

"5. (1) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property:

(j) Any property comprised in any settlement, trust, or other disposition of property made by the deceased, whether before or after the commencement of this Act, and situated in New Zealand at the death of the deceased:

(ii) Which is accompanied by the reservation or assurance of, or a contract for, any benefit of the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person."

The settlement made by the son was accompanied by the provision of a life interest in the sum of £20,000 settled by the father with the result that not the whole policy moneys but the policy as encumbered transferred by the son forms part of the dutiable estate, and this, in my view, is the answer to the question raised.

Solicitors: for appellant: *Fullerton, Smith & Co.*, Marton; for respondent: Crown Law Office, Wellington.

WHITEHEAD V. WHITEHEAD AND OTHERS.

1948, June 10, 11, July 23. Court of Appeal, Wellington. Sir Humphrey O'Leary C.J., Kennedy, Cornish, Stanton JJ.

Specific Performance—Part Performance—Possession—Testator making available land on which he encouraged son to build cottage—Absence of undertaking to subdivide or transfer land—Right of son to equitable charge for amount expended.

If a man under a verbal agreement with the owner for a certain interest in land, or under an expectation created or encouraged by the owner that he shall have a certain interest, lays out money on the land with the consent of the owner and upon the faith of such promise or expectation, with the owner's knowledge and without objection by him, a Court of Equity will compel the owner to give effect to such promise or expectation. The estate acquired by the person making the expenditure however would not necessarily be one equal to the whole of the estate in the land of the person so standing by.

Where, in an action for a declaration of ownership or for compensation or damages based on the allegation that testator undertook to transfer by way of gift to appellant, his son, a site for a cottage, it was found on the evidence that testator and appellant arranged to build two cottages on testator's land; that two cottages were built, the first for testator and the second primarily for appellant; that there was no undertaking to subdivide or transfer the land; that both testator and appellant helped with the building and that appellant expended labour and materials with testator's knowledge.

HELD—By the Court of Appeal—That testator having made available the land on which he encouraged appellant to expend labour and materials in the expectation that the second cottage was his, appellant acquired an equitable charge or lien for the value of the labour and materials expended and, accordingly, that he was entitled to judgment for that amount; *Dillwyn v. Llewellyn* (45 E.R. 501); *Ramsden v. Dyson* (L.R. 1, H.L. 129); *Plimmer v. Mayor of Wellington* (9 A.C. 699) and *Hamilton v. Geraghty* (1901, 1 N.S.W.S.R. Eq., p. 81) applied.

This was an appeal from the judgment of Christie J. (printed below) and was allowed.

CHRISTIE J.—This is an action in which the plaintiff seeks a declaration that he is equitably entitled to the ownership in

fee simple of an undefined area of land included in the estate of his late father, John Whitehead, of New Plymouth, retired farmer, deceased. In the alternative, the plaintiff claims £650 as compensation or damages.

For purposes of convenience, the said John Whitehead (who was the plaintiff's father) is hereinafter referred to as the testator.

The claim of the plaintiff is based on an alleged oral agreement between the testator and the plaintiff. The plaintiff alleges that by this oral agreement the testator undertook to transfer to the plaintiff, by way of gift, the site of a beach cottage then proposed to be erected for the use and benefit of the plaintiff on land owned by the testator. The evidence showed that the testator and his son (who were partners engaged in carrying on farming operations on other property belonging to the testator) arranged to build two seaside cottages on land of the testator, situated at the northern end of the Turangi River, near Waitara, and in due course two such cottages were built. The first cottage was built for the use of the testator himself; the second cottage seems to have been generally regarded, by the testator and his family, as being primarily if not exclusively intended for the use of the plaintiff (being frequently referred to as "Vic's cottage"). The view that the cottage was regarded as being, in a sense, the "property" of the plaintiff is supported by the original proposal for fire insurance, in which the name of the testator appears as the owner of the freehold, and the name of the plaintiff appears as the owner of the building. The proposal was signed "V. D. Whitehead, per J. Whitehead" and the policy was issued in the name of the plaintiff. I doubt, however, if any question as to the "ownership" of the property, in the true sense of the term, was raised until after the death of the testator.

The timber required for the construction of both cottages was obtained from a tree growing on other property of the testator; the cost of milling the timber seems to have been borne (in the first place, at any rate) by the plaintiff, who seems also to have arranged for its seasoning and transport to the site of the proposed cottages.

No exact accounts, as between the testator and the plaintiff, in respect of the cottages, would seem to have been kept, and the fact that the plaintiff's bank account was used, at times, as a partnership account, makes it difficult, if not impossible, to arrive at the true financial position between father and son when the second cottage was at length completed (after some unexplained delay when the plaintiff would seem to have lost all practical interest in the project).

The absence of proper accounts has resulted in outstanding differences between the plaintiff and the trustees of the testator's estate. The Court is not asked to settle these differences which would appear to be properly the subject-matter of arrangement between the parties, with the aid, if need be, of an accountant.

As to the matter specifically referred to the Court in the Statement of Claim, I am satisfied from the evidence that at no time did the testator do or undertake to do more than to make available for the use of the plaintiff an area of land sufficient for the erection of the cottage which was in fact ultimately built (being the No. 2 cottage referred to in the proceedings). In particular, I am satisfied that at no time did the testator expressly or by his conduct undertake or agree to subdivide his property so as to transfer to the plaintiff the fee-simple or any other legal estate or interest in the site of the said cottage; nor do I think that the plaintiff has by reason of the words or conduct of the testator or by reason of work done or money expended in or about or in connection with the cottage acquired any equitable estate or interest therein, or in the land on which it is erected.

The claim of the plaintiff, therefore, fails, and judgment is given accordingly for the defendants.

In the meantime, I do not make an order as to costs, but invite counsel to submit representations. As the plaintiff, although he has failed to establish his claim, was not without merit, I think that some part of his costs should be borne by the trust estate.

Grey for appellant.

Ewart for second respondents.

Grey for the appellant:

The appellant's claim relates to a beach cottage erected by him in reliance on his father's promise to transfer the land to him. The cottage was insured by the father in the appellant's name as owner. The subsequent policy, as the evidence shows, was, due to a mistake on the part of the company, not issued in conformity with the proposal or the interim policy. That can be rectified: *Welford on Fire Insurance* (3rd ed. 102). The appellant expended approximately £281 for materials and did the greater part of the work on the two cottages. He also contracted as owner for the installation of the electric light. The appellant claims that he has an estate or interest in the land. The claim is based not on any agreement, but on the acts which followed the testator's promise to give the appellant the land. The fact that no accounts were kept as between the appellant and his father is irrelevant, because they were adjusted as the work proceeded. The finding that the testator made available an area of land sufficient for the erection of a cottage is sufficient within *Plimmer's case* (9 A.C. 699) to entitle the appellant to judgment. The evidence of the appellant is corroborated (i) by the proposal for the first policy of insurance. (ii) The statements by the father to the insurance agent. (iii) The evidence of the widow. There is also evidence of corroboration of the work done by the appellant. So far as any approval by the Land Board under the Land Act 1924, is concerned, there is no evidence that any such approval has or has not been obtained. *Plimmer v. Mayor of Wellington* (9 A.C. 699, 708, 710, 712, 713); *Campbell v. Campbell* (1932, 3 D.L.R. 501, 508); *Dillwyn v. Llewellyn* (45 E.R. 1285, 1286); *Hamilton v. Geraghty* (1901, N.S.W.S.R. (Eq. 81)); *In re Hume* (12 G.L.R. 61); *Veitch v. Caldecott* (173 L.T. 30, 34); *Cameron v. Cameron* (11 N.Z.L.R. 642, 651, 659); *Unity Bank v. King* (53 E.R. 563). The appellant has expended moneys on the cottage and is not a volunteer: *Skidmore v. Bradford* (L.R. 8 Eq. 134); *Duke of Beaufort v. Patrick* (51 E.R. 954). As to uncertainty with regard to the area of the land, see *North v. Percival* (1898, 2 Ch. 128); *Chattock v. Muller* (L.R. 8 Ch. 177). *Rumble v. Heygate* (18 W.R. 749). The appellant is prepared to accept the value of the asset he created, less the value of the land.

Ewart for the respondents:

There is evidence that the testator spent £160 on both cottages. It is a fallacy to assume that the assets of the estate have been increased by the value of the beach cottage. It is probably unsaleable, and therefore has not the value of £40 placed upon it. Any agreement to dispose of the land without the consent of the Land Board is an offence, and in the absence of the Minister's consent there can therefore be no decree that the land be transferred to the appellant. Christie J.'s decision was right. The appellant admitted that three and a half years elapsed between the alleged arrangement and the testator's death, and that during that period he made no request to the testator to be given title or even to be put in possession, and he has never occupied the cottage. The testator let the cottage and received rent for it, but the appellant made no claim for that rent. He admit-

ted that it was never decided what area he should have. He agreed that there was a subdivision and that land was sold in 1944. The insurance documents are of importance only in so far as they are acts of the parties. From that point of view the insurance proposals are unimportant, as they are acts of the insurance company. I concede that the testator showed an intention to benefit the appellant, but there is no evidence of any promise that the appellant should own the cottage. The second insurance proposal and other matters show that the testator changed his intention. Taken by themselves the policies are equivocal. Apart from the appellant's assertion, there is no proof that he paid any accounts for electric power. If at any time he had any equitable rights there is clear evidence that he abandoned them. The mere fact of expenditure without any promise or undertaking gives rise to no equitable rights. The appellant had a right of occupation at the will of the testator. The most that could be read into an arrangement of that kind is a life interest. In the absence of a clear and unambiguous arrangement the appellant has no rights, legal or otherwise. The appellant's evidence with regard to expenditure on the cottage is equivocal and unsatisfactory. A claim of this kind is one to be regarded with suspicion. This is not a case in which the Court should feel itself at liberty to interfere with Christie J.'s decision on the facts. *Watt v. Thomas* (1947, 1 All E.R. 582, 587); *Earl v. Earl* (1948, G.L.R. 179). The Court cannot safely say that the appellant's assertions must be relied on.

Grey in reply:

There is sufficient evidence to show that there has been no abandonment or cancellation of rights. This Court can find any facts not found in the Court below. *Klingenstein v. Walters* (3 N.Z.C.A. 18, 25).

Cur. adv. vult.

The Court, per O'LEARY C.J.—The appellant's claim was for (a) a declaration that he became in the testator's lifetime, the equitable owner of the land described in the statement of claim with the necessary attendant orders to enable title to be given to the land; or alternatively, (b) the sum of £650 with interest by way of compensation or damages.

The claim was based on an allegation that appellant's father—hereinafter referred to as the testator and represented in these proceedings by the second defendants—had promised him a section of land on which to build a cottage, which cottage had been built; or alternatively, had stood by whilst the appellant spent money in materials and expended labour on the cottage.

The trial judge found against the appellant and this appeal is from his judgment.

The law as to the rights of a person who has expended money on property in anticipation of a gift of land being given effect to or in the case of the owner standing by is well settled and as to this there was no real difference between the parties.

The cases of *Dillwyn v. Llewellyn* (45 E.R. 501); *Ramsden v. Dyson* (L.R. 1 H.L. 129); *Plimmer v. Mayor of Wellington* (9 A.C. 699); *Hamilton v.*

Geraghty (1901, 1 N.S.W.S.R. (Eq.) p. 81) are all in point.

In *Hamilton v. Geraghty*, Owen J. at p. 88 said:—

“In *Ramsden v. Dyson* (L.R. 1 H.L. at 170) Lord Kingsdown states the law as follows:—‘If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.’ He then points out that Lord Thurlow had seemed to have thought that, where there was uncertainty as to the particular terms of the contract the Court would ascertain the terms by reference to the Master and, if they could not be ascertained, would itself fix reasonable terms. He then adds, at p. 171:—‘Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant.’ So apparently all those eminent Judges thought either by contract, or by facts amounting to estoppel, an estate or interest in the land would in such cases be created in the person who upon the faith of such promise or expectation with the knowledge of the owner, had laid out money upon the land.”

It does not follow, however, that the estate acquired by the person making the expenditure would necessarily be one equal to the whole estate of the person so standing by; it would, in our opinion, in the circumstances, be co-extensive with the amount of expenditure; that is to say he would have a charge or lien to that extent. (Per Walker J. in *Hamilton v. Geraghty* (*supra*) at p. 90).

In the present case the appellant apparently realising the difficulties that might arise in obtaining title to the particular piece of land—these are made plain in the evidence—expressed his willingness, in this Court, to accept the value of the asset he said he created, viz. £590 less the value of the section, £50 and interest.

It has to be decided then whether appellant expended money and labour in erecting the building and improvements on the property under a verbal agreement, that he would get the land, or under an expectation created or encouraged by the testator that he would get the cottage and necessarily land upon which it stood or that the testator with full knowledge of his expectation stood by and allowed the work to be done.

To answer this question the judgment must be examined and analysed and it may be summarised as to its findings as follows:—

(1) The action was for (a) a declaration of ownership: or (b) £650 compensation or damages and was based on the allegation that testator undertook to transfer by way of gift a site for a cottage.

(2) The evidence showed that testator and appellant arranged to build two cottages and two cottages were built.

The first for testator:

the second primarily for appellant; it was known as “Vic’s Cottage”.

(3) The view that the cottage was the “property” of appellant was supported by evidence expressed in the judgment as follows:—

“The view that the cottage was regarded as being, in a sense, the ‘property’ of the plaintiff is supported by the original proposal for insurance, in which the name of the testator appears as the owner of the freehold, and the name of the plaintiff appears as the owner of the building. The proposal was signed ‘V. D. Whitehead per J. Whitehead’, and the policy was issued in the name of the plaintiff. I doubt, however, if any question as to the ‘ownership’ of the property, in the true sense of the term, was raised until after the death of the testator.”

(4) The timber for the cottages was obtained from a tree, the cost of milling “seems to have been borne (in the first place at any rate) by the plaintiff” who “seems to have arranged for its transport and seasoning”.

(5) No exact accounts were kept; father and son were in partnership in carrying on the father’s farm, and it is impossible to arrive at the true financial position when the second cottage was completed.

It seems to us that the important “facts” found by the learned Judge are:—

(1) That testator “made available” for the use of the appellant an area of land sufficient for the erection of a cottage.

(2) There was no undertaking to sub-divide or transfer the land.

The statements in the judgment following these findings are, we think, matters of law to be determined on the facts as found and other facts which, in the absence of any findings by the trial Judge, must be found by this Court.

These further facts, which on the evidence we find proved are:—

(1) There was an arrangement between the testator and appellant to build two cottages on the testator’s land.

(2) The two helped in the building and the appellant expended money on materials with the testator’s knowledge.

The position, therefore, is that testator made available an area of land on which he encouraged the appellant to expend labour and materials in the expectation that the second cottage was his.

The conclusion arrived at by the learned Judge is that neither by reason of the words and conduct of the testator nor by reason of work done or money expended, did the appellant acquire an equitable estate or interest in the cottage on the land. We are unable to agree with this. There was something which he might acquire which, on the facts, we think he did acquire, namely an equitable charge or lien to be reimbursed the value of the labour and materials expended on the building and property. His Honour appears to have thought that nothing short of the acquisition of a transferable estate or interest in the land would give the appellant any claim. The authorities, in our opinion, are clear that he is entitled to reimbursement where the owner of the land with full knowledge had not only stood by, as we find he did, but encouraged the appellant to make expenditure

in the expectation that the cottage on the land available was his.

What then is the amount to be assessed by way of reimbursement?

As stated earlier, appellant claimed £540 being the unchallenged value on the property by a recognised valuer; viz. £590 less the value of the land, £50.

This amount is in excess of the proved cost of material and a reasonable estimate of the value of appellant's labour. It must, too, have taken into account the value as a saleable property but when it is realised that no transfer of the property can be given for reasons, which appear in the evidence but which need not be repeated, it is clear that this full value cannot be allowed.

Appellant gave evidence in support of £281 having been actually spent on materials, though of this, £34 18s. 4d. admittedly did not go into either cottage. In the absence of a finding by the trial Judge, we accept appellant's evidence as to this expenditure. As to the value of appellant's labour, this must be a matter of some difficulty but, on the evidence, it could well be concluded that in all he spent, at least, 80 to 90 full working days on the property. We think that a total sum of £400 covers all that may be allowed and that appellant should have judgment for this amount.

The appeal is therefore allowed. In place of the judgment entered by the learned trial Judge there must be judgment for the plaintiff for £400 with costs according to scale in the Supreme Court on that amount with witness expenses and disbursements to be fixed by the Registrar. The appellant will have as costs of the appeal costs according to scale with 50 per cent additional as from a distance with disbursements including cost of printing.

Solicitors: for appellant: *Hughes, Hughes & Clarke*, New Plymouth; for respondents: *Reeves & Ewart*, New Plymouth.