COURT OF APPEAL FOR ONTARIO

CITATION: Mountain v. TD Canada Trust Company, 2012 ONCA 806
DATE: 20121122
DOCKET: C52989

Winkler C.J.O., Armstrong and Watt JJ.A.

BETWEEN

William Gary Mountain

Plaintiff (Appellant)

and

TD Canada Trust Company, Estate Trustee During Litigation for the Estate of John Nixon Mountain, deceased, TD Canada Trust Company, Estate Trustee During Litigation for Helen Elizabeth Mountain and Louanne Elizabeth Mountain

Defendants (Respondents)

Ronald S. Sleightholm, for the appellant

Mary Anne Cummings, for the respondents

Heard: May 25, 2012

On appeal from the judgment of Justice Gordon D. Lemon of the Superior Court of Justice, dated October 26, 2010, and from the costs judgment, dated June 28, 2011.

Winkler C.J.O.:

A. OVERVIEW

[1] This appeal arises from an unfortunate dispute between a brother and a sister over their late parents' property. The appellant, Gary Mountain, and the respondent, Louanne Mountain, are the son and daughter of the deceased, John Nixon ("Jack") Mountain and Helen Elizabeth Mountain.

[2] Jack and Helen owned and operated a Holstein dairy farm in Caledon, Ontario. The farm has been in the Mountain family since 1830. Gary worked on the farm as a full-time occupation for 24 years. He is the fifth generation of Mountains to operate the farm.

[3] Gary contends that he had an oral agreement with his parents that if he stayed on the farm and farmed with them, and if farming was his main occupation, he would receive the farm land and its assets after his parents stopped farming.

[4] Gary's only sibling, his sister, Louanne, worked off the farm and was not involved in running the farming operation.

[5] Jack died suddenly of cancer on November 28, 2001. The farm land and most of the farm assets had not been transferred to Gary before he died. Helen had been diagnosed with Alzheimer's disease in 1999.

[6] Jack and Helen Mountain had identical wills. Each left all of his/her estate to the other absolutely, or if either spouse died first, the estate would go

to Gary and Louanne to share and share alike. Gary and Louanne were named as the executors under both wills.

[7] On December 27, 2004, Gary commenced an action seeking a declaration that he is beneficially entitled to the farm property and farm business.[1] Gary named his father's estate, his mother and Louanne as defendants.

[8] Louanne filed a defence in which she denied her brother's entitlement to the farm property and business. She also filed a counterclaim and asked for an accounting by Gary for his use of the farm property and business since Jack's death.

[9] Helen died on December 28, 2009. An 11-day trial took place some five months later in May 2010.

[10] The trial judge found that Gary had not proven the alleged contract with his parents and dismissed his claim. On the counterclaim, the trial judge ordered both Gary and Louanne to account for their management of the estate property and assets since Jack's death pursuant to rule 74.15(1)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The trial judge awarded costs to Louanne on a substantial indemnity basis fixed at $275,000 inclusive, payable by Gary and not by the estate.

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[1] The prayer for relief in the Statement of Claim refers to a schedule that more particularly describes the farm property and farm business. The schedule was not included in the appellant's appeal book.

[11] Gary appeals from the trial judgment dismissing his claim and ordering an accounting. He also seeks leave to appeal from the costs judgment.

[12] For the reasons that follow, I would allow the appeal, set aside the costs award and order a new trial on all issues.

B. FACTS

[13] The trial judge's reasons for judgment are not reported. I therefore have paraphrased his reasons setting out the facts of this case.

[14] The farm property in issue in the action consists of four parcels of land totalling approximately 148 acres: a 49-acre lot with the family farm house and barn; an approximately 98-acre lot with a trailer on the property; a one-acre vacant lot; and a 0.48-acre lot with a house (collectively, the "farm property"). The first three of these parcels were owned by Jack and Helen as joint tenants, while the 0.48-acre lot was solely owned by Jack.

[15] Gary testified in chief that he had the following oral agreement with his parents:

> A. My parents and I, we made an agreement at that time that if I stayed on the farm and farmed with them, and farming was my main occupation, they would give me the farm land and farm assets when they were done with them.
>
> Q. And when did you understand that would be?
>
> A. I understood that the, the farming would be my main occupation. I would contribute to the farm, I'd be willing

> to take less wages than a person normally would work and that would be re-invested back in the farm; and I also understood that I eventually would start a dairy herd. And when my parents were – decided to quit farming, the farmland and the farm assets would be given to me.
>
> Q. Right. Was there any discussion, at this time, that you'd, you'd buy the assets from them?
>
> A. There is no discussion about the assets, no.

[16] After graduating from high school in 1977, Gary worked on a full-time basis with his parents in operating the dairy farm.

[17] Gary's work on the farm allowed Jack to spend more time as a cattle buyer, which involved a great deal of travelling. Gary and Jack had separate purebred titles and records for their herds.

[18] Jack held a milk quota with the Ontario Milk Marketing Board in his name and the milk sales income was paid to him. Gary obtained cattle through Jack at less than fair market value or as gifts. Over time, Gary's herd of cattle was larger than Jack's.

[19] Gary lived with his parents in their family home until 1983, when he married his wife, Debra ("Debbie"). Gary and Debbie moved into a bungalow located on neighbouring lands. In 1995, Helen transferred these lands and the bungalow to Gary and Debbie.

[20] Gary testified that after he started working full-time on the farm in 1977, he received only low wages for the first few years. The trial judge found that after 1983, Gary received a wage and share of the milk sales.

[21] Helen did the bookwork and banking for the farm until 1998. Debbie assisted Helen on the farm accounts, and took a more active role in this regard beginning in 1998 and 1999.

[22] Louanne worked for several employers off the farm.

[23] In January 2000, Jack and Helen had a three-hour meeting with their bookkeeper and tax preparer, David Riley. Mr. Riley had experience with succession planning. He discussed with Jack and Helen their plans for the succession of the farm. Mr. Riley testified that the Mountains had decided it was time to act to roll the farm over to Gary. He discussed these plans with Jack and Helen.

[24] Mr. Riley further testified that since Gary had been managing the farm for a long time, Jack and Helen wanted to transfer the farm assets from the two of them to Gary. These assets included the land, the milk quota, the equipment, the buildings and the cattle. It was Jack and Helen’s intention that Louanne would receive the one-acre lot, their personal investments and their life insurance policies.

[25] Mr. Riley prepared notes of his discussion. These notes included only rough asset values. He gave these notes to Jack, who was to confirm the values. Gary found these notes in Jack's wallet in October 2001 after Jack had been hospitalized. There is no evidence that Jack acted on these notes prior to the fall of 2001.

[26] In the spring of 2001, Jack began to feel unwell. He was hospitalized in mid-October 2001, suffering from terminal cancer. Around the same time, Louanne was also diagnosed with cancer.

[27] After being admitted to the hospital, Jack told Louanne that he wanted to see a lawyer. He was visited by a family friend, Don Elliott, who was a retired lawyer. Mr. Elliott testified that he spoke with Jack about a power of attorney and recommended a lawyer to him. He did not discuss estate planning.

[28] After Jack returned home from the hospital, Mr. Elliott arranged for his lawyer, Chris Moon, to attend at the farm to meet with Jack, Gary and Helen. The trial judge noted, at para. 30, that "they came to the conclusion that something should be done to be sure that if something happened to Jack or Helen, Gary and Debbie could run the farm." Mr. Elliott concluded that Jack and Helen should sign powers of attorney for Gary and Louanne. Mr. Elliott had no recollection of discussing a transfer of the land and assets to Gary. At

the end of the meeting, Mr. Moon said he would prepare the powers of attorney and provide them to Mr. Elliott the next day, which he did.

[29] Mr. Elliott brought the powers of attorney for Jack and Helen to sign on November 10, 2001. At trial, there was a dispute about Helen's competence at the time she signed the documents. The trial judge found that she was incompetent to deal with her financial matters by the early fall of 2001.

[30] On November 12, 2001, Gary spoke with Mr. Riley about a proposed rollover of the farm from Jack to him. Gary testified that Mr. Riley told him that he would get the farm and Louanne would get the one-acre lot. Gary did not object to that, but it was his view that Louanne was not interested in the lot.

[31] After the meeting with Gary, Mr. Riley sent a letter addressed to Jack, dated November 13, 2001. The letter says:

> This letter summarizes our discussion of the farm rollover from you and Helen to Gary. If I understand your desires correctly, the two farms, the 46 acre lot with the helper house and the trailer on the 97 acre farm are to be rolled over to Gary. The one-acre lot at Conc. 4, WHS Pt Lot 33, is to be rolled over to Louanne.

[32] Mr. Riley testified that he was sure of what Jack wanted and he wanted Jack to confirm this. He was not sure if he spoke to Jack about the letter. The trial judge found that this letter was not evidence of what Jack wanted done.

[33] Helen's sister, Catherine Monkman, testified that she visited Jack in the hospital and he told her that he needed a lawyer. She told him she had an

appointment with her lawyer, Farquhar MacDonald, and said Jack could take this appointment. Mr. MacDonald agreed to meet with Jack on November 15, 2001. However, Jack was re-admitted to the hospital that day and was unable to meet with him.

[34] Mr. MacDonald met with Mr. and Mrs. Monkman and Gary. Louanne was with her father at the hospital at the time. Mr. MacDonald testified that they discussed the assets owned by the Mountains, the form of ownership of the properties and the investments. He testified that he believed Mr. Riley's letter of November 13, 2001 was available to him at the meeting. He agreed to prepare a memo to Mr. Riley and the family following the meeting. He prepared such a memo, dated November 27, 2001, the contents of which are described later.

[35] Gary testified that he spoke with his father on November 16, 2001 at the hospital and they discussed the November 15th meeting. His evidence was that Jack read over Mr. Riley's letter and said that he was happy with the figures and to go ahead with the rollover. However, no steps were taken to do so.

[36] On November 18 or 19, 2001, Helen and Jack's minister, Reverend John Lekx, visited Jack in the hospital. Reverend Lekx testified that Gary was just coming out of the hospital room when he arrived to see Jack. Jack told the

Reverend: “Yes, I just told Gary to take the farm and get a lawyer to have it settled.” Reverend Lekx said, “You’ll be happy”. He testified that Jack seemed happy and relieved. Reverend Lekx also testified that Jack appeared lucid and clear throughout the meeting. The trial judge found that this evidence did not assist him because Jack did not carry out his intentions.

[37] Jack was transferred to palliative care by November 20, 2001. On November 26, 2001, Gary attended at the hospital and asked Jack to sign a document transferring his Ontario Milk Marketing Board quota to Gary. No witness was present when Jack signed, and he was receiving morphine for his pain at the time. Debbie had also signed the transfer document on Jack’s behalf. On November 27, 2001, Gary took the document to Louanne and explained it to her. Louanne looked at, read it, and signed as a witness to both her father’s and Debbie’s signatures.

[38] On the day Jack signed the milk quota transfer, Gary also had Jack sign a document transferring two farm vehicles to Gary and transferring a car to Louanne. Louanne signed the document even though she had not seen Jack sign it.

[39] Jack died on November 28, 2001.

[40] There is no dispute that Jack's will leaving his estate to Helen was valid. Nor is there any dispute that Jack had not formalized the rollover of the farm to Gary, nor had he changed the terms of his will before he died.

[41] After Jack's death, Gary and Helen met with Mr. MacDonald to notarize the will on December 6 or 7, 2001. Gary and Debbie continued to operate the dairy farm. Gary transferred the cattle into his name from Jack's. Gary also transferred to himself a $78,000 credit at an account with a feed store that was in Jack's name simply by phoning the feed store (referred to by the trial judge as the "Wallenstein Account"). On December 1, 2001, Gary transferred $150,000 from the farm account at the bank to his own account. He simply went to the bank and told them to transfer it and they did so.

[42] Helen moved out of the family farm house sometime after Jack's death. Initially, Gary rented the family farm house to a cousin, who paid $740 a month in rent. Gary put the rent monies into his farm account. The tenant moved out of the farm home in June 2005, after which Gary and Debbie moved in.

[43] On December 22, 2004, Gary commenced an action seeking a declaration that he is beneficially entitled to the farm property and farm business. He claimed a vesting order with respect to the individual parcels comprising the farm property and farm business.

[44] In May 2005, Gary sold the cattle and the milk quota without giving notice of this sale to Louanne. He received the proceeds of the sale, part of which were put into investment accounts and part of which were used to pay down farm debt. He and Debbie incurred capital gains taxes on the proceeds and reduced this liability by using their one-time capital gains exemption.

[45] Gary and Debbie have continued to live on and operate the farm. Gary has been running a cash crop and custom farm work business.

[46] By order dated February 1, 2006, Herold J. appointed TD Canada Trust Company (now Canada Trust Company) as Estate Trustee during Litigation for Helen Mountain and for the Estate of Jack Mountain and as guardian of the property of Helen Mountain. He ordered Gary to provide an accounting of the assets relating to Helen. In addition, Herold J. ordered the parties to attend a mediation of the issues in the action.

[47] Helen died on December 28, 2009. It is uncontested that her will was valid.

C. THE TRIAL JUDGE'S ANALYSIS

[48] The trial judge referred to ss. 4 and 9 of the *Statute of Frauds*, R.S.O. 1990, c. S.19 and to s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23. These provisions state respectively:

> *Statute of Frauds*
>
> 4. No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.
>
> 9. Subject to section 10, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect.
>
> *Evidence Act*
>
> 13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[49] The trial judge also referred to *Baker v. Iverson Estate*, [1956] O.J. No. 2 (H.C.J.), where Spence J. held that the plaintiff in that case had to meet three main difficulties in seeking specific performance of an oral contract with a deceased:

> 1. The plaintiff must adduce evidence either of her own or that of others which would set the contract with sufficient particularity to permit a decree for specific performance.
>
> 2. The plaintiff must adduce evidence that would meet the requirement of corroboration required by [what is now s. 13 of the *Ontario Evidence Act*].
>
> 3. The plaintiff must adduce evidence of acts of part performance on her part as will enable the court to grant a decree of specific performance and result in the contract being held enforceable notwithstanding the provisions of s. 4 of the *Statute of Frauds*.

[50] The trial judge concluded, at para. 9, that Gary had not proved the alleged contract. He gave several reasons for finding that Gary's evidence regarding the oral contract was not credible. The trial judge remarked that Gary's failure to transfer anything to Louanne after Helen's death despite Gary's evidence that Louanne was to get the non-farm assets "confirms the unreliability of his evidence" (at para. 103). In my view, this is questionable confirmation considering that Canada Trust was acting as estate trustee during litigation pursuant to a court order made several years before Helen's death.

[51] The trial judge went on to conclude that Gary's evidence did not support the application of the doctrine of part performance. The trial judge said the following about this doctrine, at para. 106:

> An oral agreement respecting land may be enforced by applying the equitable doctrine of part performance. Equity will intervene where it would be unconscionable for a party to set up the *Statute of Frauds* and retain

> benefits received under an unenforceable contract. The acts of part performance, however, must be clearly and unequivocally referable to the contract which is alleged.

[52] According to the trial judge, Gary was relying on acts by Jack as being acts of part performance. The trial judge said that this approach overlooks two things: 1) the acts of part performance are to be those of Gary, not Jack; and 2) those acts must be consistent only with the alleged contract (at para. 107). The trial judge found: "The acts of his [*i.e.*, Gary's] are as consistent with a son being paid reasonably for his work as they are for a contract for the transfer of the farm." He went on to say, at para. 108:

> If I am wrong in that interpretation of the law, the acts of part performance by Jack relied upon by Gary must still be considered.

[53] The trial judge concluded, at para. 141, that Gary had failed to prove his case:

> There is no signed written agreement to comply with the *Statute of Frauds*. There are no acts of Gary that are only consistent with part performance of the alleged contract. Given his apparent acceptance of the disposition of the one acre farm to Louanne, the terms of the alleged contract are not sufficient for an order for specific performance. The plaintiff himself is not credible. The alleged acts of Jack upon which he relies for part performance are not proven.

[54] After dismissing Gary's claim for part performance, the trial judge went on to reject Gary's alternative claim based on the doctrine of resulting trust. He also rejected Gary's reliance on the principle of *donatio mortis causa* to

support the gift of the vehicles and the milk quota to him. He did not deal with Gary's claim seeking the imposition of a constructive trust presumably because Gary's counsel did not address this issue in argument.

[55] Regarding Louanne's counterclaim for an accounting, the trial judge concluded, at para. 145, that Louanne's evidence "was insufficient to quantify that claim" because of "both Gary's failure to account but also Louanne's failure to provide the necessary evidence or to demand it from Gary." The trial judge said he was unable to quantify the value of the benefits that Gary had received from using his parents' assets.

[56] Although the trial judge found the evidence was insufficient to adjudicate Louanne's claim, he observed, at para. 161, that the provisions in the *Rules of Civil Procedure* and the *Estates Act*, R.S.O. 1990, c. E.21, grant the court a broad discretion to order a trustee to account for his or her management of estate property and assets. He saw no reason why the principles in Rule 74 – permitting the court to order the trustee to pass accounts – and in s. 49 of the *Estates Act* – permitting the court to inquire into the state of the accounts – should not apply to this case. He therefore ordered "Gary to provide an accounting of his use of the assets of both Jack and Helen since the death of Jack pursuant to the provisions of Rule 74 of the *Rules of Civil Procedure*." In his final order, the trial judge also required Louanne to provide an accounting pursuant to Rule 74.

D. ISSUES ON APPEAL

[57] The appellant raises the following three issues:

> (i) Did the trial judge err in finding that there was no oral agreement sufficient to support the appellant's claim to title to the farm land and farm business and vesting orders with respect to them?
>
> (ii) Did the trial judge err in ordering an accounting when the appellant had provided an accounting, which was reviewed by the respondents?
>
> (iii) Did the trial judge err in awarding the respondent substantial indemnity costs including the costs claimed with respect to the witness Clarke McLeod?

[58] My consideration of the first issue makes it unnecessary to discuss the remaining issues in detail and results in my conclusion that a new trial is required on all issues.

[59] In my view, the trial judge erred in three respects in considering Gary's claim for part performance of an oral agreement:

> (i) he erred in concluding that because there were no signed documents, there was no oral agreement;
>
> (ii) he erred in his application of the doctrine of part performance; and
>
> (iii) he made various findings of fact that disclose palpable and overriding error.

[60] As a result of these errors of law and fact, a new trial is required so that the various factual issues raised by the appellant's claim may be resolved in accordance with the governing legal principles. The trial judge's order for an

accounting arising from Louanne's counterclaim will also need to be reconsidered at a new trial.

[61] In *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 56, Fish J., for the majority, described the need for an appellate court to explain why findings of fact are unreasonable:

> [I]t seems to me that unreasonable findings of fact - relating to credibility, to primary or inferred "evidential" facts, or to facts in issue - are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. *I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence.* [Underlining in original. Emphasis added.]

[62] I wish to make it clear that my purpose in discussing why the trial judge's findings of fact are unreasonable is only to explain why appellate intervention is warranted. It is not to bind the hands of the future trial judge in reviewing the evidence at a new trial.

[63] I also note that the trial judge's factual findings discussed below are unreasonable even in light of his adverse credibility findings against Gary. These findings reflect processing errors in respect of evidence that was independent of Gary's testimony.

E. ANALYSIS

(i) Did the trial judge err in finding there was no evidence of an oral agreement as alleged by the appellant?

(a) The trial judge's errors concerning the existence of the alleged oral agreement

[64] I would set aside the trial judge's determination that there was no oral agreement between Gary and his parents that he would get the farm property and assets after they were done with them. The trial judge's analysis of this issue reflects legal error. Furthermore, his reasons reveal various errors in the fact-finding process that produced unreasonable findings of fact amounting to palpable and overriding error. These errors include a failure to consider relevant evidence, a misapprehension of relevant evidence, and findings without basis in the evidence: see *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269, at para. 159; leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 10.

[65] In concluding there was no oral contract, the trial judge put significant weight on the lack of signed documents that would support Gary's allegation of an oral agreement. He stated, at para. 38:

> [N]either of his parents signed any documents that would support his allegation of a contract. Despite having two legally trained individuals in their home [Mr. Elliott and Mr. Moon], neither [Jack nor Helen] took any steps other than to sign powers of attorney. This is strong evidence against Gary's case that there was a contract to transfer the farm and its assets to him.

[66] Fundamentally, the issue whether a valid and binding oral agreement exists does not depend on the existence of a formal written document between the contracting parties: see *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), at pp. 103-104. The essential terms of an oral contract for the purchase and sale of real property are the parties, property and price: see *McKenzie v. Walsh* (1920), 61 S.C.R. 312. If these terms have been agreed on, then a contract may be found without the need for evidence of a written agreement. The trial judge misconceived the applicable legal test for proving an oral agreement by considering the lack of written documentation as being strong evidence against Gary's claim.

[67] In addition, the trial judge's reasons for concluding that the oral agreement was not proven reveal errors in the fact-finding process that produced significant unreasonable findings of fact.

[68] For example, the trial judge emphasized that the planned rollover of the farm property to Gary, as had been documented by Mr. Riley, indicated that Louanne would get a one-acre parcel of the farm property. The trial judge found that the proposed treatment of this one-acre lot was "inconsistent with the agreement that must be proven by Gary" (at para. 64). He inferred, at para. 44, that "[i]f the agreement between [Gary] and his parents was that he would obtain the entire farm, one would think that he would object to such a plan."

[69] However, the one-acre parcel of the 148-acre farm property that was proposed to go to Louanne in 2001 was a vacant lot. The trial judge failed to appreciate that there was no evidence suggesting that this small vacant lot was somehow integral to the operation of the family farm, or that there would be any reason why Gary would object to his sister receiving this property. Gary's lack of objection to his parents' wishes in 2001 that this lot should go to Louanne had no bearing on the existence of the prior oral agreement, nor was it a reason to find, as the trial judge did, that the terms of the alleged oral agreement were not sufficient for an order for specific performance.

[70] A second example of error in the trial judge's fact-finding process involves his interpretation of the November 27, 2001 memo that Mr. MacDonald (the lawyer whom the Monkman's had recommended to Jack) sent to Mr. Riley. Mr. MacDonald prepared the memo after meeting with Gary and the Monkmans on November 15, 2001. The trial judge referred to the following passage from Mr. MacDonald's memo:

> If Jack wishes to establish some measure of equality between the amount that is given to Louanne and the amount that is given to Gary eventually, it will be necessary for him to either make a cash transfer to her immediately or alternatively, to give all or part of a promissory note given to him by Gary on the farm purchase to Louanne. We could provide some kind of provision in the Will whereby the note is not payable or is not transferred to Louanne until after the death of Helen. By delaying the payment of the note it might be

> possible for Gary to pay off Louanne with some of the liquid assets which are available on the death of Helen.

[71] The trial judge found that this memo "confirms that Jack may have wanted to transfer assets with some sort of payment to Louanne." According to the trial judge, at para. 64: "This is inconsistent with the agreement that must be proven by Gary." The trial judge further said, at para. 65, that "if the entire farm was to be transferred to Gary by way of the alleged contract, there would be no need for Gary to have a debt as suggested by Mr. MacDonald's memo." He went on to make the following observation:

> In cross-examination, Gary agreed that there was a discussion about equalization but "only if necessary". He was clear that he would not give a mortgage and would not take less in assets. It was his view that he was not required to equalize. He would agree to a promissory note only if it was forgiven on his mother's death. *This is in contrast to what Jack was apparently telling others.* [Emphasis added.]

[72] The trial judge's findings are based on a misapprehension of the evidence because, as he had noted, at para. 62, Mr. MacDonald testified that he did not speak with anyone about the above-cited paragraph prior to releasing the memo. As the trial judge also had noted, Jack and Helen were not present at the November 15, 2001 meeting with Mr. MacDonald. In addition, the trial judge failed to avert to Mr. MacDonald's testimony that he did not ever meet Jack, who passed away before he had a chance to speak with him. The trial judge's finding that Mr. MacDonald's memo was evidence of

Jack's intentions and was inconsistent with the alleged oral agreement thus reveals palpable and overriding error. There was no evidence to suggest that Jack had had any input into the proposal that Mr. MacDonald raised in his memo.

[73] The trial judge did not refer to any evidence in support of his finding that Jack was telling others that Gary was required to give a mortgage or to otherwise equalize his share of the assets with Louanne such as by way of a promissory note. Rather, he heard evidence to the contrary. As the trial judge noted, at para. 21, Mr. Riley testified that Jack and Helen wanted to be "as fair as possible, but not necessarily equal". Mr. Riley had also testified that he never discussed with Jack or Helen that Gary would purchase the farm or pay rent for the farm or that Gary would give a promissory note for the farm, apart from a cattle promissory note that was set up.

[74] Another finding that reveals palpable and overriding error is the trial judge's factual inference that Jack intentionally did not transfer the property to Gary before his death. As the trial judge put it, at para. 68:

> While I am doubtful of Jack's competence, if he was [competent] as Gary submits, Jack had thoughts about how to arrange his affairs, knew that they had not been put in place and did not put them in place. Since he did not do so, I can safely infer that that was intentional.

[75] The trial judge did not explain why this inference was safely drawn given the following evidence indicating that it was the swift deterioration in Jack's health that prevented him from completing the farm transfer:

- Several witnesses, including Louanne, testified that while Jack was in the hospital, he indicated that he wanted to meet with a lawyer.
- The Monkmans offered Jack an appointment with their lawyer, Mr. MacDonald, for November 15, 2001. Mr. MacDonald would have met Jack were it not for Jack's unanticipated hospitalization that same day.
- Reverend Lekx testified that on November 18 or 19, 2001, Jack told him that he had just "told Gary to take the farm and get a lawyer to have it settled."
- Mr. Riley testified that Jack passed away before they were able to finalize the rollover of the farm to Gary, so he followed the will and transferred Jack's half to Helen with the intention that it would then be rolled over to Gary.
- Mr. MacDonald testified that when he prepared his memo of November 27, 2001, he was expecting there to be an *inter vivos* transfer of the farm property, milk quota and vehicles.

[76] The trial judge's inference that Jack did not intend to transfer the farm to Gary before his death also inexplicably fails to give any consideration to the uncontradicted evidence of Mr. Riley, which he had set out at paras. 20-22 of his reasons. As the trial judge noted, at para. 20, Mr. Riley testified that in

2000, Jack and Helen decided that “it was time to act to roll the farm over to Gary.” Mr. Riley discussed these plans with both Helen and Jack. Mr. Riley testified that:

> There were particular assets that were going to go to Gary and some to Louanne. As Gary had been managing the farm for a long time, Jack and Helen wanted to transfer the assets from the two of them to Gary. This included the land, the quota, the equipment, the buildings and the cattle.

In cross-examination, Mr. Riley repeated that “the plan was for him [Gary] to manage the farm and have the farm”.

[77] The trial judge did not explain why he rejected Mr. Riley’s evidence as providing corroboration for Gary’s oral contract claim. He simply proceeded on the assumption that if the oral agreement had been entered, then Jack would have completed the transfer of the farm property and business to Gary before he died.

(b) The trial judge’s errors concerning the doctrine of part performance

[78] The trial judge erred in his analysis and application of the doctrine of part performance. He also misapprehended or disregarded relevant evidence, resulting in palpable and overriding error. The trial judge’s application of the legal test for part performance reveals a failure to consider and appreciate the context of this case. This was a family farming operation. Yet the trial judge

treated Gary as though he were a farm hand – and an overpaid one at that – when in reality, Gary and Jack acted as partners in a family business.

[79] In setting forth the governing legal principles, the trial judge held, at para. 107, that the acts of part performance that Gary needed to prove were those of Gary's, not Jack's. He also held that "those acts must be consistent with only the alleged contract." The trial judge's statement of the law is wrong in two respects.

[80] In *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709, 97 O.R. (3d) 241 (C.A.), Gillese J.A. clarified the legal principles that apply when determining whether there is an oral agreement respecting land, and if so, whether there are sufficient acts of part performance to take the oral agreement outside s. 4 of the *Statute of Frauds*. As explained in *Erie Sand*, at para. 49, the doctrine of part performance is a creation of equity. The doctrine was created:

> …to prevent the *Statute of Frauds* from being used as a variant of the unconscionable dealing which it was designed to remedy: see *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69, at para. 10. The requirements in s. 4 of the *Statute of Frauds* must give way in the face of part performance because the acts of part performance fulfill the very purpose of the written document - that is, they diminish the opportunity for fraudulent dealings with land based on perjured evidence.

[81] Gillese J.A. made it clear, at para. 75, that the doctrine of part performance is not limited to a consideration of the acts of the plaintiff:

> In sum, it appears to me that given the decision of the Supreme Court in *Hill*, it is now settled law in Canada that the acts of both parties to an alleged oral agreement may be considered when a court is called on to determine if sufficient acts of part performance take an alleged agreement outside the operation of the *Statute of Frauds*.

[82] Gillese J.A. also made it clear that the acts of part performance need not be "referable only to the contract alleged". Rather, the test as established by the majority judgment of Cartwright J. in *Deglman v. Brunet Estate*, [1954] S.C.R. 725, at p. 733, is that it is sufficient if the acts are "unequivocally referable in their own nature to some dealing with the land".

[83] The trial judge erred in law in holding that the only relevant acts of part performance are those of Gary. He further erred in stating that Gary's acts must be consistent only with the alleged contract.

[84] The trial judge noted, at para. 108, that if he was wrong in his view on whose acts of part performance may be considered, he would consider the acts of part performance by Jack that Gary was relying on. He went on to consider the alleged acts of part performance under these headings: income; milk quota; motor vehicles; cattle; Holstein Canada; Wallenstein account; bank accounts; and transfer of home to Gary and Debbie (at paras. 109-38).

[85] In considering each of these topics, however, the trial judge did not depart from his erroneous view of the law that the acts of part performance must be consistent only with the alleged contract. Moreover, he also made a number of fatal errors in his analysis of the evidence concerning the alleged acts of part performance. These errors arose from the trial judge's failure to appreciate the contextual circumstances in which the events material to this litigation occurred.

[86] In *Erie Sand*, Gillese J.A. explained, at para. 94, that the proper approach to determining whether acts of part performance are referable to some dealing with the land is to begin by determining the context, or in other words, the relevant circumstances. The court is to "[t]hen consider the acts of part performance having regard to the way in which reasonable people carry on their affairs."

[87] The need for a contextual approach follows from the purpose of the doctrine of part performance. At para. 79 of *Erie Sand*, Gillese J.A. discussed the two underlying aspects of the doctrine:

> The first aspect is detrimental reliance which, as has been noted, requires a party to prove its acts of part performance. Without detrimental reliance there can be no inequity in relying on the *Statute of Frauds*, thus, it is the first hurdle to be met. The second aspect of the doctrine, however, relates to Equity's requirement that the acts of part performance sufficiently indicate the existence of the alleged contract such that the party

> alleging the agreement is permitted to adduce evidence of the oral agreement.… The former is a matter of substantive law based on the rationale for the doctrine of part performance, whereas the latter is primarily evidentiary in nature.

[88] Requiring the plaintiff to rely only on his own acts of part performance conflates these two distinct aspects, thereby frustrating the equitable principle animating the doctrine: *Erie Sands*, at para. 79. In the same way, by applying the overly stringent requirement that Gary's acts of part performance be referable only to the alleged contract, the trial judge erred in law by holding Gary to a strict evidentiary test at the expense of the equitable rationale for the doctrine of part performance.

[89] In assessing the evidence before him, the trial judge failed to apply the common sense approach described in *Erie Sands.* Again, this was a family farming operation. The trial judge did not take into account that Gary had devoted his working life to this family enterprise and that he did so not as an employee but as a partner with his father. This course of conduct was capable of constituting detrimental reliance on Gary's part. Yet the trial judge overlooked this reliance and engaged in an evidentiary analysis that was inapposite to the circumstances at hand.

[90] The effect of the trial judge's misstatement of the law of part performance and his misconception of the relevant circumstances is revealed by his conclusion, at para. 107, that Gary's acts "are as consistent with a son

being paid reasonably for his work as they are for a contract for the transfer of the farm." The trial judge found that Gary received free accommodation, free use of the farm vehicles and free or reduced-price cattle. He also found that Gary received an income that increased over time, while Jack paid for the farming expenses related to Gary's cattle. The trial judge further found, at para. 116: "Given his annual income, cattle benefits, free house and the savings that Gary had been able to amass, it is clear that he was not underpaid for the work that he did on the farm."

[91] In focusing on whether Gary had been underpaid for his full-time work on the farm for the 24 years that he worked with Jack, the trial judge lost sight of the elementary fact that Jack and Gary, father and son, were operating the farm together as more or less equals.

[92] There can be no question on this record that Jack and Gary were engaged in the farming operation together and that it was not on an employer-employee basis, nor was it an arms-length relationship. Gary was not treated by his father as a mere farm hand, nor did he conduct himself as such. Gary received cattle from his father at no expense or at less than market value. He had access to the feed account, authority to order and pay for commodities, and had authority over the farming financial arrangements. Their relationship was not formalized, but in the circumstances, this is not surprising.

[93] There was evidence indicating that third parties regarded Jack and Gary as equal partners in the farming business. For example, as pointed out by the trial judge, at para. 132, after Jack's death, Gary transferred to himself a $78,000 credit in the Wallenstein account that was in Jack's name simply by phoning the feed store. And as the trial judge noted, at para. 150, Gary transferred $150,000 from the farm account in his father's name to his own account simply by asking the bank to do so without having to use the will or the power of attorney.

[94] The trial judge found, at para. 132, that the transfer of the Wallenstein account was not an act of Jack's to support the allegation that Jack intended to transfer the farm to Gary. This finding overlooks the potential significance of this evidence. Obviously, this evidence could not be evidence of part performance by Jack because the transfer of the feed account occurred after Jack's death. However, the evidence that the feed store and the bank transferred accounts containing significant farm assets from Jack's name to Gary's without requiring proof of Gary's entitlement to them was capable of supporting a finding that Jack and Gary were viewed as equals in their operation of the farm. This evidence was part of the relevant circumstances against which the acts of part performance should have been considered by the trial judge.

[95] The trial judge's failure to appreciate the relevant circumstances – particularly the nature of the relationship between Jack and Gary in their operation of the farm – led him to disregard evidence that was capable of showing part performance.

[96] For example, the trial judge failed to give any consideration to the acts of Gary that contributed to the overall success of the farm operation to the benefit of Jack and Helen. Mr. Elliott testified that Jack was more interested in buying and selling cattle than farming. Gary's work managing the farm allowed Jack to pursue his career as a cattle buyer, which involved significant travel away from the farm. As the trial judge noted, Gary acquired a sizable dairy herd of his own from Jack. However, the trial judge did not refer to evidence that was capable of showing detrimental reliance on Gary's part. For example, he did not refer to the evidence that, at the time of Jack's death, Gary had 65 per cent of the dairy herd, but received only 15 per cent of the proceeds from the sale of the milk to the Milk Marketing Board. The rest of the proceeds went to his parents.

[97] In addition, Gary had pointed to the transfer of the milk quota from Jack to himself as being evidence of part performance of the oral agreement. The milk quota was an asset worth almost $1 million. Jack signed the document transferring the milk quota on November 26, 2001 while he was in the hospital

and receiving morphine for his pain. Only Gary was present, although Louanne signed the document as Jack's witness the next day.

[98] The trial judge found, at para. 117, that "the suspicions are so high that I cannot rely on Gary's evidence to support the proposition that Jack intended to transfer this valuable asset to him." However, it is not clear to what extent the trial judge's suspicions are attributable to his failure to appreciate the relevant circumstances of how father and son had operated the dairy farm together for many years. The evidence that Louanne was prepared to sign the document as a witness was at least capable of corroborating the proposition that the transfer was in accordance with their father's wishes.

[99] Another example of how the trial judge misconceived the relevant circumstances, and in so doing, disregarded evidence that was capable of showing part performance, is in his consideration of the transfer of the bungalow to Gary and Debbie. At trial, it was undisputed that in 1995 Helen signed a deed of land transferring a parcel of the family farm with a bungalow located on it to Gary and Debbie for natural love and affection.

[100] Rather than asking whether the evidence of this transfer supported Gary's allegation of part performance or corroborated his evidence concerning the oral agreement with his parents, the trial judge instead emphasized that Gary and Debbie paid for their own renovations to the bungalow. He observed,

at para. 138: “Much like his forefathers, there was obviously a line at which Gary would have to pay for the benefits he received.”

[101] By wrongly focussing on who was to pay for the renovations to the bungalow, the trial judge ignored that the gratuitous transfer of this piece of the farm lands to Gary and his wife was independent, documentary evidence that was potentially capable of corroborating Gary’s evidence of the oral agreement and serving as evidence of part performance by his parents.

[102] Moreover, the cost of the improvements to the bungalow that Gary and Debbie incurred could be considered as evidence of detrimental reliance rather than, as the trial judge viewed it, indirect proof that Gary was expected to pay for the farm. At paras. 135-36 of his reasons, the trial judge discussed Debbie’s evidence that in 1993 to 1994, she and Gary were looking to buy another house because they needed another bedroom. Helen told them that she did not want them to move from the bungalow because the farm house would be theirs someday. Gary and Debbie paid for renovations to the bungalow at a cost that was “more than they had planned.” Helen advised them not to spend too much on the improvements because they would eventually get the farm house. However, Gary and Debbie did not know when that would be and "that was the problem.”

[103] The trial judge found that the uncertainty over when Gary and Debbie were to take the farm was significant evidence of the lack of any agreement between Gary and his parents (at para.137). He ignored that the evidence concerning Gary and Debbie's conduct in agreeing to stay in the bungalow and incur renovation costs in response to Helen's statements was capable of constituting evidence of an act of detrimental reliance that was "unequivocally referable to some dealing in the land" and "inconsistent with the ordinary relationship of employee or tenant": see *Brownscombe v. Public Trustee of Alberta*, [1969] S.C.R. 658; see also *Thompson v. Guaranty Trust Co.,* [1974] S.C.R. 1023.

[104] The trial judge's conclusion that there are no acts of Gary that are only consistent with part performance of the alleged contract reflects a wrong approach in law. His reasons also reveal various errors in the fact-finding process and a failure to appreciate the relevant context.

[105] Finally, it is not clear whether the trial judge would have made adverse findings in respect of Gary's credibility had he applied the correct legal principles and had he properly appreciated the context of the working relationship between Gary and Jack in operating the farm.

[106] In addition, I note that the trial judge confirmed his finding that Gary's evidence is unreliable for the following reason, at para. 103:

> Although Gary's evidence was that Louanne was to get the non-farm assets, he has failed to transfer anything to her since the death of Helen. This simple failure to act according to his own evidence confirms the unreliability of his evidence.

[107] The trial judge's confirmatory reason for finding Gary's evidence unreliable fails to take into account the context of this litigation. Helen died five months before the trial. Gary's failure to transfer assets from his mother's estate to Louanne ought to have been considered in light of the fact that Canada Trust had been appointed in 2006 to act as estate trustee during litigation for Jack's estate and for Helen.

[108] For these reasons, in my view, the trial judge's credibility finding in respect of Gary is flawed and unreliable.

F. CONCLUSION AND DISPOSITION

[109] The trial judge applied incorrect legal principles to the evidence and made numerous unreasonable findings of fact. These cumulative errors rise to the level of a substantial wrong.[2]

[110] While the appellant asks for judgment in his favour, in my view, this court is not in a position to decide the factual issues based only on the transcript. This task would be fraught with difficulty considering that the trial judge found not only that Gary's evidence was unreliable, but he also "had

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[2] Section 134(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, stipulates that an appeal court shall not direct a new trial unless "some substantial wrong or miscarriage of justice has occurred."

concerns about some of Louanne's evidence and the credibility of some of her witnesses" (at para. 104). I would therefore set aside the trial judge's order dismissing the appellant's claim and requiring an accounting and would order a new trial on all issues.

[111] The appellant is entitled to his costs of the appeal, fixed at $40,000 inclusive of disbursements and applicable taxes payable by Louanne: see *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.), at para. 80.

[112] I would set aside the trial judge's costs award and order that the costs of the first trial be determined by the judge conducting the new trial.

[113] I must stress that a new trial is in neither side's interest. This case cries out for a mediated, consensual resolution. This is a rare circumstance where in the interests of justice, I would direct that mediation be conducted prior to any new trial. The mediation may be arranged through the office of the Regional Senior Justice for Central West.

Released: "WKW" November 22, 2012

"W.K. Winkler CJO"
"I agree Robert P. Armstrong J.A."
"I agree David Watt J.A."