Neutral Citation Number: [2024] EWHC 378 (KB)

Case No: KA-2023-LDS-000002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

County Court at Leeds
1 Oxford Row
Leeds LS1 3BG

Date: 21/02/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

(1) MR NAEEM NAZIR

(2) MR KAISER NAZIR

Appellants

- and –

MRS DILSHAD BEGUM

Respondent

- -

The Appellants appeared in person

Ms Cait Sweeney (instructed by **Stachiw Bashir Green**) for the **Respondent**

Hearing date: 6 November 2023

Supplemental submissions: 14 November 2023 and 20 November 2023

Judgment circulated in draft on 7 February 2024

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Approved Judgment

This judgment was handed down remotely at 12noon on 21 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal about a question as to whether the Defendants were in adverse possession of land. A person is not to be regarded as being in adverse possession of an estate when the estate is subject to a trust: see Schedule 6 paragraph 12 to the Land Registration Act 2002. Since the Appellants' father died intestate and letters of administration were taken out during what would otherwise be the period, the issue which arises is whether the reference to a trust includes a situation of a statutory trust under section 33 of the Administration of Estates Act 1925 ("Section 33").

2. The case comes to the full appeal with the permission of Mr Justice Sweeting who stated that there was uncertainty as to the effect of an administration of an estate upon a period relied upon as adverse possession. He regarded the points (Grounds 1 – 8) in that regard as giving rise to some other compelling reason why there should be permission to appeal. There were two grounds (Grounds 9 and 10) relating to an allegation of false evidence having been given and to the impact of that as regards the dispute as to the whether the Defendant as a matter of fact had had adverse possession for the entirety of the ten-year period. Permission to appeal was refused on those points, and so those points do not arise for consideration.

3. HH Judge Walsh ("the Judge") decided the case primarily by finding in the face of disputed evidence that there was a 10-year period of adverse possession. There was a trust issue, but as will be shown, it was not an issue about Section 33. The Respondent submits that the Appellants should not be allowed to raise this issue for the first time on appeal, and that, if it does arise, that the statutory trust under Section 33 was not to be treated as a trust which could interrupt or prevent a period of adverse possession from arising. The Appellants submit that there is no prejudice for this matter to be dealt with for the first time on appeal, that Mr Justice Sweeting had given permission for it to be raised and that as a matter of law, the trust exception applied to the statutory trust under Section 33.

4. The relevant background has been set out in the Respondent's skeleton argument dated 31 October 2023. The section on background is set out at paras. 4-17 which is set out in full.

> *"4. This claim concerns a small parcel of land known as the land adjoining the back of 37 Lower Rushton Road, Thornbury, Bradford (Title No: WYK349890) ("the **Disputed Land**"),*
>
> *5. The Disputed Land is located between 37 Lower Rushton Road, Thornbury, Bradford BD3 8PX ("**Lower Rushton Road**") and 1 Gurbax Court, Bradford, BD3 8PP ("**Gurbax Court**").*
>
> *6. The original registered proprietor of the Disputed Land and Lower Rushton Road was A's father, Mohammed Nazir ("**A's Father**") [p.861, who died intestate, on 21 st March 2010. At all material times, A and their family have lived at Lower Rushton Road.*

7. On the 23rd October 2019, A obtained Letters of Administration in respect of A's father's estate [p. 97]. On the 19th April 2022, A became the registered proprietors of the Disputed Land.

8. R is the registered proprietor of Gurbax Court. She has lived at Gurbax Court with her husband, Mr Perwez, and family since 1998. R became the registered proprietor of Gurbax Court in January 2022, following the death of her husband [p. 111].

9. On the 1st February 2022, A issued proceedings against R and sought an order for possession of the Disputed Land [p.93 - 96].

*10. On the 10th March 2022, R filed and served a defence in which she disputed that A was entitled to a possession order. R's case was that she, and her husband, had adversely occupied the Disputed Land for a period of at least 10 years and had a defence under **s.98 (1) of the Land Registration Act 2002** ("LRA 2002").*

11. The claim was listed for trial on the 3 rd & 4th October 2022 and was heard by HHJ Walsh.

*12. On the 16th December 2022, HHJ Walsh dismissed A's claim on the basis that R had established a valid defence under **s.98 (1) of LRA 2002**. He further directed that R should be registered as proprietor of the Disputed Land under **s.98 (5) LRA 2002** [p.30]"*

13. On the 6th January 2022, A filed an Appellant's Notice seeking permission to appeal the Order [p. 3-211].

*14. Within their appeal, A contend that HHJ Walsh's decision was wrong. The reason, they say, is that R cannot establish the requisite 10 years of adverse possession under **LRA 2002 Schedule 6 (1)** due to the operation of **LRA 2002 Schedule 6 (12)** which states:*

> *'"A person is not to be regarded as being in adverse possession of an estate for the purposes of this Schedule at any time when the estate is subject to a trust, unless the interests of each of the beneficiaries in the estate is an interest in possession".*

*15. A assert that the reference to 'trust' in the above provision includes a situation which arises upon the death and intestacy of a Person under **s33 of the Administration of Estates Act 1925**. Therefore R could not have been in adverse possession of the land from 23rd October 2019, when they obtained Letters*

> *of Administration as it was held "on trust" by them and that "the property is also the interest of only two of the beneficiaries in the estate " (sic) [p. 161].*
>
> *16. On the 24th May 2023, Sweeting J gave A permission to appeal [p. 32-35] on the basis that there was some other compelling reason for the appeal to be heard, namely:*
>
> > *"The uncertainty as to the effect of an administration of an estate upon a period relied upon as adverse possession"*
>
> *17. On the 20th October 2023, R filed and served a Respondent's Notice outlining Different or Additional reasons upon which HHJ Walsh's order should be upheld. R also filed and served a relief from sanctions application as the Respondent's Notice should have been filed by 22nd June 2023.*

II The issues

5. The issues to which this gives rise are as follows:

   (i) Should the Appellants be allowed to raise this point on appeal?

   (ii) Does a trust for the purposes of the Land Registration Act 2002 Schedule 6(12) include a situation where land is held by personal representatives upon the death or intestacy of a person?

6. The Court will first consider these points and then turn to other issues which are said to arise.

III Allowing a new point to be raised in the appellate court

7. The Court is cautious about allowing a point to be run for the first time on appeal. It will not be permitted generally if it would require new evidence or if the trial would have been conducted differently if the point had arisen in the court of first instance: see *Singh v Dass* [2019] EWCA Civ 360 at [16-17].

8. The fact that permission to appeal has been granted on this point does not prevent a party from objecting at the hearing of the appeal on the basis that the point had not been taken at an earlier stage: see *Mullarkey v Broad* [2009] EWCA Civ 2. Lloyd LJ stated at [29] *"... the grant of permission, on which the Respondent was not heard, only shows that there were thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point."*

9. It has been suggested that this point may have been mentioned at the stage of the hand down of the judgment, but, if that was the case as to which I express no view, it was

too late by that stage for the Judge to consider, and he would have been entitled to refuse to consider if asked to do so. I am therefore satisfied that the first time when this matter was placed before the Court in any formal sense was in the Appellant's Notice.

10. The primary matter in issue was a factual one as to whether there was uninterrupted possession of the Respondent over a period of 10 years up to January 2022. The Judge assessed the evidence and preferred the evidence given by the Respondent and found that adverse possession had been proven on the balance of probabilities.

11. There was a trust issue, but this was not the same as the trust point now taken. The Appellants relied upon a declaration of trust dated 23 August 2022 which stated that the Appellants held the land on trust for themselves as beneficial tenants in common in equal shares. The Judge in his judgment at para. 24 said as follows:

> *"after proceedings began, the Claimants entered into a deed of trust in August 2022 to regulate the position in relation to the Disputed Land. They argue by reference to paragraph 12, Schedule 6 of the Land Registration Act 2002, the Disputed Land now being held in trust, no application for registration can be made based on adverse possession."*

12. At para. 26(6) of the judgment, the Judge identified the issue as *"what effect, if any, does the Claimant entering the deed of trust in August 2022 have on the proceedings."*

13. The Judge resolved this trust issue against the Appellants at paras. 80-82 of the judgment in the following terms:

> *"80. In relation to issue six, and so as to what effect, if any, the Claimants entering into a deed of trust in August 2022 has on proceedings, in my judgement, the Claimants' assertion that because there was a deed of trust in respect of the Disputed Land, the application to register a proprietor cannot be made on the basis of adverse possession is, wrong. I say so for 2 substantive reasons:*
>
> *81. First, dealing with paragraph 12, schedule 6, is not, in my judgement, about a situation that we are dealing with here, where a defendant outside the trust is claiming adverse possession in respect of a disputed plot of land. It is aimed, in my judgement, at preventing a beneficiary of a trust from claiming adverse possession against another beneficiary within the trust.*
>
> *82. Second, if that was not the case, and the Claimants' argument was correct, that would frustrate the whole purpose of section 98, and render it completely redundant to anyone*

> *who set up a trust before proceedings began. Therefore, in my judgement, that argument is not sustainable."*

14. The second reason fastens on the fact that the trust point did not arise within the 10-year period preceding the action, and that the period could not be brought to an end by a trust set up after proceedings had begun. This is not the same point as the point being raised now which concerns the effect of the administration of the estate within, and not after, the 10-year period. The issue which arose was therefore about the effect of an express trust and not the statutory trust in the intestacy. It was about the effect of the express trust after the 10-year period, whereas the intestacy point was about a statutory trust during the 10-year period.

15. Despite detailed opposition on procedural grounds, the Respondent has failed to show that if the point had been raised at an earlier stage, it would have adduced other evidence or would have conducted the trial in a different way. This is subject to one point that in the event that new or potentially credible evidence was sought to be adduced in order to support the new point, the Court could have refused to admit the new point. That would have been because that would have opened the way to new evidence, further disclosure and cross-examination as set out in paragraphs 55 and 56 below. In the event, there was no new evidence that was advanced.

16. I take into account the fact that it is potentially detrimental to the administration of justice for the point not to be explored at trial, and to the fact that the appellate court should proceed with caution to such a point arising at a late stage.

17. In the exercise of the Court's discretion, and taking into account the above points, the Court considers that it should admit the new point. The Court is able to consider and rule on the matter on the appeal. Whilst it is unsatisfactory that the point was not raised before the County Court, at least prior to the judgment hearing, it is more unsatisfactory to decide an appeal about adverse possession and to ignore this discrete point of law. The Court will therefore rule on this point.

IV The Respondent's Notice

18. The Appellants have been served a Respondent's notice. This is said to have been served out of an abundance of caution in case a notice was required. If it was required, then relief against sanctions is sought because it was served late, by several months. It recognises that the delay was serious and significant and that there is no excuse for the same, but it submits that the third limb of *Denton v TH White Ltd* [2014] EWCA Civ 906 is satisfied, namely that it is just in all the circumstances that the Respondent should be permitted to rely on it.

19. The Appellants submit that a Respondent's Notice was required and that it is now too late. They take issue with the arguments in the Respondent's Notice. When asked at the hearing, the Appellants did not seek an adjournment if the Respondent's Notice was permitted.

20. In my judgment, it is not clear that a Respondent's Notice was required in this case. It is required *"in respect of a respondent who seeks to contend that the order of the court below should be upheld for reasons other than those given by that court…"*: see CPR 52.13 and CPR PD52C para. 8(3). There is an oddity about an appellant who raises an argument which was not raised below about the application of a statutory provision which did not arise for consideration in the court below. In the ordinary course of things, the judgment would not deal with a point which a party had not argued and which (in this case and many others) the Judge could not have apprehended. It seems odd then to serve a notice upholding the judgment for reasons other than those given by the court below. In a literal sense, it might be that a respondent's notice needs to be served, but it is not necessary to rule one way or the other.

21. Until and unless an appellant is given permission to adduce the argument, it can be said that it is premature for a Respondent's Notice to be served. In the instant case, the Appellant has not been given permission to adduce the argument, only permission to raise it before the appellate court. This is the effect of *Mullarkey v Broad* above.

22. The above arguments may be sterile in that it is important that in good time before the hearing where the new point is taken, the arguments in response to the new point need to be taken so that the appellant can consider the same. On this basis, once permission to appeal had been given, a responsive document ought to have been provided, and it might be that, despite the oddities referred to above, that document is a Respondent's Notice. I shall assume for this purpose that a Respondent's Notice was required.

23. It is therefore necessary to consider relief from sanctions on an assumption which I shall make, despite the arguments to the contrary, that there had been a breach of the rules in failing to serve a Respondent's Notice at an earlier stage. In respect of the first and second limbs of *Denton v White,* I shall assume for this purpose that there has been a breach, that it was serious or significant and that there is no reasonable excuse for the breach. As regards the third limb of *Denton v White*, in considering all the circumstances of the case, in order to deal justly with the application, the Respondent's Notice should be allowed in this case. If it is not permitted, the Court would be allowing a new argument not raised before the court below without having any answer to it from the Appellant. That would be unsatisfactory for the Court and would cause an injustice, particularly in a case where there were points of law to address. Against this, the Court needs to weigh against that the position of litigants in person who are asked to deal with this point much later than should have been the case.

24. In my judgment, the Appellants have had the time to consider the points raised by the Respondent. The Respondent's Notice was served more than two weeks prior to the hearing. They have further had the opportunity to make an application for an adjournment, but they have decided understandably not to do so. I bear in mind that in addition to the usual opportunities at the hearing to answer the points which have been made, the Appellants have unusually been permitted the opportunity to make supplemental submissions in writing. That was in part because of difficulties which they had in articulating their responses in the reply and so that any further points which they had on the matters in the Respondent's Notice could be advanced to the Court. If and to the extent there was prejudice caused to the Appellants by the late

service of a Respondent's Notice, these further submissions dated 14 November 2023 reduced further any prejudice on the part of the Appellants from the lateness of service of the Respondent's Notice. Any prejudice to the Appellants caused by the late Respondent's Notice is much less than any prejudice that would ensue from preventing the Respondent from answering the new point.

25. Insofar as the Appellants have said that the Respondent's Notice contains bad points, which is not a reason to disallow the Respondent's Notice. They are points of substance in the appeal to be considered. In the written argument on behalf of the Appellants, they have assumed that Mr Justice Sweeting has found in favour of the Appellants' arguments in the permission application which he granted. He did not do so. He simply allowed the new arguments to be raised at the appeal. That did not mean that he ruled that the Respondent could not oppose their introduction at the hearing of the appeal or that he accepted that there was a trust or that Schedule 6 paragraph 12 applied. These were arguments for the appeal itself.

26. In all the circumstances, on the assumption which is made that there was a requirement to serve a Respondent's Notice, and there has been a breach of the rules in connection with the lateness of service, relief from sanctions is given for its late service.

V Merits of the appeal: route map of this judgment

27. It is first necessary to identify the relevant statutory provisions. It will then be necessary to set out the arguments of the Appellant and of the Respondent respectively. The Court will then set out its discussion of whether the death and subsequent appointment of administrators in this case was such as to give rise to a trust for the purposes of Schedule 6 paragraph 12 of the Land Registration Act 2002. If it did, then the Court will go on to consider whether the exception to this provision about all the beneficiaries being in possession such as to take the instant facts outside the provisions of Schedule 6 paragraph 12 applies, such that that provision did not prevent a defence of adverse possession from arising.

VI Does a trust for the purposes of the Land Registration Act 2002 Schedule 6(12) include a situation where land is held by personal representatives upon the death or intestacy of a person?

(1) Relevant statutory provisions

28. Relevant statutory provisions include the following:

> *"Land Registration Act 2002 section 98*
>
> *(1) A person has a defence to an action for possession of land if—*

(a) on the day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 1 of Schedule 6 to be registered as the proprietor of an estate in the land, and

(b) had he made such an application on that day, the condition in paragraph 5(4) of that Schedule would have been satisfied.

(2) A judgment for possession of land ceases to be enforceable at the end of the period of two years beginning with the date of the judgment if the proceedings in which the judgment is given were commenced against a person who was at that time entitled to make an application under paragraph 1 of Schedule 6.

(3) A person has a defence to an action for possession of land if on the day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 6 of Schedule 6 to be registered as the proprietor of an estate in the land.

(4) A judgment for possession of land ceases to be enforceable at the end of the period of two years beginning with the date of the judgment if, at the end of that period, the person against whom the judgment was given is entitled to make an application under paragraph 6 of Schedule 6 to be registered as the proprietor of an estate in the land.

(5) Where in any proceedings a court determines that—

(a) a person is entitled to a defence under this section, or

(b) a judgment for possession has ceased to be enforceable against a person by virtue of subsection (4), the court must order the registrar to register him as the proprietor of the estate in relation to which he is entitled to make an application under Schedule 6.

….

Right to apply for registration

1(1)... A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.

(2)... A person may also apply to the registrar to be registered as the proprietor of a registered estate in land if—

(a)he has in the period of six months ending on the date of the application ceased to be in adverse possession of the estate because of eviction by the registered proprietor, or a person claiming under the registered proprietor,

(b)on the day before his eviction he was entitled to make an application under sub-paragraph (1), and

(c)the eviction was not pursuant to a judgment for possession.

…

Trusts

12. A person is not to be regarded as being in adverse possession of an estate for the purposes of this Schedule at any time when the estate is subject to a trust, unless the interest of each of the beneficiaries in the estate is an interest in possession" *(emphasis added).*

"Administration of Estates Act 1925

Section 33

(1) On the death of a person intestate as to any real or personal estate, that ***estate shall be held in trust by his personal representatives*** *with the power to sell it (emphasis added).*

(2)The personal representatives shall pay out of—

(a)the ready money of the deceased (so far as not disposed of by his will, if any); and

(b)any net money arising from disposing of any other part of his estate (after payment of costs),

All such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."

(2) The arguments for the Appellants

29. The language in Schedule 6(12) refers to there being no adverse possession *"at any time when the estate is subject to a trust"*. The only qualification is that this does not apply where *"the interest of each of the beneficiaries in the estate is an interest in possession."*

30. The effect of the appointment on death or the appointment of administrators is that *"the estate shall be held in trust by his personal representatives with the power to sell it"*: see s.33 of the Administration of Estates Act 1925 above.

31. Although this was not a trust in the sense that there were beneficiaries with immediate rights, it was expressed as such in the statute and is to be treated as a statutory trust or a "special" type of trust.

32. It is said that when considering the matter in a purposive sense, those who will take the property at the end of the administration require the assistance of the protection because they have no present right to take steps against the trespasser until then. Without this, they may never acquire the right before the squatter acquires title whether due to delay in the appointment of the personal representative or delays in the period of administration of the estate.

(3) Arguments for the Respondent

33. The expression "when the estate is subject to a trust" requires a trust to exist. For a trust to exist there must be identifiable property, a trustee, and identifiable beneficiaries who can enforce the trustee's duties. None of that exists in the case of the administration of an estate. The administrators are not trustees in any usual sense of an unadministered estate. The trust fund is by definition unidentifiable until the administration ends. The beneficiaries are likewise unknown until the administration is brought to an end by the assenting of property to those entitled.

34. The reference to a trust in the Administration of Estates Act 1925 is so that the administrators are treated as trustees for certain purposes, in particular so as to enable them to be held liable as fiduciaries for breaches of duty. That is not sufficient to create a trust. In *Ayerst v* C *& K (Construction) Ltd* [1976] AC 167 (*"Ayerst"*), at pp 175 and following, Lord Diplock referred to the case where the registered proprietor is dead, and his estate is being administered. Lord Diplock referred to *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694 and the finding in that case that:

> *" ... an estate while still in the 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".*

35. If an extended definition of trust had been required, that would have been done in the interpretation section 132 of the Land Registration Act 2002. It is not included, unlike the Limitation Act 1980 in its application to adverse possession claims. That

Act incorporated section 68 (17) of the Trustee Act 1968 which stated that unless the context otherwise requires:

> *"(17)"Trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee;"*

Since this is excluded from the Land Registration Act 2002, there is no scope for the extended definition. If Parliament had wished to preserve the extended definition, it would have said so.

36. The Court must seek to arrive at the best interpretation of words in the light of their context and the purpose of the statutory provision, taking into account where available the original consultation papers. Attention is drawn to the Law Commission report No. 254[1], a consultation paper, which referred to the role of adverse possession to ensure that in cases including where the registered proprietor dies, *"land remains in commerce and is not rendered sterile"*. The example given for the operation of the provision in the Law Commission report No. 271[2] was in respect of successive interests, but there is no example given about land held by a personal representative. The Respondent submits that administration of an estate is intended to be a swift exercise and therefore the rights of those who might receive the property in the estate are usually not adversely impinged.

(4) Textbook references

37. The Appellant relies on Ruoff & Roper on Registered Conveyancing which states at 33-021 included the following:

> *"it is perhaps arguable that an application cannot be made where, at any point during the relevant period of possession, the registered proprietor at the time (i) (being an individual) was deceased and his estate was being administered; or (ii) was bankrupt and his property was being administered by the trustee in bankruptcy; or (iii) (being a company) was being wound up. This is because, in each of these cases, the registered estate may have been subject to a form of trust as indicated by Diplock LJ in Ayerst v C&K (Construction) Ltd.*

[1] Law Commissions "Land Registration for the Twenty-First Century" (Law Com. No.254) Consultation para.10.13

[2] Law Commissions Land Registration for the Twenty-First Century" (Law Com. No.271) Land Registration and Commentary para. 14.91 – 14.93.

> *A similar issue may apply in relation to a charitable trust, where there are no beneficiaries holding an equitable proprietary interest in the trust land.*
>
> *....*
>
> *In circumstances where there are no beneficiaries (or only as yet unascertained beneficiaries) who have a proprietory (sic) interest in registered land which is comprised within a "special" type of trust arising in the particular cases referred to above, it could be argued that the protection afforded by para.12 of Sch.6 is of importance, as the ultimate beneficiaries will have had no present right to take steps against a squatter during the relevant period of possession.*
>
> *If a trust can subsist in these particular cases, therefore, it may be arguable that it is a trust for the purposes of Sch.6."*

38. This passage was quoted in a First Tier Tribunal Property case before Judge Elizabeth Cooke (then a Judge of the First Tier Tribunal) of *Best v Curtis* [2015] EWLandR 20150130. Judge Cooke rejected that argument. She said the following:

> *"22. One is that under normal circumstances while an estate is being administered it is held by personal representatives. They are not trustees in the conventional sense. For a trust to exist there must be identifiable property, a trustee, and identifiable beneficiaries who can enforce the trustee's duties. The applicant cites Green v Russell [1959] 2 QB 226, 241, but authority is scarcely needed.*
>
> *23. Executors (of a testate estate) and administrators (of an intestate estate) are fiduciaries but they do not hold the property as trustees. A trustee holds the legal title and the beneficiaries hold the equitable title. In Commissioner of Stamp Duties (Queensland) v Livingstone 1965 AC 694, at 707: "... whatever property came to the executor virtute officii [by virtue of his office] came to him in full ownership, without distinction between legal and equitable interests". The applicant sites (sic) Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 20th edition paragraph 81-02 which explains that executors are treated as trustees "for certain purposes and in some aspects", in particular so as to enable them to be held liable as fiduciaries for breaches of duty. But the executors or administrators are not trustees in any usual sense of an unadministered estate. The trust fund is by definition unidentifiable until the administration ends. The beneficiaries are likewise unknown until the administration is brought to an end by the assenting of property to those entitled.*

> *24. Might paragraph 12 be referring to a trust in some extended sense? I think not. Paragraph 12 assumes a trust that has beneficiaries. The Limitation Act 1980 uses the extended definition of a trust and a trustee found in the trustee add 1925, at section 68, so as to include personal representatives. But the 2002 Act does not employ that extended definition either explicitly or by reference; Had Parliament intended an extended definition it would have said so as it did in the Limitation Act 1980 and the Trustee Act 1925."*

39. She also added the following, namely:

(i) the reasoning based on the case of *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694 that the estate in the course of administration was not a trust in equity: see para. 26;

(ii) purposive reasoning based on the Law Commission documents referred to above: see para. 28-29;

(iii) personal representatives did not hold the property in the conventional sense intended by paragraph 12 of Schedule 6: see para. 30.

40. Whereas Ruoff & Roper appears previously to have expressed only the view quoted in para. 38 above of this Judgment, it is now put in a more tentative way in that it presents its previous view and the alternative argument based on *Best v Curtis* in the following terms:

> *"A contrary view is that the trust, in such particular cases, does not have identifiable beneficiaries for the time being and does not have the normal indicia or characteristics of a trust in the usual sense. Any reference to a "trust" in such cases is therefore limited to merely confirming that the property in question cannot be used or disposed of by the legal owner for his own benefit, but must instead be used or disposed of for the benefit of other persons. This therefore precludes it from being a "trust" for the purposes of Sch.6, given that para.12 of Sch.6 gives no indication that 'trust' is to be given a wider interpretation so as to include such "special" forms of trust.*
>
> *It also appears to have been the intention that the Sch.6 procedure should operate in circumstances where a registered proprietor has died, at least in circumstances in which no steps are taken to wind up his estate.*
>
> *Given the element of uncertainty over whether there is a trust for the purposes of Sch.6 in these special cases, it is understood that the practice of the Registrar is to require the*

> *applicant to confirm (not necessarily in the statement of truth or statutory declaration, but in writing) that he wishes to proceed with the application despite the fact that it is arguable that in the circumstances a trust arises which prevents an application from being made. This confirmation will be made apparent to a person given notice of the application and it may be open to him to object to the application upon this basis. An objection based upon a trust in circumstances the land has vested in the Public Trustee (no letters of administration having been granted) will, however, be treated as groundless on the basis that no trust subsisted whilst it was so vested."*

41. Megarry & Wade on the Law of Real Property 9th Edition states the law in accordance with the view of *Best v Curtis* as relied upon by the Respondent. Reference is made in a footnote to the contrary argument relied upon by the Appellant. The relevant passage is as follows:

> *"7-108 Where the registered proprietor is dead and the estate is being administered by personal representatives, or when it has vested in the Public Trustee because no grant has been taken out, the estate is not subject to a trust."*[3]

42. In the First Supplement to the Second Edition of Jourdan and Radley-Gardner on Adverse Possession, reference is made to the Land Registry's Practice Guide 4 Section 3 which says by reference to *Ayerst* that is arguable that an application cannot be made where at any point during the 10 year period, the registered proprietor was dead and their estate was being administered. Jourdan and Radley-Gardner say that it is questionable whether that argument is correct. In *Ayerst*, which concerned assets of the company were not in the beneficial ownership of a company because they could not be used for the benefit of the company and there was no trust because there were no identifiable beneficiaries. Lord Diplock said: *"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 the trust as it was recognised by the Court of Chancery apart from statute."* The authors then went on to say:

> *"there is nothing in the Joint Report*[4] *to suggest that Sch 6, para 12 was intended to apply to a situation such as that in Ayerst where there is no 'trust' in the strict sense of the word recognised by equity, and no possibility of a reversionary interest. The language of para 12 suggests that the intention was that it should apply to trusts with beneficiaries. That is*

[3] One of the editors of the 9th Edition of Megarry & Wade is Professor Martin Dixon, who is also an editor of Ruoff and Roper. Another editor of Megarry & Wade is the same Judge Elizabeth Cooke the judge in *Best v Curtis*.

[4] In context, this appears to be a reference to the Land Registry's Practice Guide 4 above cited.

supported by Best v Curtis… at [24]: "Paragraph 12 assumes a trust that has beneficiaries."

VII Discussion

43. Although the point is without precedent from the higher courts, I prefer the view of the Respondent to that of the Appellants for the following reasons, namely:

(i) Schedule 6 paragraph 12 is referring to simply to a trust without more. The personal representatives were not trustees in the conventional sense for the reasons set out in the submissions on behalf of the Respondent. As stated in Williams, Mortimer and Sunnucks on Executors, Administrators and Probate 22nd Ed. at 48-06: *"a representative in their capacity as representative is not, strictly speaking, a trustee. A representative has vested in them the entire ownership of the deceased's estate which they hold "in auter droit" for the purposes of administration. They hold such property without any differentiation between the legal and beneficial interests; the beneficiaries merely have the right to ensure that the representative duly administers that estate."*

(ii) The sense in which a trust is used in section 33 of the Administration of Estates Act 1925 is to make the administrators subject to fiduciary obligations in the management of the estate, but not to make that which is not a trust into a trust. There is no reason to treat the personal representatives as trustees because of the use of the word "trust" in section 33 when they are not trustees in a conventional sense without any differentiation between legal and beneficial interests.

(iii) If Parliament had wished to extend the ambit of the trust referred to in Schedule 6 paragraph 12, it could have done so expressly. It could easily have done that by incorporating expressly section 68(17) of the Trustee Act 1925 into the provision about interpretation (section 132) in the same way as was done in the Limitation Act 1980. It did not do so. Without this, there is no reason to create for this purpose a trust lacking its essential characteristics.

(iv) *Ayerst* does not assist because, as stated above, it referred back to the *Commissioners of Stamp Duties* case, which stated expressly that the estate in the course of administration was not a trust in equity.

(v) In coming to the conclusion which I have, I prefer to follow what I regard as the reasoning of Judge Elizabeth Cooke in her judgment in *Best v Curtis* at [20-31]. I have done this in the above paragraphs, fortified, although not bound, by the judgment and the clear and cogent reasoning in that case.

44. A point to be added is that in the event that Schedule 6 paragraph 12 were treated as extending to a case of a so-called trust without beneficiaries, then the exception to

Schedule 6 paragraph 12 would be treated as difficult to apply is "*unless the interests of each of the beneficiaries in the estate is an interest in possession"*.

45. If the premise of a trust is that there do not have to be beneficiaries in a conventional sense, then in what sense would the exception apply so that the trust would not prevent adverse possession? There are a number of possibilities, namely:

(i) the exception evidences that the trust had to a conventional trust with beneficiaries, and therefore provides further support for the submission of the Respondent;

(ii) the exception is inapplicable, that is to say, it could not occur, in the circumstances of a statutory trust;

(iii) the exception is to be interpreted as broadly as the main part: if the trust includes this statutory trust without beneficiaries, then the beneficiaries are to be interpreted as referring to those who would in the ordinary course acquire ownership at the conclusion of the administration.

46. In my judgment, the wording of the exception assists in the construction that beneficiaries are required as in a conventional trust, and that without that, there cannot be a trust for the purpose of Schedule 6 paragraph 12. That is consistent with the view expressed in the First Supplement to the Second Edition of Jourdan and Radley-Gardiner, set out above. In short, it provides further support for the arguments of the Respondent and especially that Schedule 6 para. 12 applies only to trusts and beneficiaries.

47. In respect of beneficiaries with successive interests, it is frequently the case that they may not come into possession until many decades later and far after the 10-year period within which adverse possession may arise. Thus, the Final Report of the Law Commission at [14.93] provides an example of successive life interests to A, and then to B, and thereafter to C. The squatter will only be able to apply to be registered until ten years after C's interest has fallen into possession. These successive interests are different from the case of death and personal representatives, under which there is a statutory machinery intended to bring the administration to an end within a period far shorter than the 10 years period: see above at [34] and the Respondent's skeleton argument of the Respondent at [45c.]. The Final Report does not refer to the case of death and personal representatives as another instance as to why it is to be kept outside the adverse possession regime. These points inform and are to be taken into account in the proper interpretation of the statute.

48. For all these reasons, I reject the argument of the Appellants that the effect of the death of the registered owner or the estate being in administration during the alleged 10-year period is to operate as a bar to a claim for adverse possession. I reject the argument that death and/or the administration of an estate come within Schedule 6 paragraph 12, such as to prevent a claim for adverse possession.

VIII If there is a trust, are the interests of the beneficiaries in the estate an interest in possession?

49. If death and/or the administration of an estate come within Schedule 6 paragraph 12, then there is an issue as to how the exception is to be interpreted, namely the words "*unless the interests of each of the beneficiaries in the estate is an interest in possession."* If the preceding words are intended to capture the case of death and/or personal representatives as a trust, and if the exception does not negative that construction, then how is the exception to be interpreted? It may be that a correspondingly broad process of reasoning should be adopted to the question of who the beneficiaries are, namely those who stand ultimately to benefit from the intestacy are to be treated as beneficiaries.

50. This has then led to a controversy as to what is the evidence in this case as to who are the persons who stand ultimately to benefit from the intestacy and whether they each had an interest in possession. The argument run by the Respondent was that the two Appellants each had an interest in possession. The Appellants have submitted that in fact the position was as follows. The wife of the deceased predeceased him. The issuecomprised fourchildren and three grandchildren, and they did not each an interest in possession.

51. There are problems about this analysis. First, there was no evidence, at least directly in point, about this in the court below. This was because this issue about Schedule 6 paragraph 12 did not apply. There have been assertions of the Appellants since the hearing before the County Court that:

(i) the beneficiaries comprised four children and three grandchildren, children of a daughter who predeceased her father;

(ii) all children were over 18 at the time of the death of the deceased;

(iii) the declaration of trust dated 23 August 2022, which was before the County Court, which named only the two claimants, was because there was an interest in possession of those two beneficiaries and not all the beneficiaries;

(iv) on this basis, it was contended that the exception of all the beneficiaries being in possession had no application.

52. The Respondent submits that:

(i) the above requires new evidence, and there has been no application for new evidence. If there had been, it would have been opposed on *Ladd v Marshall* [1954] 1 WLR 1489 grounds;

(ii) the evidence was not credible in view of the contradiction between the number of beneficiaries and the declaration of trust;

(iii) it has not been shown by the Appellants that there was no interest in possession of all of the beneficiaries, whether that was the Appellants themselves or, if it was the seven beneficiaries, of all of them.

53. In my judgment, if it had been the case that Schedule 6 paragraph 12 applied subject to the exception, then the evidence does not show that the beneficiaries were not all in possession. On the premise that the exception is to be given on a broad meaning on the premise that a so-called statutory trust can amount to a trust, then the evidence from the declaration of trust indicates that the two Appellants had an interest in possession. There is no evidence to support the assertions of the Appellants as above stated, and in particular to the effect that there were seven beneficiaries, some of whom did not have an interest in possession. The problematic assertions to this effect made after the close of evidence in the court below are not evidence. There has not been an application to open up such evidence, and had there been, it probably would have failed. On this basis, the case that some of the "beneficiaries" were not in possession has not been made out. It is therefore the case that the Appellants have failed to show that Schedule 6 paragraph 12 applied.

54. If in fact, there had been credible evidence presented to the Court concerning this aspect, then a different course would have been adopted. It would be to have refused the application to take a new point in the appellate court. It would have been the case that there would have been prejudice in order to meet this new point about the identity of the beneficiaries, and the alleged successive nature of their interests. In that event, the Court would have refused permission to allow the case to be run on appeal because it would have caused an injustice to the Respondent in meeting such a case. Had it been raised at first instance, then further disclosure might have been sought as regards the declaration of trust in 2022 and the seven beneficiaries and their respective interests. There would almost certainly have been cross-examination to challenge the same.

55. In the event, the matter falls to be considered without new evidence or an application to admit new evidence. It has been advanced on the basis of assertions which are not credible, particularly because of their contradiction with the declaration of trust. In my judgment, on the evidence the Respondent is correct and the Appellants are unable to show that the so-called beneficiaries did not all have interests in possession, whether that comprised the two Appellants or indeed all those who stood to inherit in the intestacy.

IX Conclusion

56. It therefore follows that whilst allowing the Appellant to raise the new point about the application of Schedule 6 paragraph 12, the Court rejects the points made that it applies in the circumstances of this case. If it had applied in principle, it has not been shown that the exception about beneficiaries in possession does not apply. In all the circumstances, the appeal is dismissed.

57. The Court expresses its gratitude for the presentation of this case, and especially notes with thanks the commendable way in which not only the Respondent but also the Appellants have presented their case.

58. The parties are to draw up an order reflecting the outcome at the same time as providing typographical corrections.