**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION**
**CIVIL APPEAL NO : 5 OF 2015**
**(GRAND COURT CAUSE. FSD 104 OF 2011-AJEFJ)**

**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**

**BETWEEN:**

**PHILLIP BRADLEY HINDS**
**APPELLANT (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) NORAH KCOTSOB LIMITED**
**RESPONDENTS (DEFENDANTS)**

**BEFORE:**
**THE RT HON SIR JOHN CHADWICK, PRESIDENT**
**THE HON JOHN MARTIN, JA**
**THE RT HON SIR ALAN MOSES, JA**

Appearances

Robert Ham QC and Rupert Coe of Appleby for the Appellant.
Tom Roscoe and George Giglioli of Giglioli & Co for the First Respondent and Clare Stanley QC and Robert Jones of Tayler Jones for the Second to Sixth Respondents.

Hearing: 4 to 6 November, 2015
Judgment delivered: 20 November 2015

## Judgment

**THE HON JOHN MARTIN, JA**

*Introduction*

1. This appeal relates to the Cayman estate of John Samuel Hinds ("John Samuel"), who died on 4 April 1978. He died intestate, domiciled in

Louisiana. He was survived by his widow, Esther Rosalind Hinds ("Esther"), and by his and Esther's son, Phillip Bradley Hinds ("Phillip"). Phillip is the claimant in these proceedings, and the appellant on this appeal.

2. In May 1978 Esther took a grant in Louisiana of letters of administration of the estate, and in 1980 the grant was resealed in the Cayman Islands. Esther was accordingly the sole administrator of John Samuel's estate in the Cayman Islands. Under the Succession Law 1975, the persons entitled to share in that estate were Esther (who was entitled to a commission as personal representative, to the personal chattels, to a statutory legacy of a sum equivalent to 10% of the net value of the estate and to a life interest in half the residuary estate) and Phillip (who was entitled to the other half share of the residuary estate, and on Esther's death to the capital of the share which had been subject to her life interest).

3. Esther's marriage to John Samuel was her second marriage. She had previously been married to John Samuel's first cousin, John Leverette Hinds ("John Jr"), and had had three sons by him: Clive Montrivelle Hinds ("Clive"), John Leverette Hinds III ("John III") and Thomas Anthony Hinds ("Thomas"). In their individual capacities, Clive, John III and Thomas – collectively "the three brothers" – are the second, third and fourth respondents to this appeal.

4. Esther herself died in Grand Cayman on 11 July 2010, and letters of administration of her estate were granted to Clive. In that capacity, he is the first respondent to this appeal. The three brothers and Phillip are beneficially entitled to Esther's estate in equal shares.

5. In her capacity as John Samuel's personal representative, Esther came to hold the legal title to certain parcels of land on Grand Cayman – known in these proceedings as Parcels 1, 63, 172, 175, 191, and 222 - and a one-quarter interest as tenant in common in a further parcel known as Parcel 81. Parcel 1, which is also known in these proceedings as the Cayman House, had on it a house that John Samuel and Esther had built. Two of the other parcels were disposed of by Esther during her lifetime: she transferred Parcel 63 to the three brothers in February 1999, and she sold Parcel 191 in February 2005. The proceeds of sale of Parcel 191 were at once transferred by Esther to Clive and his wife, Sharon Hinds ("Sharon"), who is the fifth respondent, and by them to the sixth respondent, a company owned and controlled by her, Norahs Kcotsob Limited ("the Company", its name formed by reversing Sharon's forename and maiden name). Apart from Parcel 1, to which separate considerations apply, the parcels Esther did not dispose of - 172, 175, 222 and the share of Parcel 81 – are known as the Retained Parcels.

6. Phillip's aim in the proceedings has been to establish that the Retained Parcels, the Cayman House, Parcel 63 and the proceeds of sale of Parcel 191 were still at Esther's death assets of John Samuel's estate (of which Phillip is now the sole beneficiary). The aim of the respondents has been to establish that the Retained Parcels and the Cayman House are assets of Esther's estate, that Parcel 63 is vested indefeasibly in the three brothers, and that Sharon and the Company are indefeasibly entitled to the proceeds of sale of Parcel 191.

7. In judgments delivered on 9 July 2014 and 5 December 2014, Foster J dismissed all of Phillip's claims and ordered him to pay costs on the indemnity basis. The appeal is against the orders made consequent on those judgments.

8. Before I come to the terms of the judgments, it is necessary to say something about the way in which the Parcels came into Esther's hands. John Samuel's father – Phillip's grandfather, and the three brothers' great-uncle – was Joseph Bradley Hinds ("Bradley"). He had three children: John Samuel, Ottolee Regina Flowers, known as Jen ("Jen") and Rita Joanna Johnson ("Rita"). In September 1969, Bradley conveyed Parcel 1 to John Samuel as a gift. In about October 1972 John Samuel, Esther, Jen and Jen's husband Clarence Flowers bought Parcel 81 as equitable tenants in common in equal shares. On 4 April 1977, Bradley died in Grand Cayman. His will, dated 20 January 1975, appointed John Samuel and Rita's husband Vassel (later Sir Vassel) Johnson ("Sir Vassel") executors and left to his three children (John Samuel, Jen and Rita) his land in Grand Cayman. Before John Samuel and Sir Vassel could prove the will, however, John Samuel was killed in a helicopter crash. So far as concerned Bradley's estate, the consequences of John Samuel's death were that Sir Vassel became the sole executor; and the benefits due to John Samuel under Bradley's will passed to his estate, of which Esther was the administrator.

9. Sir Vassel proved Bradley's will on 20 June 1980, and over the next 16 or so years proceeded to divide Bradley's Cayman land among Esther, Jen and Rita. Instead of transferring the legal estate to them to hold on trust for themselves, he divided each piece of land into three broadly equal portions and gave one to each of them. Thus in 1982 he transferred to Esther a parcel – which she subsequently transferred to Phillip, and so is not in dispute in these proceedings – called Parcel 152, at the same time transferring adjacent parcels to Jen and Rita. On 31 October 1983 he transferred Parcel 63 to Esther; on 9 November 1989 he transferred Parcels 172 and 175 to her; on 8 March 1991 he transferred Parcel 191 to her; and finally, on 15 March 1996, he transferred to her Parcel 222. On each of these occasions, he again transferred adjacent parcels to Jen and Rita.

10. It is therefore the case that, with the exception of the share of Parcel 81, all the land which, or the proceeds of sale of which, is in dispute in

these proceedings came from Bradley – from whom Phillip is directly descended, but the three brothers are not.

11. The first issue which the judge felt he had to resolve was whether the transfers made to Esther by Sir Vassel as Bradley's executor were made to her in her capacity as John Samuel's personal representative (and so held on the trusts affecting his estate) or were made to her with the intention that she should take the land for her own absolute benefit. I find it difficult to see how it can seriously have been contended that both Sir Vassel and Esther were to be treated as having acted in breach of trust, and difficult to see that it would have afforded a defence to Phillip's claim if in fact they had so acted. Be that as it may, the judge eventually came to the conclusion – although, as he said, "not without some hesitation" – that the transfers were made to Esther as administratrix of John Samuel's estate to be administered by her in that capacity; and there is no appeal against that conclusion.

12. It is, however, important to note the implications of that finding. They are that all the land derived from Bradley's estate which, or the proceeds of sale of which, is in issue in these proceedings was originally held by Esther in her capacity as personal representative of John Samuel; and, with her death, the only person beneficially interested in the residue of John Samuel's estate is Phillip. On the face of it, therefore, he is now entitled to that land or the proceeds of its sale; and it is for the respondents to establish that there are circumstances that have resulted in him having lost his entitlement.

*Standing*

13. The first way in which they seek to do so is by asserting that Phillip has no standing to bring his claim. The judge accepted this assertion.

14. The relief sought by Phillip in his amended Originating Summons was primarily a series of declarations. In relation to the Retained Parcels and Parcel 1, what was sought was a declaration that at her death Esther held them subject to the trusts arising on John Samuel's intestacy, and that following her death they were held by Clive on trust absolutely for Phillip as John Samuel's issue. In relation to Parcel 63, Phillip sought a declaration that Esther held it subject to the trusts arising on John Samuel's intestacy and transferred it in breach of trust to Clive, John III and Thomas on trust absolutely for Phillip as John Samuel's issue. In relation to the proceeds of sale of Parcel 191 what was sought was a declaration that Esther held that parcel and the proceeds of its sale subject to the trusts arising on John Samuel's intestacy, and that following the transfer of the proceeds to Clive, Sharon and/or the Company they held and continued to hold them on trust absolutely for Phillip as John Samuel's issue. In addition to these declarations, Phillip sought an order that the Land Register be

rectified or amended to record appropriately his interest in the unsold parcels.

15. The reasoning that led the judge to conclude that Phillip had no standing to bring his claim was in summary as follows. He took the view that Phillip's claims were to a beneficial proprietary interest in all of the parcels; but Phillip, as a person interested in an intestate estate that had not been fully administered, had no proprietary rights. The estate had not been fully administered because, under the terms of the Succession Law, an intestate estate was to be held on trust for sale, and with the exception of Parcel 191 none of the assets had yet been sold. A person interested in an unadministered estate had a right, enforceable in an administration action, to insist upon proper administration of the estate, but that was not what Phillip was claiming. His claim was based on the premise that as beneficiary of John Samuel's estate he had a beneficial proprietary interest in the specific parcels of land comprised in that estate; and, as a matter of law, that was wrong in principle. Insofar as Phillip was claiming that assets had been misappropriated by Esther and treated as her own, he was asserting a claim that could properly only be made by John Samuel's personal representative or someone acting in that representative's name. Phillip was not seeking to bring a derivative action in the name of John Samuel's administrator, and had set out no grounds on which he would have been entitled to do so. Moreover, the administrator would be a necessary party to any such claim, and since Esther's death there was no administrator. Again, therefore, Phillip's claim was misconceived.

16. It is undoubtedly the case that a person interested in a deceased's residuary estate has no interest in any specific asset until, at the earliest, administration of the estate is complete. Authority for this proposition may be found in the following passage from the decision of the Privy Council in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 707A – 708D, which was also cited by the judge:

> "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 conclusively 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 purpose of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules 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 to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. "An executor" said Kay J in *In Re Marsden*, "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 the due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed "duties in respect of the assets" as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in the property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. 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 realised 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 realisation are very far from being interchangeable terms.

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

The judge was accordingly correct in principle to hold that Phillip had no proprietary interest in any asset of the estate until administration was complete. This much was common ground on the appeal.

17. The judge's view was that administration could not be complete until the assets had been sold pursuant to the trust for sale imposed by section 31 of the Succession Law. He expressed this view in the following way (paragraph 8.10 of the judgment):

> "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 the 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".

18. In my opinion, the judge was wrong to hold that administration could not be complete until all the assets had been sold. The ordinary rule in England and Wales is that administration is complete when all debts and expenses have been discharged and the residue has been ascertained, and at that point the personal representative becomes a trustee in the true sense of the assets for those entitled to them: see *Re Ponder* [1921] 2 Ch 59. It is not necessary that all the assets should be sold if the debts and expenses can be met and the residue ascertained without doing so (although it is to be noted that in *Re Ponder* all the assets had in fact been sold in the course of administration). The statutory framework in the Cayman Islands does not seem to me to be significantly different from that of England and Wales, and in my view a similar rule should apply. The trust for sale imposed by section 31 of the Succession Law is an administrative tool designed to enable an administrator to deal with the estate efficiently; but it is subject to a power to postpone sale by virtue of section 14 of the Trusts Law 1967, and is not to be regarded as requiring a sale where the circumstances of the estate do not require one and the beneficiaries wish to take assets in specie.

19. Because the judge took the view he did, he did not make any finding as to whether the debts and expenses of the estate had been discharged and the residue ascertained. The respondents asserted that the nature of the liabilities of the estate – which included the commission payable under section 6 of the Succession Law to Esther, which is to be calculated as a percentage of the net value of the estate – meant that they could not be ascertained unless the value of the estate was itself ascertained by sale. Phillip's contention was that any third-party debts and liabilities must long ago have been discharged or become unenforceable; and that any amounts due to Esther by way of commission, statutory legacy (and any interest on it) or arrears of

income from her life interest in half the residue would have been far exceeded by the value of the proceeds of sale of Parcel 191 which Esther had paid away in breach of trust and for which she must account.

20. In my view, it is probable that Esther had completed administration of John Samuel's estate – in the sense of discharging the debts and expenses and ascertaining the residue – well before she died. Funeral expenses and third-party liabilities must indeed have been discharged long ago. Esther's entitlement to the statutory legacy and to income from her life interest are liabilities payable out of residue: the former is expressly a charge on the residuary estate under section 29 of the Succession Law, and the life interest is expressed by the same section to be an interest in the residuary estate. Any difficulty in ascertaining the amount cannot therefore prevent ascertainment of the residue itself. That leaves only the commission payable to Esther as personal representative; and that (and also in fact the statutory legacy, interest and income arrears) is very likely to have been less then the amount of the proceeds of sale of Parcel 191, as counsel for Clive acknowledged. Even if Phillip has, as the judge held, lost the right to reclaim those proceeds from Sharon and the Company, it was a breach of trust by Esther to apply them otherwise than in accordance with the statutory trusts affecting John Samuel's estate; and she or her estate could not claim any sums still due to her without giving credit for all the amount of the proceeds of sale. It also seems to me to be of relevance that in September 1988 Esther transferred Parcel 152 (one of the parcels derived from Bradley's estate) to Phillip, and that in February 1999 she transferred Parcel 63 to the three brothers. Both these parcels were assets of John Samuel's estate, and by transferring them Esther was implicitly acknowledging that she did not need them or their value for the purposes of administering the estate.

21. However, even if it be the case that administration of the estate has not been completed, that is not in my view a reason for refusing Phillip declaratory relief. It will be observed that each declaration sought by him has two limbs, the first limb stating that the relevant property was held by Esther as personal representative of John Samuel, the second stating that the property is now held on trust absolutely for Phillip. The first limb does not require any proprietary interest to support it. The fundamental issue in these proceedings is whether or not assets which undoubtedly were at one stage assets of John Samuel's estate remain assets of that estate or are now held beneficially by someone else. That issue was fought out over eight days at substantial expense. If Phillip is otherwise entitled to succeed in his case on all or some of the assets, it would in my judgment be quite wrong to deprive him of an appropriately framed declaration to that effect. It may be that he will need to take further steps to secure the legal title to assets that remain assets of John Samuel's estate, but that is no reason for leaving him without any effective remedy at the

conclusion of these proceedings if he has succeeded in establishing that some or all of the assets in dispute remain assets of that estate.

22. For these reasons, I would hold that the challenge to Phillip's claim on the ground that he has no standing to bring it fails.

*The Cayman House*

23. The next challenge to Phillip's claim relates to Parcel 1, the Cayman House. It is said by the respondents that John Samuel held the Cayman House subject to a common intention constructive trust under which he and Esther were joint tenants in equity, with the consequence that on John Samuel's death the entirety of the equitable interest in the Cayman House passed to Esther by survivorship and did not become an asset of his estate. Again, the judge upheld the respondents' contention.

24. In directing himself as to the relevant law on common intention constructive trusts, the judge referred to paragraphs 11-023 and 11-025 of Megarry & Wade on the Law of Real Property (8th ed) and to *Stack v Dowden* [2007] 2 AC 432 at [60] and [61]. He then said this (at paragraph 10.5 of the judgment):

> "Accordingly, the whole course of dealing between John Samuel and Esther in relation to parcel [1]/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".

25. It appears to me that, in stating the test in this way, the judge misdirected himself. This is a case where the legal title was vested in John Samuel alone. In such a case, as identified in paragraph 52 of the decision of the United Kingdom Supreme Court in *Jones v Kernott* [2011] UKSC 53,

> "The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above."

For clarity, I quote paragraph 51(3) of the same decision as well as paragraph 51(4) and (5):

> "(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own

mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each 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": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant in ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4))."

26. It is accordingly clear that, in order to establish a common intention constructive trust, a two-stage test must be satisfied. First, it must be shown that there was a common intention that both parties should have a beneficial interest in the property. That is a question of fact that has nothing to do with fairness. It is only once the first test is satisfied and a common intention is established that the second stage arises; and it is only at that stage that, if it is not clear what beneficial shares were intended, the court will determine what share it would be fair for each party to have in the light of their whole dealings with regard to the property. In the present case, the judge appears to have elided the two stages and sought what he regarded in all the circumstances as a fair solution. If that is what he did, he erred in principle.

27. It nevertheless seems to me that there was sufficient material to justify the conclusion to which he came. Parcel 1 was transferred to John Samuel by Bradley by deed of gift dated 12 September 1969. At that stage, the parcel was unbuilt on. Some days earlier, however, on an unspecified date in August 1969, John Samuel entered into a contract for the building of what became the Cayman House; and that agreement recited that John Samuel was "together with Esther Hinds his wife seised of an estate in fee simple in possession" of Parcel 1. After John Samuel's death, Esther made in June 1979 a deposition in the District Court of the United States, Houston Division in civil proceedings brought in connection with his death. In that deposition, she said that Bradley had given her and John Samuel Parcel 1; that they had built the Cayman House as a retirement home; that when they had it built, both their names were on the papers; that the cost of

building the Cayman House had been partly met from money which she held on behalf of the three brothers, who had received it as compensation for the death of their father, John Jr; and that, once the building was complete, it had been let and the rent had been paid into a joint account in the names of her and John Samuel. It appears also that a further part of the building cost was obtained on mortgage; and it was a condition of the mortgage that it was "to be in your joint names if the property is so registered but in any event [Esther] is to be joined in as party to the mortgage".

28. In my view, these materials point compellingly to the existence of a common intention that Esther should have a beneficial interest in the Cayman House. They also demonstrate that Esther acted upon that common intention by undertaking liability on the mortgage and contributing to the building cost from funds she held for the three brothers. To set against these factors, Phillip was able only to point to the facts that John Samuel remained the sole registered owner and had paid for the building insurance, that John Samuel and Esther had never lived in the Cayman House, and that in a manuscript document created shortly before his death John Samuel had apparently treated himself as able to dispose of the Cayman House as he wished. The judge felt unable to place any reliance on the last of these factors, since the manuscript document contained alterations and inconsistencies that he considered made it impossible to know whether or not it represented John Samuel's real intentions; and he took the view that the factors overall were insufficient to outweigh the impression given by the building contract, deposition and mortgage. In my judgment, he was entitled to take that view.

29. The judge also took the view that the common intention was that John Samuel and Esther should share the property as beneficial joint tenants, and again I consider that he was entitled to take that view. The recital in the building contract alone compels that conclusion; but the whole of the history of John Samuel's and Esther's conduct in relation to the Cayman House up to his death demonstrates an expectation that it was to be their joint retirement home. In the circumstances, the fair solution is the one at which the judge arrived; and I would dismiss the appeal in relation to the Cayman House.

*Proceeds of sale of Parcel 191*

30. Phillip's primary contention in relation to the proceeds of sale was that Esther had transferred them to Clive and Sharon not as a gift, but to hold on Esther's behalf. Having heard evidence on the matter, notably the evidence of Sharon but also that of the three brothers, the judge concluded that Esther had transferred the proceeds of sale to Clive and Sharon as a gift. In paragraph 11.5 of the judgment, he said this:

"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. 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?"

31. Although Phillip's skeleton argument appeared to presage a wholesale attack on the judge's findings of fact, no such attack materialized; and even in relation to this issue there was no real attempt by Mr Ham QC to challenge the finding that Esther had given the proceeds of sale to Clive and Sharon. That was no doubt a realistic acceptance of the fact that it is notoriously difficult to overturn on appeal a factual finding made by a judge based on his assessment of the oral evidence. In my view, the judge's finding that the transfer was a gift is unassailable. However, the rejection of the argument that Clive, Sharon and the Company held the proceeds of sale on trust for Esther is not the end of Phillip's claim to them. As the judge had previously found, Esther had held Parcel 191 as an asset of John Samuel's estate prior to its sale, and in consequence she held the proceeds of sale also on the trusts affecting that estate. The proceeds of sale were accordingly not hers to give away, and in doing so she committed a breach of trust. None of Clive, Sharon and the Company gave any consideration for the gift, so on the face of it they were vulnerable to a claim by the estate, or perhaps by Phillip, that they should return the proceeds. In the event, they were able at first instance to defeat Phillip's claim on the grounds that it was barred by statute or by laches. The defences of limitation, acquiescence and laches have, however, relevance to Phillip's claims generally; and it is to them that I now turn.

*Limitation*

32. The judge dealt with limitation in section 12 of his judgment, which runs to 21 paragraphs. His conclusion was unequivocal: paragraph 12.21 states that "Phillip's claims in these proceedings are barred by limitation". With respect to the judge, however, it is not at all easy to see how he came to that conclusion. His discussion focused on two sections of the Limitation Law (1996 Revision): section 27, dealing

with trust property, and section 19, dealing with actions to recover land. The reasoning in relation to both was heavily influenced by his view that an unadministered estate was not a true trust and Phillip's claims were not claims by a true beneficiary – a view which appears to ignore the fact that "trust" is defined in the Limitation Law as having the same meaning as in the Trusts Law, where it expressly extends to "the duties incident to the office of a personal representative". His view appears to have led to him to the conclusion that section 27 did not apply in terms: at paragraph 12.11 he said that he was inclined to agree with the respondents' submission "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". As to section 19, the judge appears to have considered it only in relation to Parcel 63, and to have concluded that that section applied because the three brothers had been in adverse possession of it since the transfer to them and more than twelve years had elapsed before Phillip brought his claim. There does not appear to be any analysis of the position in relation to the Retained Parcels, although it may be that the judge thought that the general six year period for trust claims prescribed by section 27(3) in some way applied.

33. I think it necessary to deal with the limitation position separately in relation to Parcel 63, the proceeds of sale and the Retained Parcels. Since Esther acquired the beneficial title to the Cayman House by survivorship on John Samuel's death, there is no need to deal with it in this context.

34. <u>Parcel 63</u>.
Parcel 63 was transferred by Esther to the three brothers on 26 February 1999. It was an asset of John Samuel's estate, and the three brothers were not entitled to any interest in that estate. The transfer to them was accordingly a breach of trust by Esther. Immediately after the transfer , Esther had, in her capacity as personal representative of John Samuel, a right (and an obligation) to reclaim it for the benefit of his estate. That right accordingly accrued immediately after the transfer. Any claim by her to enforce the right would have been a claim to recover land, and section 19 of the Limitation Law 1991 (1996 Revision) would have applied to it. [It would also have been a claim to recover trust property, but section 27(3) expressly applies only where no other period of limitation is prescribed.] Section 19(1) provides 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".

Accordingly, Esther had twelve years from the transfer in which to bring the claim. She died before that period expired, without having brought a claim in her lifetime. No substitute personal representative

of John Samuel was appointed before the twelve year period expired on 25 February 2011 without a claim having been brought. The prima facie consequence was that the estate's title to the land was extinguished on that date by virtue of section 23, which so far as relevant provides that, subject to section 24, "at the expiration of the period prescribed by this Law for any person to bring an action to recover land … the title of that person to the land shall be extinguished". It is irrelevant that, so Mr Ham asserted, the respondents had failed to plead a limitation defence despite being given leave to do so: on the expiry of the time allowed for a claim to recover land the title is extinguished by virtue of section 23 whether limitation is pleaded or not. On the face of it, therefore, the estate's title to Parcel 63 has been extinguished, and the three brothers have an unassailable right to it.

35. As section 23 makes clear, however, that position is capable of being affected by the provisions of section 24. Subsections (3) and (4) of that section are in the following terms:

> "(3) Where any land is held upon trust (including a trust for sale) and the period prescribed by this Law has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Law; but if and when every such right of action has been so barred the interest of the trustees shall be extinguished.
>
> (4) Where any land is held upon trust (including a trust for sale), an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Law, notwithstanding that the right of action of the trustees would, apart from this provision, have been barred by this Law."

As I have already remarked, the definitions of trust and trustee are extended by virtue of the incorporation of the Trust Law definitions to include the duties incident to the office of a personal representative and that office itself.

36. The only persons who may be said to have been entitled to beneficial interests in the land adverse to the three brothers were Esther and Phillip. If Esther had a right of action in virtue of her beneficial interest, it will have accrued at the same time as her right as personal representative to reclaim the land and will have become barred twelve years after the transfer. Phillip's position requires further analysis.

37. As I have said in dealing with Phillip's standing to bring his claims, so long as John Samuel's estate remained unadministered he had no

more than a right to compel due administration. The respondents maintained before the judge and before us that administration had still not been completed; and it might be thought that, if they were right about that, the consequence would be that Phillip had not yet attained an interest in possession in any part of the estate, with the further consequence that no right to recover the land had yet accrued to him. On that footing, section 24 (3) would operate to prevent extinction of the estate's title, and a substitute personal representative once appointed would be able to sue to recover the land by virtue of section 24 (4).

38. It seems to me, however, that Phillip's right to recover Parcel 63 as beneficiary of the estate has also been extinguished, whether or not the estate has been fully administered. The starting point is section 24(1), which is in the following terms:

> "Subject to section 27 (1) and (2), this Law applies to equitable interests in land, including interests in the proceeds of the sale of land held on trust for sale, as they apply to legal interests. Accordingly a right of action to recover the land shall, for the purposes of this Law but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal interest in the land, and any relevant provisions of section 20 shall apply in any such case accordingly".

[Sections 27(1) and (2) have no relevance: they concern claims by a beneficiary in respect of fraud or fraudulent breach of trust, or to recover trust property or its proceeds from a trustee. Although Phillip might have a claim against Esther's estate to which these provisions could apply, he has not made it in these proceedings.]

39. Under the Succession Law, Esther held the whole of the estate of John Samuel (apart from personal chattels and commission) on trust for sale. In particular, she held Parcel 63 on trust for sale. Construing the Limitation Law consistently with the Succession Law, it is clear that the former law is not concerned with whether or not an estate has been fully administered: it recognises that the interests of a beneficiary may lie behind the statutory trust for sale. It cannot have been intended that accrual of a cause of action for the purposes of determining when the action is barred could depend on some external event such as whether or not an administrator had completed administration. Some indication that this is the policy of the Limitation Law may be derived from section 31, which provides as follows:

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

Accordingly delay in obtaining a grant does not prevent time running; and it is in my view unlikely that the legislature intended that delay in administering an estate should have the effect of enlarging the time in which a claim could be brought. I consider that, whatever the state of administration of the estate, Phillip's interest in the estate, and in Parcel 63, is to be treated for the purposes of the Limitation Law as being an interest in the proceeds of its sale; and by virtue of section 24(1), his right to recover Parcel 63 is treated as accruing as though it were an interest in land.

40. His interest under the statutory trusts was an interest in possession as to half and an interest in remainder in respect of the other half. Therefore section 19(4) becomes relevant. It is in the following terms:

> "Where any person is entitled to any interest in land in possession and, while so entitled, is also entitled to any future interest in that land, and his right to recover the interest in possession is barred under this Law, no action shall be brought by that person or by any person claiming through him, in respect of the future interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate interest".

41. The consequence of these provisions is, in my judgment, that Phillip is to be treated as having acquired a cause of action in relation to Parcel 63 on the date on which that parcel was transferred to the three brothers. On that date, he had in equity both an interest in possession and a future interest in the parcel: the equitable interest in possession is to be treated for the purpose of determining when a cause of action accrued to Phillip as being an interest in land (section 24(1)), and the equitable future interest is to be disregarded (section 19 (4)). More than 12 years having elapsed since the transfer, the titles both of the estate and of Phillip have been extinguished; and the title of the three brothers is now unassailable. On this ground, I would dismiss Phillip's appeal in relation to Parcel 63.

42. <u>The proceeds of sale of Parcel 191.</u>
The proceeds of sale were transferred to Clive and Sharon on 16 February 2005. As I have pointed out above, the transfer involved a breach of trust by Esther. A cause of action accrued on that date to Esther as personal representative of John Samuel; but she brought no claim in respect of it, and there is currently no substitute personal representative to pursue any action still capable of being brought. Phillip's claim was not brought until 17 June 2011, more than six years after the transfer to Clive and Sharon.

43. Section 27(3) of the Limitation Law is in the following terms:

> "Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which another period of limitation is prescribed by any other provision of this Law, shall not be brought

after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, 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".

44. Mr Ham QC accepted that he cannot invoke against Sharon or the Company section 27(1), which provides that no period of limitation applies to an action by a beneficiary to recover trust property in the possession of the trustee. That is because, on the authority of the decision of the United Kingdom Supreme Court in *Williams v Central Bank of Nigeria* [2014] UKSC 10, neither of them is to be regarded for limitation purposes as a trustee. He also seemed inclined to accept that, if he could not overturn the judge's finding of fact that Esther had not transferred the proceeds of sale to Clive and Sharon to hold on her behalf, the six-year limitation period prescribed by section 27(3) applied.

45. Notwithstanding Mr Ham's apparent willingness to concede the point, however, I do not consider that Phillip's claim to the proceeds of sale is statute barred. In order for section 27(3) to apply to bar the claim, more than six years must have elapsed since a right of action accrued to Phillip. Even if it be assumed that Esther had completed administration of John Samuel's estate by the time of the transfer, so that Phillip can be said to have had a proprietary interest in the proceeds of sale and able to maintain an action in respect of them in his own right, his interest was in part a future one. Unless it could be said that in some way Esther had impliedly assented to the vesting in Phillip of the entirety of the estate's cause of action in respect of the proceeds of sale in part satisfaction of his absolute interest in half the residuary estate (which is clearly not what happened), Phillip had no more than a half interest in possession. It does not make sense to say that there accrued to him on the date of the transfer half a cause of action, or a cause of action in respect of half of the proceeds. There is in section 27 no equivalent of section 19(4), disregarding a future interest for the purposes of determining when a course of action accrues if an interest in possession is held at the same time. Instead, the concluding words of Section 27(3) state that a right of action is not to be treated as having accrued until a future interest falls into possession; and that appears to me to have the consequence that no cause of action accrued to Phillip until Esther's death. Accordingly, I would hold that Phillip's claim to the proceeds of sale is not statute barred.

46. <u>The Retained Parcels.</u>
The Retained Parcels were, by definition, still in Esther's possession at her death. She had done nothing with them that was inconsistent with her duties as John Samuel's personal representative or inconsistent with Phillip's present or future entitlement. The Retained Parcels

were undeveloped – or "raw" – land. No circumstances had arisen in relation to them to give Phillip cause for complaint against Esther, still less to give him a cause of action against her. No cause of action ever arose in respect of the Retained Parcels before Esther's death, and in the absence of an accrued cause of action no limitation period can have started to run. It was only when Clive asserted, in his capacity as Esther's personal representative, that the Retained Parcels were part of her estate that a cause of action will have accrued to Phillip; and his proceedings were brought well within time thereafter. In my judgment, the judge was plainly wrong to uphold the limitation defence in relation to the Retained Parcels.

*Acquiescence and laches*

47. Since I have already concluded that Phillip's claim fails in respect of the Cayman House (on the basis that it was subject to a common intention constructive trust) and Parcel 63 (on limitation grounds), it is necessary to consider acquiescence and laches only in relation to the proceeds of sale of Parcel 191 and the Retained Parcels.

48. The judge dealt with acquiescence and laches separately. In relation to acquiescence, after citing certain authorities he stated (at paragraph 13.7) that "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". He then went on to consider Phillip's knowledge, and at paragraph 14.18 said the following:

> "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 understand that was in breach of his own entitlement. He knew too of his mother's subsequent transfer of [Parcel 63] to his half-brothers in February 1999 and then later her giving the proceeds of sale of [Parcel 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".

Finally, after considering Phillip's conduct, he expressed his conclusions as follows in paragraph 15.4 of the judgment:

> "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 find 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".

49. In relation to laches, the judge cited a number of authorities, including in particular *Frawley v Neill* [2000] CP Rep 20 (CA), and at paragraph 16.7 said that he was adopting a broad approach to the facts and circumstances of the case in seeking to determine whether, in his judgment, it would be unconscionable to permit Phillip to now assert the rights which he claimed. He then considered the consequences of Phillip's conduct, including in particular the absence of direct evidence from Esther and the possible loss of relevant documents, and stated (at paragraph 17.11) that "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". He then expressed his conclusion on laches in section 19 of his judgment, which I quote in its entirety:

> 19.1 Although 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 4 September 1982. He was almost 47 years old when he commenced these proceedings on 17 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 152]). Esther's letter of 29 June 1987 to her four sons was 24 years before these proceedings started and her transfer of [parcel 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 Jenna, [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 1/2 years after Esther came to live in Cayman and after she transferred to herself sole title to the Cayman House ([Parcel 1]) and the quarter share of [Parcel 81]. These proceedings were also commenced almost 12 years after Esther transferred [Parcel 63] to John III, Clive and Tom and some six years and four months after she gave the proceeds of sale of [Parcel 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."

50. The modern approach is to treat acquiescence, laches and equitable estoppel as labels describing broadly the same concept. As Aldous LJ put it in *Frawley v Neill* (supra), after discussing instances of the doctrines of laches, acquiescence and estoppel:

> "In my view, the more modern approach should not require an enquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The enquiry 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 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".

The judge cited this passage, and it cannot be said that in principle he approached the matter on the wrong basis.

51. In relation to the Retained Parcels, however, it appears to me that the conclusion he reached was plainly wrong. Acquiescence and laches both come into play only when a right has been infringed, since otherwise there is nothing in which to acquiesce and no right capable of being lost by delay. But as I have pointed out in relation to the limitation defence, Esther did nothing during her lifetime in relation to the Retained Parcels that amounted to an infringement of Phillip's rights. The judge seems to have taken the view that it was known to Phillip that Esther regarded all the properties comprised in John Samuel's estate as her own, and was intending to leave them equally between the three brothers and Phillip. The principal basis for this view is a letter – rightly described by Moses JA in argument as a very sad letter - written by Esther to the three brothers and Phillip in June 1987 at a time when relations between Clive and Sharon on the one hand and Phillip and his wife on the other had broken down after they had spent a month living together in the Cayman House. In relevant part, the letter said this:

"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 that the other. In view of this it may be 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 realise 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 to 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*" (emphasis added).

52. Taken at its highest, this letter expresses a hope that – whatever the strict legal position might be – the family's property could be shared equally between the three brothers and Phillip regardless of its source. It cannot be construed as a threat to bring about that situation in Esther's lifetime. The judge also seems to have thought that the transfers of Parcel 152 to Phillip and of Parcel 63 to the three brothers were the first steps in implementation of the plan Esther described in the letter, notwithstanding that Parcel 152 came from Bradley's estate (so the three brothers had no interest in it) and notwithstanding that the transfer of Parcel 63 was some 12 years after the letter. But even if the letter could be construed as a threat to deal with the properties inconsistently with the trusts applicable to John Samuel's estate, Esther never carried out that threat in relation to the Retained properties. Overall, what the judge's conclusion means is that Phillip was bound to commence administration proceedings either on receipt of the letter, or on the transfer of Parcel 63, or risk losing for ever his right to due administration of the estate and with it his right to receive any of the remaining assets in it. In my judgment, such a conclusion is wrong: Phillip was not obliged to litigate over intentions, still less over those she hoped would be achieved by agreement between a united family.

53. In *Fisher v Brooker* [2009] 1 WLR 1764 at [64] the House of Lords stated that detrimental reliance was usually an essential ingredient of

laches. The most that the judge says on this topic is that Phillip allowed Esther and the three brothers "to reasonably assume that he was going along with what was happening". There was no finding of any detrimental reliance by any of Esther or the three brothers in relation to the Retained Parcels. It was suggested to us that, had Esther understood that Phillip would object to her disposing of John Samuel's estate as she wished, she could have taken steps to achieve the equality she desired by using assets she held in her own right; but such evidence as there was of the value of her assets suggested that she could not in fact have done so.

54. In the circumstances, I consider that the judge was wrong to hold that Phillip had lost his rights in relation to the Retained Parcels by acquiescence or laches.

55. In relation to the proceeds of sale of Parcel 191, however, I consider that the judge was right to hold that Phillip's claim was barred by acquiescence. As the judge found, a substantial part of the proceeds of sale was used to fund a cruise to Alaska for the whole extended family, meaning Esther, Phillip and the three brothers and their wives, and Esther's grandchildren. By participating in the cruise, Phillip impliedly represented that he had no objection to the proceeds of sale being used to fund it; and it seems to me that that implicit representation extends to Esther's use of the money as a whole. In those circumstances, I agree with the judge that it would now be unconscionable for Phillip to insist on his strict rights.

*Conclusion*

56. For the reasons I have given, I would dismiss the appeal in relation to Parcels 1 and 63 and the proceeds of sale of Parcel 191, but allow it in relation to the Retained Parcels. I would grant the first limb of the declarations sought by Phillip's amended Originating Summons in relation to the Retained Parcels; and, since I take the view that administration of John Samuel's estate had been completed before Esther's death, I would also grant the second limb of those declarations, and an order for rectification of the land register to show him as absolute owner of Parcels 172, 175 and 222. In relation to Parcel 81, in which Phillip has only a one-quarter share as tenant in common, I consider that the declarations are adequate protection of his rights.

**THE RT HON SIR JOHN CHADWICK, PRESIDENT**

I agree.

**THE RT HON SIR ALAN MOSES, JA**

I also agree.