In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 259

JOHN D'ALESSIO

-and

ROBERT LIMES

(as trustees of The Ashley Trust)

Plaintiffs

-v-

ADA RUTH TAVARES

-and-

KYLE TAVARES

Defendants

JUDGMENT

(In Court)[1]

Dates of hearing: July 6-7, 2015

Date of Judgment: July 24, 2015

Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the Plaintiffs

Ms. Kathy Lightbourne, Sovereign Law Chambers, for the Defendants

[1] This Judgment was circulated without a hearing in order to save costs.

Introductory

1. The present dispute is formally about property rights but in substance about familial love. The present proceedings were commenced by an Originating Summons issued on July 16, 2014 by the Plaintiffs in their capacity as Trustees of the Ashley Trust. The Plaintiffs seek an Order:

> "*…that the Plaintiffs do recover possession of the property located at 15B Fairyland Lane, Pembroke HM05, Bermuda, on the ground that the Plaintiffs are entitled to possession and that the Defendants are in occupation without license or consent.*"

2. The subject matter of the dispute, 15B Fairyland Lane ("the Property") is a two bedroom house forming part of a larger group of buildings formerly owned by the late Allan Mackie ("Lot 13 and 15"). Allan Mackie was the father of the late Douglas Mackie and the 1st Defendant and acquired the Property in or about 1953. By a voluntary conveyance Allan Mackie conveyed the Property solely to his son Douglas on February 20, 1990. One or other of the Defendants have admittedly lived at the Property since September 1990 on terms that are in dispute. Douglas Mackie died on April 11, 2011. By his Will dated March 23, 2011 he gave Lot 13 and 15 to The Ashley Trust ("the Trust"). The Trust had been settled two years earlier on March 18, 2009. Clauses 7 and 8 of the Will provided as follows:

> "*7. It is MY WISH that my sister RUTH MACKIE TAVARES and her son KYLE TAVARES be allowed to reside as Licencees only at No. 15 Fairylands Lane in Pembroke Parish in the said Islands on the clear understanding that they shall be fully responsible for the maintenance and on-going expenses of No. 15 Fairylands Lane to the reasonable satisfaction of the Trustees. FOR the avoidance of any doubt my sister and her son are to be classified as bare Licencees only at the discretion of the Trustees and their occupation of No. 15 Fairylands Lane shall not confer upon them any legal or equitable rights in No. 15 Fairylands Lane save as bare Licencees.*
>
> *8.NOTWITHSTANDING the wishes contain in Clause 7 above it is my further wish that my sister and her son shall not be entitled to enjoy or use the guest apartment situate at No. 15a Fairylands Lane in Pembroke Parish in the said Islands.*"

3. By letter dated June 18, 2014 served on June 20, 2014, the Plaintiffs purportedly terminated the Defendants' license to occupy the Property. Broadly speaking, the grounds were that they were not adequately maintaining the Property and that their behaviour (notably their failure to control the 'lively' Blaze, an allegedly unlicensed pit-bull) had generated complaints from neighbours. The Defendants' response to this

Notice must have been quite blunt and clear; because the Originating Summons was issued less than a month later, with no time 'wasted' on pursuing a conciliated solution. The 1st Plaintiff, who had begun managing the estate during the Settlor/Testator's lifetime had attempted to terminate the Defendants' license while Douglas Mackie was still alive, but the latter had been too full of the 'milk of human kindness' (i.e. with natural love and affection for his younger sister) to follow through with this first eviction attempt.

The Defendants' claim to an interest in the Property

4. The Defendants' response to the purported Notice of Termination was to counterclaim for a declaration that the Property was held on trust for them by virtue of the doctrines of constructive trust or proprietary estoppel. The 1st Defendant (it would emerge at trial) was clearly not the sort of person who, faced with an attack by a 'stranger' (the 1st Plaintiff) whom she clearly viewed as the villain in this drama, would choose flight over fight. The 1st Plaintiff (it would emerge at trial) was not the sort of man who, charged by his late friend with managing and preserving his family estate, would be naturally inclined to allow sentimentality to stand in the way of efficient property management.

5. The Counterclaim had two limbs to it, the first of which was not seriously pursued. This was the plea that when Allan Mackie conveyed the equity of redemption in lots 13 and 15 to Douglas Mackie, this transfer took effect subject to "*a declaration that Douglas Mackie shall hold lots 13 & 15 on trust for Douglas Mackie and the First Defendant as Tenants in common in equal shares*" (paragraph 9). Such a conveyance was at one time contemplated but no such deed was ever executed. Nevertheless, the unexecuted draft was referred to in the Counterclaim as the "*Declaration*".

6. The second limb which was seriously pursued was a classic constructive trust and/or proprietary trust claim:

> "*That further or in the alternative, in reliance on the promises and representations made by Allan Douglas Mackie and Douglas Mackie contained in the Declaration the First Defendant paid $48,458.11 on the 7th August 1990 to Mayfair Limited to repay the Mortgage and as a consequence Allan Douglas Mackie and Douglas Mackie are estopped from denying the Declaration or hold as constructive trustees.*"

7. It was common ground that the Defendants had to establish that an unequivocal promise of an interest in the Property had been made and that they had relied upon that promise to their detriment.

Findings

8. The 1st Defendant was the only person able to give direct oral evidence about the circumstances in which her father departed from his initial plan in early 1990 to convey Lots 13 and 15 to both of his children. The Plaintiffs argued, in part through documentary evidence and in part through the evidence of Douglas Mackie's son (who was in his early 20's at the time) that the 1st Defendant paid off her father's mortgage by way of advance rent and not based on an expectation that she would acquire an interest in the estate. The documentary evidence does not plausibly support this explanation for the relevant payments and Douglas Mackie's son accepted that he was not directly involved in any family property-related discussions.

9. I accept the 1st Defendant's evidence that the main reason why her father abandoned his initial plan to transfer Lots 13 and 15 to both his children jointly was because of concerns that her then husband might assert a claim against her interest in the ongoing divorce proceedings. Alternatively, the concerns were that any transfer to her while those proceedings were ongoing would adversely affect her financial position in those proceedings.

10. A letter from the mortgagee dated January 19, 1990 Mello & Jones refers to "*Mr. Allan Mackie's wish to voluntarily convey the property to his son Douglas Mackie and his daughter Ruth Tavares*". On January 29, 1990, the 1st Defendant petitioned for divorce. And on February 20, 1990, Lots 13 and 15 were voluntarily conveyed to Douglas Mackie by his father. A Mello & Jones letter dated February 23, 1990 to the mortgagee explains that the change of plans followed "*family conferences*". The 1st Defendant herself paid the mortgagee $48,458.11 by cheque dated August 7, 1990. This was the outstanding mortgage debt, which was acknowledged by the mortgagee as being fully paid off by letter dated September 11, 1990. Shortly after that mortgage payment cheque was signed, a Consent Order was entered disposing of the 1st Defendant's ancillary relief application on August 17, 1990.

11. I accept the 1st Defendant's evidence that her divorce settlement was the source of that mortgage payment. I strongly suspect the reason for that payment might well have been to repay her father for a personal loan she had received from him (rather than advance rent). However, I will assume for the purposes of the Counterclaim that the 1st Defendant paid this sum in the expectation or hope that she would be given a legal interest in the properties. She paid her father a cheque for $13,000 dated 10th (or possibly 13th) September 1990, which according to a note on its face was for both one year's rent ($12,000) and a loan ($1000). That she only paid one year's rent in advance (as opposed to four years plus one year) is crucially supported by the fact that roughly three years later her brother wrote her a letter complaining that she was not, amongst other things, paying her rent.

12. I accept the 1st Defendant's evidence that her brother promised her at some point during this time-frame that he would give her a legal interest in the family estate. However, thereafter there was a change of heart because, as the 1st Defendant freely admitted under cross-examination, concerns arose about her financial responsibility which made the relationship with both her father and her brother somewhat frayed. She admitted that she had been spoiled as a child born many years after her older brother. By her own account, she appears to have been more of a free spirit while he was a comparatively disciplined, hard-working and conservative man.

13. Although some of these concerns on the part of her brother related to her honesty, the 1st Defendant in her oral evidence appeared to me to generally place giving honest answers ahead of attempting to win her own pleaded case. She unwittingly revealed the underlying emotional motivations behind her case. When asked why, if her brother had promised to give her a legal interest in No 13 and No 15 and instead gifted the properties to the Trust, she very touchingly answered tentatively: "*I suppose because at the time he didn't love me?*" When probed by Mr. Rothwell about what promises her brother had repeatedly made to her, she admitted that they were very general in nature, such as "*you will always have a roof over your head.*" Eventually the 1st Defendant frankly admitted that she had never actually believed that her brother would give her a joint ownership interest. The 1st Defendant's very frank oral evidence completely undermined the essential "clear promise" and "detrimental reliance" limbs of her (and her son's) proprietary estoppel/constructive trust claims.

14. Any equity which might have been created by a promise made in 1990 in light of her paying less than $50,000 in terms of mortgage debt and paying only one year's rent against many years rent free occupation), would in any event have long since been exhausted. The 1st Plaintiff estimated the commercial rental value of the Defendants' period of occupation as being in the region of $450,000.

15. It is not necessary to make any findings on the Plaintiffs' laches or delay defence in these circumstances having rejected the Counterclaim on its merits, nor indeed on the myriad of peripheral matters which were adduced into evidence.

16. Why did the Defendants pursue this ultimately hopeless Counterclaim? The 1st Defendant's nephew Ian Mackie suggested that she had recently told him: "*I don't care if I win or lose. I just want to cost you a lot of money.*" The 1st Defendant's denial that this was said was not altogether convincing, and it is not necessary to make any positive finding as to whether or not this was said. Ms Lightbourne for the Defendants made the following insightful submission in closing. Despite very complicated family dynamics, there was an underlying concern, care and almost appreciation for the different personalities of the family. This was particularly the case with respect to responsibility for each other and the properties. I agree. The 1st Defendant appeared to me to be primarily motivated by an entirely understandable

sense of hurt that she, and perhaps even more so her son, had been excluded from any beneficial interest in what was originally her parents' property.

17. However all the evidence before the Court suggests the main motivation of her brother creating only a license in the Defendants' favour was the desire to preserve the family estate for the long-term, based on an appreciation that his survivors were probably not best equipped to do so themselves. This explains Douglas Mackie's settling the Trust in 2009 (two years before he died), his selection of trusted business-savvy friends as Trustees, and eventually his gift by Will of the properties to the Trust, subject to a license in favour of his sister and nephew.

18. This license was broadly consistent with the promises the 1st Defendant says her brother repeatedly made, irrespective of what was initially promised way back in 1990. Objectively viewed, these arrangements were an expression of love as much as they also reflected a worldly-wise appreciation that those who are gifted property outright very often fritter it away. Her brother clearly wanted her to benefit from the Property in some way without having the legal capacity to place its family ownership at risk. After all, even his own children have no direct interests in the properties although they are, apparently, beneficiaries of the Trust.

19. Regretfully, the 1st Defendant, feeling scorned, was seemingly unwilling to abide by the terms of the License and decided that the 1st Plaintiff was an interloper to be combated rather than to be cooperated with. Whenever this Court is required to construe a will, its primary task is to give effect to the testator's intentions. In this spirit, the Court can only hope that in time the parties may find some way to make the sort of peace which will honour the wishes of the Testator to provide something for his sister and her son while protecting the long-term interests of present and future family members as well.

Conclusion

20. The Counterclaim accordingly must be dismissed and the Plaintiffs granted the Possession Order they seek.

21. I will hear counsel, if necessary, as to the terms of the final Order. Unless any party applies to be heard as to costs within 21 days by letter to the Registrar, the costs of the present action shall be awarded to the Plaintiffs, to be taxed if not agreed.

Dated this 24th day of July, 2015 _____

IAN RC KAWALEY CJ