In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 103

BETWEEN:

RONALD M. SMITH

Plaintiff

-and-

(1) RONELLE HOLLOWAY

(2) GOLDIE PYFROM

(3) JEWEL SMITH

(4) GOLDIE PYFROM (in her capacity as Executor of the Estate of the late Ronald Percival Smith)

Defendants

JUDGMENT

Date of Hearing: June 28-29, 2010[1]

Date of Judgment: August 13, 2010

Mr. Taaj Jamal, Cox Hallett Wilkinson, for the Plaintiff

Mr. Richard Horseman, Wakefield Quin, for the Defendants

Introductory

1. The Plaintiff claims by Specially Endorsed Writ issued on April 12 2007, in addition to further and other unspecified relief, a "*declaration that he is entitled to the legal and beneficial ownership of the Property free of encumbrances*".

2. The "Property" is '*Windy Heights*', 11 Wellington Back Road, St. George's. The Plaintiff, the only son of the late Ronald Percival Smith ("the Deceased"), claims that he was promised the Property by the Deceased before his death. Two of the Plaintiffs' three sisters contend that the Property forms part of the Deceased's estate to be shared equally between his four children in accordance with his Will.

3. The Plaintiff and his wife Donna Smith gave oral evidence while the statement of his sister Jewel Smith was read into evidence as she was abroad. The statement of the late Richard Burchall was also read into evidence. Ronelle Holloway and Goldie Pyfrom both gave oral evidence on behalf of themselves and the estate. The Plaintiff's claim crucially depends in evidential terms upon his own account of oral promises he said his father made to him about the Property upon which he placed detrimental reliance. The legal basis of the claim is the doctrine of proprietary estoppel.

The pleadings

4. The Statement of Claim makes the following averments on which the Plaintiff's case is based:

> "1.*The Plaintiff is the son of Ronald Percival Smith ("the Deceased") who died on 30th May 2000. The Plaintiff has three sisters, Ronelle Holloway, Goldie Pyfrom and Jewel Smith ("the Defendants"). The last will and testament of the Deceased was made on the 9th September, 1993.*

[1] Closing submissions were submitted in writing on July 13, 2010.

It appointed the Plaintiff as the sole executor and trustee of the Deceased's estate.

2.The Deceased's estate comprised (inter alia) several parcels of real estate which the Deceased devised and bequeathed to the Defendant to the Defendant to be held on trust for himself and the Defendants in equal shares. One of the said parcels of real estate consisted of land with a dwelling house thereon known as "Windy Heights", situated as 11 Wellington Back Road, St. Georges Parish ("the property"). The Deceased acquired the Property in or around 1981.

3. In early 1982 the Deceased acquired and began to operate a laundry business in Bermuda. At the time, the Plaintiff and his wife were living in California. The Plaintiff worked for CBS, a US national television network, and his wife worked for the California Association of Realtors. Both were offered attractive opportunities for advancement in their respective positions. In 1982 the Deceased requested that the Plaintiff return to Bermuda with his wife to help him manage the laundry business.

4. As an inducement for the Plaintiff to come to Bermuda the Deceased promised the Plaintiff that the Property would be his when he died and that in the meantime, the Plaintiff and his family could live there rent-free.

5. In reliance on this promise, in November 1982 the Plaintiff and his wife left their jobs in California to come to Bermuda and in doing so gave up their career opportunities in the US. The Plaintiff worked in the business from 1982 until the business was sold in 1997/8 and lived in "Windy Heights" from May 1983 (at first in the adjoining apartment and then in the main house after it was vacated by tenants) without demand for rent up to the time of the Deceased's death in August 2000.

6.Throughout the course of the Plaintiff's occupation of the Property at the prompting and/or with the encouragement of the Deceased and in further reliance on the Deceased's continual assurances that the property would be his on the Deceased's death, the Plaintiff spent considerable time, money and effort in improving the Property. This included

incorporating the adjoining apartment into the main house to make one dwelling unit, the replacement of doors and windows, the installation and refinishing of new floors and the expansion of rooms.

7. By reason of the matters aforesaid the Plaintiff has acquired an equity in the Property which would be satisfied by the transfer to him of the legal and beneficial ownership in the said property free of encumbrances.

8.Since the death of the Deceased the First and Second Defendants have commenced an action against the Plaintiff in his capacity as executor and trustee of the Deceased's estate claiming (inter alia) that "Windy Heights" is an asset of the estate to be dealt with in accordance with the terms of the Deceased's last will and testament."

5. The Defence makes the following most fundamental averments by way of response:

"*22. The last will and testament of the Deceased executed on 9 September 1993 clearly states that it was the Deceased's intention that the residuary estate which includes the Property was to be shared in equal parts by all the Deceased's children, including the 1st and 2nd Defendants. This decision was made following a meeting with the Deceased's lawyer on or about September 1993. The Deceased, the Plaintiff and the 1st and 2nd Defendants were present at this meeting. At no point in this meeting did the Plaintiff make mention of the promise allegedly made to him by the Deceased regarding the Plaintiff's right to the Property following the Deceased's death. The Deceased made it clear to the Plaintiff that the Plaintiff would have to pay out his siblings, including the 1st and 2nd Defendants, if he intended to live at the Property following the Deceased's death. At no stage of the meeting did the Plaintiff express any objection to the Property forming the general part of the Deceased's estate. It was agreed at this meeting and understood by all present that all the properties comprising of the Deceased's estate, including the Property, would be shared equally between all of the Deceased's children.*"

Legal findings: the elements of proprietary estoppel

6. Paragraph 2 of the Plaintiff's counsel's Written Submissions state as follows:

> "*The Plaintiff's claim is brought in proprietary estoppel and relies on the unanimous House of Lords decision in Thorner v. Majors and others [2009] UKHL 18. Lord Walker, in paragraph 29 of his judgment, identified the three main elements requisite for a claim based on proprietary estoppel as, (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.*"

7. Mr. Jamal submits that the evidence in the present case adduced on behalf of the Plaintiff meets the legal requirements for such a claim. The *Thorner* case appears to be the most recent and authoritative judicial consideration of the doctrine of proprietary estoppel relied upon in the context of a claim to land. However, to better apprehend the context in which the requisite elements were held to have been made out at trial in *Thorner*, it is helpful to reflect on the following passages in the opinion of Lord Neuberger:

> "*84.It should be emphasised that I am not seeking to cast doubt on the proposition, heavily relied on by the Court of Appeal (e.g. [2008] EWCA Civ 732, paras 71 and 74), that there must be some sort of an assurance which is "clear and unequivocal" before it can be relied on to found an estoppel. However, that proposition must be read as subject to three qualifications. First, it does not detract from the normal principle, so well articulated in this case by Lord Walker, that the effect of words or actions must be assessed in their context. Just as a sentence can have one meaning in one context and a very different meaning in another context, so can a sentence, which would be ambiguous or unclear in one context, be a clear and unambiguous assurance in another context. Indeed, as Lord Walker says, the point is underlined by the fact that perhaps the classic example of proprietary estoppel is based on silence and inaction, rather than any statement or action - see per Lord Eldon LC ("knowingly, though but passively") in Dann v Spurrier (1802) 7 Ves 231, 235-6 and per Lord Kingsdown ("with the knowledge ... and without objection ") in Ramsden v Dyson LR 1 HL 129, 170.*
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> *85.Secondly, it would be quite wrong to be unrealistically rigorous when applying the "clear and unambiguous" test. The court should not search for ambiguity or uncertainty, but should assess the question of*

clarity and certainty practically and sensibly, as well as contextually. Again, this point is underlined by the authorities, namely those cases I have referred to in para 78 above, which support the proposition that, at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.

86.Thirdly, as pointed out in argument by my noble and learned friend Lord Rodger of Earlsferry, there may be cases where the statement relied on to found an estoppel could amount to an assurance which could reasonably be understood as having more than one possible meaning. In such a case, if the facts otherwise satisfy all the requirements of an estoppel, it seems to me that, at least normally, the ambiguity should not deprive a person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him.

87.It was also argued for the respondents that, if there was an estoppel as the Deputy Judge had decided, difficulties could have arisen if Peter had changed his mind before he died. The short answer to that argument is, of course, that Peter's intention that David should inherit the farm appears never to have changed: Peter certainly never communicated to David or to anyone else that he had changed that intention. On the contrary: in 2002, twelve years after the original commitment and three years before he died, Peter was still making it clear to his solicitor, in David's presence, that David would inherit the farm (saying that "we" wanted the deeds in one place as it "would be better" for David). Thus, for at least fifteen years from 1990 to 2005, through assurances made from time to time, Peter made it clear to David that he would inherit the farm on Peter's death, and, up to, indeed at, the moment that those assurances fell to be fulfilled, they remained in force.

88.I should add that, if Peter had changed his mind before he died, the question as to what, if any, relief should have been accorded to David would have been a matter for the court, to be assessed by reference to all the facts. An example of such a case is Gillett v Holt [2001] Ch 210, where my noble and learned friend, then Robert Walker LJ, had to consider just such an issue, and did so in a masterly judgment, to which I shall have to revert on the second issue on this appeal."

8. In the present case, assuming the representations relied upon were made in and after 1982, the Deceased arguably changed his mind because: (a) the Will made in 1993 did not leave the Property to the Plaintiff; and (b) the Property was not

conveyed to the Plaintiff during the Deceased's lifetime. Accordingly, reliance is also placed on the seemingly flexible approach adopted in *Gillett-v-Holt* [2001] Ch 210. However, the factual matrix which resulted in the English Court of Appeal's reversal of the trial judge's refusal to grant equitable relief must be also be taken into account. The evidential context is best illustrated by citing the following passages in from the judgment of Robert Walker LJ (as he then was):

> "*In my judgment the cumulative effect of the judge's findings and of the undisputed evidence is that by 1975 (the year of the Beeches incident) Mr Gillett had an exceptionally strong claim on Mr Holt's conscience. Mr Gillett was then 35. He had left school before he was 16, without taking any of the examinations which might otherwise have given him academic qualifications, against the advice of his headmaster and in the face of his parents' doubts, in order to work for and live with a 42 year-old bachelor who was socially superior to, and very much wealthier than, his own parents. Mr Holt seriously raised the possibility of adopting him. Mr Holt's influence extended to Mr Gillett's social and private life and it seems to have been only through the diplomacy of Miss Sally Wingate (as she then was) that Mr Holt came to tolerate, and then accept, the notion of Mr Gillett having a girlfriend. Mr Holt had said that he would arrange for Mr Gillett to go to agricultural college but then did not arrange it, and it was only through Mr Gillett's own hard work and determination that he learned additional skills at evening classes. He proved himself by getting in the harvest in 1964 when Mr Holt was away fishing. All these matters preceded the first of the seven assurances on which Mr Gillett relied, so they are in a sense no more than background. But they are very important background because they refute Mr Martin's suggestion (placed in the forefront of his skeleton argument) that Mr Gillett's claim should be regarded as a 'startling' claim by someone who was no more than an employee. On the contrary, Mr McDonnell was not putting it too high when he said that for thirty years Mr and Mrs Gillett and their sons provided Mr Holt with a sort of surrogate family.*
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> *However a surrogate family of that sort is not the same as a birth family, and it is clear that Mr Gillett and his wife must often have been aware of the ambivalence of their position. Mr Holt was generous but it was the generosity of the patron; his will prevailed; Mr and Mrs Gillett were expected to, and did, subordinate their wishes to his (compare Re Basham [1986] 1 WLR 1498, 1505H). One telling example of this was over the education of their sons. Mr Holt decided that he would like to pay for the Gilletts' elder son, Robert, to go to Mr Holt's old school (Greshams in Norfolk). The offer did not extend to their younger son, Andrew, and the Gilletts not unnaturally felt that if*

one boy was to go to boarding school then both should go. In the end Robert went to Greshams and Andrew to a less well-known boarding school at Grimsby, and Mr and Mrs Gillett used some maturing short-term endowment policies and increased their overdraft in order to bear half the combined cost of the school fees and extras.

Mr Gillett also incurred substantial expenditure on the farmhouse at The Beeches, most of it after the clear assurance which Mr Holt gave him when, in 1975, he ventured to ask for something in writing: "that was not necessary as it was all going to be ours anyway". This was after the Gilletts had sold their own small house at Thimbleby and so had stepped off the property-owning ladder which they had got on to in 1964.

It is entirely a matter of conjecture what the future might have held for the Gilletts if in 1975 Mr Holt had (instead of what he actually said) told the Gilletts frankly that his present intention was to make a will in their favour, but that he was not bound by that and that they should not count their chickens before they were hatched. Had they decided to move on, they might have done no better. They might, as Mr Martin urged on us, have found themselves working for a less generous employer. The fact is that they relied on Mr Holt's assurance, because they thought he was a man of his word, and so they deprived themselves of the opportunity of trying to better themselves in other ways. Although the judge's view, after seeing and hearing Mr and Mrs Gillett, was that detriment was not established, I find myself driven to the conclusion that it was amply established. I think that the judge must have taken too narrowly financial a view of the requirement for detriment, as his reference to "the balance of advantage and disadvantage" ([1998] 3 AER at p.936) suggests. Mr Gillett and his wife devoted the best years of their lives to working for Mr Holt and his company, showing loyalty and devotion to his business interests, his social life and his personal wishes, on the strength of clear and repeated assurances of testamentary benefits. They received (in 1983) 20 per cent of the shares in KAHL, which must be regarded as received in anticipation of, and on account of, such benefits. Then in 1995 they had the bitter humiliation of summary dismissal and a police investigation of alleged dishonesty which the defendants called no evidence to justify at trial. I do not find Mr Gillett's claim startling. Like Hoffmann LJ in Walton v Walton (14 April 1994, CA) I would find it startling if the law did not give a remedy in such circumstances."[2]

[2] [2001]Ch 210 at 234B-235D.

9. *Gillett-v-Holt* was used as a guide by the Chief Justice in *Richardson-v-Tuzo* [2007] Bda LR 1, to which Mr. Horseman referred. In that case it was held that as the claimant had only spent $10,000 in adding an apartment onto the property in 1981 which she lived in rent free until 1988, whatever equity the claimant had acquired had long since been satisfied. Far from it being unconscionable for the claimant's assertion to own all the property to be denied, Ground CJ found that it would be unconscionable for her to be awarded ownership of the entire property. The Defendants' counsel also referred to the similar conclusion in *Sledgmore-v-Dalby* (1996) 72 P. & C.R. 196 (CA).

10. So the Plaintiff must further show, assuming that the basic requirements for proprietary estoppel are made out, that it would be unconscionable for his claim to the entire equity (or some lesser equity) in the Property to be denied. This requires the Court to establish that the elements of proprietary estoppel have been proved and, if they are, to assess what is "*the minimum equity to do justice to the plaintiff*": *Gillett-v-Holt* [2001] Ch 210 at 235E.

Factual findings: did the Plaintiff's father create or encourage an expectation that the Plaintiff would inherit the Property?

11. Having regard to the oral evidence of the Plaintiff and his wife, together with the witness statements of his sister Jewell Smith and the family friend Richard Burchall (now deceased), I find on a balance of probabilities that the Deceased did create or encourage an expectation on the part of the Plaintiff that he would be given '*Windy Heights*'. I accept that the evidence is far from clear, but this very lack of clarity is inconsistent with the notion that the claim is pure fabrication. Moreover, having regard to the family context in which the claim arises, the cogency of evidence required to support a similar claim brought by a stranger does not in my judgment apply.

12. It is common ground that the Plaintiff's father encouraged him and his wife to come to Bermuda from the US in or about 1982 to run a dry cleaning business and that the Plaintiff and his family stayed in '*Windy Heights*' from shortly after his arrival rent free until the father's death and to date. It seems inherently improbable that the Plaintiff, his wife and the two witnesses whose statements were read into evidence have all invented the idea that the Plaintiff was led to believe that the Property was effectively his own. I find it inherently believable that the Deceased would have (a) welcomed the support of his only son in running one of his businesses at a time when his three daughters were all either settled in

the US or had strong overseas ties, and would have (b) promised to leave him the home as an incentive for remaining in Bermuda.

13. The Witness Statements of Burchall and Jewel Smith, despite the absence of cross-examination, are noteworthy for the moderate way in which they support the Plaintiff's case. The Plaintiff admitted making significant loans to his youngest sister out of estate monies, so her evidence must be treated with some caution, however. The receipt of these monies was not disclosed in her Witness Statement. However, Burchall volunteered (in paragraph 5 of his November 29, 2007 Witness Statement) the fact that he received $5000 from the Plaintiff "*a few years ago...as compensation on behalf of his father*". His Statement concludes with the following observations which both support the Plaintiff's case and hint at (through referencing arguments) the possibility that the Deceased may have changed his mind about conveying the Property to the Plaintiff:

> "*Ronnie and Mr. Smith seemed like they had a fairly good relationship and Ronnie began to take over his father's business affairs, as he got older, especially in the end when he fell ill. However, they did argue from time to time and when he was angry he would make statements like ''He's (Ronnie) lucky that he has a house and does not have to pay rent.' When these statements were made, I would agree with him, and would say, 'That it was nice not to have to pay rent.' As I always thought Ronnie was given the house by Mr. Smith and that Ronnie did not have to pay rent to anyone.*"

14. Due the adversarial nature of the present dispute amongst siblings, I place little reliance on the Defendants' denials of the Property ever being referred to as the Plaintiff's house. After all, it is common place to refer to even rented property as the house of its occupants, especially in relation to long term tenancies. However it is plausible that the Deceased might have promised the Property to the Plaintiff without telling his sisters of this fact. Indeed, having regard to the fact that the Plaintiff was not either conveyed or devised the Property, it seems likely that the Deceased did as they suggest express dissatisfaction with the Plaintiff's contribution to the upkeep of '*Windy Heights*'. How much the Deceased's displeasure with the Plaintiff was justified and how much was displaced distress about the Deceased's declining business fortunes for which the Plaintiff was not responsible is impossible to tell.

15. It is open to me to find that by the time the Deceased made his will in or about 1992, the Plaintiff knew or must have known that his father had changed his mind

about giving him the Property. His failure to protest when his father made it clear that he would not get '*Windy Heights*' is arguably otherwise inexplicable. However, the Will did provide for the Plaintiff to be the sole executor, which is inconsistent with the true position being that by this date the Deceased had lost faith in or fallen out with his son. It seems more likely that, as the Plaintiff and his wife contend, they both still expected that the Deceased would make an *inter vivos* transfer of the Property which would not form part of the estate at all to be dealt with under the Will. I accept the Plaintiff's evidence in this regard. This does not rule out the possibility that the Deceased never got around to completing the transaction because of an actual or contemplated change of mind not communicated to the Plaintiff or his wife. The financial difficulties which the Deceased faced in his final years also may have served as an impediment to his freely transferring the Property by way of voluntary conveyance to his son.

16. Despite her lack of independence, I found the Plaintiff's wife to be the most credible overall of all witnesses who gave oral evidence, untainted by the stain of sibling rivalry which the other witnesses made little attempt to conceal. She says that when the Deceased came to live with them in the mid-1990's following a mild stroke, he promised to legally convey the Property to the Plaintiff as soon as possible. I accept this evidence, which seems inherently believable, having regard to the fact that (a) the Plaintiff had received no assistance to purchase a residential property, (b) his sisters had all received assistance to purchase property (Jewell was assisted by himself as executor of the Deceased's estate) and (c) he was the only child who stayed in Bermuda to support an aging parent. The other occasion when she specifically recalls a similar promise being orally made was when the Deceased was in hospital in Florida, a week before he died.

17. Perhaps the best indirect evidence supportive of the Plaintiff's claim that the Property had been promised to him comes from the Witness Statement of Ronelle Holloway. She says (paragraph 17) that her father not long before he died said this of the Plaintiff: "*He's had enough and I am not going to give him that house.*" This statement, assuming it was made, makes no sense unless the Deceased had previously evinced an intention to give the Plaintiff '*Windy Heights*'. She confirmed this statement in her oral evidence, implicitly admitting that her father had at some earlier time contemplated giving the Plaintiff the Property. This lends further credence to the assertion of Jewel Smith, untested by cross-examination, that the Deceased indicated to her that all of her siblings except her had their own houses and that she would be provided for in due course. It is common ground that the Deceased assisted the two older sisters to purchase homes abroad.

18. I find it plausible that the Deceased expressed different intentions about the disposal of the Property to different family members on different occasions and on balance accept both the Plaintiff's wife's version and the First Defendant's version of what the Plaintiff said to each of them on separate occasions while in hospital in Florida. These differing positions may have reflected a conflict between what the Deceased would have liked to have done in an ideal world and what he felt made financial sense in light of the financial difficulties he faced in his declining years. It is common ground that the estate was left with significant debts. Against this background it is believable that the Deceased may have complained to his daughters that the Plaintiff was not paying rent, despite the fact that he had promised to give the Property to his son.

19. Moreover, it is the Plaintiff's own case, as confirmed in the curriculum vitae of himself and his wife, that she ceased working for the dry cleaning business in 1993 (at least on a full-time basis) and he did likewise in 1998. So by the time of the Deceased's death in 2000, the Plaintiff had already ended his employment in the family business he returned to Bermuda to run. However, this was some 24 years after he had graduated from College with a BSc Cum Laude degree with a major in Business Administration/Accounting, at a time when the Plaintiff must have been over 45 years of age and after he had been working in his father's business for over 15 years.

20. I am unable to accept the evidence of the Plaintiff and his wife that the issue of their right to own the Property was first raised in 2005 in the context of complaints made by two of his sisters about the handling of the estate. The documentary record suggests that before that the Plaintiff was engaged in inconclusive negotiations with Second Defendant about (a) his purchasing Cape Cod for $400,000 and her agreeing to sign over '*Windy Heights*' to him. According to the Plaintiff's own October 31, 2003 letter, the Second Defendant agreed to this proposal. The Plaintiff forwarded draft letters for his sister to sign which were not executed by her. The Plaintiff ought to have known well before 2005 that his desire to acquire '*Windy Heights*' for no consideration was at least potentially contentious. Nevertheless, this request written for the Second Defendant to transfer her legal interest in the Property to the Plaintiff for no consideration, before the parties seriously fell out over the Plaintiff's handling of the estate, provides tangible documentary support for the Plaintiff's expectations in relation to '*Windy Heights*'.

21. It is in any event understandable that Plaintiff took so long to assert the proprietary estoppel claim after his father's August 2000 death, doubtless believing that absent legal title, his ability to inherit the Property was solely dependent on his sisters' consent. When this consent was not forthcoming from two of his sisters, it may well have left him with the feeling that his their subsequent complaints about his handling of the estate was rubbing salt in his wounds; his father had left him with the special burden of serving as executor of his estate without giving him any legally documented corresponding special benefit. The fact that the Plaintiff himself circulated documents suggesting that the Property was an estate asset is not inconsistent with his subsequent assertion of a contrary claim –based upon what is on any view an exceptional and little-known legal ground.

22. I am unable to make any findings as to whether or not a meeting took place at the offices of Conyers Dill & Pearman in 2000 when the Plaintiff contends the Defendants verbally agreed the Property did not form part of the estate and the Defendants say no meeting occurred. However, I do find that it is more likely than not that the Plaintiff at the time of his father's unexpected death still expected or hoped that the Property would be conveyed to him; and this expectation was based on assurances made by the Deceased to the Plaintiff and his wife. There is no or no credible evidence that any change of mind on the Deceased's part was ever communicated by him to the Plaintiff.

23. I accept the Defendants' evidence as to a 2004 meeting at the offices of Conyers Dill & Pearman, the estate's then lawyers, where various options for winding-up the estate were discussed and the Plaintiff did not assert a legal claim to the Property. Documentary support for this exists in the form of handwritten notes on Conyers Dill & Pearman notepaper. I do not consider the Plaintiff's failure to assert a claim to be significant because I accept that he had yet to receive advice about a proprietary estoppel claim. Absent such advice, he would reasonably assume that he had no legal leg to stand on and was essentially dependent on his sisters' goodwill in seeking a 100% share of the Property.

24. Either the Plaintiff has exaggerated the difficulties faced by the business or he voluntarily assumed, to some extent at least, the risk of working for modest financial returns. All the evidence points to the fact that the Deceased's businesses and/or properties were generally in a distressed state in the last few years of his life. It seems improbable that if the Plaintiff had been living "*the life of Riley*" that his sisters would not have been aware of such a fact. So if the

Plaintiff did tarry by his father's side for comparatively modest returns for more than 15 years, as appears to have been the case, it is difficult to believe that he did *not* do so in material reliance on the assurance that he would acquire the Property as his ultimate reward.

Findings: did the Plaintiff rely on the expectation of inheriting the Property to his detriment?

25. I find that it is self-evident that the Plaintiff relied upon the expectation of inheriting '*Windy Heights*', or having it conveyed to him *inter vivos*, by returning to Bermuda and giving up his life in the United States. The question of detriment is somewhat more difficult to assess. The Plaintiff clearly spent an unspecified amount on renovations, but it is equally clear that he received a far greater financial benefit in terms of rent free accommodation over more than 25 years.

26. The second detriment of which he complains is the again un-particularised loss of earnings flowing from his decision to run his father's dry-cleaning business out of which he took minimal living expenses but no guaranteed base salary at all for some 15 years. The Plaintiff and his wife say they depleted their savings in the early months of taking over this business, which I also accept. This detriment too would likely have been eclipsed by the benefit of rent-free accommodation, although one can only speculate what the loss of earnings would be.

27. The third (and to my mind the most significant) detriment which is implicit in the Plaintiff's pleaded case is the fact that in reliance on the expectation of acquiring the Property the Plaintiff (a) took no steps to acquire another property of his own; and (b) for 16 years (11 years in the case of his wife) gave up alternative employment options in the accounting field. Explicit support for this detriment, albeit in a somewhat oblique form, is found in the Plaintiff's evidence when he stated that he felt the business ought to be sold as early as 1986 but his father refused to agree with this course. Similar support for the loss of the opportunity to acquire other real property may be found in paragraph 32 of Donna Smith's Witness Statement where she states:

> "*Further, if we had at any time thought that the property was not ours we would have kept all receipts regarding renovations and we may have looked for another house.*" [emphasis added]

28. The fourth detriment (considered in further detail below) suffered by the Plaintiff, which was not explicitly relied upon but which cannot be ignored in light of the uncontested evidence, was his service as sole executor of the deceased's estate

between 2000 and 2009. I find as a matter of inference that he must have accepted this role based on the expectation that he was to receive more than an equal share of his father's estate, accepting the Plaintiff's evidence that he expected the Property would not form part of the estate and would be conveyed to him before his father's death.

Findings: what is the minimum equity required to do justice to the Plaintiff?

29. In my judgment assessing the minimum equity required to do justice to the Plaintiff requires an approach which is more flexible than that contended for by the Defendants but more rigid than that contended for by the Plaintiff. This conclusion is supported by the following extract from the passage in the judgment of Robert Walker LJ in *Gillett-v-Holt* more fully reproduced above:

> "*It is entirely a matter of conjecture what the future might have held for the Gilletts if in 1975 Mr Holt had (instead of what he actually said) told the Gilletts frankly that his present intention was to make a will in their favour, but that he was not bound by that and that they should not count their chickens before they were hatched. Had they decided to move on, they might have done no better. They might, as Mr Martin urged on us, have found themselves working for a less generous employer. The fact is that they relied on Mr Holt's assurance, because they thought he was a man of his word, and so they deprived themselves of the opportunity of trying to better themselves in other ways. Although the judge's view, after seeing and hearing Mr and Mrs Gillett, was that detriment was not established, I find myself driven to the conclusion that it was amply established. I think that the judge must have taken too narrowly financial a view of the requirement for detriment, as his reference to "the balance of advantage and disadvantage" ([1998] 3 AER at p.936) suggests.*"

30. In that case, the main claimant had given up opportunities from his teenage years and was more dependent on the testator. In the present case the Plaintiff returned home at a stage where he had already created other opportunities and was in a better position to make an informed decision. On the other hand, the paternal influence was no doubt a powerful one and the expectation of the promise being fulfilled was even more reasonable. Nevertheless, it seems to me that the main detriment in the present case was that the Plaintiff and his wife "*deprived themselves of the opportunity of trying to better themselves in other ways*", for a period in the Plaintiff's case of approximately 16 years covering the crucial mid-

career period. The most tangible equity which has not been satisfied is the loss of an opportunity to purchase a home in the Plaintiff's own right during much of his best earning years; a period during which, (it is a notorious fact), property values have increased exponentially in Bermuda. The Plaintiff and his wife were married 34 years ago and are likely now in their late fifties.

31. It seems clear that the dry-cleaning business could only be run on a very marginal basis and that the Plaintiff was effectively receiving a housing allowance by staying in '*Windy Heights*' rent free. I accept entirely that the Plaintiff and his wife, like the Deceased, must have in the early days hoped that the business would be more lucrative than it turned out to be. Nevertheless, it seems inherently improbable that he would have continued to live on such a constrained financial basis if he was told that when his father died, he would have to buy out his three sisters if he wished to own the Property outright. It is unclear what the Plaintiff's financial circumstances were at the date of the trial, save that the dry cleaning business was not profitable and had been sold some two years prior to the Deceased's death, with the sale proceeds reportedly being applied to other estate debts.

32. The Defendants contend that the Plaintiff's equity (if any) would be satisfied by his buying out the two sisters who dispute his right to the entire house on the basis that the third has agreed to forego her claim. In their evidence they appeared to reluctantly accept that the Property (or that part of it habitually occupied by the Plaintiff) had been designated by their father as a place for the Plaintiff to reside.

33. I find that it would be unconscionable for the Plaintiff to be required to buy out at least two of his three sisters (assuming the third relinquishes her 25% legal interest) to guarantee security of tenure in what has been his *de facto* home for more than 27 years. I am unable to accept that any equity he acquired must be viewed as exhausted based on a narrow financial assessment of how much he invested in the property itself. On the other hand, in assessing what the *minimum* requirements are to give effect to the Plaintiff's equity, the Court is bound to take into account: (a) the comparatively modest investment made by the Plaintiff in the Property, according to the evidence placed before the Court; and (b) the fact that, although the Plaintiff elected to remain with the unprofitable dry cleaning business to please his father despite believing that it ought to be sold as early as 1986, he did eventually decide to cut his losses and make his own independent way in the world in 1998. He has had had an opportunity to pursue his own career choices since then and to mitigate any losses which he may have suffered although it seems obvious that his employment options after spending over 15

years running a struggling family business would not have been as wide as the might otherwise have been. In California he was employed by CBS; after the family business was sold in 1998, his first job was with his Church.

34. This view is also influenced by the fact that the Plaintiff had been entrusted by his father with the role of sole executor of his Will. It is difficult to imagine that if the Plaintiff had been told in 1993 when the Will was made that he was to be the sole executor but that he would only be entitled to a 25% interest in 'Windy Heights' and any other property in the estate that he would have agreed to assume that role. He was the only child who had come home, he was working in a struggling family business and two of his sisters had already been assisted to purchase homes abroad. Accordingly, an additional detriment which the Plaintiff has suffered has been the burden of managing the indebted estate between 2000 and 2009. The Defendants sensibly did not pursue their un-particularised allegation that the Plaintiff was guilty of wilful default as trustee, and should be denied equitable relief on these grounds. But in the Defendants' favour I am bound to take into account the fact that Plaintiff did not complete the winding-up of the estate and on August 20, 2009 did not oppose the Second Defendant being appointed executor in his place.

35. So while I find it impossible to conclude that the Plaintiff's equity has been fully satisfied, it is also equally impossible to fairly conclude on the evidence that equity requires *as a minimum* that the Plaintiff be conferred full beneficial ownership of the Property. Full beneficial ownership would be the maximum quantum of the Plaintiff's claim which the Plaintiff would have a stronger equitable claim to if he had, for instance, made a more substantial financial investment in the Property or his father's other distressed assets. In my judgment it cannot fairly be concluded that it would be unconscionable for the Plaintiff to be denied full beneficial ownership of the Property. I find that the minimum required to give effect to the Plaintiff's equity in the Property in all the circumstances of the present case would be to declare that the Property falls to be dealt with in accordance with the Will subject to a life interest in the Plaintiff's favour. As Robert Walker LJ observed in *Gillett-v-Holt* [2001] Ch 210 at 237A:

> "*The court's aim is, having identified the maximum, to form a view as to what is the minimum required to satisfy it 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 is possible and avoid or minimise future friction…*"

36. As one is not here concerned with multiple properties or a single property under joint occupation, the need to achieve a "clean break" does not really arise. What is called for is an assessment of what the extent of the Plaintiff's equity in the Property is (if any) over and above his legal entitlement to one-quarter of the Property. In my judgment, the Property as it devolved into the Deceased's estate on his death should be held in equity as being subject to a life interest in the Plaintiff's favour. If the Plaintiff wishes to reside in the Property for the rest of his life, he has the right to do so. Most significantly of all, this finding is intended to prevent a situation where in the absence of agreement the Property can be sold against the Plaintiff's wishes.

37. The Plaintiff's minimum reasonable expectation, based on his father's assurances that he would be given '*Windy Heights*' outright, objectively viewed in the light of events after the assurance was first made in or about 1982, is that he should be entitled to occupy the Property for the rest of his life without paying rent and bearing only the ordinary maintenance expenses.

Conclusion

38. The Plaintiff's claim succeeds in part. He is entitled to a declaration that he has in equity a life interest in the Property, in addition to the quarter-interest devised to him by his father's Will. Although the case was argued on an "all or nothing" basis, it is quite clear from the authorities cited that the Court's equitable jurisdiction to do justice between the parties is very broad indeed.

39. If the Plaintiff wishes to buy out the legal interests of his sisters in the estate in fee simple, the value to be assigned to their shares will have to be discounted to take into account the value of the Plaintiff's life interest. Such an arrangement would have to form the subject of an agreement. Absent any mutually agreed resolution, the Property will remain subject to the Plaintiff's life interest until his death.

40. I will hear counsel as to costs. However, my provisional view is that since neither side has fully succeeded while each side has failed in part, the appropriate order is to make no order as to costs.

Dated this 13th day of August, 2010 _____

KAWALEY J