



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2007: No. 272

**BETWEEN:**

**DELORES THOMAS  
DUDLEY WARRINGTON THOMAS**

**Plaintiffs**

**- and -**

**LANCE TUCKER**

**Defendant**

Dates of Hearing: 20 – 21 October 2009

Date of Judgment: 8<sup>th</sup> January 2010

Richard Horseman of Wakefield Quin, for the Plaintiffs;  
Ray DeSilva of Conyers Dill & Pearman for the Defendant.

## JUDGMENT

### INTRODUCTION

1. In this case the plaintiffs seek a declaration of ownership and possession of a domestic property at 32 Tribe Road No. 5, Paget, PG 05 ('the property'), essentially on the basis that the defendant is holding over after the termination of a licence to occupy the property. The plaintiffs claim as beneficiaries under the will of Dudley Alexander Digby Thomas ("the deceased"), who died on 3<sup>rd</sup> August 1988, and pursuant to a vesting deed of 7<sup>th</sup> May 2007 which conveyed the property from the executors to them. The first plaintiff is the widow of the deceased, and the second plaintiff is his son. The defendant is a former long-term employee of the deceased in his cycle livery business at the Elbow Beach Cycle Shop ("the livery business"), and he claims title to the property pursuant to an alleged gift or promise made to him by the deceased in 1958, and there is a counterclaim to that effect.

## **THE ISSUES**

2. The plaintiffs rely upon their paper title, and the essence of their case is that, while the defendant may have had a licence to occupy the property so long as he was employed in the livery business, that ended when he ceased that employment in May 2003. The defendant says that in 1958, in recognition of his work as manager of the livery business, and in particular his expansion of the business, the deceased offered him a choice of \$30,000 in cash or the property. The defendant says that he chose the property, into which he and wife moved in November 1958, and where they have remained ever since. However, the defendant's title was never perfected, as the deceased explained he wanted to retain the deeds to assist in funding his real estate business. Although the defendant asserts that the 1958 arrangement had contractual effect, his counsel recognizes that any action founded on contract has long been statute barred. He therefore bases his claim to the property on proprietary estoppel and adverse possession. The plaintiffs deny the alleged gift and also say that the defendant has delayed unduly in bringing his claim to their great prejudice, in that the evidence of the deceased is denied to them, and that he should therefore be debarred by laches from now pursuing it.

3. The case turns on whether the defendant's version of events is true or not. He accepted that the burden of proof was on him, and for that reason gave evidence first. The plaintiffs were not personally party to the 1958 arrangement (nor does the defendant contend otherwise), and there are no witnesses to it. It is not documented in any way. There is no statement or evidence from the deceased to explain it, apart from the terms of his will, clause 14 of which provides –

“14. I DEVISE [the property] unto my trustees UPON TRUST that my trustees shall permit my long term employee Lance Tucker to reside in my said cottage paying a monthly rent of \$20.00 PROVIDED that the said Lance Tucker shall undertake in writing to pay for the costs of maintaining my said cottage both as to the interior and exterior thereof PROVIDED ALSO that the said Lance Tucker shall continue to be employed by me or my estate as manager of the Elbow Beach Cycle Shop or in such other position as may be agreed by my trustees.

15. In the event that the said Lance Tucker shall cease to be so employed and my trustees shall in their discretion see fit to sell the said cottage, my trustees shall give first refusal to the said Lance Tucker to purchase the said property.”

#### **THE DEFENDANT’S EVIDENCE**

4. The defendant’s case is that from a young age he was skilled in the repair of motorcycles, and that he began working in the livery business after school when he was about 10 years old. When he left school in 1951, at the age of 13, he first went to work for another cycle business, but in March 1952 he started at the livery business full time and he remained there for the next 51 years. When he began the deceased was managing the shop, and the defendant worked as a mechanic, but in 1955, when the defendant was 17, the assistant manager left to run another business, and the deceased wanted to spend his time on his growing real estate business, so the defendant was promoted to be manager in which position he ran the business, although the deceased retained control of the cheque book. It is the defendant’s case that, as manager, he aggressively expanded the business, so that within three years he had tripled the number of cycles from 300 to 900. He was also loyal, so that when an opportunity to acquire the cycle concession at the new Carlton Beach Hotel came up, he passed it along to the deceased who then acquired it for himself. It is also his case that he gave up sports, at which he excelled, and music, which he used to perform publicly at hotels, due to the pressures of his work. He also says that he used to assist the deceased in his real estate business in a variety of ways, including monitoring the work of contractors on various projects. He describes himself as “a very close friend and business partner” of the deceased.

5. The defendant married in August 1958, and on the wedding day moved into an apartment owned by a friend of the deceased. This was all arranged by the deceased, and any rent payable was taken care of by him, as the defendant paid none. In the meantime, by conveyance of 25<sup>th</sup> April 1958, the deceased had acquired the property for £750<sup>1</sup>, whereupon he demolished the existing building and built a new, two-bedroom cottage on the foundations, completing the work in or about November 1958. The defendant says that,

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<sup>1</sup> The currency and legal tender of Bermuda in those days was pounds, and remained so until the Bermuda Monetary Authority Act 1969, section 9 of which established the Bermudian Dollar as from 6<sup>th</sup> February 1970.

shortly after completing the rebuilding, the deceased took him and his wife to see the property, and told the defendant that he had invested \$33,000 in acquiring the land and doing the work. He told the defendant that he had \$30,000 cash for him, presumably as some form of employment bonus, or the defendant could have the cottage. The defendant chose the cottage, the deceased gave him the key and he and his wife moved in and have remained there ever since. However, it is also the defendant's case that the deceased said that he would like to retain the title deeds for use as collateral in his real estate business, and the defendant agreed to that. The defendant never subsequently received them, and the property was never formally conveyed to him. A request for the deeds in 1976 brought the response that the deceased was almost finished with them and that the defendant would get them shortly, but he never did.

6. It is also the defendant's case that after he moved into the property some further works were required to complete the cottage, which he carried out. These included flooring, painting inside and out, and leveling the yard on the north side, together with a retaining wall topped by a wall of Bermuda stone. Within five years he says he had to replace the bathroom fixtures, which had been second-hand in the first place. Again he paid for or did the necessary work himself.

7. The defendant says that this was not the only example of the deceased's generosity towards him. He says that, in or about 1961, the deceased gave him 50 Bank of Bermuda shares. Similarly, he says that in or about 1963 the deceased gave him one of six lots from a subdivision that he was creating on South Road. In this case the deceased did give the defendant the deeds, although they appear to contradict the defendant's version that this was a gift, in that they show a payment of £1,200 pounds from the defendant. The defendant says that that was not how it happened, and that when presented to him for signature the deeds had been amended from the initial draft, which had been a voluntary conveyance. Although this surprised him, he nonetheless executed the document. The conveyance of 20<sup>th</sup> March 1963 is at Tab 14 of the court bundle, and apart from the recital of the price, it also includes a formal receipt for the consideration signed by the deceased and witnessed by the defendant's brother, David.

8. In 1967 the Land Valuation and Tax Act of that year came into force, and that imposed a tax on residential property. This would normally be paid by the owner: see Ibid. section 33. The defendant concedes that he never paid this tax, nor did he pay for the insurance on the property. He says that he never received a land tax statement, and that he just assumed that it was another one of those details which the deceased had taken care of on his behalf.

9. In late 1970 or early 1971, when the defendant and his wife had their third child, he says that the deceased came to him and offered to assist him in extending the property. The defendant then drew up his own plan, which included the addition of a bathroom, a substantial living room, an entrance foyer and a kitchenette, together with further leveling of the yard. He gave his own sketch to the deceased, who then had an architect draw up proper plans and obtain planning permission. The defendant then says that he himself personally built the walls, with the assistance of friends, although the deceased contributed the services of a mason to assist with the roof and the chimney, and also paid for the further leveling of the yard.

10. In 1983 the deceased was the subject of a serious assault, which required surgery and hospitalization and from which he never really recovered, dying in 1988. At this time Mrs. Thomas took over management of the shop, but whether or not that was at the defendant's suggestion is disputed. It does however mean that they worked alongside each other. Ten years later, in 1993, the defendant says that he raised the question of the cottage with Mrs. Thomas asking her if she knew the background, which she said she did not. He says that he then explained it and asked for the deeds. He says that Mrs. Thomas promised he would have them within three months, but in early 1994 she came and said that she could not locate them. All that is disputed, and by this time the deceased had been dead for five years. It is, however, the only discussion the defendant says they had on the subject.

11. On 19<sup>th</sup> May 2003, nearly 15 years after the deceased's death, the lawyers for the trustees of the deceased's estate<sup>2</sup> wrote in the following terms:

**“Re Estate of Dudley Alexander Thomas, Deceased**

We have been instructed by the Trustees of the above-mentioned Estate to contact you regarding the cottage at Ord Road currently occupied by you.

This property is held in trust by the Trustees of the Estate of Dudley Alexander Thomas pursuant to Clause 14 of his Will. It was Mr. Thomas' wish that the Trustees permit you to reside in the cottage at a monthly rent of \$20.00, provided that you undertake **in writing** to pay the costs of maintenance (both interior and exterior) with respect to the cottage. Your right to occupy is to continue as long as you are an employee of Elbow Beach Cycle Shop. It was also his wish that at such time as you cease to be employed at the Cycle Shop that if the Trustees shall desire to sell the cottage, they should give you the first option to purchase the same. We enclose herewith a copy of the relevant provisions of this will for your information. We are also instructed by our clients to make it clear that Mr. Thomas was in no way influenced or coerced in making his will, and that all the terms therein contain his sole and clear instructions.

As you continue to occupy the property, the Trustees have a duty to obtain your undertaking in writing regarding its upkeep and the nominal rental payment of \$20.00 a month. As you are aware, the land tax and the house insurance for this property is paid by Mrs. Thomas on behalf of the Trustees. We shall be contacting you shortly to provide you with the Agreement and obtain your signature thereto in accordance with the Will.”

The defendant says that on receipt of this he was so outraged that he telephoned Mrs. Thomas and told her that he would not be returning to work at the Cycle Shop, and indeed he has not been back since.

**THE PLAINTIFFS' CASE**

12. As noted above, neither plaintiff has direct knowledge of the alleged transaction and at that time were not present or involved in the dealings between the defendant and the deceased.

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<sup>2</sup> Under the will the trustees were the first plaintiff, Mrs. Thomas, Mr. Arnold Francis and Mr. Frederick Yearwood. At the time of the letter Mr. Arnold Francis was shown on the notepaper as a consultant to the firm of Christopher, Francis and Forrest, who wrote the letter.

13. The first plaintiff had been married to the defendant's brother David, prior to meeting the deceased, and has two children from that relationship, but that has little direct bearing on events. She paints a picture of the deceased as a hard but fair businessman, who required her to pay rent for the property in which she was living during the latter part of their seven year courtship. They were eventually married on 24<sup>th</sup> August 1967. She says that the relationship between the defendant and the deceased was strictly a business one, and they never socialized. She herself managed another cycle business, the one at the former Carlton Beach Hotel, which eventually became the Sonesta Beach. In the early 1980s, when the contract for that was not renewed, she worked from home for a while and then went to manage another of her husband's cycle shops. Then, on 4<sup>th</sup> July 1984, after the assault on her husband, she started work at the Elbow Beach shop.

14. She says that prior to the 2003 letter the defendant never once told her that he had been given the property. In particular, after the assault on her husband, the defendant never brought the subject up or attempted to clarify his position. She denies that in 1993 he asked her for the deeds, and that she promised to get them. Her understanding from her husband was that the defendant lived there as part of his employment, and that he was living there rent free for so long as he was employed in the livery business. In cross-examination she insisted that the deceased had always told her and everyone else that the property belonged to him and that his employee, the defendant, lived there. Moreover, she said that, after his injury, the deceased had expressly instructed her that she had to pay the insurance and land tax on the property.

15. As to the deeds, she says that an exhaustive search was made at the time of the application for probate, but that they could not be found. As a last resort she asked the defendant if he had ever seen them, and he said that he had not. She denies the defendant's version that he asked her for the deeds in 1993 and she said she would provide them and then later said that she could not find them. Moreover, she says that she did show the will to the defendant at the shop, but he did not claim ownership at that time. She said that this was before 1993 during the probating of the will. She says that she went to the defendant who was sitting on a box at the rear of the shop mending a bike. She asked him about the

deeds and he said he could not find them, and had never seen them. She then went home and got a copy of the will, and folded it to hide all but the relevant part, and took it to the defendant and showed it to him and explained it to him. She said that he acted like he did not believe her. She said that the lawyers had told her she had to talk to him about it, but accepts that nobody put anything in writing to him at that period.

16. She explains that the estate's failure to claim rent was attributable to the absence of the deeds, but that there came a point at which the estate's lawyer said that they should press on without them, and that is when the letter of 19<sup>th</sup> May 2003 was written, and the preparation of the vesting deed put in hand. However, in 2005 the deeds were located at a local surveyor's office. It took another two years to do the vesting deed, which is dated 7<sup>th</sup> May 2007.

17. The second plaintiff is the only son of the deceased and the first plaintiff. He gave evidence about the character of his father, the thrust of which was that he was not the sort of man to give away property. He says that his father took him into his confidence about his property dealings at early age, gradually introducing him to the business as his understanding progressed. He relates various anecdotes about the father's relationship with the defendant, the tenor of which is to demonstrate that the father regarded him as an employee and not in any sense a family member or friend. He said that his father had always told him that the property was his house, and never said anything to suggest he had given it to the defendant.

## **FINDINGS OF FACT**

18. Having heard the evidence, and seen the parties cross-examined, I reject the defendant's version of events. I find it improbable that the deceased would have given a young employee of three years' standing a residential property outright, no matter how successful he may have been. On the other hand I think it highly likely that he would have provided such an employee with accommodation rent free, and the deceased's subsequent conduct in respect of the land tax and insurance is compatible with that but incompatible



with an outright gift. I also think it unlikely that the deceased would have made the will in the terms that he did if he had given the property to the defendant.

19. There are other aspects of the defendant's evidence which in my judgment undermine his version. As noted above, the currency in Bermuda in 1958 was pounds. Yet the defendant's version of the conversation preceding the gift, has the deceased speaking in dollars – he says the deceased offered him \$30,000 outright, and said that the cottage and works cost him \$33,000. The defendant's explanation for this is that in the livery business they dealt with tourists and thus in US dollars. I am not persuaded by that. I note that the purchase price of the property was expressed in pounds, and I think it likely that the building works would have been costed and paid for in pounds. I think that the reference to dollars is an anachronism which points to the falsity of the defendant's version of events.

20. The alleged gift of the property in the 1963 sub-division is contradicted by the conveyance. I think that the defendant was keen to portray it as a gift to bolster his version, but that the contemporary documents give the lie to this. While it is not directly relevant to the 1958 transaction, it goes to the defendant's credit, or rather lack of it.

21. I also think it unlikely that, back in 1958 at the time of the gift, the defendant would not have spoken about it to his wife, who was present at the time. However, she was not called to give evidence (and there is nothing before me to suggest that she is not still alive and available). He was, of course, cross-examined on that, and his explanation was that she was standing a little way off, and so did not hear what was said. A little later he said that he knew that she did not remember any of the conversation, and that he knows that she does not know anything about it. He said that he never discussed it with her at the time as she was then a very young girl. He said that he did not even manifest his joy at the gift for her to see, saying that things like that do not really excite him. I find none of that convincing.

22. There is also the issue of the extension work in 1971. The defendant says that the deceased approached him and said that if he wanted to build onto the property he would

assist. In his re-examination he said the deceased said to him: “Lance, your family has increased and if you want to put an addition on to the house you may do so and I will help you<sup>3</sup>.” That has the ring of the land-owner giving permission. In any event, he told the defendant to draw a plan of what he wanted, and he then took that and gave it to his architect who produced the formal plans and submitted the application and obtained planning permission. The plans were produced at trial and marked D1. The application (which is stamped as received on 31<sup>st</sup> March 1971) and the permission came back to the defendant in the same envelope as D1. The application does not advance the question on ownership very much, as neither party has signed it as owner, but the application is made in the defendant’s name, and the permission was granted to him, and not to the deceased. I think that that is a significant indicator of who was in fact doing the work. While it is difficult to ascertain after this passage of time what were the precise contributions of either party, I accept the defendant’s case that he did much of the work, and supplied the materials, himself. However, that is not incompatible with his being a tenant or licensee who was permitted to add onto the property by the owner, and that is what I find the situation to have been.

## **LEGAL ISSUES**

23. Turning to the case as pleaded and as advanced at trial, the defendant essentially abandoned any case based on contract, recognizing that it must now be long statute-barred, but in any event, on the facts as I find them, there was no contract for the transfer of this property to the defendant in 1958 or at any time since. The defendant’s primary case was based on proprietary estoppel, but again that falls away on the facts. I note in passing that the estoppel alleged was not the Gillett v Holt<sup>4</sup> kind, where a promise of a future gift or legacy is made in return for an employee continuing in his employment. What was alleged here was an outright gift, as a bonus for past good performance, and it was the defendant’s case that it was not tied to his future employment in any way. Indeed it was his evidence that he considered that even if he had left his employment the week after the gift, he could have kept it.

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<sup>3</sup> See the evidence at 11.26 a.m. on 20<sup>th</sup> October 2009.

<sup>4</sup> [2001] Ch. 210

24. There is then the question of the 1971 extension works. As noted above I find that the defendant was responsible for most of the work. Does that give him any rights? The answer to that depends upon the basis of the arrangement between the deceased and the defendant. The pleaded case is that the works were carried out in detrimental reliance on the promise that the defendant would be given ownership of the property. I have already found that there was no such promise and no gift of the property, and that this was a case where the landowner permitted the tenant or licensee to improve the property for his own purposes, in this case raising his family. I do not think that either side put their minds to what would happen when and if the relationship ended. Indeed, I think that there was an implicit mutual assumption that it would continue for the foreseeable future, as indeed it did: the defendant's occupation of the property persisted for over 30 years after these works. In those circumstances I do not think that the circumstances in which the extension was built can give rise to any estoppel or other rights. In particular I have considered whether the works could entitle the defendant to some share in the present day value of the property, but I think that, like all tenant's improvements, they revert to the landowner in the absence of some agreement to the contrary.

25. Finally, the defendant relies upon adverse possession. Again, that is inconsistent with the facts as I have found them, as the defendant was living there with permission. In my judgment, that permission continued until the defendant left his employment upon receiving the letter in May 2003, and his possession since then is insufficient on any basis to found a claim to the property.

26. I have considered whether the defendant's lengthy tenure of the property during his employment could, of itself, give him some right of tenure beyond its termination. The defendant, however, advances no claim on that basis, and I cannot see how he could. It is a hard case in that respect, but, apart from the right of pre-emption conferred by the will, I fear that he has no right to remain in the property beyond what the plaintiffs may see fit to give him.

27. I therefore give judgment for the plaintiffs for a declaration in terms of the writ and for possession of the property. There is a claim for “unpaid rent and mesne profits” in the writ, but counsel for the plaintiffs tells me that that is, very fairly, not now pursued. I therefore dismiss it. I also dismiss the defendant’s counterclaim. I will hear the parties on costs and on the exact form of the possession order.

Dated the 8<sup>th</sup> day of January 2010

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Richard Ground  
Chief Justice