IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1184/82

BETWEEN: ALFRED BARRY CAREY of Mangonui, Northland, and MARGARET ROSE CAREY his wife

Plaintiffs

AND: ALFRED ARNOLD CAREY of Auckland, Retired Taxi Driver

Defendant

Hearing: 11-12 June 1984

Judgment: 25 June 1984

Counsel: P C Sumpter for plaintiffs
Miss C R Newton for defendant

JUDGMENT OF HENRY, J.

This action concerns a property at Mako Street, Taupo Bay, Mangonui, Northland, and is an example of the unhappy situation which can arise when there is a falling-out between father and son. The property was purchased under long term agreement in 1972 as an empty section, title being taken in the name of Mitchell Brent CAREY, he being a natural son of the first-named Plaintiff Alfred Barry CAREY ("the Plaintiff"), but adopted by the Defendant who is also the father of the Plaintiff. Mitchell Carey died in 1973 and the section was transferred to the Defendant. It seems that the bulk of the purchase

price, and certainly the balance which was owing as at Mitchell's death, came from the proceeds of a life insurance policy.

In 1974 the Plaintiff was living with his wife and family in their home at Papatoetoe. During that year it was decided to construct a dwelling on the section, and a Mr Cook was employed to prepare some plans and drawings and also to construct the building. There is some dispute as to the terms of his employment, its termination, and his remuneration, but resolution of those matters is not required for present purposes; neither is it appropriate to attempt to make any findings on them. What is relevant is that when he did cease work, construction was at a stage where the dwelling could be described as a shell, with most of the internal finishing work still to be done. Mr Cook's employment was over a period of approximately two-and-a-half to three months, during which time the Plaintiff regularly assisted in the construction work, travelling with his family from the Papatoetoe house for the weekends. Following the termination of Mr Cook's employment the Plaintiff continued to go to the property at weekends and during holiday periods to proceed with construction. I accept that the bulk of the physical work relating to the interior of the upstairs was carried out by the Plaintiff between 1974 and 1976, with him making some minor contribution also by way

of purchase of materials, but that the Defendant was primarily responsible for such purchases. I am also satisfied that during this period the Defendant from time to time did make statements to the effect that the lower portion of the dwelling was to be for the Plaintiff.

At the end of 1976, the Plaintiff decided to sell the Papatoetoe house and move to Taupo Bay. This was not at the express request of the Defendant, but came about as a result of the earlier indications from him that the Plaintiff was to have the lower portion, and a consequent decision by the Plaintiff and his wife to make the change The move had the Defendant's full approval, and was consistent with his earlier expressed intention as to the Plaintiff's use of and entitlement to the property. Following that move in 1976, I am satisfied that the Plaintiff carried out further substantial work on the property, including in particular the completion of the downstairs portion into a livable unit, all with the full knowledge and approval of the Defendant.

A further significant factor is that there was a mortgage on the property, taken out for the purpose of providing funds for the construction, and although there is some dispute as to the urgency which arose to repay that mortgage, it is common ground that the Plaintiff in fact provided funds of $4341.00 to effect its discharge. This

was late February or early March 1977, at a time when the Plaintiff was residing on the property and expending work and some monies on it.

The legal formalities relating to the discharge of mortgage were carried out by the Defendant's solicitor, Mr Vial, and a meeting with him had been arranged for that purpose. On that occasion the Defendant raised the possibility of his transferring either a whole or a part of the property to the Plaintiff, and a gifting programme was discussed. Mr Vial wrote to the Inland Revenue Department concerning the proposal, preparatory to putting it into effect. Nothing further appears to have been done for some little time thereafter, but it is clear that the Defendant again consulted Mr Vial in March 1978. Following instructions then given to him, a letter was written to the Plaintiff, in effect offering him the whole of the property but reserving to the Defendant and his widow a life occupancy of the upstairs portion. The terms of that letter were never implemented, according to the Plaintiff because of his then financial inability to meet the legal expenses involved. There matters rested until 1982, with the Plaintiff and his family continuing to reside downstairs and the Defendant, from time to time as he desired, occupying the upstairs. Regrettably, family discord then arose. The precise reasons for the discord are not exactly clear, but would seem to relate to the lady who was the Defendant's close companion.

Matters seem to have got out of all proportion, and culminated in the Defendant asking the Plaintiff, in April 1982 on the occasion of a family funeral, to vacate the property and then instituting proceedings for recovery of possession in the District Court. The Plaintiff then commenced the present action seeking a proprietary interest in the property.

The first cause of action is based on the equitable rule known as proprietary estoppel. The rule dates back to the 18th century and has been frequently applied both in New Zealand and other Commonwealth jurisdictions. The classic statement of the elements of a proprietary estoppel is still that of Fry J. in Willmot v Barber [1880] 15 Ch.D. 96, in which the well-known five probanda were laid down. That case, and other cases are collected and discussed in Spencer Bower & Turner's Estoppel by Representation (3rd edition, 1977) at p.285 et seq. The probanda are :

1. The Plaintiff must have made a mistake as to his legal rights

2. The Plaintiff must have expended money or done some other act on the faith of his mistaken belief

3. The Defendant, who is the possessor of a legal right, must know of the existence of his own right inconsistent with the right claimed by the Plaintiff

4. The Defendant, as possessor of the legal right, must know of the Plaintiff's mistaken belief as to his rights.

5. The Defendant, as possessor of the legal right, must have encouraged the Plaintiff in his expenditure of money or in the other acts he has done either directly or by abstaining from asserting his legal rights.

Whether those are still necessary requirements before relief may be granted is possibly open to question. Recent authorities tend to support a somewhat wider equitable jurisdiction, with the test being simply whether it is unconscionable for a Defendant who has stood by later to insist upon the exercise of his strict legal rights. The careful and detailed judgment of Oliver J. in Taylor Fashions v Liverpool Victoria Trustees Co. [1981] 1 All ER 910 is an example; Amalgamated Investment and Property Co. Ltd v Texas Commerce International Bank Ltd [1981] 1 All ER 923, on appeal [1981] 3 All ER 577, is another.

I do not find it necessary to consider the development or refinement of the rule since Willmot v Parker, if such there has been, as the facts in this case are such as to enable resolution of the issues without that necessity. The Plaintiff believed he had a legal right to an interest in the property; he expended money and carried out work on the property in the faith of that belief; the Defendant knew his existing legal right to the property was inconsistent with the Plaintiff's belief, a

belief of which he, the Defendant, was aware; and the Defendant actively encouraged the expenditure of money and the carrying out of work by the Plaintiff.

The basic facts which give rise to those findings are not really in dispute. Insofar as the Defendant now tries to explain that his understanding or intention was that the Plaintiff was completing the downstairs for a family holiday home - meaning all his family and not just the Plaintiff - I do not accept his evidence. I have no doubt that the Plaintiff was at the time the only family member to be involved in the construction work to any extent, and that there was a clear and common understanding, one that was expressed by the Defendant, that the downstairs was to be the Plaintiff's. The extent of the work carried out, and the payment of the mortgage, cannot otherwise be explained. There were two matters which occurred subsequent to the Plaintiff being told the downstairs was to be for him. The first was a suggestion by the Defendant that the whole of the property would be transferred to the Plaintiff, subject to some rights of occupation by the Defendant or his widow. That was never implemented, but undoubtedly was still held out to the Plaintiff during 1977 and 1978, and probably right through to, early 1982. The second was the complete change of heart undergone by the Defendant in April 1982 when friction had arisen between the parties. That change of heart cannot defeat the operation of the

equitable rule if its components were by then, as I have found them to be, established. I also find that it would be unconscionable to allow the Defendant now to exercise his legal right of sole ownership.

It remains, therefore, to consider how this equity which has arisen should be met. It was submitted for the Defendant that the Court should not allow a form of joint possession because of the animosity which now exists. I have given careful thought to the principle embodied in that submission. I have also given careful thought to whether it would here be sufficient to require payment of the value of improvements as a condition to terminating the rights resulting to the Plaintiff. I have concluded, however, that the only fair and just way of giving effect to those rights is to recognize in a formal way the clear understanding which was reached in the early stages of this chain of events - namely that the Plaintiff should have a legal proprietary interest in the property. The value of the work carried out by him and his family I accept, as detailed in his evidence, as being in excess of $6000.00; in addition, there is the mortgage repayment of $4341.00. When regard is had to that, to the value placed on the property in 1977 by the Inland Revenue Department of $24,000.00, and to the clear intention earlier mentioned, I am satisfied that the extent of that interest should be a one-half.

I tend to the view that the difficulties of joint possession are not insuperable - they appear to have been overcome during the past two years without major problem, and in any event the provisions of the Property Law Act 1952 are available to any proprietor of a moiety should he feel that such a course is necessary.

In the circumstances, it would seem appropriate to give relief to both named Plaintiffs, and they are accordingly entitled to a declaration that the Defendant holds the Mangonui property in trust for himself as to one-half, and for the Plaintiffs as to one-half. They are also entitled to an order requiring the Defendant to take all necessary steps to effect a transfer of the property to give effect to that declaration, the respective interests of the Defendant and the Plaintiffs to be as tenants in common.

Although it is unnecessary to consider the alternative pleading based on a constructive trust, it is nevertheless desirable for the sake of completeness to record my views on this cause of action. The findings I have already made show that the Plaintiff made substantial capital constributions to the improvements of the Mangonui property, and that a common intention of shared beneficial ownership is the proper inference to be drawn from the totality of the evidence.

Accordingly, as was stated by Cooke J. in Hayward v Giordani (1983) NZLR 140 at p.143, it is orthodox doctrine that the Court may then hold a trust of an appropriate share to exist. I so hold, and I further hold that the appropriate share here is a one-half share.

It follows that the counter-claim for possession must be dismissed.

I will hear Counsel as to the appropriate form of the declaration and order and any ancilliary matters, should that be necessary.

In the particular circumstances of this case, including the fact that the Defendant has been granted legal aid, I do not propose to make any order as to costs.

J. Fleming J.

Solicitors

Wallace McLean Bawden & Partners, Auckland, for plaintiffs

McVeagh Fleming Goldwater & Partners, Auckland, for defendant