IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2009: No. 399

BETWEEN:

RONALD FREDERICK TERCEIRA

Plaintiff

-and-

(1) HAROLD MICHAEL TERCEIRA
(2) NADINE JOY DECOUTO
(3) KARON MARIE TERCEIRA
(4) CAROL-ANN TERCEIRA
(5) DAVID ALAN LIVINGSTON TERCEIRA
(6) LINDA CLAIRE WILKINSON

Defendants

JUDGMENT
(In Court)

Dates of Trial: November 22-December 1,
December 9-10, 2010[1]
Date of Judgment: February 4, 2011

Mr. Alan Dunch, Mello Jones & Martin,
for the Plaintiff

Mr. David Kessaram and Ms. Louise Charleson,
Cox Hallett Wilkinson, for the Defendants

[1] Closing submissions were tendered in writing on January 7, 2011.

Introductory

1. Battling over family inheritance is often a powerful emotional attraction as it affords the bereaved a distraction from their grief. Such battles tend to override the better instincts which would motivate the less emotional to privately resolve any family disputes and honour the memory of their loved ones in a more dignified manner. This may explain in part the present litigation in which the Plaintiff, an eldest child, sues his six other siblings in respect of a dispute as to his entitlement to certain property which in legal title terms forms part of their deceased father's estate ("the Estate"). He claims that he is entitled to the legal and beneficial ownership of a commercial building known as 5 Marsh Lane, Devonshire ("the Property") by virtue of the doctrines of proprietary estoppel and/or constructive trust. In short, the Plaintiff contends that he only erected the building at his expense and business risk because his father promised that he would convey the Property to him.

2. The Defendants contend that the Property forms part of the Estate and in which all seven siblings have an equal joint interest. They say the Plaintiff's evidence as to the alleged promise is not credible and should be rejected. Further and in any event, he has waived the right to pursue the claim and is debarred by his inequitable conduct as Executor from claiming relief. By their Counterclaim, the Defendants claim compensation for the Plaintiff's use and occupation of the Property from June 1, 2007 when the parties' mother died.

3. The bitterness with which this inheritance battle was conducted is to some extent explained by the fact that the majority of the parties both lived and worked on property forming part of the Estate. The family ties that run through the various legal and commercial dealings which bear on the issues in dispute make it impossible for the Court to assess the hotly contested evidence through the lens ordinarily used for either a purely commercial case or a traditional family property case. The central dispute concerns the ownership of a commercial building erected on family property and disputants who, by and large, both lived and worked on family property.

The Plaintiff's case

RFT

4. The Plaintiff's evidence and that of his witnesses on its face clearly supported his pleaded case. He testified that he and the First and Second Defendant ("HMT" and "NJD" respectively) were at all material times executors of the Estate of the late Harold Frederick Livingston Terceira, who died on January 16, 1996.

5. The Plaintiff ("RFT") stated that together with his wife Susan ("KST") in or about 1985, he purchased a business called Gulfstream Graphics, a commercial printing business. Due to a fire at the firm's initial premises in or about 1986, they commenced looking for new premises. They asked KST's brother Bruce Barker to look out for a suitable property for them. RFT recalled looking at several properties during this period, in particular a

commercial property at Laffan Street on sale for $455,000. During this time, RFT recalled discussing his need to find new premises for his business with his father.

6. In the course of one discussion on the balcony of his father's 3 Marsh Lane premises, RFT recalled his father pointing to the vacant land now known as 5 Marsh Lane and saying words to the effect of "*why don't you build your own building over there?*" RFT repeated this account both vigorously and demonstratively throughout his oral testimony. As a result of further discussions on that same day, RFT understood his father to be proposing that (a) he (RFT) would fund the planning, design, construction and maintenance of the building, and (b) his father would thereafter subdivide the land between 3 and 5 Marsh Lane and convey the latter portion to RFT. Despite his wife's concerns about her father-in-law's promise not being in writing, RFT met with his father again and confirmed this oral agreement.

7. In reliance on his father's assurance and promise, RFT applied for and obtained planning permission and a bank loan and the designing, approval and construction of the building was financed through a combination of his own funds and bank financing. Construction began in 1988 and concluded in 1990; as of January 1, 1991, RFT was registered as the owner of the building in the Land Valuation List and has paid land taxes since then and insurance since 1990. He never paid nor was asked to pay rent by either of his parents during their lifetime. All rents generated by the Property were paid to RFT's company, Gulfstream Graphics. RFT had no further discussions with his father about subdividing the land after the Property was occupied.

8. RFT and his wife arranged the Planning application although it was filed under the name of the father who was the legal owner of the land. Shortly before this, RFT and his brother HMT informally agreed that the latter would do the foundation and construction of the building at a discounted labour rate in return for HMT being permitted to rent space in the building at a discounted rate. In or about October 1987, Planning approval was granted. David Mello paid the requisite fee on behalf of RFT and his wife. In or about November 1987, they borrowed $240,000 secured by the deeds of the house owned by RFT and his wife. The couple had an existing loan outstanding in the amount of $28,000 in respect of the purchase of their business.

9. In or about November 1987, RFT contacted Atlantic Building Systems ("ABS") in Atlanta, the same company which his father had used for the construction of the 3 Marsh Lane commercial premises. RFT purchased tickets for himself, his father and Michael to travel to Atlanta; his father was interested in coming while RFT thought HMT's construction role made it beneficial for him to visit ABS as well. Their route was via Tennessee where DALT lived and their father owned property. While the trio travelled together to Tennessee, their father stayed there and DALT joined his two older brothers for the business trip to Atlanta. In Atlanta, they commenced negotiations with ABS about the supply of materials for the Property and extra materials requested by their father for 3 Marsh Lane. A contract was eventually executed in or about May 1988.

10. HMT, according to RFT, delayed commencing work on the foundations for the Property, which he only started in August 1988 and had not completed by October. He approached his father who arranged for other contractors to complete the work, albeit paid by RFT. Some of these workers were seconded from other projects being run by his father. In about 1990, when the exterior works had been completed, RFT could not afford to complete the interior. His father took out a bank loan in the amount of $76,000 on the understanding that (a) RFT would pay the interest due to the Bank in such amounts as he could manage, and (b) the father would advance whatever was required by RFT to complete the project, which RFT would repay. Two payments of $20,000 were in fact advanced on this basis. When RFT referred a tenant to his father, his father agreed that the rent from space in 3 Marsh Lane could be applied by RFT towards the interest payments on the father's loan. These payments were made between 1991 and 1995, during which period RFT and his wife made one $8000 balloon payment, and after which RFT resumed making interest payments. After the father's death on January 16, 1996, RFT's mother advised that the bank wished the loan to be amortised. It was agreed that RFT and his wife would be responsible for one-third of the loan, a $500 interest payment, and that the mother would pay $1000 per month in reduction of the outstanding principal. Shortly thereafter, the mother paid off that loan in full as well another loan in relation to NJD.

11. According to RFT, at a March 1996 meeting with his two co-executors with Peter Smith shortly after his father's death, he made it clear that the property should not form part of the estate. He conceded now knowing that it was probated as such, perhaps because his father retained legal title. Both his siblings vigorously contested the assertion that RTF asserted ownership at this stage.

12. On or about May 15, 2007, the parties' mother passed away. At a June 2007 family meeting, the Defendants proposed keeping all properties together. RFT proposed a subdivision so that he could continue to operate his business in return for his interest in any other property even if the land was worth less than his $1/7^{th}$ share of the entire estate. This was the first time his siblings objected to his assertion that he owned the building erected on 5 Marsh Lane. According to his siblings, this was the first time he asserted he owned the building, and he did so in terms which suggested that RFT accepted he did not own the land on which it stood. Under cross-examination, RFT agreed with this characterisation of the way in which he asserted his claim, but denied that this was the first occasion on which he had raised the topic.

13. RFT denies owing the estate approximately $212,624.57 in respect of rent for his occupation and use of the Property and denies that there was any binding agreement reached as regards rent to be paid by the parties in or about July 2007. He asserts that NJD had primary control of the estate after his father's death in 1996 and that he had little to do with its management since. Under cross-examination he argued that he should not be accountable for rent if his siblings are not also accountable.

14. RFT was not a completely convincing witness, although parts of his testimony were quite credible. In my judgment, he too often doggedly denied any part of the Defendants' case

which he felt would hurt his own case, seemingly with scant regard for the objectively ascertainable truth of the matter. His evidence often suggested that what he wished was the truth he had convinced himself into believing was the truth. Bearing in mind the high emotional and financial stakes involved in a case brought by RFT against all of his six siblings, I find that I should generally approach his evidence with care and seek independent support if possible for his most significant and controversial assertions.

The Plaintiff's wife

15. Although KST's Witness Statement might be read as suggesting that she was privy to her father-in-law's early discussions with her husband about building on the disputed land, she confirmed in cross-examination that these assertions were based on what her husband had relayed to her. She confirmed her husband's evidence that, *inter alia*, (a) before they built the commercial premises on 5 Marsh Lane, they considered together with her brother purchasing the Laffan Street property, (b) she was concerned about relying on a verbal promise from her father-in-law, (c) HMT did construction work at a reduced rate and subsequently rented space on the Property at a reduced rate, (d) her father-in-law advanced $40,000 out of his $76,000 loan to her and her husband which was all (together with interest on the whole loan) that they were responsible for, (e) after her father-in-law's death, NJD was primarily responsible for the estate administration and management, (f) she and RFT invested $250,000 of their own money in constructing the building sourced from their own funds as well as rental income, (g) prior to 2007, none of his siblings raised any queries about his right to collect rent or own the Property, and (h) after 20 years of their business being located on the Property, it would be unfair, prejudicial and contrary to her father-in-law's assurances for the couple to have to relocate their business at this juncture.

16. KST further stated that her father, a professional engineer, did most of the plans for the foundation and engineering aspects of the construction project. She also significantly stated that in or about the autumn of 1990, her brother Bruce Barker met with her father-in-law at the home of RFT and herself. After a discussion which she did not hear, her brother told her not to worry about the subdivision of the land because her father-in-law had said "*it was going to be Ron's in the end*". Thereafter she had no reservations about the ultimate ownership of the Property.

17. Bearing in mind the commonality of interests KST shares with her husband in relation to this litigation, I find that I should treat her evidence with caution where it deals with contentiously significant matters and look for any independent supporting material which can be found.

Bruce Barker

18. Bruce Barker is KST's Bermudian brother and the former principal in a local architectural firm who is now retired in Wales. He supported their testimony as regards

the fact that (a) he visited the Laffan Street property with them in or about 1985 and thought this was a good investment, (b) his sister voiced concerns (which he shared) about her father-in-law's offer not being in writing, and (c) that his father assisted with design drawings (adding that he provided consultancy support when his father was away). He also crucially stated that in the autumn of 1990, he was asked by RFT and KST to look at a dampness problem in their studio when the father dropped by. He heard RFT's father discussing concerns about how the subdivision of Marsh Lane would be carried out. In a private conversation with his sister's father-in-law, the latter said words to the effect of "*I don't know why Ronnie and Sue are worried...it's going to be Ronnie's in the end anyway.*"

19. Bruce Barker cannot be regarded as an independent witness but he is clearly less closely connected to the Plaintiff than the latter's wife. He gave his evidence in such a straightforward manner that Mr. Kessaram appeared to handle him in cross-examination very gingerly, somewhat like a cat on a hot tin roof. The Defendants' counsel did not suggest in cross-examination why this apparently respectable professional man should decide, during an early retirement, to expose himself to the risk of this Court finding that he has given perjured evidence. It is true that it would have been obvious to the witness that no living witness could positively contradict the crucial portions of his evidence; but it must equally have been obvious that the choices open to this Court having regard to all the evidence including that of the six Defendants would be stark ones: either Bruce Barker's evidence is true or it has been deliberately concocted in a premeditated manner. Moreover, the Plaintiff's case is far from a straightforward one, and the evidence of Bruce Barker even if accepted is plainly insufficient by itself to guarantee a commercially substantial outcome in favour of his sister and her husband, having regard to the broad discretionary nature of the equitable relief sought.

20. In answer to the Court, the witness indicated that he is qualified to work as an architect in both Bermuda and the UK and has tentative plans of continuing to do professional work in Bermuda in the future. This too made it less probable to my mind that he would chance his good name in a local court in support of a far from 'open and shut' claim. Having regard to the manner in which he gave his evidence, it could only be rejected out of hand if this Court concluded that this witness had the capacity to give perjured evidence with a coolness typically associated with the professional conman or the habitual liar.

21. Although I found Bruce Barker to be a credible witness in general terms, and despite no basis being advanced for this Court finding him to be a premeditated perjurer, that does not obviate the need to approach his evidence with care in light of his familial ties to RFT's wife.

The Defendants' case

CT

22. CT appears to be the sibling who coordinated the Defendants' case. Much of her understanding of the circumstances in which the building came to be erected on 5 Marsh

Lane was based on discussions with one or both of her parents, not necessarily contemporaneously with the relevant events. In essence, she stated that she understood that her father proposed that RFT take out the loan because he was unable to do so himself and that the arrangement was that once the loan was retired, the third-party rental income would be payable to her father during his lifetime and thereafter to her mother during her lifetime. CT also stated that she recalled her father complaining on several occasions that KST had not prepared accounts so that he could monitor the rent situation.

23. She described the first family meeting after her mother's death in terms that were generally not contested. However, RFT denied responding to his siblings' refusal to agree to hive off 5 Marsh Lane by slamming his fist on the table, saying that if they did not agree he would tear the building down and hold them up in court for years so they would have to sell the family homestead. On a subsequent occasion when discussing this matter with RFT, CT says (which he denies) that he became emotional and complained that his parents never gave him anything. At another similar meeting, she further testified that KST said (which she denies) that looking back it must have been a "bombshell" for the Defendants to hear at the first family meeting that the Property belonged to RFT.

24. CT gave her oral evidence in a very careful and straightforward manner and made no discernible attempts to embellish her testimony, even when cross-examined about conversations with her parents which no other witness could directly challenge. I found her to be a credible witness, even though it is obvious that as the *de facto* leader of the Defence team her emotional investment in the outcome is considerable so that what she says about contentious matters should be considered with care.

DT

25. DT was the youngest sibling, born in 1967, and was primarily resident in Tennessee at all material times. From discussions he had with his father during the construction phase and after, he stated that (a) he thought his father was allowing RFT and HMT to erect the building on his behalf to give them experience, (b) his father told him RFT took out a loan because his father thought it unlikely he could borrow the money due to his age and other commitments, (c) his father was upset that his brothers had done the foundations wrong adding to the cost and that other costs overruns necessitated a further loan to complete the project, and (d) that his father complained that RFT was collecting rent from HMT and not applying it to the loan, on which he was only paying interest. His mother confirmed this concern as well.

26. According to DT, his mother in or about 1995 related how RFT presented a draft lease to his father with a view to their father subletting the Property to RFT and his wife. Their father was so angry that HMT had been left off the document, that he chased RFT out of the house and up the hill towards RFT's own house. Under cross-examination, he admitted his Dad would "*yell and curse quite a lot*". He also admitted that CT may have changed some of the original wording in his initial draft witness statement. Nevertheless, he insisted that he remembered the various instances cited by the other Defendants where their father was angry with their eldest brother.

27. In discussing the notes he made in preparation for the first family meeting after his mother's death[2], DT explained that the Tennessee land comprised two parcels, one 66 acres and the other 120 acres. His notes memorialised the fact that his mother had at one time indicated that she wished him to have the 66 acres and to divide the 100 acres equally amongst the six other children. He explained that she did not pursue this idea because she thought it would be unfair for him to have more than a $1/7^{th}$ share of the entire property. As regards areas of evidence where he disputed the Plaintiff's version of events, he said that RFT and his wife had either twisted the truth or, where unable to twist the truth enough, simply lied. Even Bruce Barker must have been lying.

28. DT also gave his evidence in a straightforward way and admitted that in some respects his understanding of certain matters may have been somewhat inaccurate. He openly admitted having a very distant relationship with his oldest brother. While I found him to be a credible witness who genuinely believed that his recollections of discussions with his parents concerning the Plaintiff were based solely on his own independent recollection, the possibility that his present recollection has been influenced by that of his siblings cannot be ignored in assessing his evidence.

LCW

29. LCW does not live on the family estate. Direct communications with her father ceased after he disapproved of her marriage. After his death she discovered that she had been excluded from his Will. Through a Deed of Family Arrangement executed on April 4, 1996, she was included as an equal beneficiary alongside her siblings.

30. LCW had no direct knowledge of the terms on which the Property was developed, but understood from other family members that RFT was to apply rents to the mortgage only and not retain any surplus. She confirmed that RFT first asserted a claim to the Property at the first family meeting after her mother's death. Under cross-examination she stated that after her mother suffered a stroke, she mentioned more than once her hope that RFT would start paying rent in respect of the Property. She also admitted that at one point she considered selling her interest in the Estate to the other beneficiaries.

31. LCW appeared to me to be the least partisan of the Defendants and a generally credible witness.

HMT

32. HMT lives on the family estate and acquired his construction business STK from his father in consideration of his paying off a bank loan in or about 1986. He was the only witness other than RFT to give direct evidence of discussions he had with his father about the development of the Property. According to him, his father decided to erect a building on 5 Marsh Lane, his elder brother agreed to take out a loan his father felt unable to obtain, and it was agreed that the two brothers would use whatever space they needed in

[2] Trial Bundle D, page 192E.

the new building. Third party rents would be applied towards the loan. The initial approach by his father was to ask if HMT would mind giving up space on the then vacant lot which he used for storing materials for his construction business.

33. He stated that the $766 rent paid monthly by his company, STK, for use of the Property was calculated with reference to his share of the loan repayments. His ledgers, prepared by KMT, showed 3-4 occasions on which land tax payments had also been made on his behalf. In or about 1995, his father told HMT that he had discovered rent from a third party tenant was sufficient to meet the mortgage payments and that HMT should cease paying his brother rent. Despite this, he continued to make further rent payments because RFT continued to demand contributions from him. Around 1997-1998 he ceased payments. Although their father seemed to believe interest and principal was being paid, HMT was told by his brother that only interest was being paid regularly along with occasional balloon payments.

34. HMT also confirmed that at the reading of the Will, RFT made no mention of any claim to the Property. Nor was it mentioned in discussions between their father's death and their mother's death between the three executors to the Estate, nor in dealings such as resolving an issue of damage to the Property itself. The one matter that he alone addressed in detail was the nature of the dispute between his father and RFT concerning Four Star Development Ltd. (formerly Devils Hole Cycles). His father told HMT that he was angry with RFT because he had attempted to sell both the business and the land, having gone behind his father's back in an attempt to acquire a majority shareholding. Other Defendants confirmed that this was a major incident illustrating their father's mistrust of RFT.

35. I am mindful of the need to treat HMT's evidence as to matters in controversy with care although, in general terms, I found him to be an uncomplicated and credible witness.

NJD

36. Unlike her two older brothers, NJD was privy to the fact that her father had a heart condition and was seeking to put his affairs in order in the last year of his life. He showed her a list of rents received by fax from RFT and his wife for the Property and expressed concern about their failure to provide an accounting about the state of the loan. This document[3] was highly controversial with RFT and KST insisting that it was prepared for the Bank when amortization was requested, not the father in connection with his request for an accounting. She also stated that she once overheard her mother asking RFT about whether the loan for the Property was paid off.

37. NJD stated that her father planned to transfer all his property including the Twin Palms residential property to Four Star but he found that residential property could not lawfully be transferred. It was clear from the Affidavit of Value that the Marsh Lane property had been transferred to the company by a voluntary conveyance dated June 1, 1995 which was belatedly disclosed by RFT. However, she subsequently discovered that for stamp

[3] Trial Bundle E, page 53.

duty reasons the conveyance was actually not completed. She was certain that at the March 1996 meeting the executors had with Peter Smith, RFT did not assert a claim to the Property.

38. Under cross-examination, NJD agreed that RFT never agreed to pay rent for the Property when rent payments by family members were discussed after their mother's death. She described the relationship between her eldest brother and his father as "very strained", and described examples of significant clashes. Their father told her that he did not trust "Ronnie". Although their father had a bad temper, he was generally fair. She stated that her brother once told her that his family was his nuclear family and that he did not fit in with the wider extended family.

39. I am again mindful of the need to treat NJD's evidence as to matters in controversy with care although, in general terms, I found her to be an uncomplicated and credible witness.

KJT

40. KJT stated that she was very close to her father and worked in his office, speaking to him almost every day. He asked her to sit in on meetings involving himself and his two eldest sons concerning the proposed development of 5 Marsh Lane. At one such meeting, KST was unusually there (this was disputed). She asked how they could get their money back if the loan was to be secured with their house. KJT said her father replied calmly: "*ok, you keep track of the account for the building separately, and collect the income from the rents until the loan is paid off.*" Under re-examination she said that her father also asked his daughter-in-law why she raised this question and KST stood up and said: "*Because I don't trust you.*" Subsequently, her father consistently badgered RFT for information as to the state of the loan so that he could ascertain when he would be able to start collecting rent from #5.

41. KJT also gave examples of dealings between RFT and his father that did not go well. She testified that on one occasion her father said of his eldest son: "*watch him, he can't be trusted, he's lower than a snake's belly.*"

42. I found KJT to be a straightforward and generally credible witness who did not seek to conceal the strength of her partisanship for the Defendants' cause. In answer to the Court, she was unwilling to concede that RFT's taking out a loan secured by his own home for the benefit of his father's property was an exceptional transaction, pointing to one other instance where a personal loan was taken out in connection with family property.

Findings on key factual issues

Did the parties' father promise to subdivide the Marsh Lane property and convey 5 Marsh Lane to the Plaintiff?

43. I find that on a balance of probabilities RFT'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 explicitly or clearly articulated whether or not the conveyance would occur *inter vivos* or by will. Nor were the father's expectations as to HMT'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. The assurance was specifically motivated by a desire on the father's part to get the building erected despite the concerns of RTF and his wife about the fairness of the bargain and the risks they were assuming. However, it is obvious that at some point, likely after the construction was completed and possibly due in part to a rift between father and eldest son, this idea was abandoned, if it was ever seriously proposed. It is quite plausible that the Plaintiff's father encouraged him to believe that he would be left the Property as a spur to the Plaintiff getting the building erected without ever actually intending to follow through.

44. I accept that one of the father's motivations in encouraging his eldest son to finance the construction of the building was that he was either unable to or unwilling to borrow money for this purpose himself. I also accept the Defendants' evidence that the father had always wanted to erect such a building on the vacant lot. I am unable to find that these rationales were made explicit to the Plaintiff himself at the time when he was invited to put up a building. Whatever the father's subjective motivations actually were, I find that he encouraged the Plaintiff to believe that if he took the lead in erecting a commercial building on 5 Marsh Lane, this was a better option than purchasing his own separate commercial property.

45. I do not rely on RFT's evidence alone as a basis for this finding, although I accept that his father did tell him at an early stage: "*why don't you go and build yourself a building over there?*", or words to this effect. Nor do I rely solely on the crucial and credible evidence of Bruce Barker as to what the parties' father told him years later as being supportive of the Plaintiff's own evidence. I found it significant that Bruce Barker was not challenged when he asserted that his own father contributed engineering expertise (and himself occasional consulting services) to the project in the early stages. There was no suggestion that they were remunerated for this work. Such assistance on the part of the Plaintiff's wife's family is to me consistent with the idea that the Property was expected by them to belong to RFT (and by implication his wife as well) at some point. It is in my judgment inconsistent with the notion that 5 Marsh Lane was at that time regarded by the Plaintiff and his wife and her family as simply Terceira family property in which RFT would only ever have a $1/7^{th}$ interest. After all, it is the Defendants' positive case that they had cool relations with the Plaintiff and that his wife had told their father that she did not trust him. This was not one big happy extended family where in-laws could be expected to pitch in to help the development of common family property.

46. I accept the Defendants' evidence that they had no knowledge of the assurance the Plaintiff was given by his father. It is not inherently improbable that a parent would promise a special gift to one child without telling the others. Nor is it improbable that one of the parties' parents would make a promise today and resile from it tomorrow. DT

testified that his mother at one time contemplated giving him a parcel of the Tennessee property but subsequently decided that giving him more than his siblings would be unfair. There is no suggestion that his siblings were aware of the "promise" or its subsequent withdrawal. Something similar may well have occurred in connection with the Property and the Plaintiff. I find that there was a strained relationship between RFT and his father but do not infer from this that his father (who made him an executor on July 4, 1986) would not have promised to reward RFT for taking charge of the construction, financing and management of a commercial building instead of acquiring his own premises.

47. It is part of the Defendants' own case that KST was extremely concerned about exposing her family home to the risks of the Property's commercial development. It would be surprising in these circumstances for RFT to assume potentially substantial financial risks and the burden of financing and primarily managing the construction project without expecting some financial return more generous than an equal share with his six siblings with whom he did not by all accounts enjoy a close relationship. The unchallenged evidence of the Plaintiff and his wife to the effect that they paid for the trip to Atlanta, even if one assumes that this was out of the proceeds of the bank loan, is more consistent with RFT believing that he was going to ultimately acquire the Property than with the notion that he well knew that it was simply going to be common property. Nothing in the evidence adduced at trial suggests that the Plaintiff was so full of warmth and generosity towards his parents and/or siblings that he would extend himself in the manner which he did for their primary benefit. I accept the evidence of NJD that RFT once told her that he considered his wife and children to be his only real family.

48. I do not overlook the evidence of the Defendants, which I accept, that RFT never mentioned his claim to the Property (and then asserted a claim to the building) until after his mother's death. Obviously, this potentially suggests recent fabrication of the assurances he relies on in the present proceedings. However it is equally consistent with the fact that he did not take legal advice on the proprietary estoppel claim until after his mother's death and (a) had been told by his father that he would not get the Property, and/or (b) assumed in any event that in the absence of an *inter vivos* transfer or testamentary gift, the original assurance was not legally enforceable. Alternatively, and additionally, first raising a potentially contentious claim after his mother's death is also consistent with the Plaintiff's natural love and affection for his mother who (in the wake of her husband's death) was already upset at merely being given a life interest in the Estate.

49. I did not believe RFT's testimony about raising a claim at the reading of the Will; this appeared to me to be an ill-conceived attempt by the Plaintiff to bolster what he feared was a weak case in terms of the delay in asserting his claim. I doubted RFT's evidence that after discussing the subdivision in or about 1990 on the occasion Bruce Barker visited, he never discussed his father's assurance with him again. Mr. Terceira senior was not a wilting flower who was reluctant to speak his mind. Although I can make no positive finding on this issue, it would be surprising if the Plaintiff's father did not recant from his promise during his lifetime in the course of what appears to have been periodic episodes of ranting and raving at his eldest son. This (no less than the Defendants' recent

fabrication theory) would partly explain why RFT did not assert a claim to the Property during his mother's lifetime. She would have merely confirmed that her husband ultimately had no intention of leaving 5 Marsh Lane to RFT.

50. For the reasons explained more fully below, I also accept the Defendants' evidence that RFT produced a draft lease for his father to sign to enable RFT and KST to sublet to third party tenants. While his father's anger at HMT's name being excluded is consistent with the father having told his other children that the building was simply another family property for RFT and HMT to use for their businesses, it is also consistent with both (a) the assertion of prospective ownership that RFT claims he had at the time, and (b) the anxiety KST says she had from the outset about the absence of documentation of the father's assurance which prompted the couple to provide their home as security for the loan. That anxiety is consistent with KST having said to her father-in-law "*I don't trust you*", which I find she did say at the meeting vividly described by KMT.

51. I accept the Defendants' evidence that at the first family meeting after their mother's death, RFT became angry and threatened to tie them up with legal proceedings when they did not agree to let him keep the Property in return for his share of the remainder of the Estate. I also accept that he later complained to CT: "*Mom and Dad never gave me anything*". It was curious that he denied this latter statement, which had the ring of truth to it, having regard to the sibling warfare which the present litigation represents. Apart from revealing his sensitive side, it hardly damages his central case. On the contrary, it suggests that he at one time at least expected to be rewarded for his labours with respect the Property by being gifted it outright. Equally, his wife denied admitting that it must have come as a "bombshell" when her husband first raised his claim after his mother's death. I accept that she said this, in terms which were not inconsistent with the validity of the claim as such, but which clearly (a) did not assist the Plaintiff's response to the contention that he should be debarred from any relief by reason of his delay, and (b) contradicted RFT's subsequent case that all his siblings were aware that he was a *de facto* owner of the Property. The "bombshell" statement may well have been nothing more than a conciliatory attempt by KST to acknowledge the way her husband's siblings had reacted to the claim.

52. On balance therefore, I find it more likely than not in light of all the evidence that RFT's father did encourage him to take the lead in erecting and financing the erection of the Property and managing it thereafter by assuring him that he would be given the land on which the building ultimately stood. However, the Plaintiff's father did not share this assurance with his other children and decided not to honour it at a precise juncture which is uncertain and largely immaterial to the existence of the Plaintiff's claim (as opposed to the scope of equitable relief to which he may be entitled). It is likely that the change of mind occurred at some point after the building was completed. The fact that the father excluded one daughter from his Will altogether simply because he did not approve of her marriage makes it quite plausible that he would recant on an assurance in relation to the Property because he was for some reason angry at his eldest son. It is also noteworthy in the present case that the Will which made no special provision for the Plaintiff was made

in July 1986 before the fire in late 1986[4] and the assurance relied upon in late 1986 or early 1987[5]. While this does not make the giving of the assurance any more plausible as such, the conclusion that the assurance was made in late 1986 or early 1987 would have been undermined if the Will had been made during or shortly after the relevant time period.

Findings: what agreement was reached in relation rental income from the building erected on 5 Marsh Lane?

53. I find that the rental agreement ultimately reached was essentially as the Defendants contended. The Plaintiff was to apply the rent towards discharging the loan he had taken out (as well as the monies advanced under the father's own supplementary loan) and thereafter the third party rents were to be paid over to the father in his lifetime and thereafter the mother. Although the evidence as regards the timing is understandably somewhat unclear, I find that it is more likely than not that the pre-loan rent discussions focussed on the application of rental income towards repayment of the loan. Discussion about what would happen after the loan was repaid likely only took place once the building had been completed and it was apparent that the flow of rental income was likely to comfortably settle the Plaintiff's loan obligations.

54. It is possible that the meeting described in paragraph 9 of KJT's Witness Statement took place before the assurance had been given to KRT by his father about the subdivision and conveyance which would in due course be made. In any event, it clearly occurred before the loan had been taken out by RJT and while the financing was still subject to debate. The detailed way in which RFT described the meeting, which was said not to have occurred, is in my judgment inconsistent with fabrication. Moreover it hardly assisted the Defendants' case to confirm that KST did have anxieties about taking out the loan on her home at this stage. Notably all she says her father said to RFT and KST at this stage with respect to rental income was: "*ok, you keep track of the account for the building separately, and collect the income from the rents until the loan is paid off.*"

55. All the controversial meeting account achieves is to destroy (or at least discredit) the Plaintiff's version of the terms on which the Property was developed. He contends all understood that he was regarded as *de facto* owner of the building from the start. This portrayal of events is simply not believable having regard to the oral evidence and two particular factual findings.

56. Firstly, and most significantly, I find that the handwritten document headed "Building Information" was prepared by KST in response to her father-in-law's request for information on rents received so he could ascertain whether the Plaintiff's loan had been or ought to have been paid off, as NJD testified. The evidence of KST and RFT to the effect that this document was prepared for the Bank in response to an amortisation request was simply incredible, having regard to the terms of the document and generally.

[4] Witness Statement of Bruce Barker, paragraph 7.
[5] Although HMT does not of course concede the assurance was ever made, he was first approached about the Property in early 1987: Witness Statement, paragraph 5.

57. Secondly, it seems improbable that if RFT, HMT and their father had dealt with the project in all respects and from the outset on terms that made it clear that RFT would upon completion treat the building as his sole property, concerns about the subdivision taking place would still have been being voiced as late as 1990. The mere fact that the building was referred to as "Ronnie's building" during this period, as Bruce Barker confirms, is not inconsistent with Mr. Terceira senior continuing to regard himself, as he was, as legal and beneficial owner of the Property. Yet according to Bruce Barker in 1990 when the building was nearing completion, the father was still trying to allay his son and daughter-in-law's concerns about the ultimate disposition of the Property. In my judgment having bitten the bullet and taken out the loan in or about 1987, if an unambiguous agreement that RFT could collect rent from his brother and third parties as if he was the owner of the Property had been reached, then his concerns about the absence of evidence of his father's assurance ought to have been substantially allayed.

58. Thirdly, I accept the Defendants' evidence that their father became enraged in or about 1995 because (a) he discovered or suspected that the rental agreement which had been reached was not being honoured by the Plaintiff, and (b) because RFT attempted to persuade his father to let the Property to him so that he and his wife could sublet the premises. This unequivocally shows that the Plaintiff did not at this juncture have subsisting agreement with his father that he could treat all rental income as his own. The production of the draft lease further suggests either that (1) no assurance had ever been made and the Plaintiff was solely concerned about securing repayment of the loan, or (2) that an assurance had been made but that because there was no obvious objective evidence of this fact, RFT was anxious to demonstrate the Property was effectively his.

59. Both alternative conclusions are plausible. It is true that HMT says that the explanation for the lease given to his father by RFT (as relayed to HMT by his father at the time) was to secure RFT's ability to repay the loan out of the rent proceeds if his father died before it was paid off. However, on balance and accepting Bruce Barker's evidence, I find that more likely than not that RFT sought a lease both (a) to secure repayments of the loan out of the rent, and (b) to buttress his tenuous claim to the Property which his siblings had likely never been aware of and might not accede to, at a juncture when it seemed unlikely that the subdivision was going to occur. The reported anger of his father at the draft lease excluding HMT makes little sense if all RFT was really seeking to achieve was to secure repayment of his loan, in circumstances where no assurance had been given (and possibly withdrawn).

60. It would make sense for the father to be enraged, and to perceive the lease as a similar "devious" ruse to RFT's Devils Hole Cycle company "shenanigans", if he perceived the lease as an attempt to provide documentary evidence of the subdivision assurance in circumstances where the Plaintiff's father had either (a) told RFT to be happy with his word, or (b) made it clear to RFT that he had changed his mind (on June 1, 1995, the entire Marsh Lane Property was conveyed to Four Star Development Limited). According to HMT, his father's concern was that RFT would be able to set his brother's rent and evict him. The suggestion that RFT had any basis for concern about continuing

to apply rents towards the outstanding loan seems to have been implicitly rejected as either not genuine or not material. The Defendants contend that by 1995 the Plaintiff had never asserted any claim to the Property and all the family knew that it had been agreed that the rents should be applied to repay the loan. It is difficult to see what significant problems in this regard the Plaintiff could reasonably have feared would occur after his father's death merely because this agreement was not evidenced by writing. The lease incident in my judgment provides indirect evidence of the Plaintiff's belief in 1995 that he had rights to the Property superior to those of his siblings at a time when he well knew he had no undisputed legal claim to the Property.

61. Even if this conclusion is wrong, I would find in any event that the mere fact that the lease incident occurred in 1995 is not inconsistent with the notion that the Plaintiff was persuaded to take out a loan and lead the development and subsequent management of the Property by an assurance made in or about 1987 that it would ultimately become his.

Findings: when did the Plaintiff first assert his claim to the Property? If not until after his mother's death in 2007, what was the reason for the delay?

62. The respective cases on delay are ships which pass each other in the night. The Plaintiff says he was overtly in occupation of the Property since the project was completed and no one challenged his various acts of ownership, including (a) collecting rent, (b) paying land tax and insurance, and (c) prior to the building's construction, arranging for planning permission, financing the purchase and erection of the building. In any event, he asserted a claim at the reading of the Will and made it clear to Peter Smith subsequently that 5 Marsh Lane should not be treated as part of the estate. The Defendants say they were astonished to hear for the first time that he felt he owned the building in May 2007 after their mother's death. The building was always considered to be part of the Estate, despite the fact that their eldest brother took the lead in constructing it and financed it as it was inconvenient (if not impossible) for their father to do so.

63. I have no hesitation in rejecting the suggestion that RFT's use of the Property and conduct in relation to it between in or about 1987 and 2007 put the Defendants on notice of his claim in any sense that required them to challenge his asserted acts of ownership. This was a property legally owned by a father who had historically sought to encourage his children to run their own businesses on the Estate. The Plaintiff was his eldest son who was (one suspects) to some extent 'a chip off the old block', with a personality in which neither hot-headedness nor bull-headedness was in short supply. This may explain why, despite the rows that I accept that father and son had before and after 5 Marsh Lane was developed, the Plaintiff was retained as his father's executor and not cut out of the Will. The Plaintiff's desire to be his own boss possibly explains in part why, when he needed his own commercial premises but elected to avoid the expense of buying either land or land and a building from a third party, RFT was seemingly eager to treat the project and the building as his own and ultimately willing to put up his own home as security for the primary loan. This "will to power" also possibly explains why he resisted his father's attempts to monitor the rental income generated by the Property to see

whether the loan had been paid off. From his perspective, the agreement for rent to revert to his parents after the loan was paid off may very well have seemed fundamentally unjust.

64. But none of these considerations can alter the crucial facts as I have found them to be; that irrespective of how the Plaintiff in his own mind viewed his status, the Defendants all viewed him as simply occupying and managing family property for the ultimate benefit of his father during his lifetime, and then for his mother during her lifetime. So no question of the Defendants challenging his use of the Property properly arises. However this analysis probably better reflects the technical legal view of the position rather than a more practical view. In purely practical terms, the Plaintiff had overtly to the Defendants' knowledge treated the Property (in particular the building) as if it was his own. He solely managed it during his parents' lifetime (avoiding his father's attempts to monitor the financial position) and thereafter. The Defendants knew or must be deemed to have known that even if the Property technically belonged to the Estate, a radical change in the operational status quo would have been required in May 2007 by treating it in practical and commercial terms as simply being an indistinguishable part of the wider Estate.

65. I have no hesitation in rejecting the suggestion that the Plaintiff asserted a claim to the Property at any time after his father's death and before his mother's death. There is no credible independent support for his unconvincing evidence that he told Peter Smith that 5 Marsh Lane should not be included in the estate. The preponderance of the evidence points to the fact that RFT dealt with his father's estate as an executor between 1996 and 2007 as if 5 Marsh Lane formed part of the estate.

66. Because of the way the Plaintiff's case was advanced, it was not necessary for him to explain why he waited until 2007 to assert a claim to the Property. However, he did credibly state under cross-examination that after his father's death he (1) resigned himself to the fact that he had not been left the property, and (2) decided not to raise the assurance until after his mother died. When he did raise the claim, he initially sought on general grounds of fairness to claim ownership of the building; only later did he assert a promise to convey the land. Having regard to my finding that an assurance that the Property would ultimately be his was made in or about 1987 to RFT and three years later to his wife's brother, the only plausible general explanations for his delay in asserting the claim are one or more of the following: (a) a failure to take legal advice after the reading of the Will; (b) an assumption that absent an *inter vivos* transfer or testamentary disposition, he had no legally enforceable claim; (c) 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; and (d) a desire to avoid distressing his mother by raising a contentious claim in circumstances where it was unlikely that she would want to depart from her late husband's final wishes as reflected in his Will. Having regard to RFT's demeanour when he gave this aspect of his evidence, I find that he delayed raising his claim- at least in part-out of concern for his mother's emotional wellbeing.

67. Be that as it may, there is another important and more specific legal and practical reason why it was logical to first raise the Plaintiff's claim after his mother's death and the

Defendants cannot claim to have been materially prejudiced by the 1996-2007 delay. The latest logical date for the claim to be asserted was before the vesting deed took effect transferring the Estate assets including the undivided Marsh Lane property to the seven beneficiaries. Under cross-examination, RFT admitted signing the vesting deed but testified that NJD told him that his mother did not want the transfers to be consummated until "after she goes". It appears that the parties' mother was unhappy that she was given only a life interest in the Estate, which may explain why her husband's executors effectively allowed her to run the Estate until her own death. Be that as it may, on October 14, 1999 Peter Smith wrote the three executors inviting them to consider when they wished to execute the Vesting Deed. He concluded by noting: "*This Vesting Deed becomes essential after the death of your mother if you decide to exercise the statutory power of sale and sell the property*"[6]. I find that the executors tacitly agreed not to execute the Vesting Deed until after their mother's death, so that the need to consider their respective entitlements did not in any final sense arise until May 2007.

68. In summary, I find that the Plaintiff'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 in any event, it was not unreasonable for him to postpone raising his claim until then, in all the circumstances of the present case. The Deed of Family Arrangement was executed so soon after the Will was read and in a context in which the Plaintiff's far from obvious equitable claim had not yet been raised, that his silence at this stage in my judgment is unsurprising.

Findings: what detriment did the Plaintiff suffer from relying on his father's assurance?

69. The Plaintiff's detriment is impossible to quantify in precise financial terms. It is unclear what sums were funded by him and his wife from their own resources and what portion of the loan and interest were repaid out of rental monies received after the building was completed. Their evidence was lacking in particularity in this regard. It is also necessary to take into account the rent free commercial premises that he has supposedly enjoyed for some 20 years. What was clearly set out in RFT's Witness Statement on which he was not challenged was an accounting of how much rental income he received for each rental unit. Extrapolating from these figures (for which no totals were set out), it appears that the rent collected between 1990 and 2003 was as follows:

(a) South-East lower unit:	$31,400
(b) South-East upper unit:	$91,425
(c) Western upper/lower:	$58,206
(d) Centre upper level:	$31,500
TOTAL:	**$212,531**

[6] Trial Documents G, page 158.

70. Since the loan proceeds were applied to extinguish a $28,000 pre-existing loan, it appears that the rents received during the 1990-2003 period ($212,000) covered the principal amount of that portion of the loan applied towards the Property. As far as his father's loan is concerned, RFT made one balloon payment of $8000 and a few $500 interest payments until mother wrote off the $40,000 owed by him; most of the interest for that loan appears to have been covered by rent paid to his father by the tenant he could not accommodate at 5 Marsh Lane. The Plaintiff must therefore have contributed his own resources to pay these amounts and all of the interest on the $240,000 loan, which was paid off in February 2000 after 13 years. Assuming the interest payments to be in the region of $16,800 per annum (assuming an interest rate of 7%), these payments would only marginally exceed the notional rent attributable to the Plaintiff's own use of the premises. The notional rent calculated by KST in the list of rents supplied to her father-in-law in the early-to-mid 1990's was $1532; under cross-examination, she stated she thought that this figure was possibly based on the interest payable on the loan. Thus it only seems fair to conclude (on a rough and ready imprecise basis) that the Plaintiff enjoyed the benefit of rent-free commercial premises after his loan was paid off in 2000; a period of 10 years rather than 20.

71. Nevertheless, the following detriment was clearly suffered: (a) RFT assumed the commercial risk of financing the entire project and exposed his family home to attachment at a time when the ability to attract tenants and collect rent was not guaranteed; (b) RFT gave up the opportunity to acquire his own commercial premises and the undisputed economic and legal benefits that sole ownership would bring (although he acquired the benefit of far lower outgoings for his business in cash-flow terms); (c) RFT assumed primary responsibility for erecting the building; (d) after completion, RFT assumed sole responsibility for managing the building over and above what he would have had to do as a mere tenant; (e) RFT likely contributed modest amounts of his own funds towards the overheads associated with the building; and (f) a certain amount of the goodwill in the Plaintiff's business is linked with the premises it has occupied for 20 years. It would undoubtedly be emotionally and probably financially traumatic for RFT, who now appears to be in the region of at least 60 years old, to be forced to relocate at this late stage having built up no equity in commercial property with which to fund an alternative investment. While this detriment may be hard to value in dollars and cents, it is clearly tangible and real and in my judgment outweighs the corresponding benefits which the Plaintiff has received.

72. What constitutes detriment must also be coloured by the family context which emerged through the evidence. Most of the Defendants appear clearly to be enjoying the benefit of commercial and/or residential property constructed by their father without paying rent and without having expended the time and resources or assumed the risks that RFT expended and assumed in connection with 5 Marsh Lane. Bearing in mind the emotional distance between the Plaintiff and his siblings and having regard to the often volatile relationship between father and eldest son, it was reasonable in all the circumstances for the Plaintiff to expect that his disproportionate investment in the Property would be rewarded by his receiving more than a $1/7^{th}$ interest in it at the end of the day. After all, only HMT made any investment in the Property (through his reduced-rate construction

services) and he received more than a corresponding benefit by way of both (a) payment for services rendered, and (b) reduced rate rental use until the loan was repaid, after which he has had rent-free use of the Property.

Findings relevant to the Defendants' Counterclaim

73. The Defendants' Counterclaim alleges that the Plaintiff is in breach of his duties as an executor of his father's estate and an agreement to the parties that he should be liable to pay rent for his use and occupation of the Property since his mother's death. The main factual issues relevant to these claims centre on how the parties managed the estate after their father's death and whether or not any agreement was reached between those family members who should be liable to pay rent for the family properties they were occupying.

74. I find that the general pattern which was seemingly established during the parties' parents' lifetime was that family members did not have to pay rent for the use of commercial or residential premises save as may have been required to meet specific expenses or they volunteered to do so. There were clearly exceptions, but after their parents' death, this general picture remained the same and likely became more clearly the general rule as no rental income was required for their parents' support. In 2007 there was an agreement in principle that the rental value of all properties should be assessed and rent notionally paid. However, I find that no final agreement was reached in this regard, certainly as far as the Plaintiff was concerned.

75. At trial the Defendants abandoned paragraphs 22-24 of their Defence and Counterclaim which alleged an agreement by RFT to pay rent for the Property. They persisted with the claim that the Plaintiff acted in breach of duty as an executor under a Will which required unanimous decisions by (a) failing to pay rent, (b) failing to resign as a trustee and (c) opposing an application to remove him as executor. An accounting is sought for the Defendants' share of lost rent which RFT ought to have paid and which he and his wife did receive from third party tenants.

76. I find that no conflict of interest arose until the Plaintiff asserted his claim in May 2007 at the earliest or until the date of the issue of the Writ herein on November 24, 2009 at the latest. He ought not to have opposed the application for his removal and ought to have voluntarily resigned. Obviously if this Court rejects his claim to an equitable interest in the Property altogether, he must be liable to account to the Estate for third party rents received.

Legal findings: merits of proprietary estoppel claim

What facts are required to give rise to a proprietary estoppel

77. There did not appear to be any or any material dispute as to the legal principles applicable to the primary claim. I consider myself to be bound by the Court of Appeal for Bermuda decision in *Taylor-v- Perinchief* [1995] Bda LR 13 and the following *dictum* at pages 9-10 per Sir James Astwood (P):

"*In Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. (1982) Q.B. 133 Oliver J while appreciating the historical development of the doctrine of proprietary estoppel recognized the need to place the doctrine of proprietary estoppel on a more modern footing. At pp. 1 S 1 to 152 he said:*

'Furthermore, the more recent cases, indicate in my judgment, that the application of Ramsden v Dyson , L.R. 129 principle—whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial—requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

The decision in Taylor's case was cited with approval by the Privy Council in Lim Ten Chuan v Ang Swee Chuan (1992) 1 WLR I 13. In delivering the judgment of the Board, Lord Browne—Wilkinson said at P. 117:

'The decision in Taylor's Fashions Ltd. v Liverpool Trustees Co. Ltd. (1982) Q.B. 133 showed that, in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make.' "

78. Based on the facts that I have found as set out above, I find that (a) the Plaintiff'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 the Plaintiff's own family home by having the Property gifted to him; (b) the Plaintiff 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 (1) the Plaintiff gave up his pursuit of purchasing outright his own commercial premises and (2) effectively acted as owner of the Property for no consideration for over 20 years. However, the assurance was only operative between early 1987 and early 1996 (at the latest), a period of roughly 9 years.

The defence of waiver

79. Mr. Kessaram and Ms. Charleson rightly submit that the test for waiver is whether there has been "*an objective manifestation of choice*": Wilken, '*The Law of Waiver, Variation and Estoppel*' (Oxford University Press: Oxford, 2002), 2nd edition, paragraph 4.26. In my judgment, having regard to the facts as I have found them, the Plaintiff's execution of the Deed of Family Arrangement cannot fairly be construed as an election to waive his equitable claim. According to the Defendants they were at this juncture oblivious of their brother's potential claim.

80. This is the second case of this nature to come before me in a six month period[7]. In each case (a) the claimant alleged that he first raised his equitable claim at the reading of the will, (b) there was no reliable minute of what transpired at the reading of the will, and (c) the equitable claim was unarguably first raised years later. In my judgment probate practitioners ought to give serious consideration to adopting some simple procedure at the reading of wills designed to compel beneficiaries to disclose the existence of any equitable claims or be deemed to have waived them. This could involve an oral explanation of the sort of claims that might be asserted combined with a request to sign a waiver form if no claims are contemplated at all. Best practice would also seem to dictate that a written minute be taken of the crucial meeting(s), so that the room for dispute over what was said is substantially reduced, if not eliminated altogether.

The defence of unclean hands

81. It is true that the Plaintiff, in a one against six sibling confrontation, did not while an executor raise and pursue his claim in an 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.

82. As I held in *OA'CT' Mobile et al-v- IPOC International Growth Fund Ltd.*[2006] Bda LR 69, rejecting a similarly inflated submission as to the scope of the clean hands doctrine:

[7] The first was *Smith –v- Holloway et al*, Civil Jurisdiction 2007: 103, Judgment dated August 13, 2010.

"*89.Mr. Diel, however, sought to translate the proposition, that the Court must take into account all the circumstances relating to the foreign proceedings it is sought to restrain, into a wider proposition altogether. He contended, in effect, that this principle meant that in considering whether or not to decline relief on the grounds that the Plaintiff did not come to the Court with clean hands, all matters relating to the Plaintiff's conduct generally ought to be taken into account. I would therefore adopt the following submission set out in paragraph 8.4 of CTM's Skeleton Argument as accurately summarizing the applicable law on the clean hands doctrine:*

> *'Spry "Equitable Remedies" similarly states: "It is not uncommon to find broad statements that a plaintiff is not granted an injunction if he does not have clean hands. Properly understood these statements are correct; but they should be applied cautiously, for it is by no means true that a plaintiff who has acted unconscionably is refused all access to the court or that he is considered to be beyond protection for all purposes. The court declines to intervene only if the inequitable conduct in question is shown to have 'an immediate and necessary relation' to the relief sought and the grant of that relief is unconscionable." (Spry, at pp. 409-410, citing the same authorities as Snell)"*

The defence of laches

83. I adopt the law as advanced by the Defendants' counsel at page 46-49 as to the equitable jurisdiction for refusing relief on the grounds of delay. It is incumbent upon them to show that there has been (a) "*unreasonable delay in the commencement or prosecution of proceedings*", and (b) "*in all the circumstances the consequences of delay must render the grant of relief unjust.*" In traditional legal terms, there is little question that there was unreasonable delay. The claim could first have been brought in 1996 and was not raised until 11 years later. However, in the unique context of the present case, the Plaintiff's decision to defer raising the claim until after his mother's death was in my view understandable, especially since his co-executors were content to defer execution of the Vesting Deed until then as well. Despite this unique factual matrix in which for practical purposes the need to finally adjudicate the beneficiaries' respective interests was in any event suspended, there is no legally acceptable reason why the Plaintiff could not have given some notice (e.g. by way of a reservation of rights at the very least) of his claim. Ignorance of his legal rights is not a valid excuse. As a matter of law therefore, I feel bound to find that the unreasonable delay limb of the *laches* defence was made out on the facts.

84. The crucial question then becomes was the delay so prejudicial as to justify refusing to grant the relief sought altogether? Mr. Kessaram and Ms. Charleson rightly pointed out that a classic ground of delay causing substantial prejudice justifying the grant of relief is where crucial evidence is lost, for instance because the key witnesses are dead: *Richardson-v- Tuzo* [2007] Bda LR 1 (per Ground CJ at paragraphs 30, 36, 38). The most important lost witness in the present case was the parties' father who died before the right

to make the claim was known. It was contended that the Plaintiff deliberately delayed so that his mother would not be able to refute his claim. This is a wholly speculative assertion, even though it is not a wholly implausible one. While it is clear from the Defendants' evidence which I accept that their mother would likely have confirmed that she expected to receive rents after RFT paid off the loan, it is far less evident that she would have been able to convincingly refute the proposition that the assurance relied upon was ever made. Further, it would have been open to the Plaintiff to place greater emphasis on the constructive trust branch of his case by relying on the equity generated by his contribution to the Property's current value, irrespective of whether or not the assurance was ever made. Finally, I have found as a fact that a desire to avoid distressing his mother materially contributed to the Plaintiff's decision to delay raising his claim until after her death. This was possibly the most honourable act performed by the Plaintiff in relation to this matter; it would be somewhat perverse for this delay to be used as the sole basis for denying his claim.

85. For all these reasons, I find that it would not be inequitable to allow the Plaintiff to pursue an otherwise meritorious claim by reason of any prejudice (which I am satisfied was not substantial) the Defendants may have suffered due to his technically unreasonable delay in bringing his claim.

The defence: no clarity regarding content of the estoppel

86. The Defendants contend that the assurance relied upon legally fails because the legal interest relied upon lacks certainty, having regard to the fact that the land in question would have had to be subdivided on terms which are unclear. Counsel relied principally on *dicta* in the speech of Lord Scott in *Cobbe-v- Yeoman's Row Management Ltd.*[2008] 1 WLR 1752 (HL) at 1763. The proprietary estoppel claim in the latter case arose in the context of an attempt to enforce an oral promise made in the course of negotiations for an unconsummated joint venture, and the main rationale for the decision was the undesirability of importing uncertainty into commercial transactions and the inappropriateness of applying the doctrine of equitable estoppel in a commercial context: see per Lord Walker at1785 H-1786 A.

87. On the facts as I have found them, the Plaintiff was led to believe that the land on which the new building was erected would be subdivided and conveyed to him by his father at a point uncertain. In my judgment, the fact that the terms on which subdivision would occur were uncertain does not mean that the legal interest promised to be conveyed is so uncertain that the minimum requirements for proprietary estoppel were not. This aspect of the Defence also fails.

<u>Relief: what is the minimum required to do justice to the Plaintiff's equity?</u>

88. I accept Mr. Dunch's submission on behalf of the Plaintiff that once the Court finds that there were assurances or promises made which RFT detrimentally relied upon, the task of the Court is to determine what is "*the minimum equity required to... do justice between*

the parties": per Robert Walker LJ (as he then was) in *Gillett-v-Holt* [2000] 3 W.L.R. 815 at 840H, a test followed by this Court in *Smith-v-Holloway et al,* Supreme Court Civil Jurisdiction 2007: No. 103, Judgment dated August 6, 2010 at paragraph 10.

89. In my judgment it is impossible to fairly find that the minimum required to satisfy the Plaintiff's equity is to direct that he is entitled to be transferred sole title in the land and building which sits upon it. Indeed, his own assessment at the first family meeting after his mother's death of what was required to do justice-and his opening negotiating position-was that he should be regarded as owning the building in return for his giving up his interest in all other estate property and paying the difference if the value of the land conveyed was greater than his $1/7^{th}$ share in the rest of the estate. I have regard for the following facts in particular in this regard: (a) the Plaintiff has now had the benefit of rent free commercial property for over 7 years; (b) the Plaintiff knew or ought to have known from at least 1995 when his father refused to sign the draft lease that (i) his father had either changed his mind about the gift altogether, or (ii) wanted HMT to be able to continue to use part of 5 Marsh Lane on an indefinite basis in any event. This dilutes the Plaintiff's equity significantly as he allowed HMT to assume between 1995 (or 1998 when HMT 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. Moreover, the Plaintiff on any view knew as early as 1996 that he had no unimpeachable right to the Property and elected to remain in the Property rather than to pursue other investment options at that juncture. In other words, the period under which he operated under the influence of the assurance was less than 10 years.

90. In *Gillett-v-Holt* the English Court of Appeal felt that a clean break was desirable to avoid further friction between the "warring" parties in the context of property under common occupation; this was in the context of claimants who clearly deserved to receive full beneficial ownership of commercial property. The Plaintiff seeks to invoke that principle here. The goal of ending friction cannot justify awarding the Plaintiff more than his equity deserves. Moreover, this is a family dispute which the parties have apparently conducted in a comparatively civilised manner. RFT and HMT have, by all accounts continued to use the separate parts of the Property, with RFT presumably continuing to bank third party rents. I do not ignore the possibility that declining the full relief the Plaintiff seeks will result in friction in the future.

91. The challenge facing the Court is to determine at which point on the continuum between full equity in the Property and no equity at all (on the basis that any equity to which the Plaintiff was entitled has now been satisfied altogether) justice to all parties falls. This is a far from scientific exercise, as all of the authorities make clear. It is obvious that the Plaintiff is not entitled to be conveyed the Property altogether because his contribution in all the circumstances does not justify this result. Nor would it be just to find that the Plaintiff should be declared the owner of the entire building (or the value of such), excluding the land. In this regard I take into account the fact the Plaintiff himself has tacitly acknowledged his brother's right to use the premises rent free, even after the loan was repaid in 2000 and was clearly not forthright with his siblings about the status of his loan.

92. Whilst he may have felt this was none of their business because the building was his, the Plaintiff knew or ought to have known that their understanding (and his father's before his death) was that he was only indisputably entitled to bank third-party rents as long as the loan was outstanding and thereafter such rents would be payable to his parents. This was the basis on which he agreed to occupy the Property, albeit in the "secret" hope that it would ultimately be his on or before his father's death and albeit that this understanding was probably reached after RFT had passed the point of no return in commitment terms. Although he assumed the risk of funding the construction from his own resources, in fact most costs were funded by third party rents (including rent paid by HMT and notionally by the Plaintiff himself).

93. In my judgment the minimum required to satisfy the Plaintiff's equity in all the circumstances is to declare that the only equity to which he is entitled and which has not been satisfied is his right to use such portion of 5 Marsh Lane as his business has habitually occupied and/or is currently occupying (whichever is the larger space) under a lease for life for nominal consideration on terms that permit him to sub-let the relevant space if desired. This finding is made on the basis that the Plaintiff is entitled to retain or retain the benefit of all rents received in respect of the Property up to and including March 31, 2011. Although a more logical cut- off date appeared to me to be the date of the present Judgment in conceptual terms, for practical reasons it seems sensible to allow the parties sufficient time to put in place new administrative arrangements in relation to third party tenants.

94. This assessment of the extent of the Plaintiff's equity also acknowledges the essential truth of the assertion made by the Plaintiff and his wife to the effect that, but for their efforts between 1987 and 1990, the building would not be there. Moreover, even the Defendants' version of the basis on which the building of 5 Marsh Lane took place implicitly accepts that the Plaintiff reasonably expected to have-at a minimum- space of his own for the use of his business on an open-ended basis without having to pay rent after the loan was paid off.

Findings: the Plaintiff's constructive trust claim

95. I see no need to consider the Plaintiff's constructive trust claim on the basis that he would be entitled to no greater or less relief under the constructive trust doctrine, to the extent (if any) that it applies.

Findings: the Defendants' Counterclaim

96. The Defendants' Counterclaim is refused. Based on the conduct of all parties concerned in relation to this closely-knit family Estate as well as RFT's own conduct, in my judgment it is impossible to justly find that the Plaintiff's conduct constitutes a breach of fiduciary duty on his part giving rise to an obligation to pay rent for his use of the Property. I have primarily found that he was in equity entitled to use those portions of 5 Marsh Lane which his business has occupied at all material times.

Conclusion

97. The Plaintiff's proprietary estoppel claim succeeds to the extent that he is entitled to the following equity in the Property: (a) he is entitled to a lease for life of that portion of the Property which his business customarily occupied (or was occupying at the date of the commencement of the trial herein), whichever is the largest including the right to sublet; and (b) he is entitled to retain the benefit of all rents received in respect of the Property up to and including March 31, 2011.

98. The Defendants' Counterclaim is dismissed.

99. I will hear counsel as to costs.

Dated this 4th day of February, 2011 _____
KAWALEY J