In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 463

BETWEEN:

DWAYNE SAUNDERS

Plaintiff

-v-

EDITH FARQUHARSON

Defendant

JUDGMENT

(in Court)

Date of trial: October 13-14 2014
Date of Judgment: October 27, 2014

Mr. John Hindess, Marshall Diel & Myers Limited, for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

Introductory

1. The Plaintiff and the Defendant are two of six siblings. He is a self-employed house painter who appeared clearly to be a man committed to a simple and materially modest lifestyle. She is a sophisticated qualified accountant who presented as being committed to a far more financially dynamic and refined middle class lifestyle. The present action concerns their respective legal rights to

their late mother's home at 23 Horseshoe Road, Southampton ("the Property"). Under her Will, the parties' mother left the Property outright to the Defendant. The Plaintiff was merely given the right to live in the Property at the Defendant's discretion. Within months of the Defendant taking up occupancy of the Property, she requested the Plaintiff to leave.

2. One brother gave evidence for the Plaintiff. Three sisters gave evidence for the Defendant. The Plaintiff claims a 50 % equity in the Property, based on promises he says his mother made to him prior to making her Will. Alternatively, he seeks to enforce, also by way of a proprietary estoppel, an oral agreement he contends was reached between the parties, after the reading of the Will, pursuant to which a studio apartment was to be created on the Property for him to live in. In the further alternative he seeks a money judgment in respect of contributions he made to the Property prior to their mother's death.

Applicable legal principles

3. The legal principles applicable to whether or not an equitable interest in property is created by way of proprietary estoppel were essentially agreed. It is now generally accepted that the same broad test applies in relation to claims to an equitable interest in land, whether using the legal label of constructive trust or proprietary estoppel. I find that the way the Plaintiff put his case evidentially can best be analysed through the lens of a proprietary estoppel claim in any event.

4. In *Terceira-v-Terceira* [2011] Bda LR 67, the Court of Appeal for Bermuda (Scott Baker JA) opined as follows:

> "15…*The three main elements necessary to establish a claim to proprietary estoppel are (1) a representation made or assurance given to the claimant, (2) reliance by the claimant on the representation or assurance and (3) some detriment incurred by the claimant as a consequence of that reliance. See Lord Walker of Gestingthorpe in Thorner v Major and ors [2009] UKHL 18 para 29. But as Lord Scott of Foscote pointed out in the same case at para 15 the representation or assurance would need to be sufficiently clear and unequivocal, the reliance by the claimant would need to be reasonable in all the circumstances and the detriment would need to be sufficiently substantial to justify the intervention of equity.*"

5. What these abstract principles mean in practice can perhaps best be illustrated by reference to the facts which have been found in other cases sufficient to support a proprietary estoppel claim. In paragraph 16 of the Court of Appeal's Judgment in *Terceira-v-Terceira*, a case relied upon by the Plaintiff's counsel, my own factual findings recorded at trial were reproduced:

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

6. That was an example of a clear assurance, reasonably relied upon to the claimant's substantial detriment, in a family commercial property context. A pivotal witness who supported the plaintiff's case on the making of the assurance was a credible brother-in-law whose evidence was not directly challenged.

7. The Defendant's counsel placed before the Court another local case, *Ronald Smith-v- Ronelle Holloway et al* [2010] Bda LR 85. In that case I upheld a proprietary estoppel claim in respect of a family residential property based on the following key factual findings:

> "*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…

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."

8. The latter case provides a further illustration of a clear assurance, reasonable reliance, and significant detriment, mitigated by the benefit of rent free accommodation and minimal investment in the property concerned. The outcome in that case was that the dispensation in the Will for the plaintiff (a 25% share of the property) was only enhanced by conferring a lease for life. One of the defendants in that case admitted that the deceased father had at one time planned

to give the house to the plaintiff; another defendant was told by the deceased that the plaintiff would be willed the house; and the plaintiff's wife gave credible supporting evidence.

9. These cases illustrate the high hurdle that proprietary estoppel claimants have to meet to persuade a Court that it would be unconscionable for the claimant to be denied being an equitable interest in the disputed property which is greater than his legal entitlement.

Findings: was a clear unambiguous assurance made that the Plaintiff would be given a 50% share of the Property?

10. The Plaintiff alone testified that his mother promised to give him and the Defendant an equal share in the Property. The reliability of his evidence was vigorously challenged. According to his Witness Statement, his mother told him that he and the Defendant would be given the Property jointly on several occasions:

    (1) in or about 1999, when he asked his mother to be a guarantor for the loan to purchase his own house in Spanish Point, she invited him to move into the Property instead and said "*this house is going to be yours and Angie's*". He moved in, partly in response to the promise and partly to provide her with companionship, and began making payments of $600 towards the mortgage;

    (2) the promise was repeated on several occasions afterwards. After falling out with his sister Laverne, who returned to the property from abroad around three years later, he specifically recalled his mother saying: "*don't let her make you leave, the house is going to be yours anyway*".

11. The Plaintiff claimed to have told the Defendant shortly after her marriage in the early 2000's that their mother had promised them both the Property. This was denied by the Defendant under cross-examination. The Plaintiff called his brother Perry Saunders, who said under cross-examination that he thought the Plaintiff may have mentioned to him his mother's promise before her death.

12. The Plaintiff called the parties' Aunt Lola Brangman, who testified that in 2010 when their mother was ill, she stated that she wanted both parties to live together at the Property after her death. This was not clearly inconsistent with the September 15, 2006 Will, which gave the Property to the Defendant but stated as follows:

> "*I wish (without imposing…any trust or legal obligation binding in law or in equity on my Trustees) that my son DWAYNE DAVID SAUNDERS of 'Catherine's', 23 Horseshoe Road, aforesaid be permitted to occupy any apartment of my said property, at the discretion of my daughter Edith, for his use and enjoyment for and during the term of his natural life.*"

13. The Plaintiff was not in general terms an impressive witness. He often appeared unable to distinguish his duty as a witness to tell the truth from his motives as a litigant to win his case at all costs. A significant gap in his evidence, not unusual in cases of this nature, was the failure to explain why if the assurance relied upon was in fact given his mother changed her mind in 2006 when executing her Will. But this does not completely undermine the Plaintiff's evidence that the promise of a gift was in fact made in 1999. It begs the question as to how long it was reasonable to rely on any assurance which was previously made. Is there any independent evidence which supports the Plaintiff's account on this issue?

14. The Defendant herself was unwilling to exclude the possibility of the Plaintiff being promised an interest in the house by their mother in general terms. The parties' mother was clearly capable of manipulating her children to get the support which she wanted. Mr. Hindess relied heavily on her concealing from her children the fact that the mortgage had been paid off in or about 2004 until four years later. This was, quite possibly, motivated by the desire to ensure that the Plaintiff continued to make his monthly contributions. But it did suggest that the Plaintiff might have been encouraged by his mother to join her in the Property in 1999, when two other siblings were vacating the premises, by promising him an interest in the Property as he claimed.

15. Further, the Defendant appeared to accept that the Plaintiff may have left the Will-reading ceremony precipitously because he was upset. She deposed in her Witness Statement that he left immediately after the reading before copies of the Will were handed out. This was before she and her family moved into the Property, attempted to live together but determined that she had to request the Plaintiff to leave. The Plaintiff's sister Shawnette Miller stated under cross-examination that in the course of numerous conversations after the funeral, the Plaintiff told her that their mother had promised him an interest in the Property. This must have been some time before the Plaintiff and the Defendant had their falling out.

16. On balance, I find it impossible to believe that the Plaintiff fabricated completely his evidence about being promised a joint interest in the Property. His evidence that this promise was made in 1999 and prompted his moving into the Property, looked at in light of the evidence as a whole, had the ring of truth about it. I find it more likely than not that the parties' mother did promise him a joint interest in the Property in or about 1999. However I make no finding as to whether she repeated those assurances at any point thereafter.

Findings: did the Plaintiff rely on his mother's assurance?

17. I find that the Plaintiff did rely on the assurances I accept his mother made in or about 1999 by moving into the Property. However, he has failed to prove that it was reasonable for him to rely upon the assurance beyond the date when by his own account he last specifically recalled his mother repeating it, namely in or about 2003. Apart from moving into the Property and assisting with maintenance while paying a modest rent, the Plaintiff did little if anything to encourage his mother to adhere to the assurance which I find she initially made. In these

circumstances it seems unlikely that the Plaintiff had any reasonable basis to rely upon the promise that he would be given an interest in the Property. No matter how important the contributions which he did make seemed to him, the fact that his mother complained to so many his siblings about his lack of support suggests that in the last two years before the Will was executed in 2006, the assurance was not repeated.

Finding: did the Plaintiff suffer detriment by relying on the assurance?

18. The Plaintiff has failed to satisfy me that the contributions he made exceeded the benefit he received from enjoying cut-price accommodation to such an extent as to make it unconscionable for him to be deprived of an equitable interest in the Property. Only contributions made by him between 1999 and 2003, the period during which it was reasonable for him to rely upon the promise, count as far as detriment is concerned.

19. The Plaintiff's sister Laverne Griffin, who had lived at the property between 1989 and 1995, returned to stay there in 2003. I accept her evidence that she quarrelled with her mother over being asked to contribute to household expenses while the Plaintiff was making no contribution. She regrets adopting this stance now, realizing that no one should stay in a house for free. While I accept the Plaintiff's evidence that he did his best to pay his monthly mortgage contribution of $600, I am bound to find that his financial and other contributions to the Property's upkeep were inconsistent and modest from as early as 2003 when Laverne returned there and before. His sister deposed that while she was in Florida her mother complained about his inconsistency. Her evidence that he used his mother's cars as if they were his own was not challenged.

20. Perry Saunders testified that he contributed financially while he lived there (from around 1989 until 1993), and moved when he could not continue to meet such obligations. Years after he had left, he paid for his mother's health insurance between 2001 and 2008, or thereabouts. The Defendant paid $800 per month from the Bahamas between 2000 and 2009. Tawanna Wedderburn's evidence that she stayed at the Property between 2001 and 2003 and consistently paid her mother $1500 per month was not challenged. I accept her disputed evidence that the Plaintiff was not consistently employed during this period, did not make regular financial contributions but did contribute through landscaping and painting work. The Plaintiff's financial inconsistency was confirmed by Shawnette Miller as well as by the Defendant.

21. The Plaintiff's brother Michael Parris loyally signed a Witness Statement supporting his maintenance contributions in glowing terms. However, having taken the oath, he very honestly admitted that much of what is described in paragraph 5 of his Witness Statement he did not actually observe. The Plaintiff's own documentary records, subjected to Mr. Rothwell's careful cross-examination, helped to prove the Defendant's case that his approach to work is a very laid-back one. In fact, looking at the evidence as a whole, I find that all material times the Plaintiff worked on an occasional basis and was less productive than he might he have been had he been required to pay a commercial rent and be fully responsible for his other living expenses.

22. There was no credible support for the Plaintiff's exaggerated claim that he spent conservatively $150,000 on the Property over the years for repairs and maintenance alone. It seems probable that the value of the maintenance work that has been done by the Plaintiff over the 15 years since 1999 has filled the gap between the $600 which he was supposed to pay (during his mother's lifetime-$400 from May 2011) and the direct financial contribution which has actually been made during this period (none for the last three years). However, there is no credible evidential foundation for the assertion that the Plaintiff has suffered material detriment in the sense that the value of his contributions to the Property are greater than the benefit he has received through accommodation.

23. Firstly, the Plaintiff can only in my judgment complain of detrimental reliance on the assurance for the four year period of 1999-2003 in any event. The expectation that I accept he had after that period until the Will was read that the assurance would be honoured was no more than wishful thinking: "to wish is to hope; to hope to expect". Secondly, I find that the $600 monthly payment he was supposed to make during his mother's lifetime was not only less than a market rent. The Plaintiff also clearly benefitted from living with his mother in the following two respects:

    (1) he was protected from the commercial pressure of paying his rent on time or risking eviction;

    (2) he was protected from the commercial pressure of consistently and promptly paying in full for other living expenses, including food, transport and utility bills .

24. I further find that:

    (a) the Plaintiff has failed to prove that he suffered any detriment by giving up the opportunity to purchase a property of his own. There is no evidence that he had the financial wherewithal to do so without third party support. By his own account he could only purchase the Spanish Point property if he obtained a guarantor;

    (b) any contributions which the Plaintiff made in terms of constructing the car port and/or erection of walls and/or landscaping or general maintenance during the construction phase in the 1980's is irrelevant as regards proof of detrimental reliance on an assurance made in 1999.

Findings: is the Plaintiff entitled to enforce the 2011 'Agreement'?

25. In light of my above conclusions I am bound to reject the alternative claim that the Plaintiff is entitled to enforce in law or in equity the tentative agreement reached between the parties for a studio apartment to be constructed for the Plaintiff to occupy on the Property. I find that:

(a) the Plaintiff adduced no evidence of a legally enforceable contract;

(b) the studio apartment option was discussed in April or May 2011 before the Defendant determined that the Plaintiff's lifestyle made it impossible for her to agree to his continuing to reside on the Property;

(c) it was entirely justified and far from unconscionable for the Defendant to withdraw from any assurance which she may have given to the Plaintiff about his continued occupation of the Property in any event.

Conclusion

26. In summary, I find that the Plaintiff has failed to prove the existence of a reasonable expectation arising in his favour of an equitable interest in the Property. His claims are dismissed. I will hear counsel as to costs although there is no obvious reason why costs should not follow the event.

27. The parties' mother in her wisdom saw fit to leave the Property to the Defendant and to suggest that the Defendant permit the Plaintiff to live there for life without giving him a legally enforceable right of residence. The evidence suggests that underpinning the Will may well have been a mother's intuitive sense that this particular son required prodding encouragement rather than disempowering support to fulfil his true potential. On this analysis, his mother's failure to give the Plaintiff any legal rights to the Property may fairly be viewed an act of love and respect.

28. The parties' legal rights, therefore, fall to be determined in accordance with their mother's wishes as expressed in the Will. Seeking to heal the familial breach which has occurred lies beyond the remit of this Court and must be left to the parties to resolve.

Dated this 27th day of October, 2014 _____
IAN RC KAWALEY CJ