C890203

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WILFRED RAYMOND HEATH,
ROWLAND HENRY HEATH,
EDITH MAUDE WELLS,
ELEANOR C. HEATH
Executrix of the Estate of
EDWIN CHARLES HEATH
and
LORRAINE PLACE
Executrix of the Estate of
DORIS ISABEL OSTOICH,
ROWLAND HENRY HEATH
Executor of the Estate of
MURIEL HEATH

PLAINTIFFS

AND:

BERNICE DARCUS
and
JACK DARCUS

DEFENDANTS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE SPENCER

Counsel for the Plaintiffs: Frank G. Potts and
Angela E. Thiele

Counsel for the Defendants: Dale B. Pope

Place and Date of Hearing: Vancouver, B.C.
March 26 to 30, 1990

PROLOGUE

Since the conclusion of this trial on March 30, 1990 counsel for the defendants has advised me that Bernice Darcus has died. I am grateful for that advice, but in my opinion, since the trial has been completed and it only awaits for me to hand down Reasons for Judgment, there is no need for a personal representative to be appointed for her Estate in order that this action be completed by the delivery of Judgment. No party has accepted my invitation to speak to the matter of a personal representative. I therefore proceed to publish Reasons for Judgment as follows.

REASONS FOR JUDGMENT

This is an action by certain beneficiaries under the will of Muriel Heath for a declaration that there exists a trust in their favour over property left by the deceased under her will, and for enforcement of that trust. They are children of Mrs. Heath.

Mrs. Heath died in 1955, leaving her will which was executed in 1944. She left her house to her executor as trustee on the following trusts:

> "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;"

There were other details of the trust, but the important part for

the purposes of this case is that the will then went on to provide for the sale of the house and to divide the residue of the estate in equal shares between the testator's six children who survived her. The proceeds of sale of the house fall into the residue so divided.

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, thirty-four 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.

The heirs say that there was a verbal agreement entered into by their sister Bernice at the time, that she would sign the house back to the estate so that its proceeds could eventually be divided between the heirs as the will provided. That agreement is denied on Mrs. Darcus' behalf, and by the other defendant, her son, who in 1988 took an undivided one-half interest in the house by transfer from his mother.

After so long a time, much of the evidence that might have gone to the issue whether or not there was such an agreement has been lost. Two of Mrs. Heath's children, heirs under her will, who signed the quit claim in 1956 have died. Another is too ill to testify. Bernice Darcus herself is old and infirm and unable to testify. The solicitor who handled the family's affairs, including the probating of the will and the quit claim from the executor and the heirs to Bernice, has died. What evidence remains, in the

memories of Wilfred Heath and Maude Wells, is weakened by fading memory that makes it difficult to determine what is real memory and what is reconstruction of events based upon expectations that have grown over the years. Bernice Darcus' own memory is furnished by conversations she has had with two of her children, Jack Darcus and Shirley Sullivan, with some of the heirs, and with various public health workers and medical personnel who discussed her well-being with her over the years. From time to time, Bernice Darcus took different positions about whether or not there ever was an agreement that she held the house in trust for all the heirs.

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.

There is also evidence of a memorandum written by Mr. Mayall the solicitor who acted both for the family and the estate, three years after the quit claim deed was signed, setting out that the transfer was on the understanding that when Bernice no longer wished to occupy the house it should be sold and the proceeds divided between the testator's children in accordance with the will. The memorandum was admitted as an exhibit by the agreement of all parties but is challenged as to its reliability in the argument of the defendants' counsel. Maude Wells said she found a copy of it for the first time in 1988 among some of her sister

Bernice's papers which she had obtained in 1976. Mrs. Wells' memory of when she first realized she had the memorandum and how it might have escaped her notice since 1976 is unconvincing. She was shaken on cross examination on the point and I am not at all satisfied that her memory of it is sound. Accordingly, I cannot conclude that it ever was among Bernice's papers.

The memorandum reads as if it were an after-thought created to protect the executor who executed the quit claim from any recourse by the other heirs, but at the same time as the executor quit claimed, so also did all the other heirs by a separate document. Thus the memorandum was not necessary as protection for the executor and appears to be an attempt by the solicitor to record his understanding of what was actually agreed to at the time. If, as I think, it did not come from Bernice's papers, it cannot be treated as her knowledge of what the transaction originally was. Its value then rests upon its being a memorandum made by a deceased person in the course of his duty contemporaneously, or nearly so, with the event it records. That is the test of admissibility of such a document whose author is deceased. Although this document has been admitted by agreement, I think I must test its weight by the same criteria. Since it was not prepared until three years and eight months after the quit claim I do not think it is a reliable memorial of the transaction. Its very existence suggests that someone may have already called the purpose of the quit claim into question. Perhaps it was written at someone's request because Bernice had not yet reconveyed the house to the executor. I cannot be sure of that, but the fact the memorandum was written so long after the event suggests that someone at least foresaw the possibility of disagreement about the purpose of the quit claim. I therefore ignore it as evidence of that purpose.

Apart from the memorandum, there is other written evidence that is consistent with the trust. It is Bernice Darcus' old will dated May 16th 1969. By it she directed that her children be entitled to live in the house while they wished and that thereafter it be sold and the proceeds, after the payment of legacies to each of her three children, be divided in equal shares between her own brothers and sisters. The will would have restored an interest which each of the siblings in the house whose sale proceeds would have been theirs if the terms of their mother's will had been observed. It is consistent with them having an ongoing interest in the house in spite of the quit claim. It is inconsistent with the defence claim that the brothers and sisters all gave up their interests in the house to Bernice outright.

In 1978 when Kenneth Ostoich on behalf of his mother Doris' estate caused an enquiry to be made of Bernice if she would return title to the house to the estate she denied that there ever was an arrangement or promise that she would return the house to the estate. She said it was given to her by her siblings outright. I reject that latter day version. The earlier evidence against it, particularly as supported by the evidence of Shirley Sullivan is conclusive that there was a verbal trust imposed upon and accepted by Bernice Darcus. 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.

Bernice apparently changed her mind about the existence of a trust in 1978 after consulting her solicitor, Mr. Specht. I accept Shirley Sullivan's evidence that that was the case. Apparently

Bernice Darcus relied upon Mr. Specht's opinion to deny the trust, but her denial of it in 1978 cannot terminate a trust which I find to have existed since 1956. It can only be terminated by the agreement of the beneficiaries or by operation of law. By 1978 Mrs. Darcus had a history of intermittent mental illness which may have affected her recollection of events from 1956 and consequently the instructions she gave to Mr. Specht. In the medical records prior to June 1978 there are numerous references to the house being left to the family and to the fact that the brothers and sisters would get a share of it when it was sold. The information obviously came from Bernice herself in answer to questions put to her by the various record takers who dealt with her. Part of the records, Ex.9 Tab 24(d), contains derogatory remarks about her family which indicates that she was the informant rather than one of them on her behalf.

Mr. Pope emphasized the evidence that Harry Heath, the executor of their mother's estate, said in 1956 that he was transferring the house because he did not want to pay the taxes. He pointed out also that the disrepair of the house would have required the other siblings to pay towards its maintenance. That was advanced as part of the reasoning to substantiate an unconditional gift to Bernice. However, the wording of the will casts the responsibility for the taxes and upkeep of the house upon such of the testator's children as shall be living in it. Thus while Bernice lived there she, rather than Harry, had to pay the taxes. The only relief he would get from transferring it to Bernice would be that the tax bills would no longer come to him. That is the probable explanation for his remarks to Lionel Darcus.

The question arises whether Bernice's son Jack Darcus knew of the trust. He has testified that he did not. He took a one-half interest in the house from his mother by conveyance dated August

1st 1987. He testified that he had never heard of any arrangement by which his mother agreed to return the property to her brothers and sisters. He recalled an occasion in the early 1960s when his mother told him that the relatives had given her the house but now wanted it back because its value was increasing with re-zoning of the neighbourhood for apartment use. Since then he said she never mentioned it to him again until there was the enquiry on behalf of the siblings in 1978.

It is strange that he would not have been told the same thing that his sister Shirley was told. She remembered her mother giving her to understand that the house would revert back to the other brothers and sisters. That was at some time before she left home in 1969. Jack left home in 1964 but he remained in contact with his mother. I take note also that no evidence of the family's knowledge was called from his brother Roy. It is true that Roy has been away from Vancouver for many years, but I find it surprising that Jack would not have obtained his evidence in Vancouver for this trial if it supported his position that their mother never mentioned the subject of a trust. I draw an adverse inference that had Roy been asked, his evidence would have been contrary to Jack's, just as was the sister's evidence. Otherwise, I would have expected the defence to have obtained Roy's evidence.

Jack Darcus obviously has an interest in showing that his mother owned the house unconditionally since he took a one-half interest from her in 1987. He said he had no knowledge that his mother was treated for depression including admissions to a psychiatric ward in 1977. I cannot believe that if, as he said, he remained in frequent contact with her. Nor, unless Jack already knew of the trust arrangement, do I find credible his evidence that although he learned for the first time from William Wells in 1977 that the siblings proposed to sell the house and divide the

proceeds six ways among them all, he still permitted William to supervise his mother's affairs because he thought William was motivated by good intentions towards her. Given that he then had the impression that William with Bernice's siblings had attempted to move her from the house against her will and sell it and divide the proceeds, and given that he says his mother told him that William had got her to sign a power of attorney against her will, I would have expected him to have intervened directly to prevent William from dealing with his mother's affairs from 1976 onwards. That he did not, leads me to the conclusion that Jack had knowledge of the trust which he now denies. When William Wells told Jack that the siblings were to get a share in the house, Jack raised no question or objection except to ask what good a sum of only $20,000 would do for his mother in her financial circumstances at that time. I would have thought that the suggestion of sharing would have raised an immediate issue had it come to Jack's ears then for the very first time.

I find Jack Darcus' memory to be unreliable in other respects. His recollection that he gave Mr. Specht's name and telephone number to Mr. Ottho as his mother's solicitor at the end of their meeting in the spring of 1978 is contradicted by Mr. Ottho. It is most unlikely to have happened. If it had, Mr. Ottho would have written to Mr. Specht rather than to Mrs. Darcus. I think Jack's memory is faulty when he denied receipt of a copy of Mr. Specht's opinion letter to his mother dated June 2nd 1978. I find that a copy was sent to him under a covering letter of the same date and probably received by him. That opinion was based on a statement in which Bernice Darcus denied any agreement to return the house as a condition of the quit claim to her in 1956, but I am quite satisfied that Jack knew there was such a claim by 1976 when he spoke to Mr. Wells. On the balance of probabilities I find that

his mother would have told him much earlier than that, as she told his sister Shirley, that the house would eventually be divided between her siblings. I find Jack knew of that claim long before the half interest was transferred to him in 1988.

THE STATUTE OF FRAUDS

The trust was created in 1956. At that time Section 7 of the Statute of Frauds required that:

> "All declarations or creations of trusts or confidences of any lands, tenements or hereditament shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will and testament in writing, or else they shall be utterly void and of none effect."

There was no writing here. Bernice's 1969 will did not create the trust, it is merely a piece of evidence going to show that some trust or other probably existed from the beginning. The exceptions for implied and constructive trusts set out in Section 8 do not apply because this was an express trust. The defendants rely on the statute and say it is an absolute bar to the claim of trust.

The answer to this argument lies in the old authorities which always admitted parol evidence where to insist upon the statute and defeat a trust for the absence of writing would itself have been a fraud. Bannister vs. Bannister (1948) 2 A.E.R. 133 (C.A.) was cited for its bald statement of this proposition at page 136 but a more detailed discussion of it appears in some of the authorities there cited, and especially in Re Duke of Marlborough: Davis vs. Whitehead (1894) 2 Ch. 133 per Stirling J. That was a case where the Duchess conveyed her property to the Duke solely for him to raise money to pay his debts by mortgaging it and then to reconvey it to her. There was no written evidence of the arrangement to reconvey subject to the mortgage and the Duke died

before it could be done. His creditors claimed the property as belonging to his estate and available to satisfy his debts. The court went so far as to consider that had the Duke, in his lifetime, refused to reconvey in the face of the parol evidence, that would have been a fraud on the Duchess. It was held that the creditors could stand in no better position and the parol evidence was admitted to prove a trust to reconvey in favour of the Duchess. 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 and the parol evidence is admissible in spite of the wording of the statute as it stood in 1956.

The most important defences to the declaration and enforcement of a trust in this case lie under the Limitation Act and under the doctrines of laches and acquiesence.

THE LIMITATION ACT

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.

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 27 June 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 Testators 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.

Mr. Kenneth Ostoich got a copy of Mr. Specht's letter from Mr. Ottho. He testified that he could not understand the letter because he knew his Aunt Bernice had told him of the existence of the trust obligation in or about 1965 when he was fifteen years old. He too said he knew of the will and relied upon it and that he trusted Bernice's children would make sure the house was dealt with in accordance with the trust when the time came. I do not think he could reasonably have read Mr. Specht's letter as other than a rejection of the existence of any trust. Even though he testified that he decided to do nothing more for the time being and to let his aunt live out her days in peace, he was, in my opinion, on notice that she rejected the claim of trust.

The other plaintiffs who were able to testify, Wilfred Heath, Eleanor Heath on behalf of the estate of her deceased husband Edwin Heath, and Maude Wells, all said that they never heard of Mr. Specht's reply. They also said that Mr. Ottho never had

instructions to act for them when he wrote to Bernice to try and get her to recognize the trust in a formal way. Mr. Ottho's letter specifically claims to represent them and also the brother who could not testify at trial, Rowland Henry Heath. Mr. Ottho testified however that in fact he had no such instructions and that his letter was a deliberate exaggeration of the facts for the purpose of pushing the case on behalf of the estate of Doris Ostoich for which he did act. That is a startling piece of evidence to hear from a solicitor. I accept it as true however because I doubt whether a solicitor would make such a statement about his own conduct unless it were the truth. Mr. Ottho had spoken to the others but said that all he had was their approval that he should try and get Bernice to recognize the trust as solicitor for Doris' estate.

His evidence is supported by Mr. Specht's note of a telephone call to him on June 22nd 1978 from Jack Darcus telling him that he knew Mr. Ottho was not in fact acting for the others. Jack had already met with Kenneth Ostoich and Mr. Ottho and knew that Ottho was acting for Doris Ostoich's estate. I therefore find that Mr. Ottho had the concurrence of the others to proceed to try and get Bernice to restore title to the estate or otherwise acknowledge the trust, but that he was not in fact acting for them. The cases cited by the defendants to try and pin knowledge of the denial of any trust in Mr. Specht's letter of June 27th 1978 upon all the siblings are Scherer vs. Paletta (1966) 57 D.L.R. (2nd) 532 (Ont. C.A.), Pineo vs. Pineo (1981) 21 R.F.L. (2nd) 261 (N.S.S.C. Trial Div.) and Revelstoke Companies Ltd. vs. Moose Jaw (1984) 1 W.W.R. 52 (Sask. Q.B.) All of them beg the question. They are all cases where the solicitor had been authorized to proceed by the client as the client's solicitor. That is not the case here. There was a holding out by Mr. Ottho that he was solicitor for all the

siblings, but he was never authorized to do that. He had instructions only from Kenneth Ostoich representing Doris Ostoich's estate. Mr. Ottho however sent a blind copy of his letter to Rowland Henry (Harry) Heath. He is too ill to testify, but I find on the balance of probabilities that he received it and did nothing to tell Jack Darcus that Mr. Ottho was not authorized to act for him. Since he had knowledge of Ottho's misrepresentation of authority, he too is bound by whatever notice Ottho received that Bernice rejected the existence of any trust. By his silence at the time he permitted Ottho to hold himself out as his solicitor.

Of the other siblings, Maude Wells was also affected by Mr. Specht's reply denying the trust. Mr. Ottho did not act for her at the time, but she testified on discovery and in an affidavit in interlocutory proceedings that she received a copy of Ottho's letter and of Mr. Specht's reply. She resiled from that evidence at trial, but that is after she has had an opportunity to become aware of the importance that her knowledge in 1987 may have upon the defence of limitation. She testified that she swore the affidavit without even scanning it. Mr. Ottho said he went over the affidavit with her and told her it was all under oath for legal proceedings. Maude Wells is an elderly lady. She says these are the first legal proceedings she has been involved in. Her memory is obviously patchy. As she said, it comes and goes. In the face of her strong evidence at the discovery, when her attention was clearly drawn to the two letters, and when she bolstered her evidence of having seen them both by reference to the upset caused by Mr. Specht's letter and to the relevance of Ottho's letter to the question of a limitation, I am bound to find that she in fact knew of both letters at the time and she too failed to dis-associate herself from Mr. Ottho's assertion that he was acting for

her. In the result, I find that both Harry and Maude knew in 1978 that Bernice rejected the existence of any trust. So did Kenneth Ostoich. There is no evidence, admissible against Wilfred or Edwin that they did. It would be speculation to presume that they necessarily saw and knew what the others saw and knew.

However, there is yet another route by which Wilfred is also fixed with knowledge of Bernice's denial of the trust in 1978. He agrees that he authorized Kenneth Ostoich to pursue the matter even though he never authorized him to retain Mr. Ottho. Kenneth was therefore his agent to delve into the question of perfecting his title as a beneficiary under the trust. Even though Kenneth never told him the results of his efforts, he is fixed with the knowledge Kenneth gained in 1978 in and about the very matter for which Wilfred authorized him to make enquiries. Ample authority for the proposition that knowledge of the agent gained in the scope of his agency is imputed to the principal is to be found in Bowstead on Agency, 15th Edition, at page 412 et seq. It does not matter that Kenneth may never in fact have told Wilfred the result, or that neither Bernice nor Jack knew he had not done so. The knowledge is imputed as a matter of agency law and that had the effect of starting time to run against Wilfred. That is not so harsh a result as it may at first seem, because Wilfred knew the enquiry was on foot but did nothing to ask about its progress. He had ample opportunity to contact Kenneth and ask him the result in 1978.

The limitation defence was also put on the footing that all the siblings knew from 1956 that if there ever was a trust, Bernice had refused to honour it. That is based on the evidence that the trust, if at all, required her to return title to the estate in a matter of a few weeks and that everyone knew she did not do that. I cannot reach that conclusion however because the evidence is not

so clear. I do not find that she was to return it until after she no longer required the house as a place to live. That is consistent with Shirley Sullivan's evidence and with the terms of Muriel Heath's original will. It gave Bernice not a life interest but a right to stay in the house for so long as she wished. The will is poorly worded but that is the interpretation I put upon it. It does not, for example, give Bernice such an interest that were she not living in the house she could rent it out and keep all the rents for herself during her lifetime. Since that, in my opinion, is the term of the trust, but for Mr. Specht's letter in 1978 none of the siblings would have known until 1984, when Bernice moved out and the house was not returned, that she intended to dishonour the trust.

That leaves the estate of Edwin facing a limitation period that began in 1984. Section 3(2)(c) and (d) of the Limitation Act provides a limitation of ten years. This action began within that time.

FULLY AWARE

These plaintiffs argue that Section 6(1)(a) and (b) of the Act exempts them from a limitation period beginning in June 1978. They say that if they are fixed with knowledge of Mr. Ottho's enquiry and Mr. Specht's reply in 1978 they were still not "fully aware" that Bernice was denying the existence of any trust at all and that her denial of the trust then, or in 1984 when she failed to return the house to the estate or let it be sold for the benefit of all the siblings was a fraud upon them. The section has been referred to as a step towards preserving the old common law exception that prevented a limitation defence from running in cases of fraud, see Ellis vs. Clifford (1988) 30 E.T.R. 245 (B.C.S.C) at 253. In my opinion it is fraud for Bernice to deny the trust when she had previously acknowledged its existence. This is not at all

a case like Rankin vs. Irving (1983) 47 B.C.L.R. 242 (B.C.S.C.) where the defendant was described as an honest trustee. That was a case of a claim of constructive trust where the defendant did not know of the possibility of the claim until long after the events giving rise to it. In the case at bar the trust claim arises out of a specific undertaking made by Bernice at the time of the quit claim in 1956. For her now to deny it is a fraud upon the beneficiaries.

But the plaintiff's argument in my opinion breaks down when they try to disassociate themselves from the knowledge Mr. Ottho and Kenneth Ostoich had of Mr. Specht's letter denying the trust in 1978. The Doris Ostoich estate by employing Mr. Ottho directly, and Rowland Henry Heath by knowingly permitting him to hold himself out as his solicitor are bound by the knowledge he had. Knowledge imparted to the solicitor has long been attributed to the client who employs him. Bank of British North America vs. St. John and Quebec R. Co. (1920) 52 D.L.R. 557 (N.B.S.C. App. Div.), sustained on appeal at (1921) 67 D.L.R. 650 (S.C.C.) is the most frequently quoted authority. In my judgment knowledge attributed to the client through the solicitor is as full and perfect as the solicitor's knowledge itself. It is not a degree of knowledge less than the solicitor's. It cannot be said, in view of Mr. Specht's denial for Bernice that any trust existed, that the Ostoich estate and Rowland Henry Heath did not have full knowledge in 1978. The same must also apply to Maude Wells who I have found had a copy of Mr. Specht's letter from Mr. Ottho at about the time it was received, and Wilfred who is fixed with Kenneth's knowledge as his agent. They are barred from this claim by the expiration of ten years before the issuance of the writ.

LACHES AND ACQUIESCENCE

I will consider these defences only as they affect the estate

of Edwin Heath since all the other siblings are in my judgment defeated in their claims by the Statute of Limitations. They are germane here because these plaintiffs seek the equitable relief of enforcement of a trust. Equity requires that a plaintiff not delay in the enforcement of an equitable remedy. If he does he may be barred by his own laches. It also requires that he not stand by and knowingly permit another to proceed to his detriment on the assumption that the plaintiff does not advance a claim to property. That is the doctrine of acquiescence. They are intertwined in their application. Delay is part of acquiescence, see Morris vs. Dominion Foundries and Steel Limited (1980) 28 Chitty's Law Journal 326, a decision of Southey J., as he then was, in the Ontario Supreme Court.

For either laches or acquiescence to apply however it is necessary that the plaintiff to be stopped should have been aware that he had a claim and that there was some challenge to it. One cannot be guilty of delay nor of acquiescing in another's acts to his detriment unless one is aware that there is something that is being delayed or that someone is taking some action that calls one's own title into question. That is not the case with Edwin Heath's estate. There is no evidence that fixes him or his personal representative with knowledge of Mr. Specht's letter or with any other knowledge of Bernice's denial of the trust until she moved out in 1984. Mr. Specht's June 22nd 1978 note of Jack's telephone call to him records Jack's view that "Ed. won't go against" Bernice. According to Mr. Ottho's file note Edwin was probably present at a family meeting with him before he wrote his June 15th 1978 letter to Bernice but there is no convincing evidence that Edwin instructed Ottho to act for him or that he authorized Kenneth Ostoich in the way Wilfred did. According to both Edwin's widow and his daughter, he spoke of his interest in

the family home being available for his widow when he died, up to the date of his death in 1983. That evidence is not admissible for any purpose except to show Edwin's state of mind. It goes to show that he was apparently unaware of any challenge to the trust by Bernice in 1978.

Edwin's estate has delayed pursuing this claim since 1984. Jack Darcus rented out the house until 1987 when he began living there with his family. That was contrary to the meaning of Muriel's will and to the purpose of the trust I have found existed. No one knew that Bernice had conveyed a half interest in the house to Jack, but I find the family knew she had moved out. Since then Jack has repaired and improved the house. He has renewed some of the wiring, built a fence and replaced the roof. He says it has cost him several thousands of dollars but the fence and roof were done while the premises were rented out and paid for from rents. So were the taxes. It was not until 1987 that Jack moved in and the rent was lost. Jack's income during the period was minimal and I am satisfied that he has spent little of his own money on repairs. He has paid taxes since he moved in, but it was the intention under the will, and I find the trust arrangement, that they should be paid by the occupant and not by Muriel's children not in possession. I therefore find that the delay since 1984 has not been to the prejudice of the defendants except to the extent that witnesses have died and living memories have become weaker about the events in 1956. That is particularly true of Bernice Darcus herself, who at the time of the trial was too infirm to tell her side of the story. But her denial has appeared through Mr. Specht's notes, admissible to show her state of mind in 1978, and her earlier recall of the trust agreement has been furnished through her statements against her interest recounted by her daughter Shirley Sullivan and by the public health nurse Ms.

Sobiski. Jack Darcus has, I find, been aware of the family's claim to the house probably since the 1960s when his sister was told about it and certainly since 1977 when William Wells told him of the plan to sell it and share the proceeds among the siblings. He specifically knew from Mr. Specht's letter of August 31st 1978 that a sale of the house might precipitate a renewed claim by the siblings. Therefore when he took a half share of the house by transfer from his mother Bernice in 1987, assuming she was competent to do that, he took it with knowledge of the siblings' claim. Under those circumstances I decline to apply the defences of laches or acquiescence against the claim made on behalf of Edwin's estate.

In the result, the claims of all the plaintiffs except Edwin's estate are dismissed as statute barred. Edwin's estate succeeds and there will be a declaration that the defendants hold the property in trust, as to one-sixth, for that estate. The terms of the trust I find to be that a division of the property should have been made when Bernice moved out in 1984. Since that time the rents have probably done little more than pay for the taxes and maintenance. There will be an order that the defendants pay Edwin's estate one-sixth of the present value of the house. For that purpose the parties have leave to present further evidence of appraisals or the house will be ordered to be sold and the net proceeds divided one-sixth to Edwin's estate and the rest to the defendants. If there must be a sale, the parties have leave to apply for directions for its conduct.

COSTS

Only one of the plaintiffs has succeeded in this claim. The estate has shared the costs of the case with those plaintiffs who have lost and it would be unjust that the others, on the coat tails of Edwin's estate, should recover costs from the defendants. I

therefore direct that the plaintiffs' costs be taxed and the Edwin's estate be awarded one-fifth of them together with one-fifth of those disbursements attributable to the action generally but excluding disbursements solely for the discoveries of the plaintiffs. If there was a discovery of a representative of Edwin's estate that disbursement may be recovered in full as may the witness fees of the witnesses Eleanor Heath and Mrs. Brodeur. Other than that, each party will bear their own costs.

Vancouver, B.C.

May 2, 1990