



IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

Claim No: 3LS30314

Leeds Combined Court Centre
The Courthouse,
1, Oxford Row
Leeds LS1 3BG

Date: 28 November 2014

Before:

HIS HONOUR JUDGE ROGER KAYE QC
(Sitting as a High Court Judge)

Between:

(1) HELEN POLLOCK LOTHIAN
(2) WILLIAM DOUGLAS LOTHIAN

Claimants

- and -

(1) ROGER CHARLES DIXON
(2) PATRICIA WEBB

Defendants

Counsel and Solicitors:

Richard Selwyn Sharpe instructed by Lupton Fawcett Denison Till, York, appeared for the Claimants

**Nigel Thomas instructed by Slater Heelis LLP, Sale Moor, appeared for the second Defendant
The First Defendant did not appear and was not represented**

Hearing dates: 24 (reading day), 25-27 November 2014

Hand down Judgment: 28 November 2014

APPROVED JUDGMENT

I direct pursuant to **CPR PD 52 para 5.12** that no official shorthand note or mechanical recording need be taken of this judgment and that copies of the approved final version as handed down may be treated as authentic.

Date: 28 November 2014

Roger Kaye QC

Judge Roger Kaye QC:

1. This is the trial of a claim by the two claimants, Mr and Mrs William Lothian, both husband and wife, to the estate of a Miss Helen MacArthur who died, aged 78, on the 15 September 2012 (“the deceased”). The first claimant, Mrs Helen Lothian (“Mrs Lothian”), is a cousin of the deceased and also a sister of the second defendant, Mrs Patricia Webb (“Mrs Webb”) who was also the deceased’s cousin
2. The first defendant is the administrator of the deceased’s estate. It is accepted by all concerned that he has, as such personal representative, taken no active part in these proceedings and will be bound by the result.
3. The deceased left a last will dated 10 February 1983 (“the 1983 Will”), the making and terms of which she seems to have forgotten by the turn of the century and at the time she gave instructions to her solicitor for a new will (or to be accurate as she saw it, a will) shortly before she died. Under the 1983 Will Mrs Lothian and Mrs Webb share the net residuary estate in equal shares after provision for some legacies of cash and jewellery. (It appears the jewellery no longer exists (having been stolen in the past) and one or more of the pecuniary legacies may have abated owing to the death of the relevant beneficiary.)
4. Nevertheless some two months after her death, and after enquiries had been made, the 1983 Will emerged. The named executors renounced probate with the result that letters of administration with will annexed were eventually granted to the first defendant out of the Newcastle-upon-Tyne District Probate Registry on 8 May 2013.
5. It is common ground that the principal asset in the deceased’s estate consists of her shareholding of 9,996 out of the 10,000 authorised and issued shares in a company called MacArthurs Hotels Ltd (“the Company”) which in turn owns and operates a pleasant hotel situate at and known as the Mount Hotel, 1-6 Cliff Bridge Terrace, Scarborough, YO11 2HA (“the Hotel”). The deceased’s shareholding was valued for probate purposes on an assets basis at £584,766. In addition the estate included at death further assets in the agreed valued sum of £457,980 though these have been depleted since death by discharge of debts, inheritance tax, and expenses. The remaining shares are in the name of a Mr Donald McDiarmid but he takes no active part in the Company at all. To all intents and purposes it was Miss MacArthur’s company.
6. The Hotel is, I was told (and it appeared to be common ground supported by evidence or appropriate inferences to be drawn from the evidence), a moderately successful family run hotel though it had an overdraft limit with HSBC of £100,000 which the bank was not pressing even though the extent of the overdraft from time to time approached that limit. The Hotel had been kept afloat however by the

support of the deceased during her lifetime with loans of over £200,000 and even after her death a further £20,000 was injected as working capital. The Hotel was valued at the date of the deceased's death at £950,000 for the purposes of working out the assets based value of the deceased's shareholding.

7. The current position, according to information supplied by the first defendant's firm, was that after payment of the deceased's debts, testamentary expenses and inheritance tax, the net estate consisted of the shares in the Hotel as mentioned, a bond with M & G worth some £110,468, and cash held by the first defendant's firm in the sum of £59,545.90 though this may have increased slightly owing to accumulated interest. In addition the Company owes the estate the sum of £20,000, which the parties agreed could be lent to the Company to provide cash flow plus the sum of £213,000 owed previously to the deceased by way of director's loans to the Company. Thus total assets currently appear to be in the region of £980,780 of which over £220,000 represents debts due to the estate though to what extent these debts are recoverable is another question. The debts owed by the estate consist of provision for the remaining costs (legal or otherwise) properly incurred in respect of the administration of the estate.
8. The claimants' case is, in substance, that from about September 2010 onwards right up to the time of her death, the deceased, knowing that she had inoperable terminal cancer, proposed, represented to, assured or promised the claimants that if they (and principally the first claimant, Mrs Lothian) came and stayed at the Hotel on a full time basis to look after her during her final illness and helped her to run and manage the Hotel up to her death, she, in return, would leave them her entire estate on her death. The claimants contend that, after discussing the matter between them (at the insistence of the deceased before committing themselves) they accepted the proposal and relying on this representation, assurance or promise acted to their detriment in fully performing what was expected of them under the arrangement such that by reason of the doctrine of proprietary estoppel it would be unconscionable for the second defendant, Mrs Webb, to insist on the strict terms of the 1983 Will. Alternatively they contend there was a common intention on the part of the deceased and the claimants that in return for the claimants acting as mentioned the deceased's estate would be held on a constructive trust for them from and after her death.
9. Following an exchange of pre-action correspondence the action was commenced on 23 May 2013.
10. It is fair to say that the stance initially taken by the second defendant, supported by members of her family, was that the claimants should prove their entire case. This was largely due to the fact that although Mrs Webb and the deceased were close in their younger days, there had been little real contact between their two families (or more specifically between Mrs Webb's family and the deceased) in latter

years and certainly not since around 2009 (if not before) such that Mrs Webb and her family had little if any knowledge either of the deceased's terminal illness (the deceased being described by many witnesses as a very private person), the promise made by her to the claimants, or even of her death until after the funeral (this being, as I find, at the express request of the deceased). The defendants were unaware too until after the deceased's death of the fact that the deceased had decided, at what turned out to be almost the last moments of her life, to give instructions to her solicitor to draw up a will (under the impression, as I have said before, that she had not made any previous will) reflecting her promise and leaving her entire net estate to the claimants after payment of debts, funeral and executorship expenses. Unfortunately although the new will was drafted and prepared (at speed) reflecting these wishes, the deceased died before it could be executed.

11. The second defendant also challenged the deceased's mental capacity but this challenge fell away once expert evidence had been obtained.
12. A further attempt by Mr Selwyn Sharpe who appeared for the claimants, to add a further, third, cause of action based on a contractual promise by a late amendment during the course of the trial (as a result, it has to be said, of my own enquiries of counsel) was objected to by Mr Thomas on the grounds it was too late, insufficiently particularised, and prejudicial and was refused by me in an earlier judgment largely on those grounds having regard to the principles applicable to late applications to amend reflected in the Court of Appeal decision of *Swain-Mason v Mills & Reeve (a firm)* [2011] EWCA Civ 14; [2011] 1 WLR 2735.
13. Sadly, in what has become a hard fought family dispute no doubt causing much anguish on both sides, save for the abandonment of the challenge on mental capacity grounds, the second defendant maintained her challenge to trial.
14. After having heard evidence from the claimants' witnesses however, Mr Thomas, who appeared for the second defendant, rightly in my judgment, re-assessed his client's position and accepted that the promises, or assurances or representations as alleged by the claimants had indeed been made by the deceased to them and had been relied upon by them. That these assurances continued right up to the moment before the deceased's death is well evidenced by her instructions for her will given the day before she died.
15. Mr Thomas was not prepared, however, to accept that the claimants had acted to their detriment. His case was that the claimants had received a countervailing benefit in the provision of free board and lodging during their time spent at the Hotel with the deceased in return for their assistance and other such intangible or tangible benefits. The issues thus became whether the claimants had suffered detriment and if

so what was the extent to which the equity thereby created in their favour was to be satisfied. In short, what was the appropriate relief.

16. Mr Selwyn Sharpe submitted that this ought to be nothing less than the entire estate. Mr Thomas submitted that all the justice required in this case was an award to the claimants of some £40,000 or so plus recoupment of their unspecified travelling expenses. The only support for these figures came from some non-expert evidence suggesting the £40,000 might be based on a reasonable annual salary of a trainee manager in the north-east over two years of about £18,000-20,000 p.a.
17. I heard from a large number of witnesses on both sides. I entirely accept all witnesses as honest according to the best of their memories on both sides of the action.
18. There was little real dispute as to the law of proprietary estoppel (the principles are discussed and set out at Snell's principles of Equity, 32nd ed, especially for present purposes at paras. 12-04 to 12-30 and 3rd cumulative supplement. I was also afforded the privilege of a sight of the advanced proofs of the 33rd ed.) I need not go into the law in great detail. As has been established in a number of the highest authorities, there must be an assurance, reliance and detriment: see, e.g. *Thorner v Major* [2009] 1WLR 776 HL, *Suggitt v Suggitt* [2012] EWCA Civ 1140.
19. Detriment is not a narrow or technical concept but must be judged in the round. The real detriment or harm from which the law seeks to give protection is that which would flow from the change in position if the assumption were deserted that led to it. It need not be expenditure of money or other quantifiable financial detriment but it must be substantial: see *Gillett v Holt* [2001] Ch 210 CA. As was emphasised in *Thorner* (above) and other cases, ultimately the matter is to be viewed at the moment of crystallisation, namely whether, looked at in the round, in the circumstances that have happened, it would be unconscionable for the promise or assurance not to be kept even if there was not initially a legally binding concept.
20. I will need to consider relief in more detail.
21. I accept the evidence of and for the claimants. The proposal was put to Mrs Lothian in September 2010. She had earlier during a visit to the Hotel with her granddaughter in about April of that year begun to appreciate how ill her cousin was and had assisted her with visits to the doctor and hospital. The motives of the deceased were that she wanted the Hotel to remain in the family (it had been passed down to her and her brother who predeceased her in about 1981) and to be run as a family friendly welcoming hotel according to the same standards and values as she had. She felt her cousin, Mrs Lothian could do this and had trust and confidence in her to do it. While she had been close also to Mrs Webb in the past, this close contact had been eroded and lost by

the time she learned of her terminal illness. She forgot about the Will she had made almost 30 years previously. She saw more of Mrs Lothian and her daughter and granddaughter. She was also concerned not to go into a home but plainly wanted to keep working in her hotel as long as she could (which she did, remaining very much in charge right up to her death). She therefore also wanted companionship and no doubt emotional support especially from another empathetic woman. She knew it would impose a considerable emotional and physical strain on Mrs Lothian, her family and her husband who had not been separated for any lengthy period, for more than a couple of weeks, since their marriage in 1968. Hence her insistence that Mrs Lothian should first consult her husband before accepting the proposal. She clearly considered however that Mrs Lothian was, no doubt with Mr Lothian's co-operation, up to the task.

22. The principle deficiency of the majority of the witnesses for the second defendant (who did not herself give evidence from the witness box, largely on account of her age, frailty and no doubt anxiety at the prospect of giving evidence and being cross-examined) but none of whom I criticise on this account, was that they had no or very little knowledge of the relevant events. For example, Mr Gordon Andrew, a relative, had made a visit to the Hotel in the period 2010 to 2012 while the deceased was still alive and when the claimants were in residence. The thrust of his evidence was that he had seen the claimants doing nothing to assist the deceased who seemed herself very much in charge of affairs at the Hotel but instead had sat down with him and taken a leisurely cup of tea with him. The trouble with this evidence (which I wholly accept as given honestly and truthfully) was that how long this tea taking lasted was never revealed and his entire visit on that occasion lasted only about 2 hours. In any event I have no doubt that engaging with and entertaining or looking after family members was merely part of the duties expected of and undertaken by Mr and Mrs Lothian. I therefore give it little weight.
23. I also heard from a Mr Craig Bridgewood who had been employed as manager of the Hotel in July 2012 some two months before the deceased's death and who was made redundant after her death for financial reasons. He was somewhat understandably disappointed about this but again at the end of the day his evidence was really to the effect that in his opinion the claimants were more in the role of being supportive and helpful as companions to the deceased. However he had not kept an eye on the claimants. He was after all doing his own job.
24. I was really therefore left mainly with the evidence of the principal witnesses for the claimants, namely Mr and Mrs Lothian themselves. Both are of advanced years; both suffer from dyslexia. Mrs Lothian is now 69, suffers from multiple sclerosis and during the period before the deceased's death had troubles with her eyes and teeth, necessitating treatment. She also, as a result of her agreement to commit her self to the deceased, had put off a much needed hip operation to replace her

hip joint in one leg until after the death of the deceased leaving her in much pain and discomfort. The gist of Mr Thomas's cross-examination was to demonstrate or to try and elicit that neither had done very much at all or had received benefits from their stays at the Hotel, principally in the form of board and lodging (which I accept) or, in Mr Lothian's case, payment for his using his information technology skills for the benefit of the Hotel business (which I do not accept, at least so long as related to any period when the deceased was alive). It must be understood that I do not, in any shape or form, criticise Mr Thomas for the theme of his cross-examination; it was entirely consistent with his stance taken at the outset that it was for the claimants to prove their case.

25. As to detriment, the evidence was clear. I find that despite her age, health problems and discomfort Mrs Lothian and her husband readily agreed to help and support Miss MacArthur. Although the arrangements were that Mrs Lothian was to be at the Hotel "on a full time basis", this is not to be taken literally but in a reasonable common sense manner. They were not prisoners as they acknowledged. Nevertheless Mrs Lothian over the next two years spent a substantial amount of her time staying at the Hotel providing care, solace, support and companionship to Miss MacArthur as well as actual physical work in and for the benefit of the Hotel and its guests. Mrs Lothian's rough calculation, which I accept, was over 9 months of the year (if not more) were so spent. All this was obviously acceptable to Mrs MacArthur. Mrs Lothian returned home to Scotland, where she and her husband of over 40 years, lived, for Christmases (when the Hotel closed) but returned to the Hotel for the New Year's annual bridge party. She also went home for eye and dental treatment (and consequential recuperation), for pre-op assessments for her eventual hip replacement (done after the deceased's death). She spent trips away to collect her granddaughter for stays at the Hotel and to return her. Mr Lothian who had the house to manage and a business to run, visited every 2 to 3 weeks at weekends.
26. In my judgment detriment of a substantial kind is clearly established. The Hotel had excellent and supportive staff who all knew their jobs and tasks, but the deceased knew she would need someone to help keep an eye on things and assist in supervising matters as well as providing support and comfort and social and emotional support often far into the night when she could not sleep. Thus Mrs Lothian apart from being gently coaxed and trained in the art of hotel management by the deceased, helped out with light duties as and when and where required: she sat on reception, cleared tea things away, showed guests their room, looked after the bar, helped in the kitchen, washed up, collected and washed glasses, vacuumed rooms and corridors, collected medication for Miss MacArthur, accompanied her on medical appointments, booked in guests, acted as night porter, banked receipts. She had no specific duties, but plainly carried out a multitude of duties and tasks, assisting in acting as general administrator, supervisor and,

frankly I've no doubt, as dogsbody as the circumstances required. The deceased occasionally described her as her second in command to staff. She put off her much needed hip operation also no doubt causing her continued pain and discomfort. She missed her husband and family, which she clearly felt, was a great strain.

27. Though it was Mrs Lothian upon whom the deceased expected the main burden to fall, Mr Lothian too helped on his wife at his weekend visits with the type of general tasks she undertook but also carried out some other tasks: changing bulbs, sourcing and arranging supply of electrical goods, resetting loose carpets, sorting out a drainage problem; again a multitude of different things. He was a communications engineer and helped sort out a data loss problem on the Hotel's computer by liaising with the computer experts. He too found the separation from his wife a great strain though they spoke by telephone each evening.
28. In my judgment therefore these and no doubt many other activities and support amount to substantial detriment. The fact is that the claimants substantially altered their entire life style in order to help care and support the deceased in her last two years.
29. Mr Thomas submitted that they had countervailing benefits, which cancelled out the detriment. True they were not paid for their time and trouble, but had free board and lodging whenever at the Hotel. Members of their family too came and enjoyed the pleasant atmosphere and sea air at the Hotel. No doubt, but I do not regard these benefits for one moment as any kind of meaningful compensation or countervailing benefit for the open-ended commitment they gave at the outset and to which they both adhered. True, they also knew the deceased's illness was terminal, but they had no idea how long they might be called on to continue their support and at no time was there any suggestion that they flagged or failed in supplying such support apart from the home visits of Mrs Lothian mentioned previously and which were in the main to attend to her own medical needs. To deprive them of some remedy or relief on this account would, in my judgment, indeed be unconscionable.
30. I therefore find that an equity was and is established in the claimants' favour.
31. I must therefore now turn to what relief is appropriate. I was taken to or referred to a number of authorities in support of a suggestion as to the basis of the court's approach to the relief to be awarded to give effect to the equity that arises in the claimants' favour from the assurances given, from their reliance on them and subsequent detriment. In the interests of time I have not dealt with these authorities at length or set them all out in detail. I am nevertheless grateful for the industry of counsel on both sides.

32. The starting point in my judgment is reasonably clear: the task of the court is to do justice, to do what is necessary to avoid an unconscionable result. Clearly the maximum extent of the relief is the property the claimants might reasonably expect were the promise of the deceased to be honoured: that is her entire estate. The court has a wide judgmental discretion, but this must be principle based. It is not just a question of honouring the expectations. It is sometimes said that the court will only grant such relief as is the minimum necessary to satisfy the equity: see *Suggitt* (above) at para 19 per Arden LJ (referring no doubt to the dicta of Scarman LJ (as he then was) in *Crabb v Arun District Council* [1976] Ch 179 CA at p. 198). Moreover, if the claimant's expectations are out of all proportion to the detriment suffered, the court will satisfy the equity in another and more limited way: see *Jennings v Rice* [2003] 1 P&CR 100 at p. 114 para 50 per Robert Walker LJ and the references to *Snell* cited above. In such a case the court may have to exercise the wide judgmental discretion (see same at para. 51). This is the approach favoured by Mr Thomas.
33. I must in considering the appropriate relief bear in mind that the deceased's promise was clear, certain and continued up to her demise. The claimants' clear expectations were the entire estate. I do not overlook the fact that they had an expectation to half the net residuary estate under the 1983 Will (though unaware of that fact before the deceased's death). The Hotel clearly had needed cash injections from time to time. This continued after the death of the deceased. Mr Bridgewood could not be continued owing to financial circumstances. There was an overdraft from the bank and the deceased herself and lent substantial sums to the Company to enable the Hotel to keep going. The shares alone were unlikely to be sufficient. There is little evidence as to the means, wealth or assets of the claimants. But it is not unreasonable to anticipate or infer that the deceased considered that the claimants, whom she regarded as that part of her family who helped and supported her, should also have other assets to keep a project dear to her heart, her hotel, alive and functioning. She expressed the hope that Mrs Lothian's own daughter and possibly in time her granddaughter might also become involved. The detriment suffered by the claimants was substantial, not least an open ended commitment, albeit the deceased's illness was terminal, but in respect of which they had no idea how long she might last. The evidence was, as I have said, that the deceased was in charge and kept her finger on the Hotel's pulse right to the end. By the time of her death the claimants had already suffered considerable detriment. They had been helping for some two years for much of which they had been in effect compelled to live apart from each other. Mrs Lothian too had her health problems: multiple sclerosis, dyslexia, her eye problems and the continuing draining effect of the need for a hip replacement that she had postponed. These factors alone must have caused considerable continued anxiety and worry to the claimants.

34. In my judgment to satisfy the equity by an award of the type described by Mr Thomas: some £40,000 plus travel expenses, is poor return for the time, support, work, devotion and care put in by the claimants especially Mrs Lothian even allowing for the fact that the claimants already had an entitlement to half the residue under the 1983 Will. There had been little contact with Mrs Webb's side of the family in the last years of the deceased's life. To deprive the claimants of something approaching their full expectation of the entire estate and to compel the estate to be split into two with the concurrent uncertainties as to the future of the Hotel, would in my judgment be an injustice and unconscionable. I do not overlook the fact that Mrs Webb's family were not notified of the death of the deceased until after the funeral which caused them, especially Mrs Webb, much understandable distress but in doing this I am satisfied that the claimants were doing no more than carrying out the wishes of the deceased clearly and verbally communicated to them. She simply wanted at her funeral those who had been closest to her in her last years and months. That in my judgment was undoubtedly the claimants distressing as this may be to Mrs Webb and her family.
35. Mr Selwyn Sharpe also urged me to bear in mind what he described as the conduct of the defendants in their challenge to the estate and implicit criticism of the claimants, particularly in not immediately reporting the deceased's death to them and maintaining a challenge based on lack of mental capacity. For my part having heard evidence from Mrs Webb's husband and members of her family, I found them reasonable, decent and honest people and have not thought it necessary to rely on such matters. As Mr Thomas submitted, his clients' stance, namely that the claimants ought to prove their case was not entirely unreasonable. Subject to submissions to follow, that stance is already likely to result in adverse costs consequences for them.
36. Accordingly in my judgment the equity can, in all the circumstances of this case, be satisfied by awarding the claimants the entire net residuary estate of the deceased, that is after satisfying the legacies left to be fulfilled under the 1983 Will and the payment of her debts, funeral and testamentary expenses. In short, the provisions of the 1983 Will should subject to that award otherwise stand.
37. In the circumstances it is unnecessary to consider the claim based on constructive trust.