IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CICA (CIVIL) APPEAL No. 0016 of 2022
(GRAND COURT CAUSE No. G0216 of 2020)

ETTA LOU ROBINSON

APPELLANT

V

RANDY MCLEAN

ALFRED MCLEAN

RESPONDENTS

Before: **The Rt Hon Sir John Goldring, President**
The Hon John Martin KC, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: **Mr Clayton Phuran of CP Attorneys for Appellant**
Mr Crister Brady of Brady Law for Respondents

Heard: **5 September 2023**

Draft circulated: **12 March 2024**

Judgment delivered: **4 June 2024**

JUDGMENT

MARTIN JA:

1. This is an appeal from an order dated 30 December 2021 of Ramsay-Hale J (as she then was). By that order, the judge dismissed claims by the then plaintiff, Meldine Powell, relating to land said to be comprised in the estate of her father Alfred Lawrence Powell, deceased ("the

Deceased"), who died intestate on 3 January 1992 at the age of 96. Meldine Powell has now herself died, and the appeal is brought by her daughter and administratrix Etta Lou Robinson. The respondents to the appeal are the administrators of the Deceased's estate, Randy McLean and Alfred McLean.

Background

2. The Deceased was married once. He and his wife, Pearlitha, had ten children: Meldine, Astor, Ventris, Annistine, Leroy, Arlain, Roylin, Macey, Murphy and Byron. I will call these "the legitimate children". At the date of the trial, the only two still alive were Meldine and Arlain, although there were surviving issue of some of the others.

3. The Deceased also had seven children out of wedlock from a relationship with Lurline McLean. The Respondents are two of these children; the others are Dean Orr, Patricia Stoll, Laura Powell, Vadonna Powell, and George Powell. Although not all these children took the surname McLean, I will call them collectively "the McLean children".

4. Between 1918 and 1933 the Deceased bought and had conveyed to him three parcels of land in the Frank Sound area. I describe these parcels, which much later were registered as Midland East section, block 58A, parcels number 11 (subsequently renumbered 107), 40 and 41, individually by their parcel numbers and collectively as "the Land". The Deceased lived on the Land with Ms McLean, raised the McLean children on it, and farmed it until his death. After his death, the Respondents remained in occupation of the Land and continued to farm it.

5. In the 1970s, a system of land registration was introduced to the Cayman Islands. A land adjudication process was established by the Land Adjudication Act ("the LAA") of 1971. Its purpose was to facilitate the establishment of claims and the definition of boundaries; and a person found by the adjudicators to be entitled to a parcel was registered as proprietor of it in the Land Registry. The process of adjudication was completed by September 1977 and resulted in the registration of all land in the Cayman Islands. The Deceased would have been entitled to an adjudication in his favour by virtue of his documentary title to the Land, but he did not make a claim as required by section 6 of the LAA. The consequence of his failure to claim was that the Land was deemed by section 17(1) of the LAA to be Crown land, and title and the right to possession of it were vested in the Governor under sections 2 and 7 of the Governor (Vesting of Lands) Act, first enacted in 1964. The Crown was registered as proprietor of parcel 11 on 8 February 1977. It is unclear when it was first registered as proprietor of parcels 40 and 41; but edition 2 of the title register in each case was opened on 13 February 1998, so that first

registration will have occurred before that. It is reasonable to infer that the Crown was registered as proprietor on the same date in respect of all three parcels, that date being 8 February 1977.

6. As I have said, the Deceased died on 3 January 1992. On 15 September 2005 the Respondents were granted Letters of Administration of the Deceased's estate. This was despite the fact that as illegitimate children of the Deceased they had no interest in their own right in the estate. Although the Status of Children Act, 2003 had by then given equal status to legitimate and illegitimate children, section 20(3) of the Act provided that the estate of a person who had died intestate before the commencement of the Act should be distributed in accordance with any enactments and rules of law which would have applied to it as if the Act had not been passed. Those enactments included section 35(3) of the 1995 Revision of the Succession Act (which reflected the law as in force up to 22 February 1989, and hence at the Deceased's death), by which an illegitimate child was entitled to share in the estate of his intestate father only if the intestate had been adjudged to be the father by an affiliation order (see *In the Estate of B* [1999 CILR 460]), and no such order had been made in the present case. This meant that the change in status of illegitimate children did not affect the Respondents or the rest of the McLean children. The Respondents nevertheless claimed to be entitled to a grant on the basis that the majority of the legitimate children had renounced their interests in the estate in favour of the Respondents.

7. In about November 2006 a disposition of the Land was made to the Respondents as administrators of the Deceased's estate pursuant to sections 9 and 10 of the 2005 Revision of the Governor (Vesting of Lands) Act.

8. On 2 December 2006, the Respondents were registered as joint proprietors of Parcel 11, and they and the other five of the McLean children were registered as joint proprietors of Parcels 40 and 41.

9. On 3 July 2007, Meldine Powell and the other six then surviving legitimate children started proceedings ("the 2007 proceedings") with file number G282 of 2007 seeking (a) the removal of the Respondents as personal representatives of the Deceased's estate and the appointment of new personal representatives; (b) rectification of the land register; and (c) a declaration that they were "the bona fide beneficiaries of [the Deceased's] estate" in accordance with the Succession Act.

10. By order of the then Chief Justice made on 8 May 2019 the 2007 proceedings were struck out for want of prosecution. The Appellant suggested that there was some uncertainty about the status of this order, given the existence of a document purporting to be a minute of an order made on 7 May 2019 recording merely the removal of a stay of administration of the estate; but although both documents were signed by the Chief Justice, only that relating to the order made on 8 May 2019 bears the Court stamp, and the return date for the summons seeking to strike out the 2007 proceedings was 8 May 2019. In those circumstances, the judge was plainly entitled to proceed, as she did, on the basis that the 2007 proceedings had indeed been struck out. In his written submissions Mr Phuran for the Appellant suggested that we should if necessary give leave for an appeal out of time against the order striking out the 2007 proceedings; but there was no formal application to that effect nor any indication of the grounds on which an appeal might be advanced, and the matter was not pursued orally. Like the judge, I proceed on the footing that the 2007 proceedings no longer exist.

The present proceedings

11. The present proceedings were commenced on 26 October 2020. The procedure adopted was the issue of an ordinary summons in the 2007 proceedings, apparently reflecting the uncertainty as to the status of the order made on 8 May 2019; but the judge treated the summons as an originating process. The relief sought was the removal of the Respondents as administrators and the appointment of Meldine Powell in their place; and an order rectifying the land register by cancelling or amending the registration of the Defendants and the other McLean children as proprietors of the Land and restoring title to the Land to the Deceased's estate. Both the claim to remove the Respondents as administrators and the application to rectify the register were based largely on allegations that the Respondents had procured the grant of letters of administration to them, and their registration as proprietors of the Land, by fraud.

The judgment

12. As **I** have indicated, the judge dismissed the claim by order dated 30 December 2021 (but not filed until 20 June 2022). The key elements of her reasoning, expressed in her notably cogent judgment, were as follows:

(1) The prosecution of the present proceedings, despite the striking-out of the 2007 proceedings, was not an abuse of process. There had been no determination of the issues raised in the 2007 proceedings, and the Respondents would not be prejudiced in their defence because the resolution of the issues turned primarily on the construction of

documents and the application of statutory provisions to facts which were for the most part agreed.

(2) Having considered the evidence of the Appellant and of the Respondents, and affidavits made by others of the legitimate children in the 2007 proceedings, the judge stated (at paragraph 80) that she accepted and found that Meldine Powell did not give her consent to the Respondents' application or renounce her interest in her father's estate, but was satisfied on the Respondents' evidence that a majority of the legitimate children consented to the Respondents' application for a grant of representation and renounced any claim to their father's estate. At paragraph 81 she said that it followed from that and her other findings that Meldine Powell had failed to meet the burden of establishing on a balance of probability that the letters of administration were fraudulently obtained by the Respondents.

(3) The judge next identified the Respondents' defences to the claim to rectification of the register, the first of which was that the Deceased had given the land to them before his death. The judge considered and dismissed the Respondents' argument that a document executed by the Deceased in 1989, in which he said that he intended to claim the Land, to register it in his name, and subsequently to transfer it to the Respondents, constituted a gift of the Land to the Respondents. There is no cross-appeal in relation to her dismissal of that argument.

(4) The judge then turned to the Respondents' second defence, a contention that any claim by the legitimate children to the Land was already statute-barred by the time the 2007 proceedings were started, the Respondents having been in possession of the Land since the Deceased's death in 1992 and hence for longer than the 12 years limitation period applicable to actions for recovery of land. At paragraph 109, she said that "the right of action to recover the Land accrued at the date of [the Deceased's] death. The [Respondents'] possession from 1992 was at all times adverse to the Estate which was held on the statutory trusts and to [Meldine Powell] and the other children of the marriage who were the statutory beneficiaries". At paragraphs 129 to 131, she said this:

> "129. My view of the matter is not altered by the fact that the title was registered in the name of the Crown as unclaimed land between 1992 and 2005 in the circumstances where it is to be inferred that the Crown, in disclaiming title, accepted that [the Deceased] held the legal and beneficial title to the Land under the conveyancing deeds (some parts of it as far back as 1918), had remained in possession of the Land to the

date of his death and would have been entitled to be registered as proprietor of the Land during the land adjudication, had he made a claim.

130. I do not accept Mr Phuran's submission that, because the Land had been registered as Crown Land, the relevant period of limitation is 30 years and not 12. The Crown had no interest in the Land and is not a party to these proceedings. The suit is between the legitimate children of the intestate and children of the intestate born outside of marriage and the relevant period of limitation is 12 years.

131. I am satisfied and find that [Meldine Powell's] claim is statute-barred and strike it out accordingly. The [Respondents] acquired a valid title to the Land by adverse possession between 1992 and 2005. The Estate's title has been extinguished and the Register cannot be rectified to restore the Land to the Estate as prayed".

(5) Finally, the judge identified in the alternative the order she would have made had she held that the claim was not statute-barred. At paragraph 135, she said this:

"By virtue of the renunciation of their inheritance by the other children of the marriage in the [Respondents'] favour, the [Respondents] would be entitled to 9/10ths of the proceeds of sale of the Land under the statutory trust for sale. In the circumstances I would not remove them as Administrators or order rectification of the Register, but order that they value [the Land] and pay 1/10th of the value to [Meldine Powell]".

Appeal contentions

13. The Appellant's brief Notice of Appeal raised only the question of limitation. It described the judge's decision as being that "the Plaintiff's claim is unsustainable, on the basis that it is subject to a time limitation"; and the relief sought was "an Order that the Honourable Trial Judge failed to take account of the claim in breach of trust, which was not subject to a statutory limitation period".

14. The Grounds of Appeal, however, went considerably further. They listed eight findings of fact and nine findings of law which were challenged, the latter including the judge's conclusion that the respondents had acquired valid title to the Land by adverse possession between 1992 and 2005 against the Estate, that the Appellant's claim was statute-barred, and that the relevant period of limitation was 12 years and not 30 years as the Crown had no interest in the land and

was not a party to the proceedings. Of the actual grounds of appeal, it is worth quoting the following:

> "(c) The Learned Judge erred to consider or sufficiently consider the finality of the adjudication process under the [LAA] and the effect of the adjudication process on settling titles including the titles to the properties.
>
> (d) The Learned Judge erred in adjudging that limitation applied and that in any event the applicable limitation term is 12 years rather than 30 years in that the land was Crown land until the Crown vested the properties into the estate of [the Deceased] in or around December 2006.
>
> (e) The Learned Judge erred in finding that limitation applied and that such application was from the date of death of [the Deceased] noting that the property only became part of the Estate by the Crown vesting the same into the estate in or around December 2006".

15. In his oral submissions, Mr Phuran withdrew any challenge to the facts found by the judge in paragraphs 70 to 80 of her judgment. Although those paragraphs do not contain all the findings apparently challenged by the Grounds of Appeal, no attempt was made to dispute before us any other findings of fact, and I treat those findings as conclusive. The real focus of Mr Phuran's attack on the judge's conclusion was, as presaged in the paragraphs of the Grounds of Appeal quoted in the preceding paragraph, on the limitation position. He said that the land was Crown land between February 1977 and its transfer to the Respondents in about November 2006, that 30 years had not passed between those two dates, and that in consequence the Respondents had not acquired any title to the land until its transfer to them. That transfer had been to the Respondents in their capacity as administrators of the Deceased's estate, as the correspondence surrounding the transfer made clear. The Respondents accordingly held the Land on trust for the legitimate children as the only persons entitled under the Succession Act (or perhaps for the legitimate children and the McLean children, since the transfer of the Land to the Respondents had occurred after the coming into force of the Status of Children Act), and the same applied to the other McLean children who were registered as proprietors of parcels 40 and 41. Paragraphs 129 to 131 of the judgment (quoted in paragraph 12(4) above) were accordingly wrong, as was the judge's resolution of the claim.

16. Mr Brady for the Respondents contended that the judge's reasons and conclusion were right. As illegitimate children, the Respondents and the other McClean children were strangers to the

Estate; and by 2004 they had acquired title to the Land by 12 years possession adverse to the Estate since the Deceased's death in 1992. The Crown had no interest in the Land, and by transferring it to the Respondents as administrators acknowledged that the Deceased had a superior title to it. The relevant limitation period was accordingly 12 years, not 30, and by the time the Respondents obtained letters of administration it was they who owned the land, not the estate. But if that was wrong, more than 12 years had passed between the registration of the Land in the names of the Respondents and the other McClean children and the commencement of these proceedings, and the Respondents and the other McClean children had accordingly acquired title by virtue of their possession during that period.

Discussion

17. Whether or not the Respondents were properly appointed administrators on 15 September 2005, the fact of their appointment means that from that date they held the estate on trust for the persons entitled to it in law.

18. The persons entitled in law were those entitled under the Succession Act on the Deceased's intestacy, unless any other person had by the time of the grant acquired an interest in the estate or assets forming part of it (relevantly in the present case, by prior gift by the Deceased, assignment or prescription).

19. The judge considered in paragraphs 88 – 95 of her judgment the Respondents' contention that the Deceased had made a gift of the land to them and rejected it. As I have said, there is no cross-appeal disputing that decision.

20. The persons entitled under the Succession Act were the children of the Deceased (and remoter issue of any pre-deceasing children). As explained in paragraph 6 above, they did not at the date of death or subsequently include the Respondents or the other McClean children, who were illegitimate. The Status of Children Act, effective from 2004, which gave equal status to legitimate and illegitimate children, did not have retrospective effect. That did not change, as Mr Phuran suggested it did, when the Land was transferred by the Crown to the Respondents: section 20(3) looks to the date of death, not to the date when assets come into the estate. On the face of it, therefore, from the date of their appointment the Respondents held the estate for the Deceased's legitimate children or their descendants, save any who had validly assigned their interests to the Respondents.

21. Any assignment will have been effected, if at all, by the document referred to in para 17 of the judgment. This document, headed "Deed of Consent of Beneficiaries and Renounciation (sic) of Beneficiaries", but not apparently executed as a deed, is in the following terms:

> "1. We, the undersigned beneficiaries are the lawful children of Alfred Lawrence Powell deceased do hereby consent for our brothers Alfred Maclean and Randy Maclean to apply for a Grant of Letters of Administration in our place and that Letters of Administration be granted to them.
>
> 2. And further we the undersigned hereby renounce all our rights and claim as beneficiaries in our late father's estate the late Alfred Lawrence Powell in favour of his other children as named in the affidavit of the Administrators for a Grant of Letters of Administration. We do not intend to lay any claim to the estate now and in the future. And we further renounce all right and claim to the estate."

The document was signed by Astor and Leroy Powell and representatives of the "heirs" of Macey, Murphy, and Byron Powell. The names of the other then surviving legitimate children (including Meldine Powell) were typed, but they did not sign in manuscript. In relation to this document the judge held at paragraph 80 that a majority of the legitimate children (but not the Appellant) had renounced any claim to the Deceased's estate; but she did not in terms consider the legal effect of that. I return to this below, but for now proceed on the basis that. whatever its effect in relation to others of the legitimate children or their estates, it did not affect Meldine Powell's rights (or, in consequence, those of the Appellant).

22. The only real issue, therefore, is whether the Respondents had by the time of the grant to them already acquired title to the land by adverse possession.

23. Fundamental to a determination of that issue is the fact that the Deceased did not own the land at his death. Instead, because it was unclaimed by him in the adjudication process it was deemed to be Crown land under section 17(1) of the LAA ("All unclaimed and unoccupied land shall be deemed to be Crown land") and was registered as such with effect from 8 February 1977. The previously existing right of the Deceased to ownership and possession of the Land by virtue of his documentary title was extinguished.

24. The judge's view, stated at paragraph 92 in the context of her consideration of the Respondents' assertion that the Deceased had given the Land to them, was that "Alfred Powell's interest in the Land was a beneficial interest only, the legal estate being held by the Crown, following the

Land Adjudication process". Her statement in paragraph 129 that "it is to be inferred that the Crown, in disclaiming title, accepted that Mr Powell held the legal and beneficial title to the land under the conveyancing deeds …, had remained in possession of the Land to the date of his death and would have been entitled to be registered as proprietor of the Land during the land adjudication period, had he made a claim" suggests a similar view that the Deceased retained an interest in the land after the conclusion of the adjudication process and the registration of the Crown as proprietor of the Land.

25. It seems to me that the suggestion that the Deceased retained any interest in the Land after the conclusion of the adjudication process is inconsistent with the terms of the LAA. So far as the legal title is concerned, the only person with legal title was the registered proprietor, and until 2006 that was the Crown, as the judge recognised. In principle, the Deceased might have retained a beneficial interest in the Land, which would not have needed to be registered and which would because of his possession have taken effect as an overriding interest; but to allow the existence of such a right in a case like the present would be to disregard the finality of the adjudication process.

26. Relevant provisions of the LAA are as follows:

(a) Section 6(1)(c) provides for the Adjudicator to give notice requiring "any person who claims any interest in land within the adjudication section to make a claim thereto either in person or by agent within the period, not being less than two months, to the person, at the place and in the manner specified in the notice".

(b) Section 8 provides that "[e]very person claiming any land or interest in land within an adjudication section shall make his claim in the manner and within the period fixed by the notice given under section 6".

(c) Section 16(1) provides so far as relevant as follows:

> "In preparing the adjudication record —
>
> (a) if the Records Officer is satisfied that a person — …
>
> (ii) has a good documentary title to the land and that no other person has acquired a title thereto under any law relating to prescription or limitation, and that he would succeed in maintaining or defending such possession or title against any other person claiming the land or any part thereof,
>
> the Records Officer shall record that person as the owner of the parcel and declare his title to be absolute".

(d) Under s20 of the LAA, any person aggrieved by an entry in or omission from an adjudication record may petition the Land Adjudication Tribunal within a period specified by the Adjudicator under s19 (being not less than two months from the completion of the adjudication record).

(e) The LAA then provides as follows:

> "Finality of adjudication record
>
> 22. After the expiration of the period declared under section 19, or when all petitions presented to the Tribunal under section 20 have been determined, whichever is the later, the Adjudicator shall sign and date a certificate to the effect that the adjudication record is final, and forthwith give notice of such certificate and of the place and times at which the final adjudication record or an official copy thereof can be inspected, and deliver to the Registrar, for compilation of the register in accordance with the Registered Land Law (1995 Revision), the adjudication record, demarcation map and all other documents received by him in the process of adjudication.
>
> Appeal to Court
>
> 23. (1) Whoever, including the Governor, is aggrieved by any act or decision of the Adjudicator and desires to question it or any part of it on the ground that it is erroneous in point of law or on the ground of failure to comply with any procedural requirement of this Law, may appeal to the Court within thirty days from the date of the certificate of the Adjudicator given under section 22 or within such extended time as the Court may, on good cause being shown, allow.
>
> (2) On such appeal the Court may, if satisfied that the decision is erroneous in point of law or that the interests of the appellant have been substantially prejudiced by failure to comply with the procedural requirements of this Law, make such order or substitute for the decision of the Adjudicator such decision as it may consider just and may order, in such manner as it may think fit, rectification of the register kept under the Registered Land Law (1995 Revision).
>
> (3) Whoever, including the Governor, is aggrieved by an order or decision of the Court may appeal to the Court of Appeal in accordance with the Court of Appeal Law (1996 Revision) governing appeals in civil proceedings (but restricted to the matters stated in subsection (1)) and the Court of Appeal may, upon such appeal, either affirm, reverse or amend the order or decision of the Court and may order, in such manner as the Court of Appeal may think fit, rectification of the register kept under the Registered Land

> Law (1995 Revision), and may also make such order as to costs in the Court, and as to costs of the Appeal as the Court of Appeal thinks proper.
>
> (4) A decision of the Court, on appeal under subsection (1) or of the Court of Appeal under subsection (3), shall be in writing and copies of it shall be furnished by the court in question to the Registrar, the appellant and all other parties to the appeal and, by the Registrar to all other parties who, in his opinion, may be affected by the appeal. …".

27. In *Wood v Wood*, Summerfield CJ (upheld by this Court on other grounds {1980-3 CILR 281) said this, in a passage cited with approval by this Court in *Cook-Bodden v Kirkconnell* [1992-3 CILR 89]:

> "Once the adjudication record becomes final under s.22 of the Land Adjudication Law, 1971 (read with s.21) it extinguishes all legal estates and registrable rights and interests in land not reflected in the adjudication record. Any person claiming a legal estate or registrable right or interest not reflected in the adjudication record had his remedy under ss. 15, 20 or 23 of that Law. This court cannot allow any other process to debase the finality of the final adjudication record by way of alteration or the setting up of additional registrable estates or rights or interests in land. The plaintiff had his remedies under those sections."

28. In my view, this passage accurately states the consequences of the scheme of the LAA. Thus adjudication that the Land was Crown land was final under section 22 of the Act, subject only to the very limited remedies of objection/correction and appeal, none of which was taken up by the Deceased. To take the view that, despite adjudication in favour of the Crown and the absence of any attempt to correct or appeal that adjudication, the Crown holds the land on trust for a person by virtue of the very facts which would have entitled that person to be registered had he taken the necessary steps to obtain an adjudication to my mind defeats the whole scheme of the Act. I therefore reject the judge's view that the Deceased retained an interest in the Land after 8 February 1977.

29. There is no dispute that the Deceased, and subsequent to his death the Respondents, were in occupation of the land. Because neither the Deceased nor the Respondents had any legal or equitable right to possession, their possession – which in the Deceased's case had previously been referable to his legal title to the (unregistered) Land – became and remained adverse to the true owner – in this case, the Crown. Conversely, the person entitled to sue to recover possession was the Governor, in whom the right to maintain actions to recover possession of

Crown land was vested by sections 7 and 8 of the Governor (Vesting of Lands) Act; and his right to sue for possession arose as soon as the Deceased's possession became adverse to the Crown's rights. The right to sue for possession was, however, subject to a time limit; and a failure to sue before the time limit expired would have had the consequence either that the true owner's title would be extinguished under section 23 of the Limitation Act ("at the expiration of the period prescribed by this Law for any person to bring an action to recover land … the title of that person to the land shall be extinguished') or, in the case of a registered proprietor, that the registered title would be held on trust for the adverse possessor under section 135 of the Registered Land Act ("The Limitation Act (1996 Revision) shall apply to registered land in the same manner and to the same extent as it applies to land not registered, except that where, if the land were not registered, the estate, right or interest of the owner therein would be extinguished, such estate, right or interest shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said law, has acquired title against any proprietor …").

30. The corollary of the time limit applicable to actions to recover land is that an adverse possessor must remain in possession for the whole period of the time limit; it is only if he does so that the title of the true owner is extinguished or replaced by a trust in favour of the possessor, and the adverse possession becomes indefeasible. In the present case, therefore, in order to defeat the Crown's title and acquire one of their own the Deceased and the Respondents would (assuming their periods of possession could be aggregated) have had to have remained in possession of the Land for the full period available to the Crown for the recovery of possession. Anything short of that, and their possession would have remained merely adverse and vulnerable, and the title they would have been in the process of acquiring merely inchoate. But they did not remain in possession for long enough: the period available to the Crown for the bringing of actions to recover land is 30 years (section 21(1) of the Limitation Act), not the usual 12 years prescribed by section 19(1) of that Act, and 30 years had not quite passed between 8 February 1977 (when the Crown was registered as proprietor of the Land) and 15 September 2005 (when the Respondents became administrators of the estate).

31. Thus when the Respondents took their grant of Letters of Administration, they had not yet acquired a title of their own to the Land. Had they done so, they would have been entitled to administer the estate on the footing that the Land was not an asset of the estate at all. As it was, however, the Land was transferred to them by its true owner, the Crown, and received by them in their capacity as administrators. And as administrators, they were obliged to deal with it as mandated by the Succession Act – that is to say, by holding it on trust for the legitimate children, unless any of those children had assigned their rights to the Respondents.

32. I have set out in paragraph 12(4) above how the judge dealt with the issue of the Crown's entitlement. I have dealt above with the inference she drew in paragraph 129 of her judgment to the effect that the Crown acknowledged the title and right to possession of the Deceased: there was no such title or right, and no such inference can be drawn. In paragraph 130 she said that "The Crown had no interest in the Land and is not a party to these proceedings. The suit is between the legitimate children of the intestate and children of the intestate born outside of marriage and the relevant period of limitation is 12 years". It is of course the case that the Crown is not a party to the proceedings, but that is not to the point: in order to establish an independent right to the Land, the Respondents had to have defeated the Crown's rights, and they did not. It is also the case that the suit is between the two families of the Deceased; but the issue is whether the Respondents and the McClean children had by 2005 acquired any right adverse to the estate, and because of the effect of the LAA the estate did not have at any time prior to that any title or right to possession capable of being defeated by adverse possession.

33. I therefore think that the judge's erroneous view that the Deceased had any interest in the land after 1977 led her to focus on what the position would have been had adverse possession been claimed against the estate, rather than against the Crown – or, to put it the other way round, had the right to recover possession been vested in the estate rather than in the Crown; and that in consequence she failed to recognise what was the appropriate limitation period. The Respondents had not acquired title adverse to the estate by the time they took their grant in 2005, and the claim should not have been struck out.

Outcome?

34. What then should this court do? The alternatives appear to be to remit the proceedings to the Grand Court for further consideration or to adopt the judge's alternative solution.

35. I set out again what the judge said in paragraph 135 she would have done were she wrong in her initial view.

> "By virtue of the renunciation of their inheritance by the other children of the marriage in the [Respondents'] favour, the [Respondents] would be entitled to 9/10ths of the proceeds of sale of the Land under the statutory trust for sale. In the circumstances I would not remove them as Administrators or order rectification of the Register, but order that they value [the Land] and pay 1/10th of the value to [Meldine Powell]".

36. No doubt because this was merely a hypothetical alternative, the judge's rationale for this disposition is less clear than the reasoning in the rest of the judgment. On the face of it, the alternative resolution appears to assume a number of things which are capable of dispute. Thus the judge appears to go from a position in which a majority (albeit unstated) of the legitimate children renounced their interests in the estate (paragraph 80 of the judgment) to one in which all but Meldine Powell did so. She appears to assume without deciding that the renunciation quoted in paragraph 21 above was effective in law, although there must be doubts as to whether it was in fact executed as a deed in accordance with section 8 of the Property Miscellaneous Provisions Act or effective as an assignment of an equitable interest under section 5 of that Act. She does not overtly consider whether the document needs to be supported by consideration or rendered enforceable by a proprietary estoppel, and if so whether it is. Nor does she consider the effect of the continuing possession of the Respondents and the rest of the McClean children from 2006 until the start of the present proceedings in 2020, a period of more than 12 years potentially capable of extinguishing the title of the estate or of Meldine Powell and the Appellant.

37. The last of these points was raised by Mr Brady in his submissions to us - although as an alternative basis for upholding the judge's judgment it should have been the subject of a respondents' notice, which it was not. In relation to the Respondents themselves, it has no merit: as administrators they were in the position of trustees, and so subject to the provisions of section 27(1) of the Limitation Act, which states as follows:

> "No period of limitation prescribed by this Law applies to an action by a beneficiary under a trust, being an action — (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property, or the proceeds of trust property in the possession of the trustee or previously received by him and converted to his use".

The Respondents are registered proprietors of the whole of Parcel 11, and part proprietors of Parcels 40 and 41. Those parcels were all assets of the estate, and so trust property, and are in the possession of the Respondents. Section 27(1)(b) therefore applies to prevent their acquiring title as against any beneficiary, such as Meldine Powell and the Appellant. The same does not apply to the others of the McClean children: for limitation purposes they are not to be treated as trustees (*Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189), so section 27(1) has no application to them, and in theory their possession might be capable of defeating a claim by a beneficiary. Whether that is the case depends on the effect of the 2007 proceedings: on the face of it, they will have stopped time running, but there is authority (not cited to us) for

the proposition that time will have stopped running only for the purposes of those proceedings (which have been struck out) and not for the purpose of any other proceedings. See *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, per Roskill J at 125-6: "I think the true proposition in English law is that where in an action in the English courts the plaintiff seeks relief and the defendant pleads limitation, the issue which an English court has to determine is whether the action before the court, and not some other action, has been instituted within the relevant limitation period". On that basis, the current proceedings would have been brought out of time.

38. Despite these issues and misgivings, I have concluded that the judge's alternative solution is the one we should adopt. On a fair reading of the judgment, it is clear that the judge considered that, apart from Meldine Powell, the legitimate children who or whose descendants had not signed the renunciation document were nevertheless to be treated as bound by it. At paragraph 74, the judge found that the Respondents sought the consent of the legitimate children to their application for Letters of Administration and asked them to renounce their right to benefit from the estate, and recorded that the Respondents maintained that they had the agreement of the majority that they would not seek to claim any interest in the estate, even though only Leroy and Astor had renounced their rights as beneficiaries in writing. At paragraph 75 the judge said that the only evidence to contradict that assertion was the evidence sworn by those of the legitimate children who were plaintiffs in the 2007 proceedings, none of whom had given oral evidence – which was particularly noteworthy in the case of Leroy and Astor, who might have been expected to explain how they had come to sign the renunciation document. At paragraph 76, the judge said that she could not discount the possibility that, having given their consent as alleged by the Respondents, the other legitimate children were later persuaded by Meldine Powell to join her as plaintiffs in the 2007 proceedings. That certainly seemed to be the case with Leroy, and Arlain's failure to give evidence disputing that she had consented gave some weight to the possibility. At paragraph 77, the judge said that the conduct of the plaintiffs to the 2007 proceedings in waiting for two years before starting the proceedings and then failing to progress them belied the sincerity of the claim. At paragraph 78 she said that it would plainly be unsafe to rely on the untested evidence of Meldine Powell and Roylin; and at paragraph 79 she said that no weight could be given to the affidavit evidence in the 2007 proceedings. Those statements, which were in the end not challenged by Mr Phuran, appear to me to be adequate to support the judge's view, implicit in the alternative solution, that all the legitimate children apart from Meldine Powell had renounced any interest in the Deceased's estate in favour of the Respondents, whether in writing or not. As to whether those renunciations were binding, there was in my judgment more than enough material available to the judge to support a finding that

the legitimate children apart from Meldine Powell were estopped by their conduct from disputing the validity of the renunciations.

39. That leaves the question of limitation in the period between 2006 and 2020. It seems to me that it would be unfair now to let that issue be litigated further. As I have said, there was no respondents' notice raising the point. Had there been, the Appellant would have been alerted to the need to prepare arguments relating to the effect of the 2007 proceedings. These arguments might have included that the current proceedings were to be treated as a continuation of the 2007 Proceedings, for much the same reasons as the judge gave when refusing to strike them out; that the injunction granted in 2007 preventing the Respondents from dealing with the Land brought about a discontinuance of any adverse possession; and that if necessary leave should be given (as Mr Phuran mentioned in his written submissions) to appeal out of time the order striking out the 2007 proceedings. These matters are not capable of summary resolution by us, and in the circumstances it would not in my view be appropriate for them to be remitted to the Grand Court.

Disposition

40. I would therefore allow the appeal, but adopt the judge's alternative solution and direct that the land be valued and 10% of the valuation amount paid to the Appellant. If the parties are unable to agree the mechanics of identifying a suitable valuer and of payment I would propose that we deal with those matters on paper, as also with questions of costs. Any submissions in that regard should be made to us in writing within 21 days from handing down of this judgment.

41. As one of her reasons for declining to strike out these proceedings consequent on the striking out of the 2007 proceedings, the judge said this at paragraph 54 of her judgement:

> "I note too that these proceedings, and in that I include the earlier claim, are between brothers and sisters, albeit in different degrees, each claiming to be entitled to benefit from their father's estate. The original proceedings were very contentious, with allegations of dishonesty and threatening behaviour made and old wounds reopened. While the trial may not heal those wounds, it will give finality to the proceedings and settle the question of entitlement once and for all. Having considered matters in the round, I am of the view that the proper exercise of the Court's discretion is to allow the claim to proceed to a full hearing so that the issues between the parties may finally be resolved by the Court".

That resolution has now been achieved, although later than the judge expected, and it is very much to be hoped that there will now be finality in this regrettable dispute between family members.

MOSES JA:

42. I agree.

GOLDRING, JA (PRESIDENT):

43. I also agree.