[2011] CA (Bda) 17 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2011

Between:

HAROLD MICHAEL TERCEIRA
NADINE JOY DECOUTO
KARON MARIE TERCEIRA
CAROL-ANN TERCEIRA
DAVID ALAN LIVINGSTON TERCEIRA
LINDA CLAIR WILKINSON

Appellants

-and-

RONALD FREDERICK TERCEIRA

Respondent

Before: **Zacca, P**
Ward, JA
Baker, JA

Appearances: Mr David Kessaram and Ms Loise Charleston for the Appellants
Mr Alan Dunch and Glenn Harvey-McKean for the Respondents

JUDGMENT

Date of Hearing: **3rd & 4th November 2011**
Date of Order: **17th November 2011**

BAKER, JA

Introduction

1. This case is about a dispute within the Terceira family. The central issue is whether Harold Terceira ("the father") who died on 16 January 1996 promised his son, Ronnie, that if Ronnie built a commercial building on part of his father's land, the land would be subdivided and the part with the building on it given to Ronnie.

2. Ronnie is one of seven siblings. The other six are the appellants in the present appeal. They are: Michael, Nadin DeCuto, Karon, Carol-Ann, David and Linda Wilkinson. Other relevant figures are Harold's wife ("the mother") who died on 1 June 2007, Ronnie's wife Susan and Bruce Barker, her brother.

3. Under the father's will the seven siblings have an equal joint interest in the residuary estate, the mother having had a life interest. Ronnie's claim was that he was entitled to the legal and beneficial ownership of a commercial building known as 5 Marsh Lane since he only erected the building at his expense and business risk because his father promised he would convey the property to him, which in the event he never did either during his lifetime or through his will.

4. Ronnie's claim was advanced on the basis of proprietary estoppel. His case was that in about 1985 he and his wife, Susan, bought a commercial printing business called Gulfstream Graphics. The following year the premises were gutted by a fire and a search began for new premises. Bruce Barker, Susan's brother, who was the principal in a local firm of architects but later retired to Wales, helped in the search. They looked at several properties including one at Laffan Street for which the asking price was $455,000.00.

The Assurance

5. In the course of a discussion on the balcony of his father's 3 Marsh Lane premises, his father pointed to what was then vacant land but is now known as 5 Marsh Lane and said words to the effect: "Why don't you build your own building over there"? There was further discussion the same day in which Ronnie understood his father to be proposing (1) that he (Ronnie) would fund the planning, design, construction and

maintenance of the building and (2) that his father would thereafter subdivide the land between 3 and 5 Marsh Lane and convey the latter to Ronnie. Susan, who was not present at these discussions, expressed concern that her father-in-law's promise was not in writing. Ronnie met his father again who confirmed the oral agreement.

6. The only direct evidence of the promise was from Ronnie. As his father had died in 1996 the Court did not have his account of the conversations. Nor was any mention made of the promise to any of Ronnie's siblings. Nevertheless the judge made the following primary finding of fact:

> *"I find that on a balance of probabilities (Ronnie's) father did encourage his eldest son to believe that in return for his obtaining a loan and taking charge of the construction of the commercial premises on what became known as 5 Marsh Lane, the lot would be subdivided and conveyed to him. I do not find that it was exclusively or clearly articulated whether or not the conveyance would occur inter vivos or by will. Nor were the father's expectations as to (Michael's) long term use of the property precisely defined at this crucial initial investment decision-making stage. This assurance was given on various occasions in the form of words and conduct from the point when the development of the property was initially discussed until when the building was completed."*

Before 5 Marsh Lane was built Michael used part of the vacant lot for storage of materials for his construction business. After it was built he used some of the space in the new building.

7. It should be said that there were a number of other aspects of Ronnie's evidence that the judge rejected although he accepted the cornerstone of his case.

8. There was important support for Ronnie's evidence of the assurance from his father in the evidence of Bruce Barker which was largely unchallenged in cross examination. The judge correctly directed himself that he should approach the evidence of Mr Barker with care because of his familial ties with Ronnie's wife but nevertheless accepted his evidence as credible.

9. Mr Barker spoke about the search for a new property in 1986 and said that he was told by his sister about the discussion between Ronnie and his father. He said Ronnie was less concerned than his sister about the absence of anything in writing.

10. In 1990 the father told Mr Barker he was still unsure how he wanted to divide the land to accommodate both his building on 3 Marsh Lane and Ronnie's on 5 Marsh Lane. Soon thereafter there was another conversation in which the father said to Mr Barker words to the effect: "I don't know why Ronnie and Sue are worried about it (the land); it's going to be Ronnie's in the end anyway."

11. Absent any basis for rejecting Mr Barker's evidence, it seems to me the judge's primary finding of fact as to the assurance is unassailable. Mr Kessaram, for the appellants, submitted that the judge had misunderstood Mr Barker's evidence but as he never pursued this with Mr Barker in cross examination I am unable to accept this submission.

12. The picture one has therefore is that in 1990 the father was standing by the assurance he gave in 1986 but was still considering how to subdivide the land.

13. One of the factual issues at the trial was what was to happen to the rents from 5 Marsh Lane after the loan was paid off. The judge found in favour of the appellants' contention that Ronnie was to apply the rent towards discharging the loan (and the monies advanced under the supplementary loan) and that the third party rents were to be paid over to the father in his lifetime and thereafter to the mother.

14. The judge also found, again contrary to Ronnie's evidence, that in about 1995 Ronnie provided his father with a draft lease entitling Ronnie and Susan to sublet the premises and that this made the father furious.

15. I turn next to the law on proprietary estoppel. The three main elements necessary to establish a claim to proprietary estoppel are (1) a representation made or assurance given to the claimant, (2) reliance by the claimant on the representation or assurance and (3) some detriment incurred by the claimant as a consequence of that reliance.

See Lord Walker of Gestingthorpe in *Thorner v Major and ors* [2009] UKHL 18 para 29. But as Lord Scott of Foscote pointed out in the same case at para 15 the representation or assurance would need to be sufficiently clear and unequivocal, the reliance by the claimant would need to be reasonable in all the circumstances and the detriment would need to be sufficiently substantial to justify the intervention of equity.

16. *Thorner v Major* was a case about a representation that the claimant would inherit a farm. Lord Hoffmann at para 2 referred to Lloyd L J's observation in the Court of Appeal that the conduct and language of the representation might have been consistent with a current intention rather than a definite assurance, but pointed out that the judge found as a fact that the words and acts were reasonably understood by the claimant as an assurance that he would inherit the farm and that they were intended so to be understood. The finding of fact was not open to challenge.

17. Mr Dunch, for Ronnie, pointed to the judge's primary finding of fact at para 43, which I have already recited, and went on to refer to the judge's further finding at para 78:

> "*… I find that (a) (Ronnie's) father assured him in or about 1986 that (i) he could put up a commercial building on what is now Lot 5 Marsh Lane and repay the loan out of rental income, (ii) he would ultimately be rewarded for assuming the risk of financing the building secured by (Ronnie's) own family home by having the property gifted to him; (b)(Ronnie) reasonably relied on this assurance (which his father subsequently confirmed to his brother-in-law), by taking out a substantial loan secured by his home and primarily (if not exclusively) managing the construction project and solely managing the building thereafter; and (c) this reliance was detrimental, in particular because (l) (Ronnie) gave up his pursuit of purchasing outright his own commercial premises and (2) effectively acted as owner of the property for no consideration over 20 years. However, the assurance was only operative between early 1987 and early 1996 (at the latest), a period of roughly 9 years."*

It was abundantly clear, he submitted, that the father's words were intended to be taken seriously. I accept that submission.

18. The judge's reference to "1996 (at the latest)" reflects his observation at para 49 of the judgment that without making a positive finding it would be surprising if the father did not recant from his promise during his lifetime during what appears to have been periodic ranting and ravings at Ronnie. The judge observed that it was quite plausible that the father had encouraged Ronnie to believe he would be left the property as a spur to Ronnie getting the building erected without ever intending to follow the promise through. That, however, is nothing to the point if, as the judge found, the words were intended to be taken seriously and were so understood by Ronnie.

19. The issue about subdivision, and more particularly the fact that it was never decided how the subdivision would be done, gave rise to conflicting expert evidence at the trial. The fact that the subdivision was not clear at the time of the assurance is not fatal to Ronnie's claim. In *Thorner*'s case the extent of the farm which was the subject of the assurance was liable to fluctuate according to sales and purchases of parcels of land from time to time. What mattered was the entity that existed at the date the promise fell due to be performed. Changes in character of extent would be relevant to relief. In the present case, although the line of division was never defined, it was common ground that division was possible and indeed the judge at para 97 or his judgment defined Ronnie's equity as extending to that portion of the property which his business customarily occupied or was occupying at the date of the start of the trial.

20. A point more forcibly pursued by Mr Kessaram was that the way in which No. 5 was constructed was inconsistent within the agreement that there would be subdivision. If it had been intended that there would be subdivision then No. 5 would have been designed as a self-contained building with a separate access to utilities. In my view this point would have had more force but for the unchallenged evidence of Mr Barker that the father was still speaking of subdivision in 1990 some four or five years after the initial assurance and at or around the time the building was completed.

Reliance

21. The second element necessary to establish proprietary estoppel is that Ronnie must have relied on the assurance. In October of 1987 Ronnie applied for and obtained planning permission and a business loan of $240,000.00, discharging a loan of $28,000.00 that existed on his own house. The new loan was secured on his house. The design, approval and construction of the building were financed by Ronnie through a combination of his own funds and the bank loan. The construction began in 1988 and ended in 1990. As from January 1991 Ronnie was registered as the owner of the building on the land valuation list and ever since has paid the land taxes and insurance in respect of No. 5. Ronnie has never paid nor was asked to pay rent by either of his parents during their lifetime. The rents generated by No. 5 were paid to Ronnie's company, Gulfstream Graphics.

22. The planning application was filed under the name of the father who was the legal owner of the land but it was prepared by Ronnie and his wife, Susan.

23. There was an informal agreement that Michael would lay the foundations and do the construction work at a discounted labour rate in return for being allowed to rent space in the building at a preferential rate.

24. The materials to build 5 Marsh Lane were provided by Atlantic Building Systems an Atlanta based company. The father had already had dealings with the company when it provided materials to build No. 3 Marsh Lane. In November 1987 the father, Ronnie and Michael went to Tennessee where David lived and the father owned property. Ronnie paid for the flights and the three brothers went on to Atlanta, leaving the father in Tennessee. In Atlanta they negotiated with Atlantic Building Systems for the supply of materials to build No. 5 Marsh Lane and some extra materials required by the father for No. 3.

25. Michael did not start building the foundations until August 1988 and when he had not completed them in October 1988 the father arranged at Ronnie's request, for other contractors to complete the work at Ronnie's expense. Some of the workers

were seconded from other projects run by the father. By 1990 the exterior works were completed.

26. The judge found that Ronnie reasonably relied on his father's assurance by taking out a substantial loan secured on his house, managing the construction project and solely managing the building thereafter. In my judgment this finding is unassailable.

Detriment

27. The third element necessary to establish proprietary estoppel is that Ronnie incurred some detriment in consequence of his reliance on the assurance. The judge found that Ronnie gave up his pursuit of purchasing outright his own commercial premises and effectively acted as owner of the property for over 20 years, albeit the assurance was only operative between early 1987 and early 1996 (at the latest) a period of roughly nine years. As to the first of these points, it is to be noted that Bruce Barker's evidence was that he strongly recommended that Ronnie purchase the Laffan Street property as he believed that it was a good investment and presented the opportunity to rent out part of the premises to offset the cost of borrowing.

28. In my judgment there was ample evidence from which to infer detriment. Ronnie assumed the risk of financing the project using his family home as security for a large loan, putting in an unquantified amount of his own money and giving up the opportunity of acquiring his own premises elsewhere.

29. It is important to keep in mind that the family context permeated the whole of this case. The judge had the inestimable advantage of hearing the witnesses, assessing them and picking up the undercurrents that may have affected the evidence and behaviour of the various individuals. He gave a careful assessment of his view of the credibility of each witness. He referred to the high emotional and financial stakes in the case and it is evident from his findings that he approached the evidence of each member of the family with care. In no instance did he find a witness had been deliberately untruthful. He described Ronnie as not a completely convincing witness but said that parts of his evidence were quite credible.

30. In these circumstances there would, in my judgment, have to be very compelling reasons for overturning the judge's primary findings of fact. As to the conclusions to be drawn from those primary findings, this was not a case where it could be said that every such conclusion was obvious, for example, whether the father recanted from his assurance during his lifetime. In my view there is no basis whatsoever for overturning the judge's primary findings of fact and I do not think any of his secondary findings or inferences to be drawn from his primary findings are plainly wrong.

31. The appellants sought to raise a number of reasons why Ronnie was not entitled to the equitable relief to which he would otherwise have been entitled.

Laches

32. The appellants asserted at the trial that Ronnie could have raised the issue of the assurance during the lifetime of his father; or, after his death during the lifetime of his mother. He considered himself to be the owner of the property (albeit not the land on which it stood until it was conveyed to him) from the time that No. 5 was built. It will be recalled that the father died on 16 January 1996 and the mother on 1 June 2007. The judge had no hesitation in rejecting Ronnie's evidence that he asserted a claim to the property on the reading of the father's will nor did he assert such a claim at any time before the mother's death. He found that the preponderance of the evidence pointed to the fact that Ronnie dealt with his father's estate as an executor between 1996 and 2007 as if 5 Marsh Lane formed part of the estate. The judge concluded at para 66 that Ronnie's only plausible general explanations for his delay in asserting his claim were one or more of the following:

- A failure to take legal advice after the reading of the will;
- As assumption that absent an inter vivos transfer or testamentary disposition he had no legally enforceable claim;
- What turned out to be a frustrated hope that, irrespective of the strict legal position, his siblings would reach a compromise on general equitable grounds;
- A desire to avoid distressing his mother by raising a contentious claim in circumstances where is was unlikely she would want to depart from her late husband's final wishes as reflected in his will.

33. The judge found that Ronnie delayed his claim at least in part out of concern for his mother's well being. He pointed out that there was also a practical reason why it was logical not to raise the claim during his mother's lifetime. It arises in this way. The mother was unhappy that she had only been left a life interest in the estate which the judge said could explain why her husband's executors effectively allowed her to run the estate until her own death. She did not want the transfers consummated until "after I go." On 14 October 1999 the executors were asked to consider whether they wished to execute the vesting deed and were told it became essential after the death of the mother if they wished to exercise the statutory power of sale and sell the property. They agreed not to execute it until after their mother's death and so the need to consider their respective entitlements did not in any final sense arise until May 2007.

34. The judge found that Ronnie's claim was first unambiguously raised in May 2007 and that since the execution of the vesting deed had been put on hold until then it was not, in all the circumstances, unreasonable for Ronnie to postpone raising his claim until then.

35. In order to establish the defence of laches the appellants must show (1) unreasonable delay in the commencement and prosecution of proceedings and (2) that in all the circumstances the consequences of the delay renders the grant of relief unjust. The judge concluded the claim could first have been brought in 1996 but was not raised until eleven years later, but that Ronnie's decision was understandable, especially as his co-executors were content to defer execution of the vesting deed until then. Despite this, there was no legally acceptable reason why Ronnie could not have given some notice of his claim. The unreasonable delay limb of laches was made out on the facts. He concluded, however, that the second limb was not. The critical question was whether the delay had caused substantial prejudice to the appellants. The most critical missing witness in the present case was the father, who died before the right to make the claim was known. As to the mother, it was not evident she would have been able to refute the proposition that the assurance was made and it would have been open to Ronnie to place greater

emphasis on the, alternative, constructive trust way in which the case was put by relying on the equity generated by the property's current value irrespective of whether or not the assurance was ever made. Whilst the later point seems to me to be speculative, I accept the judge's former point. I cannot conclude that the judge's finding that the defence of laches was not made out was wrong.

Waiver

36. The judge accepted Mr Kessaram's definition of waiver as "an objective manifestation of choice" but concluded that Ronnie's execution of a deed of family arrangement on 4 April 1996 could not fairly be construed as an election to waive his equitable claim.

37. I was initially concerned whether this finding could stand because the decision on the part of Ronnie to participate in an agreement to redistribute his father's estate so that his share was reduced from one sixth to one seventh without raising his claim seemed to me on the face of it a plain waiver of his claim. As Mr. Kessaram put it: by entering into the deed of family arrangement, Ronnie represented by conduct to his siblings that he was not claiming any greater share of the estate than that to which he was entitled under the will. He was therefore estopped from asserting his entitlement to any greater share.

38. However, Mr Dunch drew attention to the unusual circumstances leading to the deed of family arrangement. What happened was this: the father, apparently, disapproved of the man Linda married and she was the sole sibling not named as one of the beneficiaries. The point arose that Linda's husband was of a different race from the father. Section 10 of the Human Rights Act 1951 provides that any instrument that purports to discriminate against any person in the disposition of any property to any person or class of persons either directly or indirectly shall be of no effect in so far as it purports to prohibit or restrict the distribution of property. The other six siblings accepted that the disposition discriminated against Linda and agreed that, in consideration of her not making an application for such a declaration to the Supreme Court, she should be an equal beneficiary.

39. In these circumstances, I do not think that by participating in the deed of family arrangement Ronnie was impliedly representing he was not claiming any greater share in the estate than that to which he was entitled under the will. Accordingly, the Judge was correct in holding that there was no waiver of his claim.

Inequitable conduct/unclean hands.

40. The appellants argued that Ronnie's inequitable conduct barred him from relief. There were various aspects to this mainly related to his position as a trustee of his father's will. I have covered separately the question of delay, which also figured as part of the appellants' claim that Ronnie was guilty of inequitable conduct.

41. The appellants contend that Ronnie should not have remained as a co-executor/trustee of his father's will because that placed him with a conflict of interest. Worse, he should not have vigorously defended proceedings brought by his co-executors to remove him as an executor. The judge found that no conflict of interest arose until Ronnie asserted his claim in May 2007 at the earliest, or until the writ was issued in the present proceedings (24 November 2009) at the latest, and that he ought voluntarily to have resigned. Next, it was argued that Ronnie was untruthful to the beneficiaries when asked at the first family meeting on 29 May 2007 about the status of the building loan and whether it had been repaid. Further, that he threatened the other beneficiaries to tie up the estate in litigation for years if his interest in No. 5 was not acknowledged. It is true that in a number of respects, Ronnie's conduct was reprehensible and the judge so found, but what he had to do, and in fact did, was to assess whether Ronnie's behaviour was such as to disqualify him from all relief or whether justice could be done by granting some relief, albeit less than the full relief sought. The judge put it this way in Para. 81 of his Judgment

> *"It is true that (Ronnie) in a one against six sibling confrontation did not while an executor raise and pursue his claim in admirable way. It was in my judgment acceptable for him to initially seek consensus, but somewhat inappropriate for him to decline to answer queries about the true status of his loan. It was clearly wrong for him to make threats to damage the estate by tying it up in litigation when it was clear he was unlikely to get his own way. He ought to have resigned promptly and not opposed the application for his removal as an executor. But none of these matters, in my*

> *judgment, are sufficiently serious and connected with his claim itself to impeach its validity altogether. The crucial facts and matters relied upon in support of his claim all occurred between 1987 and 2006, so it is difficult to see how his claim could be completely undone by subsequent events."*

42. Mr Dunch pointed out that the inequitable conduct was not all one way; for example the appellants' evidence was that they always believed 5 Marsh Lane to be owned by the father yet none of them took issue with Ronnie's conduct in managing the property or otherwise collecting rents after 1996 notwithstanding the first and second appellants were executor and trustees.

43. In *Gillett v Holt* [2000] 3WLR 815 @ 840G Robert Walker L J pointed out that the court had first to identify the maximum extent of the equity. He went on:

> *"The court's aim is, having identified the maximum, to form a view as to what is the minimum required to satisfy and do justice between the parties. The court must look at all the circumstances including the need to achieve "a clean break" so far as possible and avoid or minimise friction: see Pascoe v Turner [1979] 1WLR 431,438-9."*

44. The maximum equity in the present case was the out and out transfer of the ownership of 5 Marsh Lane. The Judge held that it was impossible to find that the minimum required to satisfy Ronnie's equity was to direct he be entitled to be transferred sole title to the land and the building which sits upon it. He noted Ronnie's own assessment at the first family meeting after his mother's death was that he should be regarded as owning the building in return for giving up his interest in all the other estate property, paying the difference in value if the value of the land conveyed was greater than his 1/7 share in the rest of the estate.

45. The judge specifically had regard to Ronnie having had the benefit of rent-free commercial property for over seven years and that he knew or ought to have known from at least 1995 that his father had either changed his mind about the gift altogether or wanted Michael to be able to continue to use part of 5 Marsh Lane on an indefinite basis. The equity was diluted significantly because he allowed Michael to assume between 1995 (or 1998 when Michael ceased paying rent) and 2007 that he would be entitled to occupy a portion of the property rent-free once the loan was

paid off. Further, Ronnie, on any view, knew as early as 1996 that he had no unimpeachable right to 5 Marsh Lane but elected to stay there rather then pursue other investment options. Thus the period over which he operated under the influence of the assurance was less than 10 years.

Conclusion

46. The judge identified the challenge facing the court as determining at what point between full equity and no equity at all justice to all parties fell. This was a family dispute in which the judge had the advantage of hearing all the parties. He made a number of findings of fact, far from all of which were favourable to Ronnie. Inevitably, he had to draw inferences from those facts that he found. He was well placed to do that (much better placed than this court) having seen and assessed all the witnesses. He was also well placed to weigh up the effect that Ronnie's conduct should have on a just outcome.

47. The judge concluded that Ronnie should not be conveyed the property outright because his contribution did not in all the circumstances justify it. Nor should he be declared the owner of the whole building (or its value) excluding the land because he had tacitly acknowledged Michael's right to use the premises rent-free even after repayment of the loan in 2000. Further, he was not forthright with his siblings about the repayment of the loan. He therefore concluded that the only equity to which Ronnie was entitled which had not been satisfied was his right to use such portion of 5 Marsh Lane as his business had habitually occupied and/or was currently occupying (whichever is the largest space) under a lease for life under nominal consideration on terms permitting him to sublet if desired. Further, he was entitled to retain all rents up to and including 31 March 2011.

48. As the judge pointed out at the end of his judgment his conclusion acknowledged the essential truth of the assertion made by Ronnie and Susan to the effect that but for their efforts between 1987 and 1990 the building would not be there. Furthermore, even the appellants' version of the basis on which the building of 5 Marsh Lane took place implicitly accepted that Ronnie reasonably expected to have

space of his own for his business on an open ended basis without having to pay rent after the loan was paid off.

49. In my judgment the judge has sifted his way through a mass of conflicting evidence. None of his findings in respect of that evidence was plainly wrong and he has reached a just result. The appellants' counterclaim alleging breach of fiduciary duty giving rise of an obligation on the part of Ronnie to pay rent for his use of the property inevitably failed in consequence of the judge's findings on the claim.

50. I would dismiss the appeal.

Signed

Baker, JA

Signed

I agree Zacca, P

Signed

I agree Ward, JA