Court of Appeal for British Columbia
Heath v. Darcus
Date: 1991-10-16

C.E. Hinkson, Q.C., and D.W. Pilley, for appellants (respondents by cross-appeal) except Eleanor C. Heath, executrix of estate of Edwin Charles Heath.

F.G. Potts, for respondent by cross-appeal, Eleanor C. Heath, executrix of estate of Edwin Charles Heath.

D.B. Pope, for respondents (appellants by cross-appeal).

(Vancouver Docs. CA012518, CA012519)

[1] October 16, 1991. MCEACHERN C.J.B.C. (TAGGART J.A. concurring):– This is an appeal from a Chancery judgment which, because of limitations of actions, dismissed a claim in a family dispute [[1991] B.C.W.L.D. 1291, supplementary reasons at 48 B.C.L.R. (2d) 259, [1990] 6 W.W.R. 419]. The facts will emerge from the chronology I shall now describe.

I. *Chronology*

[2] Mrs. Muriel Heath died on October 20, 1955 leaving six children and a badly drawn will. By that will Mrs. Heath left a residence on Cartier Street in Vancouver to her son and executor, in trust, so long as her daughter Bernice Darcus, or any of three other designated children remained unmarried, and continued to live in the house. After that, the house was to be sold with the executor son having a first right of purchase, and the proceeds were to pass into residue and be divided equally amongst all her children.

[3] Probate of the said will was granted on December 8, 1955.

[4] On January 31, 1956 the other five of these children quit claimed their interest in the house to Bernice Darcus pursuant to a verbal agreement as she was in necessitous circumstances. It was expected she would have to raise some moneys by way of mortgage. For that reason she was permitted to have the title transferred into her name. It was understood that upon her ceasing to live in the property it would be returned to the estate or sold with the proceeds being divided in accordance with the will. I shall reproduce the actual findings of the learned trial judge in this connection after completing this chronology.

[5] Things remained more or less in this state until 1976 when Bernice Darcus, being unwell and doubtfully able to look after herself, was moved by the executor into an

apartment. This lasted only a very short time before she returned to the house. I think nothing turns on this brief absence from the home.

[6] In late 1977 one of Mrs. Heath's other daughters died. The executor of this deceased daughter retained Ulf Ottho, a solicitor, to investigate the estate's claim on the property.

[7] After discussing the matter with some or all of the other brothers and sisters Mr. Ottho, on June 15, 1978, purporting to act for all the siblings, wrote to Bernice Darcus asking her to execute a new deed setting out the interests of the siblings, subject to her "life interest," or to execute a deed of trust.

[8] On June 27, 1978 Bernice Darcus, by her solicitor, denied knowledge of any understanding about the property. I shall discuss the terms of these two letters in a moment.

[9] In 1984 Bernice Darcus finally moved away from the property which was rented out.

[10] August 1, 1987 Bernice Darcus transferred a one-half interest in the property as a tenant in common to her son, Jack Darcus.

[11] On January 17, 1989 all the other beneficiaries of the will, or their estates, brought this action for the recovery of the property, or other equivalent remedies.

[12] The trial of this action began in March 1990. After the trial, but before judgment, Bernice Darcus died, and the claim is being defended by her estate and by her son.

[13] In view of the credibility findings of the learned trial judge, which were not seriously challenged on the hearing of the appeal, the issue is whether the claims of the brothers and sisters, or their estates, are barred by the *Limitation Act,* R.S.B.C. 1979, c. 236.

[14] While finding that there was indeed a trust arrangement, the learned trial judge found that the 10-year limitation period prescribed by s. 3(2) of the Act ran from 1978 when the solicitor notified the beneficiaries that Mrs. Darcus did not acknowledge the trust. The action was accordingly dismissed except as against one brother who, the judge found, could not be fixed with knowledge of such refusal of Mrs. Darcus to acknowledge the trust.

II. *The findings of the learned trial judge on the facts*

[15] The learned trial judge made the following findings:

> Within a year of the testatrix's death, her heirs decided to quit claim the family home to their sister Bernice Darcus. Mrs. Darcus was, at the time, separated from her husband and in need of financial assistance. Now, 34 years later, the surviving heirs say that they quit claimed to her only to allow her to borrow money by mortgaging the house so that she could provide for her three children, or as a home for her to live in with them. As might be expected after so long a passage of time, the surviving witnesses who were able to testify about the terms upon which Bernice was given title to the house differ in their memories of them …
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> After reviewing the evidence I am satisfied that when the house was quit claimed to Bernice it was on her undertaking to return it eventually to the estate or to deal with it in some other way so that her brothers and sisters would take equal shares in it with her, as was provided by her mother's will…
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> The precise arrangement is unclear after this lapse of time, but it was certainly to the effect that the siblings should regain their interests as they would have been under the will. What is unclear is whether that should be achieved by returning the house to the estate or whether there should be a direct division between the siblings after sale …
>
> In view of the evidence and my finding that there was an express verbal arrangement between the siblings that Bernice should eventually reconvey this house to the estate, or otherwise provide for it or its proceeds to be divided between all the siblings as provided by the will, this case is a stronger example of fraud [than a cited case]…
>
> I do not find that she [Bernice Darcus] was to return it until after she no longer required the house as a place to live … It gave Bernice not a life interest but a right to stay in the house for so long as she wished.

[16] I take the foregoing to mean there was a family settlement, made after the death of Mrs. Heath, and concurred in by all the beneficiaries. They agreed, notwithstanding the terms of the will, that Mrs. Darcus could not only live in the house as long as she wished, but also that title (the legal estate) would be transferred to her so that she could raise funds by mortgage. As it turns out, Mrs. Darcus did twice raise small amounts by mortgage, but she left the title clear. The arrangement was also that, whenever Mrs. Darcus ceased living in the house, she would return it to the family so that they could all share, as provided by the will, in the proceeds of a sale. Counsel conceded that the siblings took their chances on what equity would be left in the house.

[17] This was probably an express trust, although some of its detailed terms, such as whether the house was to be reconveyed or sold, have not been sufficiently preserved. The trial judge, on several occasions, suggested the house was to be returned to the estate. Those matters, however, make no difference because the transfer of the legal estate in these circumstances without consideration created a resulting trust in favour of the estate or the beneficiaries. It matters not at all whether the house was to be returned to the estate for sale, or just sold and the proceeds distributed equally. This is because a court of conscience will require the trustee to do the right thing.

[18] Thus, but for the defence of limitations, the court would direct the performance of the trust by returning the property for the benefit of the beneficiaries in the most convenient way.

III. *Limitations*

[19] The learned trial judge found:

> Mr. Specht's letter [dated June 27, 1978] fairly read in the context of Mr. Ottho's, was in my opinion a rejection of the existence of any trust obligation.

[20] He then went on to hold that the claims of the brothers and sisters having knowledge of this rejection were barred because a 10-year limitation period ran against them from the date of Mr. Specht's letter, June 27, 1978. As already mentioned, they did not commence their action until January 17, 1989. As against Mr. Potts' client, the judge found that the limitation period did not commence to run until 1984 when Mrs. Darcus left the home.

[21] It will be useful to quote from the two said letters of Mr. Ottho and Mr. Specht.

[22] Mr. Ottho, purporting to represent the beneficiaries of the trust, wrote to Mrs. Darcus on June 15, 1978, in part, as follows:

> After the estate of Muriel Heath was probated, an arrangement was made whereby Title was to be put in your name purely for the purpose of yourself obtaining mortgage financing, and it was understood that you were trustee for the shares in the land of the remaining beneficiaries …
>
> My clients are concerned about ensuring that the land be settled according to the terms of your mother's Will, and ask that either a deed be re-executed setting out each beneficiary's respective share subject to a life interest in your favour or a Trust Deed be executed by yourself setting out the same interests as it is the wish of my clients, being your brothers and sisters … that you live at your present address for as long as you wish.

[23] Mrs. Darcus' counsel Mr. Specht, probably retained by her son Jack Darcus, replied in part on June 27, 1978:

> On 31 January 1956, by way of deed of land and quit claim deed, the above described property was transferred to Mrs. Darcus. She does not know anything about any understanding with regard to the transfer. In fact, she and her children have spent a considerable amount of money on the said property, in the obvious understanding that she had a good title …
>
> Mrs. Darcus wishes to live her life out in peace …
>
> I trust that Mrs. Darcus will not be put to further stress; that your clients will respect her integrity and leave her in peace.

[24] The learned trial judge relied primarily upon s. 3(2)(*b*) and (*c*) of the Act. With italicized emphasis, these provisions, along with para. (*d*), provide:

> (2) After the expiration of 10 years after the date *on which the right to do so arose* a person shall not bring an action
>
> (*b*) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
>
> (*c*) against a trustee for the conversion of trust property to the trustee's own use;
>
> (*d*) to recover trust property or property into which trust property can be traced against a trustee or any other person.

[25] In view of the findings of the learned trial judge, it is apparent that the plaintiffs' action was clearly within s. 3(2)(*b*), (*c*) and (*d*). As mentioned, however, the judge also found that Mr. Specht's letter was a rejection of the trust and that the limitation period ran from its date.

[26] While I have some doubt about whether that letter was a rejection of the trust, I am prepared to assume that it was. The question which then arises is whether the date of that letter in 1978, was a date on which the right of the beneficiaries of the trust arose to bring an action contemplated by s. 3(2). I think it was not.

[27] In my view, Mrs. Darcus had a right under both the will and the trust agreement to remain in the house for as long as she wished, even until her death. The letter possibly gave the beneficiaries the right to treat her rejection as an anticipatory breach of trust, and to bring an action for a declaration of trust. On the other hand, knowing Mrs. Darcus had the right to remain in the house, the beneficiaries were entitled to wait until she died, or left the house, to see if she or her estate would do the right thing. They had no right, in 1978, or at any time until Mrs. Darcus died or left the house, to claim it back.

[28] Thus, although the beneficiaries probably had a right to bring an action for a declaration of trust after Mr. Specht's letter in 1978, the learned trial judge erred in concluding that the beneficiaries' right to sue for fraud or conversion arose at that time. Mrs. Darcus was entitled by her mother's will and by her own agreement with her family to stay in the house as long as she wished. She had the right to keep the title for so long as she remained in the house because she may have needed it to raise funds by mortgage. It was not until Mrs. Darcus left the house in 1984 that the beneficiaries' right to assert causes of action for the recovery of possession and title, and for fraud or conversion upon refusal to execute the trust, actually arose. They had 10 years from 1984, and they brought their action within that period. The conveyance by Mrs. Darcus of a one-half

interest in the house to her son in 1987 is further evidence of fraud or conversion, but in view of the above chronology, that transfer does not affect the question of limitations.

[29] As a result of the foregoing, it is not necessary to consider Mr. Hinkson's further submission based upon s. 6 of the Act which postpones the running of a limitation period against a beneficiary of a trust in some circumstances. This is not a case of postponement because the time did not start to run until 1984 and the action was started on time.

[30] On the hearing of the appeal the respondents abandoned any argument based upon the Statute of Frauds, laches or acquiescence so I need not discuss those interesting questions.

[31] I would therefore allow the appeal, and direct that the plaintiffs are entitled to succeed both against the Darcus estate and against the defendant Jack Darcus. Unless all the parties agree otherwise, I would order that the house be transferred to the executor of the Muriel Heath estate to be disposed of in accordance with her will.

[32] The success of all of the brothers and sisters, or their estates, except the Bernice Darcus estate and her son, on this appeal leads inevitably to the dismissal of the cross-appeal, and makes it unnecessary to further consider the arguments advanced by Mr. Potts on behalf of the brother found not to have been caught by the limitation period.

[33] As this unfortunate litigation was largely made necessary by the infirmity of Bernice Darcus, I would merely order that the plaintiffs should have their costs in this court and in the court below, and that Mr. Potts' client should have his costs on the cross-appeal.

[34] SOUTHIN J.A.:– In this appeal and cross-appeal in which we have already pronounced our conclusions, there was in issue these terms of a judgment bearing date on its face the 18th July, 1990, in an action commenced the 17th January, 1989 [[1990 B.C.W.L.D. 1291, supplementary reasons at 48 B.C.L.R. (2d) 259, [1990] 6 W.W.R. 419]:

> THIS COURT ORDERS that the claims of the Plaintiffs, WILFRED RAYMOND HEATH, ROWLAND HENRY HEATH, EDITH MAUDE WELLS, LORRAINE PLACE Executrix of the Estate of DORIS ISABEL OSTOICH, AND ROWLAND HENRY HEATH Executor of the Estate of MURIEL HEATH be dismissed as statute barred.
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> THIS COURT DECLARES that the Defendants hold a one-sixth interest in the property located at 8679 Carrier Street, Vancouver, B.C., in trust for the Estate of EDWIN CHARLES HEATH.
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> THIS COURT FURTHER ORDERS that the Defendants pay to the Estate of EDWIN CHARLES HEATH one-sixth of the present value of the subject property, in the

alternative the property may be sold and the net proceeds be divided one-sixth to the Estate of EDWIN CHARLES HEATH and the rest to the Defendants.

[35] Between the date of trial and the delivery of the reasons for judgment below, Bernice Darcus died. As I understand that the other defendant is her executor, I shall hereafter speak only of the defendant.

[36] The persons named in the first paragraph appealed from the dismissal of their claims. The defendant appealed from the declaration in the second paragraph.

[37] Muriel Louise Heath, who died on the 20th October, 1955, left surviving her six children: Wilfred Raymond Heath, Rowland Henry Heath, Edith Maude Wells, Doris Isabel Ostoich, Edwin Charles Heath, and Bernice Darcus.

[38] Her will contained these provisions among others:

> I GIVE, DEVISE and BEQUEATH the lands and premises situate at 8679 Carrier Street, in the City of Vancouver, Province of British Columbia, and more particularly known and described as Lot Twenty (20), Block Fourteen (14), District Lot Three Hundred and Eighteen (318), Group One (1), New Westminster District, according to the map or plan deposited in the Land Registry Office at the City of Vancouver aforesaid, and numbered; together with all furniture, furnishings, dishes, linen and all contents of the said dwelling house, to my Executor, in trust, to be held by him as a home for my daughter, Bernice Darcus, and her family, and for my children, Wilfred Raymond Heath, Doris Heath, and Roy Heath, or any of them, as long as any of the said three children remain unmarried; provided, however, that when the time comes that none of the said three children shall be living in the house under the above terms, my son, Rowland Henry Heath, shall have the first right to purchase the said lands and premises at a price to be agreed upon between him and the majority of the children; and if he or any of the other children do not wish to purchase same, it shall be sold by my Executor. During such time as any of the children shall be living in the said house under the above conditions, such children shall pay all taxes, water rates, and other charges in connection with the said property, and shall keep the said house in good repair.
>
> I GIVE, DEVISE AND BEQUEATH all the residue of my estate unto my Executor to convert the same into money and to divide same into seven (7) equal shares, and to pay one share to each of my children, Rowland Henry Heath, Bernice Darcus, Edwin Charles Heath, Wilfred Raymond Heath, Doris Isabel Heath, Roy Alfred Osborne Heath, and Maude Edith Wells.

[39] Mrs. Darcus, who was living in the house at the time of her mother's death, remained in it with one brief interruption until, because of age and infirmity, she permanently left the house in 1984.

[40] Whether, upon the true construction of this will, Mrs. Darcus was entitled once "none of the said three children shall be living in this house" to remain in it is not before us. But the will is open to that construction, even as it is open to the construction that the

proceeds of sale do not fall into residue, the will not saying so expressly, and thus, fall to be divided upon an intestacy. A question of construction cannot be resolved in proceedings constituted as are these.

[41] On or about 19th June, 1956, Mrs. Darcus applied pursuant to the provisions of the *Land Registry Act,* R.S.B.C. 1979, c. 171, to be registered as the owner in fee simple of the lands. The instruments tendered in support of her application, which was duly granted, were a deed of land from Rowland Henry Heath, the executor of the will of Mrs. Heath, Sr. which is expressed to be in consideration of $1 and other valuable consideration and what is described as a quit claim deed from the other five children similarly expressed to be in consideration of $1 and other valuable consideration thus:

> Witnesseth that the said party of the first part for and in consideration of the sum of One Dollar ($ 1.00) of the lawful money of Canada to him in hand paid by the said party of the second part, at or before the sealing or delivery of these presents (the receipt whereof is hereby by him acknowledged and other valuable consideration hath granted, released and quitted claim and by these presents Doth Grant, Release, and Quit Claim unto the said party of the second part, the Estate, Right, Title, Interest, claim and demand whatsoever both at law and equity or otherwise howsoever and whether in possession of expectancy of him the said party of the first part of, in, to or out of All and singular that certain parcel or tract of land and premises, situate, lying and being in the City of Vancouver, in the Province of British Columbia, and more particularly known and described as Lot Twenty (20), Block Fourteen (14), District Lot Three hundred and Eighteen (318), Group One (1), New Westminster District, Plan Number 1749.
>
> Together with the appurtenances thereunto belonging or appertaining To Have and To Hold the aforesaid lands and premises with all and singular the appurtenances thereto belonging or appertaining until and to the use of the said party of the second part, subject nevertheless to the reservations, limitations, provisos and conditions expressed in the original Grant thereof from the Crown.

[42] In 1960, Mrs. Darcus mortgaged the lands to Ernest James Matthew and Margaret Lucy Matthew for the sum of $1,500. Her brother Edwin guaranteed the due performance of that mortgage. In 1963 she mortgaged the lands to Mr. and Mrs. Matthew for $1,338 and in 1964 the Matthews certified that she had discharged that mortgage.

[43] In 1987 Mrs. Darcus conveyed the lands to herself and her son Jack Darcus, the other defendant, as tenants in common.

[44] In their statement of claim, the plaintiffs asserted in part this:

> 16. [That the transfer of title was] on the representation by Bernice Darcus, and the understanding, that the aforementioned terms of the Last Will and Testament of Muriel Louise Heath would be carried out, and that, once Bernice Darcus no longer wished to occupy the lands and premises situate at 8679 Cartier Street, Vancouver,

British Columbia, the property would be sold and the proceeds divided equally between the children of the said Muriel Louise Heath named in the said Will.

17. The Defendant, Bernice Darcus further represented at the material time that she wanted title in her name because she wished to have the said lands and premises available to use as security to borrow moneys for her children's education, and that, because she was on social assistance, she would qualify for deferment on property taxes levied by the City of Vancouver, and that she would at all times honour the intent of the Will of the late Muriel Louise Heath aforesaid, on the understanding that when she no longer wished to reside in the residence, same would be sold and the proceeds divided amongst her brothers and sisters, and their heirs, and that she would hold same in trust for the other beneficiaries named in the said Will, and their heirs.

18. That the Defendant, Bernice Darcus held in trust, for each of the remaining beneficiaries of the aforesaid Will of Muriel Louise Heath, an undivided one-sixth interest in and to the lands and premises aforesaid, and continues to hold a portion equal to five-sixths of the same in trust for them and their heirs, and that, with respect to the foregoing, an actual, or in the alternative, a resulting, or constructive trust was created.

23. Contrary to the terms of the Will, and contrary to the terms of the express or implied, or resulting, or constructive, trust aforesaid, the Defendant, Bernice Darcus, on the 2nd September, 1987, conveyed an undivided one-half interest in and to the lands and premises aforesaid to the Defendant, Jack Darcus, who at all material times had knowledge of the trust aforesaid, and the equities between the parties aforesaid, and who knowingly participated in this breach of trust, and who further used harsh and unconscionable methods, and exerted undue influence, upon the Defendant, Bernice Darcus, to obtain the undivided one-half interest aforesaid, contrary to the terms of the trust and the equities between the parties and thereby participated in the breach of trust aforesaid.

WHEREFORE the Plaintiffs and each of them claim:

(a) A Declaration that the Defendants, Bernice Darcus and Jack Darcus hold an undivided one-sixth interest, in trust, for the Plaintiffs, and each of them, in and to the lands and premises having a street address of 8679 Cartier Street, Vancouver, British Columbia and better known and described as: City of Vancouver, Parcel Identifier 008-697-337, Lot 20, Block 14, District Lot 318, Plan 1749;

(b) *A vesting order with respect to the lands and premises aforesaid*. (Emphasis mine)

[45] By the statement of defence of 4th April, 1989, the defendants pleaded:

11. Defendants specifically deny that there was any trust attached to the above conveyances either verbally or in writing as the defendants had truly paid for the subject premises at the time, shortly thereafter and for years to come all to the knowledge of the plaintiffs herein.

18. By letter dated 15 June, 1978, Ulf K. Ottho, solicitor for Henry Heath, Edwin Heath, Maude Wells, Wilfred Heath and the Estate of Doris Ostoich (plaintiffs herein) wrote to Bernice Darcus stating that there was disagreement as to the title to the subject property and requesting that a Deed be re-executed or a Trust Deed be executed or he had instructions to commence an action.

19. By letter dated 27 June, 1978, Bernice Darcus' solicitor, Kenneth S. Specht, wrote to the said solicitor on behalf of Bernice Darcus denying that there was any

> understanding with regard to the Transfer and requesting that any further communication be put through his office for delivery.
>
> 24. Plaintiffs' interest in the subject premises have waxed and waned with property market values. The displacement of defendant Bernice Darcus in 1976 and letter from Ulf K. Ottho in 1978 occurred with the rise of real estate values at the time. No action was taken after the exchange of solicitor's letters in 1978 after which property values had dropped. When property values revived in 1989, this action was taken. In particular, in January, 1956, when the Deed of Land and Quit Claim Deed were executed to confer unconditional title to defendant, Bernice Darcus, in fee simple at the time when the subject premises had very little value, requiring more expenditures than it was worth, no interest was shown by the grantors nor was any documentation prepared evidencing any trust since there was no intention to create a trust.
>
> 26. Defendants plead the provisions of the Limitation Act, R.S.B.C. 1979.

[46] I have omitted much of the statement of defence which is argumentative, irrelevant to the issues of material fact raised by the plaintiffs in their statement of claim and generally contrary to R. 19, as is para. 24 which I have included only to illustrate the irregularity of the pleading.

[47] I have also omitted pleas of the Statute of Frauds and the equitable doctrines of laches and acquiescence which were not pursued in this Court.

[48] The plea of the Statute of Limitations is, to say the least, not informative and, it too does not conform with R. 19. The present Statute of Limitations has many provisions. This plea does not indicate which of those provisions is relied upon nor state the material facts supporting the plea.

[49] At the trial, the learned trial judge found there to be a trust saying this:

> After reviewing the evidence I am satisfied that when the house was quit claimed to Bernice it was on her undertaking to return it eventually to the estate or to deal with it in some other way so that her brothers and sisters would take equal shares in it with her, as was provided by her mother's will. Apart altogether from the equitable doctrine of a constructive trust, which in the face of the one dollar and other consideration named in the quit claim documents I think has no application, I rely on the actual evidence that Bernice Darcus told her daughter Shirley that was so, and that she has told the independent health care professionals that there was some such arrangement.

[50] Later in his reasons, the learned judge referred to the trust as "an express trust" and said:

> In view of the evidence and my finding that there was an express verbal arrangement between the siblings that Bernice should eventually reconvey this house to the estate …

[51] Speaking of the defence under the *Limitation Act,* R.S.B.C. 1979, c. 236, he said:

> The limitation period applicable here is ten years, as provided by s. 3(2)(*b*) and (*c*) of the Act. Section 3(3)(*b*) does not apply because the terms of the trust do not appear to have given the siblings any interest in land as remaindermen. Their interest was in money, the proceeds of the land.

[52] Ultimately, the case turned on the limitation question and it is from the learned judge's finding that five of the six plaintiffs were statute barred that the appeal has been taken. The defendant does not seek to sustain the dismissal of the action on any other ground. In other words, the defendant does not submit the learned judge erred in finding a trust.

[53] The limitation defence turned on an exchange of correspondence. As the learned judge put it:

> The *Limitation Act* defence centres upon the fact that in 1978 Mr. Ottho wrote to Mrs. Darcus, claiming to be acting as solicitor for all the other siblings or their estates and asking that she agree to execute a deed setting out the interests of each beneficiary under the original will, subject to a life estate to her or alternatively a declaration of trust in the terms of the original will to correct the state of the title. Mrs. Darcus instructed Mr. Specht to reply. His letter, dated June 27, 1978, in my opinion, is a clear statement that the existence of any trust is denied. Mr. Ottho testified that he did not understand that from the letter. He referred to background information that he had from the other siblings about a will Bernice was said to have drawn restoring the various interests. That may well be the 1969 will I have already mentioned. But no reasonable solicitor could have thought that a will, which he had never seen, and which might be revoked or challenged under the then *Testator's Family Maintenance Act,* could be relied upon as a reasonable means of resolving a claim to correct a land title to record the existence of a verbal trust. Mr. Specht's letter, fairly read in the context of Mr. Ottho's, was, in my opinion, a rejection of the existence of any trust obligation.

[54] He then considered which of the siblings was fixed with knowledge of the denial of the trust. He concluded that all, save Edwin, were so fixed and, thus, save as against him, the action was statute barred.

[55] It is not necessary for me, in this case, to address the issue of whether the learned judge's interpretation of the letters was correct.

[56] Before I come to the only issue argued before us on this appeal, I must make reference to certain of the propositions of the learned judge found in the passages of his reasons for judgment which I have quoted.

[57] First, that there was an express trust. On the evidence in this case, it is a nice question whether there was an express trust which equity would enforce or whether, because of the uncertainty of its terms, the express trust failed and, thus, there was a resulting trust arising because of the doctrine that equity favours bargains not gifts. If there

was a resulting trust, the next question was whether it was a resulting trust in favour of the executor who would, until reconveyance to him of the legal estate, hold the equitable estate in trust on the terms of the will.

[58] As to the possible significance of the difference in limitation issues between resulting or constructive trusts on the one hand and express trusts on the other, see *Ferguson v. Ferguson* (1881), 28 Gr. 380 (Blake V.C.).

[59] Secondly, that no constructive (or presumably, resulting) trust could be found in the light of the acknowledgment in the deeds of consideration.

[60] Thirdly, that if the siblings were remaindermen, they had no interest in land within s. 3(3).

[61] The second and third propositions also raise nice questions. As to the third, see *Re Witham; Chadburn v. Winfield,* [1922] 2 Ch. 413 at 418, in which Sargant J. held, following other decisions, that the proceeds of the sale of mortgaged land were land within the definition of the *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27.

[62] I make mention of these issues so that if, as and when any of them arises hereafter nothing said by me in these reasons will be taken as having expressed any opinion on these points none of which, so far as I am aware, has ever been determined in this Court.

[63] Before us, counsel addressed these provisions of the *Limitation Act:*

> 3…
>
> (2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action
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> (*a*) against the personal representatives of a deceased person for a share of the estate;
>
> (*b*) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
>
> (*c*) against a trustee for the conversion of trust property to the trustee's own use;
>
> (*d*) to recover trust property or property into which trust property can be traced against a trustee or any other person.
>
> 6 …
>
> (7) The limitation period fixed by this Act with respect to an action relating to a future interest in trust property does not commence to run against a beneficiary until the interest becomes a present interest.

[64] One must also bear in mind the definition of "trust":

> 1…

> "trust" includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a secured party in collateral.

[65] Upon the limitation point, I am of the opinion that the learned trial judge did not ask himself the right question.

[66] The right question is, what is the "date on which the right to do so arose"?

[67] In approaching this question, one must be conscious that equity knew of no limitations as such on claims in equity.

[68] When a claim in equity, however, was dependent on a legal right, equity was obedient to the Statute of Limitations if it applied to that legal right and in some cases applied the statute by analogy.

[69] In other cases, equity, if the facts warranted it, simply applied its own concepts such as laches and acquiescence to defeat stale claims.

[70] As it was put by the Master of the Rolls, Sir Thomas Plumer, in *Chalmer v. Bradley* (1819), 1 Jac. & W. 51, 37 E.R. 294 at 300-301:

> The reason that I direct these enquiries is, that, though I am impressed with the impolicy of permitting stale demands to be brought forward, though I know that on the principles stated in *Smith v. Clay* [Amb. 645, 3 Bro. C.C. 639], a court of equity is not to be called into action by those who are not vigilant in support of their rights, and am aware of the monstrous inconveniences that would result, if at some period the door were not shut to litigation: yet I fall in entirely with the opinion expressed by Lord *Alvanley* in *Pickering v. Stamford* [2 Ves. Jun. 272]. There the suit was commenced after a lapse of thirty-five years, by persons who declared themselves to have been ignorant of the existence of their rights. Lord *Alvanley,* under the circumstances of that case, could not be sure that they were not ignorant, and therefore, stating strongly his opinion in favour of the general principle, that a party ought to be barred by length of time, and, lamenting that he could not in that instance follow it, he directed similar enquiries, stating, at the same time, that if he were then to decide it, he would decide it against the Plaintiffs, and that by the enquiries he did not decide one way or the other, and would afterwards consider whether there was sufficient equity in the bill.
>
> I feel, too, that we are here dealing between trustee and *cestuique* trust; and the strong ground I have for my doubts is, that till the relation is determined, the possession of the trustee is the possession of the *cestuique* trust. If the estate be given him in trust to sell, it remains in him for that purpose, till something is done to put an end to the character in which he stands, and he continues liable for ever, or, at least, for a considerable period of time, the Court considering the trustee bound to protect the interest of the *cestuique* trust without his interposition: and the length of

> time during which the trustee has omitted to discharge his trust is not a bar to its performance.

[71] Because of that approach, equity before the *Judicature Act,* did not have to address the often difficult issue at law of when a cause of action accrued.

[72] Claims for declarations were, however, possible.

[73] As *Seton on Decrees,* 7th ed., vol. 1 (London: Stevens and Sons, 1912), puts it (at p. 164):

> Formerly it was not the practice of the Court in ordinary suits to make a declaration of right, except as introductory to relief which it proceeded to administer; but by the 13 & 14 *v.* c. 35 (Sir G. Turner's Act), s. 14, the Court was empowered, on a special case being stated for its opinion, to make such a declaration of it without administering any consequent relief. This Act is repealed by 46 & 47 *v.* c. 49 (sched.), but is in substance re-enacted by O. xxxiv, 8.

[74] That opportunity to obtain such relief is to be found in our *Rules of Court* and was to be found in the 1943 Rules which were in force in 1956, Supreme Court Rules 1943, O. XXV, r. 5:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[75] Thus, from the time of the conveyances in 1956, these plaintiffs could have brought an action for a declaration that Mrs. Darcus held these lands in trust and for a determination of its exact terms if there was, in fact, an enforceable express trust or if the trust were a resulting trust, to whom the lands resulted, that is to say, did they result to the executor or to the siblings.

[76] But when could they have first brought action for the relief claimed in para. (b) of their prayer for relief?

[77] In my view, on the peculiar facts of this case, that was either when she ceased to require or ceased to be able to use the lands as a "home", that is to say, in 1984, or when, in 1987, she breached the trust by conveying a half interest to her son or when she died in 1990. Until whichever of those events is the correct answer, she was entitled to have the lands registered in her name and could not be compelled to reconvey.

[78] As the earliest of those events is less than ten years before this action was brought, it was brought in time.

[79] Where the learned judge went astray was in considering that a demand to acknowledge a right and a denial of that right necessarily fixes the time from which a limitation period must be calculated.

[80] Much of the argument before us was directed to the meaning of s. 6(7). Upon it, I prefer to express no opinion. Whether it bears the same meaning as the more felicitously expressed section in pari materia of the English Act of 1939, I need not consider.

[81] These are my reasons for being of the opinion that s. 3(2) of the *Limitation Act* does not bar this claim.

Appeal allowed.