

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 2007 of 2008

TYRONE KENNEDY

Plaintiff

(Administrator (per Attorney of George Fergusson)

of the Estate of Joan Clarke, deceased)

AND

ANGELA COLE

Defendant

Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court

2010: October 29

November 7

November 14

2013: May 10

Mr. Chester Sue for the Plaintiff

The Defendant in person

DECISION

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INTRODUCTION

- [1] This is a familial dispute. The parties are cousins. The witnesses are their close relatives. At the heart of the dispute is a property located at 15 Delamere Land, Martindale's Road, St. Michael ("the property") that was owned by Joan Clarke, deceased ("the deceased"). She was the parties' aunt. The defendant occupies the property. The plaintiff wants possession of it.
- [2] The deceased died on 18 December 2007. Her son, George Fergusson (Mr. Fergusson) is the sole beneficiary of her estate. He resides in the United States of America ("USA").
- [3] The plaintiff is the administrator and, as such, the personal representative of the deceased's estate. His power derives from a grant of administration dated 2 July 2008 and issued to him out of the Supreme Court on 23 July 2008. It is a cessate grant, limited until Mr. Fergusson applies for a grant. He has not yet done so. As such, the plaintiff does not act as Mr. Kennedy's attorney. In that respect, the title of these proceedings is misleading.
- [4] On 11 December 2008, the plaintiff, as administrator of the deceased's estate, filed an originating summons ("the summons") against the defendant claiming possession of the property on the ground that he is entitled to possession and

that the person occupying the property does so without licence or consent. He filed that summons pursuant to Order 92, r. 1 of the **Rules of the Supreme Court, 1982, ("the RSC")**.

[5] Order 92, r. 1 of the **RSC** provides that:

Where a person claims possession of land which he alleges is occupied solely by a person or persons, not being a tenant or tenants holding over after the termination of the tenancy, who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

[6] The summons is supported by an affidavit filed on even date with the summons. In that affidavit, he deposed as to his interest in the property, the circumstances in which he claims the defendant to be in possession without licence or consent and his entitlement to possession.

[7] The defendant is unrepresented by Counsel. She filed an affidavit on 4 March 2009. She deposed as to her relationship with the deceased and the money she expended on her care and property prior to her death. In her affidavit, she also identified a remedy which she considered "reasonable and equitable" and indicated that she would need time, were she required to leave the property.

[8] On 28 October 2010, when the matter came on before me, the defendant indicated that previously, Richards J had directed that there be a trial at which the parties would be permitted to give further evidence and the defendant to call witnesses. This was confirmed by Mr. Chester Sue who appeared for the plaintiff. The trial commenced on 29 October 2010.

THE WITNESSES

[9] At the hearing, the plaintiff relied on the contents of his affidavit. The defendant cross-examined him extensively. He called no additional witnesses.

[10] The defendant gave further evidence and was cross-examined by Mr. Sue. Additionally, her mother, Zeta Taylor (Ms. Taylor), her sister Jan Cole and George Springer, the deceased's cousin, gave evidence on her behalf. They were not cross-examined.

THE EVIDENCE

(i) The evidence of the plaintiff

[11] The plaintiff deposed as follows at paragraphs 4 to 7 of his affidavit:

4. At the time of her death the [deceased] was the owner of the property.
5. Sometimes during her life time (sic) [the deceased] permitted [the defendant] to reside at [the property].
6. Since the death of [the deceased] [Mr. Fergusson] ... has requested the [defendant] to give up possession but she has refused to do so.
7. Possession is required to settle the estate.

[12] Under cross-examination, the plaintiff reiterated that the deceased had permitted the defendant to reside at the property. He stated that the deceased had returned to Barbados from the USA where she previously resided and that she was ill at the time of her return. He said that she needed care since she was becoming senile and could not see well.

[13] The plaintiff acknowledged that there was an arrangement between the defendant, the deceased and Ms. Taylor whereby the defendant would be given money for looking after the deceased. His evidence is that the defendant's task was to ensure that the deceased was fed and cared for. He said that he did not know the exact date on which the arrangement began but surmised that it was around 2004. He said too that he gave the defendant money but denied that he gave her \$75.00 weekly. His evidence is that she received money when her mother said she, the defendant, needed money.

[14] The plaintiff's further evidence is that the defendant was living with the deceased before the arrangement started. He stated that he did not know whether the defendant purchased or provided food for the deceased prior to the arrangement. He said that he bought groceries weekly for the deceased and gave them to the defendant.

(ii) The evidence of the defendant

[15] The defendant's affidavit evidence was as follows:

1. That JOAN CLARKE deceased was my Aunt, with whom I had been living for two (2) years before she died. I took care of my said aunt, my mother's sister.
2. That I spent approximately \$1,000.00 a month on my aunt's care and on her property by way

of assisting my ailing aunt.

3 That I consider it reasonable and equitable that I be reimbursed for my financial out-put in my aunt's home, on her behalf, whilst I lived there with her, before I am required to leave the said dwelling-house.

4. That at the moment I have nowhere to go. I would need time to re-adjust my living condition if I am required to leave the said seisin at lot 15 Delamere Land, St. Michael immediately.

[16] At the hearing, the defendant spoke fondly of her early relationship with the deceased whom she described as her favorite aunt. She outlined how she came to reside with her. She said that she had seen the deceased for the first time in five years when she visited the property to borrow \$600.00 from Ms. Taylor sometime during the last quarter of 2005. At that time, she observed that the deceased was emaciated and her mouth "full of sores". She thought that the deceased exhibited signs of memory loss but had her wits about her.

[17] Her further evidence is that the deceased asked her many times to stay with her and that Ms. Taylor eventually requested her to do so. She stated that at the time she was busy pursuing her occupation as a writer. She said that she used to operate a book manufacturing business in St. Lucy and sleep at a house in St. James. Initially, she had hoped that the deceased could have stayed with her and, later, she thought that she could stay with the deceased during the day and retreat to her own abode at night. However, there came a time when eye-drops had to be applied to one of the deceased's eyes at regular intervals and it became necessary for someone to stay with her for this purpose. As a result, she ended up staying at the property. She stated that she undertook the responsibility since the task would have fallen to her mother, had she not done so. Her evidence is that she had stated that she would dedicate four months to her aunt's care since she was wealthy enough to do so.

[18] The defendant detailed the effort she made to improve the deceased's health and the care she gave to her. Her evidence is that, before moving in with the deceased, she would go to the countryside to find young coconuts for her. She sought out treatment options. She cooked and cared for the deceased. She administered a treatment program that had been recommended by a practitioner of complementary medicine. This required constant daily work on her part. She stated that, at times, she was assisted by her mother and workers from a home-help scheme. Her further evidence is that on two occasions when the deceased was hospitalised she sent food and fruit juices for her.

[19] The defendant indicated the impact all this had on her life and how she came to receive money from the plaintiff. She stated that she could no longer write since her time was consumed fully with the care of the deceased. Her further evidence is that Ms. Taylor asked her how much money she wanted and she said \$75.00.

[20] According to her evidence, she did not want to be paid for taking care of the deceased but she requested the money since she could not go anywhere. Her evidence is that the plaintiff gave her \$75.00 every week but for a three week period during which he gave her \$100.00 per week. She also said that on one occasion he gave her \$600.00 to purchase medicine.

[21] The defendant's further evidence is that she took steps to earn income and provide food for the household. She stated that she grew and sold plants at the property and that she used some of the sale proceeds to purchase guttering for the property. She said that she also improved the property by planting fruit trees. Her evidence is that she was assisted by a gardener to whom Ms. Taylor paid \$50.00 per week. She stated that she also made patterns and sold them to a garment factory.

[22] The defendant gave evidence of a statement, which she claimed the deceased made to her repeatedly, relating to the defendant's future occupancy of the property. She stated:

Many times she said get me a lawyer. I need a lawyer. No one can put you out of this house. You have been too good to me."...Then I said when she gets better I would deal with that - that is anything to do with a lawyer.

[23] Under cross-examination, the defendant stated that she assisted with the deceased's care from 2005 to 2007. She reiterated that there was an arrangement whereby she would be paid \$75.00 per week. She stated that the arrangement started after she had to put the drops in the deceased's eye and repeated that she took the money since she could not go out to work. She denied receiving any other money apart from the \$600.00 to which she had referred.

[24] The defendant maintained that prior to residing with the deceased, she sold books. She said that her books were widely available in Barbados and that persons would purchase advertising space in them. She said that she paid for the utilities through her mother. However, pressed further by Mr. Sue, she admitted that Mr. Fergusson used to pay for the utilities but stated that he stopped doing so when the deceased was hospitalised. She maintained that her mother did not pay the utility bills for her. She denied that Mr. Fergusson had brought someone to assist her.

(iii) The evidence of Ms. Taylor

[25] Ms. Taylor stated that she visited the deceased in the USA when she observed that she was in poor health. Her

evidence is that Mr. Fergusson brought the deceased back to Barbados. She said that he requested her to “look in” on the deceased and arranged with her sister, Barbara Kennedy (Ms. Kennedy), to send food for her. Her further evidence is that the plaintiff would take food for the deceased but that she would not eat it. She asked that he, Mr. Fergusson, remain with the deceased to see that she ate and stated she would visit her three times per week and sit with her while she ate.

[26] This witness also gave evidence as to the circumstances leading up to the defendant’s occupation of the property and the arrangement to pay her money. She said that the defendant came to see her at the property one day when she, the defendant, was about to move into a new house. Her evidence is that the deceased became aware of the defendant’s intention to move into a new home and invited the defendant to stay with her, indicating that she was living alone. She said that the defendant agreed to move in with the deceased even though she had made a deposit on the other house. Her evidence is that the defendant cared for the deceased and assisted in purchasing items for her. She confirmed that the plaintiff purchased groceries and vegetables for the deceased every Friday. She stated that after the defendant moved in with the deceased, the latter started to eat and her appearance improved.

[27] Ms. Taylor’s further evidence is that the defendant used to write books but that after she started to live with the deceased she could not do much. She said that after it became necessary to put drops in one of the deceased’s eyes, the plaintiff decided to give the defendant money to take care of the deceased. She said that the amount of money was \$75.00.

[28] This witness also gave evidence of statements made by the deceased about the defendant’s future occupancy of the property. She stated:

Joan Clarke said that as long as the defendant saw after her she would have the living in the house. She had asked me to bring a lawyer that she would make a Will. She did not make a will. Her brain was not there.

(iv) *The evidence of Jan Taylor*

[29] Ms. Taylor spoke of the role which the defendant played in caring for the deceased. She said that when the deceased was hospitalised, she would take food for her that had been prepared by the defendant. She also said that a friend of the defendant took juices for her. Her evidence is that the defendant started to plant vegetables on the property and that she used some of the produce to feed the deceased. She also stated that the plaintiff used to buy groceries for the deceased. Her further evidence is that on one occasion she had taken the defendant to the Barbados Community College where the defendant was scheduled to deliver a lecture. She was shown some books which she said she recognised as books authored by the defendant.

(v) *The evidence of George Springer*

[30] Mr. George Springer recalled going to the Barbados Community College with the defendant on one occasion but could not remember her purpose for going there. He stated that he sold some books for her at Ms. Taylor’s request. He said that there were not many books and that he was unaware of them until Ms. Taylor had given them to him.

THE CLEAN HANDS DOCTRINE

[31] There is an aspect of the evidence of the defendant and Ms. Taylor to which I have not yet referred. They expressed the opinion that Mr. Fergusson’s treatment or neglect of his mother betrayed an intention to bring about, and contributed to, her demise. For the reasons which follow, I do not find it necessary to detail this evidence.

[32] The defendant referred to the maxim that requires a litigant to come to court with clean hands and contended that one could not engage in the conduct of which she accused Mr. Fergusson then seek to throw her out of the property.

[33] Mr. Sue submitted that the defendant had provided no evidential or legal basis for an application of the clean hands doctrine. He further contended that, even if the doctrine is relevant, the defendant had not proven to the requisite standard that Mr. Fergusson is guilty of the misconduct alleged.

[34] I agree entirely with Mr. Sue on the question of proof. In determining the truth of such an allegation, I have to take account of its gravity. This is the effect of **section 133 of the Evidence Act Cap. 121**. That provision reads:

(1) In a civil proceeding, a court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) In determining whether it is satisfied as mentioned in subsection (1), the matters that the court shall take into account include the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of matters alleged.

[35] In ***Hornal v Neuberger Products Ltd [1957] 1 Q.B. 247*** the Court of Appeal (UK) was unanimous in the view that in considering whether an allegation of an offence is proven in a civil trial, the degree of probability required must be proportionate to the allegation made. The court endorsed the following sentiments expressed by Denning L.J. in ***Bater v Bater [1950] 2 All E.R. 458, 459***:

It is of course true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.

As Best C.J. and many great judges have said, "in proportion as the crime is enormous, so ought the proof to be clear". So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.

- [36] I have carefully weighed the evidence of the defendant and that of Ms. Taylor. They are affected by the loss of a relative whom they loved dearly. They are unhappy with the role played by Mr. Fergusson in her care. This is not an uncommon situation. However, I do not consider that the evidence adduced establishes the grave assertions they make about Mr. Fergusson who had no opportunity to rebut them.
- [37] In any event, the clean hands doctrine has no application in this case. The principle that he who comes to equity must come with clean hands is one of the important maxims of equity. It is explained in ***Equity: Doctrines & Remedies 4th Ed.*** (Meagher, Gummow and Lehane) at paragraph 3-110 as meaning "that when a plaintiff whose conduct has been improper in a transaction seeks relief in equity that relief will be refused."
- [38] The application of the maxim is confined to cases where the claimant seeks an equitable remedy. Since such remedies are discretionary, it is open to a court to consider the conduct of a plaintiff in determining whether or not to grant them. It is not so in this case.
- [39] Additionally, the defendant alleged no misconduct on the part of the deceased or the administrator of her estate who brought this action. Mr. Fergusson, against whom the allegations were leveled, is not a party to these proceedings. These are proceedings by an administrator who seeks to proceed with the task of administration. The sole question for my determination is whether he is entitled to possession. Hence, I find no merit in this submission.

THE PLAINTIFF'S SUBMISSIONS

- [40] I turn to the plaintiff's submissions. Mr. Sue submitted that the plaintiff, as the personal representative of the estate of the deceased, is entitled to recover possession of the property. He contended that the deceased permitted the defendant to occupy the property and that the defendant did so rent free, paid no utilities and bought no food. He submitted further that she had a licence which terminated on the deceased's death.
- [41] Counsel submitted further that the evidence adduced by the defendant at the trial differed from that contained in her affidavit. He argued that she had adduced no evidence to support the statement in her affidavit that she spent \$1000.00 per month on the deceased and her property. He submitted that the evidence showed that the defendant was paid for looking after the deceased.
- [42] Mr. Sue urged that no interest in equity, or otherwise, arose in favour of the defendant. He submitted that she had suffered no detriment in caring for the deceased and that there was no evidence to suggest that anyone had given her the impression that she would be rewarded for her efforts. He submitted further that the arrangement was to her advantage and that there was no evidence to support her statement that the deceased had told her no one could put her out of the property.

THE DEFENDANT'S SUBMISSIONS

- [43] I have already discussed the defendant's submissions in relation to the clean hands doctrine. She submitted also that the court should make a '*nunc pro tunc*' order 'to allow the changing of the present to justify the past'. I understood her to mean that the court should sanction her continued occupation of the property because of the events expressed in her evidence and that of her witnesses.
- [44] The defendant highlighted her evidence as to the statement she attributed to the deceased that no one could put her out. She submitted that she has 'some equity'. She referred me to the case of ***Angela Cole v The Attorney General of Barbados No. 695 of 1991 (date of decision 22 July 1999)*** and a case of ***Grantley Farmer***. I took this to mean a reference to ***Re King's Application (1988) 40 WIR 15***. She urged that 'behind the law there is natural law which is about decency and fair play'. She submitted that she should be allowed five years further residence in the property.

DISCUSSION

- [45] Section 3 of the ***Succession Act Cap. 249*** provides that the real and personal estate of a deceased person shall devolve and become vested in his personal representative. Section 6 provides that, where a person dies intestate, his estate shall vest in the Public Trustee until administration is granted. Thus, in these circumstances, the property is vested in the plaintiff and was so vested at the date of the filing of the originating summons. Barring some legal impediment, he is entitled and obligated to take possession of the property for purposes of administration.
- [46] I accept Mr. Sue's submission that the defendant took up occupancy of the property as a licensee. E. H. Burn, ***Cheshire's Modern Law of Real Property, 12th Ed. P. 577*** succinctly defines a licence as 'a permission to enter

upon the land of another for an agreed purpose.'

- [47] Mr. Sue's further submission that the defendant's licence terminated on the deceased's death also has merit provided it is that the defendant was a bare licensee. The law on this point is expressed at **paragraph 10, Vol. 27(1) of Halsbury's Laws of England 4th Ed.** There it is stated that "[a] gratuitous licence is revocable by notice at any time, and is terminated by the death of either party".
- [48] Hence, unless there is some legal basis for the defendant's continued occupation of the property, the plaintiff is entitled to possession.

PROPRIETARY ESTOPPEL

- [49] The defendant makes no claim to any contractual rights against the deceased's estate. Having considered her evidence and the manner in which she has put her case, it appears to me that she is relying on the doctrine of proprietary estoppel. I will limit my discussion of the doctrine to those principles that are relevant to this case.
- [50] I take the following summary of the elements set out by Lord Justice Walker in ***Thorner v Major et al* [2009] 1 W.L.R. 776 (Thorner)** at paragraph 29 as a useful starting point:
- ...most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance...
- [51] However, in ***Gillett v Holt* [2001] Ch 210**, at page 225 C-E, Walker L.J. cautioned that the doctrine 'cannot be treated as subdivided into three or four watertight compartments'. He noted that 'the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined...' Fundamentally, he went on to stress that 'the principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine' and that '[i]n the end the court must look at the matter in the round.'
- [52] Recently, the Court of Appeal in ***Ward v Walsh et al Civ. App. No. 20 of 2005 (date of decision 28 November 2012)*** underscored this fundamental objective in highlighting three related factors. At paragraphs 73 and 74 of the decision, Burgess J.A. commented that (1) the doctrine is concerned fundamentally with the promotion of conscientious dealings in relation to land; (2) the court may scrutinise dealings between parties and restrain particular assertions of legal rights on grounds of conscience; and (3) the doctrine has the effect of creating rights of an equity founded upon estoppel.
- [53] To found an estoppel, the assurance must be sufficiently clear and any reliance on it must be reasonable. The requirements relating to the adequacy of an assurance were stated by Hoffmann L.J. in ***Walton v Walton ((unreported) 14 April 1994; [1994] CA Transcript No. 479)*** in a passage that was cited with approval by Lord Walker, at paragraph 56, in ***Thorner***. Hoffman L.J. stated at paragraph 16:

The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made.

- [54] This requirement was endorsed by Lord Scott, in ***Thorner***, who pointed out at paragraph 15 that while the elements of representation or assurance, reliance and detriment are always necessary, in a particular case, they might not be sufficient. He went on:
- Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance ... would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity.
- [55] The defendant and Ms. Taylor gave evidence of certain statements attributed to the deceased relating to the defendant's future occupancy of the property. Ms. Taylor's evidence was that the deceased stated that as long as the defendant looked after her she, the defendant, would 'have the living in the house'. I understand the phrase 'have the living in the house' to mean that she could occupy the house until she dies. The defendant's evidence was that the deceased had told her that no one can put her out of the property and that she had been too good to her.

[56] I have to determine whether these statements were made. I have given careful consideration to the evidence. I had the benefit of seeing the witnesses as they gave their evidence and the manner in which they responded to the various questions put to them. I think that, with the exception of Mr. Springer, they all in some way betrayed that they were affected emotionally by the death of the deceased and this litigation. There was some hesitation to be forthright in some instances by the plaintiff but, generally, I am satisfied that the witnesses tried to be truthful to the court.

- [57] I have considered Mr. Sue's submission against accepting the defendant's evidence as to the statements she claims to have been made by the deceased. He makes a strong point. One must ask why the defendant did not put forward evidence that is so fundamental to her claim in her affidavit which was sworn well before the hearing. One can be forgiven for wondering whether this was a self-serving statement concocted by her late in the day to build a defence. However, I have considered also that the defendant is not a lawyer and might not have brought the same degree of care to the presentation of her case as would be expected from a legally trained person. She seemed sincere in giving her evidence.

- [58] It is true that the statement Ms. Taylor attributes to the deceased differs somewhat from that spoken of by the defendant. However, Ms. Taylor's evidence suggests that the deceased did, from time to time, make statements about the future occupancy of the property by the defendant. It may be said that she, like the defendant, has a motive to lie. Both betrayed a feeling that Mr. Fergusson is not deserving of the property. The defendant wants to remain in the property. Ms. Taylor is her mother. However, I found Ms. Taylor to be a truthful witness. I find it difficult to reject her evidence in this respect. I find that the deceased did make the statements attributed to her by the defendant and Ms. Taylor, respectively.
- [59] However, there is no evidence that the statement of which Ms. Taylor gave evidence was spoken by the deceased to the defendant or that it was otherwise heard by, or made known, to her. A person cannot be said to have relied on a promise or assurance of which he or she was not aware. The defendant's evidence was lengthy and detailed. She gave no evidence of that statement having been spoken to her by the deceased or conveyed to her by anyone. Ms. Taylor's evidence is equally unhelpful in this regard. Hence, I cannot find that the defendant was aware that those words of which Ms. Taylor gave evidence, were spoken by the deceased.
- [60] That leaves for my consideration the statement that was made by the deceased to the defendant that no one could put her out of the property. I accept the defendant's evidence that the deceased said those words to her many times. However, the defendant faces some difficulties. She has not established to my satisfaction that she lived with and cared for the deceased because of any statement that the deceased might have made to her.
- [61] In *Greasley v Cooke* [1980] 1 W.L.R. 1306 Lord Denning confirmed his statement in *Birkom Investments Limited v Carr* [1979] Q.B. 467 at page 483 that '[o]nce it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced.' However, I cannot find that any representation made by the deceased in this case was calculated to influence the judgment of a reasonable person or could reasonably have been so taken by the defendant. I so state for the reasons which I outline below in considering whether it would have been reasonable for the defendant to have relied on the statement that was made to her by the deceased.
- [62] Another difficulty stems from the fact that the defendant adduced no evidence as to when the statements were made to her by the defendant. Further, nothing in her evidence helps as to when she might have started to rely on them, if she ever did.
- [63] The time from which a defendant reasonably relied on an assurance is crucial in determining whether an estoppel arises based on that assurance. Detriment can follow only from the time of reliance. In a case of this nature, the extent of any detriment endured might well be less if reliance commenced toward the end of the period of care as compared to if it existed at the start of, or early in, the period.
- [64] I can draw an inference from the evidence that the statements were made during the period of care. The evidence is that the deceased stated that the defendant had been too good to her. This suggests that the statements were made sometime after the defendant had commenced caring for the deceased. The evidence is that the deceased did not return to the property after her second period of hospitalisation. I infer from the defendant's use of the words "this house", that, at the time of speaking, she was in the property and, hence, under the defendant's care.
- [65] However, I am unable to determine, even approximately, the time or times when the statements were made and when the defendant started to rely on them, if she ever did. The defendant's evidence is that the deceased made the statement to her many times but she does not indicate whether these times were scattered over the period of the care or clustered at some point along the time line and, if so, at what point. I will add that, even if it were, that the representation of which Ms. Taylor gave evidence had come to the defendant's awareness, a similar difficulty exists with respect to that statement.
- [66] In any event, I have grave concerns about the quality of any assurances given by the deceased and, given the defendant's knowledge of the deceased's personal circumstances, I find that she could not have reasonably relied on the statement made to her by the deceased or, for that matter, that made to Ms. Taylor.
- [67] The deceased was an elderly woman. No medical evidence was adduced at trial but all the witness, except Mr. George Springer, spoke of her physical and mental state. The plaintiff described her as senile. The defendant said that, when she first saw her, she was emaciated and showed signs of memory loss. The defendant and Ms. Taylor had concerns about her dispositive capacity. Both refused to honour her request for a lawyer. Ms. Taylor did not think she could make a will since, in her view, '[h]er brain was not there'. The defendant considered it inappropriate to have the deceased conduct legal business until her health had improved.
- [68] The statements made by the deceased to the defendant and to Ms. Taylor have implications for the long term use of the deceased's property and the administration of her estate. The defendant was aware of the deceased's state of health and condition. In those circumstances, I cannot find that the statements made by the deceased were such that a person might reasonably expect would have been relied on by the defendant. Knowing all she did, she could not reasonably have relied on the statement made to her by the deceased.
- [69] That being so, it would not be unconscionable to allow the plaintiff's action to succeed.
- [70] Having so determined, the issue as to whether the defendant acted to her detriment becomes a moot one since I cannot find that any detriment suffered by her resulted from a reasonable reliance on any assurances made to her by the deceased. Nonetheless, I will state my findings as to whether the defendant suffered a detriment consequent upon her residing with and caring for the deceased.
- [71] In *Gillett v Holt* [2001] Ch 210, at page 232, Lord Walker summarised the nature of a detriment in a

passage that was cited recently by Sir Jonathan Parker in *Henry v Henry* [2010] UKPC 3, at paragraph 38. The passage reads:

The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.

[72] The authorities demonstrate that detriment may consist of a person giving up a job to reside with another person or by acting as an unpaid care-giver or, as a care-giver for a token payment. The cases of *Jones v Jones* [1977] 1 W.L.R. 438, *Greasley v Cooke (Supra)* *Jennings v Rice* [2002] EWCA Civ. 159 and *Wayling v Jones* [1996] 2 F.L.R. 1029 are illustrative.

[73] In considering this issue, I am required to weigh any disadvantages which the defendant would have suffered against any countervailing advantages which she would have enjoyed. This approach was advocated by Walker L.J. in *Campbell v Griffin (2001) 82 P. & C.R. DG23* and endorsed in *Henry (supra)*.

[74] I am satisfied that the defendant did expend money on the care of the deceased and I so find. She has put the figure at \$1000.00 per month but has produced nothing to substantiate this sum. I am unable to reconcile her evidence that she was wealthy enough to dedicate four months to the deceased's care with the fact that she had found it necessary to borrow \$600.00 from Ms. Taylor shortly before residing with the deceased.

[75] Hence, I do not believe that the defendant had the financial resources to expend \$1000.00 each month on the defendant's care. However, I accept her evidence that, while residing at the deceased, she derived income from her plant and pattern-making business. It is more likely that any money expended on the deceased or the property was derived from these sources and I so find.

[76] I find also that having committed herself to the care of the deceased, the defendant was unable to pursue her profession as a writer and book producer. She was also restricted in her ability to be away from the deceased's house, although she was able to make arrangements from time to time with other persons if she had to go out. She had to shoulder the burden of caring for the deceased. I accept that she was paid some money by the plaintiff but, at most, she would have received \$75.00 per week. This is a token sum. I accept Mr. Sue's submission that she received some countervailing benefits. She would have enjoyed rent free occupation of the property. I find that while the deceased resided there, the defendant did not pay for the utilities. She had the use of the property as a base for her plant and pattern-making business. She received financial assistance in paying the labourer.

[77] This is not a case where the defendant endured disadvantages over a period of many years. She commenced living with the deceased towards the end of 2005. The deceased died on 18 December 2007. She was in the hospital and a nursing home before she died. I accept the defendant's evidence that the period of care was about two years. Nonetheless, weighing the factors, were it necessary for me to determine this issue, I would have inclined to the view that the defendant did suffer a sufficiently substantial detriment of which account should be taken.

[78] There is a final point. Had I held that an equity existed in the defendant's favour, I would have had to consider how best to give effect to that equity. In her affidavit, the defendant deposed that she considers reimbursement for her financial outlay to be reasonable. She deposed also that she would need time to "re-adjust [her] living condition" if required to leave. At trial, she stated that she was seeking "five years living" in the house to finish the work she had not finished. She has enjoyed many years of rent free accommodation in the property since the date of the deceased's death.

[79] In *Henry*, it was emphasised that in satisfying an equity, a court will not necessarily make an order that corresponds with the promise made or the expectation held by a claimant. The court is entitled to consider whether the expectation is proportionate to the detriment suffered. Sir Jonathan Parker stated at paragraph 65 that '[p]roportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.'

[80] At paragraph 42, the court cited the following passage found at paragraphs 50 and 51 of the decision of Lord Walker in *Jennings* which provides useful guidance:

50. "...I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.

51. But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations...the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion."

[81] The evidence suggests that the defendant was motivated by her love for the deceased and the desire to spare her mother the burden of care-giving. She enjoyed countervailing benefits. Had she satisfied me that an equity arises in her favour, I would have treated this as a case in which a wide judgmental discretion should be exercised in deciding how to give effect to the equity. I do not think that the relief requested by the defendant would have been required to do justice in this case. It seems to me that justice would have already been served by the period of occupancy she has enjoyed since the deceased's death.

[82] However, that is all conjecture. I have found that no equity arises in the defendant's favour and that there is no other legal basis on which the plaintiff is barred from the relief he seeks. I hold that he is entitled to recover possession of the property and I order the defendant to yield up possession to him on or before 7 June 2013.

[83] I will hear the parties as to costs.

Olson DeC. Alleyne

Judge of the High Court