



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 216 of 2020
(Probate & Administration 107 of 2005)

BETWEEN

MELDINE POWELL
(By her Guardian Etta Lou Robinson)

Plaintiff

AND

RANDY MCLEAN
ALFRED MCLEAN
(Administrators of the Estate of Alfred Lawrence Powell)

Respondents

OPEN COURT

Appearances: Mr. Clayton Phuran, Attorney-at-Law for the Plaintiff
Mr. Crister Brady Attorney at Law for the Respondents

Before: Hon. Mrs. Justice Margaret Ramsay-Hale

Heard: 28 April 2021

Draft Judgment circulated: 7 October 2021

Judgment Delivered: 30 December 2021

HEADNOTE

Administration - Application to remove personal representatives of an Intestate Estate on ground appointment obtained by fraud - s 8 of the Succession Act - Probate action to be commenced by Writ- Grand Court Rules Order 5 (2) - Probate and Administration Rules

Succession - Intestacy - Statutory trust for sale arising on intestacy - Whether defendants entitled on intestacy and holding land as trustees - Definition of child of the Intestate - ss29 and 30 (c) of the Succession Act (2006 Revision - Status of Children Act 2003 - s 35 (3) The Succession Act 1975 (Law 18 of 1975)

Land Law - Land Adjudication Act - Land registered in the Crown as unclaimed land - Whether held on trust for purchaser in possession

Land Law -inter vivos gifts of real property - Whether valid gift of land made to defendants - Milroy v Lord - Equity will not perfect an imperfect gift

Limitation of Actions - Succession - Intestacy - Adverse possession - Application of Limitation Act to equitable interests in land - Whether claim for rectification statute-barred - When right of action accrues - Whether defendants acquiring title by adverse possession - Whether grant of Letters of Administration revived Estate's Title - Doctrine of relation back - ss 19, 20, 24, 27 and 31 of the Limitation Act



Succession - Limitation of Actions - Claim for rectification of Register - Whether vesting of Land in the Estate by Crown revived Estate's title - s.23 Limitation Act

JUDGMENT

Introduction

1. The Plaintiff in this matter is Meldine Powell, who appears by her daughter and Guardian, Etta Lou Robinson. Ms. Powell is the daughter of Alfred Lawrence Powell, deceased, ("Mr. Powell") and his wife, Pearlithal, also deceased. The Defendants, Randy McLean and Alfred McLean, are her half-brothers on her father's side. They were appointed administrators of Mr. Powell's estate ("the Estate") by the Court on 15 September 2005 in an application bearing cause number P 107 of 2005.
2. The Estate is comprised of some 36 acres of land ("the Land") in Registration Section Midland East Block 58A, Parcels 11, 40 and 41. Parcel 11 is registered in the names of the Defendants as joint proprietors while Parcels 40 and 41 are registered in the names of the Defendants and their siblings of the whole blood as tenants in common in equal shares.
3. On 26 October 2020, by ordinary Summons filed in P 107 of 2005, the Plaintiff commenced proceedings to remove the Defendants as administrators of the Estate pursuant to section 8 of the **Succession Act** and appoint the Guardian or another as administrator in their place. The Summons also sought, among other things, an order to rectify the Land Register pursuant to section 140 of the **Registered Land Act**, *inter alia*, to cancel or amend the registration of the Defendants and their siblings as proprietors of Parcels 11, 40 and 41 and restore title to all the Land to the Estate.

Procedural History

4. At the first hearing of the matter on 6 November 2020, the Court observed that the application, properly construed, was a contentious probate action as defined in the **Probate and Administration Rules**¹ which must be commenced by way of Writ pursuant to **Grand Court Rules** Order 5 r 2 (e). Further, and in any event, the Plaintiff alleged, in her supporting affidavit, that the Defendants transferred the Land in the Estate to themselves in fraudulent breach of trust. Order 5 r 2 (b) provides that where any claim is based on an allegation of fraud, the claim should be commenced by way of Writ.

¹ The **Probate and Administration Rules** provide that "*a probate action is an action, other than a non-contentious action, for the grant of Letters of Administration of the estate of a deceased person or for the revocation of grant.*"



5. I note here that because the application was originally issued as a Summons in a pending cause, it was not filed by the Clerk of Court as an originating process and given a Cause Number as provided for by Order 5 r 5. This is an irregularity in the process which must be cured by the Plaintiff.
6. Mr. Brady, who appears for the Defendants, made an *in limine* (and, as it transpired, unfiled) application to strike out the Summons as an abuse of process on the ground that it raised the same issues and sought the same relief as in Cause No. G 282 of 2007 (“G 282 of 2007”) which had been struck out by the Hon. Chief Justice on 9 May 2019. Noting that Mr. Phuran, on behalf of the Plaintiff, had filed written submissions on the question of whether the action was an abuse of process, the Court invited Mr. Brady to file written submissions and adjourned the matter to 1 December 2020.
7. On 1 December 2020, the Court, having considered further submissions by Counsel, determined that before any interlocutory application could be decided, the best course would be for the claim to be fully particularized. The Court ordered that the matter be continued as if begun by Writ and directed the parties to agree any further directions necessary for the conduct of the trial or the hearing of any interlocutory applications. The proceedings were then adjourned generally.
8. The Order was not perfected. A Statement of Claim was filed by the Plaintiff on 26 January 2021 but no Defence was filed by the Defendants. In exercise of its case management powers, the Court, on its own motion, relisted the matter for 28 April 2021. The Defendants’ filed their Defence the day before the hearing along with a joint affidavit in lieu of witness statements. No point was taken by Mr. Phuran about the late filing of the Defence. Indeed, the parties were anxious to proceed with the matter to save costs and it was agreed that all matters would be resolved in a rolled up hearing, including the application to strike the claim as an abuse of process.

Factual Background

9. Ten children were born within the marriage of Mr. Powell and his wife, Pearlitha: the Plaintiff, Meldine, Astor, Vintris, Annistine, Leroy, Arlain, Roylin, Macy, Murphy and Byron. Although the marriage persisted, Mr. Powell and his wife ceased to cohabit as man and wife at a date unknown. He went on to establish a relationship with Ms. Lurline McLean with whom he had seven more children. The Defendants, Alfred and Randy McLean, are two of the seven.
10. According to copy deeds which were obtained by the Defendants from the National Archives, Mr. Powell purchased a parcel of land in an area of Frank Sound then known as ‘*Munk Cabbage*’ from an Albert Levy of Bodden Town on 28 December 1918 for the sum of £7. Another parcel was purchased from one Sarah McCoy of Bodden Town for £7 on 19 November 1924. A third parcel



was purchased from James Levy and his wife Isabelle for £25 on 8 March 1933 (“the Land”). Mr. Powell lived on the Land in Frank Sound with Ms. McLean where they raised their family together and he farmed the Land for as long as he was able. The Defendants knew the land intimately as they were regularly taken along the full perimeter of the lands by their father, and shown the boundary markers in the early mornings on their way to the farmlands.

11. The Intestate died at the age of 96. The Defendants remained in occupation of the Land and continued to farm it after his death.
12. The system of land registration commenced in the Cayman Islands in the 1970’s. The public was invited to make a claim to their land during the land adjudication process which was established by the **Land Adjudication Act (1971)**. Property interests and boundaries which were accepted by the adjudicators were recorded in the Land Register. A new register was opened for every parcel shown on the Registry map. Where no claim was made or where a claim was not accepted, the land in question was adjudicated Crown Land.
13. Mr. Powell never made an application to register the land he had acquired in Frank Sound. In consequence of that the Land, which was parcellated and registered as Midland East Block 58A, parcels 11, 40 and 41, was adjudicated Crown Land.
14. In 1989, Mr. Powell executed a document which was witnessed by the late Ronald McLean, JP of East End. The document states as follows:

“TO WHOM IT MAY CONCERN;

I, LAWRENCE ALFRED POWELL, INTEND TO CLAIM MY PORTION OF LAND BETWEEN FRANK SOUND AND NORTH SIDE BETTER KNOWN AS ‘MUNKCABBAGE’ BLOCK MIDLAND EAST, PARCELS 40 AND 41.

FURTHERMORE, I INTEND TO REGISTER THE SAID PARCELS IN MY NAME AND, SUBSEQUENTLY, TO TRANSFER THE ENTIRE CLAIM TO MY TWO SONS, TO BE SHARED EQUALLY BETWEEN THEM, NAMELY ALFRED NEVILLE MCLEAN AND RANDY HOWARD MCLEAN.”

15. In 2000, with the assistance of their attorneys, Peter Polack and Co., the Defendants applied to then Governor Peter Smith CBE for the transfer of the Land to them personally on the ground that their father had gifted it to them. That application was denied but after 5 years of pursuit by the Defendants, the Governor in Cabinet announced that it was intended to vest the land formerly deemed Crown Land into the Estate of Alfred Lawrence. The Notice was gazetted on 8 February 2005.

16. The Defendants, relying on legal advice, applied for a grant of Letters of Administration in the Estate on 18 August 2005. In their affidavit in support of the grant, the Defendants acknowledged that their father was still married at the date of his death, that their father and his wife had ten 'lawful' children and that he and his brothers and sisters were his illegitimate children. They asserted that a majority of their father's lawful children had consented to their application and that those who consented had renounced any interest in the Estate. The application was accompanied by a *Deed of Consent of Beneficiaries and Renunciation of Beneficiaries* signed by Astor Powell and Leroy Powell as well as by the children of Macey Powell (dec'd) Murphy Powell (dec'd) and Byron Powell (dec'd), representing a further three of the remaining seven children of the marriage. Both Murphy and Byron had predeceased their father.²

17. The Deed was in the following terms:

"1. WE, the undersigned are the lawful children of ALFRED LAWRENCE POWELL, deceased DO HEREBY CONSENT for our brothers ALFRED MCLEAN and RANDY MCLEAN 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 our entire 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 state now and in the future.

AND we further renounce all right and claim to the estate."

18. The Plaintiff and her brother Roylin Powell ("Roylin"), also a child of the marriage, became aware of the gazetted Notice to vest the Land into their father's estate in or around May 2005. Roylin and the Plaintiff instructed attorney-at-law Keith Collins to act on their behalf in seeking to have their claim to the Land recognised "*on the basis of long possession*".

19. On 7 June 2005 Mr. Collins in a letter to the Governor, copied to the Land and Survey Department, made a claim on behalf of the lawful children of the marriage. In affidavits sworn in support of their application, the Plaintiff and Roylin asserted, erroneously, that Mr. Powell had inherited the Land from his father who had in turn inherited it from his grandfather and claimed, quite untruthfully, that they and the other children of the marriage had taken over the Land since his death and had occupied it since.

² Section 31(1)(a) **Succession Act (1995 Revision)** provides that the issue of any child of the intestate, who predeceases the intestate, is entitled to their parent's share.



20. On 15 September 2005, the Defendants were granted Letters of Administration in the Estate.
21. In June 2006, Mr. Collins applied for and received permission to view the file in which the grant of Letters of Administration to the Defendants was made. No steps were taken to challenge the grant.
22. On 12 October 2006, the Plaintiffs were advised by the Lands and Survey Department, in a letter to their attorney, that the Department had been instructed by the Permanent Secretary of the relevant Ministry to proceed with the transfer of the Estate to the Defendants as Personal Representatives.
23. The same advice was tendered by the Deputy Permanent Secretary in that Ministry in a letter to the Plaintiffs' attorney dated 30 October 2006, in which she also made the point that *"the determination and/or confirmation of the beneficiaries of the estate are not matters for either the Cabinet or the Legislative Assembly, but for the Estate and the Courts."* All documents submitted on behalf of the Plaintiff to the Ministry were returned.
24. On 2 December 2006, transfers of the Land by the Defendants to themselves and to their siblings were registered. Parcel 11, which comprised most of the land which Mr. Powell used to farm, was registered in the names of the Defendants as joint proprietors and Parcels 40 and 41 were registered in their names and those of their full siblings, Dean Orr, Patricia Stoll, Laura Powell, Vadonna Powell and George Powell as tenants-in-common in equal shares.
25. On the 3 July 2007, the Plaintiff and the surviving children of the marriage, Ventris, Astor, Annistine, Arlain, Leroy and Roylin, filed the Originating Summons in G 282 of 2007 which sought (i) the removal of the Defendants as personal representatives for the Estate (ii) that new personal representatives be appointed (iii) that the Registered Land transfers made by the Defendants be revoked and (iv) that there be an order for rectification of the Land Register. They also sought a declaration that they were the majority of the lawful children of Mr. Powell and *"the bona fide beneficiaries of his estate"* in accordance with the **Succession Act**.
26. The matter continued as if brought by Writ. The Statement of Claim, which was amended and filed on 13 August 2009, alleged that the Defendants had obtained the grant of Letters of Administration by fraudulently misrepresenting that a majority of their father's children, born within the marriage had consented by Deed to their application and that those who consented had renounced any interest in the Estate. The claim alleges that that Astor gave his consent because he *"had emotional and habit forming problems he was attempting to deal with at the time"* and that Leroy was 85 when he signed the Deed and *"had terrible eyesight"*. The fact that



the children of Macey, Murphy and Byron Powell had signed the Deeds of Consent and Renunciation as beneficiaries of their parents' estate was not challenged.

27. The Defendants were enjoined from any further dealing in the Land by Levers J who granted the Plaintiffs' application for an injunction on 30 August 2007.
28. After the Amended Statement of Claim was filed in 2009, no further steps were taken by the Plaintiffs. Annistine Powell-Seymour passed away in 2008. In April 2010, Leroy wrote his attorneys and asked to be removed as a Plaintiff in the proceedings. He then passed away on 17 March 2012. Roylin followed on 31 July 2017, Astor on 4 December 2017 and Ventris on 13 March 2018.
29. The Defendants' attorney sought to progress the matter in correspondence with the Plaintiffs' attorneys in 2012. There a brief exchange of correspondence which ended in 2013 which failed to advance the proceedings. In 2018, the Defendants through their new attorney, Mr. Brady, again opened correspondence with the attorney of record for the Plaintiffs in Cause G 282 of 2007. He advised Counsel for the Defendants that he had had no instructions in the matter since 2013.
30. In November 2018, the Defendants gave Notice of Intention to Proceed. At that date, only the Plaintiff and her sister Arlain remained alive. The Notice and the Defendants' later Summons to strike out Cause G 282 of 2007 were served on the Plaintiff, who was then of advanced years and a resident in a nursing home, as well as on Mr. Lenford Pandohie, the son of Etta Lou Robinson, who held himself out to be the guardian for the Plaintiff who is his grandmother. The Notice and the Summons were also served on Arlain Powell.
31. KSG Law wrote to Mr. Brady in response to the Summons to advise Mr. Brady that they had been approached by the 2nd and 4th and the 5th Plaintiffs or their representatives. Before the hearing of the Defendants' application to strike, however, KSG advised by way of email dated 4 May 2019, that they had not come on record as only a representative of Ventris Powell had come forward to discuss the matter with them. KSG also stated that:

“Ventris Powell is deceased and no grant of probate has been made although an application is pending with the Probate Registry. As far as the representatives of the representatives of [her] Estate can give instructions to us pending the actual grant of probate, our instructions are that they do not want to pursue the matter. With respect to the other 6 Plaintiff I do not have any instructions whatsoever.”

32. The Defendants' application was heard on 8 May 2019. Although in better health than the Plaintiff, Arlain did not appear at the hearing of the Defendants' application to strike out her claim. Only Mr. Pandohie attended, as guardian for the Plaintiff. The application was granted by the learned Chief Justice who stated during the course of rendering his decision that he *“could find*



no justifiable reason for the matter not to be struck out as an abuse of the process of the Court".
There was no appeal from the Chief Justice's Order.

The Claim

33. As in G 282 of 2007, the Plaintiff claims against the Defendants in fraud, the particulars of which allege, *inter alia*, that the Defendants obtained the grant of Letters of Administration by falsely and dishonestly representing that the majority of the lawful children had consented to their application and had renounced any claim or right to the Estate. The Plaintiff says further that, having obtained that grant of representation, the Defendants caused the transfer of the Land into their names and the names of their siblings in fraudulent breach of trust. The Plaintiff therefore, seeks an Order that the Land Register be rectified to restore the Land to the Estate.

Application to Strike as an Abuse of Process

34. The first issue for resolution is whether the application should be struck out as an abuse of process on the ground that it seeks the same relief on the same grounds as in G 282 of 2007 which had been struck out for want of prosecution.

The Evidence on the Strike Out Application

35. In her evidence, Ms. Robinson sought to explain the failure of her mother, the Plaintiff, to move the matter forward. She recounted that, between 2006 and 2007, she returned to Cayman from the United States where she had lived and worked in order to look after her mother. Her mother needed assistance because her home was still in need of repairs following the passage of Hurricane Ivan in 2004. She was also a diabetic and had, by 2008, developed painful ulcers on her legs which made it very difficult for her to get around. She was prescribed the drug Warfarin. At some time in either 2010 or 2011, the drug caused her to hemorrhage internally and to lapse into a coma. She recovered from the coma but later, in 2011, she had a stroke. In 2014, she suffered a massive stroke which left her unable to take care of herself. At the time these proceedings were incepted, she was being fed via a nasogastric tube and required constant nursing care.
36. Ms. Robinson said her mother paid her lawyers \$600 per month between 2008 and 2014 and had paid upwards of \$25,000 in legal fees when she had her stroke in 2014. Her siblings who were parties to the claim became ill and/or died over the period. She said she paid no attention to the matter until it was struck out in 2019 when her son reported to her that the Judge had asked him where his mother was, as she was the Plaintiff's heir. Ms. Robinson also said that she instituted these proceedings on her mother's behalf because her mother always believed that she deserved a piece of the Land.

37. Randy McLean (“Randy”) gave evidence on behalf of the Defendants. With respect to the Plaintiffs’ conduct of the former proceedings, he made the point that the Plaintiff and the other children of the marriage had done nothing to revoke the grant of representation to him and his brother, despite being aware of the grant in 2005 and the transfers of the Land made by him and Alfred as Administrators in 2006. Instead, they waited until 2007 to file the earlier proceedings which they then failed to pursue after they got the injunction barring them from doing anything with the Land. He said the Plaintiffs did nothing to progress the matter thereafter except in response to any step they as the Defendants took.
38. Randy also said that as a result of the Plaintiff’s failure to proceed with the matter and the matter being struck out, they were entitled to believe and did believe that the matter was at an end and, on the strength of that belief, they had gone to great expense to clear and restore the Land which had been left fallow following the grant of the injunction.
39. He said that he did not think it was fair that he and Alfred should now have to face the same claim again given the Plaintiff’s excessive delay in prosecuting the earlier matter with this matter now being brought some 28 years after their father’s death and 15 years after they were granted representation in the Estate. He also stated that he and his brother have been prejudiced in their defence of these proceedings in the circumstances where the Plaintiff seeks to rely on her affidavits and the affidavits of the other plaintiffs filed in G 282 of 2007, none of whom are available to be cross-examined.

The Law

40. The question of whether it is an abuse of process, to bring a second claim after an earlier claim dealing with the same subject-matter was struck out, was considered in *Wahab v Khan* [2011] EWHC 908 (Ch), on which Mr. Phuran relied in defending the application to strike. Briggs J provided the following useful summary of the law:

“[16] The bringing of a second claim where an earlier claim based upon the same facts or seeking the same relief has failed may give rise to a number of different types of what may loosely be called an abuse of process. The clearest instance is where the claim or issue in dispute has already been adjudicated upon between the same parties (or their privies) in the earlier case, where the second claim will generally be barred as being res judicata, or subject to a fatal issue estoppel. That is a matter of substantive law, rather than the court’s case management powers arising from abuse of process: see Johnson v Gore Wood and Co [2002] 2 AC 1 at 59E, per Lord Millett.

[17] The second is where the claim or issue raised in the second case is one which both could and should have been brought in the first case, where the first case has either been

adjudicated upon or concluded by a settlement. This is what is sometimes called Henderson v Henderson abuse (a label derived from the leading case of that name) but is comprehensively analysed in Johnson v Gore Wood. It is underpinned by the same public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter: see per Lord Bingham at p 31B. The question whether such a claim should have been raised for adjudication in earlier proceedings requires a:

“broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

per Lord Bingham at p 31D to E.”

41. Where the claim was struck out for want of prosecution, as in this case, it may amount to an abuse of process if the claimant brings the second claim without complying with any relevant orders for costs. Briggs J said this at paragraph 19 of the judgment:

“In such a case the potential for abuse lies in the unfairness of putting the Defendant to the expense of fresh proceedings while his costs of previous proceedings remain unpaid: see Investment Invoice Financing Ltd v Limehouse Board Mills Ltd. [2006] EWCA Civ 9 per Moore-Bick LJ.”

42. The learned Judge said further that,

“It has been recognised since the mid-nineteenth century that the normal response of the court to such a case is to stay the second claim until the costs ordered in the first claim have been paid.”

43. The claim may also be struck out if the Court is satisfied that the bringing of the second claim amounts to an abuse as amounting to a disproportionate use of the Court’s resources. In *Securum Finance Ltd. v Aston* [2001] Ch 292, to which Briggs J referred, Chadwick LJ said this at p 309:

“For my part, I think that the time has come for this Court to hold that the “change of culture” which has taken place in the last three years – and, in particular, the advent of the Civil Procedure Rules – has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the CPR in

mind – and must consider whether the claimant's wish to have “second bite at the cherry” outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this Court in the Arbuthnot Latham case - in a passage at page 1436H-1437B:

“The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see Janov v Morris [1981] 1 WLR 1389. The position is the same as it is under the first limb of Birkett v James. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.””

44. The overriding objective of enabling the Court to deal with cases justly and at proportionate cost, which is found in the UK’s **Civil Procedure Rules** to which the learned Judge of Appeal referred, also finds expression in our Grand Court Rules. Thus, a disproportionate use of the Court’s resources may be, on the same principle, a ground on which to strike out a fresh claim.
45. Briggs J summarised the relevant principle in this way:

“[22]... it was recognised by the Court of Appeal in [Arbuthnot Latham] following Grovit v Doctor [1997] 2 All ER 417, [1997] 1 WLR 640, [1997] NLJR 633, that continued litigation with no intention to bring it to a conclusion can amount to an abuse of process. It follows that a careful assessment of the question whether this ... type of potential abuse is demonstrated in any particular case requires an analysis both of the Claimant's conduct of the earlier claim, and the reasons for its being struck out, as well as an appreciation of the extent to which the combined effect of the first and second claims may place a disproportionate burden on the court's resources, as well as a balancing of those factors against the reasons why the Claimant wishes to have a second bite of the cherry.”

46. In his submissions seeking that the action be struck out, Mr. Brady argued that no sufficient explanation had been given for the Plaintiff’s failure to progress G 282 of 2007 which is matter that the Court should weigh in exercising its discretion. He relied on that passage in the *Arbuthnot* decision cited by Chadwick LJ (*supra* para 43):

“The question whether a fresh action can commence will then be a matter for the discretion of the Court considering any application to strike out that action and any excuse given for the misconduct of the previous action. ... in exercising its discretion as to whether to strike out the second action, that court should start with the assumption that as a party has had



one action struck out for abuse of process, some special reason has to be identified to justify a second action being allowed to proceed.”

and submitted that the Plaintiff had failed to show any good reason why the action should be allowed proceed. He urged the Court to find that the proper exercise of its discretion would be to strike out the claim.

47. Mr. Phuran submitted on behalf of the Plaintiff that there was no abuse of process as the issues between the parties had never been adjudicated and there had not been a disproportionate use of the Court’s resources by the Plaintiffs, but merely a failure to progress the matter.

Decision on the Strike Out Application

48. There is no bar to this matter proceeding on the first ground identified by Briggs J as there was no determination of the issues raised between the Plaintiff and the Defendants in G 282 of 2007.
49. In these proceedings, the Plaintiff continues, through her daughter - *cum* - guardian, to assert her claim, and the claims of the other children of the marriage and/or their issue, to a share in the Estate. I accept the Defendants’ evidence that the Plaintiff took no steps in the earlier proceedings save in response to their own, but that is not sufficient by itself to support a finding that the Plaintiff’s delay in progressing that matter was intentional and contumelious as in *Arbuthnot*. Rather, the claim was simply “*allowed to go to sleep*,” to borrow a phrase from Briggs J.
50. The mere fact that the first action was struck out for delay does not warrant the striking out of the second action in the absence of any misconduct on the part of the Plaintiff in the conduct of the first.
51. The nature of the Plaintiff’s claim is also an important factor in this application. The Plaintiff claims to be entitled with the other children of her parent’s marriage to a share in the proceeds of sale of land held by the Defendants as trustees under the statutory trust for sale arising on her father’s death intestate. The claim is brought against the Defendants to recover the land on the ground that the Defendants transferred it to themselves and others in fraudulent breach of trust. For policy reasons, it is a cause of action for which no limitation period is prescribed by the **Limitation Act**, as has been set out more fully below.
52. I also consider that the Defendants will not be prejudiced in their defence because the resolution of the issues arising in this matter turns primarily on the construction of documents which have been exhibited and the application of various statutory provisions to facts which are for the most part agreed.
53. Although the decision in *Khan’s* case suggests that it would be appropriate to stay the proceedings until the costs of the first application are paid, the effect of such an order would be to strike out

of the Plaintiff's claim through the back door, so to speak, as the Plaintiff has no means. Such a result would not be fair in the circumstances where the Court is satisfied that there is no prejudice to the Defendants in being required to defend the claim.

54. 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 a 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 matter 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.

The Defence

55. In their Defence, the Defendants deny they obtained the grant of Letters of Administration by fraud, asserting that they at all times acted on the advice of their attorneys. They say further that they distributed the Land in accordance with their father's wishes, consistent with the gift he made to them of the Land in 1989. They plead, in the alternative, that the present proceedings to rectify the Land Register to restore the Land to the Estate is statute-barred by the **Limitation Act** which bars actions for the recovery of land 12 years from the date on which the right of action accrued.

The Issues

56. The primary issue for resolution is whether the Plaintiff is entitled to have the Land Register rectified to restore the title to the Land to the Estate. The resolution of that issue turns on the question of whether Mr. Powell had made a valid *inter vivos* gift of the Land to the Defendants before his demise. Alternatively, the resolution of the issue turns on the question of whether the Estate's title had survived the Defendants' possession of the Land between 1992 and 2005 which was adverse to the interests of those entitled on intestacy. Notwithstanding the apparent simplicity of the claim and the defence, the case has raised a number of complex and novel questions of law requiring the construction of a number of statutes.

The Evidence in the Action

57. Ms. Robinson's evidence was that she had known that Mr. Powell owned the Land in Munkcabbage for over 60 years. Had known about it since she was a child. She recalled that after Church on Sundays, she and her cousins would take the horse and donkey to the Land for him to have on the Monday morning when he went to the farm. She said the Land had not come to, Mr.



Powell from his great-grandfather. In fact, she said, nobody knew who Mr. Powell's great-grandfather was. Whoever he was, he had not lived in Cayman.

58. Her evidence was that the Land had been purchased by Mr. Powell. She recounted that her grandmother - Pearlitha - had found some barrels of crude oil which had fallen off a ship and come up through the Breakers channel. Mr. Powell had taken those barrels and sold them to the Government and used the money from that sale to buy the Land. Her mother - the Plaintiff - believed that Mr. Powell had sold the Land but she later discovered that the "*government had taken it*" when there was "*an advertisement*" for the Powells to claim their Land.
59. It was Ms. Robinson's evidence that Mr. Powell had also owned land in Breakers and in Mastic but none of the children of the marriage got any of that land from him, except Byron who got a piece of land in Breakers. She said she believed that the land in Mastic had been sold to build a house in East End for Lurline McLean, the Defendants' mother and that she was unaware that the Defendants had lived on the Land since the date of their father's death in 1992 up until the day they applied for Letters of Administration in 2005.
60. Mr. Phuran sought leave to adduce into evidence the affidavits sworn by the all the plaintiffs in G 282 of 2007, with the exception of Arlain's affidavit who was available and could have attended Court, albeit with some degree of difficulty.
61. Counsel submitted that the affidavits were admissible under section 45 (1) of the **Evidence Act** as statements made out of the Court and relevant to the question of whether the Defendants had obtained the Letters of Administration by fraud by falsely swearing that the majority of the children of the marriage as well as those persons "*having an immediate or contingent interest in the deceased estate*" had consented to their application and had "*renounced their right and claim to the estate*".
62. Notwithstanding the affidavits were not sworn in the main proceedings in G 282 of 2007 but in support of the interlocutory application to restrain the Defendants from dealing with the Land, the Court admitted the affidavits de *bene esse*.
63. In her affidavit, the Plaintiff stated that only two of Mr. Powell's seven children then alive had given their consent to the Defendants' application for Letters of Administration and renounced their right to share in their father's estate. She suggested that their consent was not fully informed. She said of Leroy who had consented, that:

"Leroy was around 85 years of age at the time he was asked to sign the Deed renouncing his rights, had terrible eyesight (sic)."

by which I take her to mean that he did not know what he was signing.



64. With respect to Astor, who had also consented, she stated:

“Astor had some emotional and habit forming problems he was dealing with at the time, which may have clouded his judgment.”

which may be intended to suggest that he lacked the capacity to consent.

65. The other plaintiffs gave no independent evidence in their affidavits but simply adopted the contents of the Plaintiff’s affidavit *“without exception”*. More significantly, neither Astor nor Leroy gave any evidence explaining how it was they came to sign the Deed.
66. In his evidence, Randy spoke of his years growing up on the Land with their father, of farming the Land with him as children and later as adults, during the 70’s and 80’s and that he and Alfred had carried on occupying and farming the Land after their father’s death.
67. Randy said his father had given them a blue suitcase in which the Deeds were kept and told them the Deeds were recorded at the Archives in George Town. He said that the first time his father had shown them the Deeds was when Mr. McLean had come to the house to witness what he referred to as his father’s Will. After the Will was signed, all the documents were put back into the suitcase for safekeeping. When he was about 25, he decided that he needed to *“sort the property”*. He retrieved the Deeds from the blue suitcase which had been stored away in his mother’s ceiling and took them to the Department of Land and Survey as evidence of their title to the Land. The Deeds were considered by the Department and it was later confirmed that the documents were legitimate. As a result, he and his brother instructed Mr. Peter Polack to help them claim the Land back from the Crown.
68. He said, which was denied by Ms. Robinson, that the children of the marriage had already *“gotten what they were supposed to get”* which was the land their father owned in Breakers and that their father had intended the Land to be for his illegitimate children. He noted that before the Land was vested in the Estate, the Plaintiff had always insisted that Mr. Powell had no land in Frank Sound. It was quite evident that he took umbrage at her attempt to claim an interest in an Estate that she once denied existed. He also stated that if he and his brother had not petitioned the Governor to vest the Land in them but continued to live on the land as before, they would still be living there undisturbed by the Plaintiff and the other children of the marriage who did not know anything about the Land until the Notice was gazetted.
69. In cross-examination, he maintained that the majority of the children of the marriage had given their consent and that he had not lied his affidavit in support of his application, to which the consents of only two of the seven surviving children was appended. He said that only those two



had signed their consent, but others had said they were not getting involved with the Land, because "*it was for you younger ones*".

Findings of Fact

70. Having considered the evidence in the round, I reject Ms. Robinson's evidence that she knew that her grandfather, Mr. Powell owned the Land and used to go up there on Sundays after church when she was a child. The evidence shows, quite plainly in my view, that none of the children of the marriage were aware that Mr. Powell owned the Land. The Plaintiff, in her affidavit sworn in support of her application for the Land to be vested in the children of the marriage, stated that the land had been inherited by Mr. Powell from his father who had inherited it from his father. The Deeds show to the contrary that the Land was purchased by Mr. Powell. The Plaintiff's further assertion in that affidavit, that she and the other children of the marriage had occupied the Land after his death, was another convenient lie told in order to lay claim to the Land once she became aware it was part of her father's estate.
71. Ms. Robinson's story about the land being purchased by Mr. Powell's father, Lawrence, with money received from the sale of crude oil has the appearance of being made out of whole cloth and contradicts the Plaintiff's own account, in any event.
72. I accept Randy's evidence that the Plaintiff did not know that Mr. Powell owned land in Frank Sound and had declared that "*Alfred Powell had no land up there*".
73. I am satisfied and find that, when the Defendants instructed Mr. Polack to make an application to the Governor for the Crown to disclaim the Land, they were at all times acting in the genuine belief that their father intended them to have the Land and had indeed made them a gift of the land before his death. I am also satisfied and find that when the Defendants applied for a grant of Letters of Administration in the Estate, the Defendants had no intention of administering the Land according to the **Succession Act**. Randy's evidence was that his father left nothing in Frank Sound for the children of the marriage who had already "*got what they were supposed to get*" from their father's Land in Breakers. He said that he intended to distribute the Estate to his mothers' children all of whom "*grew with them as family*".
74. The application for Letters of Administration was made on the advice of lawyers and the Defendants sought the consent of the children of the marriage to their application and also asked them to renounce their right to benefit from their inheritance arising on Mr. Powell's intestacy. The Defendants maintain that they had the consent of the majority to their application as well as their agreement that they would not seek to claim any interest in the Estate, though only Leroy and Astor had renounced their rights as beneficiaries of the Estate in writing.



75. The only evidence to contradict that assertion is the evidence to the contrary contained in the affidavits sworn by the plaintiffs in G 282 of 2007 which has not been tested in cross-examination. None, as I have said, apart from the Plaintiff give any independent evidence. This is particularly noteworthy in the case of Leroy and Astor who might have been expected to explain the circumstances under which they came to sign the Deeds renouncing their interest in the Estate or how their poor eyesight or emotional problems vitiated the consent they gave in writing.
76. I cannot discount the possibility that, having given their consent as asserted by the Defendants, the other children of the marriage were later persuaded by the Plaintiff, who was the lead plaintiff in G282 of 2007, to join her in the suit. Certainly, it appears from the evidence that Leroy had been persuaded but later changed his mind and decided to put matters right, as he wrote a letter to the attorney with conduct of G 282 of 2007 to advise that he did not wish to pursue the claim. The fact that Arlain has not attended and given evidence to contradict the Defendants' claim that she consented to their application and renounced her right to benefit from their father's Estate, also lends some weight to that possibility.
77. There is nothing in the conduct of the earlier proceedings to support the Plaintiff's claim that the majority of the lawful children did not consent to the Defendants application for Letters of Administration and had not renounced their interest in the Estate. The children of the marriage waited two years to challenge the grant of representation made to the Defendants on that basis and then failed to progress the matter, which is conduct which belies the sincerity of their claim, particularly in the absence of any explanation for the delay in instituting the proceedings or the failure to progress the matter. It is not enough to say that the plaintiffs in G 282 of 2007 fell ill or passed away as they didn't all do so at the same time.
78. Finally, in the circumstances where the Plaintiff and her brother Roylin both lied in their applications to the Governor seeking to have the Land vested in them,³ it would plainly be unsafe to rely on their untested evidence.
79. In my view, no weight can be given to the affidavit evidence in G282 of 2007 on which the Plaintiff seeks to rely.
80. I accept and find that the Plaintiff herself did not give her consent to the Defendant's application or renounce her interest in her father's Estate - indeed, the Defendants have never contended otherwise - but I am satisfied, on the Defendants' evidence, that a majority of the children of the

³ Paragraph 18 *supra*.



marriage consented to their application for a grant of representation and renounced any claim to their father's estate, as the Defendants stated in their Affidavit of Administrator.

Claim for a Declaration that the Letters of Administration had been obtained fraudulently

81. It is trite law that he who avers must prove. It follows from the foregoing findings of fact that the Plaintiff has failed to meet her burden of establishing on a balance of probability that the Letters of Administration were fraudulently obtained by the Defendants as alleged and her claim for a declaration in terms is dismissed.

Claim for a Declaration that the legitimate children are legal and beneficial owners of the Land

82. The Plaintiff claims to be entitled to a declaration that the legitimate children of Alfred Powell and/or their issue *per stirpes* are the legal and beneficial owners of the Land by virtue of the provisions with regard to the devolution of land on intestacy set out in the **Succession Act**. The relevant provisions are section 29(1) and 30(1) which provide as follows:

“29. (1) The residuary estate of an intestate, not being an entailed interest, shall be distributed in the manner or held on the trusts mentioned in this section namely-

...

(c) if the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

...

30. (1) Where, by this Law, the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts

(a) in trust in equal shares if more than one, for all or any of the children or child of the intestate, surviving the intestate, who attain the age of eighteen years...”

83. It follows from the imposition of the statutory trust for sale on intestacy that the Plaintiff's claim for a declaration of legal or beneficial entitlement to the Land falls at the first hurdle. The beneficiaries of the statutory trust created by the **Succession Act** do not have an interest in land but only an interest in personal property, being the proceeds of the sale of land.

84. The Plaintiff is not entitled to the declaration sought and her claim for a declaration is dismissed.



The Claim for Rectification

85. The Plaintiff's substantive claim - or what remains of it - is that she is entitled to an order for rectification of the Land Register to restore the Land to the Estate so that it can be administered according to the **Succession Act** in respect of her interest which she has never renounced. She contends that the Defendants transferred Parcels 11, 40 and 41 to themselves and their siblings in fraudulent breach of trust, intending to cheat her of her inheritance under the **Succession Act**.
86. Section 140 of the **Registered Land Act** under which the application is made provides as follows:
- "140. (1) Subject to the Land Adjudication Law (1997 Revision) and to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake. "*
87. The Defendants raise two defences to the Plaintiff's claim for rectification: the first is that Mr. Powell made a gift of the Land to them in 1989 with the result that the Estate at all times held the Land in trust for them with the result that there was no residuary estate at the date of his death which could be held on the statutory trusts for sale. Alternatively, they assert that they have been in open and continuous possession of the Land for upwards of 12 years since the death of Mr. Powell in 1992 and that the Plaintiff's right of action is statute-barred.



(i) Whether the putative Deed of Gift effective to transfer interest in Land

88. Taking each in turn, the first issue which arises for consideration is whether Alfred Powell made an *inter vivos* gift of the Land to the Defendants in 1989 in that document the contents of which are set out in paragraph 14 *supra*.
89. The law governing *inter vivos* gifts is set out in Vol. 52 of **Halsbury's Laws of England**. At paragraph 201 *inter vivos* gifts are defined as follows:
- "A gift made between living persons (inter vivos) may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that the thing shall not return to the donor."*
90. The learning to be derived from **Halsbury's** paragraph 231 *et seq* on which Mr. Phuran relies and from the case law, is that the donor must have done everything necessary, according to the nature of the property, to transfer it to the donee and render the settlement legally binding.
91. Mr. Phuran submits the legal estate in land must be granted by deed and that document relied on by the Defendants does not comply with the formalities for creating a valid gift of land. In support of his submission he relies on section 8(1) and (2) of the **Property (Miscellaneous Provisions) Act** which provides that an instrument is validly executed by an individual as a deed only if it is signed by the donor and is expressed to be a deed, alternatively expressed to be executed as a deed or otherwise makes clear on its face it is intended to be a deed. Mr. Phuran says further that, even if the document had been properly executed as a deed, the gift would still fail in the present case because Alfred Powell's intention, to be discerned from the document, was an intention to make a gift of the property to the Defendants at some unspecified time in the future.
92. Mr. Phuran's submission is correct, but it ignores the fact 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. Mr. Brady submits and I accept that no formalities, other than that the disposition be in writing and signed by the donor, are required for the making of a gift of an equitable interest and that the document which was signed by Alfred Powell and witnessed by Mr. McLean would be sufficient to convey his beneficial interest in the Land to the Defendants.
93. Mr. Brady submits further that the document makes it clear that Alfred Powell intended to give the Land to his sons and that he perfected the gift by delivering the conveyance deeds to the Defendants by which they could and later did prove his title to the Land.

94. I am unable to accept Mr. Brady's latter proposition. The language used in the document, which states "*I intend to register the said parcels [40 and 41] in my name and, subsequently, to transfer the entire claim,*" does not convey a present intention by Alfred Powell to give his sons all his interest in the Land which had been adjudicated Crown Land in error, not least because the document refers to only two of the three parcels which comprise the Land. Rather, the words convey an intention to transfer the whole of the legal and beneficial estate to the Defendants at some time in the future, *after* he had claimed the Land and it was registered in his name as the true owner.
95. The Defendants' claim to be entitled to the Land by way of a gift from their father is not made out.

(ii) Action Statute-Barred

96. The Defendants plead in the alternative that the Plaintiff's application for rectification of the Land Register is statute-barred. The Defendants' case is that they have been in open and continuous possession of the Land from 1992 until the Plaintiffs obtained an injunction against them in Cause G 282 of 2007. The result, they say, is that any action for recovery of the Land was already statute-barred by the time those proceedings were incepted, including an action for rectification of title by the beneficiaries under a trust for sale.
97. Although beneficiaries on intestacy do not have an interest in Land, the **Limitation Act** expressly recognises the interests in the proceeds of sale under a statutory trust for sale and provides in section 24 that the limitation periods will apply to those interests as well:
- "24. (1) Subject to section 27(1) and (2), this Law applies to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, as they apply to legal interests. Accordingly a right of action to recover the land shall, for the purposes of this Law but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal interest in the land, and any relevant provision of section 20 shall apply in any such case accordingly.*
98. Section 27(1) and (2) disapplies any limitation period where the beneficiary of a trust brings an action against a trustee in respect of any fraud or fraudulent breach of trust or to recover trust property which in the possession of a trustee.
99. The Defendants rely on section 19 (1) provides that:



“19. (1) An action shall not be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

100. The question which first arises for consideration is when did the Plaintiff’s right of against the Defendants accrue? Pursuant to section 20, the right of action accrued to the lawful children of the marriage or to his Estate on the date of their father’s death. Section 20 (2) provides as follows:

“(2) Where any person brings an action to recover any land of a deceased person and that deceased person was –

- (a) on the date of his death in possession of the land; and*
- (b) the last person entitled to the land to be in possession of it, the right of action shall be treated as having accrued on the date of his death.”*

101. Section 20(9) also bears on the question of when the right of action accrues on the particular facts of this case. It provides that:

“(9) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to in this subsection and in subsections (10), (11) and (12) as “adverse possession”); and where under subsections (1) to (8) any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.”

102. The second question arising for resolution then is whether, between 1992 and the 2004, the Land was in the possession of some person in whose favour the period of limitation can run?

103. Section 20 (13) is relevant in this regard and provides as follows:

“Where...any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale (not being a person solely or absolutely entitled to the land or the proceeds), no right of action to recover the land shall be treated for the purposes of this Law as accruing during that possession to any person in whom the land is vested as tenant for life or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale.”

104. The resolution of the issue of whether time has run against those entitled under the statutory trust for sale depends on whether the Defendants, who were in possession of the Land after their father passed away, were also entitled to a beneficial interest in the proceeds of sale.



105. It was common ground between the parties in G282 of 2007 that the Defendants and their siblings, as the illegitimate children of Mr. Powell, were not so entitled. In his submissions on behalf of the Plaintiff in these proceedings, however, Mr. Phuran appeared to argue that the Defendants were beneficiaries in possession of the land against whom time did not run. He relied on the decision of the English Court of Appeal in case of *James v Williams* [1999] 3 All ER 309. In that case, a beneficiary under an intestacy tried to position himself as owner of assets in the estate and to exclude his sister who was also entitled. The Court held that, as a beneficiary in possession, he became a constructive trustee of those assets, with or without letters of administration, and accordingly the claim brought against him by another beneficiary on intestacy was not time-barred.
106. The decision of Murphy J in *In the Estate of B* is instructive on the question of the Defendants status *qua* beneficiaries in 1992. The learned Judge canvassed the Caymanian and English legislative history relating to the vexed question of the rights of illegitimate children on the death intestate of their father. The judgment is cogently summarised in the headnote which reads as follows:

*“The two applicants were the illegitimate children of the deceased. The deceased was also the father of two other legitimate children, by the respondent, his wife and administrator of his estate. By s.35(3) of the **Succession Law** (1995 Revision), an illegitimate child who had been adjudged by an affiliation order to be the child of his natural father was entitled to the interest in his father’s estate to which he would have been entitled had he been legitimate. No affiliation proceedings had taken place to establish legally the paternity of the applicants, but it was not challenged and the court accepted the affidavit evidence of the applicants’ mother.*

The applicants submitted that (a) they were entitled to share in the estate by virtue of s.35(3), notwithstanding that no affiliation order had been made, since the court had made an adjudication of paternity upon the affidavit evidence in the present proceedings:

“Held, making the following ruling:

*“Since there had been no affiliation order made during the deceased’s lifetime in respect of the applicants, they did not qualify for a share in his estate upon intestacy. Section 35(3) of the **Succession Law** (1995 Revision) was clear and unambiguous and the court was bound to construe it according to its plain meaning without regard to any injustice which might result. There was no general statutory provision in force in the Cayman Islands reversing the presumption that an illegitimate child could not inherit upon the intestacy of its father, or affecting the construction of relevant legislation. Section 35 had been enacted with the intention of modifying the common law position, and*

*the legislature had not taken the opportunity, when later introducing sub-s. (3), to equate the position of children of unmarried fathers to that of children of unmarried mothers. Similarly, as different considerations applied when dealing with property rights (as here) to those in issue when deciding upon the welfare and protection of children, other Cayman statutes cited by the applicants were not in pari materia with the **Succession Law**, and could have no bearing on the interpretation of s.35(3) even if its meaning were not plain.””*

107. Section 35 of the **Succession Act** remained in effect until it was repealed by the **Status of Children Act** which came into effect on 31 May 2004, granting all children equal status whether born inside or outside of a marriage. The transitional provisions make clear that the provisions of the **Status of Children Act** are not retroactive. Section 20(3) provides as follows:

*“The estates of all persons who have died intestate ... before the commencement of this Law shall be distributed in accordance with any enactments and rules of law which would have applied to them **as if this Law had not been passed.**” [emphasis mine]*

108. As the Defendants were not beneficiaries of the trust for sale in possession between 1992 and 2007 when the first action was commenced, they were not beneficiaries in possession as set out in section 20(13) of the **Limitation Act** or trustees against whom time does not run, as in *James v Williams*, the limitation period of 12 years on actions to recover of land is applicable.
109. It follows then that the right of action to recover the Land accrued at the date of Mr. Powell’s death. The Defendants’ possession from 1992 was at all times adverse to the Estate which was held on the statutory trusts and to the Plaintiff and the other children of the marriage who were the statutory beneficiaries.
110. Consequently, any action for recovery of the Land was already statute-barred when the first action was commenced and these proceedings are, therefore, an abuse of the process of the Court.
111. What is the effect of the Defendants’ later application for Letters of Administration in which they acknowledged the rights of the children of the marriage under the trust for sale and from whom they sought Deeds of Renunciation?
112. The issue was not raised in the proceedings before me but it was raised in correspondence by the attorney for the Plaintiffs in the earlier proceedings with the attorney for the Defendants and so I have given some consideration to the question.

113. In my view, the answer is to be found in section 23 of the **Limitation Act** which provides that

“23. Subject to –

(a) section 24; and

(b) section 135 of the Registered Land Law (1995 Revision),

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.”

114. In other words, where the right to recover land from a third party arises and proceedings to recover the Land are not commenced within the period of limitation prescribed, then not only does the period of limitation come to an end, but the right based on title is extinguished.

115. It follows, then, that the claim for rectification must fail as the Estate no longer had title to the Land when these proceedings were commenced.

116. In the draft of this judgment circulated to the parties, I went on to consider the implication of section 26 of the **Succession Act** which vests an Intestate’s estate in a Judge of the Grand Court until administration is granted.

117. I referred to the case of *Gleeson v Feehan* [1997] 1 ILRM in which the Irish Supreme Court considered the effect of the statutory limitation period for recovery of land in the circumstances where no representation to an Intestate estate had been raised. The Irish equivalent of section 26 provides for the estate of an Intestate to be vested in the President of the High Court. In *Gleeson’s* case, the Supreme Court held that:

“The possession of lands by members of the family who had remained thereon was at all times adverse to the title of the true owner, the President of the High Court, in whom the entire estate in the lands was vested pending the raising of representation, and as they had been in possession for over 12 years, had acquired a title to the land.”

118. The decision thus suggested that adverse possession could be obtained against the Judge of the Grand Court in whom all unadministered estates vest under our statute. I held that,

“Applying that that dictum to these facts, the Defendants’ possession was adverse to the title of the true owner, in this case the Judge of the Grand Court in whom the Estate was vested until the grant of representation was made in 2005, with the result that the Estate’s title to the land was extinguished. The subsequent grant of Letters of Administration to the Defendants was incapable of reviving it.

119. Having considered the draft, Mr. Phuran submits that the passage on *Gleeson* on which I relied had been considered by a differently constituted Supreme Court in *In the matter of a consultative case stated pursuant to s 16 of the Courts of Justice Act 1947; David J O'Hagan (as personal representative of the Estate of Alice Dolan, (deceased)), Plaintiff v Desmond Grogan, Defendant* [2012] IESC 8 and that passage doubted.
120. In the *O'Hagen* case, letters of administration not having been taken out by anyone interested in the Estate of the Intestate, the Chief State Solicitor raised Letters of Administration on behalf of the Crown with the permission of the Attorney General. The State Solicitor then sued to recover land from the defendant who pleaded that he had been in adverse possession of the land for 12 years before the administration was granted and had acquired title as against the President of the High Court, relying on the same passage in *Gleeson's* case cited by me.
121. The Supreme Court in *O'Hagan's* case held that the President of the High Court is not the true owner of the estates which vest in him by operation of law but holds the bare legal estate against which no-one can gain adverse possession. The Court said this at paragraph 47,
- "If it was intended to determine that adverse possession was procured as against the President of the High Court, then, with respect, I consider this not to be a correct statement of the law, as contended for by the defendant. For the reasons explained above, as to his status[] I consider that the mention of adverse possession as against the President of the High Court in Gleeson v Feehan (No 2) [1997] 1 ILRM 522 can only properly be understood in the shorthand sense that, once title adverse to the interest of the relevant next of kin who would have been entitled to the property upon administration, absent rights acquired by the non-next of kin stranger, in that case, the role of the President of the High Court, and his interest in the property, ended at that date."* [emphasis mine]
122. Adapting the Court's reformulation of the dicta in *Gleeson*, what has transpired in this case is that the role of the Judge of the Grand Court and his interest in the property came to an end at the date on which the defendants acquired title by possession adverse to the interests of the lawful children of the marriage who were entitled to the Land on intestacy.
123. My conclusion, therefore, remains the same, that the Estate's title to the Land was extinguished by the Defendants' adverse possession and the subsequent grant of Letters of Administration to the Defendants in 2005 was incapable of reviving it.
124. A related issue arose in *O'Hagen* which was whether *an* action could be maintained for the recovery of land by an administrator appointed after the limitation period had run. The argument centered on the scope of section 23 of the Statute of Limitations 1957, which is *in pari materia* to section 31 of our **Limitation Act** which provides that:

“31. For the purposes of this Law relating to an action for the recovery of land, an administrator of the estate of a deceased person shall be treated as claiming as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

125. The section provides, as the Supreme Court noted, the statutory basis for the doctrine of relation back.

126. With respect to the defendant’s claim of adverse possession, the plaintiff argued that the time that had elapsed between the death of [the Intestate] in 1981 and the date of the grant of letters of administration in July, 2000 was irrelevant, as an administrator’s action for the recovery of land must be treated *“as if there had been no interval of time”* between the two events. On this argument, the effect of s 23 of the Statute of Limitations 1957 was to permit plaintiff to sue for and recover the premises from the defendant, once letters of administration were extracted.

127. The Court dismissed that proposition, saying as follows:

[60] The question arises therefore, as to the scope of the section, and if any limits are imposed on the relation back. No express limitation is found in Spierin, A Commentary on the Succession Act 1965 and Related Legislation (3rd ed, Butterworths), and indeed no limit is suggested either in Halsbury's Laws of England (5th ed, Butterworths), vol. 103, where, dealing with the equivalent section (s. 26 of the Limitation Act 1980), the doctrine is explained in the following terms at para 645:-

“In order to prevent injury being done to a deceased person's estate without remedy, the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully with the deceased's [...] real estate. It cannot be applied, however, to disturb the interests of the other persons validly acquired in the interval, or to give the administrator title to something which has ceased to exist in the interval, or to bind the administrator to an agreement made before the grant irrespective of its benefit to the estate.”

[61] Halsbury also clarifies that the doctrine of relation back applies for the purposes of the statutory provisions limiting the time for bringing proceedings to recover land, since the administrator is “deemed to claim” as if there had been no interval of time between the death and the grant of administration. This is in the same terms as s 23 of the Statute of Limitations 1957, and equally applies only to the recovery of land. A similar approach is taken in the Australian writings, where somewhat similar, but not identical legislation in all States, is found.



[62] *It is clear from the above statement that, if an interest has been validly acquired in the interval, or title has ceased to exist in the meantime, the doctrine cannot assist the administrator. When an administrator has been appointed, his title to the real estate relates back to the intestate's death; see In the Goods of Pryse [1904] P 301 at p 306. All this concerns the application of the doctrine in the case law. Section 23 of the Statute of Limitations 1957 provides a statutory basis for the application of the doctrine of relation back, and is, on its face, in broad and clear terms.*

[63] *...The best expression of the true meaning of the section is found in Jourdan on Adverse Possession (2003, Butterworths), in which, in dealing with the English equivalent, he states at para 31-16:-*

*“Under the general law, the estate of a deceased person vests in an executor at the moment of death. But an administrator's title only vests on the grant of letters of administration, although for certain purposes it is treated as relating back to the death. Apart from the Limitation Act, 1980, s 26, time for bringing an action does not begin to run **against an administrator** until letters of administration are granted. The effect of s 26 is that **time for recovering land runs against a deceased person's estate**, regardless of whether an executor or an administrator is appointed” (emphasis added).*

[64] *I am satisfied that this is a correct statement of the effect of the section. It means that, if in the interval between the death of an intestate and the appointment of an administrator, a party has procured a lawful interest in lands the subject of the administration, **that interest may be sufficient to bar its recovery by the administrator**, when appointed, acting in the interests of those who, but for such event, would have been entitled to the lands.”*

128. Applying that learning to the facts of this case, it was of no consequence that the grant was made to the Defendants in 2005 and not to the Plaintiff or her siblings, as time had already run against the Estate.
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 Mr. Powell 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 period, 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 has 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 the Plaintiff's claim is statute - barred and strike it out accordingly. The Defendants acquired 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.

In the Alternative

132. If I were wrong to so find, then I would hold that the Plaintiff was entitled to an order for rectification of the Register on the ground that the registration of the titles to Parcel 11, 40 and 41 in the names of the Defendants and their siblings as proprietors had been obtained by fraud within the meaning of section 140 of the **Registered Land Act**.
133. The only limitation on the Court's power to rectify the register in respect of a registration which has been fraudulently obtained by a trustee is that set out in the **Registration of Land Act** at section 140(2) which provides that,
- "The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*
134. As the Defendants' siblings did not acquire any of the Land for valuable consideration, the Plaintiff would be entitled to the Order sought restoring the title to the Land to the Estate for due administration.
135. By virtue of the renunciation of their inheritance by the other children of the marriage in the Defendants' favour, the Defendants would be entitled to 9/10^{ths} 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 Parcels 11, 40 and 41 and pay 1/10th of the value to the Plaintiff.



SUMMARY:

136. The Plaintiff's claim is for rectification of the Register of Titles to restore the title to 36 acres of land more or less registered as Midland East Block 58A, Parcels 11, 40 and 41 to the Estate of Alfred Lawrence Powell (dec'd) is dismissed as an abuse of process on the ground that it is statute-barred, the Defendants having been in adverse possession of the Land since 1992.

137. I will hear Counsel on costs.

DATED THE 30TH DAY OF DECEMBER 2021

**THE HON. MRS. JUSTICE RAMSAY-HALE
JUDGE OF THE GRAND COURT**