IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 104 OF 2011 (AJEF)

IN THE MATTER of the Estate of John Samuel Hinds (Deceased) and the Estate of Esther Rosalind Hinds (Deceased)

AND IN THE MATTER of the Grand Court Rules Order 85

B E T W E E N:

PHILLIP BRADLEY HINDS

Plaintiff

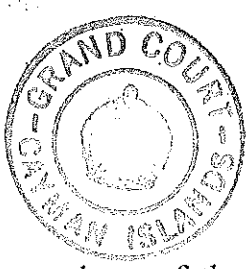
and

(1) CLIVE MONTRIVELLE HINDS, ADMINISTRATOR OF THE ESTATE OF ESTHER ROSALIND HINDS
(2) CLIVE MONTRIVELLE HINDS
(3) JOHN LEVERETTE HINDS III
(4) THOMAS ANTHONY HINDS
(5) SHARON HINDS
(6) NORAHS KCOTSOB LIMITED

Defendants

Coram:	Mr. Justice Angus Foster
Hearing Dates:	5th to 7th and 10th to 14th February 2014
Appearances:	For the Plaintiff: Mr. Peter McMaster, QC and Mr. Rupert Coe of Appleby
	For the 1st Defendant: Mr Tom Lowe, QC instructed by Mr. George Giglioli of Giglioli and Company
	For the 2nd, 3rd and 4th Defendants: Ms Clare Stanley instructed by Mr. Robert Jones of Diamond Jones
	For the 5th and 6th Defendants: Mr. Kenneth Farrow, QC of HSM Chambers

JUDGMENT



1. Introduction

1.1 This case arises from a dispute between members of the Hinds family. It concerns claims by the plaintiff against his three half-brothers and, in one instance, against his sister-in-law, in relation to seven parcels of land, (or the sale proceeds of one of them) of significant total value in the general area of South Sound, Grand Cayman. Five of the parcels in issue are divided parts of properties formerly owned by the plaintiff's paternal grandfather. The other 2 parcels were formerly in the name of the plaintiff's father, one of which has a house on it. The plaintiff's action has regrettably resulted in considerable disharmony between him and his half-brothers, particularly since their now deceased mother apparently wished all four of her sons to share the properties concerned equally between them.

2. Procedural Background

2.1 The proceedings were commenced by the plaintiff by originating summons on 17th June 2011. The action was brought in the Financial Services Division in light of the definition of financial services proceedings in O.72, r.1 (2) (e) of the Grand Court Rules because the net asset value of the estates concerned exceeds $1m. In fact the total current value of the properties in question is said to be approximately $6m. However, it does seem to me questionable whether an action of this nature is truly a financial services proceeding as that would usually be understood and whether the consequent cost of being required to initiate such a domestic family dispute concerning succession to local real property in the Financial Services Division is appropriate or reasonable.

2.2 In light of the factual disputes involved in the case, by consent order dated 17th January 2012 I directed that the proceedings should continue as if an action commenced by writ. Points of Claim, Defences and Replies, subsequently amended and re-amended in some cases, were duly served and the matter has proceeded as if it is a writ action.

2.3 On 17th December 2012, on the application of the plaintiff, I made an injunction order restraining the 5th and 6th defendants from dealing in any way with funds totaling USD535,272.31 held by the Company, which constitute the remaining balance of the proceeds of sale of one of the properties in issue in these proceedings. That injunction remains in place.

2.4 I should also mention that on 4th February 2014, the day before the trial was due to commence, it came to my attention that two of the plaintiff's then proposed witnesses, Mr. Keith Carter and his wife, Mrs. Jill Carter, were known to me as longstanding personal acquaintances. I therefore requested all counsel in the case to attend before me at short notice in order that I could explain the nature of my (and my wife's) relationship with Mr. and Mrs. Carter and to hear any consequent representations. Having explained in full the situation and having heard and considered the views of counsel on the matter, I decided that in the circumstances it was not necessary or appropriate for me to recuse myself and I did not do so. In the event only Mrs. Carter was briefly cross-examined on her witness statement at the trial.

2.5 On 5th February 2014 the action duly proceeded to trial before me over a total of 7 days at the conclusion of which I reserved judgment. The plaintiff gave evidence himself and two witnesses supporting his case also did so. The four individual defendants each gave evidence, making a total of seven witnesses in all who gave evidence at the trial.

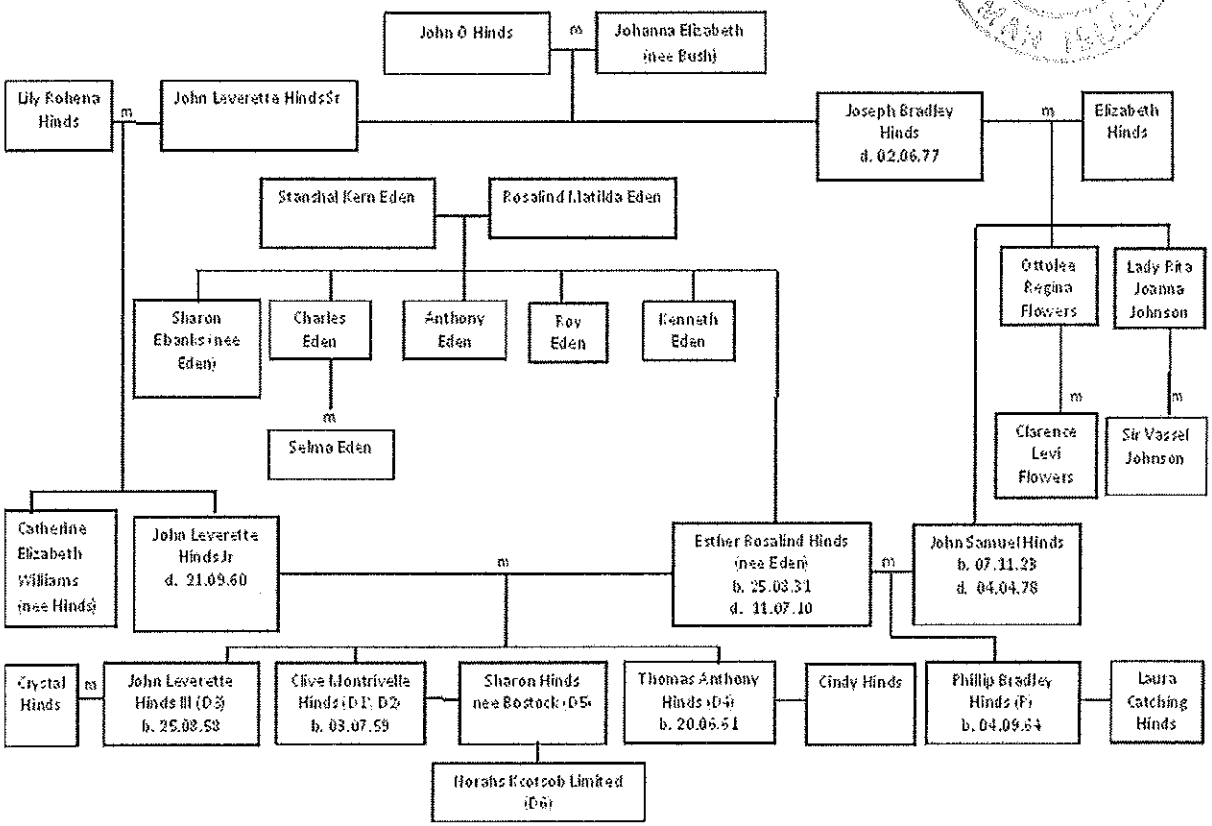
2.6 During the course of the trial, after some but not all of the oral evidence had been heard, counsel for the 2nd, 3rd, and 4th defendants applied for leave to amend paragraph 70 of their re-amended Points of Defence. The proposed amendment was to add a limitation defence, in addition to such a defence already pleaded, in response to the plaintiff's claim in respect of one of the parcels of land concerned (parcel 15C/63). The proposed new amendment alleged continuous and exclusive possession of the parcel by the 2nd, 3rd and 4th Defendants for more than 12 years before the commencement of these proceedings by the plaintiff. Counsel said that in the circumstances she was relying on the fact that registered title to the parcel was in the names of

her clients as proprietors and had been so undisturbed since February 1999, as amounting to continuous and exclusive possession of the parcel for these purposes. She submitted that no further evidence was necessary for her to make her case in that respect. The application for leave to amend was opposed by leading counsel for the plaintiff on the principal grounds that the application was made too late in the proceedings and that it would be necessary for him to ascertain whether there was evidence available to him to disprove the alleged continuous and exclusive possession of the parcel by the 2nd, 3rd, and 4th defendants. After hearing full argument I decided to allow the proposed amendment. It seemed to me that the foundation for the proposed amendment had been foreshadowed in the opening skeleton argument served on behalf of the 2nd, 3rd and 4th defendants some time prior to the trial. Counsel for the 2nd, 3rd and 4th defendants was relying on the undisturbed title to the parcel of land over many years as sufficient evidence in the circumstances of continuous and exclusive possession of the parcel by the 2nd, 3rd and 4th defendants as proprietors. I accepted the submission of leading counsel for the plaintiff that in principle title and possession are not necessarily the same thing. However, the parcel concerned is undeveloped bush land and was transferred to the 2nd, 3rd and 4th defendants over 15 years ago as tenants in common in equal shares. There was no suggestion that the status or character of the land had changed in any way and it seemed to me most improbable that there would be any evidence to that effect. It is within my judicial knowledge that unfenced and uncleared bush land is very common in Grand Cayman and does not signify that the proprietor has not been in continuous and exclusive possession of the land. It also seemed to me particularly desirable in this particular case, having regard to the family nature of the proceedings, that there should not be any loose ends left and that all points being made should be, and should be seen to be, before the court, fully canvassed at the trial and determined by the Court without unduly strict reliance on procedural rules. I also had particular regard to the overall objective and the desirability of finality in such a domestic case.

3. The parties and other relevant family members

3.1 For convenience an agreed Hinds family tree as produced for the trial is set out below. It will be easier to use this to follow my identification of the parties and other relevant family members. I will refer to everyone by their first names as was done by counsel at the trial.

THE HINDS FAMILY TREE



3.2 The plaintiff is Phillip Bradley Hinds born on 4th September 1964 ("Phillip"). He is the only child of Esther Rosalind Hinds (nee Eden) ("Esther") by her marriage in July 1963 to John Samuel Hinds who died intestate in Texas but resident in Louisiana, USA on 4th April 1978 ("John Samuel"). Esther herself died intestate in Grand Cayman on 11th July 2010. Phillip is married to Laura Catching Hinds ("Laura").

3.3 Esther was previously married to John Samuel's first cousin, John Leverette Hinds Jr. ("John Jr."), who died in the USA on 21st September 1960, with whom she had three sons, Phillip's half-brothers. They are respectively the 3rd defendant, John Hinds III born on 25th August 1958 ("John III"); the 2nd defendant, Clive Hinds born on 3rd July 1959 ("Clive"); and the 4th defendant, Thomas Hinds born on 20th June 1961, after his father's death ("Tom"). Clive is also named as the 1st defendant to these proceedings in his capacity as administrator of Esther's estate appointed as such by this Court on 31st May 2011 ("Clive as administrator"). Clive is married to the 5th defendant, Sharon Hinds (nee Bostock) ("Sharon"). The 6th defendant is a Cayman Islands company, Norahs Kcotsob Limited (Sharon Bostock spelled backwards), ("the Company") which is owned and controlled by Sharon. I shall refer to Sharon and the Company together as "Sharon and the Company". Also when referring to Clive as administrator at the same time as in his personal capacity with John III and Tom all as individuals, I shall call them together "the defendants".

3.4 John Samuel's father (Phillip's paternal grandfather) was Joseph Bradley Hinds ("Bradley"), who died testate in Cayman on 2nd June 1977, leaving a will dated 20th January 1975. Bradley was married to Elizabeth ("Betty") Hinds and in addition to their son John Samuel, who died 11 months after his father, Bradley and Betty also had two daughters, namely Ottolee Flowers, known as Jen ("Jen") and Rita Johnson, now Lady Rita Johnson, ("Lady Rita"). Lady Rita was married to Vassel, latterly Sir Vassel, Johnson, who died on 12th November 2008 ("Sir Vassel").

4. The Factual Background

4.1 A considerable amount of evidence about the background was given at the trial and in the witness statements and there is some documentary evidence, particularly relating to the dealings with the properties in issue. I have, at this stage, limited my summary of the factual background, which I have set out chronologically below, to those facts and circumstances which seem to me to be most relevant and which in my opinion were not significantly contested. I shall consider and discuss later in the course of this judgment those facts and circumstances which were either disputed or from which the conclusions to be drawn were in issue.

4.2 Esther was first married in Cayman in 1957 to John Jr. She immediately moved to live with him and his parents in Kenner, near New Orleans, Louisiana, USA. Some 2 years later Esther and John Jr. moved to their own house, also in Kenner. Their three boys, John III, Clive and Tom were all born in Louisiana. John Jr. was employed as a seaman. In September 1960, he was killed in an explosion on board his ship in the Gulf of Mexico. At that time John III was only 2 years old, Clive was 1 year old and Tom was not born until some time after his father's death.

4.3 John Jr. died intestate and on 27th July 1961 Esther was appointed administratrix of his estate by a United States District Court in Louisiana. About a year later John Jr.'s former employers paid Esther agreed compensation totalling US$100,000.00 for her and the 3 boys. The boys' shares of the compensation amounted to US$15,000 each.

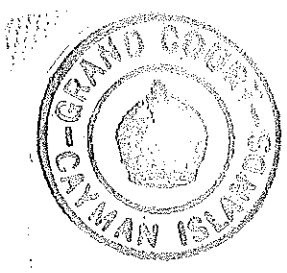
4.4 In July 1963 Esther re-married. She married John Samuel, who was John Jr.'s first cousin by virtue of the fact that their fathers were brothers. At the time of their marriage John III was 5 years old, Clive was 4 and Tom was 2. The family continued to live in the house in Kenner. John Samuel was also a seaman and rose to the rank of Captain.

4.5 The family made annual and other visits to Grand Cayman. They stayed with members of their extended families and spent time with all of their respective near relatives. They were a very close-knit family. John Samuel treated John III, Clive and Tom as if they were his own sons.

4.6 In September 1969, some 6 years after Esther and John Samuel's marriage, John Samuel's father, Bradley, conveyed to him a piece of land in South Sound which in due course became registered in John Samuel's name as parcel 7C/1. Shortly before the conveyance to him by Bradley, and in anticipation of it, John Samuel entered into a building contract for the construction of a house on the land. The house was built in 1970 and it became known in the family as "the Cayman House" ("parcel 7C/1" or "the Cayman House"). It now has the physical address 816 South Church Street.

4.7 In October 1972 John Samuel and Esther, together with John Samuels' sister, Jen, and her husband, Clarence Flowers, purchased a piece of land together which in October 1974, following the cadastral survey, was registered as parcel 15B/83 with John Samuel, Esther, Jen and Clarence shown on the Land Register for the parcel as equal proprietors in common with a ¼ share each. At or about the same time as purchasing that parcel the same four individuals apparently also purchased in the same proportions the adjacent property immediately to the north of it which became registered as parcel 15B/81 ("parcel 15/81"), described by the Land Registry as "Cliff land appurtenant to 15B/83". In 1981 John Samuel and Esther's share of parcel 15B/83 was sold to the Cayman Islands Government as part of a compulsory purchase agreement. Parcel 15B/81 was not sold however and remained owned as proprietors in common in the same equal shares by the same individuals, including ¼ share each by John Samuel and Esther respectively.

4.8 On 4th April 1977 Bradley died in Grand Cayman, leaving a will dated 20th January 1975. His will provideD in that part which is relevant for these purposes, as follows:



"6 I devise and bequeath unto to my 3 children [i.e. John Samuel, Jen and Lady Rita] *in equal shares, the 3 pieces of land situated in the District of South Sound, Island of Grand Cayman and registered in my name in the Office of the Registrar of Lands of the Cayman Islands".*

The will also named John Samuel and Sir Vassel as executors.

4.9 In March 1978, having sold the house in Kenner, Esther, John Samuel and the four boys moved to live in a new house in Metairie, Louisiana, which is also in the New Orleans area.

4.10 Less than a month later, on 4th April 1978, John Samuel was killed in a helicopter crash in Texas while travelling to his ship in the Gulf of Mexico. At that time John III was 19 years old, Clive was 18, Tom was 16 and Phillip was 13. John Samuel died intestate, resident in Louisiana.

4.11 On 19th May 1978 Letters of Administration of John Samuel's estate were granted to Esther by a District Court in Louisiana. Esther subsequently made a claim in respect of John Samuel's death and in court proceedings in Texas in that regard Esther made a deposition in June 1979, to which I shall refer later. Compensation of US$200,000 was awarded or agreed which under Louisiana succession law was to be shared equally between Esther and Phillip, as John Samuel's only biological child.

4.12 As a result of John Samuel's death Sir Vassel became the sole executor of Bradley's will. On 20th June 1980, some 3 years after Bradley's death, Sir Vassel was granted probate by this court.

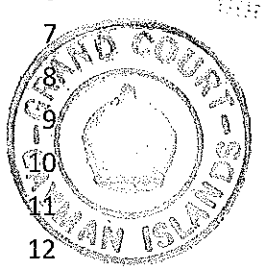
4.13 On 18th August 1980, following an application by Sir Vassel made on Esther's behalf at her request, Esther's Letters of Administration granted in Louisiana were re-sealed by this court, thereby authorizing her to administer John Samuel's estate in Cayman.

4.14 Following the grant of probate to him, Sir Vassel set about having the parcels comprising the lands which were subject to Bradley's bequest to his 3 children divided into 3 equal shares and then transferring the resulting parcels to Jen, Lady Rita and Esther. 5 of the parcels so transferred to Esther (or the proceeds of sale of one of them) are now in issue in these proceedings.

4.15 On 13th July 1982 Sir Vassel, as Bradley's executor, transferred the first divided part of a parcel comprising Bradley's estate, being the parcel registered as 152 in Block 15E ("parcel 15E/152") to Esther. This parcel was a divided part of what was originally the land that became registered as parcel 15E/116 of approximately 9 acres, part of the lands comprising Bradley's estate. In order to have a parcel divided it was necessary for Sir Vassel to become the registered proprietor of the parcel himself: see Registered Land Law ("RLL") section 21(2). He accordingly transferred parcel 15E/116 to himself as personal representative of Bradley and then had it divided. It was divided so as to take account of differing areas of ground which were fertile, rock or swamp so that it could be apportioned more fairly. It was therefore divided into 5 parcels which became: (i) parcel 15E/149 (approximately 2.59 acres) which was transferred to Lady Rita, (ii) parcel 15E/150 (approximately 1.64 acres), parcel 15E/151 (approximately 1.57 acres) and parcel 15E/153 (approximately 0.11 acres) which were transferred to Jen and (iii) parcel 15E/152 (approximately 3.13 acres) which was transferred to Esther. Sir Vassel transferred the parcel to Esther (as he transferred the parcels to Lady Rita and Jen) using the transfer Form R.L.7 prescibed by the Registered Land Rules ("RLR") made pursuant to the RLL. That form described Esther as transferee as "*the person entitled thereto under the will of* [Bradley] *to the interest of* [Bradley] *comprised in the register relating to* [the parcel]. On the same date Esther was registered as the proprietor of parcel 15E/152 in the Land Register for the parcel. As explained below, some 6 years later Esther transferred this parcel to Phillip and it is accordingly not subject to Philip's claims in these proceedings.

Also in 1982 Clive came to live in Cayman, and moved into the Cayman House. He has lived and worked in Cayman ever since.

4.16 On 31st October 1983 Sir Vassel transferred the parcel registered as 63 in Block 15C ("parcel 15C/63") to Esther. This parcel is the first of the 5 parcels deriving from Bradley's estate which are now subject to Phillip's claims in these proceedings. It was a divided part of what was originally the land registered as parcel 15C/5, an area of some 17.8 acres, which was in turn part of the lands comprising Bradley's estate. As before, Sir Vassel had the parcel transferred to himself as executor and then had it divided. It was divided into 3 parts which became registered as parcels 15C/61, 15C/62 and 15C/63, which he then transferred to Jen, Lady Rita and Esther respectively. Parcel 15C/63, which he transferred to Esther consists of an area of approximately 5.9 acres of undeveloped bush land.



Sir Vassel again transferred the parcel to Esther using RLR Form R.L.7. On the same date Esther was registered as the proprietor of parcel 15C/63 in the Land Register for the parcel.

4.17 In about May 1987 Phillip and Laura came to live in Grand Cayman and initially moved into the Cayman House where Clive and Sharon were already living.

4.18 On 29th June 1987 Esther wrote a letter to all 4 of her sons, which they all saw. This letter was probably written because Clive and Sharon on the one hand and Phillip and Laura on the other hand were not getting on well living together in the Cayman House. The most material parts of the letter are as follows:

> *"Dear John, Clive, Tom & Phil*
> ……. *I know it is strange for you to get a letter from me but I thought it should be done now before a problem arises*
> ……
> ……. *I am sure each of you knows by now how very much I love you. No matter what this will never change. I have tried my very best to be fair to each* [of you] *never giving fear that I loved one more than the other.*……
> ……
> ……

……
……
……

I pray that each of you one day will have your own individual homes but until that time I had hoped we could share equally what we have but I now feel this may be asking too much of you and your families and this is not fair and I love you too much to leave the situation unresolved. My homes will always be yours to share equally and peacefully and as long as I live I want you to know that you will be welcome at either one but I do not want either of you or your family feeling that the houses belong more to one child than the other. In view of this it maybe necessary for each one to (1) find a place of their own or (2) rent the house at a fair rate and agreeable to each one of you and myself. I do not ever want to sell the house in Cayman but I realize it is much too small for so many families. I will be willing to help each one get their own, give each a house plot of their choice or help you in some other way. The money from the rent would be put in an account for upkeep, insurance, etc. I do plan one day to come back to Cayman and live and I would like to stay at the house then and make it a home for us once again. I do not want to be a burden on either of you and I would hope I would be able to take care of myself and be financially able to do this as the years go by. Whenever I die and whatever is left I want it to be shared in four equal parts even though in some cases the law may not be in favor of this but between you and your families I believe it could be accomplished.

I pray that each of you have understood what I am trying to say and has accepted it in the loving manner in which it has been done. ……
……
……*You have always been best friends as well as brothers and jealously was never a part of your life so please do not allow it to become a part now.*
……
……

Loving you always.
Your Mom,
Esther

4.19 On 28th September 1988, at Phillip's request, Esther transferred parcel 15E/152 (see para. 4.15 above) to him in consideration of "natural love and affection" using the standard transfer form prescribed by the RLR for the transfer of land by the registered proprietor (Form R.L.1).

4.20 On 9th November 1989 Sir Vassel transferred parcels 172 and 175 in Block 15C ("parcel 15C/172" and "parcel 15C/175") to Esther. These 2 parcels were divided parts of what was originally the land registered as parcel 15C/2, a 13 acre part of the lands comprised in Bradley's estate. As executor, Sir Vassel again had parcel 15C/2 transferred to himself as personal representative of Bradley in order to have it divided. He then had the parcel divided into 6 parcels, again in an endeavour to allocate the dry, rocky area and the swamp areas as fairly as possible. One of the 6 subdivided pieces became registered as 15C/172 (2.13 acres) and one of them became registered as 15C/175 (2.2 acres). Sir Vassel then transferred both parcels 15C/172 and 15C/175 to Esther again using RLR Form R.L.7 in each case.

4.22 On 24th November 1989 Esther was registered as proprietor of both parcel 15C/172 and parcel 15C/175 in the respective Land Registers for the parcels.

4.23 On 8th March 1991 Sir Vassel transferred parcel 191 in Block 15C ("parcel 15C/191") to Esther. This parcel is a divided part of what was originally the land registered as parcel 15C/36, adjoining the land at parcel 15C/5, part of which had become parcel 15C/63 (see para. 4.16 above). On 6th September 1990 Sir Vassel had had parcel 15C/36 registered in his own name as personal representative of Bradley in order to have it divided into 3 parts, one of which divided parts became parcel 15C/191, an area of approximately 8.26 acres. On 8th March 1991, again using RLR Form R.L.7, Sir Vassel transferred parcel 15C/191 to Esther. As explained below, some 13 ½ years later this parcel

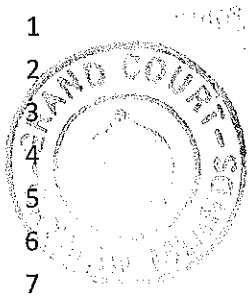
was sold by Esther and the balance of the proceeds of sale is held by the Company under Sharon's control.

4.24 On 4th January 1996 Esther, as personal representative of John Samuel, transferred the ¼ share of parcel 15B/81 (see para. 4.7 above), which was registered in the name of John Samuel at the date of his death, to herself as "*the person entitled thereto under.... the intestacy of* [John Samuel]" using RLR Form R.L.7. On the same day she was registered as the proprietor in common of that ¼ share in the Land Register for the parcel. She was, of course, already the proprietor in common of another ¼ share of the parcel in her own right.

4.25 Also on 4th January 1996 Esther, as personal representative of John Samuel, had parcel 7C/1 (the Cayman House), which was registered in the name of John Samuel at the date of his death, transferred to herself, again using RLL Form R.L.7 as *"the person entitled thereto under...the intestacy of* [John Samuel]" and on the same day she was registered as the proprietor of parcel 7C/1 in the Land Register for the parcel.

4.26 Also in January 1996 Esther left Louisiana to live in Grand Cayman and moved into the Cayman House, where she lived for the rest of her life.

4.27 On 15th March 1996 Sir Vassel transferred parcel 222 in Block 15E ("parcel 15E/222") to Esther. This parcel is a divided part of what was originally the land registered as parcel 15E/7, an area of land on the north side of what is now Stone Wall Drive, a road off the east side of Walkers Road towards the southern end. It is adjacent to parcel 15E/152, which Esther had transferred to Phillip in September 1988 (see para. 4.19 above). Sir Vassel had parcel 15E/7 transferred into his own name as executor in order to have it divided into 3 parcels, one of which became parcel 15E/222 of approximately 3.17 acres. It is not entirely clear from the documents produced at the trial precisely when this division took place but the Land Register for parcel 15E/7 was closed as a result of its proposed division on 8th March 1995. There was clearly a long delay before the final boundaries of the proposed new divided parcels were agreed so that they could be registered.



This was as a result of a disagreement between Phillip on the one hand and Lady Rita on the other as the neighbouring proprietors concerning the precise route of a vehicular right of way, which took Sir Vassel a considerable time to resolve. Sir Vassel again used RLR Form R.L7 to transfer Parcel 15E/222 to Esther.
With his transfers of parcel 15E/222 to Esther (and the transfers to Jen and Lady Rita of the divided parcels allocated to them) Sir Vassel completed his administration of Bradley's estate.

4.28 On 25th April 1996 Esther was registered as the proprietor of parcel 15E/222 in the Land Register for that parcel.

4.29 On 26th February 1999 Esther transferred parcel 15C/63 (see paragraph 4.16 above) to John III, Clive and Tom as proprietors in common in equal shares in consideration of "natural love and affection" using RLR Form 1, in the same way as she had transferred parcel 15E/152 to Phillip previously.

4.30 In 2004 Esther agreed to sell parcel 15/191 (see para 4.23 above) to Empire Development Company Ltd ("Empire") for US$1m.

4.31 On 16th February 2005 Esther completed the sale by her of parcel 15C/191 to Empire and received US$940,000.00 net ("the proceeds of sale"). The same day Esther transferred the proceeds of sale to a bank account in the joint names of Clive and Sharon. The next day, 17th February 2005, Sharon transferred the proceeds of sale to a bank account in the name of the Company.

4.32 In 2007 Phillip moved into the Cayman House to live with Esther. He continues to live in the Cayman House.

4.33 On 12th November 2008 Sir Vassel died.

4.34 On 11th July 2010 Esther died intestate, resident in Grand Cayman.

4.35 On 14th April 2011 Clive was granted Letters of Administration of Esther's estate by this court.

4.36 On 17th June 2011 Phillip commenced the present proceedings against the defendants by Originating Summons.

4.37 On 17th December 2012, on the application of Phillip, Sharon and the Company were added as defendants to the present proceedings.

5. The principal issues in the case

5.1 There are several principal issues in this case. In summary, the first main issue is the basis on which the parcels from Bradley's estate were transferred by Sir Vassel as executor to Esther. Phillip contends that they were transferred to Esther in her capacity as administratrix of John Samuel's estate and were assets of John Samuel's estate of which he, Phillip, as John Samuel's only biological child, is now the sole beneficiary. The defendants, supported by Sharon and the Company, contend that the parcels were transferred by Sir Vassel to Esther beneficially and became her personal property to deal with as she saw fit. They submit that those of the properties which were not disposed of by Esther during her lifetime are now assets of her estate, of which all 4 of her sons (i.e. John III, Clive, Tom and Phillip) are the beneficiaries.

5.2 There are also specific issues relating to the 2 properties deriving from Bradley's estate which Sir Vassel transferred to Esther and which Esther then dealt with during her lifetime. They are, firstly, parcel 15C/63, which Esther transferred to John III, Clive and Tom (see paras 4.16 and 4.29 above) and which Phillip now claims is held by them on trust for him absolutely, and, secondly, parcel 15C/191, which Esther sold to Empire and then transferred the proceeds of sale to a bank account in name of Clive and Sharon and which Sharon transferred to the Company (see paras 4.23 and 4.31 above). Phillip now claims that the proceeds of sale are held by Sharon, through the Company, on trust for him, or at least that part of the proceeds of sale remaining after Sharon had notice of his claim. Phillip's claims in respect of these parcels/proceeds of sale are disputed by the defendants and by Sharon and the Company on various grounds.

5.3 There are also disputed issues relating to the 2 parcels in issue which did not derive from Bradley's estate and both of which Esther, as personal representative of John Samuel, transferred from John Samuel's name into her own name. They are, first, the Cayman House (parcel 7C/1) and, second, the ¼ share of parcel 15B/81, both of which Phillip claims are assets of John Samuel's estate and not of Esther's estate. Phillip's claims in respect of these 2 parcels are also disputed by the defendants on various grounds.

5.4 The next principal issue concerns the formulation and basis of Phillip's claims and whether or not they are defective in law as is contended on behalf of the defendants.

5.5 The defendants and Sharon and the Company also submit that Phillip's claims are time-barred under the Limitation Law (1996 Revision) ("the Limitation Law").

5.6 Finally, the defendants and Sharon and the Company all contend that Phillip should not now be allowed to make his claims anyway due to acquiescence and laches

6. <u>The basis on which the parcels of land were transferred to Esther</u>

6.1 There were 6 parcels of land transferred by Sir Vassel as executor of Bradley's will to Esther which were mentioned at the trial, 5 of which are subject to Phillip's claims in these proceeding. The question is whether those parcels, which were all transferred by Sir Vassel to Esther in the same way, were transferred to Esther in her capacity as administratrix of John Samuel's estate to be held by her as assets of the estate or were transferred to her beneficially and held by her as her personal property.

6.2 Attempting to answer this question, as well as others arising in this case, is particularly difficult and unsatisfactory in the absence of assistance from the evidence of the principal witnesses. At the trial certain documentary evidence was available and there was some circumstantial evidence from witnesses but the principal persons involved, namely Sir Vassel

and Esther died in 2008 and 2010 respectively. Their evidence was therefore obviously not available, except in Esther's to some extent in her deposition in Texas in June 1979. This was most unfortunate and unsatisfactory. For example, it is not known whether Sir Vassel took or acted upon any legal advice concerning the terms of Bradley's will or about his obligations as executor or concerning his division of the lands of which the estate comprised or in relation to the basis on or the manner in which he transferred divided parcels to Esther. The parties strongly disagree about all that. Furthermore, it does seem likely that Sir Vassel would at least have obtained advice from the Land Registry, even if he did not obtain legal advice, in relation to the RLR transfer forms (R.L.7) which he used to transfer each of the parcels to Esther.

6.3 It is also clear that Sir Vassel and Esther spoke to each other reasonably frequently and it is likely that they spoke about the process which Sir Vassel was undertaking over the period of approximately 16 years which it took him to divide all the properties concerned and to transfer the resulting parcels to Jen, Lady Rita and Esther but, of course, there is no evidence available from either Sir Vassel or Esther about what they discussed. Sir Vassel's explanations for doing what he did and why would have been of great assistance in ascertaining the true position rather than the court having to rely on speculation in light of documentation which is open to differing interpretations. There was uncontested evidence that Sir Vassel was assiduous about ensuring that there was general agreement by all concerned in relation to the property divisions which he was proposing and/or which he had arranged but there was not complete agreement between Phillip and his half-brothers about who Sir Vassel told what and when. Sir Vassel's own evidence and that of Esther would clearly have been invaluable.

6.4 Bradley was, of course, survived by all 3 of his children, John Samuel, Jen and Lady Rita. There was unchallenged evidence that before his own death, John Samuel, who was both a joint executor and beneficiary under Bradley's will had discussions with Sir Vassel, who was of course his brother-in-law and with whom John Samuel was apparently very close. It is reasonable to

infer that they discussed Bradley's will but, due to the unavailability of Sir Vassel's evidence, it is not known what was said or possibly even agreed between them about how the provisions of the will should be implemented. By the time these proceedings were commenced not only were Sir Vassel and Esther relatively recently deceased but Jen was by then suffering from dementia and Lady Rita was too elderly to be a witness. Accordingly their evidence, which may well have been of assistance also, was not available either.

6.5 It is also not known what Esther's own understanding of the basis on which Sir Vassel transferred the parcels from Bradley's estate to her or the reasons for such understanding or why she did what she did. She had a lawyer in Louisiana, Mr. Paul Rogyom, who it is known advised her there concerning her administration of John Samuel's estate in the USA and who had dealings with Sir Vassel. It is obviously possible that his evidence may have been of assistance but the evidence was that he died in the 1990s. Esther clearly acted as if the parcels transferred to her by Sir Vassel were her own property to deal with as she wished and it is regrettable and unsatisfactory that the timing of these proceedings has deprived the court of her evidence as well as that of Sir Vassel. The unavailability of the principal witnesses who were directly involved in the disputed transaction concerned risks inaccurate, unfair or inequitable conclusions being drawn and it is clearly most undesirable that the court should have to rely instead on conjecture and speculation.

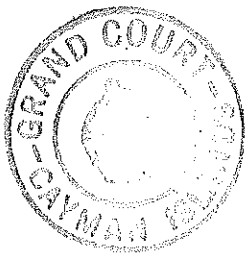
6.6 There is evidence that before he died John Samuel was contemplating making a will and a copy of a rough manuscript note by him, apparently setting down some intentions in that regard, was produced at the trial. The note was identified as being in John Samuel's handwriting but there were also a few additional markings on it, including some crossing out, which were identified as possibly but not certainly being in Esther's handwriting. It is my opinion that little, if any, weight could or should be placed on this document. It is not known whether it represents John Samuel's final thoughts; not all of its content is his and is not entirely clear. As I have said, some parts of the note have been crossed out but it is not known for certain by whom,

still less when that was done. If it was done by Esther, it could have been done in discussion with John Samuel himself or by her unilaterally after his death, in which case the note does not wholly represent John Samuel's own thoughts. I consider the background, content and reliability of the note to be too uncertain to enable any definitive conclusions to be drawn from it. However, if the note, in so far as made by John Samuel was created in the period between Bradley's death and his own death, as seemed to be generally accepted, it does seem likely that John Samuel discussed his thoughts regarding succession to his own estate, including his interest under Bradley's will, with Sir Vassel and that such discussions may have been relevant to Sir Vassel's later actions as sole surviving executor of Bradley's will. This is, of course, somewhat speculative and it does illustrate the difficulty in determining these issues after the deaths of those directly involved.

6.7 It was argued on behalf of the defendants that Sir Vassel did not comply with the terms of Bradley's will in carrying out the divisions of the parcels comprising Bradley's estate as he did and in then transferring the divided apportioned parts to each of Jen, Rita and Esther. It was submitted that the wording of the relevant bequest simply required Sir Vassel to transfer each of the parcels which comprised the lands held by Bradley at his death to the 3 beneficiaries as proprietors in common in equal shares and no more. That was clearly not what Sir Vassel did. It was contended by the defendants that Sir Vassel in fact intended to and did carry out a family division of the parcels comprising the lands in Bradley's estate, probably with the intention of minimizing the prospects of family discord whereby each of the 3 branches of Bradley's family would share equally in the land comprising Bradley's estate. It was contended that Sir Vassel's intention was to have each of the parcels comprising the lands referred to in Bradley's will divided into 3 shares in a fair and proportionate way and then in each case to distribute the resulting shares to each of Jen, Lady Rita and Esther respectively. In effect to implement a kind of family arrangement. It was said that it was pursuant to that intention that Sir Vassel engaged in the discussions and negotiations which he did with the relevant family members as the process continued and notified all

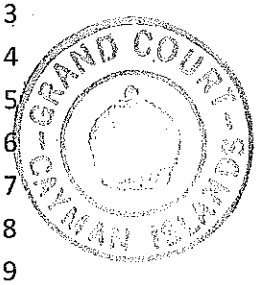
involved of his proposals regarding such divisions and what transfers he was making or had made.

6.8 It was the defendants' case that while what Sir Vassel did was no doubt with the best of intentions it was not in accordance with the terms of the will. The consequence of what he did, it was argued, was that the parcels transferred to Esther were transferred, and intended by him to be transferred to her personally for her own benefit pursuant to what amounted to Sir Vassel's family scheme, in the same way as the parcels transferred to Jen and Lady Rita were for their personal benefit. They argued that the parcels were not transferred to Esther in her capacity as administratrix of John Samuel's estate and did not become assets of John Samuel's estate. What was done was intended to benefit Esther (perhaps ultimately her sons) personally.



6.9 In my view, there was some force in the defendants' argument. However, it does nonetheless seem to me that the wording of Bradley's bequest to his 3 children of *"in equal shares the 3 pieces of land...."* was such that it was open to be interpreted as, if not necessarily requiring, at least entitling it to be implemented by having the various parcels comprising the pieces of land concerned divided into 3 equal shares in the way that Sir Vassel did, rather than leaving that to be done at some stage in the future by 3 proprietors in common. Everyone agreed in evidence that Sir Vassel was a particularly cautious, careful and meticulous man and in my view it is most unlikely that he would have knowingly, still less intentionally, departed from the terms of the will and implemented something different. It seems to me more probable that what Sir Vassel did accorded with his understanding of the bequest in the will which was not an unjustified or invalid interpretation. There was no evidence that Sir Vassel's actions in dividing up the properties comprising Bradley's estate were questioned by anyone as not being in accordance with Bradley's will. What he did in that respect was accepted, indeed actively participated in, by Jen, Lady Rita and by Esther and her sons; it was not challenged as not being in accordance with the will until very recently in legal submissions made some 17 or 18 years after the final transfers by Sir Vassel of divided parcels to Jen, Lady Rita and Esther. Of course, as I

have already said, the evidence of Sir Vassel and of Esther would have been of great assistance in resolving this issue but in the circumstances as now known I am not inclined to agree that Sir Vassel's actions in dividing up the property concerned was not, and was not intended to be in accordance with the terms of Bradley's will. However, in my opinion, it does not follow that even if Sir Vassel's divisions of the parcels comprising Bradley's estate was in accordance with the terms of the will, the transfers which he made to Esther were therefore necessarily made to her in her capacity as administratrix of John Samuel's estate.



6.10 It was pointed out, and generally agreed, that the effective transmission of property of a deceased person to a person who is the beneficiary of the property under the will requires to be by way of what is called an *"assent"*. An assent is an act by an executor in favour of a beneficiary indicating that the executor does not require the property concerned for purposes of the administration of the deceased's estate and that the property can, therefore, pass to the beneficiary in accordance with the will.

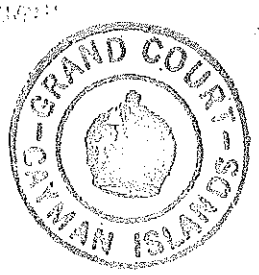
6.11 Section 28 of the Succession Law 1975, as amended in 1976 (being the Law in force at the dates of death of Bradley and John Samuel) ("the Succession Law"), provided in the relevant parts as follows:

> *"28. (1) Personal representatives may at any time assent in writing to any devise contained in the will of the deceased person, or may convey the land to any person entitled thereto as heir devisee or otherwise, and may make the assent or conveyance, subject or not to any charge which the personal representatives are liable to pay, and on such assent or conveyance all liabilities of the personal representatives in respect of the land shall cease except as to any acts done by them before such assent or conveyance.*
>
> ……
>
> ……
>
> *(3) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorize the Registrar of Lands to*

register the person named in the assent as proprietor of the land".

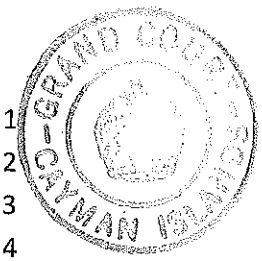
It was pointed out that Section 2 of the Succession Law provides that *"prescribed" "means prescribed by any rule or by this Law".* It also provides in the same section that *"rules"* means *"Rules of Court"*, although it should be noted that the section states that *"prescribed"* means by any *"rule"* in the singular and then refers to *"rules"* in the plural as meaning *"Rules of Court".* There is no prescribed form for an assent in the Succession Law nor is there in the Rules of Court, which anyway seems a most unlikely place to find the form of an assent prescribed.

6.12 Reference was made to several English cases concerning assents, the most helpful of which seemed to me to be *Re Commissioners of Inland Revenue v Smith [1930] 1 KB 713.* At p. 736 Lawrence L.J. said *inter alia*:



> *"The property which on the death of the testator vests in the executor does not remain vested in him forever. So soon as he assents to the dispositions of the will becoming operative and to* [the bequests taking effect] *the estate vested in him as executor is divested..... the assent of an executor may be given informally and may be inferred from his conduct. In my opinion, it is a pure question of fact whether such an assent has been given or not, depending upon the particular circumstances of each case, and no case with different facts can afford any true guide for the determination of that question..... the contention that an assent of an executor cannot be inferred, because there is a mortgage debt, or some other liability, outstanding, is not maintainable. Whether there has been an assent or not is a question of fact to be determined on the special circumstances of the particular case".*

6.13 I was also directed to the statement of Pennycuick J. in *Re King's Will Trust [1964] Ch. 542* at p. 547 where he explained:



"an assent is the instrument or act whereby a personal representative effectuates a testamentary disposition by transferring the subject-matter of the disposition to the persons entitled to it".

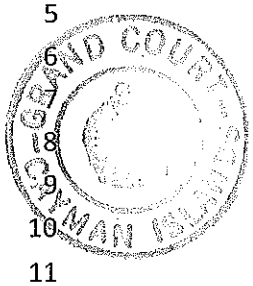
6.14 In *Re Cunliffe-Owen [1953] Ch. 545* Evershed MR said at p. 559:

".... The question whether an assent has taken place, whether there has been full administration, is a question of fact depending upon the executors' determination, and may often be a matter of fact not at all easy to ascertain or determine with precision".

6.15 Leading counsel for Phillip on the one hand and both leading counsel and counsel for the defendants on the other hand, disagreed over whether the transfers by Sir Vassel to Esther of the parcels in issue using RLR Form R.L.7 in each case amounted to assents by Sir Vassel in respect of those parcels. There is no reference to an assent in the RLL or in the RLR. Indeed there appears to be no expressly prescribed form of assent anywhere and leading counsel for Clive as administrator submitted that there is a lacuna in the law in this respect. He argued that Form R.L.7 did not amount to an assent and was not expressed anywhere to be so. He asserted that in the present case it could not simply be inferred that Sir Vassel's transfers to Esther constituted assents giving effect to the bequests under Bradley's will in respect of the parcels so transferred. If Sir Vassell did not give assents, it was argued, his transfers to Esther were simply "on-account transfers" to her personally and the parcels concerned did not therefore become property of John Samuel's estate.

6.16 The RLL, the RLR and the prescribed forms have, since 1971 (with a few amendments since) together comprised a comprehensive statutory code in respect of all registered land in Cayman and all land in Cayman has been registered since 1974 or 1975. I would accordingly be very loath to conclude at this time that there is any lacuna in the law. RLR Form R.L.7 is the form prescribed by law for the transfer of land registered in the name of a deceased person's executor or administrator by such

executor or administrator to a person entitled to the land under the will of the deceased person or on the deceased person's intestacy. Whether or not an assent has been given in such a case "*is a question of fact depending upon the executor's determination*" (see: *Cunliffe-Owen* (supra)). It seems to me that in such a case RLR Form R.L.7 is indeed intended to be "*the instrument ....whereby a personal representative effectuates a testamentary disposition by transferring the subject-matter of the disposition to the persons entitled to it*" (see *Re King's Will Trust* (supra).



6.17 There are two options under the RLL and RLR in respect of land belonging to a deceased person. The first is that the personal representative may apply to be registered himself as proprietor in place of the deceased. The application is made to the Registrar of Lands *"in the prescribed form"*, which is RLR Form R.L.19. That course is appropriate where the personal representative of the deceased person wishes his own name to be entered on the Land Register for the parcel concerned as such personal representative in place of the deceased proprietor. He must provide his grant of probate or letters of administration to the Registrar of Lands with the application. Once the personal representative has been entered on the Land Register of the parcel as proprietor he is then in a position, for example, to sell the parcel or to transfer it to a beneficiary or to apply to have it divided. The grant of such an application does not affect the beneficial ownership of the property, which does not, and is not intended to, leave the deceased former proprietor's estate. In such a case the personal representative will appear on the Land Register with the words added after his name *"as executor of the will of ..... deceased"* or *"as administrator of the estate of ..... deceased"*, as the case may be: see RLL section 116(1). Sir Vassel first adopted this option in respect of the parcels comprising the lands in Bradley's estate. He applied to be and was registered himself on each of the Land Registers of the parcels concerned as executor of Bradley's will. That was because he wished to have the parcels divided and an application for division of a parcel required him to be the registered proprietor of the parcel, although in this case as executor of Bradley's will. If a personal representative registered as such

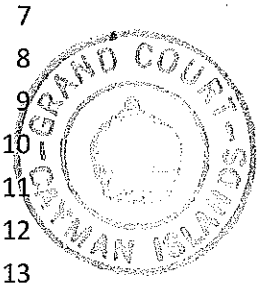
then wished to transfer a parcel to an person entitled under the will or on intestacy he would, of course, do so using RLR Form R.L.7

6.18 The second option under the RLL and the RLR in this context is that a personal representative who wishes to transfer the ownership of the property of the deceased direct to, for example, a beneficiary entitled to the property under the will or on intestacy, may, on production to the Registrar of Lands of his grant of probate or letters of administration, do so without himself becoming registered on the Land Register of the parcel at all: see RLL section 116(2). Sir Vassel did not adopt this latter method for the reason explained above.

6.19 After division of the parcels concerned Sir Vassel obviously remained registered as proprietor as personal representative of each resulting divided parcel in light of his original registration as such proprietor of the original undivided parcels pursuant to the first option above. He then used RLR Form R.L.7 to transfer, as such personal representative, the relevant divided parcels to each of Jen, Lady Rita and Esther respectively in each case, as "*the person entitled to the parcel under the will of the deceased* [Bradley]" in the terms of the pro forma printed wording on the form. As I have said already, it seems likely that Sir Vassel would have been advised about this, either by a lawyer or by the Land Registry.

6.20 It was argued by leading counsel for Clive as administrator that the absence of any qualifying words after Esther's name as transferee in the transfer Forms R.L.7 used by Sir Vassel (and, of course, signed by both him and Esther) must necessarily mean that the transfers were being made without any qualification and therefore made to Esther personally and beneficially; there was no reference on the Forms to her being the transferee in her capacity as administratrix of John Samuel's estate. However, RLR Form R.L.7 is a standard printed form prescribed by the RLR using pro forma pre-printed words. It does not on its face provide for any additional wording to be added, other than simple completion of the few blanks to identify the parcel concerned, names etc. There was no evidence from anyone from the Land

Registry and so it is not known whether it can be indicated on Form R.L.7 that the transfer (by the transferor who is a personal representative) is being made to a transferee who is also a personal representative. The printed wording on Form R.L.7 states, as already explained, that the transferee is the person entitled to the parcel being transferred either *"under the will of .....*or *on the intestacy of....."*. There is no other printed wording on the Form providing for the position where the transferee is entitled to the property, not in his or her own right but in his or her capacity as the executor or administrator of a deceased beneficiary who was so entitled under the will or on the intestacy. It would appear to follow from that, that unless somehow informed and agreed otherwise, the Land Registry will, on the basis of the completed transfer form, simply register the transferee on the Land Register for the parcel concerned as the proprietor and no more.



6.21 The Land Register of a registered parcel is a public record and available for inspection (and copy) by anyone. It seems to me therefore that anyone inspecting the Land Registers for the parcels concerned would simply see Esther registered as the proprietor and would arguably be entitled to rely on that. Of course, Sir Vassel's intentions regarding his transfers to Esther and the effect thereof would not necessarily be the same as Esther's understanding as the transferee and Esther did treat the parcels transferred to her by Sir Vassel as her own personal property.

6.22 It was argued on behalf of Phillip that RLR transfer Form R.L.7 should be construed in each case having regard to the background and surrounding circumstances of the particular transaction and adopting a common sense approach. I was referred in this regard to the well-known case: *Investors' Compensation Scheme v West Bromwich Building Society [1971] 1 WLR 1281* particularly at p. 1284 in support of that general proposition regarding the appropriate approach to construction, which is not controversial. It was submitted that in the present case the surrounding circumstances indicate that Sir Vassel intended to transfer the parcels to Esther in her capacity as administratrix of John Samuel's estate. He clearly knew that, as was the case, she had

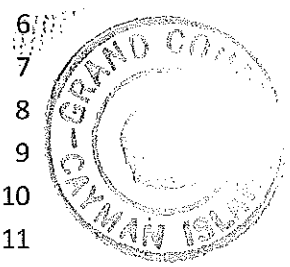
no personal interest under Bradley's estate; it was her late husband who had had the interest in his father's estate and she was simply the personal representative of her late husband. Accordingly his interests in the estate were transferred to her by the executor in her capacity as such personal representative. Her late husband's interest consisted of his equal 1/3 share with his sisters in the parcels of land comprising his father's estate. Having been divided appropriately, the resulting 1/3 shares were transferred to each of the 3 beneficiaries, but as John Samuel was deceased by the time that happened the parcels representing his share were transferred by the executor, quite properly to his personal representative, Esther.

6.23 I have, not without some hesitation, come to the view that, although the available evidence unfortunately cannot now include direct evidence of *"the executor's determination"*, as referred to by Evershed MR in the *Cunliffe-Owen* case (supra), the transfers of the parcels made by Sir Vassel to Esther out of Bradley's estate by way of Form R.L.7 were assents which were legally effective to transfer the relevant parcels to Esther in her capacity as personal representative of John Samuel in fulfillment of the provisions of Bradley's will. Although the RLR R.L.7 transfer forms used by Sir Vassel in each case referred to Esther as transferee as the "*person entitled ....under the will of* [Bradley]" and she was not personally so entitled, that could, nonetheless, in my view, be legitimately interpreted in the circumstances as meaning that she was entitled under the will in her capacity as personal representative of John Samuel, who was personally entitled, albeit it by then deceased. Understood that way the transfers to Esther by Sir Vassel as executor by way of RLR Form R.L.7 did indeed amount to giving effect to the bequests in Bradley's will by transferring the properties which were the subject of the bequest to one of the 3 persons entitled under the bequest, namely John Samuel by his personal representative.

6.24 In this connection I was also referred to a letter dated 22nd June 1982 from Sir Vassel to Esther at the time of the first transfer of a parcel from Bradley's estate, namely parcel 15E/152, to which I

have already referred (see para. 4.15 above). In the letter Sir Vassel wrote:

> *"I am enclosing the transfer form in triplicate for your signature relating to the 1/3 share* [parcel 15E/152] *of the Lambert dry land: the swamp area is now being divided. As legal representative of John* [he meant John Samuel] *the property must go to you: it's entirely up to you, and the provisions of any other instruments, to deal with the property as you wish afterwards. I am actively working on the rest of the estate as Johnny* [meaning John III, who had been visiting Grand Cayman] *might have told you and will be submitting transfer forms from time to time for your signature".*



It was submitted on behalf of Phillip that this letter makes it clear that Sir Vassel intended the transfer to be to Esther in her capacity as personal representative of John Samuel and not in her personal capacity. It was contended that the statement that the property must go to her *"as legal representative of John* [Samuel]" must be a reference to her as personal representative since the only sense in which Esther could be described as the *"legal representative"* of John Samuel was as personal representative, that is as administratrix of his estate. Sir Vassel had been directly responsible for obtaining the re-sealing of Esther's letters of administration from Louisiana and having her consequently authorized as such to administer John Samuel's estate in Cayman. The affidavit filed by Sir Vassel in support of that application, presumably after some discussion with Esther or her lawyer in Louisiana, referred to and exhibited an inventory of John Samuel's Cayman estate which clearly identified his interest in Bradley's estate as one of his assets. That interest was an asset of John Samuel, it was clearly not an asset of Esther. Both Sir Vassel and Esther obviously knew that Esther herself was not named in Bradley's will as a beneficiary and that it was John Samuel who was; not surprisingly, as it was his father's will and he was a beneficiary equally with his 2 sisters. It seems to me reasonable to infer from the circumstances that Sir Vassel and Esther must have been well-aware of and understood that. Sir Vassel's letter was written to Esther only about 2 years after the

application for re-sealing of Esther's letters of administration was granted.

6.25 It is true that Sir Vassel was not a lawyer and if, as was contended on behalf of the defendants, Sir Vassel was simply implementing an equitable family division of the properties in Bradley's estate between Jen, Lady Rita and Esther personally, it is perhaps possible that what he may have meant in his letter by referring to Esther as the "*legal representative*" of John Samuel was simply to her status as John Samuel's surviving widow entitled as such under his alleged scheme to John Samuel's share of Bradley's estate in the same way as Jen and Lady Rita. However, in light of Sir Vassel's knowledge of the circumstances and his acknowledged cautious, careful and meticulous character I consider, on balance, that interpretation of what he meant to be unlikely.

6.26 It was also submitted on behalf of Phillip that Sir Vassel's reference, in the penultimate sentence of his letter, to Esther's future dealing with the property being up to her and "*the provisions of any other instruments*" indicates that Sir Vassel was aware that there were legal limitations on what Esther was entitled to do with the property being transferred to her because it was not her personal property to do with as she liked; it was an asset of John Samuel's estate. It is obviously not clear what legal limitations Sir Vassel was thinking of and in the absence of his evidence it cannot be known for certain. The expression "*instruments*" is perhaps rather more apt to describe a document rather than being a reference to a Law but I agree that it does suggest that Sir Vassel understood that Esther would not have unfettered rights in respect of the property he was transferring to her as she would if was her own personal property.

6.27 Esther transferred parcel 15E/152, which Sir Vassel was referring in his letter, to Phillip in September 1988, some 6 years after Sir Vassel's letter and the transfer of the parcel to her. Esther made the transfer to Phillip as if she was the beneficial owner of the parcel, without any reference to her status as personal representative or to the estate of John Samuel. She did not use RLR Form R.L.7. Then in 1999 she transferred parcel 15C/63,

which had also been transferred to her by Sir Vassel, to John III, Clive and Tom, again as if it was her personal property to deal with as she liked. Again she did not use RLR Form R.L.7. Then some 5 years after that, in 2004/05, she again apparently considered parcel 15C/191, which had also been transferred to her by Sir Vassel to be her own personal property to sell to Empire and the proceeds of sale as hers to give to Sharon. Yet in 1996 when she transferred the ¼ share of parcel 15B/81 and parcel 7C/1 (the Cayman House), which were both registered in John Samuel's sole name, into her own name she did so using RLR Form R.L.7 as personal representative of the estate of John Samuel. It seems that Esther may have drawn a distinction between property registered in John Samuel's name at the date of his death on the one hand, which she treated as assets of John Samuel's estate, and the property which was transferred to her by Sir Vassel from Bradley's estate on the other hand, which she seems to have treated as her own property. However, I do not consider that inevitably reflected a correct understanding on Esther's part of the basis on which Sir Vassel was transferring the parcels from Bradley's estate to her, even though in light of the frequent discussions between Sir Vassel and Esther it might seem somewhat surprising if they had a different understanding of the basis on which Sir Vassel was doing so. Once again the absence of evidence from Sir Vassel and Esther is unsatisfactory and makes a firm conclusion in this respect somewhat tentative.

6.28 Nonetheless, in all the known circumstances and balancing the various factors, I have, albeit not without some hesitation, reached the view that the argument that Sir Vassel was transferring parcel 15E/152, and would be transferring future parcels from Bradley's estate, to Esther other than in her capacity as personal representative of John Samuel should be rejected. I find it unlikely that such a careful and cautious man, as everyone agreed Sir Vassel to be, with the knowledge and understanding of all the circumstances which he plainly must have had, would have intended, contrary to that knowledge and understanding, to transfer the parcels in question to Esther personally, ignoring the fact that they were in fact assets of John Samuel's estate. It seems to me that on balance the known circumstances support the conclusion that he did not do that but rather that he intended to

and did transfer the properties from Bradley's estate to Esther as assets of John Samuel's estate to her as administratrix of that estate to be administered by her accordingly.

7. The relevant law on succession

7.1 The law of succession is, of course, statutory. The relevant parts of the Succession Law in relation to the residuary estate of a person, who died intestate, 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-*
>
> *(a) if the intestate leaves a husband or wife (with or without issue), the surviving spouse shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than personal chattels) shall stand charged with the payment of a net sum of $1,000 or a sum equal to ten per centum of the net value of the estate whichever may be the greater, to the surviving spouse with interest thereon from the date of death at the rate of five per centum per annum until paid or appropriated, and subject to providing for such sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held-*
>
> .....
>
> *(ii) if the intestate leaves issue, upon trust, as to one half for the surviving spouse during his or her life, and subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate,* .....
> .....

The Succession Law by section 2 defines residuary estate with respect to an intestate as meaning:

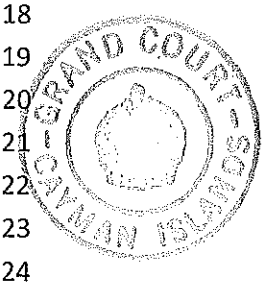
"…… every beneficial interest (including rights of entry or in reversion) of the intestate in real and personal estate after payment of all funeral and administration expenses, debts and other liabilities as are properly payable thereout, which (otherwise than in right of a power of appointment) he could, if of full age and capacity, have disposed of by will;"

Clearly John Samuel, who died intestate, left a wife, namely Esther, and one child, namely Phillip.

7.2 The statutory trusts relevant the circumstances of the present case are contained in section 30 (1) (a) of the Succession Law, which provides:

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-

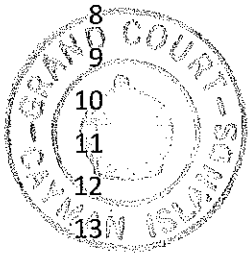
(a) in trust in equal shares if more than one, for all or any of the children or child of the intestate, surviving the intestate, who attain the age of eighteen years or marry under that age…"



And in section 31 which provides:

"31 For the purposes of this Law, the residuary estate of an intestate, or any part thereof, directed to be held upon the "statutory trusts" shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, after payment of insurance, repairs and other outgoings, upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

7.3 The position under the Succession Law is therefore that if and insofar as the real property held by Esther was held by her as assets of John Samuel's estate in her capacity as personal representative of John Samuel, of whom Phillip was the only biological child, she held such property, subject to the charge in her own favour, on the statutory trusts subject to her life interest in one half, to sell such property and to hold the net proceeds of sale, ultimately for Phillip. On the other hand, any real property which was owned or held by Esther in her own right beneficially as at the date of her death, should now be held by Clive as Esther's personal representative, on the statutory trusts for sale for the benefit of all 4 of Esther's children, namely John III, Clive, Tom and Phillip equally.



7.4 The factual position at Esther's death in relation to the 7 parcels which are now subject to Phillip's claims in these proceedings was, and remains, that, apart from the 2 parcels which Esther disposed of during her lifetime (namely parcel 15C/63, which she transferred to John III, Clive and Tom in equal shares and parcel 15C/191, which she sold to Empire), the remaining 5 properties in issue are all unsold and remain registered in the name of Esther.

8. Phillip's Claims

8.1 In summary, the relief which Phillip claims are declarations that all of the 7 pieces of real property which are in issue, that is the 5 deriving from Bradley's estate and the 2 originally registered in name of John Samuel, were held by Esther as administratrix of John Samuel's estate on the statutory trusts and that since her death the properties (and in the case of parcel 15C/191, the proceeds of sale) are held for him absolutely and that the relevant Land Registers be amended to show his interest in the properties. He therefore claims a proprietary interest in all of the parcels insofar as not sold by Esther before her death.

8.2 The legal basis for these claims was strongly disputed by both leading counsel and counsel for the defendants and, in the case of the claim relating to the proceeds of sale, by leading counsel for Sharon and the Company. It was contended that on the correct

legal analysis Phillip's claims are misconceived. In particular they contend that he has no proprietary interest in the parcels of land concerned and therefore there is no basis for the relief he seeks in respect of them. They say that on the basis which Phillip proceeds, namely that the parcels in question are assets of John Samuel's estate which were held by Esther as administratrix, Esther's statutory duties required her to convert the parcels into cash and thereafter to distribute the sale proceeds, after deduction of all costs and expenses, in accordance with the provisions of the Succession Law.

8.3 Phillip, however, contends that his interest in the parcels in John Samuel's estate is a beneficial proprietary one but it was argued by leading counsel and by counsel for the defendants that that was a misunderstanding of the nature of the "statutory trust" to which John Samuel's estate was subject under the Succession Law. They submitted that the statutory trusts imposed by the Succession Law are essentially administrative trusts, not trusts in the traditional, conventional sense pursuant to which the beneficiaries have a proprietary interest in the trust assets. They assert that the position of the beneficiaries of an intestate person's estate is analogous to that of the creditors of an insolvent company in official liquidation who have no beneficial interest in the company's assets. Their right is to ensure that the liquidator properly carries out his statutory duties to collect in and realise the company's assets, but they have no right of property in the assets of the company themselves. They obtain no such proprietary interest before a distribution by way of dividend is actually made to them. The assets remain the company's subject to their administration by the liquidator. I was referred in this context to the House of Lords case *Ayerst (Inspector of Taxes) v. C&K (Construction) Ltd [1976] AC 167* concerning the compulsory winding up of a company in which Lord Diplock made the distinction between the traditional classic trust and a statutory trust clear. Having explained the attributes of a traditional trust, he referred to the executorship of an estate as an example of a type of trust in which the "beneficiaries" position is different from that in a classic conventional trust and said (p.177)

> *" ..... Executorship of an estate in course of administration provides one example which does not owe its origin to statute. No one would suggest that an executor, who was not also a legatee, was beneficial owner as well as legal owner of any of the property which was in the full ownership of the deceased before his death. He could not enjoy the fruits of it himself or dispose of it for his own benefit. Yet because an estate while still in course of administration was incapable of satisfying the technical requirement of a 'trust' in equity that there had to be specific subjects identifiable as the trust fund, it was impossible to identify, at any rate in the case of residuary legatees, a person or persons in whom the beneficial ownership in any particular property forming part of the estate was vested: see Commissioner of Stamp Duties (Queensland) v. Livingston [1965] A.C. 694 , 707-708 per Viscount Radcliffe.*

He then considered, as another example, the situation in a bankruptcy, which owes its origin to statute, and said inter alia:

> *"...Nevertheless, as the very word 'trustee' used in the statute implies, the beneficial ownership is not vested in him* [the trustee in bankruptcy]. *He cannot enjoy the fruits of it* [the bankrupt's property] *himself or dispose of it for his own benefit. He is under a duty to deal with it as directed by the statute for the benefit of all the creditors who come in to prove a valid claim. It is no misuse of language to describe the property as being held by the trustee on a statutory trust if the qualifying adjective 'statutory' is understood as indicating that the trust does not bear all the indicia which characterise a trust as it was recognised by the Court of Chancery apart from statute."*

And later at p.180 he said:

> *"My Lords, it is not to be supposed that in using the expression 'trust' and 'trust property' in reference to the*

assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. Some respects in which it differed were similar to those which distinguished the administration of the estates of deceased persons and of bankrupts from an ordinary trust……"

8.4 It was argued for the defendants that this is equally the case with regard to the statutory trusts provided for in the Succession Law. They are "trusts" only in a loose sense, like the position in a compulsory liquidation, they are not trusts in the traditional, conventional sense under which the beneficiaries have a proprietary interest in the assets of the trust. The statutory trusts mandated on an intestacy in respect of a deceased person's estate simply mean that the administrator as such has no beneficial interest in the assets himself, but must administer the assets in the way required by the Succession Law, namely on trusts for sale.

8.5 It follows that this means that, while Phillip had a general interest in John Samuel's estate as a whole, his only entitlement was to require due administration of the estate and, for example, to ensure that property of the estate was not appropriated by the administratrix, to ensure that the assets in the estate were properly sold, to ensure that all costs and expenses were duly accounted for so as to determine the net balance and to ensure distribution in accordance with the Succession Law. It was argued that, in light of the comments in the *Ayerst* case (supra), this is so notwithstanding that the Succession Law describes someone in Phillip's position as a *"beneficiary"*; that does not mean he has any proprietary interest in the specific assets of the estate. Phillip is a beneficiary only in the sense that he has an interest in the due administration of the estate, which he himself could seek to enforce by bringing an administration action and requesting the Court to implement the statutory trusts applicable to John Samuel's estate. For example, when he saw that Esther was treating the property in the estate as her own and proposing

to divide it equally between all 4 of her sons he was entitled to do something about it. He could have brought an administration action and asked for an account but he could not, as he now seeks to do, ask the Court to declare in effect that he has beneficial proprietary interests in the specific assets, the parcels of land, in John Samuel's estate or to declare that they are now held absolutely for him. If Esther was still alive what would Phillip's claim be? He could have brought such an administration action but he did not have the proprietary interest necessary to claim that the parcels of land she held were held for him absolutely (for purposes of this argument Esther's life interest in half of the property is ignored). It is not clear to me how Phillip's position in this respect could improve simply as a result of his mother's death. After her death the court, like Esther as administratrix, whose role the court would in those circumstances be assuming, could only implement the trusts for sale by directing that the parcels of land concerned be sold and converted into cash and then direct that, upon taking such accounts as may be necessary, the net proceeds of sale be distributed in accordance with the statutory trusts. But during this process, Phillip as the statutory "beneficiary", would still have no beneficial interest in the specific property in the estate in a proprietary sense and no right to seek possession of such property. As there is no longer any administrator of John Samuel's estate, he could now only request the Court itself to administer the estate accordingly. In the *Re Loftus* case (supra) Chadwick L.J. pointed out at p. 601:

> "*the primary remedy of a beneficiary who complains of unjustified delay by an administrator in getting in the assets, paying the administration expenses and debts and distributing the residuary estate is an administration action*"

But this is not what Phillip has done. His claim is based on the premise that he, as beneficiary of John Samuel's estate, has a beneficial proprietary interest in the specific parcels of land which he contends are assets that estate. That appears, as a matter of law, to be wrong in principle.

8.6 Leading counsel for Phillip pointed out that in the *Ayerst* case (supra) Lord Diplock was careful to refer to a trust estate still in the course of administration. He submitted that it was significant that in that case the precise assets of the trust had not been identified and he argued that in the case of an estate like John Samuel's once the assets of the estate have been identified and brought under the control of the administratrix and the expenses of administration and all liabilities have been paid, the residue is ascertained and the trust "bites". Consequently at that point, he submitted, the "beneficiary" acquires a beneficial proprietary interest in the trust assets. In support of this proposition he relied on two English cases, one in the House of Lords and one in the Privy Council.

8.7 In *Dr. Barnardo's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts [1921] 2 A.C. 1*, a testator by his will bequeathed the residue of his property, consisting of stocks and shares, to a charitable institution, Dr. Barnardo's Homes. Under the applicable income tax legislation charitable institutions were exempted from income tax on interest and other payments (such as dividends), which they applied to charitable purposes. Between the date of the testator's death and the date when the residue was ascertained and distributed to the charity, the dividends on the stocks and shares as received by the executors were subject to deduction of income tax at source. After the share of the estate, consisting of capital and accumulated income, which fell to the charity was paid over by the executors, the charity claimed that the tax deducted at source should be refunded to it under the exemption in the legislation concerned. It was held that since the charity, as beneficiary of the residue, had no beneficial interest in the property of the testator until it was ascertained and distributed to it, the stocks and shares and the dividends thereon could not be said to be its property at the time of the deduction of tax at source. In his judgment in the House of Lords Viscount Cave said, inter alia, at pp.9-10:

> "*.....it is clear that exemption* [from income tax] *is given only in respect of any dividends, interest or other annual payments "of" – that is to say, belonging to – a charity,*

or which according to its trust instruments are applicable to charitable purposes only, and only in so far as they are in fact applied to charitable purposes. The appellants [the charity] *must therefore, in order to succeed in their claim, prove that the dividends from which the tax was deducted were dividends (a) belonging to the appellants, or (b) applicable to their charitable purposes only, and (c) in fact so applied. Plainly this cannot be said of these dividends when received. When the personal estate of a testator has been fully administered by his executors and the residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration."*

8.8 The second case, *Commissioner of Stamp Duties (Queensland) v. Hugh Duncan Livingston* (supra), was an appeal to the Privy Council from the High Court of Australia. In giving the judgment of the Court Viscount Radcliffe said at pp. 707-708:

> *When Mrs.Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. The nature of that interest has been defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration ..... whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly therefore he was in a fiduciary position with*

regard to the assets that came upon him in right of his office, and for certain purposes and in some respects he was treated as a trustee. "An executor, said Kay J. in In Re Marsden [(1884) 26 Ch.D. 783 at 789], is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office". He is a trustee "in this sense".

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees or various sorts, and the residuary beneficiaries……

What equity did not do was to recognize or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration …… The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realized for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realization are very far from being interchangeable terms.

At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust has as yet come into existence to affect the assets of his estate."

At p.713 Viscount Radcliffe referred to the statement in *Smith v. Layh* (90 C.L.R.102, pp. 108-109) to the effect that a residuary legatee has an equitable interest in the totality of assets forming the residue of the estate "*and therefore in the assets of which it is composed.*" and said:

"With all respect, that cannot be taken as an exact statement of the law without some further definition of terms. For its expression would have to be reconciled with the authorities that deny to the residuary legatee any property at all in any specific asset while administration proceeds and with the fact that "residue" cannot come into existence in the eyes of the law until administration is completed. Therefore, while it may be said in a general way that a residuary legatee has an interest in the totality of assets (though that proposition in itself raises the question what is the local situation of the "totality"), it is in their Lordships' opinion inadmissible to proceed from that to the statement that such a person has an equitable interest in any particular one of those assets, for such a statement is in conflict with the authority of both Sudeley [Lord Sudeley v. Attorney-General [1897] A.C. 11] *and Barnardo* [supra] *and is excluded by the very premise on which those decisions were based."*

8.9 Leading counsel for Phillip submitted that these cases make it clear that once the residue of the deceased's estate is ascertained and the administration completed the trust relationship materialises and the beneficiary acquires a beneficial interest in the specific assets of the estate. He contended that in the present case the specific assets of John Samuel's estate were known (and in the possession of Esther as administratrix) by January 1996 when Esther transferred parcel 7C/1 (the Cayman House) and the ¼ share of parcel 15B/81 to herself (although on that hypotheses it would seem to me that 15th March 1996 would be a more appropriate date, being the date of the final transfer to Esther by Sir Vassel of a parcel from Bradley's estate (parcel 15E/222)). However, whichever precise date is taken, it was argued for Phillip that it was reasonable to assume that once the identity of all of the parcels of land of which John Samuel's estate consisted was known and they were all held by Esther as administratrix, all debts of the estate and administration expenses would have been either paid or time barred long ago. Accordingly the residuary estate was, he submitted, at that point ascertained and in being and therefore Phillip's beneficial interest in the specific assets of the estate pursuant to section 29 (1) of the Succession Law took

effect. The question therefore is whether what leading counsel for Phillip proposes amounts to full administration of the estate for these purposes.

8.10 I was not satisfied that his reasoning was based on a correct application of the 2 cases relied on to the circumstances of the present case in which the intestate's estate is governed by the particular provisions of the Succession Law. I agree with the submission on behalf of the defendants that the position of a personal representative in such a case is analogous to that of an official liquidator winding up a company. As already explained, even once the liquidator has ascertained and collected in the assets of the company so they are clearly known and held by him or under his control, the creditors still have no beneficial interest in any individual asset. They remain the assets of the company. In my view, the effect of the cases cited above is that the interest of a "beneficiary" of a deceased person's intestate estate in the assets of the estate only becomes a proprietary interest in any specific asset once the estate has been fully administered by the personal representative. Viscount Cave said in the passage cited above from the *Dr. Barnardo's* case (supra) it is not until the estate has been fully (my emphasis) administered and the residuary beneficiary has become entitled to have the residue paid to him that he has any proprietary interest in any specific part of the estate. Until then everything in the estate is the property of the personal representative acting in that capacity. It seems to me that full administration in this context means collecting in all the property of the estate, selling the property pursuant to the trusts for sale, and ascertaining the net proceeds after all costs of sale and other expenses are accounted for. It is at that point that the trustee can distribute the estate to those entitled, in much the same way as an official liquidator or a trustee in bankruptcy. Before that the beneficiaries of the estate have no proprietary interest in any particular asset of the estate. It does not appear consistent with the statutory requirement that the assets of the deceased are to be held on trusts for sale that before those trusts are fully implemented the beneficiary should have a proprietary interest in any of those assets, which, as in this case, he may seek to enforce by obtaining a declaration that they are

absolutely his and so, in effect, defeat the trusts for sale. In the present case Esther, as administratrix, had not fully administered the estate in accordance with the statutory scheme by converting all of the properties into cash before her death. John Samuel's estate was not fully administered and remains unadministered. It would follow from this that Phillip does not have a beneficial interest in any of the individual parcels which he claims are assets of John Samuel's estate and he therefore may not now claim that those parcels are held absolutely for him and should be registered in his name. His claim to that effect is accordingly misconceived.

8.11 This leads to the next point arising from Phillip's claim that the parcels in issue are (or in 2 cases were) assets of John Samuel's estate but were misappropriated by Esther as adminstratrix and treated as her own, namely his locus to now claim absolute entitlement to those parcels for himself and transfer of title of them into his name. In principle, a beneficiary, even of a traditional conventional trust, has no locus to claim for recovery of trust property that has been wrongfully misappropriated; that is the function of the trustee. By analogy, a shareholder of a company does not have locus in his own right as such shareholder to sue for the recovery of property of the company or for loss sustained by the company; that is the right and function of the company itself. In certain special circumstances a shareholder may be permitted to bring a derivative action on behalf and in name of the company but it is still the company's claim. In the context of the administration of a deceased's estate Viscount Radcliffe pointed out in the *Livingston* case (supra) at pp. 713-714

> "*Nor can the difficulty be advanced by referring to those cases in Equity Courts in which a creditor or a pecuniary or residuary legatee has been allowed to follow and recover assets which have been improperly abstracted from an estate. The basis of such proceedings is that they are taken on behalf of the estate and, if they are successful, they can only result in the lost property being restored to the estate for use in due course of administration. Thus, while they assert the beneficiary's*

right of remedy, they assert the estate's right of property, not the property right of creditor or legatee; indeed the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default, and thus his rights have to be put in motion by some other person on behalf of the estate."

8.12 But that is not the basis on which Phillip now claims. He has not been "*allowed to follow and recover assets which he contends have been improperly abstracted from* [John Samuel's] *estate*"; he does not purport, even if he had been allowed, to bring his claims to assert the property right(s) of John Samuel's estate. Nor does he purport to exercise the rights of his mother as administratrix who he claims was in default. The proper person to bring proceedings to recover property of John Samuel's estate would be the administrator of that estate. However, there is, of course, no longer any administrator of the estate, Esther having died, and her letters of administration would not pass to Clive as administrator of her estate. It would therefore seem that in order for the estate to make a claim, Phillip, or someone else, would have to obtain new letters of administration in Louisiana and then have them re-sealed by this court. There would be procedural difficulties in Phillip himself bringing a derivative claim on behalf of John Samuel's estate as there is no longer a personal representative to be joined to such an action, as would be necessary for it to be properly constituted. Moreover the "special circumstances" required to be established in order to be able to bring such an action have not formed any part of Phillip's pleading or been addressed at all. For Phillip to bring such a claim would involve him changing fundamentally the capacity in which he now sues and asserting an entirely different cause of action, even assuming he was given leave to proceed in that way. His current claim does not purport to be constituted as a derivative claim or to be otherwise made for or on behalf of John Samuel's estate. Accordingly his current claim would appear to be misconceived in this respect also.

9. The Witnesses

I now turn to consider the witnesses who gave evidence at the trial.

9.1 Phillip

I found Phillip an unsatisfactory and disappointing witness. He came over to me as a cold and rather emotionless character. He is clearly an intelligent and perceptive person and he gave me the impression that he knew what he had to say in order to make his case and was determined to do so rather than being fully frank, honest and open. He seemed particularly defensive and often did not give a straight forward answer to a question he did not like but was evasive and dissembling. On several occasions I had to instruct him to just answer the question being put to him. He came over as having a self-serving memory. At times he would give an inconclusive response even when pressed for a clear answer and was difficult to pin down. Obvious examples were his evidence regarding his discovery in these proceedings and his evidence in relation to the IRS expatriation form which he had completed. I did not find him wholly reliable or candid. In my assessment, the rather calculated, superficially composed yet equivocal and insensitive demeanor which I thought Phillip exhibited and the way in which he gave his evidence was in marked contrast to the demeanor of his half-brothers, John III, Clive and Tom and the way in which they gave evidence.

9.2 Laura

My impression of Laura was of a determined, forceful and somewhat inflexible and dogmatic woman, who was there simply to support her husband's case. She did not give any helpful insights into her husband's, or her own, knowledge and understanding of the matters in issue, notwithstanding that they have been married to each other for some 27 years or so. I did not find the evidence she gave to be of any real assistance and having observed her demeanor and attitude, I was not convinced that she was a truly independent and objective witness in any event.

9.3 Tom

Tom was the first of the defendants to give evidence. I found him to be a fair, frank and open witness and I had no hesitation in accepting his honesty. His evidence was reliable in my view.

9.4 John III and Clive

These witnesses also appeared to me to be honest, fair and frank and their evidence, which I accepted, was anyway to a large extent unchallenged. I found John III's witness statement, which was very comprehensive, to be of particular assistance. As the eldest of Esther's sons I think it reasonable to expect him to know and understand the most detail of what happened, particularly in the earlier stages of the relevant history. I considered his evidence, perhaps with Tom's to be the most reliable and convincing of all.

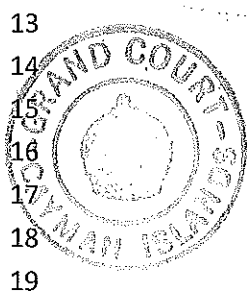
9.5 Sharon

Sharon also appeared to me to be a strong and forceful personality and she was an assertive witness. I could well see why she and Laura might not get on, as they apparently did not when living together for several months in the Cayman House when Phillip and Laura first came to live in Cayman in 1987.

Sharon was also somewhat defensive and at times rather dogmatic in her answers. She was challenged extensively over her evidence regarding the time, some 20 years or so ago, as being one of the occasions when, she said, Laura had made a comment about Phillip inheriting the Cayman House. Despite the contradictory evidence of Mrs. Jill Carter, who did emphasize that she was a good friend of Laura, I nonetheless thought what Sharon said did have the ring of truth about it. The fact, which Sharon said arose during the conversation at the social gathering concerned, that John III, Clive and Tom had not been adopted, as Sharon had, clearly struck a chord with her. It does not seem improbable to me in the circumstances, having seen both Laura and Sharon, and in light of my findings, to which I shall refer later, concerning Phillip's belief about his entitlement to the

Cayman House as an asset of his father's estate, that Laura had indeed on occasion made a comment such as Sharon claimed. Such a comment on the specific occasion in question, which was the subject of extensive cross-examination of Sharon, could easily, in my view, have been missed by Mrs. Carter in the course of what would no doubt have been a rather hectic and distracting get together of mothers and young children many years ago. Such a remark by Laura would clearly have been of far more significance to Sharon than to Mrs. Carter or anyone else present.

However, as counsel for John III, Clive and Tom pointed out, Sharon's evidence concerning that particular occasion was merely corroborative and since, as I shall point out later, Phillip admitted to knowledge of his entitlement in cross-examination, the need for any such evidence from Sharon fell away.



The principal part of Sharon's evidence related to the payment by Esther to her of the proceeds of the sale of Parcel 15C/191 and Phillip's knowledge of that. I saw no reason to disbelieve Sharon's evidence about that. She was again challenged in cross-examination about possible inconsistencies of specific timing but in the context I did not consider that the basic substance of her evidence was undermined. In my opinion her evidence that Phillip knew of the intended and/or actual payment of the proceeds of sale to her at or about the time was not successfully discredited. I preferred her evidence in that respect to that of Phillip.

10 Parcel 7C1/The Cayman House

10.1 As I have already explained, the land which became Parcel 7C1 was conveyed to John Samuel by his father, Bradley, in September 1969. The parcel was registered in the sole name of John Samuel but after his death Esther transferred the parcel into her own name. In my view, it is reasonable in the circumstances to conclude that she did so because she believed that the Cayman House was really the joint house of her and John Samuel. It was the position of leading counsel and counsel for the defendants that the legal basis for this was that the Cayman House was to all

intents and purposes jointly owned in equity by John Samuel and Esther under a common intention constructive trust and that on John Samuel's death, as such joint property, it passed to Esther as his survivor. Accordingly, the Cayman house did not form part of John Samuel's estate but, having rightfully passed to Esther it formed part of her estate on her death.

10.2 Phillip claims that the Cayman House was owned legally and beneficially solely by John Samuel and was accordingly an asset of John Samuel's estate at the time of his death. On Phillip's case, it was held by Esther in her capacity as administratrix of his father's estate. There was therefore a significant dispute between the parties in this respect.

10.3 The principles regarding such constructive trusts are conveniently set out in *Megarry & Wade on the Law of Real Property (8th. Edn.)* at para 11–023:

> *It frequently happens that land is purchased in A's name alone, but B claims an interest in the property by reason either of some contribution direct or indirect to its acquisition or from having made some improvement to it. To succeed, B will have to demonstrate:*
>
> *"(i) A common intention that both parties should have a beneficial interest in the property; and*
> *(i) That B acted to his (or as is commonly the case, her) detriment on the basis of that common intention so that it would be inequitable for A to deny B an interest."*

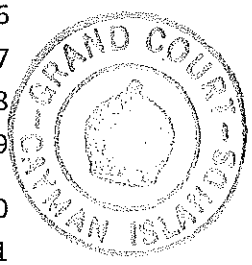
And then at para 11-025

> *"……*
> *A common intention will be inferred in two situations, being cases where it can be "deduced objectively from their conduct". In other words, there must be evidence from which the court may reasonably infer that the parties actually had a common intention, even though they did not articulate it as*

such. Thus, positive evidence that the parties did not have such an intention will defeat the inference. The first case is where B contributes directly to the purchase price, whether by a cash contribution or its equivalent, or by paying mortgage instalments. Secondly, in response to changing social and economic conditions, it is now clear that the common intention may be inferred from the parties' whole course of conduct in relation to the property.

10.4 Reference was also made to the case of *Stack v Dowden [2007] 2 AC 432* in the House of Lords in which Baroness Hale said at p.455, para 60:

> *"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it"*



She also referred in para 61 to the case *Oxley v Hiscock [2005] Fam. 211* and the judgment of Chadwick LJ in which, at para 69 of his judgment, in the context of the claimant having to establish what beneficial interest she had in the property, he said:

> *"……*
> *……*
> *It must now be accepted that (at least in this court and below) the answer is that each* [party] *is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property."*

10.5 Accordingly, the whole course of dealing between John Samuel and Esther in relation to parcel 7C1/the Cayman House must be considered in order to determine whether the court should consider it fair that Esther and John Samuel should have been

entitled to share the property equally between them by way of equitable joint proprietorship.

10.6 The course of dealing between John Samuel and Esther, so far as known, starts with the building contract for the construction of the house on the parcel which, as I have already said, slightly pre-dated the conveyance of the parcel by Bradley to John Samuel. It is an agreement between John Samuel and the builder which starts with the statement that John Samuel, together with Esther his wife, is seised of what became parcel 7C1 and wishes to erect a house on the property. It was, of course, not strictly correct that John Samuel and Esther were seised of the property at that time and the conveyance by Bradley to John Samuel was not actually made until approximately a month later. However, the statement in the building contract may, in my view, reasonably be considered as indicative of an intention by John Samuel, who signed the contract, that the house to be built should be his and Esther's. At that time John Samuel and Esther had been married for over 6 years and between them had a family of 4 boys, then aged approximately 11, 10, 8 and 5. John Samuel, was by all accounts a good and caring husband, and it seems to me not unreasonable to infer that he would wish the house to be both his and his wife's joint home.

10.7 Leading counsel for Phillip made much of the fact that the property was transferred by Bradley only to John Samuel and that accordingly Esther cannot be said to have made any contribution to the cost of its purchase or to have brought it into the family. However, in her deposition in Texas only just over a year after John Samuel's death, Esther said on oath that Bradley *"gave us this piece of property……"*. She also said immediately thereafter that it was accurate to say that John Samuel's father gave the two of them the piece of property on which they subsequently built the [Cayman] House. Although this was not strictly correct in law, I am of the view that Esther's statements clearly indicate that she and John Samuel did treat the land as having been given for the benefit of both of them on which to build a house for them both.

10.8 Esther went on in her deposition to say that she and John Samuel used the sum of $15,000.00, made up of US$5,000 each from the monies held for the 3 older boys as their shares of the compensation agreed in respect of the death of their father, John Jr., towards the costs of construction of the Cayman House. That evidence in Esther's deposition was not significantly challenged in the present proceedings. There was also evidence that shortly after the conveyance of the parcel by Bradley a loan secured by a mortgage over the property was granted by Canadian Imperial Bank of Commerce Trust Company (Cayman) Limited of George Town ("CIBC"). Esther was required to be joined as a party to the mortgage and consequently jointly and severally liable in respect of it. Leading counsel for Phillip pointed out, in support of his contention that the Cayman House was John Samuel's alone, that the property insurance in respect of the Cayman House required by CIBC and provided by National Employers Mutual was in name of John Samuel alone. However, that does not seem surprising given that the legal title to the property was in name of John Samuel. Nor does it necessarily suggest that John Samuel was not acting for the benefit of his wife as well as himself; that seems unlikely. Esther also deposed in Texas to the fact that the rent payable in respect of the subsequent lease of the house was paid into a joint bank account in Cayman in name of both her and John Samuel. To my mind that also suggests that she and John Samuel treated the house as theirs jointly.

10.9 Leading counsel for Phillip also emphasized that John Samuel and Esther did not themselves live in the Cayman House when it was first built but for several years rented it out and Esther also allowed one or more of their children live in it. However, it was clear from the evidence that John Samuel and Esther saw the Cayman as a retirement home for them both when they returned to live permanently in Cayman in due course, which they intended to do and as Esther, of course, did herself in 1996. I do not think that, having regard to the overall circumstances, the fact that John Samuel and Esther did not live in the Cayman House initially is necessarily determinative of whether in reality they considered it to be their house jointly and not John Samuel's

alone. As I have said, they were a very close knit family and this seems the most probable to me.

10.10 This is another example of the regrettable consequence of the timing of these proceedings that Esther, who could have given evidence in person concerning the position between her and John Samuel regarding the Cayman House, is not available to do so. Nonetheless, the evidence from Esther's deposition in Texas, the general course of dealing in relation to the Cayman House so far as known and such surrounding circumstantial evidence as is available is in my view just sufficient to support what seems to me to be most probable in the circumstances, namely that John Samuel and Esther considered the Cayman House to be theirs jointly. I consider that it would be fair and just that they be treated as having had equal joint shares in the property as joint proprietors in equity. On legal analysis there was a common intention constructive trust, as the defendants contend. In the circumstances the property would pass to Esther by survivorship on the death of John Samuel. Although obviously not conclusive of the issue, Esther herself clearly thought that she was entitled to the Cayman House on her late husband's death. She arranged to have it transferred it to herself as the person entitled to the property, as she said she was doing on oath in her deposition in Texas, in the presence of John III and Tom. Phillip, of course, disputes his mother's entitlement to the Cayman House. It is my assessment, as explained later in this judgment, that he considered for many years that it was always the property of his father alone and an asset of his father's estate to which he was entitled, as he now claims. As I have already mentioned, Phillip has lived in the Cayman House at various times since his father's death and he has been living there since 2007.

11 Parcel 15C/191 – the proceeds of sale

11.1 I have already summarized the basic facts relating to this transaction. Leading counsel for Phillip produced at the trial a schedule showing the payments made by Sharon's Company out of the proceeds of sale, which was subsequently agreed on behalf of Sharon and the Company. Leading counsel for Phillip also

made it clear in his opening skeleton argument that, contrary to his pleadings, Phillip does not now claim reimbursement of all of the proceeds of sale. Specifically he does not now claim such of the proceeds of sale as were spent prior to the date when Sharon became aware of Phillip's claim to them. In other words, Phillip is not now claiming reimbursement of sums spent out of the proceeds of sale in ignorance of his claim, that is at the stage when Sharon was an innocent volunteer. However, there was some dispute as to the appropriate date from which it should be considered that Sharon did become aware of Phillip's claim to the proceeds of sale. Phillip's previous attorneys, Conyers Dill & Pearman ("Conyers"), notified Clive of Phillip's claims to various assets, including the proceeds of sale, by letter dated 17th March 2011. At that time, neither Sharon nor Sharon's Company were parties to the proceedings. However, the evidence was that Clive showed the letter to Sharon, who read it. It was shortly thereafter, on 31st March 2011, that Sharon began, for the first time, to procure the Company to pay out of the proceeds of sale legal fees being incurred by Clive and his brothers in connection with these proceedings. Some 15 months later, by letter dated 30th October 2012 Phillip's new and current attorneys, Appleby, wrote asking Sharon to give an undertaking not to spend any further amounts out of the proceeds of sale. Sharon had still not been joined to the proceedings and did not give any such undertaking. On 17th December 2012 Phillip applied to this court to join Sharon and the Company as defendants and for an injunction restraining Sharon from using the proceeds of sale any further. The applications were duly granted and the injunction order dated 17th December 2012 already referred to was made. It therefore took Phillip over 18 months from the date of the letter dated 17th March 2011 from his previous attorneys to take any action against Sharon and the Company. However, he now claims reimbursement of all payments which Sharon procured the Company to make out of the proceeds of sale after 17th March 2011, as well as the remaining balance of the proceeds of sale which is subject to the injunction.

11.2 It was accepted by leading counsel on behalf of Sharon and the Company that, on the hypothesis that Parcel 15C/191 was an asset of John Samuel's estate as Phillip contends, Esther's

transfer of the proceeds of sale into the bank account in joint names of Clive and Sharon amounted to a breach by Esther of the statutory trusts on which she held the property. Phillip now seeks a declaration that the proceeds of sale are held by Sharon and/or the Company on trust for him absolutely and for payment of them to him. Alternatively, he seeks an order that compensation to be paid by Sharon and/or the Company for such of the proceeds of sale as have been spent, although, as I have pointed out above, Phillip now seeks such compensation only for the proceeds of sale spent by Sharon and/or the Company after Sharon is said to have become aware of his claim to the proceeds of sale.

11.4 The transfer by Esther of the proceeds of sale to the joint bank account of Clive and Sharon was gratuitous. It was submitted by leading counsel for Phillip that there is a presumption, albeit rebuttable, that this transfer was not by way of gift. I was referred to *Snell's Equity (32nd. Edition)* at para. 25-03 where the author quotes Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* at pp 708-709 as follows:

> "[W]*here A makes a voluntary payment to B or pays wholly (or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchase by A and B in shares proportionate to their contributions".*

Snell continues:

> *"In both kinds of transaction the facts giving rise to the presumption of a resulting trust are that A transfers property to B for which B provides no consideration. The trust arises by operation of law to give effect to a presumption that A did not intend B to take the property beneficially. The presumption can be rebutted by proof*

that A did in fact intend B to take the property as beneficial owner. This intent may be established by direct evidence, or to a degree by reliance on the presumption of advancement."

However, this presumption only operates if there is no direct evidence of A's intention: see the *Westdeutsche* case at p 708. In the present case there is direct evidence of Esther's intention, namely the evidence of Sharon, although unfortunately, because this claim was not made sooner, Esther's own evidence is not available. In the circumstances here therefore, it seems to me that it was for Phillip to establish on a balance of probability his contention that Esther's intention was not to give the proceeds of sale to Sharon as a gift and did not do so; her intention, he argued, was that Sharon should simply hold the proceeds of sale on Esther's behalf on trust for her and that is what she did.

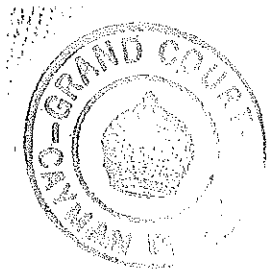
11.5 Leading counsel for Phillip attempted to establish that the gratuitous transfer of the proceeds of sale to Sharon was unlikely to have been a gift, notwithstanding Sharon's evidence that it was. In his cross examination of Sharon he sought to show that her evidence was generally inconsistent and unreliable, especially when it came to the issue of precisely when she says Phillip first became aware that Esther had given the proceeds of sale to her. However, when Phillip became aware of that is a different issue from whether there was a gift. I did not find leading counsel's attempts to undermine Sharon's evidence that the proceeds of sale were a gift successful. In my view he was not able to establish that the proceeds of sale were probably given to Sharon by Esther to be held on trust for Esther. Sharon was not a stranger to Esther; she was her daughter-in-law. As leading counsel for Sharon argued, in February 2005, at the time of her transfer of the proceeds of sale into the bank account in joint names of Clive and Sharon, Esther was only 65 years old. She was in good health and was mentally and physically able. She was in employment. She operated her own bank account into which the proceeds of sale were initially paid and she held deposits at the bank which she managed herself. She regularly used a credit card and she dealt with her own finances. The clear conclusion was that she

was not the kind of person who needed someone else to hold her money for her. One could legitimately ask what conceivable purpose or need could there have been for Esther to give the proceeds of sale to Sharon unless it was intended to be as a gift?

11.6 There was considerable evidence about the fact that Esther wanted part of the proceeds of sale to be used by Sharon to pay for the costs of a vacation for all of Esther's extended family, which it was eventually agreed should be a cruise to Alaska, which Sharon duly organized and paid for out of the proceeds of sale. Also at another stage, at Esther's request Sharon paid a sum out of the proceeds of sale to Esther's sister. However, as counsel for John III, Clive and Tom pointed out, just because someone in making a gift of money asks if the recipient would be kind enough to use some of it to pay for a vacation for all of the family or to give some money to her sister does not mean that a trust was thereby created. When asked why she thought Esther would give her such a significant amount of money as a gift, Sharon said that she had asked Esther several times but that Esther had simply said *"I have my reasons"*. Unfortunately we will never know what those reasons were. There are clearly a number of possibilities. Nonetheless, the evidence of John III, Clive and Tom, which I accepted, was that they were all made aware relatively soon after it happened that Esther had given the proceeds of sale to Sharon. John III said it was common knowledge in the family and also that Phillip did not like the fact that Esther had done so. In her witness statement Sharon stated that when she asked Esther whether she wanted an accounting of how much the cruise was costing (some US$140,000), Esther replied that the cost had nothing to do with her as Sharon was paying for the cruise with her own money. Sharon was not cross examined about that. In all the circumstances and having regard to the evidence which I accepted I am satisfied that the transfer of the proceeds of sale by Esther to Sharon was intended to be and was a gift and that the proceeds of sale were not intended to be and were not held by Sharon on trust for Esther.

12. Limitation

12.1 The defendants and Sharon and the Company contend that Phillip's claims are anyway barred by limitation. As already explained, his claims are for declarations that the properties in issue are held on trust for him absolutely (as are, he says, the proceeds of sale of parcel 15C/191). The defendants and Sharon and the Company contend that of all the sections of the Limitation Law these claims are most appropriately referable to section 27, the side note to which reads "Trust property". The section provides, in so far as relevant to the present case, as follows:



> "*(1) 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 property, or the proceeds of trust property in the possession of the trustee or previously received by him and converted to his use.*
>
> *(2)*.....
>
> *(3) Subject to sub-sections (1) and (2)* [subsection (2) is not relevant in this case] *an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Law, shall not be brought after 6 years from the date on which the right of action accrued. For the purposes of this section, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.*"

12.2 Accordingly, the general rule under section 27(3) is that an action by a beneficiary to recover trust property or in respect of a breach of trust, shall not be brought after 6 years from the date when the right of action accrued unless the action falls within one of exceptions provided for in paragraphs (a) or (b) of sub-section (1). In order to constitute such an exception an action must clearly fall within the precise statutory language. Paragraph (a) is not relevant to this case as there is no allegation of fraud. Paragraph (b), which I shall refer to for these purposes as "the exception", if applicable, leaves a trustee open for an indefinite time to a claim by a beneficiary to recover trust property.

12.3 In order to fall within the wording of the exception the action must be brought "*by a beneficiary under a trust*". It was contended for the defendants that this is referring to someone who is a true beneficiary under a traditional conventional trust who has a beneficial interest in the trust property concerned. As already discussed, a person interested in an unadministered intestate estate under a statutory scheme of the kind in this case is not a true beneficiary in that sense at all. Such a "beneficiary" has no beneficial interest in specific assets of the estate; the "trust" is an administrative one, the specific terms of which are mandated by law, namely trusts for sale. The only remedy open to such a statutory "beneficiary" prior to the full administration of the estate is to bring an administration action: see *Re Loftus* (supra). Such a "beneficiary" is not contemplated by and does not fall within the exception and nor does such a "trust".

12.4 It was further pointed out on behalf of the defendants that in order to fall within the exception the action must also be brought against a "trustee". It was accepted that for this purpose a personal representative is a trustee but as Esther is deceased there is no longer a trustee and there has not been one at any time during the course of these proceedings. The present case is brought inter alia against the administrator of Esther's own estate but he is not and never was a trustee of John Samuel's estate. Phillip's case is that the properties which he claims are his absolutely are assets of John Samuel's estate, not assets of Esther's estate, and it is on that basis that he asserts his entitlement.

12.5 The exception requires too that the action is one to recover trust property or the proceeds thereof *in the possession of the trustee or previously received by him and converted to his use*, which is also clearly not the case. The exception does not apply to proceedings for recovery of property which is no longer in the possession of the trustee: see *Re Timmis [1902] 1 Ch. 176*. At the very least, parcel 15C/63 and parcel 15C/191, having been disposed of by Esther during her lifetime were certainly not in her possession at the time of her death and neither were they converted to her use.

12.6 Both Leading counsel and counsel for the defendants submitted that it is now well-established that a "trustee" for the purposes of the exception does not include what has become known as a "class 2" constructive trustee. Although the definition of "trusts" in the Trusts Law (see section 2) includes "implied and constructive trusts", there have been a number of cases concerning the application of the English equivalent of section 27(1) to constructive trustees. In *Paragon Finance v Thakerar [1999] 1 All ER 400*, in the English Court of Appeal, Millett L.J. clarified the two types of constructive trust for this purpose. They are (i) where a trustee acquires the property by an independent lawful arrangement, which is not called into question by the plaintiff, before the time when the alleged breach of trust occurred (a class 1 trustee). Such a trustee falls within the exception and (in the absence of any other reasons to the contrary) cannot rely on any limitation period; and (ii) where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff (a class 2 trustee). Such a trustee has the benefit of the usual 6 year limitation period. It was pointed out that this distinction between types of constructive trust was recognized as long ago as the 1920s in 2 cases in the Privy Council: *Isabella Taylor v Davies & Others [1920]AC 636* and *Clarkson & Another v Davies & Others [1923] AC 100*, which are of course binding on this court. This distinction is accordingly part of Cayman Islands law. Very recently the distinction was endorsed, again in the context of limitation, in a decision of the UK Supreme Court in *Williams v. Central Bank of Nigeria [2014] 2 WLR 355,* the official report of

which only became readily available after the conclusion of the trial in these proceedings. A copy was helpfully provided to me some time later by counsel for John III, Clive and Tom.

12.7 It was contended on behalf of the defendants and of Sharon and the Company that on their case Esther was a class 2 type of constructive trustee and accordingly not a trustee falling within the exception. However, this submission (although not strictly relevant anyway in respect of the claims concerning parcel 15C/63 and the proceeds of sale of parcel 15C/191), must be dependent upon the validity of the defendants' case that the transfers to Esther by Sir Vassel were not made to her as administratrix of John Samuel's estate but to her personally and therefore not subject to the statutory trusts. I have, albeit somewhat tentatively, as explained above, reached the opposite conclusion. I have proceeded upon the basis that the properties concerned were transferred to Esther in her capacity as personal representative to be held by her on the relevant statutory trusts as property of John Samuel's estate. In light of that it seems to me that Esther's "trusteeship" would have been of a class 1 kind and so in that respect at least falling within that particular wording of exception.

12.8 On the other hand, in my view the claim against John III, Clive and Tom regarding parcel 15C/63 and the claim against Sharon and the Company regarding the proceeds of sale of parcel 15C/191 are different in this respect. Although they both relate to property originally transferred to Esther by Sir Vassel they were subsequently disposed of by Esther. She gave parcel 15C/63 to John III, Clive and Tom and she sold parcel 15C/191 and gave the proceeds of sale to Sharon. On the basis of Phillip's case it seems to me that in respect of parcel 15C/63, John III, Clive and Tom and in respect of the proceeds of sale, Sharon and/or the Company, are respectively constructive trustees of the class 2 type. Accordingly, in so far as directed against them in these respects the action does not fall within paragraph (b) and would be subject to the usual 6 year limitation period.

12.9 Notwithstanding that Esther may have been a class 1 type trustee, in *Halton International Inc. & Anor. v. Guernroy Ltd [2006] EWCA Civ. 801* the English Court of Appeal held that even though on the facts of that case the property concerned constituted class 1 trust property, the claim did not come within the exception and was accordingly time-barred as a result of the usual 6 year limitation period. At paras. 22 and 23 Carnwath L.J., giving the judgment of the Court, said:

> " 22. *Section 22 (1)* [the equivalent of section 27(1)] *provides an exception to the ordinary limitation rule that civil actions are barred after six years. Such an exception needs to be clearly justified by reference to the statutory language and the policy behind it. It is important therefore to keep in mind the reasoning behind the exception. It is not about culpability as such; fraud may not be sufficient to avoid the ordinary rule. It is about deemed possession: the fiction that the possession of a property by a trustee is treated from the outset as that of the beneficiary. In the words of Millett L.J., the possession of the trustee is "taken from the first for and on behalf of the beneficiaries" and is "consequently treated as the possession of the beneficiaries". An action by the beneficiary to recover that property is not time-barred, because in legal theory it has been in his possession throughout*
>
> *23. Turning to the present case, to treat the voting rights as class 1 property, even if justified on the facts, does not assist the claim*……
>
> ……
>
> ……
>
> ……*For the exception to apply there must be a trust (or trust-like responsibility) for specific existing property, not merely for the means to obtain it in the future"*

12.10 In light of this, even on the assumption that the properties transferred by Sir Vassel to Esther constituted class 1 trust property, the trust on which they were held by her was not a traditional, conventional trust but a statutory trust operating under a particular administrative scheme with the consequences I have already discussed above. The legal theory referred to in the *Halton v Guernroy* case, which is applicable to a conventional trust, namely that the possession of the trust property by the trustee is from the outset the possession of the beneficiary, is not applicable to such administrative trust mandated by the Succession Law. Phillip has had no interest in possession of the assets of the estate "from the outset". He would have no beneficial interest at all in the individual assets of John Samuel's estate until it is fully administered. As in *Halton v Guernroy* (supra), even if as administratrix Esther was a class 1 type trustee and the parcels of land held by her constituted class I property, it does not assist Phillip to bring his action within the exception. I have therefore concluded for all these reasons that the exception is not applicable in this case.

12.11 However, if the analysis above is correct, it would seem to follow logically that the precise terms of section 27 (3), are not met either. That sub-section expressly relates to "*an action by a beneficiary to recover trust property or in respect of any breach of trust...*" (my emphasis). If a consistent interpretation is adopted Phillip's action is not "by a beneficiary" nor is it an action to recover "trust property" as required by sub-section (3) either. In those circumstances, I am inclined to agree with the submission made on behalf of the defendants that in equity the limitation period in respect of an action such as Phillip has now brought is the usual 6 years by analogy either with section 27 (3) or with that applicable for tort or restitution claims generally.

12.12 Leading counsel for Phillip relied on the provision at the end of sub-section (3), ("the proviso") which is set out in full above (see para.12.1). In summary the proviso provides that where the beneficiary's interest in the trust property is a future one the right of action does not accrue until that future interest falls into possession. It was argued that in light of the terms of the statutory trusts Phillip's interest in one half of the trust property

was a future one in respect of which his right of action therefore did not accrue until it fell into his possession on his mother's death, notwithstanding that his interest in the other half would, on this argument, have fallen into possession when he attained the age of majority in 1982. However, if it is correct that in this case the trust of which Philip is a "beneficiary" is not a traditional, conventional trust but a special statutory administrative type of trust under which he has no beneficial interest in the any of the assets comprising the property held by the "trustee" until there has been full administration, the concept of the interest of such a "beneficiary" falling into possession does not seem appropriate. In my view, it is not clear that such a case is contemplated and provided for by the proviso. Moreover, if it is right that sub-section (3) is not applicable to Philip's action in any event it would seem to follow that the proviso to the sub-section is not applicable either.

12.13 Leading counsel for Phillip sought support for his argument from *Mara v. Brown [1895] 2 Ch. 69*. That case involved a limitation provision in the Trustee Act of 1888 similar but not identical to the proviso to sub-section (3). However, it seemed to me that the provision again related to a conventional type of trust and the facts of the case did so too. I therefore did not find it of assistance in the particular circumstances of the present case.

12.14 It was also argued on behalf of Phillip that the sections of the Limitation Law relating to actions for the recovery of land are the provisions which are relevant to his claims. Section 19 (1) of the Limitation Law provides for a 12 year limitation period for an action to recover any land, as follows:

> *"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."*

Land is defined in section 2(1) as including:

> *"any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale"*

12.15 It was emphasized on behalf of Phillip that this definition of land includes an interest in the proceeds of sale of land held on trust for sale, which, it was submitted clearly applied to the claim to the proceeds of sale of parcel 15C/191. Accordingly, it was contended that a 12 year limitation period was applicable to that claim. Leading counsel for Sharon and the Company argued that this definition is concerned with interests in land itself and the reference to an interest in the proceeds of the sale of land held upon trust for sale is not to an interest in the proceeds of sale of land which has already been sold and so no longer "held" upon trust for sale. I was not persuaded that that was a correct interpretation. It seems to me that the section is referring to particular types of interest in land one of which is an interest in the proceeds of sale of land held upon trust for sale. The section equates the proceeds of sale to the land itself.

12.16 Leading counsel for Phillip sought to support this interpretation by reference to section 26 (1) of the Limitation Law which provides that:

> *" No action shall be brought to recover –*
>
> *(a)……*
>
> *(b) proceeds of the sale of land after the expiration of twelve years from the date on which the right to receive such principal sum or proceeds accrued."*

However, notwithstanding the generality of the wording of paragraph (b) of the subsection, the side note to this section is "*Recovery under mortgage*" and the whole section clearly relates to matters concerning mortgages. In that context the reference to "*proceeds of the sale of land*" appears to relate to the sale of land pursuant to a power of sale in a mortgage. In my view, it is

doubtful whether that subsection is intended to or does relate to a claim such as Phillip's.

12.17 However, in my view, Phillip's real complaint in these proceedings is that the money which he now claims from Sharon and/or the Company represents the proceeds of a breach of trust which he seeks to recover from an alleged constructive trustee or trustees. In the circumstances, I agree with the submission of leading counsel for Sharon and the Company that Phillip's action against them is far more appropriately referable to subsection (3) of section 27 of the Limitation Law and therefore subject to the 6 year limitation period prescribed by that subsection or, as discussed above, in equity analogous thereto,

12.18 It was argued for Phillip that his claim against John III, Clive and Tom in respect of parcel 15C/63 in particular is a claim to recover land but as their counsel submitted, and as has already been discussed above, in order to make a claim to recover that parcel of land Phillip would need to have a proprietary interest in it, which he did not and the Limitation Law cannot create such an interest. Even if Phillip did have such a proprietary interest, on his case that would have arisen on the transfer of the parcel by Sir Vassel to Esther as administratrix in October 1983, almost 28 years before he commenced these proceedings, which is obviously well outside the 12 year limitation period if it is applicable. Even the transfer of parcel 15C/63 by Esther to John III, Clive and Tom was more than 12 years before the date when this action was initiated.

12.19 It was submitted by counsel for John III, Clive and Tom that even if this analysis in relation to parcel 15C/63 is wrong and Phillip's claim is to be considered as one to recover land for limitation purposes, the claim is still time-barred under the Limitation Law. Under section 20 (9) of the Limitation Law time runs in favour of the person in possession of the land concerned. It provides:

> *"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 ..... as "adverse possession)....."

As I have already explained above (see para 2.2), during the course of the trial I gave leave to counsel for John III, Clive and Tom to amend their case to plead that they have been in possession of parcel 15C/63 for more than 12 years before Phillip commenced this action. They say that they have been in possession of the land since 26th February 1999, when Esther transferred it to them in equal shares, by virtue of having uninterrupted title to it since then. Leading counsel for Phillip opposed leave to make this amendment on the ground, among others, that possession of land and title to it are not the same thing and that more than continuously holding title to the land was needed to establish continuous possession of it.

12.20 However, counsel for John III, Clive and Tom submitted that the holder of the title to land is deemed to be in possession of it. She relied upon *Powell v McFarlane & Another (1977) 38 P & C R 452* in which Slade J. said at p. 470:

> *"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
>
> *(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").*"

The principle was recently approved in the UK Supreme Court in *Bocardo SA v Star Energy UK Onshore Ltd & Another [2011] 1 AC 380*. That case concerned the ownership and possession of the strata beneath the surface of land. Lord Hope referred to *Powell v McFarlane* (supra) and at para. 31 said:

> *"As Aikens LJ said in the Court of Appeal, it is difficult to say that the appellant has actual possession of the strata below the Oxted Estate as it has done nothing to reduce those strata to its actual possession.....But he held that the appellant, as the paper owner to the strata and all within it .....has the prima facie right to possession of those strata so as to be deemed to be in factual possession of them. I think he was right to conclude that this was the effect of Slade J's dictum. As the paper title carries with it title to the strata below the surface, the appellant must be deemed to be in possession of the subsurface strata too. There is no one else who is claiming to be in possession of those strata through the appellant as the paper owner"*

The position of John III, Clive and Tom as paper owners of parcel 15C/63 is *a fortiori* and Phillip's claim to the parcel is according time-barred.

12.21 For the reasons explained above I have concluded, in the circumstances, that Phillip's claims in these proceedings are barred by limitation.

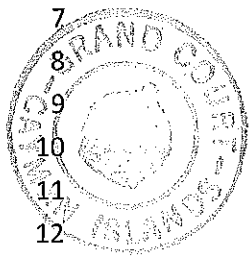
13 Acquiescence

13.1 I think it fair to say that acquiescence and laches are the principal defences to Phillip's claims in these proceedings which are relied on by the defendants and Sharon and the Company. Even if none of the other defences to Phillip's claim which they put forward are upheld, they contend that nonetheless in all the circumstances Phillip acquiesced in what he now contends were breaches of his rights and that it would therefore be inequitable to allow him to now assert those rights. They also contend, on grounds of laches, that it would anyway, in the whole circumstances of the case, be unconscionable for the court to now grant Phillip the relief which he seeks in these proceedings.

13.2 First, it was submitted, I think correctly, that even if a defence under the Limitation Law is not applicable a defence of

acquiescence and/or laches may still be relied on. Section 42(2) of the Limitation Law provides:

> *"Nothing in this Law shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."*



Acquiescence in this context includes laches: see Chadwick LJ in Re Loftus (supra) at paragraph 33 (concerning the English statutory equivalent, the wording of which is identical): *"It is not, I think, in doubt that "acquiescence" in that context includes conduct which would lead a court of equity to refuse relief on the grounds of laches".*

13.3 In relation to the law on acquiescence my attention was drawn first to *Duke of Leeds v Earl of Amherst (1846) 2 Ph. 117* in which Lord Chancellor Cottenham said at p. 123:

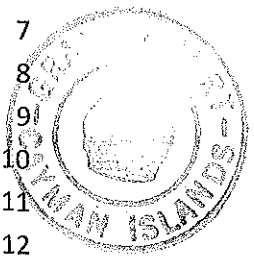
> *"If a party, having a right, stands by and sees dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence"*

13.4 In a later case, *Evans v Benyon (1887) 37 Ch D 329,* Cotton LJ said at pp. 344-345:

> *"Now, in my opinion, if a person, knowing that a trustee is distributing a settled fund, consents to and is active in the distribution of that fund, he cannot afterwards, if he finds that he is interested under the trusts of the settlement, turn round against the trustee and say, "I am entitled to a share of all which ought to be held by you on the trusts of the settlement; that sum in the division of which I concurred ought to be still held by you; therefore I call upon you to make it good." A Court of Equity ought not to sanction any such claim, even although the claimant did not at the time of the distribution know that he was interested, and although he did not at the time know that the division was a breach of trust."*

13.5 More recently in *Re Pauling's Settlement Trust [1962] 1 WLR 86* Wilberforce J said at p.108:

> *".....the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."*



13.6 Subsequently, Harman L.J. in the English Court of Appeal in *Holder v. Holder and Others [1968] 1 All E.R. 665*, after quoting the passage above from the *Re Pauling's* case, said at p. 673:

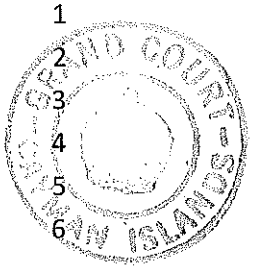
> *" There is therefore, no hard and fast rule that ignorance of a legal right is a bar, but the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee."*

Harman L.J. described the issue in that case as follows:

> *"The plaintiff knew all the relevant facts but he did not realise nor was he advised till 1963* [i.e. about 18 months after the sale to his brother which the plaintiff was seeking to set aside and some 8 months after the completion of the sale] *that the legal result might be that he could object to his brother's purchase because he continued to be a personal representative."*

And he concluded:

> *"On the whole I am of the opinion that in the circumstances of this case it would not be right to allow*



the plaintiff to assert his right (assuming he has one) because with full knowledge of the facts he affirmed the sale ..... The plaintiff is asserting an equitable and not a legal remedy. He has by his conduct disentitled himself to it .....I think we should not assent to it on general equitable principles."

13.7 Accordingly, in order for the court to determine whether there has been acquiescence it must consider all the circumstances of the case and in particular must establish what facts the plaintiff knew and what he did, whether actively or passively, in light of that knowledge. There is no hard and fast rule that the plaintiff's ignorance of his legal rights is a bar but the court must apply equitable principles in all the circumstances in order to decide whether it would be just to allow the plaintiff to assert the remedy he claims. I shall therefore consider what Phillip knew in the circumstances.

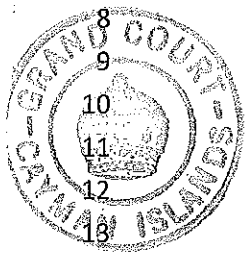
14. Phillip's knowledge

14.1 I have already recorded my assessment of Phillip's evidence. In my opinion he was careful to play down as far as possible the extent and timing of his knowledge and his understanding of his position in relation to the properties in issue and of the significance and consequences of the dealings with those properties. I did not find his attempts to do so convincing. I am satisfied that in light of all the facts and circumstances of this case the extent and time-frame of his actual knowledge and understanding was considerably greater and over a longer period than he was willing to admit.

14.2 However, Phillip did nonetheless admit various matters in evidence which in my opinion were of considerable significance. There is no doubt that soon after the death of his father, John Samuel, he became aware of the implications of being his father's only biological child and of his consequent favoured position over his half- brothers in respect of succession to John Samuel's assets under Louisiana law. He became entitled to one half of John Samuel's estate in the USA. The undisputed evidence was that when he reached the age of 18, among other

things, he became absolutely entitled to his half share of the US$100,000.00 compensation which had been paid in respect of his father's death and it was not effectively challenged that he then became overtly financially extravagant as a result.

14.3 Phillip admitted in evidence that at least by 1993, by which time he was almost 30 years old, he had appreciated that as his father's only biological child he would have similar rights in respect of his father's estate in Cayman. Moreover he admitted that he had also appreciated by then that his father, Jen and Lady Rita were entitled under his grandfather Bradley's will and that he had understood that as his father's only biological child he would share his father's entitlement in his grandfather's estate with his mother.



14.4 Phillip also admitted in evidence that he had known that his father had died leaving property of his own in Cayman, particularly parcel 7C/1 (the Cayman House). He also conceded that he had known by at least September 1988 that his grandfather, Bradley, had died leaving land in Cayman. He also said that he had known by 1993 or 1994 that Sir Vassel, as his grandfather's executor, was transferring assets of Bradley's estate and that, his father being dead, transfers of his father's share in the estate were being made to his mother. He actually said at one point that he knew this "through the transfer of parcel 15E/152". That parcel was transferred by Sir Vassel to Esther in July 1982, and was, as I have already mentioned, the first of the parcels which he transferred to her which was referred to at the trial. Esther subsequently transferred that parcel to Phillip in September 1988. It was not entirely clear to which transfer of that parcel Phillip was referring in his evidence but clearly, on his own evidence, it was either in 1982 or, at the latest, 1988 and therefore significantly earlier than 1993-1994 that he understood that Sir Vassel was transferring the property comprising his father's share of his grandfather's estate to his mother. In my view, as I shall explain later, it was in fact more likely to have been the transfer by Sir Vassel made in 1982 and therefore in 1982 or not long after then that Phillip understood this.

14.5 Phillip admitted in evidence too that by 1993-1994 he knew that his mother was administering his father's estate and that he knew that his mother was treating the parcels transferred to her by Sir Vassel as her own property and that she was proposing to distribute the property equally between all 4 of her sons. He agreed that Esther's letter to her 4 sons in June 1987 made that clear. He also agreed that after his father's death his mother had a standard practice of telling each of her 4 sons what she proposed or wanted to do, then praying about it and then doing it. His evidence was that he actually knew about the transfers made to his mother by Sir Vassel at or about the time they occurred. He also accepted that it is likely that he was told at or about the time that his mother was intending to transfer or had transferred parcel 7C/1(the Cayman House) and the ¼ share of parcel 15B/81 from his father's name into her own name in 1996. He also said that he would have been told about the transfer by his mother to John III, Clive and Tom of parcel 15C/63 in February 1999 and that he knew about Empire's approach to his mother about the sale of parcel 15C/191, which was in 2004, which he said he advised her against and that he knew she had gone ahead with the sale in early 2005.

14.6 These facts were all expressly admitted by Phillip in his evidence at the trial but, as I have said, I am satisfied that in the circumstances his knowledge went further and was obtained sooner than he admitted.

14.7 The undisputed evidence was that the family was close-knit and that, particularly after John Samuel's death, any matters of any significance were discussed between them all. Furthermore, John Samuel, Esther and her sons, including Phillip were very close to Sir Vassel, who was known as Uncle Vassel to the 4 boys, and that close relationship continued after John Samuel's death. The evidence of John III and Tom in particular, which I accepted, was that Sir Vassel discussed with all of them and they all, including Phillip, knew what he was proposing and then doing as Bradley's executor with regard to the property in Bradley's estate, namely dividing it into 3 shares for their 2 aunts, Jen and Lady Rita, and the third for John Samuel's share. In light of Phillip's own admissions, the evidence of his half-brothers and the surrounding

circumstances I find as a fact that Phillip knew from sometime in 1982 or not long thereafter that Sir Vassel was taking or had taken steps to have the parcels of land comprising part of his grandfather's estate divided and that he then intended to transfer or had transferred the share of the divided property representing his father's share, namely parcel 15E/152, to his mother. Phillip was then 18 years old and an adult. Although he was still living in Louisiana, he was visiting Cayman regularly as before and when he did so he was visiting, if not staying with, Sir Vassel and Lady Rita. He was as well speaking frequently to his mother and regularly to his half-brothers. In all the circumstances it is inconceivable in my opinion that what Sir Vassel proposed to do and was then doing and why he was doing so with respect to the division of the properties formerly belonging to Bradley, starting in 1982, was not discussed with and understood by Phillip at that time or shortly thereafter.

14.8 In fact Esther's sons were familiar with the land on Stone Wall Drive, part of which (parcel 15E/152) was the subject of the first of Sir Vassel's transfers to Esther which was considered at the trial. The evidence was that it had been one of John Samuel's favourite pieces of land and he had taken his sons to see it. It was only some 6 years after parcel 15E/152 was transferred from Bradley's estate to Esther that she transferred it to Phillip. The unchallenged evidence was that it was at Phillip's request that she did so because he wanted to develop the parcel and build apartments on it.

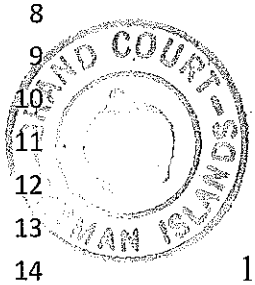
14.9 Phillip came, with Laura, to live and work in Cayman in May 1987 when he was almost 23 years old. At that time Sir Vassel would have been in the process of having parcel 15C/2, comprising part of Bradley's estate, divided. In my view, being resident in Cayman and in frequent contact with his uncle, Sir Vassel, Phillip must have become, if he was not already, particularly familiar with the property concerned and aware of what Sir Vassel was doing and why. Sir Vassel, on completion of the division, subsequently allocated as John Samuel's share what became registered as parcels 15C/172 and 15C/175. He then transferred them to Esther, as the third transfer to her from Bradley's estate, in early November 1989. Those transfers were

accordingly made some 2 1/2 years after Phillip came to live in Cayman. It was some 3 ½ later that Phillip himself wrote to the land surveyors, Evans & Co. by letter dated 8th July 1993 recording his own understanding that Evans and Co. had been involved in the original divisions by Sir Vassel of his grandfather's estate. It seems reasonable to infer that he was taking an interest in that issue because of his own knowledge and understanding before then of his privileged position in respect of his father's share of Bradley's estate. For the reasons outlined I consider it most probable that Phillip realised long before 1993-1994, which is the time he admitted to in cross-examination, at least that the parcels which Sir Vassel was transferring to his mother represented his father's share of the lands in Bradley's estate, that they were therefore assets of his father's estate and that he, as his father's only biological child, had an interest in his father's estate.

14.10 Esther left Louisiana to live in Cayman in early 1996 and she moved into the Cayman House, where she lived for the rest of her life. It was at or about that time that she had parcel 7C/1 (the Cayman House) and the ¼ share of parcel 15B/81 respectively transferred from John Samuel's name into her own name. It is, in my opinion, therefore highly likely that Phillip was made aware of those transfers into his mother's name at or about the time they were made and that he was aware by then that the properties concerned were assets of his father.

14.11 It was in March 1996, that Sir Vassel made the final transfer to Esther of a divided part of the property representing John Samuel's share in Bradley's estate (parcel 15E/222). He informed Esther and her sons that he had done so and told everyone that he had finished the process. Phillip was also particularly familiar with that parcel, which is also on what is now called Stone Wall Drive and is adjacent to parcel 15E/152 which Esther had transferred to him some 7 ½ years earlier. There was a disagreement between him and his aunt, Lady Rita, about the location of the relevant vehicular right of way which delayed by some time the ability of Sir Vassel to agree the precise boundaries of the divided parts.

14.12 As he admitted in evidence, Phillip also knew about Esther's subsequent transfer of parcel 15C/63 to John III, Clive and Tom in equal shares in February 1999. There was unchallenged evidence that he was obviously not happy about it. In my assessment, that was likely to have been because he knew that it was one of the parcels which had been transferred to his mother by Sir Vassel from his grandfather Bradley's estate and therefore part of his father's estate to which he, and not his half-brothers, was entitled. In my view, in light of the evidence and the circumstances, it is probable that he would have believed the transfer of the parcel by his mother to his half-brothers was a breach of his own entitlement.



14.13 Philip admitted too that he knew about his mother's agreement with Empire in late 2004 to sell parcel 15C/191. He said himself in evidence that he advised her at the time not to sell it. Again, in my opinion, it is probable that he did not want his mother to sell the parcel because he knew that the parcel had been transferred to her by Sir Vassel and he believed that it was also rightfully part of his father's estate in which he had an interest, not his mother's own property.

14.14 I should also perhaps re-iterate in this context that I accepted the evidence of Sharon and of the defendants in relation to Phillip's knowledge regarding the proceeds of sale of parcel 15C/191. In all the circumstances I find as a fact that Phillip knew that Esther intended to give or had given the proceeds of sale to Sharon either shortly before or at or about the time that she did so in mid February 2005. There was evidence, which I accept, that Phillip was unhappy about what Esther was proposing to do or had done with the proceeds of sale and, according to Sharon he gave her "the evil eye" when he was told. In my opinion, that was because he knew the proceeds of sale derived from a parcel which he considered to be part of his late father's estate. He believed he therefore had an entitlement himself in respect of the proceeds of sale and that they were not his mother's to give away.

14.15 Phillip is, as I have said already, clearly an intelligent and well-educated person. I found him also to be astute and perceptive. He came to live in Cayman at the age of almost 23 and worked at

Bank of America as a trust officer. Apart from a relatively short time working as manager of the Chamber of Commerce, he has always worked in the international financial sector with particular experience of commercial trusts and complex finance transactions. Since 1997 he has worked with Maples Finance, one of the largest providers of specialized fiduciary services in Cayman and which is closely associated with the largest law firm in Cayman. As an indication of his considerable ability and competence Phillip holds a senior executive position there with a high salary. He is clearly financially sophisticated. He also obviously has an interest in and knowledge of real estate generally. He was only 24 or so when he asked his mother to transfer parcel 15E/152 to him because he wanted to develop it. Through a joint venture company, which he established with a business partner, he then successfully developed and built a complex of 4 apartments on the property. In my view it is reasonable to infer that Phillip has been familiar from a young age with property ownership and property development in Cayman. Amongst other things he would have known that the land register of any parcel of land is a public document available for inspection and copying by anyone who wishes. In all the circumstances I find it wholly implausible that Phillip would not have ascertained for himself in some detail the position regarding his entitlement and rights in respect of his father's estate and the properties of which it comprised at the very latest by the time he was 30 years old and I was not at all convinced by any assertions otherwise.

14.16 It was argued on behalf of Phillip in closing that if he had known that his mother as administratrix was holding property to which he had an entitlement he would have discussed it with his mother and that the fact that he said he did not do so demonstrates that he did not know the position. In my opinion, that contention does not accord with what Phillip expressly admitted in evidence that he did know, as I have already explained above. If he did not discuss his admitted knowledge with his mother that does not detract from his admitted knowledge. Moreover, in my view, it does not necessarily follow anyway, in the particular circumstances of this case, that just because Phillip did not raise with his mother the matter of his entitlement in respect of the

property she was holding as administratrix of his father's estate he did not believe he had such an entitlement. Phillip knew that his mother loved all 4 of her sons equally and wanted to continue treating them equally. She did not wish to and did not favour any one over any of the others. She confirmed as much in writing in her letter to the four of them in June 1987. Phillip obviously knew and Esther obviously knew that he had already received significant favoured treatment over her other 3 sons in Louisiana. He knew too that she had been sympathetic to and treated him favourably in respect of his request for parcel 15E/152. In my assessment he knew very well that in all the circumstances his mother would be extremely upset if he suggested to her that he should again receive favoured treatment over her other sons in respect of the remainder of his father's estate in Cayman, even though he believed he was entitled to such favoured treatment. That was very obviously not what his mother wanted and he admitted as much in evidence. My conclusion, having seen and heard the witnesses and considered all the circumstances, is that Phillip deliberately did not discuss with his mother what he believed to be his preferred position in respect of his father's estate in Cayman because he knew she would be very upset and distressed if he did so.

14.17 It is not entirely clear to me precisely what Phillip contends he did not know until he consulted lawyers after his mother's death. I have concluded, as explained above, that by then he knew considerably more than he admitted in evidence and from earlier too. But at the very least Phillip clearly did know well before he consulted lawyers what he admitted in evidence to having known. If Phillip is contending that he did not know until he consulted lawyers that his mother's actions and intentions as administratrix were in breach of his entitlement to his father's estate, I cannot accept that. It does not accord with my findings and conclusions as explained above. I will consider Phillip's consultation with Conyers Dill and Pearman ("Conyers") after his mother's death further below in the context of discussing laches but in so far as relevant to his knowledge I am of the opinion that he already knew the relevant facts upon which his present claim is based well before he consulted Conyers. Furthermore, I also consider that in the whole circumstances it is

probable that Phillip also understood himself that he could challenge his mother's actions in contravention of his own rights before he consulted Conyers. I am satisfied that he consulted them in order to confirm on a legal basis and to take action in respect of what he knew and basically understood already.

14.18 It is my assessment, having regard to all the evidence and surrounding circumstances that, at the latest by the end of the 1980s, Phillip knew that he had rights to his father's Cayman estate, which his half-brothers did not have, he knew what that estate consisted of or would consist of, including his father's interest in his grandfather's estate, and he knew that his mother, as administratrix of the estate was intending to treat the assets of his father's estate and did treat them as her own personal property to do with as she wished. He also understood that was in breach of his own entitlement. He knew too of his mother's subsequent transfer of parcel 15C/63 to his half-brothers in February 1999 and then later her giving the proceeds of sale of parcel 15C/191 to Sharon in February 2005 and he understood that his mother's doing so was in breach of his own entitlement in respect of his father's estate. I conclude that Phillip knew all of these relevant facts. In addition I find that Phillip also knew that his entitlement in respect of his father's estate as his father's only biological child was being breached. It does not seem to me that Phillip in particular, with all his personal attributes, needed to be a lawyer or to have any special expertise to understand all that; he certainly had the ability and wherewithal to do so.

14.19 I also consider further that in the circumstances it is almost inconceivable that at the very latest by the time he was 32 years old in September 1996, by which time Sir Vassel had completed his administration of Bradley's estate and his mother had transferred the property in his father's name to herself, Phillip would not have had an understanding of the nature of his entitlement and rights in respect of his father's estate and of his mother's obligations as administratrix and her breaches thereof and I find as a fact that he did so.

15 Phillip's conduct

15.1 Notwithstanding the knowledge and understanding which he had, Phillip stood by and did nothing. As I have mentioned, there was unchallenged evidence that he was unhappy about Esther's transfer of parcel 15C/63 to John III, Clive and Tom but he did nothing to challenge it. He did challenge the evidence of Sharon that he showed unhappiness and disquiet when, according to her, he was told that Esther had given the proceeds of sale of parcel 15C/191 to her but, for the reasons already explained, I preferred the evidence of Sharon and John III in particular on this issue. Nonetheless, once again Phillip did nothing to challenge what his mother did with the proceeds of sale or to demand his share. In both these cases Phillip knew that the parcels concerned had been previously transferred to Esther by Sir Vassel and were assets of his father's estate. In fact Phillip took no steps to challenge anything his mother did as administratrix. Nor did he do anything to challenge or object to what he knew she and his half-brothers obviously thought, namely that the properties in issue which Esther did not otherwise deal with were to be shared equally between her four sons.

15.2 I have already explained my conclusion that the probability is that Phillip deliberately did nothing because he did not want to distress his mother by taking any steps to assert his entitlement contrary to her wishes for all of her sons. I have found that Phillip knew that what his mother was doing or proposed should be done in relation to the parcels comprising his father's estate was or would be a breach by her of her obligations and duties as administratrix but he chose not to challenge his mother. He stood by for many years, notwithstanding his knowledge and understanding. He did so for his own reasons.

15.3 For many years, at least since the time of Esther's letter to all 4 of her sons in June 1987, if not sooner, John III, Clive and Tom had reasonably understood and expected that the Cayman properties held by their mother would be shared equally between all 4 of them. Phillip knew of this long-standing expectation and understanding on the part of his half-brothers but he did nothing to challenge it. Neither they, nor Esther, were given any

indication that Phillip intended to challenge that expectation and he did not do so until after Esther's death many years later. It was consistent with and pursuant to that concept of equal division that Esther transferred parcel 15C/63 to John III, Clive and Tom in equal shares in light of her earlier transfer of parcel 15E/152 just to Phillip, in order to more or less equalize matters between the 4 of them at that time. The evidence was that all of her sons, including Phillip, understood that was her intention and why. As I have already mentioned, the evidence was that Phillip was clearly not happy at the time about this transfer by Esther but he did nothing about it. It would, in my opinion, have been a reasonable inference for Esther, John III, Clive and Tom to make from Phillip's conduct that he had accepted the position. In my view John III, Clive and Tom were entitled to and did rely on that.

15.4 In my opinion, in all the circumstances Phillip is to be taken as having acquiesced or concurred in his mother's intended and actual breaches of her obligations and duties. He acquiesced in the maladministration of his father's estate by his mother and he allowed his mother and his half-brothers to reasonably assume that he was going along with what was happening. I found his statement in evidence that if he had known of his rights sooner he would have sued his mother to be wholly unconvincing and I simply did not believe it and nor did his half-brothers, whose evidence I did find credible and which I accepted. In my judgment it would be unjust and inequitable to permit Phillip to now assert those rights.

16 Laches

16.1 In *Lindsay Petroleum v Hurd (1874) LR 5 PC 221*, a case in the Privy Council and so binding on this court, Lord Chancellor Selborne said at pp. 239-240:

> *"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his*

conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

16.2 The principle as explained in that case is therefore that where it would be unjust to allow a remedy because the conduct of the party seeking the remedy (in the present case, Phillip) either (1) amounts to the equivalent of waiving the remedy or (2) if not amounting to waiver, nonetheless makes it unreasonable for the other party (in the present case the defendants and Sharon and the Company) to now have the remedy asserted against them, then the court should not allow the remedy. In both such cases the length of the delay in asserting the remedy and the nature of the conduct of the party seeking the remedy and its effect, are very relevant. Each of these types of laches were relied on in the present case. For the court, it is ultimately a question of applying equitable principles and seeking to balance the justice against the injustice of taking one course or another in relation to the claim in the particular circumstances of the case.

16.3 In *Erlanger v New Sombrero Phosphate Co. (1878) 3 App Cas 1218* in the House of Lords Lord Blackburn quoted Lord Selborne's statement and said at pp.1279 - 1280:

"I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which

might reasonably be required, and the degree of change, which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

16.4 More recently, in *Frawley v Neill [2000] CP Rep 20 (CA)* Aldous LJ in the English Court of Appeal described the principle in rather broader terms: see at pp. 7- 8:

"In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

This statement was approved in two subsequent cases, also in the English Court of Appeal: by Mummery LJ in *Patel v Shah [2005] EWCA Civ 157* at paras. 32 – 33 and by Chadwick LJ in *Re Loftus [2007] 1 WLR 591* at para. 42.

16.5 I was also referred to 2 older cases, which I mention because of a degree of similarity between the circumstances in those cases and the circumstances of the present case:

In *Bright v Legerton (1861) 2 De Gex, Fisher & Jones; 45 ER 755,* the Lord Chancellor, Lord Campbell, applied the doctrine of laches to dismiss a claim by a beneficiary of an estate for an

account of the trustees' dealings with the assets. At p. 617 he described the principle as follows:

> *"A court of Equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished, much less cast a burden of proving such an affirmative..."*

16.6 *Hourigan v Trustees Executors & Agency Co Ltd (1934) 51 CLR 619* was a case in the High Court of Australia where the court refused to grant relief to a son in relation to his late father's estate. Rich J. said at p. 629 – 630:

> *"If a party in a position to claim an equitable right which is not undisputed lies back and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his affairs that it would be unfair to him and to others claiming under him to tear up the transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any".*

These two cases are also of significance because it was argued on behalf of Phillip that laches will almost never apply in a case where the claim relates to a traditional express trust. However, these cases establish that even in a case involving such a trust laches may be available as a defence.

16.7 Nonetheless, although these latter 2 cases are obviously helpful, I have borne in mind throughout in considering laches the importance of the approach which has been repeatedly made clear in the authorities, namely that each case has to be decided on its own facts. I have also, following the more recent statement of the appropriate procedure referred to in *Frawley v Neill* (ibid), as approved in *Patel v Shah* (ibid) and *Re Loftus* (ibid), adopted a

broad approach to the facts and circumstances of this case in seeking to determine whether, in my judgment, it would be unconscionable to permit Phillip to now assert the rights which he claims. I should also confirm, for the avoidance of any doubt, that I accept that, as leading counsel for Sharon and the Company helpfully reminded me, the question whether or not it would be unconscionable or not to allow Phillip to now assert the rights which he claims is not one to be approached and resolved as a matter of discretion, it is a matter of and for the court's judgment.

17 The consequences of Phillip's conduct

17.1 It was not until 15 years after Sir Vassel transferred the final parcel to Esther and informed all concerned of his completion of the administration of Bradley's estate and Esther transferred the Cayman House and the 1/4 share of parcel 15B/81 to herself, that Phillip first gave notice, by letter from his then lawyers, Conyers, to Clive, as administrator of Esther's estate, that he was making any of the claims which he now makes in these proceedings, which he commenced some 3 months later. It was a further 18 months before he joined Sharon and the Company as defendants. Those are by any standards clearly very significant delays. In my judgment, the delay by Phillip has placed the defendants and also Sharon and the Company in an unreasonable, unfair and prejudicial position.

17.2 John III, Clive and Tom were the proprietors of parcel 15C/63 for almost 12 ½ years before Philip commenced these proceedings in which he claims that the parcel is in fact held by them in trust for him. Until just before then there was no question about their ownership. Phillip knew the parcel had been given to them by their mother but did nothing to challenge that until after his mother died. I have determined above that Phillip acquiesced in the transfer of the parcel to his half-brothers and they have had no reason to doubt that over many years. They will themselves have benefitted from the likely increase in the value of the parcel in line with the general increase in property values over that period. They would be deprived of that and Phillip alone would benefit from the increase in value of the parcel if his claim was

now allowed. In my view, in all the circumstances to deprive John III, Clive and Tom of the parcel after all this time would be unreasonable, unfair and inequitable.

17.3 I also consider it probable that if Phillip had asserted his entitlement during his mother's lifetime, as he could have done, she would have taken steps to seek to work out a compromise with Phillip to give effect as far as possible to her wishes and to maintain harmony between her sons. The fact that she was given no opportunity to try to do so was prejudicial to John III, Clive and Tom.

17.4 Also, if Phillip had challenged his mother's transfer of the Cayman House to herself in 1996, she could also have asserted and established in more depth that she had in practice been considered joint owner of the Cayman House with her husband and that it would be fair and equitable to treat her as such. However, Phillip's delay has meant that this cannot now be investigated as fully as it could which is unfair and prejudicial to John III, Clive and Tom because if Phillip's claim is now allowed there is a risk that the Cayman House would not form part of Esther's estate.

17.5 A further prejudice caused by the delay in bringing these proceedings is the difficulty of now accounting for the cost and expense which Esther would have incurred as administratrix (on Phillip's case) in relation to her dealings with John Samuel's estate. For example, there would have been costs in connection with the registration in Esther's name of the parcels transferred to her by Sir Vassel and in connection with the sale of parcel 15C/191. The administration of John Samuel's estate in terms of the Succession Law of course remains incomplete but the delay in bringing these proceedings until after Esther's death makes any accounting practically impossible.

17.6 As I have mentioned already, according to Esther's evidence in her deposition in Texas she and John Samuel used money from the sums held for John III, Clive and Tom from the compensation awarded on the death of their biological father, John Jr., to meet or at least contribute to the cost of building the Cayman House in

1970, over 40 years before these proceedings were commenced. That obviously cannot now be fully explored with Esther and fair compensation determined if appropriate in light of the claims which Phillip now seeks to assert.

17.7 It was submitted as well on behalf of the defendants that Phillip would obtain unfair benefit if his claims were allowed now, after such a long delay. If he had claimed at some time during or shortly after the 16 year period over which the parcels from Bradley's estate were transferred to his mother by Sir Vassel and at the end of which his mother transferred the Cayman House and the part of parcel 15B/81 to herself, that they were all assets of his father's estate in which he alone was interested with his mother, it is probable that Esther would have taken a very different approach towards the parcels concerned. But Phillip now claims, after her death, that all those parcels are exclusively his (other than the one Esther sold to Empire). Therefore he alone would benefit from the significant increase in property values over the past many years.

17.8 The position in relation to the claim against Sharon and the Company is that, for the reasons which I have already addressed, Phillip knew from at least March 1991 that parcel 15C/191, representing part of his father's entitlement in Bradley's estate, was transferred to his mother by Sir Vassel as an asset of his father's estate. He also knew that during 2004, some 13 years later, Esther had received an offer from Empire to purchase the parcel and that a sale price of US$1m was agreed. He knew that a significant amount out of the proceeds of sale was subsequently paid by Sharon for a cruise to Alaska for Esther and her whole family, being her 4 sons, 4 daughters-in-law and all her grandchildren, which Esther had been keen to do. Phillip, Laura and their 3 children clearly benefitted from the proceeds of sale in this way. Phillip did not assert any right or entitlement to the proceeds of sale nor did he do anything to object to or try to prevent their use in this way without his consent or at all, notwithstanding the knowledge which I find he had. I was referred by leading counsel for Sharon and the Company to *Holder v. Holder* (supra) in which it was held that, even if the sale of the 2 farms in issue in that case had been voidable at the

instance of the plaintiff, it would have been inequitable in the circumstances to allow the plaintiff to have the sale set aside even though he did not know until later of any right to set it aside, because he had benefitted from it and made no attempt to stop it. This was the case as far as Phillip was concerned in relation to the considerable expense on the cruise. Of course, he did not benefit from Sharon's subsequent use of the proceeds of sale but it does not seem unreasonable to me to conclude in the circumstances that Phillip must at least have realised that there was a strong likelihood that Sharon would be spending the proceeds of sale in ways which would probably make repayment difficult or impossible if he did subsequently make a claim for re-payment. Yet, notwithstanding all that he knew Phillip did nothing regarding Sharon and the proceeds of sale until his new attorneys, Appleby, were instructed to write to her on 30th October 2012. Even then Sharon and the Company were not joined as defendants to these proceedings until 17th December 2012, almost 8 years after Esther gave Sharon the proceeds of sale.

17.9 In my opinion there would be obvious prejudice to Sharon in now having to re-pay to Phillip the funds which she has spent out of the proceeds of sale since paying for the cruise, which have mainly gone on legal costs. I am satisfied that the fact that some of Sharon's payments out of the proceeds of sale were made after the letter to Clive in March 2011, which of course was sent to him in his capacity as administrator of Esther's estate and not to her, although she admitted that she saw it, is not determinative of the decision in this case whether it would be unconscionable to allow Phillip to now assert his claim against her. It may be a factor to be considered in adopting the broad approach to the overall circumstances but in my view it is no more than that. In so far as Phillip claims the unspent balance of the proceeds of sale still held by Sharon through the Company, it seems to me that there would still be prejudice to Sharon in allowing him to do so now at this late stage. She has since early 2005 assumed and acted on the basis that she is, through the Company, the unqualified owner of the proceeds of sale and that she can continue to have recourse to them as needed, particularly in relation to legal costs. In light of the long delay by Phillip in

contending otherwise and in the overall circumstances it would, in my view, also be unfair and unjust to now allow him to deprive Sharon of the balance of the proceeds of sale which, I have found, were given to her by his mother.

17.10 I have already pointed out that as a result of the delay by Phillip in making these claims the evidence of the two principal witnesses, Sir Vassel, who died only 2 ½ years before these proceedings were commenced and Esther, who died only 11 months before these proceedings were commenced, was not available. If Phillip had made his claims during their lifetimes their evidence would have been taken and would almost certainly have resolved some of the principal issues which have been raised in these proceedings. Instead, the delay has caused considerable difficulty, unfairness and possible injustice as I have already explained. I have also already mentioned that if Phillip had made his claims timeously the evidence of Jen and Lady Rita would probably also have been available. Furthermore, the very lengthy delay in Phillip making his claims has quite likely resulted also in the loss of relevant documents.

17.11 In my opinion, the long delay in bringing these proceedings has resulted in obvious general unfairness and prejudice to the defendants and to Sharon and the Company and quite likely a denial of justice. I am of the view that it has also resulted in the specific prejudice and unfairness to which I have referred above.

18. Phillip's case on laches

18.1 It was submitted by leading counsel for Phillip that the test of unconscionability should be applied on a case by case basis to each of the parcels of land which are subject to the claims made by Phillip in these proceedings. I do not consider that approach to be consistent with the broad approach which is be taken by the court as explained in the *Frawley v. Neil* case (supra) and as endorsed in *Patel v. Shah* (supra) and *In re Loftus* (supra). That test was accepted by all parties in the present case to represent the correct approach in this context. In my view I must look at the broad picture and consider the facts and circumstances of the case overall in determining whether I find it to be unconscionable

for Phillip to be permitted now to assert the claims which he does in these proceedings.

18.2 It was emphasized on behalf of Phillip that John III, Clive and Tom had the same knowledge of the facts as Phillip did and that it was a relevant factor that they must have understood Phillip's position as much as he is said to have done. However, that seems to me to miss the point. Even if John III, Clive and Tom did know the facts as well as Phillip did they had an entirely different understanding and perspective and would have approached the position from a quite different point of view. The evidence was that their understanding and expectation was that the properties in issue were going to be shared equally between them all and that even if Phillip had the same interest in relation to John Samuel's estate in Cayman as he had had in relation to John Samuel's estate in the USA he was not insisting on that position in Cayman. Phillip's conduct until his mother died was consistent with that understanding, of which he was well aware, and his half-brothers were given no reason by Phillip to think otherwise. Phillip did nothing to object to or challenge what his mother said in her letter of June 1987. He admitted that he knew that his position in Cayman was effectively the same as it had been in Louisiana and I am satisfied that he knew that what his mother said in her letter was contrary to that. Indeed he knew that his mother was treating the properties in his father's estate as solely her own which was obviously a breach of his own entitlement. However, he chose not to do anything about it for his own reasons.

18.3 Leading counsel for Phillip also pointed out that under the statutory trusts pursuant to the Succession Law Esther had a life interest in half of the properties in issue. However, in the context of considering whether it would be unconscionable to allow Phillip to now assert his supposed rights after all this time, the fact that his interest until his mother's death was arguably in part reversionary does not preclude such a finding; see *Life Association of Scotland v. Siddal [1861-73] All ER Rep. 892* per Turner L.J at p. 896 as confirmed by Lord Chancellor Campbell at p. 897.

18.4 Phillip's principal case is, as I have already mentioned in discussing acquiescence, that he was not aware of his rights until he consulted the lawyers, Conyers, after his mother's death. He said that he was prompted to consult lawyers as a result of an email which John III sent Clive, Tom and Phillip 3 weeks after their mother's death and then a second email from him to them all about 4 weeks later. John III is qualified as a CPA and has carried on business as an estate planner for many years and there was unchallenged evidence that, to the knowledge of all of her sons, and on occasion in conjunction with them, he had discussed estate planning with Esther for many years. There were concerns about possible United States tax liabilities in light of the fact that Esther was a United States citizen. John III's first email addressed estate planning issues arising on Esther's death, particularly United States capital gains tax. His second email discussed what should be done about the Cayman House in particular on the basis that all the assets in Esther's estate would go to the four of them equally. One of the suggestions he made was for the Cayman House to go to the four of them equally and allow Phillip, if he wanted, to continue living in it and pay a fair market rent to his half-brothers, with 3 months of the year free to reflect his own one quarter share on the basis that they would all have to agree on a rent and also on maintenance of and improvements to the house. Phillip said he was surprised and upset at what he considered to be the callous and greedy nature of his half-brothers in discussing her estate so soon after their mother's death. Despite a further email from John III to them all 2 days later saying that his last email was not meant to be cold or uncaring, reminding them that he is an estate planner by profession and emphasizing that he was simply wanting to make sure everything was taken care of promptly in accordance with the US tax code, Phillip said "the damage was done" and he decided to consult Conyers.

18.5 There was a dispute about precisely when Phillip first went to consult Conyers but I am satisfied that it was after his mother's death and probably after John III's second email. However, I was not convinced by and did not accept Phillip's explanation for consulting lawyers. He may have been upset that John III had raised estate planning matters so relatively soon after his

mother's death, although John III's emails did not seem to me unduly inappropriate or untimely, and that may have provoked him into consulting lawyers at that particular time, although in my view he would have done so in due course anyway now that his mother had died. However, in my assessment the principal reason for his going to consult lawyers at that particular time was John III's assertions that all the assets were to be divided equally between the 4 of them and the suggestion that on that basis he should pay rent if he wished to continue to live in the Cayman House. In the circumstances already explained, Phillip would, in my opinion, have considered that he had inherited the Cayman House from his father, that it was his property and that his half-brothers had no right to it or to propose that he pay rent for it. There was unchallenged evidence that while his mother was still alive he had been asked to pay her a very modest rent for his occupation of the Cayman House but that he only did so reluctantly and sporadically. Instead he spent significant sums on capital improvements to the Cayman House, such as installing tile flooring, central air conditioning, rebuilding the roof, extending the driveway and other enhancements. That was, I consider, entirely consistent with a belief on his part that the house was really his. It also explains why I did not entirely disbelieve Sharon's evidence that Phillip's wife, Laura, had said several times that Philip had inherited the Cayman House from his father.

18.6 I did not believe or accept Phillip's claim that it was not until he was advised by Conyers that he was aware he had any rights in respect of his father's Cayman estate. In light of the facts and circumstances of this case I am, as I have already said, quite satisfied that Phillip had not only known all the relevant facts on which his claims are now based for many years but that in fact he had also believed he had rights in respect of his father's estate as well as knowing the precise property of which that estate consisted long before he consulted lawyers. In my view he knew enough to have consulted lawyers as long ago as the time of his mother's letter at the end of June 1987, and certainly by the end of 1996 or at the latest at the time of his mother's transfer of parcel 15C/63 to John III, Clive and Tom. There was nothing to prevent him doing so. He simply chose not to do so and delayed

doing so; to do so would have meant saying that his mother was not administering or had not administered her husband's, his father's, estate properly and had ignored his own entitlement. My firm opinion is that he went to Conyers after his mother's death to confirm, and no doubt for them to provide a legal analysis of and opinion on, what he had already known and believed for a long time but in respect of which he had deferred taking any action. I reject Phillip's explanation for not bringing these proceedings until he did and I find that the only substantive reason for his long delay is that he did not wish to raise these matters during his mother's lifetime.

19 Conclusion on Laches

19.1 While there is, of course, more to laches, than "mere delay", it may nonetheless be of assistance to put matters into perspective chronologically. Phillip became 18 years old and an adult on 4th September 1982. He was almost 47 years old when he commenced these proceedings on 17th June 2011. By then his father, John Samuel had been dead for almost 33 years; it was over 31 years since his mother's letters of administration granted in Louisiana were re-sealed in this court. These proceedings were commenced some 29 years after Sir Vassel made the first transfer to Esther from Bradley's estate (parcel 15E/152). Esther's letter of 29th June 1987 to her 4 sons was 24 years before these proceedings started and her transfer of parcel 15E/152 to Phillip was some 18 months later, in September 1988. It took Sir Vassel almost 16 years from the date on which he was granted probate to complete the process of dividing the property in Bradley's estate and transferring the divided parts to Jen, Lady Rita and Esther. That process was completed in 1996 when Phillip was almost 32 years old. As I have already pointed out, that was some 15 years before these proceedings were commenced. For completeness, I should also point out that these proceedings were brought some 16 ½ years after Esther came to live in Cayman and after she transferred to herself sole title to the Cayman House (parcel 7C/1) and the ¼ share of parcel 15B/81. These proceedings were also commenced almost 12 years after Esther transferred parcel 15C/63 to John III, Clive and Tom and some 6 years and 4

months after she gave the proceeds of sale of parcel 15C/191 to Sharon.

19.2 By any measure there has been very significant lapse of time and extraordinary delay in bringing these proceedings by Phillip against his 3 half-brothers and his sister-in-law in respect of matters which I am quite satisfied he had known about for many years but which he did not want to raise during his mother's lifetime. In my opinion the delay is inexcusable.

19.3 In light of the legal principles to which I have referred above and having taken a broad approach to all the facts and circumstances of this case as I have found them to be, I am of the opinion that it would be unreasonable, unfair and unjust to the defendants and to Sharon and the Company to now allow Phillip to assert the relief which he claims. In my judgment it would be unconscionable to permit him to do so.

20 Conclusion

Even if Phillip's claims in these proceedings are not defective as a matter of law or are not time-barred under the Limitation Law, in my judgment, in all the circumstances and for the reasons above, they should anyway be refused on the grounds of acquiescence and/or of laches. I therefore decline to grant the relief which Phillip seeks in his amended originating summons and points of claim both dated 17th December 2012.

Dated 9th July 2014

The Hon. Mr. Justice Angus Foster
JUDGE OF THE GRAND COURT