IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. MacDonald*, 2003 NSSC 8

Date: 20020115
Docket: SN 113692
Registry: Sydney

Between:

Darrell MacDonald, Sonia MacDonald and Clarine (Renee) MacDonald, of Ingonish Beach, County of Victoria, Province of Nova Scotia

Plaintiffs

v.

Eric MacDonald and Madonna MacDonald of Ingonish Beach, County of Victoria, Province of Nova Scotia

Defendants

D E C I S I O N

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	at Sydney, Nova Scotia on 24, 25 and 26 June, 2002, with last submissions received on 22 July 2002.
Counsel:	Alan J. Stanwick and Gerard X. MacKenzie for the plaintiffs Hugh R. McLeod for the defendants

Moir, J.:

[1] *Introduction.* The plaintiffs are three of the four children of Clayton MacDonald, late of Ingonish Beach in Victoria County. The defendants are his son and daughter-in-law. In October 1984, Mr. MacDonald executed a deed in favour of the defendants conveying to them his only valuable asset, the family home including a little under 40,000 square feet of land. The defendant, Eric MacDonald wants to sell the land. Darrell and Sonia MacDonald want to continue living there and they, along with their sister Renee, claim that the deed is subject to a trust or to a collateral agreement. They also set up arguments respecting unjust enrichment and promissory estoppel. Eric and Madonna MacDonald deny the assertions supporting a trust or an agreement and they set up the *Statute of Frauds* and the defence of laches.

[2] I am satisfied that the deed was subject to a trust. While the terms of the trust were spoken and not reduced to writing and while some of the terms have to be implied, the *Statute of Frauds* does not apply. Nor is the equitable defence of laches applicable.

[3] *Hearsay and Credibility.* The plaintiffs offered evidence of a discussion said to have taken place shortly before the deed in which Clayton MacDonald is said to have expressed and Eric MacDonald is said to have accepted stipulations for subdivision and reconveyance of part of the land. Mr. MacLeod objected to

this evidence on the basis that it constituted hearsay. The plaintiffs also offered evidence of statements said to have been made by Clayton MacDonald indicating his belief that Eric MacDonald was obliged to subdivide and re-convey. Again, there was a hearsay objection. Thirdly, the plaintiffs offered evidence of utterances said to have been made by Eric MacDonald which, if he did say such, tended to show that he thought himself obliged to subdivide and re-convey. This was subject to the same hearsay objection. I said I would rule at the end of the trial and I noted the evidence I would have to ignore if I upheld an objection.

[4] I gave my ruling before argument. The evidence of the discussion was admitted both as an act or declaration of a party before making a conveyance: *Fleet* v. *Farrell* (1985), 71 N.S.R. (2d) 124 (SC, AD), and as a verbal act in distinction from hearsay, that is as "words which, when spoken, effect a legal result" admissible "as original evidence of the very fact in issue": J. Sopinka, S.N. Lederman and A.W. Bryant. *The Law of Evidence in Canada*, 2ed. (Toronto, Butterworths, 1999) at para. 6.215 and 6.216. I excluded the second category of statements except to the extent they overlapped with the third, because utterances of Clayton MacDonald long after the deed were truly hearsay and I was not satisfied there was a sufficient circumstantial guarantee

of reliability so as to meet the threshold for the principled admission of hearsay. The third category of statements, those attributed to Eric MacDonald after the deed, were admitted both as alleged prior inconsistent statements going to credibility and as alleged admissions. Some of what Mr. Clayton MacDonald was said to have said then became admissible only for the purpose of understanding what Mr. Eric MacDonald was said to have said. At the time I made these rulings, I stressed that I had made no ruling on the substantive issue of the preclusive effects of the *Statute of Frauds* and that I had yet to reach final conclusions on credibility and weight.

[5] On its own, I found difficulties with the evidence of Eric MacDonald. For example, he says the deed was a wedding present but he and Madonna MacDonald were married several months before the deed and had their own home across the road from the homestead. I had a positive impression of the tone, demeanour, power of recollection and consistency of the testimony of the three plaintiffs and their witness, Terry Clark. Where in conflict, I prefer their evidence over that of Eric MacDonald. Particularly, I reject his testimony that there had never been any discussion between himself and his father concerning subdivision and re-conveyance.

[6] *Findings of Fact.* In 1908 the grandfather of the plaintiffs and of the first defendant bought a lot at Young's Road in Ingonish Beach and he built a house, which remains today. The grandfather deeded the property to Clayton MacDonald in 1952. He and his wife had four children, fairly close in age and all four grew up in the homestead. Their mother died in 1977. Except for a time between 1984 and 1986, Mr.Clayton MacDonald lived in the homestead until his death in November of 1991. The first plaintiff, Mr. Darrell MacDonald lived there continuously while his father was alive. Afterwards, it was his residence except for about six weeks in 1992 when he worked in Ontario, a year and a half in 1995 and 1996 when he worked on Prince Edward Island and two months in 2000 when he worked in Alberta. Sonia MacDonald left home in 1982 and moved back in September 1985. From 1993 to 1997 she lived in Dartmouth. In March 1997 she moved home and she shares the homestead with her brother Darrell to this day. Renee MacDonald left home in 1981 and she lived at the homestead again from 1986 until 1992.

[7] Eric MacDonald married Madonna MacDonald in June 1985. They had a home across Young's Road from the homestead. According to Darrell MacDonald a discussion took place between his father and his brother in the kitchen of the homestead late in September 1985 or early in October. At that

time Clayton MacDonald was living nearby with a Gertrude Whitty, Sonia MacDonald had just moved back to the homestead and Darrell MacDonald was living there as always. Darrell MacDonald was present for the discussion in question as was his sister, Renee, and a family friend, Terry Clark. Eric MacDonald said he was unable to make the payments on his mortgage. He wanted to sell that property, get a loan and put a small house on part of the homestead lot. To do this he would need for his father to deed the homestead to himself. He explained that he needed to have enough land to put in a septic system for the new house. Also, he needed the property to get the loan. Mr. Clayton MacDonald responded that he would give his son a deed so long as, after all was done, he would split the land and deed the lower half, with the old homestead on it, to his brother, Darrell. Also, Mr. MacDonald said that Darrell would have to let Sonia and Renee live there whenever they wanted. Renee MacDonald testified to the same discussion in the same time frame. She recalled that Eric wanted to sell his home and put a small home on the upper part of the homestead lot. The upper part was not big enough for septic. Her father said he would deed the homestead to his son if Eric would subdivide it and convey the homestead to Darrell, so long as she and her sister could stay there. Terry Clark was visiting the MacDonalds when this occurred. He says

that Darrell, Clayton, Renee, Eric and himself were in the kitchen. He recalls Eric agreeing that he would divide the lot and give Darrell his piece. Darrell needed the whole for a septic system and his father brought up the subject of subdividing and Eric agreed to it. The land would be signed over to Eric, who would subdivide it and deed the homestead back.

[8] As I said, Eric MacDonald denies this conversation took place. He says the discussion was a private one, between himself and his father, in Eric MacDonald's truck one day when he picked his father up on Young's Road. He claims his father decided to make a wedding present of the homestead. I think this most unlikely. Mr. Clayton MacDonald was a kindly man who treated his four children equally and who had full possession of his faculties. Mr. Eric MacDonald had little contact with his brother and sisters. It seems unlikely Mr. MacDonald would have wanted to put his son and daughter in peril of being put out of the home. Darrell MacDonald had lived there all his life and there was no evidence he planned to live anywhere else at the time. Sonia MacDonald had just moved back. Clayton MacDonald himself and Renee MacDonald were soon to move back. It was evident when they testified that the brother and sisters were much attached to the homestead. Their father would have been aware of that. Further, a wedding gift three months after the

event, comprising the father's entire assets does not sit well with common sense.

[9] After the deed, the parties carried on in a manner consistent with the discussion testified to by Darrell MacDonald, Renee MacDonald and Terry Clark. Eric MacDonald got his approvals and put a small home on the upper part of the lot. His father continued living with Gertrude Whitty for about another year, then moved home for good. Renee moved back. Expenses were shared, including a one-half contribution for taxes, Eric being expected to pay the other half. Eric MacDonald said nothing and did nothing to suggest the rest of the family did not have the right to occupy the homestead portion. On the contrary, he made admissions to the opposite effect. Darrell MacDonald testified, and I accept, that on four to six occasions Eric MacDonald responded to questions put by his father saying he would get on with it when he could and sign part of the land back to Darrell. Further, after Clayton MacDonald died Eric stated that there was not enough land to effect a subdivision, which is the truth and which also shows his true reason. His statement shows that his true reason was not that the whole was gifted to him absolutely. Sonia MacDonald testified, and I accept, that in October 1987 her brother, Eric, said he did not have the money for a survey but would get it done. And, she also testified and I find that in the

summer of 1988, when his brother Darrell was making improvements to the homestead, Eric was pressed by their father, but he responded that he did not have the time for it just then.

[10] Eric MacDonald only lately asserted an absolute right to the property. Over many years, he stood by while Darrell and Sonia invested thousands of dollars and much labour into improving the homestead, including insulation, siding, a deck, a porch, a furnace and hot water heating system, kitchen floor, kitchen ceiling, chimney, septic. He accepted contributions to the real property tax bill from his father, his brother and both sisters and he allowed Darrell to pay off over $3000 in tax arrears that he, Eric, had caused to accumulate. Mr. MacLeod suggests all of this is more than adequately accounted against fair occupation rent. Mr. Eric MacDonald never suggested rent. Not once in the last seventeen years since he got his deed. This was not because he wanted to keep peace as he said on the stand. It was because he knew his brother and sisters knew the true arrangement with his father.

[11] *Statute of Frauds.* Subsection 5(5) of the *Statute of Frauds*, R.S.N.S. 1989, c. 290 provides:

> No declaration or creation of any trust in land shall be valid unless it is in writing, signed by the person entitled to create or declare the trust, or by his last will, but thi:s Section shall not extend to any trust in land arising or resulting by implication or

> construction of law or which may be transferred or extinguished by act or operation of law.

The plaintiffs refer to the proposition or maxim that the *Statute of Frauds* cannot be used to perpetuate a fraud. They refer, in that regard to *Rochefoucauld* v. *Boustead*, [1897] 1 Ch.D. 196 (C.A.), and the earlier decisions referred to by the Court of Appeal in that case. The following appears at p. 206:

> It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

As Mr. MacLeod pointed out, Waters says "in this whole area... the courts are stumbling through a thicket": D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Carswell, 1984), p. 212. Part of the difficulty is that the *Rochefoucauld* v. *Boustead* approach amounts to a judicial repeal of the statute. An alternative approach would award a constructive trust because of the trustee's unconscionable retention and because of the fraud that would result if the trustee were allowed to retain, retention by a trustee always being fraud. The remedy of a constructive trust is outside the statute. So is the resulting trust, and, in some cases, where trustees have been shown

to retain land despite an oral trust the conveyance has been voluntary and resort is had to resulting trust. The difficulty is that the terms of the resulting trust could hardly ever be taken from the express parole trust. All of this is discussed at pages 208 to 215 of *Waters.*

[12] If there was not a simpler way, I would grant a constructive trust. It has been clearly proven that Mr. Eric MacDonald received a deed to the homestead property on a trust for his benefit and for that of his brother and sisters. He was to convey half the lot to his brother, reserving life estates to his sisters. His retention of the whole is axiomatically a fraud.

[13] Mr. MacLeod protests that the plaintiffs did not plead fraud. But, it was his client who pleaded the *Statute of Frauds* and we have no pleading like an Answer in this jurisdiction. Besides, the fraud of which we are now speaking arises almost axiomatically on the facts pleaded in the Statement of Claim. Mr. MacLeod also suggests the difficulties of which Waters wrote are simply answered by *Deglman* v. *Guarantee Trust Co. of Canada,* [1954] 3 D.L.R. 784 (S.C.C.) and *Bollivar* v. *Hirtles Estate* (1989), 93 N.S.R. (2d) 279 (N.S. Co. Ct.). But, these are not cases of trust or of fraud.

[14] The doctrine of part performance has been applied in a somewhat specialized way to unwritten trusts under s. 5 as opposed to unwritten contracts under s. 3

of the *Statute of Frauds*. This comes up in Waters' discussion of the difficulties associated with the broad proposition represented by *Rochefoucauld* v. *Boustead*. Waters began by comparing that with part performance, at p. 209:

> The difficulty arises from the fact that fraud is a less justifiable ground for excluding the statute than a claim based on part performance. Part performance requires evidence of acts other than the making of the contract, and these further acts must be referable to the alleged oral contract, the doctrine of fraud in its application in the Statute of Frauds, however, does not call for evidence of any occurrence other than the creation of the alleged oral trust, and it is the evidence of that creation which the Statute precludes. It may be possible to prove a trust in the particular case by acts which are only explicable in terms of a trust but it is not necessary to prove it in this way. The court is able to conclude that there was a trust merely by preferring the claimant's testimony to that of the alleged trustee.

Then Waters referred to part performance where a trustee under a parole trust does not go into possession, further at p. 209 with footnote references omitted:

> It was no doubt Strong, J.'s intention to meet this difficulty when, in a dissenting judgment in *Barton v. McMillan* he argued that the English cases, which had rejected the Statute as a defence, could be justified. In his view *Hugh v. Kaye, Booth v. Turle, Davies v. Otty (No. 2),* and *Lincoln v. Wright* could be explained on the basis that in each the grantor of land had remained in possession, an act inconsistent with the deed and consistent with a trust. Here, he concluded, was a situation entirely analogous with part performance. The parol trust was established not merely upon the oral testimony of witnesses, but upon a retained possession which, since it was inconsistent with the deed, could only be explained on the basis of the alleged trust. In support of this interpretation, it is interesting to observe that twenty-two years earlier in *Campbell v. Durkin* Mowat V.C. had followed *Lincoln v. Wright* on this precise basis that, if the grantor retains possession after the conveyance of title to the alleged trustee, parole evidence of the trust is admissible.

I conclude that there is an analogy between part performance as a justification for proof of an unwritten contract for the sale of land and absence of possession as a justification for proof of an unwritten trust in respect of land. Where the grantee does not go into possession and others remain in possession long after the deed, it is open to them to prove an unwritten trust and, if it is proven, to secure enforcement of the terms. For years, Mr. Eric MacDonald left his brother and sisters in possession of the lower half of the property including the homestead. He sought no rent and asserted no other right in reference to the part he was to have conveyed to his brother. On this basis, I conclude that the *Statute of Frauds* does not prevent enforcement of the unwritten trust in this case.

[15] *Laches.* This defence is probably eclipsed by the statutory limitation, which has hardly begun to run against the plaintiffs and which may have been running against the defendants since 1985. In any case, the defendants did not disclose their claim or intention until recent years.

[16] *Trust.* I do not think resort need be had to the law of resulting trust, although the plaintiffs pleaded and argued for a resulting trust. The evidence strongly rebuts the presumption of gift, but the resulting trust is for situations where an express trust cannot be found or enforced. That is not the situation here.

[17] The plaintiffs also pleaded and argued for a constructive trust. As I said before, I would grant such as a remedy on account of the trustee's retention of trust property, but there is a more straightforward analysis.

[18] The discussion of late September or early October 1985 was very clear. The express trust terms were made plain if the assumption was perplexing or naive: that land too small for septic approval could be subdivided off after the septic was installed. The express trust terms were: Eric MacDonald would hold the entire lot in his name for so long as was necessary to raise a loan on the security of the lot and to install a septic system for his new, small home; he would then get subdivision approval and convey the lower half to Darrell MacDonald with non-exclusive life tenancies to Sonia MacDonald and Renee MacDonald. What is missing is what to do if one cannot subdivide. The fact that the loan was to be for the construction of Eric's and Madonna's home and the fact they were to make the payments lead to an implication that Darrell MacDonald was to be held harmless, as were the life tenancies of Renee and Sonia MacDonald. In the event subdivision is impossible, the appropriate implied term is that title will be divided in the manner the land was suppose to have been. That is, Darrell MacDonald would have a 50% tenancy in common with Eric and Madonna MacDonald, who would have a joint tenancy of the other 50%, and

Darrell's interest would be subject to non-exclusive life tenancies in favour of Renee and Sonia MacDonald. Eric and Madonna MacDonald would be responsible for paying the mortgage debt and any balance would be accounted against their share in the case of sale.

[19] *Remedy.* I have already discussed my position that a constructive trust is unnecessary. The plaintiffs asked for a declaration that the homestead was divided in 1985. They submit that the various land titles validation legislation coming out of attempts to deal with title to imperfectly divided land cure the defectiveness of the intended subdivision. I am not satisfied that the legislation extends to a parole trust involving an intended subdivision. Further, it is not established that the intended subdivision conformed with the planning laws of 1985. Furthermore, I would not grant such a remedy without the municipality being joined as a party. I am prepared to grant a declaration that the lands cannot be subdivided as provided in the unwritten trust and that the implied terms are in effect.

[20] *Conclusion.* I will grant a declaratory judgment that Mr. Darrell MacDonald has a 50% tenancy in common with Mr. Eric MacDonald and Ms. Madonna MacDonald, who hold the other 50% jointly but bear full responsibility for paying the mortgage debt. I will also declare that Sonia MacDonald and Renee

MacDonald hold life tenancies as against Darrell MacDonald, entitling them to occupy the homestead along with their brother whenever they please. I will grant any incidental remedies that may be just. If counsel cannot agree on costs, they may contact my office to arrange a hearing or, if both sides agree, they can forward written submissions instead.

J.