SUPREME COURT OF QUEENSLAND

CITATION:	*Etchison v ANZ Executors and Trustee Company Ltd* [2005] QSC 363
PARTIES:	**BARBARA LINDA ETCHISON** (plaintiff) v **ANZ EXECUTORS AND TRUSTEE COMPANY LIMITED ABN 33 006 132 332 (as executor of the will dated 14 March 2001 and codicil dated 28 March 2001 of HELEN ANN GORDON RIMMER deceased)** (defendant)
FILE NO/S:	BS 5186 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane
DELIVERED ON:	6 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12, 13, 14, 15 and 16 September 2005
JUDGE:	McMurdo J
ORDER:	**The claim is dismissed**
CATCHWORDS:	ESTOPPEL – ESTOPPEL IN PAIS – EQUITABLE ESTOPPEL – GENERAL PRINCIPLES – where the plaintiff nursed the defendant prior to her death at the plaintiff's home for approximately two years – where the plaintiff held power of attorney for the defendant – where the plaintiff was not paid for her nursing services – where the defendant paid the plaintiff rent for the use of her house – where the defendant told the plaintiff that she was to be paid for her work and that she was to put in an account to the estate for the "going rate" which would be in addition to any gifts left in the deceased's will – where the plaintiff was left approximately $350,000 in the will – where the plaintiff put in a claim to the estate for $228,000 being $25 per hour for 10 hours per day, 7 days per week for two and half years, plus additional expenses for the removal of a bathroom installed at the deceased's expense and the renovation of the kitchen, from alleged wear and tear from the deceased's live-in assistants – where the claim was based upon an alleged equitable estoppel – whether the plaintiff would have acted differently had she not expected to be paid in addition to any bequest left to her in the deceased's will – whether it was unconscionable, in light of the bequest,

for the estate not to pay the plaintiff the amounts claimed

Powers of Attorney Act 1998 (Qld), s 59

Commonwealth v Verwayen (1990) 170 CLR 394, followed
Gillett v Holt [2001] Ch 210, followed
Giumelli v Giumelli (1999) 196 CLR 101, referred to
Jennings v Rice [2002] EWCA Civ 159, discussed
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, followed

COUNSEL: D G Mullins SC for the plaintiff
D R M Murphy for the defendant

SOLICITORS: McCullough Robertson for the plaintiff
Gleeson Lawyers for the defendant

McMURDO J:

The case in outline

[1] Mrs Helen Rimmer died on 12 July 2003 leaving an estate worth about $1.5 million. The defendant is the executor of her will dated 14 March 2001. By that will, Mrs Rimmer left a legacy of $240,000, together with a share of the residue, to the plaintiff, Mrs Etchison. In all, Mrs Etchison inherited at least $350,000. With the exception of some small legacies, the balance of the estate was left to two charities. Mrs Etchison claims to be paid from the estate a further $258,883.42, or such other sum as the court determines, for the care which Mrs Etchison says she gave to Mrs Rimmer in the two and a half years before her death.

[2] Her claim is not in contract or in restitution. It is a claim upon the basis of an equitable estoppel. In essence, she says that Mrs Rimmer told her many times that she should be paid for these services from her estate, over and above whatever she was given by the will, and that she relied upon that assurance to her detriment. In particular, she says that she looked after Mrs Rimmer, day and night, seven days a week, from January 2001 when Mrs Rimmer moved from a nursing home to Mrs Etchison's house. The extent to which Mrs Etchison provided care is strongly challenged. Mrs Etchison says she was prevented from resuming her nursing career, by having to stay home with Mrs Rimmer. That is also challenged. And there are other but relatively less important aspects of her case of detrimental reliance, each of which is also disputed.

[3] Mrs Etchison says that Mrs Rimmer said that Mrs Etchison would be paid by her estate at "the going rate" for her care, and that the executor's failure to do so is unconscionable.

Events before 2001

[4] Mrs Rimmer was born in the United Kingdom in 1924. She qualified as a nurse before moving to Australia in the 1960s. Her brother, the late Professor William Burnett, had already moved to Brisbane. Through him she met Mrs Etchison, who

says that they were close friends from about 1965. I accept that they were friends for many years, although in the few years prior to 2001, Mrs Etchison was not amongst her closest friends. They were each nurses, but at no stage did they work together. Mrs Rimmer had no children and was widowed in the early 1990s. She lived in a house she owned at Clayfield. She also had an apartment at the Gold Coast. She owned race horses, both in her own right and as a syndicate member. It was through a syndicate that she met Mrs Holland, who was a close friend from the early 1990s until January 2001.

[5] Mrs Etchison, like Mrs Rimmer, is a widow with no children. Mrs Etchison had a successful career in nursing until 1981 when she was in a serious car accident in New South Wales. Subsequently she worked as a consultant to various hospitals. But for many years prior to 2001, she had not been involved in this or any other work connected with health care. In the late 1990s she was looking to do some retraining in order to resume nursing. She had maintained her nursing registration. She was aged about 65 when Mrs Rimmer, who was then about 77, came to live at her house in 2001.

[6] That is the house she owns in Beck Street, Rosalie. The house was (and is) divided into two sections. At the front, there was a two storey flat, with a kitchen downstairs and a bathroom upstairs, which she let for about $320 per week. She lived in the rear section, which was at ground level, where she had her own kitchen. The rear section had its own entrance, but there was an internal door connecting it to the flat.

[7] Mrs Etchison owned three properties in Toowoomba. One was a house which had been her home but which she was letting by 2001. There was another rental house and a third property which was made up of flats. By 2001, she was also conducting a cleaning agency business, under which she would act as an agent for people providing domestic services. According to her tax returns, this business yielded an income of about $5,000, with expenses of almost as much.

[8] Her tax returns also show an income from GIO General Ltd, of $11,594 for the 1999 year and $7,798 for the following year. At first in her evidence, Mrs Etchison said that this was for work done in her nursing consultancy. Later she seemed to accept, I think correctly, that this income was part of her compensation for injuries suffered in the road accident in 1981, which was during her travel to work. No such income appears in her subsequent tax returns.

[9] In about August 2000 Mrs Rimmer suffered an injury for which she was hospitalised. Upon her discharge she went to a nursing home at New Farm before going back to hospital and again to that nursing home. But there was not a permanent place for her there and alternative accommodation had to be found. She was being helped in all of this by her then closest friend, Mrs Holland, to whom she had granted a power of attorney. Mrs Holland was making considerable efforts to find somewhere suitable, when a place was offered at a nursing home at Jindalee. Mrs Holland accepted it and Mrs Rimmer moved there in December 2000.

[10] Mrs Etchison says that she rang Mrs Rimmer in August 2000, on a day which must have been not long before Mrs Rimmer's injury. Mrs Etchison had not spoken to her since the beginning of that year. Mrs Etchison was then out of Brisbane when Mrs Rimmer was injured and hospitalised. Towards the end of 2000, she went to

Mrs Rimmer's house to see her and was told by neighbours that she had gone to a nursing home. She found her at the Jindalee home and visited her in December.

Mrs Rimmer moves to Rosalie

[11] Mrs Etchison found Mrs Rimmer was in a poor state: she was physically frail and on heavy medication. Mrs Etchison began to visit her often. She says, and I accept, that Mrs Rimmer was unhappy at Jindalee and wanted to move. They agreed that Mrs Rimmer should move to Mrs Etchison's house where she would stay until she was well enough to return to her own house at Clayfield. According to Mrs Etchison, this required the revocation of the power of attorney which had been granted to Mrs Holland. Mrs Etchison contacted Mr Podowski, a solicitor whom she knew as a client of her cleaning agency. He went to see Mrs Rimmer at Jindalee, but was told by staff that Mrs Rimmer had dementia. According to a later letter from Mr Podowski (June 2001), he told Mrs Etchison that he could not attend to the revocation of the power of attorney without "an appropriate doctor's report", following which Mr Podowski received a report which was to the effect that Mrs Rimmer then lacked capacity to revoke the power of attorney.

[12] The report was by Dr G C Berry, Consultant Geriatrician, and dated 25 January 2000. Dr Berry saw Mrs Rimmer at the nursing home on 22 January. In that report Dr Berry wrote:

> "Since arrival at Jindalee Nursing Home, she requires full personal care assistance for showering and dressing, as she would not do these activities unless done for her. She is however very poorly insightful to her care needs and feels she does everything for herself and is bored. She is mobile with no aid and is continent.
> …
> She was poorly aware as to the reason she needed nursing home placement and had the concept that she would be returning home soon. When asked about her business affairs, she said she had none that needed any attention and she felt that she was able to look after all her own affairs without any help. When asked about an enduring power of attorney, she confirmed that this was in existence and was held by Mrs Patricia Holland, although she could not tell me where this person lived. She felt that she had made this enduring power of attorney 7 or 8 weeks ago, but had no memory of signing it. She said and I quote, that she "doesn't want to change it at the moment" and that she "was happy with it". This is at direct variance to her expressed wishes to the solicitor involved. She could not explain to me what an enduring power of attorney was. When I asked her what would happen if she became incapable, she said she would have to give the matter more thought, but she had no idea that Patricia Holland would be looking after her affairs in the event of her becoming incapable.
> …
> In summary, this lady has a degree of dementia sufficient to affect her executive functioning, such that she does not have legal capacity. Her legal capacity has been previously documented as being incapable and thus the existing enduring power of attorney is valid

> and that Patricia Holland is in charge of her legal, medical and lifestyle decisions.
>
> She is not capable of revoking the present enduring power of attorney, as she is incapable. She would not have testamentary capacity in the event of her wishing to change her will. In fact, when asked about whether she had made a will, she felt that her present will was obsolete and had no idea that a will remains valid until a new will is made.
> …"

[13] As it happened, on the day of this report, Mrs Etchison arranged for another solicitor to visit Mrs Rimmer at Jindalee. He is Mr Graham Isles, whom Mrs Etchison says she knew as another client of her cleaning agency. Mr Isles was accompanied by his book-keeper, who was a former nurse whom Mr Isles thought could assist in the assessment of Mrs Rimmer's capacity. It seems that Mr Isles was unaware that a specialist had seen Mrs Rimmer only a few days earlier. Mr Isles took with him a draft form of revocation of the power of attorney. He was satisfied that Mrs Rimmer did have capacity and she signed the form on that date, 25 January. Later that day, Mrs Rimmer left the nursing home with Mrs Etchison and went to live with her at Rosalie.

Wills and other documents

[14] On 31 January 2001, Mr Isles and his clerk visited Mrs Rimmer at Rosalie. He took a form of enduring power of attorney in which the names of the proposed attorneys had been typed. They were Mr Isles, Mrs Etchison and Beverley Hermann, who was and is a close friend of Mrs Etchison. Ms Hermann was present. Mrs Rimmer then executed that enduring power of attorney, as did the attorneys.

[15] On the following day, Mr Isles again saw Mrs Rimmer at Rosalie. According to his file note, he told her that he was concerned that she did not have a will and he asked her "the parameters for a new will" to which she "didn't really know what to put in the will". His note records that he then discussed possible gifts to Mrs Holland, Mrs Etchison and others, before saying that he would prepare a draft will for her consideration. On the next day, 2 February, he revisited Mrs Rimmer. He was accompanied by his book-keeper and a solicitor from another firm, whom he had asked to be present because of what Mr Isles says were his "concerns about capacity". He had with him a draft will which Mrs Rimmer then executed. It appointed Mr Isles and Perpetual Trustees Queensland Limited as executors and provided for a bequest to Mrs Etchison of $40,000, a bequest to Mrs Holland in the same amount, bequests of $1,000 for each of Mrs Rimmer's nephews (who lived in the United Kingdom) and the residue to be left to the Queensland Cancer Fund.

[16] By this stage Mr Isles was receiving correspondence from solicitors acting for Mrs Holland, challenging the revocation of Mrs Holland's attorneyship. And he was corresponding with the Office of the Adult Guardian, to whom Dr Berry had sent a copy of her report. On 5 February 2001, Mr Isles wrote to Dr P Mulholland, psychiatrist, asking him to examine Mrs Rimmer and to report as to her "mental health and capacity". Dr Mulholland examined her on 12 February and reported on 13 March 2001. Whilst Mr Isles was awaiting Dr Mulholland's opinion, he prepared a further will. In draft, it provided for gifts of $240,000 to Mrs Etchison,

$10,000 to Mrs Holland, $1,000 to each of the nephews, $200,000 to the Queensland Cancer Fund and $500,000 to the University of Queensland for the establishment of research fellowships in memory of Mrs Rimmer's late brother, Professor Burnett. Mr Isles says that he discussed this draft with Mrs Rimmer and she then instructed him to reduce the gift proposed for to Mrs Etchison from $240,000 to $80,000 and to increase the gift proposed for the University from $500,000 to $750,000. The residue was to be divided equally between each of the beneficiaries. The draft was amended (by hand) accordingly, and it was then executed on 18 February.

[17] Mr Isles was continuing to correspond with the solicitors for Mrs Holland and the Office of the Adult Guardian. Mrs Holland was continuing to challenge the revocation of her attorneyship. Mr Isles arranged for Mrs Rimmer to again revoke that power of attorney, but this time in the presence of a doctor, who was Dr Gianarakis, a general practitioner practising at Wellers Hill. He had seen Mrs Rimmer, in company with Mrs Etchison, on 30 January, and he had written the referral to Dr Mulholland. He then noted that Mrs Rimmer "had been taking medications which commonly cause mental confusion and sedation in the elderly" and that he had decided that she should cease to take them. When he saw her again on 9 March, he noticed a definite improvement in her mental alertness which he attributed to her ceasing the medications "along with the change in her living arrangements". He was of the view that she then had capacity to revoke the power of attorney. The revocation was executed in his presence on 9 March.

[18] Dr Mulholland had seen Mrs Rimmer on 12 February. In his report he wrote:

> "…
>
> 12. The overall clinical situation at this time is consistent with her having a mild degree of chronic organic confusional state and I expect that her condition fluctuates in the sense of her having good days and bad days. In other words she has a mild degree of dementia, however her overall intellectual functioning was satisfactory.
>
> 13. She was well aware of issues to do with Power of Attorney and Will. I was of the view that she had the necessary capacity to make a new Will if that is what she wanted to do and that she had the capacity to change matters in respect of Power of Attorney if that was what she wanted to do.
>
> 14. It needs to be pointed out that her mental state is likely to be subject to change and therefore it would be necessary to have her reviewed by a medical practitioner on the day if and when she was making any changes.
>
> 15. In summary my understanding of the situation is that there probably has been times in the past and especially so when she was on very substantial doses of Serenace and morphine +/- when she was medically ill when it is likely that she would not have had requisite capacities however for the most part at the present and recent time and especially when her medication is minimal and her general medical state is reasonable then she has

> the requisite capacities. However the condition is likely to be subject to change and ideally she should be assessed by a medical practitioner on the day that she was making any changes in order to make sure that her mental state is satisfactory at that time."

[19] On the following day, 14 March 2001, Mrs Rimmer made another will. She appointed Mr Isles and the defendant company as executors. There were gifts of $240,000 to Mrs Etchison, $5,000 to Mrs Holland and $1,000 to each of the nephews. She gave $200,000 to the Cancer Fund and $500,000 to the University of Queensland. The residue was to be divided equally between each of the beneficiaries. Mr Isles says that when he returned to his office after the occasion when this will was executed (again at Rosalie), he reflected upon the gift of the residue and as to whether it was appropriate for that to be divided equally between the beneficiaries, given the disparity between the various bequests. On 19 March he wrote two letters to Mrs Rimmer. In one he summarised the effect of the will of 14 March. In the other letter he suggested that the residue be divided between the various beneficiaries in proportion to the amounts of their respective bequests. He enclosed a draft codicil to that effect. Mrs Rimmer executed it on 28 March 2001.

[20] The court has granted probate of the will of 14 March 2001 and that codicil, on the application of the defendant. There is no challenge as to Mrs Rimmer's testamentary capacity as at 14 March and 28 March 2001, or to Dr Mulholland's opinion. It is possible to reconcile his opinion with that of Dr Berry, although she had seen Mrs Rimmer only some three weeks earlier, because when Dr Mulholland saw her, she had ceased the medication which he described as a mix of anti-psychotic drugs and a potent and sedating analgesic. In his March 2001 report he said that he would have expected that Mrs Rimmer was confused when she was on that medication.

[21] The relevance of this sequence of wills and other instruments is that it demonstrates the extent to which Mrs Rimmer had turned from Mrs Holland to Mrs Etchison. Until the beginning of 2001, Mrs Holland had been her closest friend. According to Mrs Holland's evidence, which I accept, Mrs Rimmer had told her that she would be left most of her estate. There is no suggestion that prior to 2001 Mrs Rimmer had any intention of leaving Mrs Etchison any of her property. But Mrs Rimmer had been very unhappy at the Jindalee home, and had come to blame Mrs Holland for her predicament. She was very grateful then to Mrs Etchison for taking her out of the nursing home to Rosalie and for, as I will discuss, the substantial care which Mrs Etchison was then providing for her. Clearly Mrs Rimmer was intent on demonstrating her gratitude by the terms of her will.

[22] Mrs Etchison says that at all times she remained unaware of the contents of any will, and that although Mrs Rimmer told her that she would be given something, she had no idea of what it would be. I accept this evidence, which is unchallenged.

Mrs Rimmer at Rosalie

[23] As I have mentioned, Mrs Etchison's house was divided into two sections. When Mrs Rimmer moved to the house on 25 January 2001, tenants occupied the flat. Mrs Rimmer had to be accommodated in Mrs Etchison's relatively small section at the rear. The tenants vacated on about 16 February 2001, at the end of their lease.

Mrs Rimmer then moved into the flat, becoming the new tenant at a rent of $300 per week. The bathroom in the flat was upstairs, which made it impractical for Mrs Rimmer's use. So a bathroom was constructed downstairs within the flat. It was Mrs Rimmer who paid for the cost of its installation (which I find was $6,150) in August 2001. Mrs Etchison says that Mrs Rimmer agreed that she would also pay for the removal of this bathroom when Mrs Rimmer returned to her own house at Clayfield. But Mrs Rimmer remained at Rosalie until her death in July 2003. The bathroom is still there and the flat has a new tenant. Still Mrs Etchison says that she would like to see the bathroom removed and she makes a specific claim in these proceedings for the estimated cost. I accept that the current cost of removal would be of the order of $12,700.

[24] Mrs Rimmer was renting both the downstairs and upstairs of the flat. Although she did not go upstairs, she used it to accommodate the several people who stayed overnight to provide her with paid assistance. The assistants would usually work in two day shifts, for about $50 per day. The nature and extent of that assistance is not entirely clear. Mrs Etchison says that they were effectively cooks and cleaners for Mrs Rimmer and that anything in the nature of nursing care was still provided by her. One of these people was Mrs Baker, who was called in the plaintiff's case. She said that she worked two days a week as a cook and cleaner, staying overnight, and that she did two hours work in the morning and three hours in the afternoon, although she would be at the house all day. At other times she would sit with Mrs Rimmer and watch television or talk with her. She did not assist Mrs Rimmer with any medication and she recalled Mrs Etchison's constant attention in that respect and in other ways, such as helping Mrs Rimmer to use the bathroom. Another assistant was Miss Hicks, who described her own tasks as the washing, ironing, cooking and cleaning "and to sit, if needed be" with Mrs Rimmer. She said that Mrs Etchison would give Mrs Rimmer her medication, bathe her and help her get dressed. Sometimes the three of them would go out to a restaurant or shopping. She was reluctant to assume any responsibility for Mrs Rimmer's medication and was happy to leave that to Mrs Etchison.

[25] But there is evidence indicating that some of these assistants did administer medication. At least for some of the time that Mrs Rimmer was at Rosalie, it was the practice of assistants to record details of Mrs Rimmer's health and care on a daily basis within a diary which was kept in the flat. In the 2002 diary there are extensive daily entries from February through August. There are recorded details of the particular medication taken by Mrs Rimmer on each day, and often of things such as what she had eaten, when she had slept, and other notes of her health. Yet according to Mrs Etchison it was only Mrs Etchison who administered medication. At least during this six months or so in 2002, I do not accept that as correct. These diary entries, written by various assistants, are more likely to have been records of what the assistants had themselves done on the day (including assistance with medication if Mrs Rimmer required assistance), than their recording of what Mrs Etchison was doing. In many cases Mrs Etchison made her own note next to an assistant's note. Almost invariably Mrs Etchison initialled the assistant's note. It is not likely that these are records of things done by Mrs Etchison, but that she had the various assistants make notes of them, rather than noting them herself. Her evidence that she provided all of the assistance in the nature of nursing is supported by at least the evidence of Mrs Gray and Miss Hicks, that they did no work of this kind. However, perhaps some assistants were given more responsibility than others.

[26] Although several witnesses described Mrs Rimmer's frail condition, they said that she was reasonably alert and had some mobility. She was not bedridden and she was able to be taken out to shops and restaurants, or occasionally on Mrs Etchison's trips to Toowoomba. When she was at Rosalie her general practitioner was Dr Scott. He paid about twenty home visits from September 2001 until June 2003. He described her illnesses as severe emphysema, heart failure and osteoporosis. At a stage quite close to her death she also developed an infection on her foot which required frequent attention. According to his evidence, which I accept, Mrs Etchison was "acting appropriately as a provider of nursing care".

[27] Mrs Etchison says that she was attending to Mrs Rimmer on a full time basis, from early morning until late at night, on nearly every day. Consistently with that, she says that any reasonable allowance for her work should be calculated on the basis that she was working at least a ten hour day. I am satisfied that she provided very valuable assistance by overseeing and co-ordinating the work done by the various assistants, by helping Mrs Rimmer in the administration of medication and often physically helping Mrs Rimmer to move about and to do things such as bathe and dress. She also provided constant companionship for Mrs Rimmer. What all of that amounted to as an average per day cannot be assessed with any precision. But for several reasons I am not persuaded it was something approximating ten hours per day over the whole time that Mrs Rimmer was at Rosalie. First, the very considerable assistance which Mrs Etchison provided did not keep her at home. She continued to carry on her cleaning agency business and actively manage her rental properties in Toowoomba, including organising significant improvements to them. From August through October 2002, she was employed two days a week at the Greenslopes Hospital, resuming her nursing career. She says that she had to give up that work, and to reject an offer of full time employment, because when at work she was being repeatedly telephoned by Mrs Rimmer. Whether she stopped this work for this or other reasons is discussed below. But Mrs Etchison must have believed that she could leave Mrs Rimmer in the care of others whilst she went to work at the hospital. The extensive diary entries for much of 2002 indicate that the various assistants then employed by Mrs Rimmer were reporting upon Mrs Rimmer's day in terms which suggest that Mrs Etchison had not been home. And the diaries indicate that on a routine basis, the assistants were administering at least much of the medication, although under Mrs Etchison's supervision at the end of the day in question. At least once there was in place the system whereby the assistants were living and working at Rosalie, Mrs Etchison's workload must have lessened. I accept that until that system was in place, Mrs Etchison was working full time in the care of Mrs Rimmer and that, for that relatively short period, she was precluded from doing much else and, in particular, things outside her own home. I find that it was the need to be relieved of that burden which led to the employment of these assistants. Just when that system was put in place does not precisely appear from the evidence. It was not in place before Mrs Rimmer became a tenant of the flat, which was on or shortly after 16 February 2001. But it was in place by mid 2001, because some records kept by Ms Knight, a book-keeper employed by Mrs Rimmer, date from June 2001 and show expenditure for the assistants by then.

[28] In her evidence, Mrs Etchison was at pains to avoid describing these assistants as "carers". This was consistent with her maintaining that none of these people was involved in administering any medication or providing anything other than a cooking and housekeeping service. The particular contribution of an assistant probably varied from person to person, but as I have said, in many cases the role

went beyond that which Mrs Etchison would now concede. In the one tax return of Mrs Rimmer which is in evidence, she claimed that in the year to June 2002, she spent $17,243 upon the deductible item of "home care", an amount which substantially corresponds with the book-keeper's record as paid to "carers". The records show the amount for carers as progressively increasing through that financial year. The total expenditure for July, August and September was $2,810 whereas the expenditure for the following April, May and June was $5,450. Yet the extent to which Mrs Rimmer needed cooking and housekeeping could not have changed much. What the records indicate is that more personal assistance was being provided by the live-in carers, thereby lightening the load upon Mrs Etchison.

[29] I accept that in the last few months of her life, Mrs Rimmer required and received relatively more care from Mrs Etchison. In broad terms, Mrs Etchison's care was a full time task for the first and last few months of this two and a half year period. Otherwise I accept that Mrs Etchison provided daily and valuable care, but not on anything like a full time basis as she claims, and probably amounting to something no more than an average of two hours per day.

[30] Mrs Etchison kept no record of the time she was spending in looking after Mrs Rimmer. Ultimately, no precise assessment can be made. But I am not persuaded that, averaged over the two and a half years, Mrs Etchison's assistance, valuable though it was, involved more than four hours a day (allowing ten hours a day for six months and two per day for 24 months).

Mrs Etchison's pleaded case

[31] Mrs Etchison pleads that at about the end of February 2001, at the request of Mrs Rimmer, she agreed to provide full time nursing care for Mrs Rimmer until she was able to return to her own home, or until she died. She claims that there was a common intention that she would provide this care for remuneration calculated according to the hourly rate then payable for a registered nurse, and that Mrs Etchison would "cease the pursuit of nearly all outside employment or other sources of income". There are other elements of this alleged agreement some of which will be discussed below. She pleads that the relevant rate of payment for a nurse of her experience would be $41 per hour, yet she claims for:

> "... $228,000.00 being $25.00 per hour for 10 hours per day, 7 days a week for 2½ years, from on or about 17 January 2001 to the date of death."

She further pleads that:

> "The agreement and the common intention were pursued and implemented on the mutual understanding and expectation of the plaintiff and Mrs Rimmer that upon her death the plaintiff would be entitled to claim from the defendant … compensation for and in respect of the service provided by her; and … any reasonable claim for loss incurred by the provision of the said service."

[32] This is not a claim for monies owing pursuant to a contract or for damages for breach of contract. Nor is it a restitutionary claim. It is a claim based entirely upon an alleged equitable estoppel. Mrs Etchison alleges that she relied to her detriment

upon an expectation or assumption, created by what Mrs Rimmer said, that she would be paid for her work and that she would not suffer any loss for having performed it.

[33] The principal component of her claim is for that sum of $228,000, i.e. a payment for the care which she provided. In that respect, her case is that she detrimentally relied upon the expectation by her personal exertion in looking after Mrs Rimmer. That is not a financial detriment, because absent other circumstances, she would not be worse off for having done so. But it may be a sufficient detriment to found an estoppel. In *Gillett v Holt* [2001] Ch 210, Robert Walker LJ said:[1]

> "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."

[34] She claims that her care for Mrs Rimmer prevented her from earning other income, particularly by resuming her nursing career. That is an allegation of financial detriment. But she does not claim an amount said to represent the income lost by not resuming nursing. Nor does she claim an amount by which her cleaning agency was affected. She does claim that her inability to earn income left her short of funds and resulted in her paying interest (totalling $10,167.26) on an overdraft and credit card accounts.

[35] She claims some further amounts in connection with Mrs Rimmer's occupation of the flat. The first is for removing the bathroom. The second is for the replacement of the carpet in the flat, allegedly in consequence of more than usual wear and tear during Mrs Rimmer's time. The third is for the cost of work in the flat's kitchen, again said to be the result of unusual wear and tear during Mrs Rimmer's time, caused by the live-in assistants. And there is a further claim of some lost rental for the few months after Mrs Rimmer's death during which that kitchen work was performed.

[36] On these bases Mrs Etchison seeks an order for the payment of "$258,883.42 or such other sum by way of equitable compensation in such amount as the Court may determine". And she seeks the imposition of a constructive trust upon the estate in this amount.

Mrs Etchison's expectations

[37] I accept that about the time Mrs Rimmer moved into the flat, she said that she wanted Mrs Etchison to nurse her and that she would pay "the going rate" until she was well enough to go home. As to what was meant by "the going rate", Mrs Etchison said (without objection) that her own understanding, which she thought was Mrs Rimmer's also, was the "going rate of a registered nurse for nursing somebody in their own home". Mrs Rimmer made this statement in the context of her intending to return to Clayfield. Subsequently that ceased to be a possibility as both women must have realised. Yet no payment was then made to Mrs Etchison,

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1 At 232

or apparently then sought by her. Instead, on several occasions Mrs Rimmer said words to the effect that Mrs Etchison should render an account to her estate, in addition to whatever was left to her under the will. I accept Mrs Etchison's evidence that Mrs Rimmer made statements to this effect, supported as it is by diary notes made by Mrs Etchison, which in some cases were acknowledged by Mrs Rimmer's initialling the note at Mrs Etchison's request.

[38] According to Mrs Etchison's diary note on 12 May 2001, Mrs Rimmer said words to the effect that she did not want a certain person, then acting as her carer, to continue, but that she wanted Mrs Etchison to be her paid carer and that Mrs Etchison could "charge the estate". On 11 December 2001 Mrs Etchison made this note, which I accept was then initialled by Mrs Rimmer:

> "She said how happy she was with me, and that she considered me to be her best friend – That she loved me – and had left me a considerable sum in her will – that she also wanted me to be paid for my nursing her and looking after her – and that there was no need for me to go out to work – I would get the going rate and I should put in an a/c to the Estate – 'But I'm not intending on going yet'!! she said. I explained the situation of the horse $2,500/month to pay and how the money wouldn't last even for her. I asked would she consider selling them – to think about it – which she said she would do. …"

On 22 February 2002, Mrs Etchison made this note, again initialled by Mrs Rimmer:

> "Helen/Barb discussed money affairs and cash flow. I expressed my worry that the money was dwindling – people had to be paid and tax and rates etc. She said she had money enough. I could be paid from the estate, 'put an account in for the going rate'. 'The housekeepers are paid.' she said. 'Do we really need them. They are useless buggars anyway'. I explained that I couldn't work 24 hours/day. Helen stated how much she needed me and how she appreciated my looking after her. 'We are both matrons and need to stick together', she said. I have you in my will and you are to put an a/c into the estate when I die for the going rate. 'Don't leave me,' she said, 'and get rid of that creature [an apparent reference to a particular assistant]."

On 3 April 2003, Mrs Etchison diarised a conversation with Mrs Rimmer in these terms:

> "You are the one doing everything but you will be paid - - I explained the tax situation which I would be in – 'It will be a gift from me to you' she said, and is nobody's business. Put a bill in to the estate if worst comes to worst'. … [carer] sitting on bum doing nothing, I'm paying them for that" – she said to the carer, 'Get up of your bum I'm paying you. Don't be breaking my chair!'"

On 30 May 2003 Mrs Etchison wrote:

> "Helen says there is no better nurse and I must do it. She expressed her concern that I was not taking money for payment for all that I was doing for her. I said, 'Don't worry love let's just get you better.' She said, 'You know I always pay my way – you are to be paid and put in an a/c to the estate – for the going rate, and – you'll have a gift from the estate as well – you might be surprised.
>
> All this seems to be in Helen's mind, I think the pain of the foot is getting to her. I am desperately trying to get that foot better. It looks horrible."

And on the next day, she wrote:

> "Helen reiterated that I must be paid from the Estate and that the gift from the will had nothing to do with it and was nobody's business. I'm finding this somewhat embarrassing especially in front of others."

On 2 June 2003, Mrs Etchison noted:

> "She seemed to be worried that I was not being paid and talked about giving me payment. 'If worst comes to worst, put a bill into the estate if anything happens to me' but then quickly added 'but I'm not going yet!'"

On 12 June 2003 Mrs Etchison wrote:

> "I expressed my concern re the a/cs and said to both Ethel and Helen that they needed to turn the 0^2 off when not using it. It was a very expensive machine to run. Helen said, 'I'm paying for it'. I said, 'Yes, but the money won't last forever, and its getting thin.' She said that I didn't know all that she had. We joked about having it tucked away in Annie's room!! I said I only saw what comes in and goes out. She expressed emphatically that I was to be paid the going rate for what I was doing. She appreciated all that I was doing and that I was also in the will which had nothing to do with it. She didn't want to be paying those other buggars (mainly the agency staff and therapeutic nurses). We had talked about the cost of the dressing $25.00 per time and $140 for 6 hours shift for Agency."

Lastly, on 11 July 2003 (a few days before Mrs Rimmer's death) Mrs Etchison noted:

> "Seemed a lot better – altho she said she was dying and put her head over to mine – She gave me some instructions – She said she expected me to 'put a claim in' as she stated 'for all the goodness in caring for me' and she would haunt me if I didn't'. … Helen stated once again that she was leaving me a 'considerable legacy and it was nothing to do with the money I was to claim from the estate'."

[39] If there was a common intention that Mrs Etchison be paid, why was she not paid by Mrs Rimmer? One reason suggested by the diary notes was a concern about Mrs Rimmer's finances. But whether Mrs Etchison knew it, Mrs Rimmer was able to

spend more for her care than she was paying to the various live-in carers. According to her tax return for the year to June 2002, she had a taxable income of $56,100 on which she was able to claim a rebate of 20 per cent of her medical expenses of $18,771 (which included the amount of $17,243 I have mentioned for the carers). Most of her income came from a pension paid from the United Kingdom, but she also earned about $18,000 in interest and dividends. Mrs Rimmer was able to manage her own finances, assisted by a book-keeper and a tax agent. The book-keeper, Ms Knight, came to the house once a month to prepare a journal and reconcile the cash paid on Mrs Rimmer's behalf. Mrs Rimmer would regularly write cheques of the order of $1,000, which Ms Hermann would cash at the bank. The cash would be used to pay carers and buy groceries and other items for Mrs Rimmer. It was also used for Mrs Rimmer's rental payments to Mrs Etchison (usually made three months in advance) and to pay for the installation of the bathroom. Mrs Etchison says that although she was not privy to Mrs Rimmer's financial affairs, for some reason she was concerned that Mrs Rimmer was running short of money. Possibly, Mrs Rimmer led her to believe that.

[40] In her evidence, Mrs Etchison referred to another reason why she was not paid by Mrs Rimmer. It was that she had been advised by Mr Isles that if she became a paid carer, the enduring power of attorney would be revoked. I accept that she was given that advice by Mr Isles. Section 59 of the *Powers of Attorney Act* 1998 (Qld) provides that if an attorney becomes a paid carer, the enduring power of attorney is revoked to the extent that it gives power for a "personal matter".

[41] There may have been other reasons for Mrs Etchison not making a claim on Mrs Rimmer. After all, this was not a commercial relationship; it was through their friendship that Mrs Rimmer came to live at Rosalie and to be looked after by Mrs Etchison. Much of the benefit provided to Mrs Rimmer was the companionship of a friend, and Mrs Rimmer must have provided some companionship to Mrs Etchison. In this context, it is understandable that Mrs Etchison would not have thought it appropriate to bill her friend according to the number of hours she spent in her company.

[42] Mrs Etchison does not say that she had legal advice, from Mr Isles or anyone else, that she could expect to be paid when Mrs Rimmer died. She did consult Mr Isles about that shortly after Mrs Rimmer's death. As I have mentioned, she did not keep records of what time was spent in looking after Mrs Rimmer. However, I am satisfied that well before Mrs Rimmer's death, Mrs Etchison intended to make such a claim as this, and believed that it might be accepted.

[43] In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-9, Brennan J defined the elements of an equitable estoppel, the first of which is that:

> "the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship."

Without legal advice, this plaintiff could not have been confident that she would have a legal relationship with Mrs Rimmer's executor under which it would have to pay for her services. The fact that Mrs Etchison did not keep any record of her

time, from which she could ultimately present an account at the "going rate", is a strong indication that she did not expect that the estate would be obliged to pay her. Mrs Etchison impressed me as an efficient and methodical person, who would have kept such records had she expected that she would be entitled to payment. I am not satisfied that her state of mind reached an expectation that a legal relationship would exist between her and Mrs Rimmer's estate. I do accept that during Mrs Rimmer's lifetime, she was minded to make a claim such as this once Mrs Rimmer had died, an intention which was induced by Mrs Rimmer's statements.

Detrimental reliance

[44] The third element of an equitable estoppel, according to Brennan J in *Waltons Stores*, is that the plaintiff acts or abstains from acting in reliance on the expectation.[2] As I have mentioned, the principal part of this plaintiff's case is that she acted or abstained in reliance upon an expectation of payment, by her personal exertion in caring for Mrs Rimmer. The extent of that care has been discussed. The present question is whether it was provided in reliance upon her receiving payment for it from the estate, in addition to whatever she was left under the will.

[45] Mrs Etchison says, and I accept, that she did not know the contents of the will. Mrs Rimmer told her that she would be left something; but she does not say that she had any particular expectation of how much she would be left. As it happened, she has inherited far more than she could claim as a fair remuneration for her services according to a "going rate", even had she worked the number of hours which she now asserts.

[46] Would Mrs Etchison not have done what she did out of friendship and gratitude for a promised bequest, especially had she known of its extent? Would she not have seen the bequests to her as a sufficient reward and been minded to provide the same assistance without expecting some further payment? Those questions were not directly addressed in Mrs Etchison's evidence. Instead, it is argued on her behalf that the bequests in her favour are irrelevant to this case. The reason advanced is that the common understanding was that Mrs Etchison was to be paid from the estate in addition to whatever sum was left by the will. That submission is discussed below. But first it is necessary to consider whether Mrs Etchison's care was provided in reliance upon whatever hope or expectation Mrs Etchison had of being paid for it. This is a factual issue of causation. The plaintiff need not prove that the hope or expectation of payment was the sole reason for her assistance if it was a substantial cause of her doing so. There were other causes. As Mrs Etchison emphasised in her letter to the executor dated 12 September 2003, one was the friendship between these two women. Another was the expectation of a bequest. In my view, Mrs Etchison was happier to assist knowing that her friendship and efforts were likely to be recognised by Mrs Rimmer's will. Because Mrs Etchison was not suffering a financial detriment by looking after Mrs Rimmer, in my view she would have provided this care for these reasons, had she been given no hope of payment from Mrs Rimeer or the estate. That view is fortified by the terms of her letter to the executor.

[47] Upon the hypothesis that Mrs Rimmer had not made these statements as to payment from the estate, and Mrs Etchison had not thought that she would make such a claim

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2 At 429

for her care, would she have provided the same assistance? Realistically that hypothesis should include an element that Mrs Etchison knew of the likely extent of her inheritance. Upon that hypothesis, I am not satisfied that Mrs Etchison would have acted differently, and that in particular, she would not have provided assistance for Mrs Rimmer at all, or to the same extent.

[48] I turn then to the alleged financial detriment. Mrs Etchison had been conducting a business of a cleaning agency. The tax returns show that she continued to do so and at about the same level of turnover and expenses after Mrs Rimmer moved to Rosalie. In each case the expenses for the business were close to the relatively small income. I am not persuaded that she lost the prospect of building up this business and thereby suffered any significant detriment in that way.

[49] Mrs Etchison claims that she was precluded from re-entering the nursing profession. She had not been involved in nursing care itself, as distinct from some consultancy work, for many years prior to 2001. Indeed upon one view of the evidence, she had not been engaged in actual nursing since her 1981 car accident. As mentioned, she was still receiving substantial payments in consequence of that injury until 2000. Perhaps it was the prospect that those payments would cease which led her to look to resume nursing work. But the fact that she had been so many years out of the profession makes it more difficult to accept that she would have been in work for all, or at least much, of the period when Mrs Rimmer was with her. There is an incomplete picture presented by the evidence of her attempts to re-enter the nursing profession. She had retained her registration as a nurse but she needed to do some retraining. There is a letter to Mrs Etchison of 9 June 1998 from the Wesley Hospital advising that she had been placed on a waiting list for the Nurse Re-entry program scheduled to start in August 1998. There is a further letter from the Wesley Hospital dated 2 November 1999 to the effect that the hospital was considering whether it would continue to conduct a Nurse Re-entry Program and suggesting that Mrs Etchison contact the Queensland Nursing Council as to alternative programs. Plainly Mrs Etchison had been trying to obtain some retraining but was unsuccessful at least by the end of 1999. There is a recent certificate that Mrs Etchison had completed a refresher course at the Queen Elizabeth II Jubilee Hospital from January to June 2005. And she worked at the Greenslopes Private Hospital from 5 August to 25 October 2002 as a registered nurse for a total of 213 hours for which she received a gross income of $6,377. The evidence does not demonstrate when it was that she did complete the refresher course of the kind she was originally seeking to undertake at the Wesley Hospital. According to her oral evidence, she was qualified in 2000, but in her letter to the executor of 12 September 2003, she says that she was not qualified when Mrs Rimmer moved in. Her employment at Greenslopes indicates that she was qualified by then.

[50] Her employment over that period of almost 12 weeks at Greenslopes suggests that her care of Mrs Rimmer did not prevent her from working as a nurse. Her evidence is that she received so many telephone calls from Mrs Rimmer, when at work at Greenslopes, that she felt pressured into leaving that employment. Notably, her diary does not refer to her having to give up this work to return to the house or to some relevant conversation with Mrs Rimmer at about this time. I am unpersuaded that she stopped working at Greenslopes for this reason, rather than because the work was no longer on offer or she was no longer minded to do it. By the time Mrs Rimmer came to Rosalie, Mrs Etchison was approaching her 65th birthday, she had

not worked in nursing for many years, and she was occupied by her cleaning agency and her management of her rental properties in Toowoomba. I am not persuaded that her caring for Mrs Rimmer deprived her of income by re-entering the nursing profession earlier than when she did at Greenslopes, or prevented her from working more extensively as a nurse. She was no doubt intending to return, if possible, to nursing when Mrs Rimmer came to live with her. I accept that it would have been impossible for her to do so (had she then been qualified) before the system of live-in carers was in place.

[51] Another alleged detriment is said to be the cost of removing the bathroom. The flat has been relet and Mrs Etchison has not had the bathroom removed. I have accepted that the current cost is of the order of $12,700. But I do not see why, if she considers it a disadvantage, Mrs Etchison has been unable to have this bathroom removed, at least now that she has this inheritance.

[52] Next she claims the cost of work which she has had performed in the kitchen. I am satisfied that she did have work performed as pleaded in paragraph 11(c) of the statement of claim, involving a total cost $6,488.80.[3] I am not satisfied that this work was warranted by anything more than normal wear and tear within rented premises. The replaced items had been used by previous tenants and were about ten years old by the time Mrs Rimmer moved in.

[53] Next is her claim that she suffered loss by being unable to *immediately* relet the area following Mrs Rimmer's death. That seems to be related to her claim for repairs to the kitchen, in that it took time for that work to be done because, she claims, she was short of money from staying home to look after Mrs Rimmer. Given what I have said about the kitchen work, it is perhaps unnecessary to discuss this claim further. But I am not persuaded that she was delayed by scarcity of funds, and nor is it proved that if there was a scarcity, it was for the reason claimed.

[54] Lastly, there is a claim for an amount of $10,167.26 which is said to represent at least some of the interest expense from her being without other income, through having to care for Mrs Rimmer. This is the interest on her credit cards from January 2001 (totalling about $7,000) and a balance of about $3,000 as the interest on an overdraft account from then. This involves a focus on but a part of her financial position, which was affected by many things, such as what she was spending upon the maintenance and improvement of her rental properties.

[55] I conclude then that she has not demonstrated any financial detriment from her caring for Mrs Rimmer. She has not proved that she would have been wealthier had Mrs Rimmer not come to live with her.

Unconscionability?

[56] For an estoppel of this kind, the relevant equity arises from the unconscionability of the defendant's leaving the plaintiff to suffer a detriment occasioned by its conduct or conduct for which it is responsible: *Waltons Stores* at 426-7. The appropriate relief is designed to prevent such unconscionable conduct and so to do justice between the parties: *Waltons Stores* at 404; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 411, 413, 429, 454 and 487. Accordingly the plaintiff's detrimental reliance is relevant to, although not necessarily determinative of, the relief which

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[3] The amounts pleaded in para 11(L) save that $1,329 is allowed for the oven and $344.50 for the tiles

will be ordered. In *Waltons Stores*, Brennan J expressed that relationship, between detrimental reliance and the appropriate equitable relief, as follows:[4]

> "But the better solution of the problem is reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side wind. Equitable estoppel complements the tortious remedies of damages for negligent misstatement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance of what another induces him to believe."

[57] In *Verwayen*, Deane J said that prima facie, the estoppel should operate to preclude departure from the assumption (or expectation), and that it is only where the relief framed on the basis of the assumption would be "inequitably harsh, that some lesser form of relief should be awarded".[5] At 445 Deane J added that:

> "the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted."

That passage was endorsed in the joint judgment of Gleeson CJ, McHugh, Gummow and Callinan JJ in *Giumelli v Giumelli* (1999) 196 CLR 101 at 123-125. As Deane J then said, the relevant circumstances of the case can go beyond the plaintiff's expectation and the plaintiff's detrimental reliance. In assessing whether the prima facie entitlement to have the expectation fulfilled is displaced, it is necessary but not sufficient to have regard to the particular detriment.

[58] Mrs Etchison argues that the size of her bequest is not such a relevant circumstance. In that argument, the terms of Mrs Rimmer's statements, and of the corresponding alleged expectation, are emphasised: Mrs Etchison was to be paid beyond whatever was left to her in the will. That argument seems to elevate the plaintiff's alleged expectation to a level where it cannot be affected by other considerations.

[59] The executor submits that the testamentary gifts to Mrs Etchison are relevant, at least because they should defeat this claim by the operation of the presumption of satisfaction, i.e. a presumption that the testatrix intended to satisfy her obligation (if any) to pay for Mrs Etchison's services by testamentary gifts in her favour. In my

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4 At 427

5 At 443

view the resolution of this case is not through the operation of that presumption. The presumption is rebuttable, and Mrs Rimmer's several statements to the effect that Mrs Etchison ought to be paid, over and above what was left by the will, would rebut it. And there would be other difficulties with the operation of the presumption of satisfaction. One is that according to what was said by Mrs Rimmer, payment would be made not by her, but by her estate: it was to be the executor and not Mrs Rimmer who was subject to the obligation. Further, if there was an obligation upon Mrs Rimmer, the amount she was obliged to pay varied from the date of the will, and an intention could not be presumed, at the date of the will, to satisfy by the legacy of a fixed sum, the indebtedness of the testatrix as at the date of death.[6]

[60] As I have found, the substantial detriment suffered by Mrs Etchison was not a financial detriment. It was the detriment of Mrs Etchison's personal exertion which, of itself, has not made her financially worse off. In essence, the argument for a refusal of this claim being unconscionable involves the suggested unfairness of her being unrewarded for her efforts. Yet she was rewarded by the operation of the will. The relatively large provision made in her favour was surely due to Mrs Rimmer's gratitude for her efforts.

[61] I infer that prior to 2001, Mrs Etchison was not mentioned in any will of Mrs Rimmer. Mrs Holland gave evidence to the effect that Mrs Rimmer had said that Mrs Holland was to be her sole beneficiary. In her evidence, Mrs Holland produced a document which Mrs Rimmer had left with her. It was a list of persons to be informed by Mrs Holland in the event of Mrs Rimmer's death. At no time was Mrs Etchison's name on the list (although there were deletions and additions). I am not suggesting that Mrs Etchison was an unworthy recipient for the substantial gifts from Mrs Rimmer's ultimate will. But plainly the gifts were a recognition of the very considerable assistance and friendship which Mrs Etchison provided from 2001. But the will's provision for Mrs Etchison was generous, and far exceeds what she could claim was a fair sum on the "going rate" basis. The "going rate" cannot be precisely quantified, but the plaintiff's submissions say that it broadly corresponds with rates charged by certain nursing or care agencies, and can be quantified at $25 per hour. Even assuming a 100 hour week, for each and every week of a two and a half year period, the total would be $325,000. The amount Mrs Etchison will receive from the estate is not precisely proved but I infer that it will exceed that amount. I infer that the estate has a value of approximately $1,500,000. (Mr Isles said that this was the value, as he understood it, of her property in 2001 and her income seems to have been sufficient for her expenses). There were specific bequests, including the $240,000 to Mrs Etchison, totalling $947,000. Accordingly, she will receive (just over) one quarter of the residue, which I infer will be about $500,000. Even allowing for the value of the estate to be, say, $1,300,000, it can be seen that she should inherit more than what could be sensibly claimed at the "going rate".

[62] Yet in the way in which her case is argued, it would be unconscionable for the executor not to pay her the amounts claimed whether the will had left her $1,000,000 or $1,000. In my view a consideration of what is or is not unconscionable must have regard for the benefits she has already received from Mrs Rimmer's estate as a reward for her efforts. The extent of the provision made in her favour under this will deprives this case of that aspect of unconscionability which is

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6 *Webb v Webb* (1900) 21 LRNSW Eq 245

ultimately the justification for equitable intervention. Equity intervenes not because Mrs Rimmer may have intended that she receive some further payment or because Mrs Rimmer made statements to that effect.

[63] Although this case must be decided upon its own facts, there is assistance in the remarks of Aldous LJ (with whom Mantell LJ and Robert Walker LJ agreed) in *Jennings v Rice* [2002] EWCA Civ 159. In that case the plaintiff had provided care for an elderly woman in her home for many years prior to her death. She had paid him nothing for this work which he performed partly out of compassion for her and partly because she assured him that she would see him right. In particular she frequently said, with apparent reference to her house and its belongings, "this will all be yours one day" or words to that effect. She died a widow without children and wholly intestate. Her estate was valued at £1,285,000 with the house and furniture valued at £435,000. The trial judge awarded him £200,000 on the basis of an estoppel as is claimed here. The plaintiff appealed, arguing that the relief did not fulfil his expectation and that he should have been awarded at least the £435,000 which was the value of the house and contents. His appeal was dismissed, upon the basis that in the facts and circumstances of the case, it was not appropriate to give him relief to the extent of fulfilling his expectation. In rejecting the appellant's submission that the relief in such cases should always be to fulfil the plaintiff's expectation, Aldous LJ said:

> "Mr Warner warned against the conclusion I have reached. He submitted that it led to uncertainty and that the appropriate course was to satisfy the expectation. I accept that the flexible approach adopted in the past may mean that there is room for what has been referred to as a judicial discretion, but the rigidity of the approach advocated by Mr Warner can lead to injustice which could not form the basis of an equitable result. One only has to alter the facts of this case to illustrate the unsatisfactory nature of Mr Warner's submissions. The expectation was that Mr Jennings would receive the house and furniture valued at £435,000. If he had been left £5 or £50,000 or £200,000 in Mrs Royle's will, or she had died one month, one year or twenty years after making the representation relied on, should the court award the same sum? Yes, said Mr Warner. The result could then have been that Mr Jennings would receive £635,000 made up of the expectation and the legacy of £200,000, or perhaps, £435,000 in total, even when the detriment was say £800."

[64] The fact that Mrs Rimmer's statements were that the care would be paid for beyond what was left by the will does not determine the outcome. To say that those statements, and any expectation engendered by them, should override the requirement for the relief to correspond with what is required to avoid unconscionability, is to give a noncontractual promise a contractual effect. The fulfilment of that expectation could well have been an appropriate remedy (assuming proof of the necessary expectation) if, say, she had been left $5,000 (as was left to Mrs Holland). But she was left these large bequests effectively for what she did for Mrs Rimmer from January 2001, and they critically affect the ultimate merit of her claim for more. Assuming for the moment that she did have an expectation that the executor would be obliged to pay her at the going rate, beyond the testamentary gifts to her, in my conclusion it is not unconscionable for the executor to leave that expectation unfulfilled, in whole or in part.

Conclusion

[65] The plaintiff's claim is dismissed. I will hear the parties as to costs.