THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2018/0002

BETWEEN:

MATHILDA NELSON

Appellant

and

ALEXIS ALCIDE

Respondent

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag]
The Hon. Mr. Gerard Farara, QC	Justice of Appeal [Ag]

Appearances:

Mr. Dexter Theodore, QC with Ms. Sueanna Frederick for the Appellant
Ms. Wauneen Louis-Harris for the Respondent

2020: March 13,
April 8.

Civil appeal – Land law – Proprietary estoppel – Whether the appellant had established the essential elements of a claim based on the doctrine of proprietary estoppel and, if so, what was the minimum equity necessary to do justice to the appellant

The appellant claimed an entitlement to ownership of 7,000 square feet of land and the erections thereon, situate at Monchy in the quarter of Gros Islet in Saint Lucia forming part of the estate of her grandmother, Emilene Alcide (also known as Emilienne Alcide), who died in Saint Lucia on 11th November 2011, after a prolonged period of illness. The respondent is the son of Emilene Alcide. He lived in the United States for some 39 years and returned to live in Sant Lucia in 2001. After the death of his mother he obtained letters of administration in her estate on 25th October 2002, a prior application by one Clyde Alexander for probate of a Will of the deceased having been struck out by the court on 8th March 2006. The appellant alleges that she lived with the grandmother from age 9 months until the age of majority. The appellant also alleges that upon reaching the age of majority, the grandmother told her that she would give her a spot of land at Monchy to build her home and a shop. In or about 1992 she built two buildings comprising her home and a shop on a spot of land close to the grandmother's dwelling-house, with the grandmother's permission. These buildings were predominantly of wood except for the kitchen and bathroom which were built of concrete. It is the appellant's evidence that in or about 1992 she moved into her house with her children and lived there and operated a small business from the shop until the grandmother died in November 2001, a period of some 9 years. During that period the appellant regularly cared and provided for the grandmother, who had been bedridden during the last 5 years of her life, and she used some of the proceeds from her shop business to support and care for the grandmother.

The appellant claimed, among other things, a declaration that she owned an undivided portion of the land at Monchy on which she had built her house and a shop "by way of being a constructive trustee on the said property". She also sought an order for partition of the property to reflect the 7,000 sq. ft. of land the grandmother gave to her, and an order directing the respondent, as successor to the grandmother's estate, to convey the said portion of land to her. However, the learned judge, after a delay of over 3 years and 6 months in the delivery of his judgment, dismissed the appellant's claim, including her claim based on proprietary estoppel. He concluded that there was no evidence that the grandmother intended the appellant to have 7,000 square feet of the land and that, the appellant had not acted to her detriment in building on the land.

Being dissatisfied with the decision of the learned judge, the appellant appealed. The main issue in the appeal was whether the appellant had satisfied the essential elements of a claim based on the doctrine of proprietary estoppel and, if so, what was the minimum equity necessary to do justice to the appellant. Accordingly, three grounds of appeal arose for determination, namely: (a) whether the learned judge erred in finding that the appellant did not act on her grandmother's offer until after the grandmother died, as the respondent testified and the learned judge found; (b) whether the learned judge erred by failing to make an order granting the land which the appellant was in possession of, in light of his finding that it was entirely possible and even probable that the deceased did offer the appellant a piece of land; and (c) whether the learned judge erred in failing to make an order in favour of the appellant on the basis that, since the land was not subdivided, it would have been impossible to state which piece of land the appellant should occupy.

Held: allowing the appeal; setting aside the decision of the trial judge with costs to the appellant in the court below and two-thirds of such costs in the appeal; and declaring and ordering, among other things, that the appellant is the owner in fee simple of the area of land situate at Monchy in the Quarter of Gros Islet on which the two partially wooden and concrete structures which she built stands, which structures are described in the Enforcement Notice dated 24th June 2004 issued by the Development Control Authority as two timber buildings measuring 16'x12' respectively, plus a 5 foot wide curtilage around the outer walls of the said structures (collectively "the said land"), with the right, enforceable as an easement or right of way, for the appellant to access the said land from the closest point on foot or with a motor vehicle; and that the respondent shall, upon the said area of land being surveyed and partitioned, transfer the said land to the appellant; that:

1. An appellate court will be slow to set-aside findings of fact and to substitute its assessment and findings for those of the trial judge, unless the trial judge clearly erred, as a matter of principle, in his assessment of the evidence or the witnesses, or did not consider relevant evidence, and/or was plainly wrong, or in circumstances where there has been inordinate delay in the delivery of the judgment which undermines the learned judge's assessment and evaluation of the witnesses and/or the evidence. In this matter, the learned judge not only delayed for an inordinate amount of time in delivering the judgment, but he failed to assess or to properly assess or to give due consideration to the relevant evidence when reaching his conclusions on the legal issues and was, in the circumstances plainly wrong.

   Re Successful Trend Investments Corporation: Kathryn Ma Wai Fong v Wong Hei Yik and others BVIHCMAP2018/001 and 002 (delivered 27th March 2019, unreported) applied; **Henderson v Foxworth Investments Ltd and another** [2014] 1 WLR 2600 considered.

2. The learned judge ought to have permitted the parties to rely on all of their respective affidavits filed in the matter, as evidence-in-chief, as was provided for in the Case Management Order made in November 2011, and ought also to have permitted the appellant to rely on her witness statement filed 10th October 2012, the filing of which was permitted by the Pre-trial Review Order made 9th July 2012.

3. The modern practice of pleadings in civil cases, which is the bedrock of pleading under the CPR 2000, is that the statement of case must contain all the facts upon which a party intends to rely in support of their claim or defence. The fundamental principle is that it must be sufficiently clear to the other party what are the matters in dispute between them, and what are the salient facts and important documents upon which a party intends to rely in support of their claim or in their defence. In ascertaining whether a party has satisfied the requirements under the CPR for setting out their statement of case, a court, consistent with the modern practice, will look, not just to the statements of case itself, but also to the witness statements and other key documents in the case, all of which help to define the dispute and the underlying legal and factual issue between the parties. Accordingly, the appellant had properly pleaded the essential elements upon which to base a claim founded on proprietary estoppel in her statement of claim, affidavits and witness statement. Indeed, whether the appellant had made out her case based on proprietary estoppel was a major issue before the trial judge which he considered and rejected in his judgment.

   Rule 8.7(1) and Rule 10.5(1) of the **Civil Procedure Rules 2000** considered; **Carlton Smith and another v Esther Oakley** BVIHCV2009/0201 (delivered 28th June 2010, unreported).

4. The level of specificity or particulars required of a litigant when seeking to make out a case based upon proprietary estoppel, is that the detriment suffered by the litigant in reliance on an assurance made by the property owner, must be specifically alleged, pleaded and proved. Where no particular detriment is pleaded or alleged, any claim based upon proprietary estoppel will fail. A court will not presume detriment which has not been pleaded by the party seeking to claim in equity. However, a court is not precluded from drawing reasonable inferences from established facts supportive of detriment having been suffered or undertaken in reliance on an assurance, in reaching a conclusion as to whether proprietary estoppel has been made out.

Gillet v Holt [2001] Ch 210 applied; **Henry v Henry** [2010] UKPC 3 followed.

5. The question whether it would be unconscionable for a court to allow the promisor to resile from the assurance or representation made or given to a claimant, is to be approached in the round, as part of a broad inquiry. Therefore, in order to found a claim to property on proprietary estoppel, three elements or ingredients must be proved, namely: (i) there must be an assurance or representation, whether express or implied, that the claimant has or would have an interest in the land of the defendant or his or her estate; (ii) reliance by the claimant on that assurance or representation; and (iii) the claimant must act to his or her detriment in reliance upon the assurance or representation. These three elements in combination must lead the court to conclude that it would be unconscionable or inequitable for the person who made or gave the assurance relied on, to resile from it.

Gillett v Holt [2001] Ch 210 applied; **Thorner v Major** [2009] UKHL 18 followed; **Mohammed v Gomez and others** [2019] UKPC 46 followed; **Henry v Henry** [2010] UKPC 3 considered.

6. The learned judge erred in finding that the appellant had only started building on the land after the grandmother died on 11th November 2001 and was then stopped by the court. This finding was unsustainable in light of (i) the judge's other finding to the effect that the appellant had not acted to her detriment in building her shop on the land, as this was helpful to the appellant in her efforts to live comfortably and make a living for her children; and (ii) the documentary evidence in the form of a letter dated 8th August 2002 from the electrical corporation, St. Lucia Electricity Services Limited ("LUCELEC") to the respondent's lawyer (in response to his letter dated 13th June 2002), and the Enforcement Notice dated 24th June 2004 from the Development Control Authority to the appellant which identified two timber buildings on the land each measuring 16ft. x 12ft and used for commercial purposes.

7. The LUCELEC letter and the Enforcement Notice undermined the respondent's credibility and are inconsistent with his evidence on this important aspect of the case to the effect that when his lawyer had written in 2002 to the electrical corporation requesting them not to connect the appellant's property to the main

supply, there were no structures on the land built by the appellant. It also undermines the judge's recollection of the evidence, including the significance of both the LUCELEC letter and the Enforcement Notice and the judge's extensive questioning of the respondent thereon during the trial whereupon the judge had concluded, quite correctly, that these documents were unhelpful to the respondent's case, and the respondent's insistence, in the face of these documents, in insisting that there was no structure built by the appellant on the land when the grandmother died. Accordingly, the Court of Appeal was in as good a position as the trial judge to assess this evidence and to conclude that the appellant had built on the grandmother's land at Monchy in or about 1992 the two buildings in which she lived with her children and operated a small shop for a period of some 9 years up to the grandmother's death.

8. An assurance may be given or made either expressly by words which are 'sufficiently clear' whether spoken once or repeated over time; or by necessary implication by the omission of a property owner who has stood by in silence over a period of some years, allowing the claimant to openly possess his property and to act thereon or in relation thereto in a way only explicable on the basis that a clear enough assurance had been made or given regarding the claimant's entitlement to property or some other estate in or right or interest in the property. The findings and conclusions of the learned judge are consistent with the grandmother having offered or given the appellant the assurance that she would have been entitled to a piece of land upon which to build a shop and her home. Therefore, the learned judge ought to have concluded that the appellant had established, on a balance of probabilities, that the appellant had relied on the assurances given to her by the grandmother that she would have a plot of land on the grandmother's estate, at Monchy, upon which to build, live and provide for her family, and, in reliance thereon, she had built her home and shop on the land.

Thorner v Major [2009] UKHL 18 followed; **Mohammed v Gomez and others** [2019] UKPC 46 followed.

9. Detriment is not a narrow or technical concept. Whether a claimant has acted to his detriment in reliance on an assurance made to him by the property owner, must be assessed in the context of the particular matter, having regard to all the circumstances, and must be judged at the time when the person who gave the assurance seeks to go back on it. Detriment is not limited to the expenditure of money or to some other quantifiable financial detriment, but must be something which is substantial, not minor or trivial. In assessing the detriment, a court must weigh the disadvantages suffered by the claimant in reliance on the assurance, against the advantages which the claimant enjoyed as a consequence of that reliance. In establishing detriment so as to found a claim based on proprietary estoppel, it is not absolutely necessary for a claimant to have built a permanent structure on the property of the person making the assurance, so that a claim will necessarily fail where there is no permanent structure built.

Gillett v Holt [2001] Ch 210 applied.

10. The judge erred in not finding that the appellant had established that she had acted to her detriment in expending money in building on the land during the lifetime of the grandmother, and in providing for the care and upkeep of the grandmother both financially and by personally looking after her ill grandmother during the last 9 years of her life, during which period the appellant can be said to have deprived herself of the opportunity for a better or other life elsewhere.
Gillett v Holt [2001] Ch 210 applied; **Henry v Henry** [2010] UKPC 3 considered.

11. Once proprietary estoppel has been established on a balance of probabilities, a court is then obliged to go on to consider, in all the circumstances of the particular case, what is the 'minimum equity' necessary to do justice to the claimant. In this respect, the court must approach the matter with caution. The court has a very flexible jurisdiction and wide discretion to fashion the appropriate equity or remedy in order to do justice to the detriment suffered by the claimant. In doing so, a court has a duty, in a clear case, to fulfil the claimant's expectations. Where the claimant's expectations are not clear or are uncertain or extravagant or out of all proportion to the detriment which the claimant has suffered, the court should give effect to the claimant's equity in some other way. In this regard, the detriment of an ever-increasing burden of caring for an elderly and/or ill person over an extended period is very difficult to quantify in monetary terms.

Gillett v Holt [2001] Ch 210; **Henry v Henry** [2010] UKPC 3 applied.

12. Having regard to the detriment suffered by the appellant and the learned judge's failure to assess or to take any of these factors into account in reaching his conclusion on detriment, it was open to this Court to reach its own assessment on the extent of the detriment suffered in determining what was the minimum equity necessary to do justice to the appellant. In all the circumstances, the appellant ought to be granted ownership in fee simple of the of area of land on which she built her home and a shop, plus a small curtilage of approximately 5 feet wide around the said structures, with an easement or right or way for egress to and from the said portion of the land, which must be surveyed and partitioned, and the designated parcel transferred by the respondent to the appellant .

Pascoe v Turner [1979] 2 All ER 945 considered; **Henry v Henry** [2010] UKPC 3 considered; **Campbell v Griffin and others** [2001] EWCA Civ 990 considered.

JUDGMENT

[1] **FARARA JA [AG]:** This is an appeal from the judgment of Belle J (“the learned judge”) delivered 13th June 2016 ("the Judgment"), just over 3 years and 6 months after the trial

of the claim on 21st November 2012, by which the learned judge dismissed the appellant's claim and ordered her to pay the costs of the respondent pursuant to Part 65 of the **Civil Procedure Rules 2000** ("the CPR"). By any accepted standard, this period constitutes an inordinate delay in the delivery of the judgment, and in the delivery of justice between the parties to these proceedings.

[2] In our respectful view, the period of the delay is not one which can be justified or countenanced on any reasonable basis. In that regard, we can do no better than to refer to the salutary words of Lord Hoffmann in the opinion of the Privy Council in **Citco Banking Corpn NV v Pusser's Ltd and Another**.[1] There the delay in the delivery of the judgment by the first-instance judge was almost 5 years. At paragraph 21, Lord Hoffmann puts it this way:

> "The judgment as delivered offers the parties no explanation for the delay and their Lordships understand that the judge is no longer serving in the British Virgin Islands. But their Lordships feel bound to observe that such delays are completely unacceptable. Besides being a violation of the constitutional rights of the parties to a determination of their dispute within a reasonable time, they are likely to be detrimental to the interests of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice."

[3] In the instant matter, the appellant has not made inordinate delay in the delivery of the Judgment a specific ground of appeal. However, as will be seen, the correctness of certain conclusions on the evidence by the learned judge have been challenged by the appellant in her grounds of appeal and submissions before this Court, in a way which calls into question the learned judge's recollection, treatment and assessment of the evidence, oral and documentary, and his findings and conclusions on the issues for his determination.

Background

[4] The claim in this matter concerns the alleged entitlement of the appellant to ownership of 7,000 square feet of land and the erections thereon, comprising part of the immovable estate of her grandmother, Emilene Alcide, deceased (also known as Emilienne Alcide),

[1] [2007] UKPC 13.

situate at Monchy, in the quarter of Gros Islet in Saint Lucia. The respondent is the son of Emilene Alcide and the appellant is his niece. The grandmother died in Saint Lucia on 11th November 2001 at age 82 years, after a period of prolonged illness, during which she had been bedridden for the last (approximately) 5 years of her life.

[5] The evidence of the appellant was that she had begun living with the grandmother from age 9 months until she reached the age of majority (about age 19). During that period, consisting of some 13 years, she was entirely dependent upon the grandmother for her support, as were her brothers and sisters who had also come to live there with the grandmother at a very young age.[2] It is the appellant's evidence that in 1992, when she was about 19 years of age, by which time she had her own children who were also living in the house with the grandmother, the grandmother told her that she would give her a spot of land at Monchy upon which to build her home and a shop.

[6] In or about 1992, she built her home and shop on the said spot of land. This consisted of two buildings, predominantly of wood, with the kitchen and bathroom being built of concrete. She then moved with her children to live in the dwelling-house, and also operated a small business from the shop.[3] It is also the evidence of the appellant, that she was the person responsible for the care and up-keep of the grandmother, which she continued to do after she had moved into her own home on the land in or about 1992 up until the grandmother's death in 2001, a period of some 9 years. It is also the case for the appellant, that during the said 9-year period when she resided with her children in her own house and operated a shop from the land, she used some of the earnings from the shop to support and care for the grandmother. Furthermore, during the last 5 years of the grandmother's life, she was bedridden and totally unable to care for herself.

[2] See paras. 8 to 10 of the Judgment and Record of appeal, Tab 40, p. 193 lines 6-21, p. 194 lines 12-14 and p. 195 lines 4-6).

[3] See paras. 11 and 14 of the Judgment; and Record of appeal, Tab 40, p. 195 lines 21-25 and p. 196 lines1-9.

The Claim

[7] The claim was commenced by claim form with statement of claim filed on 16th June 2009. The appellant (as claimant) sought a declaration that she owned an undivided portion of land at Monchy, in the Quarter of Gros Islet, comprising 7,000 square feet, and the erections thereon, "by way of being a constructive trustee in the said property". She also sought an order for partition of the property to reflect the 7,000 square feet allegedly given to her by the grandmother, and the structures thereon. The appellant also sought orders of the court (i) directing the respondent, as successor to the grandmother's estate, to convey to her the said 7,000 square feet. of land on which her structures stand; and (ii) that the orders of the court dated 25th October 2002 and 4th November 2008 be varied to reflect the wishes of the grandmother and the appellant's expectation, "to receive 7,000 square feet. of the grandmother's immovable estate situate at Monchy, with the erection thereon, as recited in the Last will and Testament of the grandmother."

[8] It is indisputable, that no Will purporting to be that of the grandmother has been admitted to probate in Saint Lucia. An application, by petition filed 11th June 2003 by one Clyde Alexander (purportedly as executor) for probate of the Last Will and Testament of the grandmother, dated 10th October 2001, was, by order of the High Court dated 8th March 2006, struck out.[4] It is my understanding that there has been no appeal from the said order. Moreover, letters of administration in the estate of the grandmother were granted to the respondent on 25th October 2002.[5] The order of the court approving the grant is also dated 25th October 2002.[6]

[9] From the documentary evidence before the court, the lands comprising the estate of the grandmother were registered under the **Land Registration Act**[7] with absolute title, as part of Block 1453B of the Gros Islet Registration Quarter. This is clear from certain of the exhibits to the various affidavits filed in this matter by both parties, and which are part of the Record of Appeal. It is also clear from these exhibits, that the parcel or parcels of

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[4] See Record of appeal, Tab 34, p. 118-119.
[5] See Record of appeal, Tab 34, p. 110.
[6] See Record of appeal, Tab 34, p. 111-112.
[7] Cap. 5.01, Revised Laws of Saint Lucia 2017.

land were successively subdivided following the various applications made by the respondent subsequent to the death of the grandmother, and new parcels created.[8] Accordingly, the portion of the grandmother's estate claimed by the appellant in these proceedings, concerns registered land which is subject to the provisions of the **Land Registration Act**.

The Evidence-in Chief

[10] An issue arose during the hearing of the appeal, as to which documents forming part of the Record of Appeal, constituted the written evidence-in-chief of the appellant and respondent, respectively, before the trial judge. The learned judge, at paragraph 4 of the Judgment stated: "*The evidence in this case is contained in the Affidavits of the parties and the cross examination by counsel for the opposing* sides." From this statement, one would glean that it is all the affidavits of the appellant and respondent respectively filed in the proceedings below which were to be accepted as their evidence-in-chief. However, as we shall see, this was apparently not the case as the matter unfolded during the course of the trial.

[11] Ms. Louis-Harris, learned counsel for the respondent, during oral argument, informed this Court that only certain of the affidavits constituted the evidence-in-chief in the court below, and that the learned judge had expressly refused to allow any reliance to be paced on the witness statement of the appellant, the filing of which had not received the prior permission of the learned judge. To buttress this, learned counsel took us to an exchange between the judge and counsel for the parties at the commencement of the trial on 21st November 2012.[9]

[12] From this exchange,[10] it is apparent that the Case Management Order ("the CMC Order") made in November 2011 by the judge, (there is no copy of this order in the Record of Appeal) provided for the affidavits already filed by the parties to be deemed their

[8]See, for example, Parcel 639 subdivided 27 March 2007 to create parcels 804 and 805 - Record Tab 35 p. 134; and Parcel 805 subdivided in June 2009 to create parcels 1003, 1004 and 1005 - Record Tab 35 p. 135).
[9] See Record of appeal pp. 179 – 187.
[10] See Record of appeal p. 186, lines 5-6.

evidence-in-chief.[11] Notable from the judge's characterisation of the CMC Order, is the absence of any restrictions on which affidavits already filed by the parties were to be deemed their evidence-in-chief at the trial. However, it is apparent from the Record in this appeal, that the appellant (claimant) filed a witness statement on 10th October 2012[12] subsequent to the CMC Order. Additionally, the Record contains a witness statement of one Theresa Marcellin, the mother of the appellant, also filed by the appellant on 10th October 2012.[13] These are the only two witness statements filed in the matter.

[13] All other filings by the parties were by way of affidavit evidence, filed prior to the CMC Order, except for two affidavits, one of the appellant's brother, Gabriel Hippolyte filed 10th October 2012,[14] and the other, the affidavit of the appellant's uncle, Polycarp Nelson, filed 23rd October 2012.[15] However, at the conclusion of the trial judge's exchange with counsel on this issue, he did not permit the appellant to rely on her witness statement as evidence-in-chief at the trial, and confined the parties to certain, but not all, of their filed affidavits as their evidence-in-chief. In fact, the learned judge stated at paragraph 1 of the judgment, that leave to file witness statements had not been obtained.

[14] This limitation of the evidence-in-chief of the parties only to certain affidavits, was contrary to what the learned judge stated were the terms of the CMC Order, whereby all prior filed affidavits were to stand as the evidence-in-chief of the parties. These included, importantly, the appellant's affidavit filed 15th December 2008[16] and the appellant's Supplementary Affidavit filed 28th May 2009.[17] This restriction, imposed at the trial, seems contrary to the learned judge's statement at paragraph 4 of the Judgment, that the evidence in the case consisted of the affidavits of the parties and their cross examination. However, as to the affidavits of the witnesses; Theresa Marcellin, Gabriel Hippolyte and Polycarp Nelson, the judge records that each of these were struck out by the court at the trial for failure of the deponents to appear to give evidence.

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[11] See Record of appeal, Tab 40 p. 182 lines 18-20.
[12] See Record of appeal, Tab 27.
[13] See Record of appeal, Tab 26.
[14] Record of appeal, Tab 28.
[15] Record of appeal, Tab 29.
[16] Record of appeal, Tab 7.
[17] Record of appeal, Tab 12.

[15] At pages 186 (lines 22-24) and 187 (lines 13-14) of the Record of Appeal, the learned judge is recorded as stating, in relation to the appellant's affidavit (at page 80 of the trial record)-

> "So if there is, if there is an affidavit, Mr. John [Appellant's counsel at the trial], of...Mathilda Nelson [the Appellant] we should be proceeding on the Affidavits and not the Witness Statement."
>
> ….
>
> "Okay, so that is the Affidavit you are going to have to rely on."

[16] And at page 187 (lines 16-21) in relation to the respondent's affidavit evidence (pages 80 and 84 trial record), the learned judge stated:

> "Eighty and eighty-four. Yes, he has another Affidavit at page 84, one was filed tenth June, the other one was file[d] the seventeenth of June, those are the Affidavits on which you would have to rely..."

[17] Regrettably, the confusion relating to this issue does not end there. For, included in the Record of Appeal, (at pages 152-153) is a copy of the Pre-Trial Review Order ("the PTR Order") made by Belle J on 9th July 2012 entered 24th August 2012), to which the learned judge's attention was not drawn by either counsel, nor did the judge allude to it during his exchange with counsel for the parties. That exchange came after the learned judge had asked for and, apparently, received the court file relating to this matter. The PTR Order, at the paragraph numbered “1”, placed on the appellant the responsibility for the preparation and filing by 28th September 2012 of a Core Bundle No.1, comprising the pleadings, orders, pre-trial memoranda and "information communicated to either party as a result of a Court Order under Part 38.6(b) of the CPR 2000". By the paragraph numbered “6”, a Core Bundle No. 2, "consisting of the Witness Statements and or Witness Summaries for the Claimant and the Defendant **to be relied on at the trial**, the Expert Report, Agreed Statement of Facts, if any, [and] Agreed Statements as to relevant specialist area of law, if any", (emphasis added) was also to be prepared and filed by the appellant by 28th September 2012.

[18] From the PTR Order, it would seem that the learned judge had authorised reliance by the parties on their respective witness statements at the trial. This would have been in addition to the prior CMC Order which constituted the various affidavits filed in the matter

as the evidence-in-chief of the parties. However, from the judge's ruling on the first day of the trial, he only permitted the appellant to rely on her affidavits filed 10th June 2011[18] and 17th June 2011;[19] and the respondent to rely on his affidavits filed on 31st March 2010[20] and 12th April 2011.[21] In my view, the learned judge was wrong to limit the parties to only these affidavits at the trial. The judge ought to have permitted the parties to rely on all of their respective affidavits filed prior to the CMC Order in November 2011; and ought to have permitted the appellant, consistent with the PTR Order of 9th July 2012, to also rely on her witness statement filed 10th October 2012.[22] Indeed, the learned judge compounded his error by referring to and considering certain parts of the appellant's witness statement at paragraph 32 of the Judgment.

[19] Accordingly, this Court, in considering and evaluating, for the purposes of this appeal, the learned judge's assessment of and conclusions on the various issues, will not confine itself to those affidavits which the judge, at the trial, permitted the parties to rely on, but, instead, will consider the evidence proffered in all the filed affidavits of the parties themselves, the appellant's witness statement, and the cross-examination of the parties.

Principles on which an appellate court may set-aside a trial judge's findings of fact

[20] It is settled law that an appellate court will be slow to set aside findings of fact and to substitute its assessment and findings for those of the trial judge who had the unique benefit of seeing and hearing the witnesses, and assessing their credibility, unless the trial judge clearly erred, as a matter of principle, in his assessment of the evidence or the witnesses, or did not consider relevant evidence, and/or was plainly wrong, or in circumstances where there has been inordinate delay in the delivery of the judgment which undermines the learned judge's assessment and evaluation of the witnesses

[18] Record of appeal, Tab 18.
[19] Record of appeal, Tab 19.
[20] Record of appeal, Tab 14.
[21] Record of appeal, Tab 33; see also record of appeal p. 188 lines 21-25 and p. 245 lines 17-20 and p.246 lines 1-6).
[22] Record of appeal, Tab 27.

and/or the evidence.[23] In my respectful view, as will be developed further, the learned judge not only delayed for an inordinate amount of time in delivering the judgment, but he failed to assess or to properly assess or to give due consideration to relevant evidence when reaching his conclusion on the legal issues and was, in the circumstances, plainly wrong in his decision.

The Trial Judge's Decision on the Claim

[21] The learned judge's primary findings and conclusions are set out below. In brief, the learned judge, having found that it was entirely possible and even probable that the grandmother did offer a piece of her land to the appellant upon which to build her dwelling-house and a shop, as was the case for the appellant, concluded that the ingredients necessary to establish a gift in contemplation of death had not been satisfied on the evidence. The judge also found that there was no evidence that the grandmother intended the appellant to have 7,000 square feet of the land, that the appellant had not acted to her detriment in building her house and shop on the land, and there was nothing unconscionable in not allowing the appellant to receive a particular piece of land from the estate of the grandmother. Accordingly, the learned judge dismissed the appellant's claim based on proprietary estoppel.

Grounds of Appeal and Issues for Determination

[22] The appellant relies on three grounds of appeal. They are as follows:

(1) The learned judge after accepting that the Appellant's grandmother may have mentioned to the Appellant that she would be given land the learned judge erred in law by concluding that while this may have displayed an intention to permit the appellant to have a piece of land where the shop was situated, it did not evince an intention for the Appellant to have 7,000 square feet of land, and made no order for the Appellant to have any land at all.

[23] See: Re Successful Trend Investments Corporation: Kathryn Ma Wai Fong v Wong Hei Yik and others BVIHCMAP2018/001 and 002 (delivered 27th March 2019, unreported); and Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600.

(2) The learned judge erred in law after rightly finding that it was "entirely possible and even probable that the deceased did offer the Appellant a piece of land", misdirected himself by determining that because the land was not subdivided it would have been impossible to specifically state which piece of land the Appellant should occupy and take possession of and therefore made no order in the Appellant's favour at all.

(3) Although noting that the Respondent had acknowledged that when he returned from abroad in 1999 the Appellant was already living on the land the learned judge misdirected himself by holding that the Appellant did not act on her grandmother's offer to give her land after her grandmother had died (in or around 2001).

[23] The three issues for this Court's determination were summarised at paragraph 2 of the appellant's skeleton argument as follows:-

"(a) Whether the learned judge erred in finding that the appellant did not act on her grandmother's offer until after her grandmother died;

(b) Whether the learned judge erred by failing to make an order granting the land which the appellant was in possession of, in light of his finding that it was entirely possible and even probable that the deceased did offer the Claimant (now Appellant) a piece of land; and

(c) Whether the learned judge erred (sic) in failing to make an order in favour of the appellant on the basis that since the land was not subdivided it would have been impossible to state which piece of land the appellant should occupy."

The Judgment

[24] There are several passages from the Judgment which are of significance to the learned judge's conclusions on the various issues and which have featured, to some extent, in the submissions of counsel in this appeal. These are:

> "[18] Firstly, [the Defendant] stated that he lived abroad for 39 years. He insisted that his mother was not ill for more than five (5) years.
>
> [19] …He [the Defendant] specifically noted however that he was not residing in Saint Lucia between 1989 and 2001. But he recalls returning to Saint Lucia in

2001. Mr. Alcide [the Defendant] said he communicated with his mother on a daily basis.

[20] He [the Defendant] said he had no knowledge that his mother promised the Claimant any land…

[21] Mr. Alcide's [Defendant's] view was that his mother was interested in selling the Claimant a piece of land. That is what he was aware of.

[22] Mr. Alcide's [Defendant's] most adamant rejection was of the notion that the Claimant lived with his mother from the age of 5 months until she reached the age of 18 years…

…

[24] The Defendant acknowledged that the Claimant was living on the land when he returned to Saint Lucia in 1999 after living abroad for 39 years. He reiterated that there was no house on the land before 2004. This assertion was supported by the Enforcement Notice of the DCA and the injunction of the court in 2008 where the Claimant was ordered to stop building on the land.

[25] I take notice of the fact that this was family land which was not yet subdivided between family members in any formal way. I also note that the quantity of the land and that there were a number of persons whom may have been entitled under ordinary process of law to inherit land from Mr. Alcide's mother's estate.

[26] I have concluded that the Defendant was not aware of many things that went on in Saint Lucia on spite of his recent visits and frequent calls. I conclude that it is entirely possible and even probable that the deceased did offer the Claimant a piece of land but because the land was not subdivided it would have been impossible to specifically state which piece of land the Claimant should occupy and take possession of.

…

[41] Articles 695 and 97 of the Civil Code require a donor to make a gift of immovable property by way of deed which must be registered in the registry of lands or a gift intended to take effect after death by Will. These requirements were not fulfilled because there is no documentary proof of a gift of land by the deceased to the Claimant supported by registered deed.

…

[46] The evidence of the Claimant is that the defendant's grandmother permitted the Claimant to place a shop and a small house on the land near to her own home. While this may display an intention to permit her to have a piece of her land where the shop was situated it does no[t] display an intention for her to have 7000 sq feet of the land.

[47] It is also true that the evidence does not show that the Claimant acted to her detriment in placing the shop on the land. Indeed this was helpful to the Claimant in her efforts to live comfortably and make a living to feed her children.

…

[50] It is also true that the Claimant should plead promissory estoppel if she wants to rely on this principle. However we have seen that the claimant did not plead this principle and that her lawyer did not rely upon it in his submissions on the Claimant's behalf.

[51] The question which arises then is to determine whether there is a remedy in equity which would aptly apply in this case under the head of propriety estoppel. There can be no appropriate remedy. Indeed I do not hold the view that the evidence leads to the conclusion that **particular** piece of land was offered to the Claimant or that land of a **particular** size was offered to the Claimant. (emphasis added)

[52] Finally there is nothing that makes it unconscionable to prevent the Claimant from proceeding to claim a particular piece of land from the estate of Emilienne Alcide and build on it without better evidence to support such an entitlement.

[53] Indeed based on the evidence I am of the view that [D]efendant's grandmother may have mentioned to the Claimant that she would be given land. But the evidence that the Claimant's grandmother did anything about this offer is very sparse. Indeed I accept that the Claimant did not act on this alleged offer of land until after the grandmother's death. That is when she started building and was stopped by the court.

[54] I therefore hold as follows:
1. The Claimant has failed to prove that the Defendant's mother gave her **a 7000 sq. ft. parcel of land** (sic) in contemplation of death. (emphasis added)
…".

Was Proprietary Estoppel pleaded by the appellant?

[25] It is common ground that this appeal turns on whether the trial judge properly applied the principles applicable to the doctrine of proprietary estoppel. These principles are: assurance, reliance, and detriment. However, learned counsel for the respondent submitted that the appellant had not properly pleaded proprietary estoppel and, in particular, the third ingredient of detriment.

[26] As to the requirement to plead proprietary estoppel, Rule 8.7(1) of the CPR requires a claimant to set out in the statement of claim 'all the facts upon which the claimant relies' in support of the claim. Correspondingly, Rule 10.5 (1) requires a defendant to set out in the defence all the facts on which he or she relies to dispute the claim. These tenets of pleading represent the modern approach to pleadings in civil matters and are materially different from the approach and practice applicable before the CPR, when the court's civil procedure was governed by the old Rules of the Supreme Court.

[27] The modern approach to pleading was considered by Hariprashad-Charles J in **Carlton Smith and another v Esther Oakley**,[24] a case dealing with a claim based on proprietary estoppel. At paragraph 37 of that decision, the learned judge referred to a passage in **Bullen & Leake & Jacob Precedents of Pleadings**,[25] where the authors expressly stated that proprietary estoppel must be specifically pleaded. However, in that passage the authors go on to state:

> "It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (*Houston v Sligo (1885) 27 Ch D 448; and see Sanders (orse Sanders) (1952) 2 All ER 767, p 769, per Lord Merriam P.)*."

[28] In **Carlton Smith**, the trial judge also considered this oft cited dicta of Lord Woolf MR in **McPhilemy v Times Newspaper Ltd and others**:[26]

> "*The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged.* In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. *Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that pleadings should make clear the general nature of the case of the pleader*." (emphasis mine)

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[24] BVIHCV2009/0201 (delivered 28th June 2010, unreported).
[25] 13th Ed. p 1148.
[26] [1999] 3 All ER 775 at pp. 792 to 793.

[29] Specifically with regard to the importance of witness statements in identifying the issues and providing the necessary particulars upon which a party intends to rely in proof of their case, the judge in **Carlton Smith**, also referred to this passage from the decision of the Court of Appeal in **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**:[27]

> "It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. … In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties."

[30] Accordingly, the modern practice relative to pleadings, which has as its bedrock the relevant provisions of the CPR setting out the duty of both the claimant and defendant in civil litigation to set out their case, is that the statement of case must contain all the facts upon which the party intends to rely in support of their claim or defence. In this regard, the fundamental principle is that it must be sufficiently clear to the other party what are the matters in dispute between them, and what are the salient or important facts upon which each party intends to rely in support of their claim or in defending against the claim. In ascertaining whether a party has satisfied the requirements under the CPR, a court will look, not just to the statements of case, but also to the witness statements and other key documents in the case, all of which help to define the dispute and the underlying legal and factual issues between the parties.

[31] Specifically with regard to reliance on the doctrine of proprietary estoppel (or some other species of estoppel), Robert Walker LJ (as he then was) in **Gillet v Holt**[28] makes clear: "The detriment alleged must be pleaded and proved." This statement of principle was cited with approval at paragraph 28 of the opinion of the Privy Council in **Henry v Henry**.[29] Accordingly, the particular level of specificity or particulars required of a litigant when seeking to rely upon a promise or assurance made to them by an owner regarding their property, is that the detriment suffered by the party in reliance thereon, must be

[27] Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16th July 2007, unreported).

[28] [2001] Ch 210 at 232.

[29] [2010] UKPC 3.

specifically pleaded and proved. Where no detriment is pleaded, any claim based upon proprietary or promissory estoppel will fail. Put differently, a court will not presume detriment which has not been pleaded by the party seeking to claim in equity. This does not prevent the court from drawing reasonable inferences from established facts supportive of detriment having been suffered or undertaken in reliance on an assurance, in reaching a conclusion as to whether proprietary estoppel has been made out.

[32] In my view, the respondent's submission that the appellant did not plead, or did not properly plead, proprietary estoppel, is without merit. The appellant's case based upon estoppel is sufficiently pleaded at paragraphs 6, 7, 8, 9, 15 and 16 of the statement of claim. These paragraphs state:

> "…
>
> 6. … Because of the care, love and attention the Claimant gave to the defendant's mother (the Claimant's grandmother) told the Claimant that the Claimant could take Seven Thousand (7000) Square Feet of land to build her home and a shop.
>
> 7. The Claimant subsequently built a wooden structure on the land which she used as her home and shop, the proceeds from which was spent to care for the Claimant's grandmother (the defendant's mother).
>
> 8. As a result of the closeness between the Claimant and her grandmother the Claimant's grandmother repeatedly told the Claimant that she would leave the land for her when she dies.
>
> 9. The Defendant's mother did leave the land which she died possessed of for the Claimant (See exhibit MN1 paragraphs 6 and 8 of the Last Will and Testament of EMILIENNE ALCIDE).
>
> …
>
> 15. The Claimant and the Claimant's grandmother lived with the expectation that the Claimant will benefit from her grandmother's Will and the contribution she made towards her grandmother's maintenance and upkeep and also from the grandmother's expectation that the Claimant will so benefit.
>
> 16. When the Claimant's grandmother fell ill the Claimant provided maintenance for the wooden house and her grandmother."[30]

[30] Record of appeal, Tab 4 pp. 17-18.

[33] The gravamen of the appellant's pleaded case, as set out in these paragraphs, was also supported, in part, by her affidavits filed: 15th December 2008[31] at paragraphs 5, 6 and 7; 28th May 2009[32] at paragraphs 5, 6 and 7; 10th June 2011[33] at paragraph 6; 17th June 2011[34] at paragraph 6; and her witness statement filed 10th October 2012[35] at paragraphs 4,5,7,9,12 and 14.

[34] Furthermore, the issue of proprietary estoppel was clearly a live issue before the court below, as the appellant specifically claimed the land as a constructive trustee, and the learned judge listed proprietary estoppel as one of the legal issues for his determination,[36] and considered this issue at paragraphs 48 to 53 of the Judgment.

[35] In her statement of claim, the appellant pleaded detriment at paragraphs 7 and 15. The detriment pleaded was that she acted on the grandmother's promise of land on which to build her home and a shop, by in fact building a wooden structure on the land in which she lived and operated a small utility shop. This clearly would have involved some expenditure of money on her part. These structures, were, on the evidence, built and existed prior to the death of the grandmother in 2001. The appellant has also pleaded, at paragraph 15, the financial support which she provided for the care and upkeep of the grandmother after she had moved into her own house on the land in 1992. These two aspects of the detriment relied on by the appellant were buttressed by like statements of fact in her various affidavits filed in this matter, and in her witness statement and oral evidence, including her evidence that she looked after and care for the grandmother over a period of some 9 years from 1992 until her death in November 2001.

[36] In all the circumstances, I hold that the appellant had properly pleaded the elements upon which to base a claim founded on proprietary estoppel, including the essential

[31] Record of appeal, Tab 7.
[32] Record of appeal, Tab 12.
[33] Record of appeal, Tab 18.
[34] Record of appeal, Tab 19.
[35] Record of appeal, Tab 27.
[36] See paragraph 40 of the Judgment.

element of detriment. Accordingly, the submission by the respondent to the contrary is rejected.

Did the appellant build a house and shop on the Grandmother's land prior to her death?

[37] At the commencement of his oral argument, Mr. Theodore QC, learned counsel for the appellant, drew this Court's attention to page 292 of the Record of Appeal, where, during questions put by the court to the respondent, the learned judge made reference to two letters. The first was written on behalf of the respondent by his then lawyer, Mr. Evans Calderon, to the St. Lucia Electricity Services Limited ("LUCELEC").[37] And, the second, is a response from LUCELEC to Mr. Calderon. Neither letter was included in the Record in this appeal. However, counsel for the appellant produced LUCELEC's response letter dated 8th August 2002 ("the LUCELEC letter"), which, it is apparent, was in evidence before the judge. This was conceded by his then counsel during the course of the judge's questioning of the respondent. Furthermore, Ms. Louis-Harris, learned counsel for the respondent, quite correctly, withdrew her initial objection to the LUCELEC letter being made part of the Record in this appeal. The LUCELEC letter is an important piece of documentary evidence in this matter, as is an Enforcement Notice[38] dated 24th June 2004 issued by the Development Control Authority ("the DCA Notice"), which notice was stated to take effect on 22nd July 2004.

[38] The relevant paragraphs of the LUCELEC letter state:

> "Further to our letter of June 13, 2002, we wish to advise you that we have made site visits to the location of the complaint and did not come across any electrical installation over the said property, which warrants our intervention to rectify.
>
> In order that a connection not be made should the stated Merlyn Nelson submit an application to us it is prudent that we receive such orders in writing from you indicating that this should not be done. Failing this, it is likely that she may be connected."

[37] See Record of appeal, Tab 40, p. 286, lines 21-25.
[38] Record of appeal, Tab. 34 pp. 120-121.

[39] The significance of these letters, from and to the respondent's then lawyer, and the judge's comments on them whilst the respondent was giving his oral evidence, must be put in their proper context. Essentially, it was the appellant's case, as borne out by her pleadings and evidence, that the grandmother had, on at least two occasions prior to 1992, promised that she could have a piece of land measuring 7000 square feet upon which to build her house and a shop; and that in 1992 she built "a little dwelling house" and a shop on the land, out of wood and concrete, the concrete portion comprising her kitchen and bathroom.[39] That her grandmother made her the promise of the land prior to 1992 is borne out by her testimony under cross-examination:

> "Q. When did - - when did she [the grandmother] said that to you?
>
> A. Before she gave it to me in ninety-two.
>
> Q. In what year?
>
> A. Ninety-two.
>
> THE COURT: I can't hear you.
>
> …
>
> THE WITNESS: Before she gave it to me in ninety-two.
>
> Q. In nineteen ninety-two she said that to you?
>
> A. Yes."
>
> …
>
> "Q. When she gave you the land; when she said to you I giving you - -take the 7,000 square feet; did she say that to you by yourself, were you there with her only?
>
> A. No, there was - - she said that before to me and afterwards when she was giving it to me there was my uncle and my brother who said I'm giving Merlin this piece of land that she could make a living and to have a house and to do her little structure on. My brother, my brother was there."[40]

[40] The appellant's evidence as to what she built on the land and when is at page 204 (lines 2-14) _

[39] Record of appeal, Tab 40 pp. 203-204.

[40] Record of appeal, Tab 40 p. 203 lines 16-25; p. 204 line 1; and at p. 205 lines 20-25.

"Q. Why didn't you take it?

A. But I had it, that's then I built on it.

Q. What did you build on it?

A. I build a shop where I could do my sewing and a little dwelling house at the same side, that was the place she gave me to do—

Q. I build a shop - -

A. And a little dwelling house - -

Q. - - and a dwelling house on it?

A. Yes.

Q. Out of what?

A. Yes, out of wood and concrete.

Q. Out of wood, what is made of concrete?

A. My kitchen, my bathroom."

[41] The respondent strongly disputed this evidence of the appellant. The transcripts of the trial reveal that the respondent's evidence was that, prior to his mother's death in 2001, there was no house built on the land by the appellant, and that her attempt to construct a structure thereon came after his mother's death in 2001, and only in November or December 2004. He also gave evidence that this construction on the land was started by the appellant in 2004 and was stopped by the DCA Notice issued in June 2004. Furthermore, the respondent relied heavily on both the LUCELEC letter and the DCA Notice, as evidence supportive of his testimony.[41]

[42] However, the learned judge took strong exception to the correctness and cogency of the respondent's evidence on this important issue, including his denial that the appellant's house had not been built on the land prior to his mother's death. Specifically, the learned judge repeatedly called into question the respondent's reliance on the LUCELEC letter

[41] See Record of Appeal, Tab 40 p.285 lines 18-25, p.286 lines 11-15.

and the DCA Notice as being supportive of his version of the facts, which the judge concluded could not be justified. The serious concerns of the judge and his clear disbelief of this aspect of the respondent's evidence, is manifest from the following exchanges between the judge and the respondent:

> "THE WITNESS: Because in two, two-o-two, I had sought advice from Counsel - -
>
> THE COURT: Yes.
>
> THE WITNESS: And Counsel had written to LUCELEC and LUCELEC wrote back saying that –
>
> …
>
> THE WITNESS: --they had inspected the property, there was no electrical connection, neither did Matilda Nelson ever applied for any connection for the property.
>
> THE COURT: One what?
>
> …
>
> THE WITNESS: That's two-o-two.
>
> THE COURT: Well, so the DCA enforcement is no assistance to us then?
> WITNESS: I beg your pardon, My Lord.
>
> THE COURT: DCA Notice in two thousand and four is of no assistance to us."[42]
>
> …
>
> "THE WITNESS: That's right. In two thousand and four - -
>
> THE COURT: It's of no assistance to us because this letter is written in two thousand and two and clearly there was a building there in two thousand and two.
>
> …
>
> WITNESS: Yes
>
> THE COURT: So, the DCA notice is no assistance to us. DCA notice is coming in two thousand and four to tell her to stop building.
> WITNESS: Yes.
>
> THE COURT: Now, there was a building there in two thousand and two. So they are coming two years after the fact to tell her to stop building."[43]

[42] Record of appeal Tab 40, p. 287 lines 9-25.
[43] Record of appeal, Tab 40 p. 288 lines 1-14.

[43] This exchange notwithstanding, the respondent continued to insist that the appellant only started to build on the land in November or December 2004, when he reported the matter to the DCA, albeit he later admitted that the appellant had a wooden "shack" on the land prior to him going to see his lawyer, Mr. Calderon, which prompted him to write to LUCELEC in 2002. The Record reflects the following exchange:

> "THE COURT: She started to build in two thousand and four?
>
> THE WITNESS: That's correct, that's when DCA came there in two-o-four and that's when I –
>
> THE COURT: Or she tried to extend the building that was already there in two thousand and four; which is the truth?
>
> THE WITNESS: No, there no building there, My Lord, it was a new structure that she started to build and on December, on December the twelfth, November twelfth, two-o-four, I reported the matter to DCA. These was no-… ".[44]
>
> …
>
> "THE COURT: Why would it be necessary for you to tell, to ask DCA to disconnect from a property that was not there, in two thousand and two? Why would it be necessary for you to write to electricity and tell them to disconnect a property, that from a property, that is, not even there; that's what I wanna hear from you?
>
> THE WITNESS: The letter that Mr. Calderon wrote.
>
> THE COURT: Yes.
>
> THE WITNESS: --was not to provide any electricity to any structure that Matilda Nelson—
>
> …
>
> THE COURT: So why did you do this letter?
>
> THE WITNESS: I wrote - - there was no building there, My Lord. I went to see Mr. Calderon, I told him I do not want electricity to be provided for that - - whatever Merlin intend to build there.
>
> THE COURT: How do you know she intend to build something there?
>
> THE WITNESS: because prior to that, My Lord, there was a shack. "[45]

[44] Record of appeal, Tab 40 p. 291 lines 16-25.
[45] Record of appeal, Tab 40 p. 293 lines 1-24.

…

“THE COURT: There was a?

THE WITNESS: A shack.

THE COURT: A shack.

THE WITNESS: A wood –a straw, a straw—

THE COURT: And she lived in the shack?

THE WITNESS: She never lived in that place. My Lord, Matilda Nelson never lived there. She sometimes occasionally on the weekend would sell fry chicken and –

THE COURT: So, she put the shack there?

THE WITNESS: The shack was put there after the death of my mother, after the death of mother.

THE COURT: Well, I do not think that these letters assist you too much. Okay. Based on what I'm hearing LUCELEC letter is of no real assistance to you, DCA Notice is of no assistance to you, you now admitting that there was a shack there and you are saying to the Court now that, that was built after your mother's death. Well, it was there sometime between two thousand and one and two thousand and two; you agree?

THE WITNESS: The shack?

THE COURT: Yes.

THE WITNESS: My Lord, the Shack was one of the permanent structure.”

…

“THE WITNESS: The shack became in existence in two-o-four.

THE COURT: It couldn't have been two thousand and four, Mr. Alcide because you, you caused a lawyer to write to LUCELEC in two thousand and two.

THE WITNESS: Yes.

THE COURT: About a shack that was only there from two thousand and four, how could that be true? Please Mr. Alcide?

THE WITNESS: My Lord, whatever was happening, she had the shack there and there is a lot of things going on and when she started building that's when I went to DCA and that's when DCA send the Enforcement Notice to the Claimant."[46]

[44] It is passing strange that the learned judge did not refer to any of this evidence in the Judgment, but nevertheless concluded at paragraph 53, "Indeed I accept that the [appellant] did not act on this alleged offer of land until after the grandmother's death. This is when she started building and was stopped by the court.".

[45] As the learned judge had been at pains to point out to the respondent during his testimony, the LUCELEC letter and the DCA Notice, rather than being supportive of the respondent's case that the appellant had not built any structures on the grandmother's land prior to her death in 2001, and not until late 2004, were supportive of the fact that there were structures there on the land, at least prior to when the respondent's lawyer wrote to LUCELEC on 13th June 2002. The LUCELEC letter was in direct response to the respondent's complaint to the electrical corporation that the appellant's structure(s) on the land ought not to be connected to the power grid, which presupposes that she did have the structure there on the land at that time. Accordingly, the LUCELEC letter, and the DCA Notice, are supportive of the appellant's pleaded case and evidence, that she had built certain structures, namely, a shop and small dwelling-house, on the said land, and she had done so sometime prior to the grandmother's death in 2001. In point of fact, the DCA Notice confirms the existence in 2004 on the land of "*two timber buildings measuring 16'x12' respectively and used for commercial purposes*". Furthermore, there is no evidence that the structures on the land at the time of the LUCELEC letter in August 2002, were built after the grandmother died on 11th November 2001, a mere eight months before.

[46] The LUCELEC letter and the DCA Notice, therefore, undermine the respondent's credibility as a witness and his evidence on this aspect of the matter and, likewise, the judge's recollection of the evidence and his conclusions at paragraph 53 of the Judgment. In reaching the conclusion that the appellant only started to build on the land

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[46] Record of appeal, Tab 40 p. 294 lines 10-21.

after the grandmother's death and was then stopped by the court, the learned judge failed to analyse the evidence properly and fell into grave error. Specifically, he failed to assess or to properly assess the evidence of the parties, including the documentary evidence of the LUCELEC letter and the DCA Notice, both of which, to varying extents, undermined the respondent's version, and are supportive of the appellant's version, as to when the appellant built her dwelling-house and shop on the portion of the land which the grandmother had promised her. In my respectful view, the judge's finding at paragraph 53 which is unsupported by the clear evidence in this case, is plainly wrong, and therefore cannot be sustained. Furthermore, his findings on this aspect seem to be at odds with his findings at paragraphs 14, and 47 of the Judgment. As to the latter, the learned judge concluded that the appellant had not acted to her detriment "in placing the shop on the land" and this was "helpful to the [appellant] in her efforts to live comfortably and make a living to feed her children." All these matters completely vitiate the judge's conclusions and findings at paragraph 53. In the circumstances, it is therefore open to this Court to reach its own findings and conclusions on this aspect of the evidence.

[47] Having regard to the evidence, I am satisfied, on a balance of probabilities, that the appellant built on the land, in or around 1992, a shop and small dwelling-house, consisting predominantly of wood, with a the kitchen and bathroom of concrete, in which she lived with her children from about 1992 continuously until at least when the grandmother died in November 2001, and from which she operated a shop, used to support herself, her children and the grandmother. Further, that the said structures were there in 2002 when the respondent's lawyer wrote to LUCELEC and when the LUCELEC letter in response was sent to him. I am also satisfied on the evidence that these structures were there on the land when in 2004 the officials of the DCA conducted an inspection as a precursor to issuing the DCA Notice.

The Law of Proprietary Estoppel

[48] I have been unable to discern any substantive differences of opinion between counsel for the parties on the applicable law and legal requirements necessary in order to establish a claim based on proprietary estoppel. Proprietary estoppel is an equitable doctrine rooted

in the fundamental principle of unconscionability, a principle which permeates all elements and a court's consideration of the evidence necessary to establish proprietary estoppel. Put simply, the question of whether it would be unconscionable for a court to allow the promisor to resile from the assurance or representation made or given to a claimant, is to be approached in the round, as part of a broad inquiry. It is not to be approached in a compartmentalised way, whereby each element or ingredient of proprietary estoppel is considered as free-standing, leading to a court accepting or rejecting the claim where it finds that one element may not have been fully made out on the evidence.[47]

[49] It is well-settled that to found a claim to property on proprietary estoppel, three elements or ingredients must be proved. These are: (i) there must be an assurance or representation, whether express or implied, that the claimant has or would have an interest in the land of the defendant or his or her estate; (ii) reliance by the claimant on that assurance or representation; and (iii) the claimant must act to his or her detriment in reliance upon the assurance or representation.[48] These three elements, in combination, must lead the court to conclude that it would be unconscionable or inequitable for the person who has made or given the assurance relied on, to resile from it.[49]

[50] Unconscionability has been characterised as an 'objective value judgment', which is very important in 'unifying and confirming' the other three element of proprietary estoppel.[50]

[51] Specifically with regard to 'detriment', the authorities are clear that a party seeking to rely on proprietary estoppel must specifically plead the detriment which they have suffered in reliance on the assurance. In **Gillett v Holt**, a case where the detriment pleaded was that the plaintiff, who had spent his working life as manager of the first defendant's farm, in reliance on the assurances and repeated promises made to him over several years

[47] Gillett v Holt [2001] Ch 210.
[48] See Gillett v Holt (supra); and Thorner v Major [2009] UKHL 18; [2009] 1 WLR 776 per Lord Walker at para. 29; approved by the Privy Council in Mohammed v Gomez and others [2019] UKPC 46 at para. 24.
[49] Henry v Henry per Sir Jonathan Parker at para. 40 citing with approval Robert Walker LJ (as he then was) in Jennings v Rice [2003] P. & C. R. 8.
[50] Per Walker LJ in Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752 at para. 92.

that he would succeed to the first defendant's farming business and the farmhouse in which he and his family had lived for over 25 years, it was held that the plaintiff had **suffered detriment in that he had** deprived himself of other opportunities in which to better himself. Robert Walker LJ made the following observation at page 232:

> "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.
>
> … There must be sufficient casual link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved."

[52] These passages from the judgment of Walker LJ (as he then was) in **Gillett v Holt** were cited with approval in **Henry v Henry**. The latter case concerned an appeal from the decision of Belle J in Saint Lucia, and of this Court. At paragraph 55, Sir Jonathan Parker, delivering the opinion of the Board, had this to say about the relationship between reliance and detriment-

> "As to the relationship between reliance and detriment in the context of the doctrine of proprietary estoppel, just as the inquiry as to reliance falls to be made in the context of the nature and quality of the particular assurances which are said to form the basis of the estoppel, so the inquiry as to detriment falls to be made in the context of the nature and quality of the particular conduct or course of conduct adopted by the claimant in reliance on those assurances. Thus, notwithstanding that reliance and detriment may, in the abstract, be regarded as different concepts, in applying the principles of proprietary estoppel they are often intertwined…In the instant case, that is certainly so."

[53] Once proprietary estoppel has been established on a balance of probabilities, a court is then obliged to go on to consider, in all the circumstances of the particular case, what is the 'minimum equity' necessary to do justice to the claimant.[51] In this respect, the court

[51] Pascoe v Turner [1979] 2 All ER 945, per Cumming-Bruce LJ at p. 950; Henry v Henry [2010] UKPC 3 at para. 66.

must approach the matter in a cautious way. It has a very flexible jurisdiction and wide discretion to fashion the 'equity' or remedy in order to do justice to the detriment suffered by the claimant.[52] This gives rise to a consideration of what is termed 'proportionality', a principle which also permeates the application of the doctrine of proprietary estoppel.[53] It involves a court embarking upon a balancing of the advantages and disadvantages to the claimant as established by the evidence.[54]

[54] At paragraph 50 of the judgment in **Jennings v Rice**,[55] Walker LJ, having referred to the duty of the court in a clear case to 'fulfil the claimant's expectations', pointed out that in a case where the expectations are not clear or are "uncertain or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognize that the claimant's equity should be satisfied in another (and generally more limited) way". He continued at paragraph 51:

> "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. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity….**But the detriment of an ever-increasing burden of care of 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." (emphasis added)

[55] This kind of analysis can lead to a court considering a range of possible ways in which to give effect to the claimant's equity, and includes, in the particular circumstances of each case, making an order granting the claimant fee simple or absolute title to property, a life interest in property, the payment of monetary compensation, or a finding that the 'equity' has already been satisfied.

[52] Campbell v Griffin and others [2001] EWCA Civ 990, per Robert Walker LR at para. 33.
[53] See Henry v Henry at para. 65.
[54] Mohammed v Gomez (supra) at para. 37.
[55] [2002] EWCA Civ 159.

[56] For example, in **Henry v Henry** the Privy Council considered that the minimum equity was achieved there by awarding the appellant one half of the undivided half share of the respondent in the hillside plot of rural land. In **Campbell v Griffin**,[56] the court ordered compensation to the appellant in a particular sum, plus interest, charged on the property, possession of which property was to be given up by the appellant and the property sold and the charge thereby discharged. In **Mohammed v Gomez**[57] (considered to be a case with unusual circumstances), the Privy Council upheld the assessment and decision of the Court of Appeal of Trinidad & Tobago, that the appropriate remedy was to treat the appellants as if they were statutory tenants, to quantify their statutory tenancies as a tenancy for a 15 year period (based upon their 'security of tenure' for over 50 years); and to give them an option to purchase the parcels of land "on which their houses stand", at half market value, the said option to be exercised during the period of their 15 year tenancy.

[57] In **Pascoe v Turner**,[58] Cumming-Bruce LJ, after considering what was the appropriate minimum equity to do justice to the defendant, concluded that this could only be satisfied by declaring the defendant to be the holder of a fee simple estate in the property. In reaching this conclusion he opined at page 951 that:

> "We take the view that the equity cannot be satisfied without granting a remedy which assures to the defendant security of tenure, quiet enjoyment and freedom of action in respect of repairs and improvements without interference from the plaintiff. The history of the conduct of the plaintiff since 9th April 1976 in relation to these proceedings leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding upon conscience. The court must grant a remedy effective to protect her against the future manifestations of his ruthlessness."

[58] With the above exposition into the applicable law and legal principles relating to proprietary estoppel, I now turn to consider the learned judge's treatment and application of these principles to the facts of this matter, to the submissions of learned counsel for

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[56] [2001] EWCA Civ 990.
[57] [2019] UKPC 46.
[58] [1979] 2 All ER 945.

the parties thereon, and to an assessment of whether, and to what extent, the learned judge erred.

Assurance

[59] As stated above, the appellant's pleaded case on proprietary estoppel is contained at paragraphs 6, 7, 8, 9, 15 and 16 of the statement of claim, which paragraphs are set out in full at paragraph 32 above. Specifically with regard to the element of 'assurance', the appellant (as claimant) pleaded that because of the care, love and attention which she gave to the grandmother, the grandmother "told the [appellant] that [the appellant] could take" 7,000 sq. ft. of her land "to build her home and a shop". She also pleaded that because of their closeness, the grandmother told her that she would leave the land for her when she dies, and that she did leave, in her Will, for the appellant 7,000 square feet of land.

[60] The evidence of the appellant on this issue is to be found in her affidavits filed respectively on 10th and 17th June 2011,[59] and her oral testimony during the trial on 21st November 2012.[60] In essence, it was the appellant's evidence that when she reached the age of majority, about 19 years of age, and whilst she was still living with the grandmother in the latter's house on the land, the grandmother gave her a spot of the land on which to build a shop and her home. In or about 1992, she built the shop and home, mainly of wood, with the kitchen and bathroom of concrete, on the said spot of land, and she moved to live there with her children. She conducted a business from the shop, the proceeds of which were used by her to support her children and to care for the grandmother, who had been ill for some years, and was bedridden during the last 5 years of her life. During the period that the appellant lived with the grandmother (from age 9 years) and the period of 9 years when she lived in her house on the land, the respondent lived in the United States. He returned to live in Saint Lucia in 2000. The judge found that the respondent "was not aware of many things that went on in Saint Lucia in spite of his recent visits and frequent calls."[61]

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[59] Record of appeal, Tabs 18 & 19.
[60] Record of appeal, Tab 40 pp. 188 to 244.
[61] See paragraph 26 of the Judgment.

[61] The learned judge concluded that it was entirely possible and even probable that the grandmother "did offer the [appellant] a piece of land"; but it was impossible to specifically state which piece the appellant should occupy and take possession of, because the land had not been subdivided.[62] Furthermore, the learned judge reasoned at paragraph 46 that whilst the evidence of the appellant that the grandmother had permitted her to place a shop and a small house on the land near the grandmother's home, "may display an intention to permit her to have a piece of her land where the shop was situated, it does no[t] display an intention for her to have 7000 sq. ft. of the land". Additionally, at paragraph 53, the learned judge concluded on the evidence that the grandmother "may have mentioned to the [appellant] that she would be given land."

[62] Learned counsel for the respondent submitted, in his oral argument, that the judge made no finding of an assurance made or given by the grandmother to the appellant. Instead, what he found was merely that an 'offer' was made to the appellant.[63] In support of this submission, counsel relied on paragraphs 46, 49 and 53 of the Judgment. As to the nature and quality of the evidence of an assurance, learned counsel for the respondent, in her skeleton argument,[64] referred to a passage from the judgment of Walker LJ in **Thorner v Major**,[65] cited with approval by the Board in **Mohammed v Gomez**, where, at paragraph 56, Walker LJ stated-

> "I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be **clear enough**. What amounts to sufficient clarity, in a case of this sort, **is hugely dependent on context**…" (emphasis added)

[63] In **Mohammed v Gomez**, Lord Carnwath, having reviewed the various authorities dealing with the nature and quality of verbal assurances, concluded in this way:

> "26. However, as Lord Walker makes clear, once one has moved beyond claims based on specific contractual rights, there may be no clear division between the nature and quality of any alleged verbal assurances, and the conduct of the respective parties in response. Depending on the factual context acquiescence may be seen as one aspect of assurance."

[62] See paragraph 26 of the Judgment.
[63] Respondent's skeleton argument para. 2.1.
[64] Respondent's skeleton argument para. 1.12.
[65] [2009] UKHL 18.

[64] In **Jennings v Rice**, Walker LJ at paragraph 47, in addressing the approach which a court ought to have when uncertain assurances are made stated that "their specific vindication cannot be the appropriate test". In this vein, Lord Carnwath in **Mohammed** stated at paragraph 27: Later in the same judgment, Lord Walker explained why "the uncertainty of assurances will not be fatal to the claim but may affect the appropriate remedy.".

[65] In my opinion, these statements of principle, coming as they do either from the highest authority or with its unequivocal approval, takes full account of the variety of ways in which an assurance may be given or made. This may be made directly by words which are 'sufficiently clear', spoken once or repeated over time; or by necessary implication by the omission of a property owner, who has stood by in silence over a period of some years allowing the claimant to openly possess his or her property, and to act thereon or in relation thereto in a way only explicable on the basis that a clear enough assurance had been made or given regarding the entitlement to the property or other estate, right or interest in the property. Importantly, these statements of principle regarding the nature and quality of the assurance necessary to found a claim based upon proprietary estoppel, takes into account the particular 'context' in which the assurance was made, and the weight which a court ought to give to certain types of situations and relationships, existing at the time the assurance was given. Such relationships include family relations, or where a claimant has been accepted or treated as 'family' by the property owner, over an extended period.

[66] In my view, the findings and conclusions of the learned judge at paragraphs 26, 46 and 53 of the Judgment are consistent with the grandmother having offered or given the appellant the assurance that she would have a piece of land upon which to build a shop and her home. While it is true to say that the learned judge made no positive finding on the element of assurance, his finding and conclusions in these paragraphs are consistent with the grandmother having made such an assurance to the appellant, and belie an acceptance by the judge of the appellant's evidence on this aspect. Furthermore, it is apparent that the reason posited by the learned judge for not making a finding of

assurance is fallacious. This was because the learned judge wrongly equated the inability to identify with absolute certainty a defined piece of land measuring 7000 square feet as claimed, with the appellant having not made out a case based upon proprietary estoppel. This erroneous assumption is manifest from his treatment of the evidence at paragraphs 26, 46 and 53 of the Judgment.

[67] In doing so, the learned judge fell into grave error which infected his approach to and assessment of the evidence as it relates, not just to the element of assurance, but to reliance and detriment as well, the effect of which, as will be addressed later, and severely undermined and vitiate his conclusions on whether the appellant had established a claim to the plot of land based on proprietary estoppel.

[68] The fact that the land had not been subdivided so as to delineate the exact size and area of the plot or lot promised to the appellant by the grandmother, and on which she had built in 1992 her home and shop, was no bar to the learned judge making a positive finding or conclusion of an assurance, one which was 'clear enough' or sufficiently clear from the accepted evidence, taking due account of all the circumstances and the particular context of this matter. That context is where the appellant had a long, close and caring relationship with the grandmother up until her death in 2001, during which period she regarded the grandmother as her mother. In the circumstances, and having regard to the findings made by the learned judge at paragraphs 26, 46 and 53, he ought to have found that the element of an assurance had been made out on the evidence. The learned judge clearly erred in not doing so. Accordingly, this Court finds on the evidence that the appellant had satisfied the element of assurance in that the grandmother had, in 1992 or thereabout, assured her that she can have a piece of her land at Monchy on which to build a house and shop, and that she would provide for this in her Will.

Reliance

[69] At paragraph 53 of the Judgment, the learned judge accepted "that the [appellant] did not act on the alleged offer of land until after the grandmother's death. That is when she

started building and was stopped by the court". However, the Judgment is devoid of any proper assessment of the relevant evidence on this aspect and of the judge's reasons for reaching this conclusion.

[70] I have already found that the learned judge erred in this finding of fact, which runs contrary to the other findings he made and to his own profound dissatisfaction with the evidence of the respondent that the appellant did not commence building on the land until after the death of the grandmother in 2001. In particular, the learned judge either did not accept or had grave doubts that the appellant's lawyer's letter to LUCELEC and the LUCELEC letter in response in August 2002, or the DCA Notice in 2004, were confirmatory of or supported the respondent's case that the appellant had no structures on the land prior to the death of the grandmother in November 2001. This documentary evidence and the significance of the judge's extensive questioning of the respondent at the trial to the effect that they completely undermine the respondent's case on this issue, seems to have been forgotten by the learned judge when he came to consider his decision some three and a half years later. Moreover, the learned judge did not take into consideration in his assessment of the evidence, the admission by the respondent during questioning by the court, that there was a "shack" there on the land before his lawyer's letter to LUCELEC in June 2002. This was an important admission which tended to support the appellant's case that she had built on the land and lived there with her children prior to the grandmother's death in November 2001.

[71] Ms. Louis-Harris, learned counsel for the respondent, submitted that there was no evidence in the witness statement or statement of claim of the appellant to the effect that she had built the house and shop on the grandmother's land prior to her death.[66] Needless to say, it is passing strange that the respondent, in making this argument, refers to the appellant's witness statement, when it was the contention of learned counsel for the respondent before this Court, that the judge did not allow the appellant to rely on her witness statement because he had not given his prior permission for it to be filed.

[66] Respondent's skeleton argument para. 3.3.

[72] That said, the simple answer to this submission, is that the appellant, at paragraph 8 of the statement of claim, pleaded that she subsequently built a wooden structure on the land which she used as her home and as a shop, "the proceeds of which was spent to care for" the grandmother. Accordingly, it was the case for the appellant in the court below, that the grandmother was alive when she built the house and shop, since the grandmother benefitted from the proceeds of sale from the shop which were used for her care and upkeep. Furthermore, this pleading was buttressed by the appellant's affidavit evidence whereby, at paragraph 7 of her affidavit filed 15th December 2008,[67] she deposed that "the structure was erected before my grandmother died…". It is also buttressed by her evidence in cross-examination, where she testified that the grandmother told her in 1992 that she could build on the land,[68] and that she had followed through on this assurance by in fact building certain structures on the land in 1992. [69]

[73] It was the position of the respondent at the trial, that the grandmother had given the appellant permission to build a house on the land, but she never promised to give the land to the appellant. At page 205 of the Record of Appeal, counsel for the respondent at the trial framed a question to the appellant in this way:

> "Q. I'm putting it to you that no such promise was ever made. That she never told you – what she said to you, you can go and build your house there but she never told you that she was gonna give you that land; I'm putting that she never told you that?"

[74] Furthermore, there was no outright denial by the respondent that the appellant acted on that permission, except in answer to questions from the court to which I have already alluded, which answers the learned judge found to be unhelpful at least, if not unbelievable. The appellant was cross-examined directly on the issue of whether she had built the house and shop on the land prior to the grandmother's death. At pages 219 to 220 of the Record of Appeal is the following exchange:

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[67] Record of appeal, Tab 7; see also record of appeal, Tab 11 paras. 5 to 7 of the appellant's affidavit filed 28th May 2009.

[68] Record of appeal, Tab 40 p. 203 lines 16-25.

[69] Record of appeal, Tab 40 p. 196 lines 2-10; p 204 lines 3-14).

> "Q. You said you had a wooden house there and it was from the proceeds of that wooden house that you use to take care of your grandmother; isn't it true that wooden house was constructed in two thousand and four after the death of your grandmother?
>
> A. No, that is not true."

[75] I have considered each of the matters relied on by the respondent at paragraph 3.3 of his skeleton argument. My view is that none of these matters, even if correct, are relevant to the issue of whether the appellant relied on the assurance made to her by the grandmother.

[76] Having considered the submissions of learned counsel for both parties on this aspect, in our judgment the learned judge erred in finding that the appellant had not acted on the "offer" of land made to her by the grandmother. The judge seems to have reached this conclusion on the basis, as he stated, that the evidence that the grandmother did anything about this offer is very sparse. This line of reasoning is fallacious, it is based on the fact that the grandmother did not have the area of land promised to the appellant surveyed or partitioned or donated by deed to the appellant during the grandmother's lifetime. Firstly, the evidence discloses that the grandmother was ill for some years and bedridden during the last 5 years of her life. It is difficult to understand how a person in her poor health could have been expected to engage surveyors and lawyers to partition the land and to transfer title to the appellant. Secondly, the expectation of the appellant, based on the assurances given to her by the grandmother, was that she could immediately occupy the land and build her home and shop there, and that the grandmother would vest title to the land in her through the instrumentality of her Will. Thirdly, the absence of any steps being taken by the grandmother during her lifetime to perfect the gift of land to the appellant is not fatal to a claim based on proprietary estoppel.

[77] Finally, the judge's conclusion at paragraph 53 that the appellant had not acted on the grandmother's offer of land, does not accord with the clear evidence in the case. The appellant, in reliance on the assurances made to her by the grandmother, in fact built her

house and shop on the land, and she lived there for at least 9 years prior to the grandmother's death. The fact that the appellant had not requested a deed of donation from the grandmother, or did not herself seek to have the area of land surveyed and partitioned during the lifetime of the grandmother, does not detract from the fact that she acted in reliance upon the assurances made to her by the grandmother by building on the land, living there, and caring and supporting the grandmother for at least a period of 9 years.

[78] It is clear that the learned judge erred in his findings and conclusions at paragraph 53 of the Judgment. He made these findings and conclusions without any assessment or proper assessment of the relevant evidence and, apparently, in total disregard of his own pointed questioning of the respondent on an important factual issue, to the effect that the documentary evidence on which the respondent relied, was not supportive of his evidence and position on this matter. In the circumstances, the learned judge ought to have found that the evidence pointed inextricably to the appellant having built on the land prior to the grandmother's death and, quite probably, as far back as 1992, as she testified. Accordingly, the learned judge ought to have concluded that the appellant had established, on a balance of probabilities, that she had relied on the assurances given to her by the grandmother that she would have a plot of land there on which to build a shop and her house, and, in doing so, she had built her home and shop on the land, and resided there with her children from 1992 up until the grandmother's death in 2001.

Detriment

[79] In considering the learned judge's treatment of this element of proprietary estoppel, I am cognizant of a number of the guiding principles of law. Firstly, detriment must be alleged, pleaded and proved; and, secondly, whether detriment is sufficiently established is to be "tested by whether it would be unjust or inequitable to allow the assurance to be disregarded." This underscores the important principle of unconscionability which permeates the doctrine of proprietary estoppel. Thirdly, detriment is not limited to the expenditure of money or to some other quantifiable financial detriment, but must be

something which is substantial, not minor or trivial.[70] Fourthly, in assessing the detriment suffered by a claimant, a court must weigh the disadvantages suffered by the claimant in reliance on the assurance, against the advantages which the claimant enjoyed as a consequence of that reliance. [71]

[80] The learned judge concluded at paragraph 47 of the Judgment, that "the evidence does not show that the [appellant] acted to her detriment in placing the shop on the land. Indeed this was helpful to the [appellant] in her efforts to live comfortably and make a living to feed her children". It is the submission of Mr. Theodore, QC, learned counsel for the appellant, that (i) while the learned judge recognised that detriment is an element of proprietary estoppel which must be established by evidence, he did not conduct a proper assessment of the evidence under this head in the particular circumstances of this case; and (ii) had he done so he ought to have found that the appellant had acted to her detriment, irrespective of a finding that she also benefitted from her occupation of the land. With these submissions we are in agreement.

[81] On the other hand, Ms. Louis-Harris, learned counsel for the respondent, argued strenuously that, in the instant matter, the appellant "had failed to adduce any evidence of detriment."[72] Specifically, she submitted, the appellant had failed to produce any evidence as to the amount of her expenditure in building structures on the land, nor did she adduce any evidence of the way in which she had acted to her detriment. Accordingly, it was her contention that the learned judge was correct in coming to the conclusion that the evidence does not show that she acted to her detriment. In this regard, reliance was placed on both paragraph 47 cited above, and on this passage at paragraph 38 of the Judgment, which reads:

> "However, I accept the Defendant's counsel's submission that the Claimant did not act to her detriment. Indeed the deceased assisted her and the much stronger inference arising from the evidence is that [the] deceased set out to

[70] Gillett v Holt [2001] Ch 210 at p. 232.
[71] Henry v Henry [2010] UKPC 3 at para. 51.

[72] Respondent's skeleton argument para. 4.7.

assist the Claimant by permitting her to erect a shop from which she could sustain herself."

[82] Counsel for the respondent also submits that it was for the appellant to establish that she had built a permanent structure on the land, and the evidence was only of wooden buildings. She compared the alleged detriment in this matter, with the evidence of detriment in a number of the leading authorities to which I have already referred. In **Mohammed**, the fact that the appellant had built permanent structures on the land and had continued to expend money on their upkeep, was considered sufficient to establish a claim based upon proprietary estoppel. Mr. Theodore, QC submitted that it is not necessary to have built permanent structures in order to establish sufficient detriment.

[83] I do not accept as a matter of law or principle, that in order for a claimant to establish that he acted to his detriment so as to found a claim based on the doctrine of proprietary estoppel, he must have built a permanent structure on the property of the person making the assurance. As Robert Walker LJ said in **Gillett** at page 232:

> "…the authorities also show that [detriment] is not a narrow or technical legal concept
> …
> Whether a claimant has acted to his or her detriment, must be viewed and assessed in the context of the particular matter, having regard to all the circumstances, and judged at the time when the person who has given the assurance seeks to go back on it. Ultimately, the test as to whether the detriment is 'substantial', is whether it would be unjust to allow the person giving the assurance to disregard it, that is, would it would be unconscionable to allow them to resile from the assurance made."

[84] The fact that a claimant may have built a wooden structure on the owner's land, does not lead, inextricably, to the conclusion that the claimant has not acted to their detriment or even that the structure was not intended to be permanent, in the sense of an intention that it is to remain there for a considerable period of years. In fact, some wooden structures can be substantial in size, costly, and not intended to be temporary, or to only remain there for a short period. The important consideration is that the permanency or lack thereof of the structure built on the land of another, is one of the factors to be considered by a court in determining whether a claimant acted to their detriment.

Additionally, the size and materials by which a structure was built, may be a reflection more of the financial means or choice of the person building it at the time, and not whether it was intended to be permanently affixed to the land or a mere temporary structure. The extent of the structure and the likely cost incurred in placing it there, would also be material considerations in a court's assessment of what is the 'minimum equity' necessary to give effect to the equity which the claimant has acquired as a result of their reliance on the assurance made to him by the landowner. In short, these are but some of the important evidentiary factors and considerations in determining whether, in all the circumstances, it would be unconscionable or inequitable to allow the landowner to repudiate or to resile from his or her assurance.

[85] Suffice it to be said, that the evidence of the appellant is that the structures were of both wood and concrete, with the concrete portion consisting of her kitchen and bathroom. This evidence, points to some intention of 'permanence', or an intention to permanently occupy that part of the grandmother's property which the grandmother had assured her she would have. Of significance is the DCA Notice which records the presence there of two timber buildings, each measuring 16'x12', and used for commercial purposes. Clearly these are relatively small buildings, but of sufficient size to have been occupied and used by the appellant and her children as a dwelling-house, and as her shop from which she made a living. However, an important consideration is the fact that no evidence was led by or on behalf of the appellant as to the amount of money she had expended in building these structures on the land, and there was no expert evidence as to the likely cost of building those kinds and size of building in Saint Lucia in 1992.

[86] However, in the instant matter, the detriment to the appellant is not limited to the structures on the land or the amount of money which she may have expended thereon. The appellant also relied on the fact that she cared for and looked after her grandmother over a period of many years, including the last 5 years of her life when she was essentially bedridden. This evidence was not taken into consideration by the learned judge in making his finding on detriment. The judge relied purely on her building the

shop and house on the land near the grandmother's house, which "was helpful to the appellant in her efforts to live comfortably and making a living to feed her children." [73]

[87] In this regard, the learned judge failed to take or to properly take into consideration in coming to his conclusion on detriment, the evidence as to the care and support which the appellant had provided to the elderly grandmother after she had built and occupied her own house on the land in 1992 until the death of the grandmother in 2001.

[88] I have already referred to the dicta of Robert Walker LJ as he then was in **Jennings v Rice**, where at paragraph 51, he underscored the important principle that detriment can also relate to something more difficult to quantify than the actual expenditure of money or acting to one's financial detriment. Specifically, as to what 'value' to be attributed to the burden of caring for an elderly or sick person, on a daily basis, over an extended period of years, and to the detriment of pursuing some other alternative life. This is an especially important consideration in the context of the life and culture in the Caribbean, made more so where the years of benevolent dedication to an elderly or sick person are what are considered the primary or more productive working years of one's life.

[88] The evidence in this case from the appellant was that she cared for her grandmother (the respondent's mother) over a period of some 9 years, whilst she lived in her house on the land, and whilst the respondent was living in the United States. This included a period of 5 years when the grandmother was bedridden.

[89] Applying the principles set out in **Gillett v Holt** and **Henry v Henry**, it is clear that the learned judge misdirected himself on the issue of detriment. He failed to conduct or to properly conduct a proper assessment and weighing of the disadvantages suffered and advantages enjoyed by the appellant. The judge erred in not finding that the appellant had established on the evidence that she had acted to her detriment in expending money in building the house and shop on the land during the lifetime of the grandmother, and in providing, financially and by way of her human capital, for the care and upkeep of the

[73] See paras. 46 and 47 of the Judgment.

grandmother during the last 9 years of her life, including a the last 5 years when she was bedridden. During this period the appellant supported the grandmother financially from the proceeds which she earned from the operation of her shop on the land, and she cared for the grandmother virtually singlehandedly. These factors the learned judge failed to weigh, or to weigh properly, against any benefit which the appellant derived from living on the land. In this regard, it must be noted that the appellant did not earn a living from the land itself, but from her shop operated on the land.

[90] Furthermore, the appellant remaining there living on the land in such close proximity to the grandmother, not only benefitted the appellant, but also the grandmother, who was ill and bedridden for some years. In doing so, the appellant can be said to have deprived herself of the opportunity for a better or different life elsewhere, notwithstanding her limited education.[74] In this regard, it is to be noted that in **Campbell v Griffin**, where the court found that the appellant had established detriment, the period during which the appellant had cared for the Ascoughs was approximately 4 years, and the rent free period which he enjoyed was approximately 2 years.

[91] None of these factors were taken into consideration by the learned judge. Respectfully, the judge failed in his duty to conduct a proper assessment of the evidence, weighing the disadvantages and advantages to the appellant, in reasoning to a conclusion on the issue of detriment. Accordingly, as in **Henry v Henry**, it falls to this Court to determine the issue of detriment afresh. Having analysed the evidence above, and being cognizant of the prevailing and countervailing factors, I conclude that the detriment to the appellant in this case is not outweighed by the advantages which the appellant enjoyed or derived from her living on the land.[75] I also find that the appellant did suffer detriment in reliance on the assurance made to her by the grandmother that she would have a plot of land upon which to build a house and a shop. Accordingly, on the evidence before the Court, the appellant has established this third element of the doctrine of proprietary estoppel.

[74] See: Henry v Henry at para. 61.

[75] See: Campbell v Griffin paras. 31,32 and 33.

What is the Minimum Equity?

[92] What then is the minimum equity necessary to do justice to the appellant having regard to the way in which she changed her position for the worse in reliance on the grandmother's assurance? Firstly, a court's approach to this issue must be a cautious one.[76] Secondly, in seeking to give effect to a claimant's equity, the court has a wide discretion.[77] Thirdly, this Court's determination of this issue is not, in any way, circumscribed by the learned judge's decision in this matter, as the judge did not find detriment and, accordingly, did not go on to consider how or in what way the appellant's equity ought to be satisfied. In the circumstances of this case, the learned judge clearly erred in not doing so, as was submitted by counsel for the appellant.

[93] Mr. Theodore, QC also submitted that this Court ought to declare the appellant to be the owner of 7,000 square feet of the land including where her wooden house and shop sit, as this is the exact acreage of land which the grandmother provided for the appellant in her Will. He submitted that this Court can and ought to take this provision of the Will into consideration, notwithstanding that the Will has not been admitted to probate, as, in equity, a court could rely on this provision as evidence of the intention of the grandmother in seeking to carry through with the assurance which she gave to the appellant. Mr. Theodore, QC also urged this Court to make an order in favour of the appellant, which will provide her with some 'security of tenure' on the land. In this regard, he placed heavy reliance on the dicta of Cunning-Bruce LJ in **Pascoe v Turner** at page 951:

> "We take the view that the equity cannot be satisfied without granting a remedy which assures to the defendant security of tenure, quiet enjoyment and freedom of action in respect of repairs and improvements without interference from the plaintiff. The history of the conduct of the plaintiff since 9 April 1976 in relation to these proceedings leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding on conscience. The court must grant a remedy effective to protect her against the future manifestations of his ruthlessness."

[76] Pascoe v Turner at p. 951.
[77] See Campbell v Griffin at para. 30; and Henry v Henry at para. 52.

[94] Ms. Louis-Harris, learned counsel for the respondent, argued that apart from the evidence of the appellant, there is no other evidence, and the learned judge did not find, that the grandmother had agreed to give the appellant 7,000 square feet of the land. As to the actual area of the land occupied by the appellant, learned counsel pointed the Court to the description in the DCA Notice (two timber buildings each measuring 16'x12'). She submitted that the Court should not make an order granting the land to the appellant, but ought, more appropriately, to consider compensating the appellant in money for the structures she built on the land. However, if the Court was minded to make an order granting the land to the appellant, this ought to be limited to the only area occupied by the structures, with no curtilage.

[95] In our considered view, a court must be cautious in relying upon a statement in a document purporting to be the last Will of the grandmother, which document has not been proven or admitted to probate. Such document purporting to leave a specific acreage of land to the appellant, is not a valid document and has no legal effect unless and until it has been proven to be the Last Will and Testament of the grandmother. Therefore, in our view, this document is not, and cannot be used as evidence of the intention of the grandmother as to what portion of the land she agreed to give or to leave for the appellant for the purpose of building her house and a shop, so as to give rise to an equity in 7,000 square feet of the land at Monchy. Accordingly, we decline to do so, and do not accept Mr. Theodore's submission on this aspect.

[96] Having assessed and given due regard to the detriment suffered by the appellant as stated above, and the way in which it can be realistically said on the evidence that she changed her position for the worse, and mindful of the size of the buildings which she built of the land as set out in the DCA Notice, and the likely expenditure she would have incurred in building those relatively small structures; and, also, being mindful of the extent to which the respondent has used lawful means to completely displace the appellant from the land, this Court has determined that, in order to protect the appellant's interest and right to use her shop and house on the land, the appropriate order necessary to give effect to her equity is to provide her with security of tenure there. After

all, the intention of the grandmother was for her to have a plot of the land for herself upon which she and her children could live and she can earn a living for her family, In this regard, we do not consider that equity would be best served by simply compensating the appellant for the structures which she built on the land. Such an order would involve an assessment of the value of the two structures which, more likely, have been negatively impacted by the passage of time. In our view, this approach would not do justice to the appellant who proceeded on the expectation that she would be given the land for herself. However, we can see no evidential basis or justification in making an order granting the appellant 7,000 square feet of the land, as she claimed, and we decline to do so.

[97] Doing the best we can in all the circumstances, we consider that the appellant, who had been assured by the grandmother that she would be given a plot or lot of land on which to build her home and a shop from which to earn a living, ought to be granted ownership in fee simple of the area on which the two structures she built stand, plus a small curtilage of approximately 5 feet around the said structures so as to enable her to have practical use of and egress to and from the said structures.

Conclusion

[98] Accordingly, the order of the Court is that the appeal is allowed and the decision of the trial judge is set aside with costs to the appellant in the court below, and costs in the appeal, to be two-thirds of the cost below.

[99] We make the following consequential declarations and orders:

(1) The appellant is the owner in fee simple of the area of the land situate at Monchy in the Quarter of Gros Islet in Saint Lucia which formed part of the estate of Emilene Alcide (also known as Emilienne Alcide), deceased, on which the two wooden structures she built stand as described in the Enforcement Notice dated 24th June 2004 issued by the Development Control Authority in Saint Lucia, plus a 5 foot wide curtilage around the outer walls of the said structures (collectively "the said land"), and with the right, enforceable

as an easement or right of way, to access the said land from the closest point on foot and with a motor vehicle;

(2) Subject to the said area of land as defined at paragraph (1) above being surveyed and partitioned so as to create a separate numbered parcel of land, the respondent shall forthwith transfer the said land to the appellant free and clear of all incumbrances and with absolute title thereto under the **Land Registration Act**;

(3) Until the appellant is registered as the owner of the said land, she shall be entitled to an overriding interest with respect to her interest in the said land as declared by this Court;

(4) The appellant shall, at her sole expense, engage a surveyor to survey the said land for the purpose of giving effect to the orders of this Court including a subdivision and partition of the land so as to designate the said land as a separate numbered parcel;

(5) The respondent shall not and is hereby restrained from in any way obstructing, preventing or hindering the entry of the appellant's surveyor on the land at Monchy for the purpose of conducting the survey of the said land as hereby ordered;

(6) The respondent shall, upon being presented with the survey plan of the said land, forthwith attend at the offices of the appellant's lawyers in Saint Lucia and execute an application, prepared by the appellant's lawyers at her expense, for the partition or subdivision of the land in accordance with the said survey plan, and the cost of the partition or subdivision application, including filing fees, shall be borne by the appellant;

(7) The respondent shall within 3 business days of being notified by the appellant's lawyers that a new parcel number has been approved and issued for the said land and the instrument of transfer of the said land to the

appellant is ready for execution by him, attend at the offices of the appellant's lawyers in Saint Lucia and execute the instrument of transfer of the said land in favour of the appellant. Thereupon, the appellant's lawyers shall be responsible for the registration of the executed instrument of transfer and the appellant shall bear all costs of her lawyers in preparing the instrument of transfer and the appropriate filing fees;

(8) The respondent shall not and is hereby restrained from in any way obstructing or hindering or delaying the execution and registration of the said instrument of transfer; and

(9) In the event that the respondent shall refuse to or delays his execution of either the application for partition or subdivision (as the case may be) or the instrument of transfer of the said land to the appellant, and such refusal or delay shall continue for a period of 7 days, the Registrar of the High Court of Justice in Saint Lucia shall and is hereby authorised and empowered to execute the said application for partition or subdivision and the said instrument of transfer, as the case may be, on behalf of and as the agent or attorney-of-fact of the respondent.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar