PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2018/0204
BETWEEN

ANDREW JOHN MOLETA

Applicant

and

JEAN FRANCES MOLETA

Respondent

Property: Titch Cottage, Old School Lane, Ryarsh, West Malling

Title number: K622298

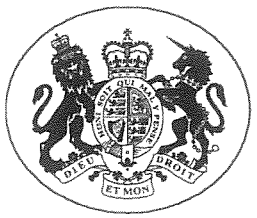
ORDER

The Chief Land Registrar is ordered to cancel the application dated 14 November 2017.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 15th day of May 2019



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Title number: K622298

Before: Judge McAllister
Alfred Place, London
26 March 2019

Representation: Mr Duncan Richards of Counsel appeared on behalf of the Applicant; Mr Dean Thistle of Counsel instructed by Gill Turner Tucker Solicitors appeared on behalf of the Respondent.

DECISION

Introduction

1. The Applicant, Andrew Moleta, is the son of Andre Moleta who died on 22 April 2003. The Respondent, Jean Moleta, married Andre Moleta in June 1993. At the time of their marriage both Andre Moleta and Jean Moleta had children from their previous marriages: Andrew Moleta and his sister Juliet Moleta are the children of Andre

Moleta, and David Whiting and Catherine (Cate) Kileen are the children of Jean Moleta. Without intending any disrespect I will refer to the parties and other family members by their first names. Andre was known as Bob, and I will so refer to him.

2. Jean and Bob divorced their respective partners in 1988. On 16 June 1988 the property known as Titch Cottage, 1 Old School Lane, Ryarsh, Kent ('the Property') was bought by them for the sum of £79,500. The Property was held as beneficial joint tenants, and it became their home until Bob's death. Jean was was registered as the sole proprietor in June 2003.

3. By an application dated 14 November 2017 Andrew applied to enter a restriction against the title of the Property on the basis that he has an interest in the Property by virtue of an implied or constructive trust arising from assurances given to him and his sister by their father in 2002 and 2003. His claim is that the Property is held on trust for each of the four children in equal shares, alternatively that a claim arises in proprietary estoppel. It is common ground between Andrew and Juliet that she has agreed to transfer his potential interest to him. This, of course, is a matter between them.

4. I heard evidence from Andrew, Juliet and Jean. Juliet's evidence was given via Skype from Edinburgh, where she lives.

5. For the reasons set out below I will order the Chief Land Registrar to cancel the application. In my judgment, no trust as claimed by Andrew arises, and the claim in proprietary estoppel also fails.

Background and evidence

6. The catalyst of this dispute was the decision taken by Jean in 2016/2017 to sell the Property to move closer to her daughter, Cate. The Property was put on the market, and a buyer found for £335,000. The sale was due to be completed on 29 June 2017. In open correspondence, the solicitors acting for Jean offered to place one half of the net proceeds of sale to be held by them pending an agreement or a court order. This did not happen.

7. On 27 April 2018 Jean issued a claim in the County Court at Maidstone against Andrew and Juliet seeking a declaration that on Bob's death the Property passed to her absolutely, and other relief. Those proceedings, as I understand it, have been stayed pending the outcome of this reference.

8. The background to this matter is as follows. In 1988, following their divorce, Bob and his former wife Christine sold their then home in Maidstone and split the proceeds, 40/60. This agreement was recorded in a consent order dated 17 August 1995. It is not entirely clear why the order was made some 7 years after the divorce. Jean's evidence is that the order was prompted by a late application for half Bob's pension. In any event, Bob used his share of the proceeds to buy the Property.

9. Andrew further believes that his father made substantial improvements to the Property with the assistance of monies from his ex-wife's pension on the basis that the Property would be left to their two children. A £1,000 was paid to Andrew's mother in consideration of this agreement. Andrew facilitated this arrangement.

10. Jean sold her share in her former matrimonial home to her ex husband and used her share of the proceeds (£37,000) to buy the Property. It is her case that she and Bob contributed approximately the same amount. Jean's evidence is that they both understood the significance of, and wanted to buy, the Property as joint tenants and not as tenants in common, and in particular understood that the survivor would inherit the whole of the Property which would not form part of the deceased's estate. I accept this evidence.

11. On 12 August 1994 Bob and Jean made mirror wills. These provide that each would leave the entirety of their estate to the other if the other survived for more than 28 days. In the event that the other did not survive, the estate would be divided between their four children. The Wills were prepared by the same solicitors who had acted on the purchase of the Property some six years earlier. Andrew and his sister were not aware of the exact terms of the Wills until 2017, although they knew that 'mirror' wills had been made.

12. Andrew's case rests on the events which took place following Bob's diagnosis of terminal cancer in 1999. In 2002 Bob told his daughter, Juliet, that, in view of the fact

that Jean would almost certainly survive him, Jean would put in place provisions so that each of the four children could receive a quarter share of the Property. Andrew was working abroad but returned in mid 2002, and was present when Bob repeated what he had already stated, as was Jean. In essence, the clear and explicit agreement, made by both Jean and Bob was that Jean, as the survivor, would pass the Property whether by assignment, will or trust so that each of the four children would receive a 25% interest.

13. Bob assured Andrew that there was no need to go through any further formalities because each child would receive 25%. In giving evidence, Andrew accepted that this would happen after Jean's death and that she could stay in the Property until then.

14. Pressed further, Andrew accepted that his father had never stated that Jean could not move from the Property to another property, and indeed this is not either his or his sister's case. At the relevant time, in 2002/2003, it was a given, he said, that Jean would stay in the Property but no discussions on this point took place.

15. Asked why he had taken steps to prevent Jean from moving house, Andrew stated that he wanted to place the restriction on the Property to protect his (and the others' interests): it is not possible, he said, for the interest to be transferred from one property to another. The only other option, he said, was that any other house would be placed in trust for himself and the others.

16. His preferred option would have been to buy out the share of the other three but it is clear from correspondence written to Jean in 2017 that this option was not realistic. It is also clear from these letters that Andrew realised that the promises made to him and Juliet by Andre are not reflected in the Wills.

17. Juliet's evidence was as follows. During the period 2001 to 2003 she was working as a fashion designer for Karen Miller in Maidstone. As her father was ill, and as the commute from Brighton where she lived was not the easiest, she stayed in the Property three nights a week. During this period her father told her repeatedly, in Jean's presence, that the when the Property was sold after Jean's death, each of the four children would get a share of the proceeds. Juliet never believed that she would be entitled to anything before Jean's death. Both she and her father believed, perhaps

naively, that Jean would stay in the Property. There was no discussion about what would happen if Jean wanted to move house.

18. In about 2016 Jean wrote to Juliet telling her she was planning to move closer to Cate Jean and Juliet met for lunch. Juliet suggested that the proceeds of the sale should be put in trust for the children but Jean's response was that the money was hers. It is clear that the relationship between Andrew and Juliet on one side, and Jean on the other, deteriorated after this point.

19. Juliet stated in evidence that she does not want any money from the proceeds of sale, but wanted to be able to state what had happened. She trusted her father and Jean to handle the proceeds of the Property as promised and had no doubt that her father wanted his children to have the inheritance he had worked hard for.

20. Jean's evidence is that Bob told Andrew and Juliet in about 2003 that he had made a Will leaving everything to her, but that they would be provided for in her Will. The Wills had been made in 1994 following Christine's claim to Bob's pension. There was no doubt in her mind that the main purpose of the Wills was to provide for each other first. The Property would in any event pass to the survivor by survivorship. Jean agreed that she too stated at the time of the discussions in 2002/2003 that she would make a Will leaving everything to the four children, but it was never stated that she could not sell the Property, which was intended to be, and was, her financial security. It was her intention to continue living at the Property but in 2015 or 2016 she made the decision to move closer to her daughter in Ickenham, Uxbridge.

21. On Bob's death, Jean gave Andrew and Juliet £1,000 as Bob had asked her to. The issue regarding the Property only arose when Jean told them that she was planning to sell the Property. Relations then deteriorated, as is clear from the correspondence, although it is also clear that everyone regretted the turn of events. Jean did not want to put the Property, or any other property, in trust.

22. I fully accept that every witness was being truthful in the evidence given. This is not a case where there is a significant dispute of fact. It seems clear to me that Bob's assurances and promises were that, in due course, and following Jean's death, the four children would inherit equally, and that Jean knew of, and agreed with, these

assurances. It is also clear and not in dispute that Jean was always free to sell the Property and move elsewhere, although the effect of this was not considered at the time of the assurances. It was the decision to move which prompted Andrew and Juliet's concern that their position was not as protected as they believed it to be. The issue therefore is whether, as a matter of law, Andrew is entitled to the restriction sought.

Legal Principles

23. The terms of the Wills are clear. Bob and Jean left all their real and personal estate to the other on condition only that the other survived for a period of 28 days. The Property was held as joint tenants, and therefore in any event passed under the doctrine of survivorship, irrespective of the provisions in the Wills. A Will cannot sever a joint tenancy.

24. Andrew's case is put on the basis of either a constructive trust, or an equity which arises under the doctrine of proprietary estoppel. A constructive trust arising out of an express agreement may and often does overlap with a claim founded on proprietary estoppel. In both cases, the claimant must have acted to his detriment in reliance on the belief that he would obtain an interest, and in both equity acts on the conscience of the legal owner to prevent him or her from defeating the common intention.

25. In relation to a constructive trust, the starting point is the establishment, by the claimant, of an agreement, arrangement or understanding with the legal owner about their respective shares in the property. This agreement may be based on evidence of express discussions or inferred from conduct. Usually, the relevant intention is established at the time of purchase, but the agreement may be 'ambulatory' in the sense that their understanding of the existence and extent of their beneficial interest evolves over time (see, generally, *Snell's Equity,* 33rd Ed, paras 24-049 ff).

26. In the present case it is said that an agreement was reached with both Bob and Jean, following Bob's diagnosis of cancer, as the legal owners of the Property, that the Property would be held on trust for the four children. It is not said, as I understand it, that this agreement was made at the date of the purchase of the Property. The precise terms of the agreement claimed to have been made, based on the evidence given at the

hearing, are that the interests held by the four children would not be realised until after Jean's death, and, would in any event attach to any other property she purchased in her lifetime.

27. It also seems clear to me that Jean does not disagree with this summary of what was agreed. She accepted that the four children would receive a quarter share after her death, and not before. The suggestion that the Property (or any other property purchased with the proceeds) be put in trust was one which she did not accept. It is also her case (accepted, as I have said, by Andrew and Juliet) that she should be free to move elsewhere.

28. The courts have, in the past, been reluctant to allow a claim based on a promise to leave specific property on death because of the revocable nature of a will and the doctrine of testamentary freedom. But more recent cases, such as *Thorner v Major* [2009] 1 WLR 776 and *Gillett v Holt* [2001] Ch 210, make it clear that a claim of this kind can succeed where the quality of the assurance and the detrimental reliance are such that the repudiation or denial of the assurance would be unconscionable in all the circumstances. In *Gillett v Holt* the potential testator was not dead, and the claimant successfully prevented an intended disposition under a new Will.

29. However, in order for a constructive trust to arise, or for a claim in proprietary estoppel to succeed, it is also necessary to show that Andrew acted to his detriment in reliance on the parties' common intention or on the inducement or expectation that he would enjoy some rights in the Property.

30. It is this element of detrimental reliance which makes what would otherwise be an unenforceable declaration, a proprietary right, and which provides the key element of unconscionability in a proprietary estoppel case. A gratuitous intention to create a beneficial interest is of no effect. It is not unconscionable for the owner to stand on his legal rights unless the claimant has suffered detriment.

31. The acts of detrimental reliance must be of a kind which the claimant would not have embarked upon but for the fact that he or she was to have an interest in the property. The most obvious example is expenditure of money, but other acts might be sufficient, such as looking after the owner of the property or members of his or her family, giving

up a career, working for the owner for many years at below market wages etc. The detriment must, in short, be sufficiently substantial to justify the intervention of equity.

32. In the present case, I agree with Counsel for Jean that there is no allegation, or evidence of, detrimental reliance. The case is put on the basis that a promise was made and that this promise does not seem to have been fulfilled. It is not enough to say, as Counsel for Andrew argued, that the detriment lies in the fact that no other steps were taken to protect what he described as a contingent interest, or that the failure to allow the restriction amounts to detriment. The denial of a right, by itself, is not a detriment: a claimant must show that in reliance of the promise, assurance or understanding he acted to his detriment. The detriment must flow from the assurance given, and must be substantial. It is an essential element of both a constructive trust and a proprietary estoppel claim.

33. For this reason alone it seems to me clear that the claim must fail. This leaves the question of costs. As the successful party, Jean is in principle entitled to her costs. A schedule in Form N260 is to be filed and served by 31 May 2019. Andrew may respond within 14 days of receipt of the schedule. I will then consider what order to make.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 15th day of May 2019