

SUPREME COURT OF QUEENSLAND

CITATION: *Foley & Anor v Foley* [2006] QSC 347

PARTIES: **FIONA LEE FOLEY**
(first plaintiff)
BLAYDE WONDUNNA FOLEY by his litigation guardian FIONA LEE FOLEY
(second plaintiff)
v
BARRY PATRICK FOLEY
(defendant)

FILE NO/S: BS2244 of 2005

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 21 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 2-3 October 2006

JUDGE: Mullins J

ORDER: **1. The plaintiffs' claim be dismissed.**
2. Caveat No 708463054 be removed.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CONSTITUTED *INTER VIVOS* – where legal title to property was held by the plaintiff, but the property was beneficially owned by the plaintiff's parents – where plaintiff alleged that an agreement had been made between her parents and her about holding the property for the benefit of the plaintiff's parents' grandson – whether various statements made from time to time by the plaintiff's parents about giving the property to their grandson amounted to an agreement to create an *inter vivos* trust – where instructions given by the plaintiff's mother (and adopted by the plaintiff's father) to their solicitor to prepare a transfer of the property from the plaintiff to the plaintiff's parents as joint tenants was inconsistent with the alleged agreement – plaintiff unsuccessful in proving that the alleged agreement was made

ESTOPPEL – EQUITABLE ESTOPPEL – where legal title to property was held by the plaintiff, but the property was beneficially owned by the plaintiff's parents – where the plaintiff's father did not object when the plaintiff's mother spoke at family gatherings of giving the property to their grandson – whether the plaintiff's mother maintained the intention of benefiting her grandson – where plaintiff at the

request of her parents executed a transfer of the property to her parents as joint tenants – where instruction for and execution of that transfer with the knowledge of the plaintiff’s parents was inconsistent with the previously expressed intention of the plaintiff’s mother to benefit her grandson – plaintiff unsuccessful in proving facts to found an equitable estoppel

Property Law Act 1974 s 35

Delehunt v Carmody (1986) 161 CLR 464 CON

Flinn v Flinn [1999] 3 VR 712 DIS

Giumelli v Giumelli (1999) 196 CLR 101 DIS

Riches v Hogben [1986] 1 QdR 315 DIS

Stephenson v Barclays Bank Trust Co Ltd [1975] 1 All ER 625 CON

COUNSEL: GW Diehm and K Carmody for the plaintiffs
DRM Murphy for the defendant

SOLICITORS: Michael Drummond Lawyer for the plaintiffs
Duells Lawyers for the defendant

- [1] **MULLINS J:** The first plaintiff (“the plaintiff”) is the daughter of the defendant and the aunt of Blayde Wondunna Foley (“Blayde”). The proceeding concerns the ownership of the property situated at 71 Maddever Road, Booral (“the property”). The property was purchased in the name of the plaintiff in December 1995 using funds belonging to her mother, Mrs Shirley June Foley (who was married to the defendant), and the defendant. The plaintiff had signed a transfer of the property in favour of her parents on 4 April 2000. Mrs Foley died on 23 July 2000. On 2 February 2005 the defendant lodged for registration that transfer of the property and also lodged a request to record the death of Mrs Foley. The defendant thereupon became the sole registered owner of the property.
- [2] The plaintiff alleges that in 2000 she and the defendant and Mrs Foley entered into an oral agreement to keep the property in trust for Blayde until Blayde became an adult and the defendant and Mrs Foley had both died or no longer resided at the property and then to transfer title to the property to Blayde. The essential terms of the agreement are pleaded in paragraph 6 of the amended statement of claim as follows:
- “6.1 The First Plaintiff would remain the registered owner of the property;
 - 6.2 The First Plaintiff’s mother and the Defendant would be entitled to reside at the property for as long as each of them were alive and/or they wished to live at the property;
 - 6.3 The First Plaintiff’s mother and the Defendant would not be required to pay any rent to the First Plaintiff while they resided at the property;
 - 6.4 The property would not be transferred to Blayde Foley until he was an adult and the Defendant and the First Plaintiff’s mother had both died or no longer resided at the property (whichever event occurred first).”

- [3] The plaintiff seeks to enforce the trust which she claims is binding on the defendant's interest in the property and is for the benefit of Blayde as a result of this agreement. Blayde by his litigation guardian who is the plaintiff also seeks the same relief in the proceeding as the plaintiff.
- [4] The defendant denies that there was ever any oral agreement between himself, the plaintiff and Mrs Foley to keep the property in trust for Blayde on the terms alleged by the plaintiff. The defendant claims to be entitled to be registered as the owner of the property.

Witnesses

- [5] The plaintiff gave evidence and relied on evidence from her brother, Mr Rowan Foley ("Rowan"), and her sister Ms Mellissa Foley ("Mellissa"). Mellissa is the mother of Blayde. The defendant gave evidence and called evidence from solicitor Mr Larry Bell who took instructions from Mrs Foley for a will prior to her death, prepared the transfer that was signed by the plaintiff on 4 April 2000 and acted in relation to Mrs Foley's estate.
- [6] What came through strongly from the evidence of the plaintiff and Rowan was that they always supported Mrs Foley's wishes about Blayde being the ultimate beneficiary of the property, as that reflected their view as to what was a proper disposition of property within the family. It is also clear that their view has influenced their interpretation of family discussions about the property.
- [7] The difference in recollection between the defendant on the one hand and the plaintiff and Rowan on the other about the content of family discussions concerning the property is explicable (at least to some extent) by the significance which the plaintiff and Rowan attached to those discussions in comparison to the defendant.
- [8] Mr Bell was able to give his evidence by reference to various file notes that had been made by himself and others. Although with hindsight it was a matter of regret for Mr Bell that he had not sorted out the title to the property before Mrs Foley passed away, I am satisfied from a consideration of his evidence and evaluating his responses in cross-examination that his recollection of his various attendances on Mrs Foley and/or the defendant and other family members was reasonably clear. I have no hesitation in accepting his evidence.

Relevant facts

- [9] The property was purchased in the plaintiff's name, as she was able to obtain in her name the loan from Westpac Banking Corporation that was required by her parents for the purchase. The funds for the purchase were otherwise provided by the defendant and Mrs Foley. It is common ground that they made the payments due under the loan that was secured by the mortgage granted by the plaintiff to the bank over the property. The defendant and Mrs Foley paid for the relocation of a house to the property and the renovations to that house. The defendant and Mrs Foley paid the rates for the property. The loan was finally paid out by them in July 1998. Around that time the defendant and Mrs Foley consulted solicitors Corser Sheldon & Gordon about obtaining a transfer of the property from the plaintiff. A contract for the sale of the property to the defendant and Mrs Foley was prepared and signed by the plaintiff, the defendant and Mrs Foley. A transfer was drawn in favour of the defendant and Mrs Foley as joint tenants. It was signed by the plaintiff, but her

signature was not witnessed. The defendant and Mrs Foley requested the plaintiff to organise for the release of the mortgage, but the plaintiff did not attend to doing so. As the loan had been paid out, there was no impediment to obtaining the release of the mortgage over the property. The defendant and Mrs Foley did nothing further in relation to the property at that time.

[10] Blayde was born in August 1996. Mellissa and Blayde lived with the defendant and Mrs Foley for at least two years from shortly after Blayde's birth.

[11] Each of the plaintiff, Rowan and Mellissa referred to a number of instances after Blayde's birth and before Mrs Foley's death when there were family discussions about the property. These discussions are relied on by the plaintiff to allege the agreement against the defendant.

[12] Mellissa stated:

“6. After my parents purchased the subject property, I fell pregnant with Blayde. Although it was not expressly stated by my parents I believe that they had concerns about my financial stability. They wanted to keep the property in the family.

7. Consequently, on a number of occasions I recall both Barry and Shirley telling me that the subject property would be left to Blayde and that Rowan and Fiona would hold the subject property in trust until Blayde was old enough.”

[13] Rowan stated in the form of affidavit that was signed by him (exhibit 1) which he adopted when he gave evidence:

“Both Barry and Shirley often stated, at family gatherings, how they were keeping the subject property for Blayde and he would inherit the subject property when they both passed away.”

Rowan also referred during cross-examination, in general terms, to numerous family conversations that took place between the birth of Blayde and the passing of Mrs Foley where “...there was always agreement that the property was to go to Blayde Foley” (at T38).

[14] The plaintiff could recall a conversation in the backyard of the property when Blayde was about one year old. The plaintiff was present with the defendant, Mrs Foley, Mellissa and Blayde, when she recalled (at T14) that Mrs Foley said “Your father and I have made a decision to give the land to Blayde.” The plaintiff stated that the defendant was within hearing range when Mrs Foley made that statement and that he did not make any comment. It should be noted, however, that this conversation preceded the instructions given by the defendant and Mrs Foley to Corser Sheldon & Gordon in mid 1998. The plaintiff could recall other family occasions when Mrs Foley repeated the statement in the defendant's presence and that the defendant said to Blayde on one occasion “You're a very rich little boy. You own all of this land.” (at T15).

[15] When the defendant gave evidence, he denied that he had been a party to discussions that the property would be given to Blayde. He made the point that it was never his intention that Blayde should be given the property, so that the defendant no longer owned it.

- [16] Mrs Foley was diagnosed with kidney disease prior to her commencing dialysis in 1998. Prior to her death, she also suffered a series of heart attacks.
- [17] Mrs Foley consulted Mr Bell on 9 December 1999 about making a will. She gave instructions that she wished to leave the property and her shares to Blayde when he attained the age of 25 years, all her jewellery to the plaintiff and the rest and residue to the plaintiff and Rowan in equal shares. It was implicit in this instruction by Mrs Foley in relation to the property that she had power to dispose of the property by her will.
- [18] Mr Bell did a search of the property and ascertained that it was registered in the name of the plaintiff. An appointment was eventually made by Mrs Foley to see Mr Bell on 29 February 2000. Mr Bell's file note records an attendance only on Mrs Foley and he confirmed in evidence that the defendant did not attend with Mrs Foley on that occasion. Although the defendant stated that he attended with Mrs Foley to discuss her will with Mr Bell, I accept that Mr Bell's recollection aided by his file note is more reliable. The instructions given by Mrs Foley on that date which were recorded by Mr Bell were for Mr Bell to organise for the property to be transferred to the defendant and Mrs Foley as joint tenants and that he was to obtain a letter from an agent regarding a valuation, prepare the transfer and Form Q and discuss the release of mortgage with the mortgagee. Mr Bell explained that Mrs Foley's instructions for her will were left in abeyance, because of the state of the registered title of the property and that he acted on the fresh instructions that were given by Mrs Foley at that appointment on 29 February 2000. The contemporaneous handwritten diary note made by Mr Bell unequivocally shows that Mrs Foley and the defendant were to hold the property as joint tenants. Mr Bell cannot now recall what he said to Mrs Foley on 29 February 2000 about the effect of a joint tenancy, but consistent with his practice when he thought a client may not have understood what a joint tenancy was, he stated that he would not have taken instructions for the transfer to be in favour of Mrs Foley and the defendant as joint tenants, unless he had explained to Mrs Foley what joint tenancy meant and, in particular, that the property would pass to the surviving owner on the death of one of the joint owners. At the time of the trial Mr Bell had been a solicitor for 22 years. I accept Mr Bell's evidence that his experience as a solicitor meant that he would not have taken an express instruction from Mrs Foley in the circumstances to prepare a transfer of real property in favour of her husband and herself as joint tenants, without explaining the effect of a joint tenancy. The critical finding that I make is that Mrs Foley did instruct Mr Bell to prepare the transfer of the property in favour of the defendant and Mrs Foley as joint tenants.
- [19] The submission was made on behalf of the plaintiff that it was not open for a finding to be made that such an explanation as to the effect of a joint tenancy was given by Mr Bell in view of the admissions that were made on the pleadings by the defendant. A close analysis of the relevant paragraphs of the amended statement of claim and further amended defence shows that the pleadings do not preclude the finding that I have made which is, in effect, that Mr Bell did explain to Mrs Foley on 29 February 2000 that a joint tenancy meant that the property would pass to the surviving owner on the death of one of the joint owners. Paragraph 7 of the statement of claim alleges that the plaintiff instructed Mr Bell "to prepare her will ensuring that upon her death the property would be passed to Blayde Foley (or Blayde Foley's trustee), subject, however, to the matters stated in sub-paragraphs 6.2 and 6.3 of this Statement of Claim". The defendant denied the facts alleged in

paragraph 7 of the statement of claim. Paragraph 10 of the statement of claim makes a number of allegations about the instructions for and preparation of the transfer that was executed on 4 April 2000. One of the allegations is that Mrs Foley did not instruct Mr Bell that the property was to be held by her and the defendant as joint tenants. That allegation is denied in paragraph 6 of the defence. Paragraph 12 of the statement of claim alleges:

“Mr Larry Bell did not explain to the First Plaintiff or the First Plaintiff’s mother that transferring the property to the First Plaintiff’s mother and the Defendant as joint tenants in their own right (and not in trust for Blayde Foley), could, upon the death of the First Plaintiff’s mother, defeat the purpose of the agreement and the intention of the First Plaintiff’s mother’s proposed will.”

The facts alleged in paragraph 12 of the statement of claim are admitted by the defendant who pleads additional facts including that there was no need for Mr Bell to give an explanation, as pleaded in paragraph 12 of the statement of claim, as the alleged agreement was not made. The allegation made in paragraph 12 of the statement of claim about what Mr Bell did not explain was couched in terms that related the explanation of a joint tenancy to the effect on the agreement that the plaintiff alleges was made. It is not surprising that paragraph 12 of the statement of claim was admitted by the defendant, as there is no allegation (nor evidence) that on 29 February 2000 or 4 April 2000 that Mr Bell was aware of any such agreement. He could therefore not give an explanation about joint tenancy by reference to that agreement.

- [20] On 4 April 2000 Mr Bell attended on Mrs Foley, the defendant and the plaintiff. Mrs Foley had told the plaintiff that the purpose of the meeting with Mr Bell was so that the plaintiff could sign the property over to Mrs Foley and the defendant and that Mrs Foley’s will could then be finalised. It was on that occasion that the plaintiff (as she was bound to do at the request of the defendant and Mrs Foley) signed the transfer which showed the defendant and Mrs Foley as joint tenants as the transferees. Mr Bell witnessed the plaintiff’s signature on the transfer. On the same day, he also signed the transfer as the solicitor for the transferees. The plaintiff conceded that there was no discussion between Mrs Foley and Mr Bell on that occasion about setting up a trust for Blayde. The transfer was left by the defendant and Mrs Foley with Mr Bell to attend to the registration of the transfer. I infer from the defendant’s presence at this meeting when the transfer of the property was signed by the plaintiff that the defendant accepted that it was proper that the property was transferred to Mrs Foley and him as joint tenants and thereby confirmed the instruction that had been given by Mrs Foley on 29 February 2000.
- [21] Mr Bell made enquiries about obtaining the release of the mortgage over the property. He made a file note of a telephone call on 13 April 2004 that he advised either the defendant or Mrs Foley that the bank needed two weeks to prepare the release. The file note recorded that they would “drop it in” when it was received.
- [22] Mr Bell’s secretary telephoned Mrs Foley on 11 July 2000 to enquire how she was going with obtaining the release of the mortgage and noted that Mrs Foley said that she would check with the plaintiff.
- [23] The plaintiff had frequent trips overseas during 2000 and the release of the mortgage had not been provided to Mr Bell, before Mrs Foley passed away.

- [24] On 1 August 2000 the plaintiff, the defendant, Mellissa and Rowan attended on Mr Bell in relation to Mrs Foley's estate. Mr Bell advised them that he had not made a will for Mrs Foley, as he had been waiting for the release of the mortgage in respect of the property.
- [25] A discussion then took place amongst the plaintiff, the defendant, Mellissa and Rowan in the presence of Mr Bell about what would happen with the property. The recollections of the witnesses vary as to the content and the effect of the discussions, except for Mellissa whose recollection of that meeting was limited. The plaintiff stated (at T25):
- "People in the room were happy that the land was still in my name and that at some point the land would go to Blayde down the track."

The plaintiff conceded that the defendant did not say anything at that meeting to the effect that he wanted the property transferred to Blayde, but stated that the defendant never raised any concerns at the meeting. Rowan stated that:

"However, it was agreed between myself, Fiona and Barry (on Larry Bell's advice) that Blayde should still inherit the subject property (when Barry passed away) and that the best way to proceed was to transfer the subject property, as part of the estate process, into the names of Barry and Fiona and myself (as trustee for Blayde) as joint tenants."

Rowan considered that all of the family members who were at the meeting "indicated" to Mr Bell that the property was to be held in trust for Blayde. Rowan stated that he believed the defendant did make a statement to that effect and the defendant did not say anything against the proposal that the property was to go to Blayde in accordance with Mrs Foley's wishes.

- [26] The defendant does not recall much about the discussions at the meeting on 1 August 2000, as he was ill at the time and was also grieving. The defendant denied that he gave instructions to Mr Bell that the property was to be transferred to Blayde and himself.
- [27] Mr Bell recorded receiving instructions on 1 August 2000 from the defendant at the meeting he had with Mrs Foley's family to act as his solicitors in finalising the estate of Mrs Foley. On his instruction sheet, Mr Bell recorded the following as special instructions (where Mr Bell is referred to as LRB):
- "There is no Will executed by Mrs Foley as LRB was waiting to transfer 71 Maddever Road, property back to Barry and Shirley as per signed tfr on file. As it had a mortgage to Westpac LRB was waiting for Fiona Foley the daughter to drop in the release so the tfr and release could be registered. Mrs Foley's instructions for her Will are contained in the instruction sheet. Barry and Family are aware that there is no will so her estate will have to be administered under the rules of the Succession Act. He will drop in all Bank a/c's in Shirley's name and Share certificates. The house and land at 71 Maddever Road, Booral on Barry's instructions and with the consent of Fiona and the rest of family is to be transferred to Barry and Blayde (Shirley's grandson) Fiona Lee Foley and Rowan Paul Bulmer-Foley if applicable are to hold his share in trust. Barry wanted to know how much this was all to cost. Said once I had

received all the docs I would send out to him a detailed letter with our retainer and our estimate of costs. Fiona is to go to Westpac and pay the fee to have Westpac release the mortgage. She said she would do this in the next couple of days.”

[28] In cross-examination Mr Bell stated that what he had recorded in his diary note about the property being transferred to the defendant and Blayde was a proposal that had been put forward at the meeting, but was not a firm instruction from the defendant. Although the defendant does not recall the detail of the discussion about the property at the meeting, I find that it is likely that he did not demur from the proposal that was favoured by his children at that meeting.

[29] Mr Bell handed the file in relation to Mrs Foley’s estate to his employed solicitor Ms Tweddell. In his file memo dated 31 August 2000 to Ms Tweddell he referred to having the defendant organise the release of the mortgage over the property and for it to be delivered to their firm “... so we can look at transferring this property to Barry, the husband, and the grandson Blayde, to be held as a minor or to be held by Fiona and Rowan as Trustee for him”.

[30] Ms Tweddell wrote the letter from Bell Dixon Butler dated 6 September 2000 to the defendant which included the following statement:

“However we note the property at 71 Maddever Road Booral (currently registered in the name of your daughter Fiona) is to be transferred to you and your grandson Blayde in accordance with your late wife’s wishes.”

According to Mr Bell, there was an inaccuracy in that statement, as it did not refer to the intention that Blayde’s interest should be held for him on trust by the plaintiff and Rowan.

[31] It is clear that the defendant received the letter dated 6 September 2000, as he provided his solicitors with the documents that they had requested in that letter. The defendant did not recall receiving the letter at the time that it would have been delivered to him and did not recall making any response to the statement set out in the letter about the proposed transfer of the property.

[32] On 21 September 2000 Mr Bell saw the defendant who advised him that he was reconsidering the position of the transfer of the property. Mr Bell recorded the discussion he had with the defendant in the following terms:

“Barry advised that he was now reconsidering whether the property be transferred to Fiona and Rowan as Trustee for Blayde. Bearing in mind, I told him there would be stamp duty involved. He said that he trusted Fiona to hold it for Blayde until he was of age and then it can be transferred to him at that point in time. I said that would be ok but obviously the property would (*sic*) still in the name of Fiona who will be considered to be the legal owner. He would speak to Fiona and the others about it to see whether it was to be transferred to Fiona and Rowan as Trustees for Blayde or to be left in Fiona’s name to be transferred at a later date when Blayde turns 18 years of age.”

[33] Ms Tweddell also wrote the letter from Bell Dixon Butler dated 1 November 2000 to the defendant which reported on the finalisation of Mrs Foley’s estate and

included a cheque in the sum of \$6,950.63 drawn in favour of the defendant. This letter included the following statement:

“The only other matter which the writer desires to comment on is that of the property at 71 Maddever Road, Booral. This property is presently in the name of your daughter Fiona Lee Foley and it was the writer’s understanding that on the death of your wife that this property was to pass to Blayde. This matter was discussed with you and your instructions were to leave the property in Fiona’s name with the understanding that when Blayde reaches the age of 18 years, the property would then be transferred to him. Should this not be the case, we would ask that you urgently speak to the writer to discuss the matter further.

- [34] According to Mr Bell there also was an inaccuracy in that statement in that he did not understand that the discussions that took place on 1 August 2000 resulted in the property passing to Blayde when he turned 18 years. In any case, the defendant did not respond to the invitation in the letter of 1 November 2000 to advise Ms Tweddell, if she had not correctly recorded the position in respect of the property. The reality of the situation was that if the defendant did not require any action to be taken in relation to the property at that stage, he was not bound to communicate with Ms Tweddell about the title to the property.
- [35] The defendant continued to reside at the property. The plaintiff obtained the release of the mortgage from the bank in 2002. I infer that registration of that release was effected thereafter. The defendant remarried in or about May 2003.
- [36] On a couple of occasions during 2003 and 2004 the defendant put a proposal to the plaintiff that involved subdividing and/or selling part of the property. The relationship between the plaintiff and the defendant became strained over Christmas 2004 as a result of their different views on the ownership of the property.
- [37] On 13 January 2005, the defendant instructed Mr Bell’s firm to finalise the transfer of the property to himself. The plaintiff sent a letter to the “Foley Family” dated 13 January 2005 in which she acknowledged that there were “vested interests by both Mellissa Foley and Barry Foley” in the property and conveyed her decision to implement an arrangement whereby the rates for the property would be paid by Mellissa until Blayde turned 25 years old and that the defendant could continue to live at the property, rent free, unless the rates were not paid which would result in the property being “put on the rental market”.
- [38] The defendant’s solicitors advised the plaintiff’s solicitor by letter dated 4 February 2005 that the transfer of the property into the sole name of the defendant had been effected. The plaintiff lodged Caveat No 708463054 in respect of the property.

Issues

- [39] The plaintiff’s claim is pleaded in the alternative. The proceeding raises the following issues:
- (1) did the plaintiff, the defendant and Mrs Foley enter into an agreement to create a trust in respect of the property in 2000 on the terms alleged by the plaintiff?
 - (2) is the defendant estopped from denying that a trust exists in favour of Blayde in respect of the property on the terms that the plaintiff alleges were

the subject of the agreement between the plaintiff, the defendant and Mrs Foley?

Was there an agreement as alleged?

- [40] It is an admitted fact on the pleadings that when the plaintiff purchased the property, it was for the benefit of and on trust for the defendant and Mrs Foley. There was no allegation in the statement of claim as to how the defendant and Mrs Foley held their beneficial ownership of the property, ie as joint tenants or tenants in common. The common practice for husband and wife is to hold matrimonial property as joint tenants. In the absence of evidence of expressed or implied intention at the time the property was purchased, the presumption in equity (in the light of s 35 of the *Property Law Act 1974*) is that they held the beneficial ownership as tenants in common: *Delehunt v Carmody* (1986) 161 CLR 464, 473. There is nothing in the evidence to suggest that the respective interests of the defendant and Mrs Foley in the property were other than equal. To the extent that subsequent conduct can be relied on to rebut the presumption of their ownership being as tenants in common, the transfer of the property that was prepared in 1998 showed the defendant and Mrs Foley holding the property as joint tenants.
- [41] Any agreement to create a trust of their entire beneficial interest in the property required the concurrence of both the defendant and Mrs Foley, whether they held their beneficial interest as tenants in common or as joint tenants. It is therefore not necessary to determine whether they were joint tenants or tenants in common, before the events of 2000. The plaintiff was not an essential party to the creation of a trust by the defendant and Mrs Foley of their beneficial interest in the property. As the legal owner of the property, without any beneficial interest, the plaintiff was in a position where her dealings with the property were subject to the direction of the beneficial owners who were of full age and capacity: *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625, 637.
- [42] There is no doubt that Blayde was a favoured grandchild, particularly as he resided with his grandparents for a couple of years early in his life. I accept that Mrs Foley made the various statements about benefiting Blayde in respect of the property in the course of informal family discussions. I accept that during these informal family discussions the defendant did not demur when Mrs Foley made these various statements in his presence. The legal effect of the various statements that the plaintiff and her siblings recall being made by Mrs Foley and even the defendant is, however, equivocal. They could be referring to making provision for Blayde under their wills or creating a trust in his favour or otherwise giving him the property.
- [43] Apart from the lack of consistency in the content of the statements made by Mrs Foley, these statements do not cover the matters that are pleaded in paragraphs 6.2 and 6.3 of the statement of claim as essential terms of the agreement. These are the entitlement of Mrs Foley and the defendant to reside in the property and that there would be no obligation on Mrs Foley and the defendant to pay rent to the plaintiff while they resided in the property. These alleged terms of the agreement are consistent with a trust being declared in respect of the property or a gift of the property *inter vivos*, rather than an agreement in respect of the making of wills by the defendant and Mrs Foley. As the defendant and Mrs Foley were the beneficial owners of the property from the time it was acquired in the plaintiff's name, they were entitled to reside in the property and were under no obligation to pay rent for

their occupation of the property. Effect could be given to the terms of the agreement alleged in paragraphs 6.2 and 6.3 of the statement of claim only if the defendant and Mrs Foley had agreed to dispose of their beneficial ownership of the property whilst they were alive. To the extent that Mrs Foley's instructions to Mr Bell for her will in December 1999 can be taken as an indication of her wishes about the property at that time, her proposal was for Blayde to benefit under her will and not to create a trust prior to her death.

- [44] Although the agreement is alleged to have been made in 2000, there was no evidence given of any family gathering in 2000 where relevant statements were made by Mrs Foley or the defendant. The only relevant events in 2000 that were the subject of evidence were the attendances on Mr Bell on 29 February and 4 April 2000.
- [45] The instruction given by Mrs Foley on 29 February 2000 to Mr Bell about the preparation of the transfer of the property was inconsistent with implementing a trust prior to her death in respect of the property or a gift of the property in Blayde's favour on the terms alleged in paragraph 6.1 of the statement of claim that the plaintiff would remain the registered owner of the property.
- [46] The plaintiff seeks to rely on the effect of the family discussions at the meeting with Mr Bell on 1 August 2000 as amounting to an acknowledgment by the defendant of his obligations to Blayde under the alleged agreement. The family discussions that took place in the presence of Mr Bell at the meeting on 1 August 2000 were directed at what steps could be taken at that stage to implement what Mrs Foley's children understood and endorsed as her wishes to benefit Blayde. The gist of that discussion as recorded by Mr Bell does not reflect the terms of the agreement alleged by the plaintiff as having been made prior to Mrs Foley's death. I do not consider that what was discussed at the meeting on 1 August 2000 had any probative value in establishing the existence of the alleged agreement.
- [47] The plaintiff assumed the burden of showing that the defendant (together with Mrs Foley) made the agreement with the plaintiff in 2000 for the property to be held on trust for or given to Blayde which required the beneficial ownership of the property to pass from the defendant and Mrs Foley to Blayde. The proceeding focused on Mrs Foley's wishes in respect of the property, but the defendant was equally a beneficial owner of the property who had to be a party to the agreement that was alleged to have been made. I find no reason not to accept the defendant's statement that he never had any intention of giving up ownership of the property whilst he was alive. His actions in 1998 in endeavouring to obtain the transfer of the legal title of the property to Mrs Foley and himself and his approval of the transfer that was signed by the plaintiff on 4 April 2000 support this finding which is not displaced by the failure of the defendant to remonstrate or object when Mrs Foley spoke at family gatherings about giving the property to Blayde. The instruction given by Mrs Foley to Mr Bell on 29 February 2000 and confirmed by the execution of the transfer of the property in her presence on 4 April 2000 is inconsistent with the agreement alleged by the plaintiff. The plaintiff has failed to prove against the defendant the agreement in the terms alleged in paragraph 6 of the statement of claim.

Is there an equitable estoppel?

- [48] The plaintiff alleges that the defendant is estopped from denying the trust on the basis that if the defendant had told the plaintiff and Mrs Foley that he would not agree to the trust, Mrs Foley would have had the opportunity, so as to secure her testamentary desires, to instruct her solicitors to transfer the property to her and the defendant as tenants in common, and to have her solicitors prepare forthwith a will giving her interest in the property to Blayde on trust.
- [49] The plaintiff relies on equitable estoppel of the nature that founded relief in *Riches v Hogben* [1986] 1 QdR 315, *Flinn v Flinn* [1999] 3 VR 712 and *Giumelli v Giumelli* (1999) 196 CLR 101. There was no dispute between the parties as to the elements of representation, reliance and detriment that needed to be proved to establish the operation of an equitable estoppel. What was in dispute was whether the facts, as proved, gave rise to an equitable estoppel that could be enforced for the benefit of Blayde.
- [50] There are a number of difficulties with the claim of equitable estoppel. It is inconsistent that the representation that is alleged is the failure of the defendant to inform Mrs Foley that he did not agree to the establishment of an *inter vivos* trust of the property in favour of or an *inter vivos* gift of the property to Blayde, but the detriment that is alleged relates to Mrs Foley not taking steps to “secure her testamentary desires” in respect of the property.
- [51] The factual matters that have defeated the plaintiff’s claim based on the alleged agreement are also inconsistent with the equitable estoppel claim which is pleaded by reference to the terms of the alleged agreement. The instructions given by Mrs Foley to Mr Bell on 29 February 2000 that were carried into effect by the execution of the transfer of the property on 4 April 2000 mean that the plaintiff cannot show that Mrs Foley was intent on implementing a trust or gift of the property in favour of Blayde.
- [52] I am also not satisfied that I can infer that the detriment, as pleaded, can be proved. It is speculative and inconsistent with the instructions given by Mrs Foley to Mr Bell on 29 February 2000.
- [53] An interesting submission was made on behalf of the plaintiff as to the entitlement of Blayde to rely upon any estoppel arising in this matter. It is not necessary to address that submission, as the facts which I have found do not support any claim based on equitable estoppel.
- [54] The various statements made by Mrs Foley during her lifetime to which the plaintiff attached significance were not unequivocal and, ultimately, were not matched by her actions. I formed the view during the hearing of the proceeding that the plaintiff and Rowan were endeavouring to enforce what they considered to be a desirable outcome in relation to the wishes of Mrs Foley that had been expressed from time to time. Pre-eminence was given in this proceeding by the plaintiff to Mrs Foley’s wish in general terms to benefit Blayde in respect of the property which could not be considered in isolation from the defendant’s wishes when they related to the beneficial ownership of the property as a whole. Mrs Foley had expressed a wish from time to time about the disposition of the property, but she embarked instead on a course (with the concurrence of the defendant) that was inconsistent with bringing that wish to fruition on the terms that the plaintiff pursued in this proceeding.

Orders

- [55] It follows that the orders which should be made are:
1. The plaintiffs' claim be dismissed.
 2. Caveat No 708463054 be removed.
- [56] It follows that the first plaintiff should pay the defendant's costs of the proceeding.
I will hear submissions on costs, however, before making any costs order.