[2010] UKPC 3
Privy Council Appeal No 0024 of 2009

JUDGMENT

(1) Theresa Henry (2) Marie Ann Mitchell (Appellants) *v* Calixtus Henry (Respondent)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Hope
Lord Brown
Lord Mance
Lord Clarke
Sir Jonathan Parker

JUDGMENT DELIVERED BY

SIR JONATHAN PARKER

ON

17 February 2010

Heard on 4 November 2009

Appellant	*Respondent*
Myriam Stacey	Colin Foster

(Instructed by Myers,
Fletcher and Gordon)

SIR JONATHAN PARKER:

1. This is an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court, St Lucia. At issue in the appeal is the ownership of an undivided half share in a plot of agricultural land some 3.5 hectares in extent and situate at Jalousie, in the Quarter of Soufriere, St Lucia. The undivided half share in issue is that of Theresa Henry, the first appellant. The other undivided half share is vested in Marie Ann Mitchel, the second appellant. Marie Ann Mitchel's entitlement to her half share is not in dispute.

2. In the action, the respondent Calixtus Henry claimed to be entitled to Theresa Henry's half share in the plot on three alternative grounds. First, he claimed that a Deed of Sale dated 8 August 1999 whereby Theresa Henry purchased her half share from Geraldine Pierre was void on the ground that Geraldine Pierre, who was then, aged 95 and who died some two months later, lacked capacity. Secondly, he claimed title by adverse possession. Thirdly, he raised a claim of proprietary estoppel.

3. At trial, Mr Justice Cottle dismissed all three claims. He rejected the challenge to the Deed of Sale, and on the adverse possession claim he found that Calixtus Henry had been in possession of the plot with Geraldine Pierre's consent. As to the claim of proprietary estoppel, the judge found that Geraldine Pierre had promised Calixtus Henry that she would leave her share in the plot to him on her death if he cared for her until her death and cultivated the plot. However, the judge held that notwithstanding that Calixtus Henry had fulfilled those conditions, and that he had been induced to do so by Geraldine Pierre's promises, he had not thereby acted to his detriment; and that for that reason the proprietary estoppel claim failed.

4. The judge went on to give a second reason for dismissing the proprietary estoppel claim – a reason which he regarded as "more compelling" – namely that no promises had been made by Theresa Henry; that she was a purchaser for value; and that she had been a registered proprietor since 1999. He held that in those circumstances there were no grounds for disturbing her title to the half share.

5. Calixtus Henry appealed to the Court of Appeal on the issue of proprietary estoppel alone. On that issue, the Court of Appeal held that the judge had misdirected himself in his approach to the question of detriment. It went on to find, reversing the finding of the judge, that in reliance on Geraldine Pierre's promises Calixtus Henry had suffered detriment, and that accordingly an equity had arisen in his favour in respect of Theresa Henry's half share. As to the judge's second reason for dismissing the proprietary estoppel claim, the Court of Appeal held that Calixtus Henry's equity

was binding on Theresa Henry since it was an "overriding interest" within the meaning of section 28(g) of the Land Registration Act, Cap 5.01 of the Laws of St Lucia.

6. As to the extent of Calixtus Henry's equity, the Court of Appeal concluded that once the equity had been established there was no power in the court to consider questions of proportionality and that it followed that Calixtus Henry was entitled to the full half share. The Court of Appeal accordingly made a declaration to that effect. Theresa Henry and Marie Ann Mitchel now appeal.

7. Thus the issues before the Board on this appeal are:

> (1) whether (as the Court of Appeal held) the judge misdirected himself in his approach to the question of detriment;
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> (2) whether the Court of Appeal was right to substitute for the judge's finding that no detriment had been suffered a finding in the opposite sense;
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> (3) whether the Court of Appeal was right to hold that, under the doctrine of proprietary estoppel, an equity has arisen in Calixtus Henry's favour in respect of Theresa Henry's half share; and
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> (4) if so, whether the Court of Appeal's decision that the equity should be satisfied by declaring Calixtus Henry to be the owner of the full half share should be upheld, or whether the equity should be satisfied in some other (and if so what) way.

8. The salient background facts are as follows.

9. The plot is situated in a rural part of St Lucia. It is on a hillside, with a view of the sea. Although no agreement has been reached between the parties as to its current market value, it appears that it may have some development potential.

10. The plot has been in the ownership of Geraldine Pierre's family for many years. Following the death of her father, it devolved upon Geraldine Pierre and her sister Etanise Prospere in equal undivided shares. Etanise Prospere died some time ago and Marie Ann Mitchel has succeeded to her share.

11. At some time before Calixtus Henry was born (he is now about 50 years old) Geraldine Pierre allowed his grandmother, Gladys Henry, to build a house on the plot and to live in it. Gladys Henry was a relative of Geraldine Pierre. It was Calixtus Henry's evidence at trial that he was born in that house; that he lived there with his grandmother until she died some thirty years ago; and that he has continued to live there ever since. In about 1981 he was joined by Miss Gabriella William, and they have since cohabited in the house built by his grandmother. He has four children by Miss William, all of whom are now in their twenties.

12. Calixtus Henry testified that Geraldine Pierre used to visit the plot on a daily basis until, some five years before her death, she became too old and infirm to do so. As he put it (Record of Proceedings p.61): "She was coming up and down every day." His evidence was that he used to call her "Mama", and that she treated him like a son.

13. On 5 December 1998 Geraldine Pierre made a Will appointing Calixtus Henry her executor and leaving her half share in the plot to him.

14. Theresa Henry and Marie Ann Mitchel are relatives of Geraldine Pierre. Since June 1971 Theresa Henry has lived in St Croix, in the US Virgin Islands. According to her evidence at trial, she visited St Lucia in January 1999 at Geraldine Pierre's request and during that visit Geraldine Pierre intimated that she wished to sell her half share in the plot to her.

15. On 21 January 1999 Geraldine Pierre made a further Will in which she left her half share in the plot to Theresa Henry and two other family members.

16. By the Deed of Sale dated 8 August 1999 Geraldine Pierre sold her half share in the plot to Theresa Henry at a price of EC$26,000. Theresa Henry testified that the price was paid in cash. The judge made no express finding that the price was paid, but there is an implicit finding to that effect in his description of Theresa Henry as a "purchaser for value". Equally, although there was some suggestion in the evidence that EC$26,000 may have been an undervalue (in her witness statement Theresa Henry says that Geraldine Pierre had told her that she would give her a "good price"), no finding to that effect was made by the judge.

17. On 8 September 1999 Theresa Henry was registered as owner of an undivided half share in the plot.

18. On 14 October 1999 Geraldine Pierre died, aged 95. Some five days later, Theresa Henry gave Calixtus Henry notice to quit the plot. On 19 April 2001 Theresa Henry and Marie Ann Mitchel were registered as proprietors of the plot.

19. On 31 January 2005 Mr Colin Foster, Calixtus Henry's counsel, wrote to Marie Ann Mitchel on his behalf claiming an interest in the plot and threatening proceedings to stop the construction of a road on the plot. On 24 April 2007 the present action was commenced against Theresa Henry and Marie Ann Mitchel.

20. We now turn to the evidence directly relevant to the proprietary estoppel claim.

21. In his witness statement, the truth of which he confirmed in evidence in chief, Calixtus Henry describes himself as "a baker and a farmer by profession". In paragraphs 5 to 7 of that statement, he says this:

> "5. Mama always … informed me that her father had passed the land [i.e. the plot] to her and that she must pass it to the next generation that worked the land. Mama stated many times to me and Pauline [Pauline Edwards, another family member] that she would leave the land for those that worked the land and for those that cared for her in her home country [i.e. St Lucia]. ….
>
> 6. Mama gave everyone the opportunity to possess land on the mountain but only if they would work the land and cared for her in her own country as she did not want to leave St Lucia to live abroad or to live in St Croix. Many years ago Pauline's husband Barrington James was invited to work on the land and indeed he did so for a short time. Barrington found the work on the land hard and complained that only a little money could be made off the land and in time Barrington and Pauline and their children relocated to St Croix where they continue to live out their lives. ….
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> 7. …. At one time Pauline tried to get Mama to move to St Croix with her, but Mama told me that she did not want to go and that it made no sense to go to another country. Mama always wanted to live her life in her own country and to die in her own home and Mama made me promise to her that I would help her achieve this. Mama also made a promise to me that because I cared for her and because I was the only one who lived on and cultivated the land that I would be given her share in the land on her death. Mama also made it abundantly clear to everyone that if no other member of the family worked the land that all of her land would be given to me. Time passed and no other family members occupied the land or returned from St Croix to live on the land and no other person but myself worked the land and it was from this time on that Mama kept

> on repeating and saying to me that the land would belong to me if I cared for her and if I cultivated the land."

22. Under cross-examination by Mr Alfred Alcide, counsel then appearing for Theresa Henry and Marie Ann Mitchel, Calixtus Henry stood by his witness statement. He told the court that from the age of about 14 or 15 he had cultivated the plot; as he put it (Record of Proceedings p.75): "I was working like a man on the land". He also from time to time helped his mother in a baking business (hence his description of himself in his witness statement as "a baker"). He said that the plot provided food not only for him and his family but also for Geraldine Pierre; that he was always taking food to Geraldine Pierre; and that if there was any produce left over, he would sell it. He went on to say that from his youth Geraldine Pierre had always promised to leave him her half share in the plot on her death, provided that he lived on the plot and cultivated it, and provided that he took care of her until she died. He maintained that, with the help of Gabriella William, he had done that.

23. Gabriella William gave evidence corroborating that of Calixtus Henry.

24. Theresa Henry's evidence was to the effect that Geraldine Pierre had explained to her that she (Geraldine Pierre) had merely given Calixtus Henry permission to live on the plot during her lifetime, and that on her death he would have no further rights in respect of the plot.

25. In paragraph 4 of his judgment, Mr Justice Cottle summarised the proprietary estoppel claim as follows:

> "4. In his witness statement the Claimant swears that during her lifetime Geraldine Pierre had promised him that her share of the land would be his if he cared for her until her death and cultivated the land and taken care [sic] of Geraldine Pierre until her death in 1999 at the age of 95. …. Because he has relied on her promise and acted thereon to his detriment, the Claimant avers, he has thereby acquired an interest in [the plot]."

26. Turning to the facts in relation to the proprietary estoppel claim, Mr Justice Cottle said this (in paragraph 7 of his judgment):

> "7. The witnesses were all cross-examined on their witness statements. Having seen and heard them, I found the following facts:

1. The Claimant has been living on the lands continuously for more than 30 years.

2. Geraldine Pierre promised to leave the lands to the Claimant on her death.

3. The Claimant relied on that promise.

4. Geraldine [Pierre] sold her interest in the land to the first Defendant."

27. In paragraphs 8 to 10 of his judgment, the judge dismissed Calixtus Henry's challenge to the Deed of Sale and his claim based on adverse possession. In paragraphs 11 to 13 of his judgment the judge addressed the proprietary estoppel claim, as follows:

> "11. Mr Foster for the Claimant placed greatest reliance on the doctrine of proprietary estoppel. As noted above, the evidence in this case establishes that the Claimant had been induced to act as he did by the promises of the deceased. He relied on those promises.
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> 12. Unfortunately, I do not find that I can rule in favour of the claimant. There are two reasons. Firstly, the Claimant cannot say that he has acted to his detriment. He has for decades resided rent free on land which belonged (in part) to the deceased. He testified that this has been the source of his livelihood in large measure. He has reaped the produce of the land. He was able to sell any surplus and retain all proceeds of such sales. I find that far from having suffered detriment because of his reliance on the promises of the deceased, the Claimant positively benefited.
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> 13. But the second, more compelling reason is that the first Defendant is a purchaser for value of the lands. There is no suggestion that the first Defendant made any promises to the Claimant. By her purchase she has acquired the legal title to the property. She has been registered proprietor since 1999. I do not find that there are any grounds upon which this Court should disturb that legal title."

The judge accordingly dismissed the action.

28. It is to be noted that although (according to the transcript) in the course of closing submissions counsel referred the judge to section 28 of the Land Registration Act (St Lucia), the judge makes no reference to that section in paragraph 13 of his judgment.

29. In the Court of Appeal, Mr Foster concentrated his argument on the judge's finding that in relying on Geraldine Pierre's promises Calixtus Henry had suffered no detriment. He submitted (among other things) that the judge had failed to take into account the detrimental effects that would be suffered by Calixtus Henry should those promises not be fulfilled. Mr Alcide submitted that the judge's finding that Calixtus Henry had suffered no detriment should be upheld.

30. The leading judgment in the Court of Appeal was delivered by the Hon. Mr Michael Gordon JA, with whom the other two members of the Court (the Hon Mr Denys Barrow JA and the Hon Mde Indra Hariprashad-Charles JA) agreed.

31. In paragraph 9 of his judgment, Gordon JA rejected Mr Foster's submission that regard should be had to the detrimental effects that would be suffered by Calixtus Henry should Geraldine Pierre's promises not be fulfilled. Gordon JA concluded that such an argument was without merit and should be disposed of peremptorily.

32. Noting that counsel had not referred the Court of Appeal to authorities on proprietary estoppel, Gordon JA went on to quote a lengthy extract from the judgment of Barrow JA in *Randolph M Howard v Aubrey Munroe* (St Vincent and the Grenadines Civil Appeal No. 4 of 2006), in which Barrow JA referred to a number of well-known authorities including *Ramsden v Dyson* (1866) LR 1 HL 129, *Inwards v Baker* [1965] 2 QB 29, *Pascoe v Turner* [1979] 1 WLR 431 and *Greasley v Cooke* [1980] 1 WLR 1306.

33. Gordon JA continued as follows (in paragraphs 11 and 12 of his judgment):

> "11. With the benefit of the extant jurisprudence it is clear that the trial judge misled himself into attempting to ascribe a dollar value to the detriment, or to compare the advantage with the detriment. One does not buy the equity. In consonance with the finding of the trial judge, I find that Geraldine Pierre the appellant did promise to leave the Land to the appellant on her death, but, contrary to the finding of the trial judge, I find that the appellant did suffer a detriment in reliance on that promise. Geraldine Pierre made it clear that the promise of the land was conditional on the continued working of the land. There is no doubt that the appellant continued,

not only to work the land, but to look after Geraldine Pierre. It was his evidence that he always took food for Ms. Pierre.

12. Once the equity is established, and I find that it has been, the next exercise is to determine its extent. As I have stated above, there is no power in the court to say that the promise (and the resulting benefit) is disproportionate to the detriment. In the circumstances I find that the appellant has established proprietary estoppel".

34. Gordon JA then turned to the second, "more compelling", reason which the judge gave for dismissing the proprietary estoppel claim. In paragraph 13 of his judgment he referred to section 28 of the Land Registration Act (St Lucia), which provides as follows (so far as material):

"28. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and affect the same, without their being noted on the register –

(a) – (f) ….

(g) the rights of a person in actual occupation of land or in receipt of the income thereof save where inquiry is made of such person and the rights are not disclosed".

35. Gordon JA continued (in paragraph 14 of his judgment):

"14. Implicit in the witness statement of the first respondent [Theresa Henry] is an acknowledgment that she knew that the appellant [Calixtus Henry] occupied the Land. There is no evidence that any enquiry was made of the appellant as to the quality in which he occupied the Land. She may have come to certain conclusions on her own, but such conclusions do not bind the court. Having found that the appellant has established a proprietary estoppel combined with the finding that the appellant has an overriding interest in the Land the order of the court ineluctably follows that:

(a) the appeal is allowed and the appellant is declared the owner of an undivided half interest in [the plot] …."

36. Before the Board, there was no issue between Miss Myriam Stacey (appearing for Theresa Henry and Marie Ann Mitchel in place of Mr Alcide) and Mr Foster as to the relevant principles of law relating to proprietary estoppel or as to the general approach which the court should adopt in applying those principles. Rather, the issue between them is as to how the relevant principles should be applied to the facts of the instant case.

37. In *Gillett v Holt* [2001] Ch 210 Lord Walker of Gestingthorpe (Robert Walker LJ, as he then was) discussed the nature of the doctrine of proprietary estoppel and the general principles underlying that doctrine. In the course of his judgment in that case Lord Walker said this (ibid.p.225C-E):

> "… although the judgment is, for convenience, divided into several sections with headings which give a rough indication of the subject matter, it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."

38. Later in his judgment, under the heading 'Detriment', Lord Walker said this (ibid. p.232A-F):

> "Both sides agree that the element of detriment is an essential ingredient of proprietary estoppel. There is one passage in the judgment of Lord Denning MR in *Greasley v Cooke* … which suggests that any action in reliance on an assurance is sufficient, whether or not the action is detrimental. In *Watts v Storey* [[1983] CAT 319] Dunn LJ (who was a party to the decision in *Greasley v Cooke*) explained Lord Denning MR's observations as follows:
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> > 'Nor, if that passage from Lord Denning MR's judgment is read as a whole, was he stating any new proposition of law. As the judge said, it matters not whether one talks in terms of detriment or whether one talks in terms of it being unjust or

> inequitable for the party giving the assurance to go back on it. It is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, i.e. an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance was given had suffered some prejudice or detriment.'
>
> 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.
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> …. 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."

39. On the facts of *Gillett v Holt*, the detriment to the claimant lay in the fact that in reliance on the defendant's assurance he had deprived himself of the opportunity to better himself in other ways (ibid. p.235B). As to the satisfaction of the claimant's equity, Lord Walker cited a passage from the judgment of Sir Arthur Hobhouse in *Plimmer v Wellington Corporation* (1884) 9 App Cas 699 at 714, where Sir Arthur Hobhouse described the aim of the court in satisfying an equity arising from a proprietary estoppel as being to "look at the circumstances in each case to decide in what way the equity can be satisfied".

40. In *Jennings v Rice* [2003] P. & C. R. 8, Lord Walker (Robert Walker LJ, as he then was) stressed once again the need to assess the various elements of proprietary estoppel in the context of a broad inquiry as to unconscionability. In paragraph 44 of his judgment he said this:

> "The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search, because … proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification. The cases show a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the claimant's

> expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them."

41. In *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 Lord Walker said this (at para 92):

> "92. [Counsel for the first defendant property company] devoted a separate section of his printed case to arguing that even if the elements for an estoppel were in other respects present, it would not in any event be unconscionable for [the third defendant] to insist on her legal rights. That argument raises the question whether 'unconscionability' is a separate element in making out a case of estoppel, or whether to regard it as a separate element would be what Professor Peter Birks once called 'a fifth wheel on the coach' … But Birks was there criticising the use of 'unconscionable' to describe a *state of mind* … Here it is being used (as in my opinion it should always be used) as an objective value judgment on *behaviour* (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again."

42. So far as satisfaction of any equity is concerned, later in his judgment in *Jennings v Rice* Lord Walker said this (at paras 50 and 51):

> "50. To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.

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

43. Whilst accepting what she described as the overarching requirement of unconscionability, Miss Stacey submits that reliance and detriment nevertheless fall to be considered separately. In support of that submission she relies on a dictum of Mummery LJ in *Steria Ltd v Hutchison* [2007] 2 P & CR DG8) that reliance and detriment "are distinct concepts, both of which are relevant to and need to be separately addressed in determining whether an estoppel has been established".

44. Miss Stacey submits that to amount to detriment the conduct relied on must be in some sense prejudicial, and that in assessing whether a particular course of conduct is prejudicial it is necessary to weigh any disadvantages involved in the pursuit of that course of conduct against any countervailing advantages. That, she submits, is what the judge effectively did in paragraph 12 of his judgment, when he referred to what he considered to be advantages which Calixtus Henry had enjoyed in reliance on Geraldine Pierre's promises. Miss Stacey submits that having carried out that weighing process the judge rightly concluded that Calixtus Henry had suffered no detriment.

45. She submits, further, that there were no grounds justifying the Court of Appeal's interference with the judge's conclusion that there was no detriment – a conclusion which she describes as a finding of fact – and that in any event the Court of Appeal's finding to the opposite effect was wrong.

46. As to the Court of Appeal's conclusion that any equity enjoyed by Calixtus Henry in respect of the plot is an overriding interest within the meaning of section 28 of the Land Registration Act and is accordingly binding on Theresa Henry, Miss Stacey accepts that any such equity would constitute an overriding interest within the

meaning of the section, but she submits that the test of unconscionability must be considered afresh in relation to the position of Theresa Henry as purchaser under the Deed of Sale.

47. In support of this last submission she relies on a passage in Gray's Elements of Land Law (5th ed) concerning the equivalent section in the English Land Registration Act 2002 (section 116). The passage in question is to be found at para 9.2.93, and it reads as follows:

> "Of course, the mere fact that, in one or other way, an inchoate equity survives a registered disposition is not, in itself, determinative of its actual impact on the disponee of the registered title. The newly recognised status of the inchoate equity certainly marks an important acknowledgment that third parties are not immune from the requirements of conscionable dealing: the mandate of conscience is no respecter of persons. But the binding effect of the inchoate equity simply means that third parties must discharge the burden of showing that *their* proposed assertion of strict legal entitlement is not, in its own turn, unconscionable. The call of conscience requires to be measured *de novo* in the light of the circumstances in which each disponee takes title. The ultimate effect of the inchoate equity is tailored specifically, in the discretion of the court, to the particular disponee whom it is sought to affect. The mere fact that an equity of estoppel might command a particular remedial outcome as against one estate owner in no way precludes the possibility that another estate owner remains free, without injury to conscience, to enforce his strict legal rights or to proffer only some limited money compensation as the precondition for doing so. The question of overriding conscientious obligation arises afresh on each occasion and may well admit of divergent responses on different occasions."

48. Miss Stacey submits that there is, on the judge's findings, nothing unconscionable about the circumstances in which Theresa Henry purchased Geraldine Pierre's half share, and that accordingly she should take free of any equity which might be found to have arisen in Calixtus Henry's favour as against Geraldine Pierre.

49. As to the extent of any equity which is found to exist in favour of Calixtus Henry, and as to the relief to be granted in respect of it, Miss Stacey submits that the Court of Appeal erred in law in its unquestioning acceptance of what she described as "the expectation measure of relief": i.e. the full half share. She submits that any equity which has arisen has been fully satisfied by the countervailing benefits which Calixtus Henry has received over the years, as found by the judge, and which he has continued to enjoy "until this day" (Record of Proceedings p.100-101). In any event, she submits

that an entitlement to the full half share is on any basis disproportionate to any detriment which Calixtus Henry may have suffered and far exceeds "the minimum equity to do justice to the [claimant]" (see *Crabb v Arun District Council* [1976] Ch 179, 198 per Scarman LJ). She submits that the maximum relief required to do justice in this case would be a small monetary payment.

50. Mr Foster submits that in reaching his conclusion that Calixtus Henry had suffered no detriment the judge applied the wrong test; and that, on the facts, a degree of detriment is established which justifies the relief granted by the Court of Appeal (i.e. the full half share). He goes so far as to submit that on the facts of this case there were no countervailing advantages to be brought into account. Accordingly, he submits, the "expectation measure" is the correct one to apply. In support of his submissions he cited a number of authorities, including *Gillett v Holt* (above).

51. In the judgment of the Board, the judge clearly misdirected himself in his approach to the issue of detriment. He said in paragraph 12 of his judgment that Calixtus Henry could not say that he had acted to his detriment and that, far from having suffered detriment because of his reliance on the deceased's promises, he positively benefited. But he did not attempt to weigh the disadvantages suffered by Calixtus Henry by reason of his reliance on Geraldine Pierre's promises against the countervailing advantages which he enjoyed as a consequence of that reliance. That is a process which, on principle, he should have undertaken (see *Jennings v Rice* (above)). Instead, in paragraph 12 of his judgment the judge merely listed three advantages which he considered that Calixtus Henry had enjoyed in consequence of his reliance on Geraldine Pierre's promises: viz. the fact that he had lived rent-free on the plot, the fact that the plot was the source of his livelihood in large measure, and the fact that he had reaped the produce of the plot and was able to sell any surplus and retain all the proceeds of such sales. The judge made no reference to the evidence contained in paragraphs 5, 6 and 7 of Calixtus Henry's witness statement (see paragraph 21 above), or to the evidence that Calixtus Henry had kept Geraldine Pierre supplied with produce from the plot and that he had cared for her.

52. In *Campbell v Griffin* (2001) 82 P & CR DG23, Lord Walker (Robert Walker LJ, as he then was), when considering the issue as to how the equity which had been found to have arisen in that case should be satisfied, described the court's approach to that issue as a cautious one. The court had to look at all the circumstances in order to achieve the minimum equity to do justice to the claimant. However, he went on to observe (as he also observed in his judgment in *Gillett v Holt* (above)) that the court enjoys a wide discretion in satisfying an equity arising under the doctrine of proprietary estoppel. Lord Walker then went on to weigh the disadvantages which the claimant had suffered by reason of his reliance on the defendant's assurances against the countervailing advantages which he had enjoyed by reason of that reliance (including, in that case, rent-free occupation of the property in issue). Lord Walker concluded that the claimants' rent-free occupation of the property had not

extinguished his equity, but that in all the circumstances the grant of a life-interest in the property would be disproportionate to his legal and moral claims over the property. In the result, exercising the wide discretion to which he had earlier referred, he concluded that the appropriate form of relief was an award of a fixed monetary sum charged on the property.

53. In the instant case the judge should have undertaken a similar weighing process to that undertaken by Lord Walker in *Campbell v Griffin*; that is to say, he should have weighed any disadvantages which Calixtus Henry had suffered by reason of his reliance on Geraldine Pierre's promises against any countervailing advantages which he had enjoyed by reason of that reliance. Had he done so, he would have brought into account on, as it were, the debit side of the account the evidence contained in paragraphs 5, 6 and 7 of Calixtus Henry's witness statement (see paragraph 21 above), including the fact that other members of the family had not responded to Geraldine's offer of "an opportunity to possess land on the mountain … if they would work the land and cared for her in her own country as she did not want to leave St Lucia to live abroad or to live in St Croix", but instead had moved to St Croix where they were able to live more comfortably.

54. It may be that the judge was led to address the question of detriment with such brevity by his belief that his second reason for dismissing the proprietary estoppel claim was indeed "more compelling". In truth, however, his second reason was unsustainable, given the terms of section 28 of the Land Registration Act (St Lucia). As the Court of Appeal recognised, any equity acquired by Calixtus Henry in respect of the plot is an overriding interest within the meaning of that section and is accordingly binding on Theresa Henry.

55. 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 (see the extract from Lord Walker's judgment in *Gillett v Holt* quoted in paragraph 37 above). In the instant case, that is certainly so.

56. Nor, in the opinion of the Board, is there any substance in Miss Stacey's submission that the issue of proprietary estoppel has to be considered afresh in relation to the position of Theresa Henry as a third party purchaser. The Board does not rule out the possibility that cases may arise in which the particular circumstances surrounding a third party purchase may, notwithstanding the claimant's overriding

interest, require the court to reassess the extent of the claimant's equity in the property. However, in the instant case that issue simply does not arise since the Defence of Theresa Henry and Marie Ann Mitchel contains no plea to that effect, nor was any such case pursued on their behalf at trial.

57. Accordingly, the Board concludes that the judge's finding that Calixtus Henry "could not say that he has acted to his detriment" cannot stand; and that the Court of Appeal was entitled to revisit that issue.

58. However, the reason which the Court of Appeal gave for setting aside the judge's finding that no detriment had been suffered is, in the opinion of the Board, itself unsustainable.

59. In paragraph 11 of his judgment, Gordon JA concludes that the judge misled himself in attempting "to compare the advantage with the detriment". That, however, is precisely the process which the judge should have undertaken in this case but in the event failed to undertake. The Board concludes that the Court of Appeal's erroneous approach to the issue of detriment undermines its finding that Calixtus Henry "did suffer a detriment in reliance on that promise". Gordon JA's observation that "[o]ne does not buy the equity" amply demonstrates this. Whilst that statement is of course literally correct, at least in the context of the instant case, the existence and extent of any equity arising under the doctrine of proprietary estoppel is nevertheless dependent on all the circumstances of the particular case, including the nature and quality of any detriment suffered by the claimant in reliance on the defendant's assurances.

60. Accordingly, it falls to the Board to address the question of detriment afresh.

61. In the opinion of the Board, it is clear from the evidence, and in particular from paragraphs 5, 6 and 7 of Calixtus Henry's witness statement (see paragraph 21 above), which the judge must implicitly have accepted, that by remaining on the plot – and by doing so not only for his own benefit and that of his family but for Geraldine Pierre's benefit too in providing her with food and in caring for her – Calixtus Henry effectively deprived himself of the opportunity of a better life elsewhere. The Board concludes that that detriment is not outweighed by the advantages referred to in paragraph 12 of the judge's judgment.

62. Overall, the strong impression which the evidence conveys to the Board is that in reliance on Geraldine Pierre's promises Calixtus Henry has opted for a hard life, in which he has had to struggle to make ends meet and to provide for his family, in circumstances where more attractive prospects beckoned elsewhere.

63. Accordingly the Board concludes that in the instant case the requirement of detriment is met, and that an equity has arisen in Calixtus Henry's favour under the doctrine of proprietary estoppel in respect of Theresa Henry's half share in the plot.

64. It remains to consider how, in all the circumstances, that equity should be satisfied.

65. In paragraph 12 of his judgment, Gordon JA said this:

> "As I have stated above [i.e. in the previous paragraph], there is no power in the court to say that the promise (and the resulting benefit) is disproportionate to the detriment."

With respect to Gordon JA, the Board considers that that statement betrays a fundamental misconception as to the nature and purpose of the doctrine of proprietary estoppel, as set out in the authorities to which we have referred. Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.

66. The Board concludes that, in all the circumstances of the case, the appropriate relief in order to achieve the minimum equity required to do justice to Calixtus Henry is to award him one half of Theresa Henry's undivided half share in the plot.

67. The Board will accordingly humbly advise Her Majesty that the appeal should be allowed, that the order of the Court of Appeal be set aside and that it be declared that Calixtus Henry is entitled to one half of Theresa Henry's undivided share in the plot.

68. The parties should make any submissions on costs in writing within 21 days.