IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 131 of 2011

BETWEEN

NESTER PATRICIA RALPH AND ESAU RALPH

APPELLANTS

AND

MALYN BERNARD

RESPONDENT

Panel: **Mendonça, J.A.**
Jamadar, J.A.
Mohammed, J.A.

Appearances: **Mr. S. Saunders for the Appellants**
Mr. G. Raphael for the Respondent

Date of delivery: March 9th, 2016

I agree with the judgment of Mendonça, J.A. and have nothing to add.

P. Jamadar
Justice of Appeal

I too agree.

M. Mohammed
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The respondent in this appeal claimed against the appellants a declaration that she is the owner of and entitled to possession of a dwelling house and the parcel of land on which it stands in Couva (the dwelling house and the parcel of land on which it stands are together referred to as the premises) and an injunction restraining the appellants whether by themselves, their servants or agents from evicting or attempting to evict the respondent from the premises. The appellants disputed the respondent's claim and counterclaimed for possession of the premises.

2. The respondent based her claim on proprietary estoppel and alternatively the extinguishment of the title of the appellants to the premises as a result of adverse possession for more than sixteen years. The trial Judge granted the declaration sought by the respondent on the basis of promissory estoppel and alternatively proprietary estoppel. He however held that the claim based on adverse possession was not made out. The appellants and the respondent have appealed. The appellants contend that the Judge erred in granting the declaration. The respondent on her appeal contends that the Judge should not have rejected her claim based on adverse possession.

3. The background to this appeal is not a complex one. The first appellant was married to Michael Ralph in 1977. He died on June 13th 2006 and I shall hereinafter refer to him as the deceased. The deceased and the first appellant became tenants of the parcel of land pursuant to an agreement dated November 4th 1987. The agreement was made between the deceased and Malyn Bernard, the first appellant, and the National Housing Authority. According to the agreement *"in consideration of the expense to be incurred by the tenants in the erection of a dwelling house on the*

lands and the sum of $1,058.00" by way of three year's rent in advance the State shall grant and the tenant shall accept a lease of the premises for a term of thirty years at the monthly rent of $44.11. The agreement contained an option on the part of the tenants to renew the lease for a further term of thirty years.

4. The first appellant and the deceased lived together on the parcel of land until 1990 when they separated. They however were never divorced. After the first appellant and the deceased separated, the deceased began a common-law relationship with the respondent. In August 1991 the respondent and the deceased began living on the premises to the exclusion of the first appellant. The respondent's two children, Avanel and Christal (who were not the children of the deceased) also lived with the respondent and the deceased on the premises.

5. The respondent and the deceased lived together on the premises until the death of the deceased. The respondent has continued to live on the premises.

6. At the time the respondent and the deceased began to live on the premises there was a structure on the parcel of land that had been built by the first appellant and the deceased. Both the respondent and the first appellant gave evidence at the trial as to the nature of the structure that existed at the time the respondent and the deceased began to live there. The evidence conflicted with each other but the Judge preferred the evidence of the respondent and that has not been challenged. According to the respondent's evidence, in 1991 the structure consisted of one bedroom and a concrete foundation. It was covered with old galvanize and was not blocked off entirely. There was an opening at the top which was covered with plastic to prevent the rains from coming in.

7. In August 1992 the deceased and the respondent borrowed the sum of $1,400.00 and used that to block up the room, put in louvers and purchase new galvanize to cover the room properly.

8. After the year 1992, the respondent and the deceased added two bedrooms, a living room and a kitchen to the one bedroom. According to the evidence of the respondent, which the Judge accepted, she assisted with the work and additions to the structure that she met there in 1991 both financially and with the provision of labour. She stated that the deceased, who was a mason, did the masonry and *"when he could not afford to employ workers, she assisted him in doing work on the two bedrooms, living room and kitchen".* She "*mixed mortar and put it in buckets and handed it to the deceased".* She also handed him blocks and any other material that he needed.

9. According to the respondent she was able to contribute financially because she was a seamstress earning $3,000.00 per month. She also gave evidence that after Mr. Ralph took ill in 1996, she and her two children cultivated a parcel of land. They planted and reaped melongene, peas and pumpkin which they sold wholesale to make ends meet. They rented cars which they gave to drivers to work for them. The respondent stated that from her earnings and that of the deceased they were able to save up to $5,000.00 per month which they used to improve the structure.

10. The Judge, however, did not fully accept the respondent's evidence on the issue of her earnings and that of the deceased. He accepted the respondent did earn money as a seamstress but found that her evidence as to the amount earned was exaggerated. As to the cultivation of the lands the Judge was of the view that the evidence did not establish, *inter alia*, what and how much was cultivated and was not helpful in determining what income was derived from that endeavour. With respect to the rental of the vehicles the Judge accepted that the respondent and the deceased did earn income from that venture but it appeared to him to be barely profitable. The Judge in those circumstances concluded:

> *"23. Nevertheless there is sufficient evidence apart from this that the [respondent] earned income and spent and/or contributed to the expenditure of some of this income in the completion of the dwelling house.*
>
> *24. While the evidence does not demonstrate or support a significant level of income it does reflect a level of industry on the parts of both [respondent] and deceased, in which effort the [respondent] participated.*
>
> *25. It is reasonable to infer that her contributions would have been indirect in meeting household expenses and making available to the deceased income which could be and was utilized for its construction and expansion."*

11. The respondent also gave evidence of assurances by the deceased that he wanted her to have the property when he died. In the respondent's witness statement she stated:

> *"13 From the time I got involved with the Deceased he told me that the First [Appellant] had told him that she was no longer interested in the property. The Deceased also told me and I verily believed that whenever he died he wanted me to have the property. The Deceased had in fact gone to the National Housing Authority in the year 2003 to have my name added to the property but the National Housing Authority advised that it could not be done with him married to the First [Appellant].*
>
> *18. The Deceased died on June 13th 2006. I have continued to reside at the said premises with my children to the present time. From the beginning of my relationship with*

the Deceased I have relied on the assurances given to me by the Deceased that he wanted me to have the property if anything should happen to him and I have assisted him in making the additions to the property based on his assurances and my daughter Avanel also relied on his assurances that I would be the owner of the property when she erected the structure to the front. I have been with the Deceased in undisturbed possession of the said dwelling house and the parcel of land on which it stands which measures three hundred and ninety-three point six square meters since the year 1991."

12. The Judge accepted this evidence. After referring to **Snell's Equity** (31st ed.) at para 10-08 which states, *inter alia*, that a requirement for promissory estoppel is a clear and unequivocal promise or assurance, he concluded that:

"33. I find that there is evidence that such promises or assurances were made in the context of the long relationship between the Deceased and the [respondent]".

And later in his judgment he added:

"36. I find that on a balance of probabilities the deceased may well have represented to the [respondent] who lived with him and looked after him until his death that she could obtain an interest in the said premises, and I accept the evidence of the [respondent]in this regard."

13. The Judge further found that a) the respondent's expenditures on the premises were permitted by the deceased, were not objected to, and were in fact joint expenditures, and b) that the expenditures were based on the belief that at the time of such expenditures that she already owned or would obtain an interest in the premises.

14. In the circumstances the Judge concluded:

"45. I find that the [respondent] has established an equitable interest in the said premises by virtue of her contributions, though they are far less than she attempted to portray. They are to be assessed however, relative to the income of herself and the deceased, and in the context of their long standing, and in fact permanent living relationship.

46. In that context, I find them to have been sufficient in law to have acquired an equitable interest in the said premises.

47. I find on the evidence:

a) That the respondent acquired an equitable interest in the said premises by virtue of promises and assurances made to her by the deceased and that in the circumstances she was led by the deceased to believe that she had acquired, or would acquire such an interest.

b) *The [respondent] acquired an equitable interest in the said premises by virtue of contributions made by her toward construction of extensions to the said dwelling house and/or reliance to her detriment upon such."*

15. As to the claim in adverse possession the Judge found that the respondent was a licensee of the deceased and *"is therefore not entitled to assert adverse possession against the first [appellant] unless the deceased were entitled to do so and she were entitled, through him, to enforce any rights that he acquired by adverse possession herself. In fact, however, she is not one of those persons entitled to enforce such rights on behalf of the estate of the deceased*". In those circumstances the Judge concluded that the respondent was not the owner of the premises by adverse possession.

16. Before I conclude the background to this appeal, I must refer to Esau Ralph, the second appellant. He is the son of the deceased and the first appellant. There is no dispute that for some time he lived on the premises with the respondent and the deceased. The exact period of time is, however, in dispute. The Judge made no finding in that regard. I do not think it of any significance to this appeal that he did not do so.

17. It is also not disputed that some time in or about the year 2003 or 2004 the second appellant built his own house to the back of the dwelling house and on the same parcel of land as the dwelling house. According to the respondent the second appellant sought the permission of the deceased to build the house but this was denied. The second appellant's evidence was different. He alleged he built the house with the permission of the deceased and his mother. The Judge made no finding on this disputed evidence. However he found the second appellant to be *"aggressive"* and his evidence *"self serving"*. He was of the view that little if any weight could be placed on his evidence. This would seem to point to the evidence of the respondent being preferred to that of the second appellant. But the Judge concluded the assessment of his evidence by saying the "*evidence of the undisputed facts was preferred*". There is no dispute that the second appellant did build a house on the parcel of land in or about 2003 and 2004 in which he and his family lives. No steps were ever taken to prevent the construction of the house or remove the second appellant from the lands

18. In 2009 the appellant paid to the Trinidad and Tobago Housing Development Corporation (formally the National Housing Authority) the sum of $20,870.00 representing the arrears of rent due under the 1987 tenancy agreement made between the deceased and the first appellant and the National Housing Authority. On the payment of that sum, the appellants were granted a lease of the premises for 199 years with effect from January 1st 2004.

19. As I mentioned there are appeals by the appellants and the respondent. I will first consider the appeal of the respondent which relates to the Judge's finding on the issue of adverse possession because if the respondent's submissions are correct, the appellants' appeal becomes largely academic. It is however relevant to note that the declaration made by the Judge on the respondent's claim in proprietary estoppel was that she is "*the owner and entitled to possession of the dwelling house in which she resides comprising a three (3) bedroom dwelling house and the parcel of land on which it stands, save for the portion of the said property occupied by the second [appellant] to the back of the said property, to the back of the three (3) bedroom dwelling house occupied by the [respondent*]". Counsel for the respondent made it clear that the respondent's claim was only to the area or portion of the land on which the dwelling house was erected and therefore took no objection to the form of the declaration of the Judge. The respondent's appeal from the Judge's finding in adverse possession is therefore not seeking to disturb the declaration made. The claim in adverse possession according to the respondent was an alternative basis on which the respondent's claim to the dwelling house and the area of the parcel of land on which it stands should have succeeded.

20. Counsel for the respondent contended that the trial Judge should not have rejected the respondent's claim in adverse possession. He submitted that the first appellant had discontinued her possession of the premises in 1990. Thereafter even though the deceased and the first appellant were joint tenants under the 1987 lease agreement with the National Housing Authority, the possession of the deceased to the exclusion of the first appellant meant the deceased was in adverse possession *vis a vis* the first appellant and her title to the premises was extinguished after the expiration of 16 years. It did not matter that in 2009 the Trinidad and Tobago Housing Development Corporation (formerly the National Housing Authority) granted a new lease since the source of that title was the 1987 lease, which was extinguished before the grant of the new lease. In those circumstances the appellants had no title to the premises and an action to recover possession of the premises was barred. The respondent further submitted that in the circumstances the appellant had no title to the premises and an action to recover possession of the premises was barred. The respondent also argued that in the circumstances the lease granted by the Trinidad and Tobago Housing Development Corporation was transferred to the respondent and she was therefore entitled to a declaration that she was the owner of the premises.

21. I will deal first treat with the issue raised by the respondent in relation to the new lease of 199 years granted by the Trinidad and Tobago Housing Development Corporation to the appellants

in 2009. In essence, the respondent submitted that the appellants cannot rely on that new lease to obtain possession of the premises as it too would be caught by the respondent's adverse possession of the premises for more than sixteen years.

22. Where there is a lease that is subsisting and a squatter enters upon the lands that are subject to the lease and remains in adverse possession of the lands for a period of at least sixteen (16) years the squatter cannot be evicted by the tenant under the lease. The effect of the squatter's possession is to extinguish the title of the tenant under the lease but not the title of the landlord. Time will only run against the landlord from the expiration of the lease. The landlord is therefore entitled to oust the squatter on the expiration of the lease. Those claiming through the landlord are similarly entitled. The right to possession of the lands is derived from the landlord's title. If therefore the landlord grants a new lease on the expiration of the old lease the lessee under the new lease may eject the squatter. That is the position where the new lease is not granted pursuant to an option to renew contained in the old lease. Where the new lease is granted pursuant to an option to renew, the position is different. It was held in **Chung Ping Kwan v Lam Island Development Company Limited** [1997] A.C. 38 that in such a case the tenant's right to possession under the new lease is also statute barred. The head note to that case reads so far as is material, is as follows:

> *"…when a lease has expired the lessor was entitled to oust a squatter even if an action by the lessee to recover possession had become statute barred; that where the original lease contains no lessee's option to renew the grant of a new lease enabled the new lessee to eject the squatter even if he was also the original lessee; but that where the original lease contained an option to renew it for a further period the lessee had an existing property right which is specifically enforceable against the lessor, and adverse possession for the prescribed period barred the lessee asserting against the squatter all the rights granted by the lease including that right and the legal estate resulting therefrom…"*

Lord Nicholls of Birkenhead speaking on behalf of the Privy Council stated that there is no compelling reason why as between the lessee and the trespasser, the lessee's rights under the renewal option in the lease should not be defeated just as much as his other rights under the lease. He stated (at p. 48):

> *"It is true that when he exercises the option the lessee obtains a new legal estate but this is no more than implementation of the pre-existing contract. He acquires a new legal estate by virtue only of a right included in the lease whose title has been extinguished as against the trespasser. To ignore the legal source of the lessee's entitlement to his legal estate would be to exalt form (a new legal estate) over substance (a pre-existing right to the estate)."*

23. In this case the 1987 agreement with the National Housing Authority contained an option to renew in favour of the deceased and the first appellant. On the basis of the **Chung Ping Kwan** case, if the first appellant's right to possession under the 1987 lease is statute barred, then her right to possession under the new lease, if granted pursuant to the option to renew in the 1987 agreement, should also be statute barred. The basis on which the new lease was granted, however, was not explored in the evidence. There are indications that it was not granted pursuant to the option to renew in the 1987 lease. For one thing the original lease contained an option to renew for a period of thirty years upon the expiration of the original period of thirty years. For another, the new lease granted was for a period of 199 years and further it did not take effect from the date of the expiration of the term under the original lease. Indeed, the original period of 30 years under the 1987 agreement is yet to expire so the new lease was in fact granted before the expiration of the original lease. On the other hand, it seems unlikely that the new lease would have been granted to the appellants if the first appellant did not have an option to call for a renewal of the original lease. In those circumstances the original 1987 lease can be viewed as the legal source of the new lease. In view of the conclusion I have reached on other grounds in relation to the claim in adverse possession, it is not necessary that I come to a firm conclusion as to whether the new lease was obtained by virtue of the option to renew contained in the original lease and I decline to do so. However, in treating with this appeal as it relates to the claim in adverse possession I will do so on the basis that all that the respondent needed to establish to succeed against the appellants was that the first appellant's title under the original lease had been extinguished.

24. Under section 3 of the Real Property Limitation Act (the Act) an action to recover land is barred after sixteen years from the time at which the right of action accrues. Section 22 of the Act provides that after the period of sixteen years has expired the title of the person who might have brought the action for the recovery of the land is extinguished. These sections are as follows:

> *"3. No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.*

22. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."

25. Section 4 of the Act deems a right to bring an action to recover land to have first accrued in certain circumstances. Of relevance is section 4(a). This section, so far as is relevant to this appeal, is as follows:

4. The right to…. bring an action to recover any land … shall be deemed to have first accrued at such time as is hereinafter mentioned, that is to say:

"(a) when the person claiming such land …, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received".

Under this section the right to bring an action to recover lands is deemed to have first accrued at the time of dispossession or discontinuance of possession of the person claiming the lands, which in this case are the appellants as the paper title owners.

26. Of relevance to this appeal also is section 14 of the Act. This section provides as follows:

14. *When any one or more of several persons entitled to any land or rent as co-heirs, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons or any of them.*

That section abrogates the position at common law which was that the possession of one co-tenant was the possession of the other co-tenant. By virtue of section 14, possession of a co-tenant who is in actual possession of the entirety of the land or more than his undivided share of the land or the receipt by a co-tenant of more than his undivided share of the rent or profits thereof is not the possession or receipt of the other co-tenant. The consequence, so far as an action by one co-tenant against the other for the recovery of possession of the lands is concerned, is that for the purposes of section 3 time runs against the claimant form the date of his dispossession or discontinuance of possession of the lands because section 4(a) deems the right to bring an action to recover land to have first accrued at the time of dispossession or discontinuance of possession. The effect of the provisions of the Act, therefore, is to make possession of the joint tenants separate so that time would run in favour of any joint tenant who took possession of more than his undivided share of the land.

27. It is the respondent's contention that time began to run against the appellants for the purposes of section 3 from August 1991 when the deceased began to occupy the premises to the exclusion of the first appellant. The respondent's case is therefore that from that date the first appellant was dispossessed and the possession thereafter of the deceased, extinguished the title of the first appellant.

28. It is well settled that the respondent's claim in adverse possession requires proof of a) factual possession b) possession adverse to the paper title owner and c) an intention to possess. (see **J.A Pye (Oxford) Limited v Graham** [2003] 1AC 419]. The last two elements I do not regard as issues in this appeal. I need not say anything of them. So far as factual possession is concerned the respondent would have to establish that the possession of the deceased was single and exclusive and was of more than his undivided share of the land.

29. It seems on the evidence that after the deceased and the first appellant separated in 1990 that there was a short period when no one lived on the premises. According to the respondent when she and the deceased went to live on the premises on August 27th 1991 the place was covered in bush and no one was living there. So it seems that on August 27th 1991 the deceased began to live in the premises to the exclusion of the respondent. What the respondent must however show is that the deceased remained in possession of the premises for a continuous period of sixteen years from August 27th 1991 and ending sometime prior to the filing of the counterclaim by the appellants on

February 26th 2010. The possession must be single and exclusive and it must have been possession of more than the deceased's undivided share of the land. If the respondent can establish such a case, the title of the appellants would be extinguished in relation to that portion of the land of which the first appellant was dispossessed.

30. It is not disputed that the deceased died on June 9th 2006. This is before the expiration of sixteen years prior to the filing of the counterclaim. Accepting for the purposes of argument that the respondent's possession after the death of the deceased may be counted as the continuation of the deceased's possession, the evidence does not speak to whether such possession is in relation to more than his undivided half share of the premises. This is particularly so from and after 2003 to 2004 when the second appellant entered upon the lands and built his home. I think it is in these circumstances that the respondent seems driven to claim no more than the dwelling house and the area or portion of the land on which it stands. What the respondent is required to demonstrate is that the deceased was in single and exclusive possession of more than his undivided half share for a continuous period of sixteen years, but the evidence does not address this.

31. On that ground alone the respondent's claim in adverse possession fails. But even if the respondent could satisfy the Court that the possession of the deceased related to more than his undivided share of the premises the respondent has further difficulties as, I think, the Judge correctly held.

32. The Judge found that the respondent was the licensee of the deceased and this finding has not been challenged. The possession of the licensee is that of the licensor (see **Sze To Chung Keung v Kung Kwok Wai David** [1997] 3 LRC 253). So that the possession of the respondent was that of the deceased. The deceased died in 2006 before the expiration of sixteen years. It is only if the death of the deceased did not determine the license in favour of the respondent and her continued possession after the death of the deceased can be considered the deceased's possession that sixteen years will expire before the filing of the counterclaim. Accepting that to be so the effect of it would be to extinguish the title of the first appellant. The appellants would no longer have a paper title under which they can claim possession of the premises. But the question arises as to what claim does the respondent have to ownership or possession of the premises so as to be entitled to the declaration sought by her on the basis of adverse possession.

33. The first appellant and the deceased were joint tenants under the 1987 agreement with the National Housing Authority. On the death of the deceased it is accepted by the parties that the first appellant became the sole tenant of the premises. If the respondent were able to satisfy the court of the requisite factual possession, the effect of that, contrary to the submissions of Counsel for the respondent, would not be to transfer the title of the first appellant to the respondent. The possession of the squatter on extinguishing the paper title owner was put this way in **Fairweather v St. Marylebone Property Company Limited** [1963] AC 510,535:

> "*It is necessary to start, I think, by recalling the principle that defines a squatter's rights. He is not at any stage of his possession a successor to the title of the man he has dispossessed. He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time exhausts the one or more periods allowed by statute for successful intervention. His title, therefore, is never derived through but arises always in spite of the dispossessed owner. At one time during the 19th century it was thought that section 34 of the Act of 1833 had done more than this and effected a statutory transfer of title from dispossessed to dispossessor at the expiration of the limitation period. There were eminent authorities who spoke of the law in just these terms. But the decision of the Court of Appeal in 1892 in* **Tichborne v Weir** *[(1892) 67 L.T.. 735) put an end to this line of reasoning by holding that a squatter who dispossessed a lessee and "extinguished" his title by the requisite period of occupation did not become liable in covenant to the lessee's landlord by virtue of any privity of estate. The point was fully considered by the members of the court and they unanimously rejected the idea that the effect of the limitation statute was to make a "Parliamentary conveyance" of the dispossessed lessee's title or estate to the dispossessing squatter.*
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> *In my opinion this principle has been settled law since the date of that decision. It formed the basis of the later decision of the Divisional court in* ***Taylor v Twinberrow*** *[[1930] 2KB.16] in which it was most clearly explained by Scrutton L.J. that it was a misunderstanding of the legal effect of 12 years' adverse possession under the Limitation Act to treat it as if it gave a title whereas its effect is "merely negative" and, where the possession had been against a tenant, its only operation was to bar his right to claim against the man in possession. I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple.*

34. In view of the above if the respondent were able to satisfy the Court of the factual possession of the deceased he (the deceased) would not have acquired the estate or interest of the first appellant in the premises. The deceased and those claiming under him can bar a claim in possession by the appellants and can get a title by his possession to the premises. Of course the reference in the **Fairweather** case to the ability of the squatter to convey a title in fee simple must be understood in the context of this case to mean that it would not be a title superior to the Trinidad and Tobago Housing Development Corporation. The point, however, is that the rights acquired by virtue of the

possession of the deceased are rights vested in the deceased and, as he has died without a will, are rights now vested in his estate. Those rights can be enforced for and on behalf of the estate of the deceased. They cannot be enforced by the respondent for her own benefit and this claim has been brought in her own name for her own benefit. It follows therefore that even if the respondent were able to satisfy the Court on the element of factual possession of the deceased, she would have no claim in her own right to possession or title of the premises. Those entitled to make such a claim are those entitled to enforce the rights acquired by the possession of the deceased and the respondent is not one of them. The Judge was, therefore, correct to conclude, as he did, that the respondent as licensee of the deceased is therefore not entitled to assert adverse possession against the appellants unless the deceased were entitled to do so and she were entitled to enforce any rights that he acquired by adverse possession herself. But that she was not one of those persons entitled to enforce those rights on behalf of the estate of the deceased. As the Judge noted, any claim that the respondent has to possession of the premises depends on the operation of estoppel and it is to this aspect of this appeal that I now turn.

35. As I mentioned with respect to the claim in estoppel the Judge considered the respondent's claim from the perspective of both promissory and proprietary estoppel. Before this Court, as also appears to have been the position in the Court below, the arguments were limited to proprietary estoppel. I will therefore consider the appellants' appeal from the perspective of proprietary estoppel only. In any event I do not believe, having regard to the conclusions I have reached on the appellants' appeal, that if the matter were considered as one in promissory estoppel it would improve the respondent's position.

36. The appellants submitted that the Judge should not have granted the declaration in favour of the respondent that he did. The submission is based on two broad grounds. First it was argued that the pleadings of the respondent are deficient and that should have resulted in the dismissal of the respondent's claim. Secondly, the decision of the Judge it was argued, is against the weight of the evidence.

37. As to the first submission it is appropriate to consider the elements of proprietary estoppel.

38. In **Thorner v Major and Ors**. [2009] UKHL 18 Lord walker pointed out that while there is no universal definition of proprietary estoppel, which is both comprehensive and uncontroversial, that most scholars agree that the principle of proprietary estoppel is based on "*three 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…" For a claimant therefore to properly plead his case in proprietary estoppel, he must set out those three elements; a representation or assurance, reliance on that representation or assurance and detriment as a consequence.

39. In this matter the respondent's case is based on an assurance by the deceased that she was to have the premises when he died. It was therefore necessary for her to set out the assurance, the fact that she relied on it and in so doing acted to her detriment. From a perusal of the statement of case the respondent has done that. The appellants, however, contend that the claim is not sufficiently pleaded for two reasons namely: i) there was no plea that the respondent would acquire an interest in the premises during the lifetime of the deceased, and ii) that the respondent did not plead that the deceased told her he would leave the premises to her after his death if she helped him to complete the structure on the lands.

40. The first criticism seems to suggest that the doctrine of proprietary estoppel is only applicable if the assurance on which the claimant relies is limited to the claimant acquiring an interest in the subject property during the life of the person giving the assurance and does not apply when the assurance is that the claimant will inherit his property. That however is not so. There are many cases where the assurance relied on was that the claimant would inherit the property on the death of the person giving the assurance. In **Gillett v Holt** [2000] 2 All ER 289, for example, the representation was that the claimant would inherit the business. In **Thorner v Major,** supra**,** the representation was to the effect that the claimant would inherit the Steart Farm upon the death of the owner.

41. As to the second criticism, that is simply not the representation on which the respondent relies. The representation was not conditional upon the respondent helping the deceased to complete the structure. It was that she would inherit the property. The law of proprietary estoppel requires the claimant acting to her detriment in reliance on the assurance. But that is not to be confused with what the claimant has alleged the assurance to be.

42. In the circumstances I do not agree with the criticisms of the appellant on the pleaded case of the respondent.

43. In contending that the decision of the trial Judge was against the weight of the evidence the appellants made the following submissions:

> 1. The respondent led no cogent evidence to establish the assurance made by the deceased. As the Judge did not accept the respondent's evidence as to whether she knew a Chalkie Codrington and the level of income she and the deceased generated, he should not have placed any weight on the respondent's evidence;
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> 2. *"It was difficult to see*" or "*incomprehensible to understand how the respondent could acquire any interest in the premises"* when the Judge totally rejected the respondent's evidence as to her income;
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> 3. In the absence of evidence of the amount of earnings of and contributions by the respondent it is difficult to see how the respondent could be awarded the premises on the basis of proprietary estoppel;
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> 4. The Judge erroneously took into account indirect contributions when they were not pleaded or relied upon by the respondent; and
>
> 5. When the Judge made the declaration in favour of the respondent, he disregarded the interest of the first appellant in the premises when there was no evidence on which he could properly do so.

The appellants made no issue of the fact that at the time of the assurances which the respondent claimed that the deceased made to her that his legal interest in the premises was that of a joint tenant together with the first appellant and that he predeceased the first appellant.

44. As to the first submission, evidence was led on behalf of the respondent as to the assurances made by the deceased that she would inherit the property. Such evidence may be found at paragraphs 13 and 18 of the respondent's witness statement, which I have set out earlier in this judgment, and in the evidence of Avanel. This was evidence from which the trial Judge could find, as he did, that the deceased made the assurances relied on by the respondent. It does not follow from the fact that the Judge did not accept every aspect of the respondent's evidence that he could not accept her evidence as to the assurances made and place appropriate weight on it. That is a matter which turned essentially on the credibility of the witnesses which the Judge was in a position of advantage over this Court to determine.

45. With respect to Avanel, who is the daughter of the respondent and who gave evidence on the respondent's behalf, the Judge found that she testified in a "*candid and truthful manner*". According to her evidence she was aware of the assurances made by the deceased. The deceased

told her that the premises would be for her mother. The Judge also accepted Avanel's evidence that the deceased guaranteed a loan to start her business and permitted her to construct an annex on the lands for the purposes of the business. The Judge indicated that the effect of Avanel's evidence in the round was that it reflected the deceased lived in a family arrangement with the respondent and her children until his death and corroborated the fact that the deceased intended the respondent and her family to regard the property as being for their use and benefit and not just for their temporary use and benefit.

46. The appellants did not challenge the Judge's acceptance of Avanel's evidence. What they did challenge was the finding that Avanel's evidence corroborated the evidence of the deceased. The appellants contended there was no rational for such a conclusion. I however do not agree.

47. Avanel, who, as I mentioned, the Judge regarded as a truthful witness, gave evidence that the deceased in fact told her that the premises would be given to her mother. This evidence certainly was capable of corroborating the evidence of the respondent. Further, Avanel's evidence demonstrated that the deceased and the respondent and her children lived together as a family and that the property was used for the benefit of the family. This supports the evidence of the respondent in that it is more likely and natural in those circumstances that the deceased would want the respondent to have the property on his death.

48. In the circumstances, having regard to the evidence the Judge was well entitled, as he did, to accept the respondent's evidence that the deceased made assurances to her that the premises would be hers.

49. The other submissions (at para. 43.2 and 43.3) may conveniently be discussed together. They raise the issue of detriment. There is no doubt that for proprietary estoppel to arise the person claiming must have acted to his detriment on reliance of the assurances made. There is evidence which the Judge accepted that the respondent acted on the basis of the assurances made by the deceased. According to the respondent she relied on the assurances made by the deceased and assisted him financially and by the provision of her labour in making additions to the property. The appellants do not challenge the primary findings of fact made by the Judge as to what the respondent did. Rather the appellants contend that in view of the Judge's findings, the respondent has not established any sufficient detriment to raise an equity in her favour. Before dealing with that submission it is appropriate to make some general observations on the question of detriment.

50. Detriment need not be financial in nature. Detriment can be established in different ways, so for example in **Thorner** the detriment consisted of the claimant providing his labour. It has been emphasized that detriment is not a "*narrow or technical concept*" and "*need not consist of the expenditure of money or other quantifiable financial detriment so long as it is something substantial"* (see **Gillett v Holt**, supra). In considering whether the detriment is substantial the test is whether it appears unconscionable in all the circumstances that the representor should be allowed to resile from his representation or assurance having regard to what the representee has done or refrained from doing in reliance on the representation or assurance. The requirement must be approached as part of a broad enquiry as to whether the repudiation of the assurance is or is not unconscionable in all the circumstances (see **Gillett v Holt,** 308). The approach, therefore, is not an exercise in forensic accounting, rather the Court is engaged in a classic evaluative exercise and the Court must stand back and look at the matter in the round to determine whether having regard to all the circumstances it would be unconscionable to permit the repudiation of the assurance (see **Davies v Davies** [2014] EWCA 568 paras 51 and 56 and **Gillett v Holt** p. 309).

51. The detriment which the claimant must be shown to have suffered falls to be judged at the moment when the representee purports to go back on the representation (see **Jones v Watkins** (November 26, 1987) Official Transcripts 1980-1989 p. 11). Of course the deceased has never in this case sought to withdraw his representation but the appellants, who are in fact the beneficiaries of his estate, have sought to do so. In these circumstances I would say that the detriment falls to be judged from the moment the appellants requested the respondent to vacate the premises (which was by letter of October 22nd 2009). The enquiry however looks back from then and asks the question whether in the circumstances which have happened it would be unconscionable to permit the assurance to be repudiated (see **Thorner v Major** para 101).

52. Where a claim based on proprietary estoppel is made particularly against the estate of a deceased person, the items of detriment relied on should be specifically pleaded and proved. The Court should not readily infer detriment which has not been specifically alleged and proved (see **Jones v Watkins** p. 11).

53. Returning to the appellants' submissions it is not that the respondent led no evidence as to her income and her monetary contributions to the improvements to the premises. The respondent did lead such evidence, which the Judge did not reject in its entirety. He accepted that the respondent

did earn an income as a seamstress and form other sources. What he did not accept was the respondent's evidence as to the amount of money she earned and what she and the deceased were able to save and spend on the premises. He, however, was satisfied that the deceased did make monetary contributions from the income she earned to the improvement of the dwelling house. The appellants, therefore, overstate their case when they contend that the Judge totally rejected the respondent's evidence as to her income, but that aside, the submissions of the appellants seem to be premised on the view that the Judge must ascertain the monetary value of the respondent's contributions before they can be considered substantial. It is clear from the observations above that that is not necessary for the respondent to have succeeded, particularly in this case where the respondent relied not only on financial contributions in relation to the improvements but on her contributions via the provision of labour. According to the respondent she and the deceased worked together on improving the premises. That evidence was not rejected by the Judge.

54. The appellants also complained (see para 43.4) of the Judge's reliance on indirect contributions by the respondent. The Judge found that the respondent's contributions would also have been indirect in meeting household expenditures and making available to the deceased income which was utilized for the construction and expansion of the dwelling house.

55. There was no direct evidence on the issue of indirect contributions. The Judge thought that this was a reasonable inference to be drawn from the evidence, but the respondent did not plead anything of indirect contributions and, from the written submissions of the respondent in the Court below, no reliance was placed on indirect contributions. In my view, it was not appropriate for the Judge to draw such an inference in respect of indirect contributions as it does not appear to have been an issue in the case. However, having said that, it does not appear to me that the Judge took indirect contributions into account in determining that an equity had been raised in the respondent's favour. It is apparent from the Judge's judgment that he was alive to the fact that the essence of proprietary estoppel is to do what is necessary to avoid an unconscionable result. His focus in that regard was not on indirect contributions but on other contributions of the respondent. The Judge was aware that the respondent must have acted on the faith of the assurances of the deceased in order to establish her claim. He noted in that regard that the expenditures on the said premises were *"joint"* and that the respondent's expenditure was based on the belief at the time that she already owned or would have obtained an interest in the premises. The Judge then stated that the respondent must have incurred expenditures or otherwise acted to her detriment and then referred to **Knowles v**

Knowles, Privy Council Appeal No. 28 of 2007 where the Privy Council made reference to **Jennings v Rice** [2002] EWCA Civ 159 and noted that *"the essence of proprietary estoppel is to do what is necessary to avoid an unconscionable result".* The Judge then, with reference to the evidence, stated:

> *"44. The Privy Council's guidelines are clear. The courts must approach the case of this type with care. On a balance of probabilities however, even weighing the competing versions of evidence of each witness, taking into account the exaggerations and distortions impacted by self interest and otherwise, I find that the [respondent's] case is made out on the evidence.*
>
> *45. I find that the [respondent] has established an equitable interest in the said premises by virtue of her contributions, though there are far less than she attempted to portray. They are to assessed however relative to the income of herself and the defendant and in the context of their long standing, and in fact permanent relationship.*
>
> *46. In that context I find them to have been sufficient in law to have acquired an equitable interest in the said premises.*

56. Nothing in these paragraphs referred to indirect contributions. Indeed by referring to the respondent as having established an equitable interest by virtue of her contributions *"though they are far less than she attempted to portray"* the Judge could not have been referring to her indirect contributions as the respondent made no attempt to portray any such contributions. In the circumstances although the Judge drew an inference of indirect contributions which was not an issue in the case, that did not form part of his reasons for concluding that the respondent had made out her case in proprietary estoppel. Rather the Judge relied on the evidence of the respondent's direct contributions which he found were sufficient in law for the respondent to have acquired an equitable interest in the said premises. I think the Judge was quite entitled to come to that conclusion on the evidence.

57. I turn now to the last issue raised by the appellants, which is that in making the declaration the Judge disregarded the interest of the first appellant in the property (para. 43.5). It was argued that in making the declaration the Judge disregarded the interest of the first appellant and he was wrong to do so as there was no evidence that the first appellant had done anything to encourage any belief that the respondent had an interest in the premises.

58. It is clear, I think, that having found that the evidence raised an equity in the respondent's favour, the Judge, in deciding how that equity should be satisfied, failed to have any regard to the

interest of the first appellant in the premises. He was of the view that the first appellant was *"not in the picture*" and had *"very little to do with the property over the years*". But having rejected the claim in adverse possession, the only basis on which the Judge could have ignored the interest of the first appellant in the circumstances of this case was on the basis of the principle of proprietary estoppel.

59. As I mentioned, an element of proprietary estoppel is an assurance or representation. That may take the form of an express assurance or representation as the respondent established in this case. However, acquiescence may also form the basis of a claim in proprietary estoppel. This can arise for example where A stands by and says nothing while B builds on A's land believing it to be his (B's property). This is described in **Fisher v Brooker** [2009] 4 All ER 789 by Lord Neuberger (at para 62) as a classic example of proprietary estoppel and it applies "*where B adopts a particular course of conduct in reliance on a mistaken belief as to B's current rights and A knowing both of B's belief and the existence of A's own inconsistent right fails to assert that right against B*" (see **Snell's Equity** (33rd ed at para 12-034). In **Thorner v Major** Lord Walker opined that if all proprietary estoppel cases are to be analysed in terms of assurance, reliance and detriment then A's conduct in standing by in silence may serve as an element of assurance. It is also relevant to note that whether the claimant relies on acquiescence or an express assurance or representation that the essence of proprietary estoppel is to do what is necessary to avoid an unconscionable result.

60. In so far as the declaration made by the Judge ignored the interest of the first appellant it is open to attack on the following grounds. First, it was not the respondent's case that the first appellant made any representation or assurances that the premises would belong to her. The assurances relied on by the respondent were those of the deceased. As the respondent rested her claim in proprietary estoppel on assurances made by the deceased that cannot serve to establish a claim in proprietary estoppel against the first appellant. Secondly the respondent has not pleaded a case based on the acquiescence of the first appellant nor was any evidence led by the respondent in support of such a claim. This would require evidence of the first appellant standing by with knowledge of what was taking place over the years. There was no evidence to that effect.

61. Further, as the essence of proprietary estoppel is to do what is necessary to avoid an unconscionable result, it is not possible to see how a declaration that ignores the interest of the first

appellant can achieve that result. The following passage in **Knowles v Knowles** Privy Council Appeal No. 28 of 2007 (at para 27) bears this out:

> *"In **Jennings v Rice** [2002] 2 EWCA Civ. 159; [2003] 1 P & CR 100 Robert Walker, L.J said at paras 56 that the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result. In the opinion of their Lordships it would unconscionable in this case to deprive George of his property when he had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them…"*

62. Counsel for the respondent submitted that the order of the Judge was justifiable on the basis of the first appellant's delay in making any claim to the premises. He submitted that in the exercise of its equitable jurisdiction the court should take the delay on the part of the first appellant into account. In support of that submission Counsel for the respondent referred to High Court Action M-97 of 1989 **Seemongal v Seemongal** where the Court considered the effect of delay in an application for ancillary relief under the Matrimonial Proceedings and Property Act Chap. 45:51. He was unable to produce any authority that supported his proposition that mere delay by the land owner would give rise to a claim in proprietary estoppel against him. I am not prepared to accept that it does. Mere abandonment of one's land and delay in making a claim for its recovery if not caught by the limitation statutes do not result in the owner losing his land. The authorities are clear that what is required to establish a claim in proprietary estoppel is an assurance or representation as to a state of affairs by A or his standing by with knowledge of the mistaken belief of B and of his right inconsistent with such belief.

63. In the circumstances, in my judgment the Judge fell into error when he failed to take into account the interest of the first appellant in deciding how the equity of the respondent should be satisfied. It therefore now falls to this Court to determine how that equity should be satisfied. In determining that issue the Court has a wide though not uncontrolled discretion (see **Clarke v Swaby** [2007] UKEC 1 (at para 18). In **Campbell v Griffin** [2011] EWCA Civ. 990 it was noted that the Court is cautious in its approach to the issue. Walker LJ referred to the case of **Gillett v Holt** [2001] 3 WLR 815,839 where it was said:

> *"The aim is, as Sir Arthur Hobhouse said in **Plimmer v Wellington Corporation** (1884) 9 App Cas. 699,714 to 'look at the circumstances in each case to decide in what way the*

equity can be satisfied'. The Court approaches this task in a cautious way in order to achieve what Scarman, LJ in ***Crabb v Arun District Council*** *[1976] Ch. 179,198 called the 'minimum equity to do justice to the plaintiff'. The range of possible relief appears from* ***Snell's Equity****, 30th Ed. (2000) pp 641-643".*

64. In looking at the circumstances of each case it is necessary to consider the advantages enjoyed by the claimant and weigh them against the disadvantages suffered by reason of the claimant's reliance on the assurance. As was noted in **Henry v Henry** [2010] UKPC 3 (at para 53):

> *"In the instant case the Judge should have undertaken a similar weighing process to that undertaken by Lord Walker in* ***Campbell v Griffin****, that is to say, he should weigh any disadvantages which Calixtus Henry had suffered by reason of his reliance on Geraldine Pirre's promises against any countervailing advantages which he had enjoyed by reason of that reliance".*

65. The Court must also have regard to concept of proportionality. As was noted in **Henry v Henry** (at para 65) *"proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application".*

66. In this case the respondent has expended labour and money in improving the dwelling house on the parcel of land. It was converted from a rudimentary structure into a three bedroom house. The value of the respondent's contributions has not been monetized. It is however appropriate to note that they were less than what they were portrayed to be.

67. It is relevant to note too that although the structure was improved as a consequence of the contributions of the respondent, she had the benefit of the structure that she met on the premises, which was put there by the efforts of the deceased but also by the efforts of the first appellant. According to the evidence of the first appellant she and the deceased sold a house that they owned for $20,000 and used that money to begin construction on the parcel of land. The acquisition of the lands was also obtained through the efforts of the deceased and the first appellant.

68. The respondent has also resided on the premises as a licensee of the deceased and continued to reside in the premises after the death of the deceased in 2006. She has not paid anything for her use and occupation of the premises over the years. The arrears of rent under the 1987 lease were paid by the appellants and it is their liability to pay the rent under the new lease.

69. In fashioning any order that would satisfy the equity regard must be had also to the interests of the appellants. The first appellant was at all times the lessee of the lands. The second appellant now also has a leasehold interest in the premises. He has also built a structure on the premises (which from the evidence appears to be a substantial structure consisting of two floors) in which the second appellant, his wife and four children reside.

70. To satisfy an equity under the doctrine of proprietary estoppel the Court may direct a payment of a sum of money. In my judgment in all the circumstances of this matter, I think the most appropriate order would be to direct a payment of a sum of money to the respondent that would take into account the detriment suffered as a consequence of the reliance on the assurances of the deceased but would have regard to the advantages she has enjoyed as well as pay appropriate regard to the interests of the appellants. In the circumstances I direct that the appellants shall pay to the respondent half the value of the premises, that is to say the dwelling house and the portion or area of the parcel land on which it stands. The value shall be determined by a land valuator appointed by the agreement of the parties. Should they fail to agree within the next twenty-one (21) days the Court shall be at liberty to make the appointment on the application of any of the parties. In determining the value of the land the respondent shall be treated as if she were entitled to an undivided half share of the leasehold interest of the area or portion of the lands on which the dwelling house stands for a term of 30 years on the same terms and conditions as contained in 1987 National Housing Authority agreement. The respondent shall remain in exclusive possession of the dwelling house and the portion of the lands on which it stands until payment of the value as determined by the valuator is made to her, but shall vacate same within three (3) months of the payment of the value. There shall be liberty to apply.

71. We shall hear the parties on the issue of costs.

A. Mendonça,
Justice of Appeal