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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

LIAM KINNEY

Plaintiff;

And

SARAH McKITTRICK

Defendant.

DEENY J

[1] The court has had the benefit of considering the evidence in this case for the last three days and an opportunity to look back on the notes of that evidence. Prior to sitting the court also had the benefit of the papers in the action including two detailed Statements of Issues from counsel. Some things in those gave rise to controversy, but they were of assistance to the court in understanding the factual and legal issues and so I feel able to give judgment in this matter today without the need to reserve my judgment.

[2] I had the benefit of helpful written and oral submissions from Mr Colin Henry counsel for the plaintiff, Liam Kinney, and from Mr Seamus McNeill counsel on behalf of Sarah McKittrick. She is the personal representative of the estate of her late uncle, Patrick O'Boyle. I will return to the relationships in a moment.

[3] In delivering this judgment I take into account the submissions of counsel even if I do not expressly refer to each of them. Likewise, it is proper to say that this is not a case decided on a single answer or on a single point, but on consideration of the evidence as a whole. So, again, I do not necessarily refer to every piece of

evidence in the course of this judgment, but I have taken the totality of the evidence into account.

[4] The legal position with regard to land law in this jurisdiction, as I believe in every common law jurisdiction and no doubt more widely still, is that the transfer of real property as it was called, houses and land, requires a degree of formality. Under the Statute of Frauds in Ireland such a contract must be evidenced by Note or Memorandum in writing signed by the party to be charged. On death, land can be conveyed by the execution of a Will and the subsequent Grant of Probate by a duly authorised court. Again, that has to be in writing and, witnessed by two witnesses, bear the signature of the Testator or Testatrix. Parliament has provided laws on intestacy to govern in detail the situations that arise where there is not a Will. Therefore, a party coming in as the plaintiff does here seeking to alter the legal title of land, as it would be here on foot of an intestacy, has a burden to discharge. The burden of proof is on him to satisfy the court on the balance of probabilities that he is entitled to succeed.

[5] Counsel both referred to a number of cases that set out the legal submissions in a case of this sort where Liam Kinney is claiming proprietary estoppel, which on his case would give him good title to the lands of his late uncle, Patrick O'Boyle. He, although in evidence he seemed to think at times he was also claiming money, through his counsel did not pursue a separate claim for money left by Mr O'Boyle.

[6] The court has had the benefit of evidence about the property which is to be found in a series of Folios in County Antrim 9761, 10249, 9755, 22081, 9754, 9760, 9757 and 9584. They are lands to be found on the coast road between Carnlough and Waterfoot. There are some small fields down at the coastal road and then what seems to have been a virtually unusable and pretty steep cliff face and then some mountain lands. The mountain lands are owned, as is customary in that part of the world, in a common way between a number of shareholders who have a number of divides or shares out of 36 in the lands. The lands are used for the grazing of sheep with a few cattle down on the coast. The plaintiff seeks to claim those lands.

[7] The law has been referred to by counsel at more length, but I think I can refer to it with just a few extracts. I dealt with the law myself in two judgments in relatively recent times, McLaughlin v Murphy [2007] NI Ch. 5 and Mulholland v Kane, also a north Antrim case as it happens, [2009] NI Ch. 9 and I set out the relevant authorities in that latter case. It will be remembered that the dictum of Oliver J in Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd [1982] QB 133 has been taken as a safe summary of [a key aspect of] this law and is used in Halsbury and elsewhere and, indeed, it survived not one but two recent cases in the House of Lords, Thorner v Major [2009] 3 All ER 945 and Yeomans Row, to which I will turn in a moment. The statement, which he adopted from Mr Michael Essien QC at that hearing, is as follows:

> "If A *[in this case the plaintiff]*, under an expectation created or encouraged by B *[in this case the deceased, Mr O'Boyle]* that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation." *[own emphasis]*

So, B must have created the expectation of "a certain interest in land" and A must have relied on that and then acted to his detriment. That dictum, as I pointed out in Murphy, applies to the estate of B or in this case Mr O'Boyle as to Mr O'Boyle himself. It is also clear, as I said in Murphy, on the modern authorities that the relief granted by the court must be proportionate to the detriment suffered. It is accepted that the representation is not confined to existing facts but extends to future conduct. It is also important to note at the outset as Lord Justice Robert Walker said in Gillet v Holt [2000] 2 All England Reports 289 at 301 that:

> " the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that. 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."

So that must be borne in mind always when dealing with Mr Justice Oliver's dictum. As I said, the matter was considered recently in what is now the Supreme Court and I will just conclude these brief remarks on the law by this quotation from Lord Walker of Gestingthorpe, as he has since become, in Yeomans Row Management Ltd & Anor v Cobbe [2008] 4 All England 713 [2008] UKHL 55 at paragraph 46:

> "46. Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v Dodds* (1985) 160 …,
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> > 'Under the law of [Australia]—as, I venture to think, under the present law of

> England—proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party "ought to win" and "the formless void of individual moral opinion".'"

[8] Bearing those dicta in mind, I turn to the facts of this case and I have not overlooked Mr Henry's closing submission from Snell on Equity [32nd Ed.] including, and I think it is probably presaged by what I have already quoted from, at page 398 the following quote:

> "The impossibility of a single measure of relief has created the formula that the remedy will be 'the minimum equity to do justice' to C and it is said that in proprietary estoppel cases 'equity is displayed at its most flexible'."

[9] Applying these principles to this case what do we find? The deceased who was born on 17 December 1920 was the eldest of five siblings. He himself died on 24 October 2003 after an illness which had become pronounced earlier in the same year. He had four sisters: Margaret Kinney who herself died in July 2009 and who is the mother of the plaintiff; Rosie McCormick who died on 24 March 1984 – she died without issue; Mary O'Neill who is happily still alive but is elderly and not before this court and the defendant, Mrs Sarah McKittrick who did give evidence before the court. If Mr Kinney does not succeed in his claim either in whole or in part all the property of the plaintiff i.e. effectively hill farms in County Antrim and the not insignificant sum of £209,000 in money will be divided per stirpes between the three surviving sisters who either are alive in the case of Mrs O'Neill and Mrs McKittrick or who have left issue in the case of Mrs Kinney. The court was told that the plaintiff, Mr Kinney, is entitled to half of his late mother's estate and, therefore, one sixth of Patrick O'Boyle's estate on an intestacy with his own brothers and sisters sharing the remaining one sixth. The two surviving sisters have children, but I think it is not necessary to go into the other relationships in any detail because the persons I have just named make up the dramatis personae of this case.

[10] The court will, of course, decide the case on the evidence and the court will look to see, bearing in mind the dicta, what promise was made here by Patrick O'Boyle regarding a certain interest in land and then whether Mr Kinney acted on it, and if so he acted on it to his detriment and the extent insofar as it can practically be established of that detriment.

[11] In considering the evidence, the court has the benefit of having had the witnesses at close quarters while they have given evidence. I have had the opportunity of considering their demeanour. In relation to the plaintiff, while at

times and, indeed, perhaps most of the time I considered he was being frank. I cannot say that I found his evidence at all times convincing. It is right to say, as his counsel argued before me, that sometimes his circumlocutory answers were just colloquialisms and I accept that, but one did wonder sometimes as to whether, given that he was on Oath, he did not want to say something too definite that would have offended against that Oath. I reach the conclusion having seen him, of course, examined-in-chief and cross-examined by counsel that I could not safely rely on all his evidence where it was not corroborated. He was more convincing on some aspects such as the work he did about the farm than on other aspects. It is right to say that I found the defendant a credible witness. The clashes between her and the plaintiff were actually surprisingly few, but they do exist and in particular I accept her evidence that the plaintiff's mother raised the suggestion that the lands will go to the fellow, meaning the plaintiff, and the money could go and be divided between the two other sisters. I prefer that evidence to that of the plaintiff that the deceased had told him that he, the deceased, had put that [proposal] to Mrs McKittrick in the hospital.

[12] A significant fact in favour of the honesty of Mrs McKittrick is that she volunteered, at an early stage it would seem, to her solicitors, that she had read in the paper that the deceased had purchased Gillians Farm. She had seen in a local newspaper that the deceased had bought that on trust for his nephew, Liam Kinney, the plaintiff, and that later Patrick O'Boyle confirmed that to her and, indeed, once, much later, she mentioned it to Mr Kinney. That was not his case, perhaps for an obvious reason, but she could have hidden that fact completely from her own solicitors and from the court, but she did not do so and that adds to her credibility.

[13] It is important bearing in mind the legal principles on which I have to act to consider what the plaintiff himself said and what his own case was about the promises made to him. He was asked about this, as of course he ought to have been, by his counsel and in the early years he said that maybe once or twice or possibly more often in passing in a year the deceased might have said something to him. Given the picture I formed of the deceased I do find that a little surprising that he would have mentioned it as often as that, but let us examine what the plaintiff himself says.

> "He would have told you there is nobody else for it only me."

Those are his exact words.

> "When he bought Gillians Farm he had to borrow money to do it and he told me I would have to work hard to pay for it and at the end of the day the place would be mine as there was nobody else for it."

I pause there to say that in a sense that is right, that there was nobody else for it in as much as, though there were three other younger nephews none of them seemed

to have taken great interest in the matter and it is clear Liam Kinney did take an interest in it. He lived less than two miles away. His own father had been a labourer rather than a farmer and they had only five acres and he was about what would have been his grandparents place as a boy in the Sixties and from then on. The plaintiff was born in 1955. So that is plausible enough, but one can see the ambiguity immediately as to whether, certainly after 1979, Mr O'Boyle was talking about Gillians Farm only or talking about the different lands up the mountain and down the mountain and in two different townlands.

[14] Counsel later at the appropriate time asked Mr Kinney why he left Michelin Tyres where Mr Kinney had worked for some 17 years or so as a process operator. It was about half an hour away and the wages were good. It was put to him that he preferred farming but he claimed that he liked the works of process operator. But when asked why he left Michelin he said it was to work on his uncle's farm. In quoting his uncle he said "There was no point in you killing yourself doing two jobs", that is working at Michelin and taking land at Bernard from Mr Delargy as Mr Kinney had begun doing in 1991. His uncle wanted him to do more as he was failing a bit and, indeed, he would have been 72 in 1992 when Mr Kinney left Michelin.

> "He was a healthy man but there was nobody else helping on the farm, there was no employee".

Later on he said he did the bulk of the work whereas earlier on he would have just been helping his uncle. In the end it was he who was doing the bulk of the work which is something that I accept as an honest statement. But you will see again there that there is a lack of precision. I accept as I said and as I found in more detail in McLaughlin v Murphy that in a case of this sort the plaintiff does not have to prove the degree of certainty that would be in a written contract, but nevertheless there must be enough, as other dicta have indicated, to show that the deceased in this case was creating and encouraging an expectation of a certain interest in land.

[15] What has been said so far is rather vague it seems to me even allowing for some of the other comments. When asked about this later he was saying "I was expecting the money and the farm. They were all to be mine", but again without any very particular quote and he said something which I found a little puzzling. He said he:

> "… would not have left Michelin without whatever promises uncle did make as he could not make up the difference. It would not have been possible."

But, of course, Mr Kinney's case is that his late uncle did not give him any money so the difference was not made up except by the modest amount of money that Mr Kinney made from the land which he took on conacre or what the accountant has described as Ground Rent, inappropriately, I think, in the accounts so I found

that a puzzling and ultimately unsatisfactory answer. Either Patrick O'Boyle was giving him some money or that does not explain why he left Michelin.

[16] It might be appropriate at this point to mention a point relied on by Mr McNeill, that his side were suspicious of where Mr Kinney had found the money to buy a not insignificant piece of ground in recent years in the neighbourhood for which he had to put up £100,000 in capital. To answer that his accountant prepared an analysis of how his savings rose up to 2005 and then sharply dropped showing that the £100,000 was found from those savings for the land purchase with the addition of a bank loan. They, therefore, dispelled and I find as a fact that they have not shown that there was any theft by Mr Kinney from the house of secret stores of cash. That has not been demonstrated to the court and, indeed, Mr McNeill resiled from making the allegation expressly, but as Mr Henry pointed out the idea was floating around. I do not make any such finding. But nevertheless the figures are a little puzzling because the amounts go up in uneven amounts which do not seem consistent with it being interest. Nor does the rate of increase bear out a reasonable appreciation of interest one might think, but oddly enough in a number of the years the amount the savings increased exactly corresponds with the amount that Mr Kinney declares to the Inland Revenue he had made as a net profit in his accounts to the Inland Revenue. It is surprising to see a correlation in at least three years and in effect Mr McNeill invites me to infer, and I think I do have to infer, and I do infer that Mr Kinney had some more income than we have been fully informed about. I am not going to conclude that he was misleading the Revenue, but it seems to me that either he was understating his income to the Revenue or he was being given cash by the deceased contrary to what he has tended to claim.

[17] Mr Kinney's credibility has been attacked by counsel for the defendant and I have just touched on one of the aspects in which I have to conclude that the evidence does call into question the credibility of the plaintiff, namely his express denial that he had received any money from the deceased. He said he did save money, a wonderful amount of money, that was when he was at Michelin. In answer to a question in cross-examination he said "I got no money from Patrick". Mr McNeill said "Never?" and he said "He never gave me any money", but of course in the Replies to the Notice for Particulars served by the defendant's solicitors there was an admission that he <u>had</u> got small amounts of money and that was reflected in an accountant's report. I have to conclude that I cannot accept his evidence there.

[18] I have to more widely bear in mind his evidence in an attempt to estimate the detriment that this man suffered. If there was detriment there was also benefit because somewhere between 1994 and 1996 he and his late mother moved from their cottage at 190 Garron Road to 128, the home of the deceased, where he, Mr Kinney, is still living. In that house they got a better house than they were in because Mr O'Boyle had used his money to do up the house, "square up the house" and modernise it. Mr O'Boyle then paid the rates on the house, paid the electricity, paid for the heating oil and I think implicitly paid for any repairs that needed to be

done. Mr Kinney said that he and his mother would have mostly bought the food, but there can be no doubt that they were getting a benefit by living in the property.

[19] Even more strongly than the small amounts of money is the matter of the vehicle. Counsel asked "Did Mr O'Boyle give you a vehicle?" and the witness said "No". "Did he give you the money for a vehicle?" "No. I bought the jeep with my own money in January 2002 …" said Mr Kinney "… for £12,000 and some pounds". "Would I be right?" he asked. Mr McNeill put it to him he was not and pointed out that, again, there had been an admission in the plaintiff's Statement of Issues and also in the accountant's report that the deceased had paid the plaintiff £15,000 to pay for the jeep. "That's not the question you asked me" said Mr Kinney when this was drawn to his attention and he then claimed that a week or 10 days after he had got the car Mr O'Boyle gave him the money for it. I have to find that that is not a very convincing explanation. Mr Henry is right to point out he had told his own lawyers about it, but either his memory is unreliable in the witness box in denying things that he knew to be the case or he had forgotten that he had already admitted them but it certainly is unhelpful to his case.

[20] In relation to that case, and it can be seen that the case is put even by the plaintiff himself in a rather muted fashion in his evidence, in relation to it the defendant also relies on the fact that the case was not made until a letter from his solicitors in March 2004 in response to a letter from the defendant's solicitors of December 2003. I accept that is the case. It appears from the evidence of Mrs McKittrick that relations were strained and that the Kinneys were not talking to her after the death of Mr O'Boyle and so maybe there were not many opportunities for doing that. But it is of considerable significance that at the meeting which I find took place in No 128 where the late Mrs Kinney was asking her sisters to agree to her son getting the land that she did not say: "Sure Patrick has promised it all along to Liam". I find it inconceivable that if these frequent promises, however worded, had been made to Liam Kinney by Patrick O'Boyle that his mother would not have known of them, and I find it inconceivable that if she did know that she would not have said it to her sisters and I accept Mrs McAllister's evidence [to the contrary] in that regard. Indeed, it is supported by the fact that Mrs Kinney died not immediately after these events but in 2009, and I would be most surprised if the plaintiff's solicitors, who have carefully prepared this case, would not have taken a Statement of Evidence from her if she was there telling them "Sure Patrick told me that, that he had promised the farms to my son".

[21] It seems to me that I cannot be satisfied, as I have to be by the plaintiff on the balance of probabilities, that the deceased did in fact make an enforceable promise that the plaintiff would get all his lands. I do accept, however, that some promise was made that the plaintiff relied on to some extent at least in leaving Michelin. There was some encouragement that he would benefit from coming home to help the aging uncle and one notes that he did that in 1992 before moving into the house in 1994. I accept and I find further that the plaintiff did suffer some detriment. He did work over many years for his late uncle.

[22] I listened carefully to the cross-examination of Mr McNeill as to the mode of operation of sheep farming and though he did not refer to it in closing I accept what he elicited, that the amount of work over a period of years is counted in days perhaps rather than months or even weeks and may amount to a few weeks other than the task of, of course, walking up and keeping an eye on the animals, but it is not certainly a full-time job to mind even the quite large numbers of sheep here, 200 of Mr Kinney's own, some 300 of the deceased's. But the nature of the promise is in my view, as advanced by the plaintiff, insufficient to make such a finding [as he seeks] in his favour. However, I do find there was some detriment and here we have the concession by the defendant, at a deplorably late stage because it should have been pleaded and it is quite reprehensible that it was not pleaded in the Defence to the action, that Mrs McAllister had always viewed Gillians Farm as really being held in trust for her nephew, the plaintiff.

[23] The plaintiff has marked on the map and the parties have agreed the extent of Gillians Farm. The map has been signed by the two solicitors involved in the course of this hearing and the court will retain this, though it may be consulted by the parties. Gillians Farm I find on the evidence before me consists of field numbers 2, 3, 4, 5, 6, 7, 8, 14, 15 and 16 and for the avoidance of doubt that also includes the house at the upper end of fields 2 and 3 occupied apparently by a former religious brother for many years without paying rent, and also some shares in the mountainside above. The defendant really now, and when I say now, this only emerged in the defendant's Statement of Issues just immediately before the hearing, accept that as properly falling to the plaintiff. I find that is a proper concession and I find that the plaintiff has established a title. I find that on the probabilities that was what the deceased was talking about, that he was promising him Gillians Farm and that is what he shall have.

[24] That leads to some issues not without difficulty. First of all, does Gillians Farm equal the detriment that Mr Kinney suffered by helping his uncle over the years particularly after the promise was made in 1979 and particularly after the uncle encouraged him to come and help him and to cease work in the Michelin factory? It may be and I am inclined on the probabilities to think there might be some wider detriment than perhaps the value of Gillians land; indeed, it has not been separately valued, with the map before me. It might be a third of the value of the property, but it might be less than that and in fact probably is less than that.

[25] Related to that difficulty is the difficulty of the dwelling-house. Number 128 Garron Road has been where Mr Kinney has been living for about 17 years depending on exactly when he moved in which he could not remember. It is his home. It was his grandparents place though he is now a single man, of course his mother having passed away. What can be done about that? It seems to me that bearing in mind the wise dictum of Lord Walker of Gestingthorpe, which I quoted, I would be going beyond what I am entitled to do by simply giving him either the

house or even a life interest in the house although that is conceivably what Patrick O'Boyle would have done if he had made a Will.

[26] We should bear in mind here and the estate has to bear in mind that at the end of the day Mr O'Boyle did not make a Will and these unhappy proceedings might well not have occurred under another statutory guise and in all likelihood would not have occurred if Mr O'Boyle had troubled to make a Will. The court repeats, as it has said before, that lay people, particularly those who own property whether modest or extensive, are very well advised to go to a solicitor and make their Wills while they are fit to do so. I come to the conclusion and I find that I should not hive off number 128. Mr Henry makes the point that while it is in the middle of the frontage of one of the farms that you could get access to the rest of the farm round it, but I accept Mr McNeill's submission that it would have a deterrent effect on the sale value of that farm if you tried to sell it with a disgruntled ex-owner, as he perceives himself to be, living in the middle of it and I think it is wrong to do that.

[27] The estate has a number of beneficiaries. There is no indication that any of the other nephews are very keen to buy it or farm it but whether or not they are it seems inevitable to me that with a number of beneficiaries the property will have to be sold. I will return to that in a moment, but it seems to me that I cannot in law grant Mr Kinney a life interest or other interest in the property. Therefore, what he will be granted is a title by a declaration that the defendant, Sarah McKittrick, holds Gillians Farm on trust for the plaintiff.

[28] The defendant has a counterclaim and the counterclaim includes £3,000 a year for use and occupation by the plaintiff of the house and lands since the date of Mr O'Boyle's death which comes to £24,000. They also have a claim for the stock which was valued after the date of death at £11,000 and some pounds. Apparently the value of sheep at the time was not high. What is one to do with these counterclaims? I take into account the submissions of Mr Henry that the court strives to do justice and in fairness here. He and Mr McNeill were singing from the same hymn sheet as Mr McNeill said, quite correctly, that the court would use its best endeavours to do justice. He accepted that if there was equity with Mr Kinney due to his reliance and his detriment that perhaps went beyond Gillians Farm the court might take that into account in relation to the counterclaim and when refreshing one's memory of the dicta that seems right.

[29] There is some modest equity to carry over. Is that enough to defeat a claim for both £24,000 for use and occupation and £11,000 for the stock? I think on its own it might not be, but I have to bear in mind that, of course, the court has found that the plaintiff is entitled to some of these lands and furthermore, as I averted to a moment ago, this arises from the failure of Mr O'Boyle to make a Will and, indeed, let us be blunt about it his failure to make his own intentions clear. The proper way to do that was by making a Will, but he does not seem to have made them clear in any other way. There is a degree of ambiguity and the estate, of course, stands in

the shoes of the deceased. For what it is worth I am inclined to think that Mr O'Boyle would not be keen to see the stock taken back from his nephew, but I do not give that excessive weight. Certainly there must be some difficulty in that some eight years after the death as Mr Kinney will have been keeping the two flocks presumably together. It is also perhaps right to say that it is hard on him in simple justice to have to move out of the house he has been living in for some years, subject to one point I will come to in a moment. Trying to balance the equities here I come to the conclusion that the proper course is that the defendant should not succeed on the counterclaim and I will make no award under the counterclaim and Mr Kinney may keep the sheep that were formerly his late uncle's and he need not pay for his use and occupation of the house and lands since the death of his uncle.

[30] As I have indicated, the lands other than Gillians Farm will have to be sold by the estate. I rule that the plaintiff is entitled to bid for those lands. He is not debarred from bidding for those lands. I direct that the lands be sold in more than one lot. The precise lots can be fixed by the auctioneer who conducts the sale and I direct that bearing in mind that some of the fields are cheek by jowl with Gillians Farm. It may be that Mr Kinney will want to buy those. Maybe he will want to buy the whole lot – that is entirely a matter for him, but the lands should be sold in two lots to at least minimise the chances of subsequent dispute between the occupiers and to give Mr Kinney a reasonable opportunity to purchase [some or all] if he so wishes. Of course, it is a matter for the Executors acting lawfully to decide whether it does go to auction or whether they wish to agree a sale by private treaty, and I give no directions and say nothing in connection with that.

[31] What I do say is that in arriving at this outcome I consider it relevant in equity to try and reach a conclusion which is just and also practicable and which hopefully will not lead to further litigation nor deepen the unfortunate antagonism which may have arisen between these close relatives in the course of these proceedings.