The Statute of Limitations: No Longer an Absolute Bar

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the "package deal" might be movable defective items worthy of the warranty's protection. Thus, mobility is at best an artificial test. It is submitted that a builder's liability should not turn on whether a defective item can or cannot be removed. Aside from these points, the Gable decision must be viewed as a major stride away from cavea emptor and toward increased consumer protection.

Margarita Esquiroz

THE STATUTE OF LIMITATIONS: NO LONGER AN ABSOLUTE BAR

The plaintiff, a widow, was the devisee of a life estate in certain commercial property owned by her husband, the testator. The will provided that their son, who was designated as the remainderman in fee, could occupy the premises as his residence and for business purposes for the duration of the plaintiff's life term, provided he pay $80.00 rental per month to the plaintiff. The plaintiff's son, his wife and, later, a corporation they formed (the defendants), occupied the premises from 1953 (the year the testator died) until 1970, but they never paid any rent to the plaintiff during that time. The plaintiff brought an action in equity for a declaratory decree construing the will, and for the recovery of the 17 years rent that she contended was owed to her. The defendants raised the defenses of the statute of limitations, laches, waiver and estoppel. The trial court held that plaintiff had a valid life estate and was entitled to all the past due rental payments. On appeal to the District Court of Appeal of Florida, Third District, held, affirmed: A court of equity will not rigidly follow the statute of limitations where the equities are unequal; thus, plaintiff's life estate claim for rental was not barred by the passage of time, nor by waiver or estoppel. Tower v. Moskowitz, 262 So.2d 276 (Fla. 3d Dist. 1972).

1. The relevant portions of the will are as follows:
"I. I do hereby give, devise and bequeath my real properties located at 2195 and 2197 N.W. Seventh Avenue, Miami, Florida, and all my real property on N.W. 22nd Street, Miami, Florida, to my beloved wife, ETHEL MOSKOWITZ, for life, but upon her death or remarriage, the said properties shall go to my beloved son, MARTIN TOWER, in fee."
"V. It is my desire and wish and I do hereby direct that my son, MARTIN TOWER, shall have the right to occupy as his home the premises which he now occupies over the store premises at 2195 N.W. Seventh Avenue, Miami, Florida, and also have possession of the store premises at 2195 N.W. Seventh Avenue, Miami, Florida, which he presently occupies, both for the sole consideration of Eighty ($80.00) Dollars per month as rental for the both said premises as long as he shall desire, it being understood, however, that the said MARTIN TOWER shall also be required to pay all real estate taxes that may become due on said premises during the time he occupies the same."
Tower v. Moskowitz, 262 So.2d 276, 277 (Fla. 3d Dist. 1972).
It is clear that the defense of laches is one that is addressed largely to the discretion of the trial court. Mere lapse of time does not, of itself, constitute laches; rather, the applicability of the defense is primarily a question of fact to be determined from the circumstances of the particular claim involved.

While it is true that a statute of limitation may be employed as a guide in an equity action in connection with the defense of laches, technically, a plea of bar by the statute of limitations is not a proper defense in an equitable proceeding. Equity is not absolutely bound to apply a statute of limitation. However, it will apply the statute of limitations with the same substantial construction and effect as it would receive in a court of law, "unless strong equities compelling the application of a different rule are made to appear..."

The elements necessary to establish laches as a bar to relief are: (1) conduct by the defendant giving rise to the situation of which complaint is made; (2) failure of the plaintiff to assert his rights by suit, although he has knowledge of the defendant’s conduct and has the opportunity to institute a suit; (3) defendant’s lack of knowledge that the plaintiff will assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event that the suit is not barred. In Tower, the plaintiff-widow did not sue to enforce her rights until seventeen years after the right on which she based her suit accrued. In addition, there was a dispute as to whether the defendants had knowledge that the plaintiff would assert her right to the rental payments. Thus, the defendants had apparently satisfied the necessary requirements to establish laches as a bar to relief, yet the court held that the plaintiff was entitled to all of the back rent.

The underlying justification for the court's decision stems from the idea that

the bar of laches will not be raised solely because of the passage of time. Further, the doctrine of laches is the vehicle by which equity will follow the law and apply the statute of limitations. However, equity will not rigidly follow the statute of limitations where the equities are unequal.

2. Powell v. Key West, 434 F.2d 1075 (5th Cir. 1970).
4. Glades County v. Green, 154 So.2d 320 (Fla. 1963).
5. Reed v. Fain, 145 So.2d 858 (Fla. 1961); see H. McClintock, Handbook of the Principles of Equity § 28, at 74-75 (2d ed. 1948) [hereinafter cited as McClintock].
6. H.K.L. Realty Corp. v. Kirtley, 74 So.2d 876 (Fla. 1954); Cook v. Central & S. Fla. Flood Control Dist., 114 So.2d 691 (Fla. 2d Dist. 1959); see also 30A C.J.S. Equity § 131 (1965); see generally McClintock, supra note 5, § 28, at 74-75.
7. Wadlington v. Edwards, 92 So.2d 629 (Fla. 1957); see also 30A C.J.S. Equity § 131 (1965); McClintock, supra note 5, § 28, at 74-75.
8. H.K.L. Realty Corp. v. Kirtley, 74 So.2d 876, 878 (Fla. 1954); see also 30A C.J.S. Equity § 131 (1965); see generally McClintock supra note 5, § 27, at 69-71.
10. 262 So.2d at 279 (emphasis added).
Laches is an affirmative defense, and one element that must be established is that the delay in bringing suit results in prejudice or injury to the party asserting the defense as a bar.\(^\text{11}\)

In the instant case, the defendants argued that the statute of limitations to be applied was three years in an action for money damages for back rent, based on Florida Statutes section 95.11.\(^\text{12}\) Thus, the plaintiff's claim, stale for seventeen years, should have been barred by time. However, the court stated that "a suit for declaratory decree was cognizable by law or equity, and the choice would depend upon the subject matter [of the suit]."\(^\text{13}\) Based on the plaintiff's request for construction of the will,\(^\text{14}\) the court characterized the plaintiff's suit as properly cognizable in equity.\(^\text{15}\)

It is a well-established principle of law that one who seeks equity must do equity, and must come into equity with clean hands.\(^\text{16}\) Since the instant suit was properly brought in equity, the court used this equitable maxim to justify its decision not to rigidly follow the statute of limitations. The defendant-son had failed to pay the plaintiff, an 80-year-old widow, any rent for the use of the premises of a thriving business, even though the will bound the son to pay her the fixed and obviously small sum of eighty dollars per month. Clearly, the defendants had been unjustly enriched and the bar of laches "certainly could not be available to those who [have been] unjustly enriched . . . ."\(^\text{17}\)

In the final analysis, it was the overwhelming equitable considerations in favor of the plaintiff-widow that motivated the court in the instant case to decide that the statute of limitations was inapplicable. Unless the interests of innocent third parties are involved, "[t]he so-called equitable maxim that 'equity follows the law' is invoked only in cases wherein the equities are equal."\(^\text{18}\)

The *Tower* case, with its potentially sweeping effect, has created a precarious situation for the practicing attorney. The manifest, inherent weakness of the decision is that it fails to establish any standards (i.e., a "test" to be applied in all or most situations) or guidelines as to what facts must be presented for the court to find that the equities are "suffi-
ciently unequal” to warrant disregarding the analogous statute of limitations. Apparently, the court in the case at bar was motivated by several equitable considerations, to wit: the age of the plaintiff-widow; her need for the funds; the unjust enrichment enjoyed by the defendants; and the position of power in the corporation occupied by the plaintiff’s daughter-in-law, who dominated the family finances, coupled with her apparent abuse of this power in refusing to compensate the plaintiff. However, the court failed to indicate which, if any, of these factors it considered determinative in reaching its decision.

The impact of the decision in *Tower* is clear. The statute of limitations can no longer be considered as an absolute bar to an action merely because of the passage of time. Where a legal action is barred by the applicable statute of limitation, but might have been brought either in law or in equity, the alert attorney can circumvent the bar of the statute by stating an equitable cause of action, assuming that the equities are “sufficiently unequal” to justify disregarding the statute of limitations.

**Stephen G. Fischer**

**ATTORNEY’S FEE EARNED PRIOR TO TESTIMONY**

Plaintiff-attorney, upon learning that he would be required as a material witness on behalf of his client, withdrew from the case, and the remainder of the trial was conducted by defendant-attorney. At the trial, portions of plaintiff’s testimony supported his ex-client’s contentions, other portions did not, and much of his testimony was cumulative. Plaintiff sought recovery from defendant of the portion of the contingent fee which the plaintiff had earned prior to his withdrawal from the case. The trial court found that there had been an implied agreement between plaintiff and defendant that each would share in the fee and that plaintiff, prior to his withdrawal, had performed twenty percent of the total legal services; but the court ruled that plaintiff was precluded by the Code of Professional Responsibility from sharing in the contingent fee. The District Court of Appeal, First District, affirmed on appeal.1 The Supreme Court of Florida, on conflict certiorari review, held, reversed: Absent bad faith or coloring of testimony affecting the outcome of the litigation, an attorney who withdraws from a case to become a material witness is entitled to the reasonable fee which he earned prior to the time he realized or should have realized the need for his testimony. *Hill v. Douglass*, 271 So.2d 1 ( Fla. 1972).

The ethical requirement that an attorney withdraw from the trial of a case when he learns or reasonably should have learned that he will

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