectified in order to form "a fluid instrument" with the 2015 Consent Order and Deed of Conveyance.

54. The meaning of some of the provisions of the 2003 Deed of Agreement are now ambiguous when read as one instrument culminating with the 2015 Deed of Conveyance. The Court must therefore "*look at all the relevant circumstances surrounding the transaction"* including the provision for rectification in the Consent Order, *"not merely in order to choose between the possible meanings of words which are ambiguous"*[2] but to identify the true 'rectified' meaning of the 2003 Deed of Agreement.

[2] Ibid. Chitty on Contracts

55. On applying this approach to the interpretation, it is clear that the part of Clause 1 of the 2003 Deed of Agreement that states that "the Wife shall continue to be the fee simple owner of the Property" was a provision that no longer had effect when Wilhelm became the fee simple owner. The 2015 Deed of Conveyance could not have been subject to Lenore retaining the fee simple estate as, if so, the 2015 Deed would serve no purpose. Instead, the only part of Clause 1 that the 2015 Deed of Conveyance is subject to is that Lenore has "the right to occupy the upstairs thereof for the term of her life."

56. As to clause 5 of the 2003 Deed of Agreement, it is clear that, as fee simple owner of the property, Wilhelm's interest in the ground floor is no longer limited to a mere licence to occupy it. Accordingly, by making the 2015 Deed subject to this term, the parties intended to reinforce that, while Lenore is alive, he will allow her to occupy upstairs. As to the ground floor, based on his fee simple ownership, he would not only occupy it but the ownership would pass to his heirs. Wilhelm agreed that he and his heirs would allow the 2nd Defendant, Clayton, "to occupy the entire downstairs of the property" after the death of Wilhelm. This provision cannot be interpreted as an entitlement to ownership of the property. It is a mere promise of a licence to occupy and it is testamentary in nature. Furthermore, the provision is somewhat otiose as, with Wilhelm becoming the fee simple owner, Clayton is entitled as an heir to an interest in the property. All that remains to consider is whether he is the sole heir entitled to occupy downstairs.

57. At the time when the 2003 Deed of Agreement was executed, Wilhelm lived alone downstairs. In determining the proper interpretation of the agreements as at the time of Wilhelm's death, account must be taken of the fact that he executed the 2015 Deed of Conveyance whilst occupying the ground floor with Stephanie and his infant son Dario. In light of the efforts made to have Clayton transfer his interests to Stephanie, Wilhelm's intention could not have been that Clayton would dispossess her in order to occupy

the ground floor. The intention was that Clayton could occupy it once vacated by Wilhelm and any other of his heirs who occupied it with him at the time of his death.

58. Clause 4 of the 2003 Deed of Agreement is another of the provisions that is testamentary in nature as Lenore proposed to provide for her two sons after her death. Clause 4 provides that on her death "the title or ownership of the property will be transferred to Clayton …subject to payment of one –half the value of the property to Clevelan Doughty". However, this aspect of the Deed is now inoperable, because by the 2015 transfer of the fee simple to Wilhelm there is no longer any property that Clayton and Clevelan can inherit from Lenore on her death.

59. The concept of ademption put forward by counsel for the Defendants is relevant to this aspect of the interpretation of the agreements. Counsel relies on **Turner v Turner 2012 S.L.T. 877** where at paragraph 20 Lord Tyre explained:

> *"[20] Where the subject matter of a bequest or legacy (whether heritable or moveable) has been disposed of by the testator so that it no longer forms part of his estate at the date of death, the bequest or legacy is said to have been adeemed, and cannot take effect. The doctrine of ademption has its origins in Roman law, but in one important respect Scots law has followed English law in departing from Roman law principles. In contrast to the doctrine of conversion, the intention of the testator is not regarded as relevant to ademption. In England, rejection of inquiry into intention was clearly expressed in the judgment of Lord Chancellor Thurlow in Stanley v Potter at (1789) 2 Cox, pp.182–183 , as follows: "When the case of Ashburner v. McGuire was before me, I took all the pains I could to sift the several cases upon the subject,* ***and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy*** *was a specific legacy (which is generally the difficult question in these cases), and if specific, whether*

the thing ***remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate****. And I do not think that the question in these cases turns on the intention of the testator.* ***The idea of proceeding on the animus adimendi has introduced a degree of confusion*** *in the cases which is inexplicable, and I can make out no precise rule from them upon that ground. … I believe it will be* ***a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not.***"" [Emphasis added]

60. In light of the foregoing, the proper interpretation of the agreements as one fluid transaction is that the fee simple interest in the property remains vested in the 1st Defendant. Wilhelm's heirs are entitled to share ownership of the property. This is subject to Lenore's licence to occupy upstairs and Clayton's licence, if he so desires, to personally occupy the "entire downstairs" at such time as it is no longer occupied by Stephanie and Dario. Occupation of any of the heirs to the exclusion of others must be subject to terms agreed amongst the other heirs, failing which there may be further recourse to partition proceedings.

Property Interests and Possession- Issue Estoppel

61. The interpretation of the agreements disposes of this aspect of the case. However, for completeness, the point of issue estoppel raised by the Defendants will be addressed.

62. At paragraph H of the Fixed Date Claim, the Claimants contend that the 1st Claimant is entitled to an equitable interest and/or irrevocable licence to occupy the property based on the promises and/or assurances of the deceased. This claim extends beyond the entitlement to occupy upstairs provided for in the 2003 Agreement. Pursuant to the equitable interest

asserted by the 1st Claimant, the Claimants pursue by the instant Claim further rights to have interests in the property transferred to the 2nd Claimant.

63. The Defendants contend that by reason of the terms of the 2015 Consent Order and/or the 2015 Conveyance executed in pursuance thereof, Lenore is estopped from seeking any interest in the property other than her undisputed right to occupy upstairs for the term of her life. The Defendants rely on Section 17 of the Conveyancing and Law of Property Act Chapter 56:01 in support of this submission.

64. The **Halsbury's Laws of England on Civil Procedure (Vol. 11 (2020))** at para. 1568 describes the principles of cause of action and issue estoppel as contained in the doctrine of res judicata as follows:

> *"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."*

65. It is clear from this learning that a party may be estopped from raising an issue where, as in the present case, that issue that formed a necessary ingredient in a cause of action has been litigated and decided upon.

66. In relation to judgments by consent, the **Halsbury's** continues at para. 1579, to detail a distinction in approach between judgments entered prior to the filing of a pleading and those entered after filing pleadings in which the current issues were raised:

> *"[A] defendant who had consented to judgment before service of any pleading was not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they had never been in issue;* ***but it was otherwise with a defendant who had consented to judgment after pleading in his defence the matters which he sought to set up in the later proceedings****.*
>
> *…*
>
> *A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent, or by default, provided that the party against whom it is set up was under no disability, although the efficacy of a judgment so obtained is strictly limited. The principles must be applied flexibly, however, in order to avoid injustice."[Emphasis added]*

67. Further commentary on estoppel in relation to consent judgments is provided in **Spencer Bower and Handley: Res Judicata Fifth Edition (2019)** at Chapter 2 para. 2.16:

> *"Judgments, orders and awards by consent are as efficacious as those pronounced after a contest in creating cause of action estoppels and merging the cause of action sued on. There can be no estoppel unless the issues raised in the second action were necessarily compromised in the first. The extent to which a consent judgment may give rise to issue estoppels has not been finally determined.*
>
> *…*

The court will consider the context, especially if the consent order is ambiguous. Any issue which was raised in the litigation and was fundamental to the judgment will be conclusively determined."

68. Based on the evidence provided by the parties in relation to the prior proceedings, I am satisfied that there is no ambiguity in the Consent Order entered. There is no real or practical difference between the issue at hand and that already decided i.e. the fee simple ownership of the property. That issue, therefore, was finally and conclusively determined in 2015 and the Claimants are estopped from raising the issue again.

Trespass, harassment and intimidation

Assault

69. An assault, as a trespass to person, is defined as "an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force". The threat of violence exhibiting an intention to assault will give rise to liability only if there is also a present ability (or perhaps a perceived ability) to carry the threat into execution."[3]

70. In **Clerk & Lindsell on Torts, 16th Ed., at p. 970 para. 17-12**, the learned authors state that:

"An assault is an overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect. Although in popular language an assault includes a battery, a person may be guilty of an assault without being guilty of a battery. There are obvious reasons why in dealing with security of the person the law should treat the mere attempt as a substantive wrong. "If you direct a weapon, or if you raise your fist, within those limits which give you the means of striking, that may be assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will

[3] Halsbury's Laws of England on Tort (Vol. 97A (2021)) at para. 127

commit an assault' I think that is not an assault". And it has been held that when, although the defendants are in close proximity to the plaintiff, the defendants cannot actually carry out their threats because the plaintiffs are under police guard, there is no assault. The defendants lack the means to commit the threatened battery. Threats and vile abuse per se do not constitute assault."

71. This learning was applied by the court in **Penco & Anor v Caroni (1975) Ltd & Anor HCA No. 2977 of 1992**. In that case, similar threatening words had been used by the Defendant. However, the court considered:

    "But no gesture, however menacing, is actionable if it appears at the time that there is no intention to put the menace into immediate effect. Threatening words alone do not amount to an assault."

72. It is clear that the actions of the 2nd Defendant toward the 1st Claimant on 19 May, 2017 and 22 May, 2017, though threatening and menacing, did not amount to an assault on her person. There was a threat of violence in the 2nd Defendant's words which caused the 1st Claimant to fear injury to her person. However, it does not appear that the 2nd Defendant had an *immediate* intention to effect harm.

Intimidation

73. The 1st Claimant also cites the case of **Penco & Anor** in relation to the tort of intimidation. In that case the learning in **Clerk & Lindsell on Torts, 16th Ed., page 828, p. 15- 13 and at p. 846 para. 15-16**:

    "A commits a tort if he delivers a threat to B that he will commit an act, or use means, unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C.

    …

    In the tort of intimidation, "it is essential to the cause of action that the person threatened should comply with the demand." If A says to B, "I

will hit you unless you give me 5," and B resists saying: "you can do your worst. I am not going to pay you 5," at that point B has no cause of action for damages."

74. It is submitted by Counsel for the 1st Claimant that the blocking of the corridor, preventing the Claimant from walking along same amounts to intimidation. As indicated in the learning above, it is essential that the person threatened should comply with the demand. Notably, in the **Penco** case the court found that there was no submission to the threats issued. In the present circumstances, the 1st Claimant has never indicated that she submitted to the 2nd Defendant's intimidating conduct by no longer using the passageway.

75. Though not submitted on by the 1st Claimant, however, the actions of the 2nd Defendant on 19 May, 2017 do appear to have caused her to refrain from leaving her home. Upon this threat of violence, the 1st Claimant was in such fear that she called the police. During this incident, the 2nd Defendant has committed the tort of intimidation against the 1st Claimant.

Harassment

76. Counsel for the Claimants also submit that the actions of the 2nd Defendant amount to harassment. It is admitted that the tort of harassment is currently not recognized in common law in this jurisdiction. However, Counsel asks this court to embark on the creation of this tort in this case, following from the analysis of the court in **Tricia Brown v Elroy Julien CV2019-00550** of the evolution of the tort in other jurisdictions.

77. In that decision, the court undertook a lengthy, comparative analysis on whether harassment could be a "future tort". The analysis of the learned judge revealed that "while academics are lobbying for the recognition of the tort, the common law is slowly evolving but remaining cautious and

conservative"[4]. Informed by the learning in other jurisdictions[5], the court set out several considerations for formulating the definition and ingredients of this tort:

> *"Should the target conduct be limited to intentional conduct or include reckless behaviour? Should it be a repetitious act or cumulation of actions or include a single act? Should there be some degree of measurable damage though not as high as that expected in negligence or assault? Would the test of the perception of the effect of the offensive conduct be subjective or objective? How would, notwithstanding the impact of the action, be viewed in light of the reasonable conduct of an employer? Should it be a remedy available to both employee and employer? Sykes J (as he then was) proffered a working definition. However, another definition can well be:* ***Intentionally engaging in persistent unreasonable conduct directed at another person which reasonably causes that person emotional distress****."[Emphasis added]*

78. Counsel for the Claimant suggests that the actions in the present case satisfy the proposed definition by Kokaram J (as he then was) highlighted above.

79. There is certainly recognition by this court that there may be a space for a tort of harassment, particularly in the course of employment. However, the present circumstances do not appear to justify the intervention of the court in this way.

80. The actions of the 2nd Defendant became aggressive to the point of threatening language on two occasions. It is clear that the passing of Wilhelm Hoss and the present property dispute contributed to rising tensions between the parties. Since July 2017, there has been a consensual undertaking by both parties against interference. The Claimant has not

[4] Para. 96 Brown v Julien
[5] Canada, Ireland, UK, Australia, Singapore, USA, Jamaica

proven with sufficient gravity a persistent course of unreasonable conduct by the 2nd Defendant.

Damages

81. The Claimant cites **Halsbury's Laws of England on Damages (Vol. 29 (2019))** at para. 497 which examines damages to be awarded in circumstances of a trespass to person:

> *"Trespass to the person, whether by assault, battery or false imprisonment, is actionable without proof of actual damage. Thus in all cases of trespass nominal damages at least are recoverable, and substantial damages are recoverable for discomfort and inconvenience, or injury to dignity, even where no physical injury is proved.*
>
> *…*
>
> ***Damages for emotional or psychiatric damage** which does not result in physical illness may be recovered where there is other physical injury, and **may also be recovered in cases where there is no physical injury, as in the case of an assault without any battery, provided it is substantial and not too remote**."*

82. On the other hand, in **Tort: The Law of Tort (Common Law Series)** at Part G para. 9.52, it is stated that "[a]ssault, battery and false imprisonment are actionable without proof of damage, but unless some kind of injury is shown the claimant can only expect nominal damages." The case of **Pelling v Johnson [2004] EWHC 492 (QB)** is referenced in which the court awarded £50 in nominal damages for a trivial technical assault.

83. In the present case, the 1st Claimant claims she has been fearful for her safety, has had sleepless nights and suffered emotional distress as a result of the 2nd Defendant's intimidation. This distress is substantial enough to warrant a nominal award of damages even in the absence of physical injury.

84. In relation to the measure of damages to be awarded, the 1st Claimant has made no submission. However, the following cases were examined in which nominal awards were made:

    i. In the decision of **Mohammed v AG CV2009-02792,** the claimant had been rough handled and verbally attacked by police officers in a public place and suffered embarrassment, emotional shock and injury to dignity. In these circumstances, the claimant was awarded $5,000 in nominal damages for assault in the course of his arrest.

    ii. In the decision of **Rodolfo v Arima Borough Corporation & Garcia CV2016-01369**, the court awarded $8,000 in nominal damages for pain and suffering caused by a nuisance in the form of toxic fumes.

    iii. In **Sammy & ors. v More FM Ltd & ors. CV2016-04456,** the court awarded nominal damages of $7,500 for libel where there was a lack of evidence as to actual damage to business or goodwill.

    iv. In **Persad v Debedial & ors. CV2016-00810** in making a nominal award of $7,000 for trespass the court stated the following:

> *"Thus I have no difficulty with Counsels' submission that the Claimants should be awarded nominal damages for Mr Samlal's trespass.*
>
> *[8] In this jurisdiction, nominal damages have been awarded in various cases what is of relevance to me is the quantum of damages awarded by the Court under this head. The figures range from $100.00 to $2,500.002 and cover the same subject matter as the case at bar - trespass to land. The range therefore at present values stands at $3,500.00 to $10,500.00.*
>
> *[9] Since there is no need to prove actual loss the award being merely to serve as a vindication of rights, and having regard to the facts in this case, I shall place the quantum of damages to be awarded in the sum of $7,000.00."*

85. In the present circumstances, distress suffered by the 1st Claimant merits a similar award on the lower end of these comparator decisions. Nominal

damages in the sum of $6,000 for the tort of intimidation will be awarded to the 1st Claimant.

E. Conclusion

86. The Claimants succeed in part in that the Claims in tort have been proven. However, the Claim for possession of the property and all related relief fails.

87. The Court recognizes that the living arrangements of the 1st Claimant and 2nd Defendant are extremely taxing and urges that consideration be given to this in the administration of the 1st Defendant's estate. It may be open to the parties to discuss whether there can be sale of any of the heir's interests to allow for a living arrangement that is more peaceful.

88. **IT IS HEREBY ORDERED**:

- **i.** The Claims listed at A,B,C,D,E and I of the Claim, as well as the claim for trespass to land at H, are dismissed.
- **ii.** **It is declared that** the 1st Claimant's interest in the property is limited to the irrevocable non-transferable licence to occupy the upstairs of the property for life, agreed to by the Defendants.
- **iii.** Judgment for the Claimants on the Claim at G of the Fixed Date Claim for damages for intimidation in the nominal amount of $6,000.
- **iv.** The interim injunction ordered on 29 June 2017 is to continue in force.
- **v.** The Claimants having failed in more aspects of the case than they have succeeded are to pay to the Defendants 75% of the costs of this Claim on the prescribed basis.

EJD Honeywell

Eleanor Joye Donaldson-Honeywell

Judge