**Judgment Approved by the court for handing down.**

Neutral Citation Number: [2025] EWCA Civ 587

Case No: CA-2024-000811

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KINGS BENCH DIVISION**
**FREEDMAN J**
**[2024] EWHC 378 (KB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2025

**Before :**

**SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT**
**LORD JUSTICE MOYLAN**
and
**LORD JUSTICE ZACAROLI**

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**Between :**

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| **(1) MR NAEEM NAZIR**<br>**(2) MR KAISER NAZIR** | **Appellants** |
| **- and –** | |
| **MRS DILSHAD BEGUM** | **Respondent** |

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**James Kirby** (acting Pro Bono under the Court of Appeal Scheme) for the **Appellants**
**Stuart Roberts** (instructed by **Stachiw Bashir Green Solicitors**) for the **Respondents**

Hearing date : 9 April 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 7 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

## Lord Justice Zacaroli:

1. The question in this appeal is whether land comprising part of the estate of a deceased person (and thus subject to the statutory trust under s.33 of the Administration of Estates Act 1925 ("**Section 33**")) is "subject to a trust" within the meaning of paragraph 12 ("**Paragraph 12**") of Schedule 6 to the Land Registration Act 2002 ("**LRA 2002**"), so that another person cannot be regarded as being in adverse possession of that land.

2. For the reasons contained in this judgment, I answer that question in the negative: the relevant land is not subject to a trust within the meaning of Paragraph 12, so the land remains capable of being acquired by adverse possession pursuant to the provisions of LRA 2002.

The facts

3. The dispute concerns a strip of land (the "**Disputed Land**") that runs between the rear of 37 Lower Rushton Road ("**Lower Rushton**") and 1 Gurbax Court ("**Gurbax Court**"), both in Thornbury, Bradford.

4. Lower Rushton, including the Disputed Land, was originally acquired by the appellants' father, Mr Mohammed Nazir ("**Mr M Nazir**"). He was registered as owner of the freehold title in 1980. Mr M Nazir died intestate on 21 March 2010. On 23 October 2019, the appellants obtained Letters of Administration in respect of their father's estate. On 19 April 2022, the appellants became the registered proprietors of the Disputed Land and, on 23 August 2022, they executed a deed of trust stating that they held the Disputed Land on trust for themselves as tenants in common in equal shares.

5. The first respondent, Mrs Begum, is the registered proprietor of Gurbax Court. The property was purchased by her late husband in 1998, and it was inherited by Mrs Begum in October 2021, following her husband's death on 14 November 2020. Mrs Begum claims to be entitled to be registered as owner of the Disputed Land through adverse possession.

The proceedings

6. These proceedings began with the issue of a claim form by the appellants, on 1 February 2022, seeking possession of the Disputed Land. Mrs Begum defended the action on the basis that she and her predecessor in title had occupied the Disputed Land for more than 10 years and thereby acquired title to it by adverse possession.

7. Following the trial of the action in October 2022, HHJ Walsh concluded, in a judgment dated 16 December 2022, that Mrs Begum had indeed acquired title through adverse possession. The point that arises on this appeal, as to the relevance of the land being subject to a trust pursuant to Section 33, was not run before HHJ Walsh. A different point, to the effect that Mrs Begum could not claim adverse possession because of the deed of trust executed in August 2022, was rejected by HHJ Walsh.

8. The appellants appealed that decision, raising for the first time the argument that, by reason of Paragraph 12, Mrs Begum could not establish adverse possession, because the Disputed Land was subject to a trust pursuant to Section 33.

9. Sweeting J permitted the appellants to take this new point, but Freedman J dismissed it at the appeal hearing. This appeal is brought against that decision, with the permission of Stuart-Smith LJ granted on 23 September 2024.

10. The appellants were unrepresented both before HHJ Walsh and Freedman J, but were ably represented on this appeal by Mr Kirby, acting *pro bono* through the auspices of the Bar's *pro bono* charity, Advocate. We are grateful to him for his conspicuously clear and cogent submissions.

Adverse possession and registered land

11. The provisions relating to adverse possession in the LRA 2002 were enacted because it was recognised that the policy reasons which justified the existing law of adverse possession in relation to unregistered land had far less weight in relation to registered title: see the consultation document issued by the Law Commission and HM Land Registry entitled *Land Registration for the Twenty-First Century: A Consultative Document* (1998) (Law Com No 254), Part X, *Adverse Possession* (the "**Consultative Document**") at para 10.3. That was because, whereas unregistered title is possession-based, the basis of registered title is the fact of registration.

12. At paras 10.6 to 10.10 of the Consultative Document, the Law Commission identified four reasons which justify adverse possession: (1) the law of limitation, but this had much greater force in relation to unregistered land; (2) if land ownership and registration are "completely out of kilter", so that the land in question is unmarketable; (3) in cases of mistake, when the law of adverse possession can prevent hardship; and (4) title to unregistered land is relative and depends ultimately upon possession, but this could normally have no application to registered land.

13. At para 10.18, the Law Commission concluded that, although the principles of adverse possession have an essential role to play in relation to unregistered land, "their unqualified application to registered land cannot be justified." It was recognised that the proposed reforms could lead to apparently anomalous results (where a person could acquire title to unregistered, but not registered, land). That was simply a reflection, however, of the fact that "there are two systems of land ownership in this country which rest on wholly different foundations". The provisional recommendations in the Consultative Document (at para 10.19), therefore, were that:

> "(1) the law of adverse possession as it applies to registered land should be recast to reflect the principles of title registration; and (2) its application should be restricted to those cases where it is essential to ensure the marketability of land or to prevent unfairness."

14. The Consultative Document was followed by a further joint report of the Law Commission and HM Land Registry, together with a draft Bill, entitled "Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) (Law Com No 271) ("**the Joint Report**").

15. Many of the recommendations in the Consultative Document were reflected in the Joint Report. In particular, it reflected the point that many of the considerations justifying adverse possession in unregistered land did not apply where title was registered – see para 14.3:

> "It is only where the register is not conclusive – as is the case, for example, in relation to boundaries and short leases that are not registrable – that the conveyancing justification for adverse possession is the same as it is in relation to unregistered land."

16. The proposals were enacted in LRA 2002. The relevant provisions for the purposes of this appeal are as follows.

17. Section 96(1) LRA 2002 provides that no period of limitation under s.15 of the Limitation Act 1980 ("LA 1980"), which provides time limits for the recovery of land, shall run against any person (other than a chargee) in relation to an estate in land or rentcharge, the title to which is registered. Accordingly, s.17 LA 1980 does not operate to extinguish the title of any person where, by virtue of s.96 LRA 2002, a period of limitation does not run against them: s.96(3) LRA 2002.

18. By s.98(1) LRA 2002:

> "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 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."

19. By s.98(5) LRA 2002:

> "Where in any proceedings a court determines that – (a) a person is entitled to a defence under this section … 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."

20. The relevant provisions of Schedule 6 to LRA 2002 are as follows:

> Paragraph 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."
>
> Paragraph 5:
>
> "(1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be

registered as the new proprietor of the estate if any of the following conditions is met.

(2) The first condition is that -

(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and

(b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

(4) The third condition is that -

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

(5) …"

Paragraph 11:

"(1) A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c. 58) would run in his favour in relation to the estate.

(2) A person is also to be regarded for those purposes as having been in adverse possession of an estate in land –

(a) where he is the successor in title to an estate in the land, during any period of adverse possession by a predecessor in title to that estate, or

(b) during any period of adverse possession by another person which comes between, and is continuous with, periods of adverse possession of his own.

(3) …"

Paragraph 12 (headed "Trusts"):

> "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 beneficiary in the estate is an interest in possession." (emphasis added).

The statutory trust arising on the administration of a deceased's estate

21. By s.9(1) of the Administration of Estates Act 1925 ("**AEA 1925**"), where a person dies intestate, "his real and personal estate shall vest in the Public Trustee until the grant of administration". The vesting of the estate in the Public Trustee, however, "does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property."

22. Section 33(1) provides:

> "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."

23. By section 33(2), the personal representatives shall pay out of any ready money in the estate and any net money arising from disposing of any other part of the estate, all funeral, testamentary and administration expenses, debts and other liabilities, and out of the residue, the personal representatives shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any).

24. By s.36(1), a personal representative may assent to the vesting in any person who may be entitled thereto, either beneficially or as trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will.

The judgment of Freedman J

25. The judge concluded that the Disputed Land was not subject to a "trust" for the purposes of Paragraph 12. The statutory trust imposed by Section 33 is not a trust in the conventional sense. It ensures that administrators are subject to fiduciary obligations in the management of the estate, but they hold the entirety of the estate without distinction between legal and equitable title, citing Williams, Mortimer, Sunnucks on Executors, Administrators and Probate, 22nd ed., ("***Williams, Mortimer, Sunnucks***") at §48-06.

26. In other statutes, where Parliament intends "trustees" to include personal representatives, it does so by providing expressly for an extended meaning of trustee. In contrast, the LRA 2002 did not do so.

27. The wording of the exception within Paragraph 12 ("unless the interest of each of the beneficiaries in the estate is an interest in possession") assisted with that construction, because it indicates that the type of trust which is envisaged by Paragraph 12 is one with beneficiaries.

28. A further argument was advanced on behalf of Mrs Begum before the judge, in the event that the Disputed Land was held on trust for the purposes of Paragraph 12. It was contended that all of the beneficiaries under the Section 33 trust had interests in possession. The judge decided that the burden of proof on this issue was on the appellants, and they could not discharge it on the facts, no evidence having been called at trial on this issue (because the Paragraph 12 point had not then been raised).

The grounds of appeal

29. The appellants challenged Freedman J's conclusions that: (1) the Disputed Land was not subject to a trust for the purposes of Paragraph 12; and (2) if it was, the appellants had failed to establish that no beneficiary had an interest in possession.

30. On the first issue, Mr Kirby's arguments, in support of the contention that the narrow interpretation which Freedman J put on "a trust" in Paragraph 12 cannot be justified, fell under seven headings:

(1) The word "trust" in Paragraph 12 was not confined to a trust in the narrow sense;

(2) Parliament is more likely to have intended the word "trust" in LRA 2002 to have the same meaning as it has in LA 1980, and its failure to define the meaning in LRA 2002 is insufficient reason to infer an intended change in meaning;

(3) Not all trusts, even in the narrow sense, have interests in possession, so the fact that Section 33 trusts do not have interests in possession is not an indication that they are outside the scope of Paragraph 12;

(4) Land held by personal representatives in the administration of an estate is subject to a trust of land under the Trusts of Land and Appointment of Trustees Act 1996 ("**TOLATA**");

(5) The pre-legislative materials indicate that it was intended that land held by personal representatives would fall within Paragraph 12;

(6) The narrow construction of the judge leads to perverse and anomalous results; and

(7) The word "trust" is used elsewhere in LRA 2002 in a manner inconsistent with the judge's interpretation of it.

31. Mr Roberts on behalf of the respondent supported the judge's conclusion on the first issue, for the reasons the judge gave, and for the following additional reasons:

(1) A statutory trust, such as that in Section 33, is not a trust, but is deemed to be so in certain legislation. The absence of a deeming provision in LRA 2002 shows that "trust" in Paragraph 12 does not extend to a Section 33 trust;

(2) The words "trust", "trustee" and "beneficiary" are used elsewhere in LRA 2002 and connected secondary legislation in a manner which is consistent with Freedman J's interpretation;

(3) Historically, it has always been the case that a stranger can claim adverse possession of land held by a personal representative. If the appellants are correct,

it would reverse the *status quo*, and that would be contrary to the indications in the pre-legislative materials;

(4) LRA 2002 and LA 1980 are not *in pari materia*, and there is no basis for interpreting "trust" in Paragraph 12 by reference to the extended definition in the Trustee Act 1925, s.68; and

(5) The appellants' interpretation would lead to anomalous results.

32. On the second issue, although Mrs Begum initially resisted the appellants' appeal, Mr Roberts fairly accepted in argument that there was no answer to the appellants' appeal on this point. It was common ground that an interest in possession means a present right to present enjoyment of property: *Pearson v IRC* [1981] AC 753. As Mr Kirby submitted, there was necessarily a period of time after the grant of administration when the estate remained unadministered such that, on the assumption that there were any beneficiaries of the trust under Section 33 at all, none of them could *as a matter of law* have had a present right to present enjoyment of any part of the unadministered estate. Our conclusion on the first issue means that the second issue would in any event have been academic. I do not, therefore, need to deal with this issue.

Analysis and discussion

33. The question at the heart of this appeal is one of statutory construction: does "subject to a trust" in Paragraph 12 include a trust created by Section 33?

*The nature of the trust under Section 33*

34. The nature of the trust imposed on personal representatives has been authoritatively stated at the highest level, and recognised for well over a century.

35. In *Sudeley v Attorney-General* [1897] AC 11, a husband gave the residue of his real and personal estate to his wife for life, and by a codicil gave one-fourth of that residuary estate to his wife absolutely. On the husband's death his estate included mortgages in New Zealand. His wife died before his estate had been fully administered. The question was whether the husband's will gave the wife the right to one-fourth of the proceeds when realised, and nothing more, or gave her "ownership, a right to the mortgages or a share of them" (see p.13, in the argument of the appellants). This mattered because if it was the latter, then the property was located in New Zealand, and estate duty would have been avoided.

36. The House of Lords held that the right of the wife's executors was not to one-fourth or any part of the mortgages in specie, but was a right to require her husband's executors to administer his personal estate and to receive from them one-fourth part of the clear residue. Lord Halsbury LC based his conclusion, at p.16, on the fact that until the residuary estate was ascertained, upon completion of the administration of the estate, no trust fund was constituted. Lord Herschell, at p.18, said:

> "I do not think that they [the wife's executors] have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. What she had a right to – what they as her executors had a right to – was

> one-fourth of the clear residue of Mr. Tollemache's estate – that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants."

37. *Sudeley* was followed by the Privy Council in *Commissioner of Stamp Duties v Hugh Duncan Livingston* [1965] AC 694, another case concerned with the location of the interest of a residuary legatee in a deceased's estate for succession duty purposes. Viscount Radcliffe said, at p.707, that the nature of the interest of a residuary legatee had been conclusively defined by decisions of long-established authority. He continued:

> "…its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. 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 the 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* (1884) 26 Ch D 783, 789, "is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office". He is a trustee "in this sense"."

38. While it was not possible to state exhaustively what "those trusts" were at any one moment, Viscount Radcliffe described them "essentially" as:

> "trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees 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 the administration."

39. Further on in his judgment, Viscount Radcliffe addressed a question which had been asked in light of *Sudeley*: "Where, it is asked, is the beneficial interest in those assets during the period of administration?", which he answered as follows:

> "This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets."

40. Mr Kirby pointed out that, this being a case on appeal from Queensland, Section 33 had no application. Counsel were unable to tell us whether the relevant legislation in Queensland contained any similar provision. The principles derived from *Sudeley* and *Livingston* have, however, been consistently applied in this jurisdiction to explain the nature of the interest of residuary legatees both before and after the enactment in 1925 of Section 33: see the passage in *Williams, Mortimer, Sunnucks* cited by Freedman J (at §48-06), and the cases cited there.

41. In one of those cases, *Re Leigh's Will Trusts* [1970] Ch 277, the question was whether a provision in clause 3 of the will of a testatrix which bequeathed "all the shares which I hold and any other interest or assets which I may have in S Ltd" applied to shares in S Ltd which, at the time of her death, were held within the unadministered estate of her late husband, who had died intestate. The testatrix was sole administratrix and sole beneficiary of her late husband's estate. Buckley J held that, on the basis of the principles quoted above, the testatrix could not be said to have held any the shares in S Ltd when she died, but she did have an interest in S Ltd in respect of the shares (and a debt owed to her late husband's estate by S Ltd) sufficient to answer the description in clause 3 of her will.

42. At pp.281 to 282, Buckley J summarised the principles to be derived from *Livingston*, as follows:

> "(1) The entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered."

43. He continued:

> "This transmissible or disposable interest can, I think, only consist of the chose in action in question with such rights and interests as it carries *in gremio* … If a person entitled to such a chose in action can transmit or assign it, such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature."

44. Having concluded that the testatrix did not hold the shares themselves, but that she had an interest of a kind in them, he said:

> "I will for the moment ignore the fact that the testatrix was both sole administratrix and sole beneficiary of her husband's estate and look at the position as though another person had been administrator of the estate. All the assets of which Donald Leigh died possessed became subject to the statutory trust for sale under the Administration of Estates Act, 1925, s. 33, in the hands of his personal representative, but this is merely machinery provided for convenience in the administration of the estate and distribution of the net residue. It does not follow, in my opinion, that a person entitled to participate in the estate, and in particular a person solely so entitled, has no interest of any recognisable kind in the specific assets of which the estate consists."

45. Buckley J's summary of the principles derived from *Sudeley* and *Livingston* was approved by the House of Lords in *Marshall v Kerr* [1995] 1 AC 148, per Lord Templeman at p.157E to p.158A. It is clear from the last-quoted passage, that the long-established analysis of both the relationship between a personal representative and the assets in the estate while the estate remains unadministered, and the nature of a residuary legatee's interest in the estate, survives the enactment of Section 33. In other words, the trust created or recognised by Section 33 is not a trust in the conventional sense, because there is no separation of the legal and beneficial interest as between the personal representatives and anyone else, specifically the residuary legatees.

46. The statutory trust is one which imposes trustee-like duties on a personal representative with which they must comply in carrying out the administration of the estate. These are spelt out in the remainder of Section 33 (quoted above), in particular s.33(2), and reflect the "trusts" to which Viscount Radcliffe referred at p.707E-F of *Livingston* (quoted at para 37 above), which he said might as well be termed "duties in respect of the assets". As Buckley J succinctly put it, the trust is part of the machinery provided for the administration of the estate and distribution to those entitled.

47. It is in this respect closely related to the "trust" which arises pursuant to statute on the bankruptcy of an individual or liquidation of a company, as explained by Lord Diplock in *Ayerst v C & K (Construction) Ltd* [1976] AC 167, at p.177. He there described the origin, in the Court of Chancery, of the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or

dispose of it for his own benefit, of which the archetype is the trust, where full ownership was split between two elements: legal ownership held by the trustee and equitable ownership held by the *cestui que* trust. He went on to note that it did not follow that a person could only be regarded as legal owner – i.e. without also being beneficial owner – where the beneficial interest was vested in another, and gave the example of executorship in the course of administration, citing *Livingston* for the proposition that "it is impossible to identify, at any rate in the case of residuary legatees, a person or persons in whom the beneficial ownership in any particular property forming part of the estate was vested."

48. Another example was the law of bankruptcy, which owed its origin to statute, where the property of the bankrupt vested in a "trustee", who had no entitlement to the benefit of the property, but where there was no-one else in whom the beneficial interest vested. At p.178F, 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 a trust as it was recognised by the Court of Chancery apart from statute."

49. At p.178, Lord Diplock said that "no one would suggest that an executor, who was not also a legatee, was beneficial owner as well as legal owner…". That comment must be read, however, in light of the analysis in *Livingston*, approved in *Marshall v Kerr* since *Ayerst* was decided, that a personal representative is not regarded as holding the beneficial as well as legal title for the reason that no distinction is to be drawn between the two (see para 39 above).

*The reference in Paragraph 12 is to a "conventional" trust*

50. In agreement with the judge, I consider that the terms of the exception in Paragraph 12 provide an important indicator that what is referred to is a trust in the conventional sense, by which I mean a trust where there is a separation of legal and beneficial ownership as between a trustee and one or more *cestuis que* trust. That is the clear inference to be drawn from the language "unless the interest of each of the beneficiaries in the estate…", since it assumes that there *are* beneficiaries.

51. Mr Kirby suggested that Freedman J had concluded that the reference to beneficiaries "with an interest in possession" indicated that it was only a trust in a narrow sense that was intended, given the difficulty of applying the concept of an interest in possession to an estate in the course of administration. He submitted that the judge was wrong to do so. That was not, however, the judge's point: his point was (as I have noted in the last paragraph) that it is the reference to "the beneficiaries of the estate" that indicates that what was intended was a conventional trust where there are beneficiaries. For the reasons set out above, the Section 33 trust is *not* such a trust.

*Pre-legislative materials*

52. The task of the Court, in interpreting a statute, is to seek the meaning of the words which Parliament has used. The primary source is the words used in their particular context. External aids to interpretation may play a secondary role: Explanatory Notes,

prepared under the authority of Parliament, may cast light on the meaning of particular provisions, while other sources, such as Law Commission reports, may disclose the background to a statute and assist the court to identify the mischief which it addresses and the purpose of the legislation: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 per Lord Hodge DPSC, at paras 29 to 31.

53. Mr Kirby and Mr Roberts both claimed that the external aids to construction in this case assisted their case. I consider, however, that they point towards the judge's interpretation being the correct one.

54. There is one indication, in the Consultative Document, that adverse possession could be claimed against a registered title holder who had died. The Consultative Document identified certain situations in which a claim to adverse possession in relation to registered land may be justified. One of those, at para 10.13 was where:

> "…a registered proprietor abandons his or her land, or dies in circumstances in which no steps are taken to wind up his or her estate. A squatter then takes possession of the land. Here adverse possession fulfils a useful role, even if the adverse possessor is (as will commonly be the case) a "land thief". However distasteful such situations may be, the doctrine of adverse possession does at least ensure that in such cases land remains in commerce and is not rendered sterile."

55. While this reference provides some support for the view that it was intended that a person could continue to be regarded as being in adverse possession of land following the death of the registered proprietor, it is a relatively weak indication, particularly as in the equivalent part of the Joint Report, dealing with a registered proprietor who has abandoned the land, no reference is made to a registered proprietor that has died. What can, however, be said is that the Joint Report (at para 14.6(2)) reiterated that the *purpose* of enabling a squatter to acquire title in cases of abandonment was to ensure that land will "remain in commerce", and that the same purpose is relevant where a registered proprietor has died and there is a delay in the administration of their estate.

56. Of more significance are the provisions in the Joint Report relating specifically to what became Paragraph 12. This is dealt with under the heading "special cases" at para 14.88 "…namely rentcharges, trusts and Crown foreshore". In relation to trusts, the Joint Report noted at para 14.91 that equitable interests under trusts as well as legal estates may be barred by adverse possession, but that the legal estate of a tenant for life or the trustees of land was not extinguished by adverse possession until all the equitable interests under the trust had been successively barred. It pointed out at para 14.92 that the draft Bill dealt with adverse possession of land held in trust necessarily differently, because it rested on different principles, but said:

> "However, the solution adopted in the Bill shares the same objective as the provisions of the Limitation Act 1980, namely, that where there are successive interests, adverse possession by a squatter should not prejudice the rights of beneficiaries who are not yet entitled in possession."

57. Accordingly (see para 14.93):

> "Under the Bill, for the purposes of our scheme on adverse possession, a squatter will not be regarded as being in adverse possession at any time when a registered estate is held in trust, as long as there are successive interests in the land. It is only where the interest of each of the beneficiaries in the estate is an interest in possession that a squatter can commence such adverse possession."

58. It then provided an example which best illustrated the operation of that provision, involving land held on trust for A for life, thereafter for B for life and thereafter for C absolutely. It noted that a squatter had difficulties in acquiring title to land "held on trust for successive interests", but that this was "an inevitable consequence of the need to protect those with future interests against squatters" (see para 14.94).

59. In the Explanatory Notes to the LRA 2002, under the heading "Trusts", the following appears:

> "The purpose of paragraph 12 is that where there are successive interests, adverse possession by a squatter should not prejudice the rights of beneficiaries who are not yet entitled in possession."

The same example as appears at para 14.93 of the Joint Report is then set out.

60. It is important, as Mr Kirby submitted, not to read too much into the Explanatory Note and paras 14.91 to 14.94 of the Joint Report. At face value they suggest that the only type of trust intended to be caught by Paragraph 12 is one where there are successive beneficial interests. That would be to go too far, however, because it was accepted before us that Paragraph 12 would apply to a discretionary trust (i.e. a trust where none of the beneficiaries has – until an appointment is made in their favour – an interest in possession).

61. I consider that they nevertheless support the view that Paragraph 12 is intended to apply only to trusts in the conventional sense, i.e. where property is held by a trustee on trust for one or more beneficiaries. They indicate that the *objective* of the new provision was to replicate the treatment of adverse possession in respect of successive interests in unregistered land. Nothing in the Consultative Document or the Joint Report indicates that it was any part of the objective to prevent land being held in adverse possession where the registered owner of the relevant land dies. Had such a radical change been intended, it would most likely have been expressly foreshadowed somewhere in the pre-legislative materials.

62. I note in passing that a dispute arose as to whether Paragraph 12 extends to charitable trusts. It is unnecessary to decide this point, but I do not think it is at all clear that a purely charitable trust – where the beneficiary is the abstract concept of charity – would be caught. In addition to the point that Paragraph 12 envisages property held on trust for identifiable beneficiaries, it seems to me that it also envisages beneficiaries who stand, at some point in the future, to have an interest in possession. Charity, as the beneficiary, will never have an interest in possession.

63. Mr Kirby relied on the fact that in footnote 288 to para 14.91 of the Joint Report, the new scheme is said to apply to land held in trust "whether there is a trust of land or a settlement made under the Settled Land Act 1925". This was important, he submitted, for the following reasons:

(1) Section 1(1) of TOLATA provides that "trust of land" means "any trust of property which consists of or includes land…";

(2) Section 18(1) of TOLATA provides that the provisions of Part 1 of the Act "… apply to personal representatives, but with appropriate modifications and without prejudice to the functions of personal representatives for the purposes of administration";

(3) Personal representatives who hold *land* in trust under Section 33 therefore hold it subject to a trust of land, and thus have the same owners' powers as ordinary trustees: s.6(1) TOLATA which provides that "[f]or the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner";

(4) It is inherently unlikely that Parliament would have wanted the normal rules of adverse possession contained in Schedule 6 LRA 2002 to apply to some trusts of land but not to others and, if that had been Parliament's intention, it would have said so;

(5) The authors of the Joint Report therefore intended a trust of land held by personal representatives to fall within the definition of land "subject to a trust".

64. I do not accept this argument. The reference in footnote 288 to trusts of land is clearly, in context, intended to cater for the fact that since TOLATA was enacted, no settlement could be created under the Settled Land Act (see s.2(1) TOLATA), so that after 1996 successive interests arose in the context of trusts for sale under TOLATA. I do not think any wider purpose can be inferred from the footnote.

65. Further, it is a *non sequitur* to say that, because s.18(1) TOLATA applies the provisions of Part 1 of that Act to personal representatives, and because real property can be the subject of a Section 33 trust, Paragraph 12 must be read as including a trust under Section 33. The proposition that it is unlikely that Parliament would have wanted "normal rules of adverse possession" to apply to some 'trusts of land' but not others has no more merit than the proposition that it is unlikely that Parliament would have wanted such rules to apply to some 'trusts' but not others. Both propositions beg the question of interpretation at the heart of this case.

*The practical consequences of the different interpretations*

66. As I have noted above, both parties contended that the other's interpretation would lead to anomalous results. I consider, however, that it is the appellants' construction which leads to the more anomalous consequences.

67. In considering the following examples, it is important to note – as Mr Kirby accepted – that in the case of a person who dies intestate, no trust at all arises until a grant of administration is made. Prior to that time the estate vests in the Public Trustee, who

has no obligations at all in relation to the estate. In contrast, where a person dies leaving a will, then the Section 33 trust arises immediately upon death.

68. On the appellants' interpretation, where a person is in adverse possession of a part of their neighbour's land for nine years and 11 months, and the neighbour dies, the person would at that moment automatically lose altogether any accruing right to acquire title by adverse possession, if the neighbour left a will, but not if they died intestate.

69. In the case of the neighbour who died intestate, a person who had already been in adverse possession for five years would lose altogether any accruing right to acquire title by adverse possession if a grant of administration was made at any point in the following four years and 364 days.

70. Even if no grant of administration had been made for more than ten years after the period of adverse possession began, on the appellants' case, the right to be registered on the basis of that adverse possession would be lost as soon as a grant was made after that time. That is because, in order to be entitled to be registered on the basis of adverse possession, the period of ten years must be a continuous one which ends on the day the application is made.

71. These consequences would flow even if, once personal representatives were appointed, the property was sold (for example, to enable expenses or debts of the estate to be paid), whereas had the property been sold immediately prior to the neighbour's death, it is common ground that time would continue to run in favour of the person in adverse possession as against the purchaser.

72. Mr Kirby pointed, on the other hand, to certain consequences which arise on the judge's construction. The most serious, he submitted, was where a will leaves land in trust for A (for example a wife) for life, then for B (for example children) in remainder absolutely. He submitted that this was anomalous because a person may – on Freedman J's construction – be in adverse possession while the estate is being administered, but not once the land was vested in trustees. I do not, however, regard this as anomalous. On either construction, there is a point in time at which a person who is in adverse possession ceases to be so: on Mr Kirby's construction that point in time is the testator's death. On the judge's construction it is when the trust comes into existence at the end of the administration of the estate. It is no more anomalous because the executors might delay for many years before they assent the property to themselves as trustees, in compliance with s.36(4) AEA 1925 and that, until they do so, they continue to hold the property as personal representatives, under the Section 33 trust: see *Re King's Will Trusts* [1964] Ch 542, per Pennycuick J at pp.547-548.

73. Mr Kirby submitted that the policy reasons for protecting beneficiaries under a conventional trust whose interest is not yet in possession extend to residuary legatees. Such persons are less likely than a person entitled to possession to know about the presence of a squatter. There is some force in this, but not enough to make a difference. The interests of those entitled to a residuary estate (whether because they will stand to inherit under the rules of intestacy or because they are beneficiaries under a will) are inevitably precarious until the death of the registered owner of the land, both because the registered owner might make or change a will and because they are vulnerable to the registered owner failing to take action to evict a squatter. Their

interests remain precarious in the case of intestacy until a grant of administration is made. It is common ground, however, that they do not have any protection against potential adverse possession claims throughout that period, whether under Paragraph 12 or otherwise.

74. Moreover, once a grant has been made (or upon death where there is a will), those entitled to receive the residuary estate have a not insignificant measure of protection through their "right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate" (per Buckley J in *Re Leigh's Estates*, above).

75. No such protection is available to successive beneficiaries under a settlement, at least those successive beneficiaries who are minors or yet to be born.

76. There is in this respect an important difference between the Section 33 trust and a conventional trust with successive beneficial interests. In the case of a conventional trust, it is the duty of the trustee to *hold* the land for the benefit of others. In the case of successive interests, it is the trustee's duty to hold the land for the lifetime of those with a prior interest. In contrast, the duties of a personal representative are to administer the estate so as to distribute it to those entitled (including creditors, specific legatees or residual legatees). The property is held in the meantime – subject to the "duties in respect of the assets", as Viscount Radcliffe described the trust duties imposed on a personal representative – as part of the machinery to facilitate the administration of the estate.

*The relevance of definitions of "trust" in other statutes*

77. Both parties sought to rely on the fact that "trust" or "trustee" is defined in certain other statutes so as to include personal representatives. Mr Kirby submitted that where such a definition appeared in a "connected" statute, it is to be inferred that Parliament intended the same definition to apply. In contrast, Mr Roberts submitted that, where Parliament intends to encompass personal representatives, it does so expressly: see, for example, s.68 of the Trustee Act 1925, s.38 of LA 1980 and s.18(1) of TOLATA. He submitted that the fact that it has not done so in LRA 2002 indicates that Paragraph 12 is *not* intended to extend beyond a conventional trust.

78. Mr Kirby's main submission under this head was that "trust" and "trustee" are defined in LA 1980 as including personal representatives, and that LA 1980 and LRA 2002 are so closely connected that Parliament must have intended that "trust" and "trustee" would bear the same meaning across both statutes.

79. By s.38(1) of LA 1980, unless the context otherwise requires, "trust" and "trustee" have the same meanings respectively as in the Trustee Act 1925. By s.68(17) of the Trustee At 1925, "the expressions 'trust' and 'trustee' extend to … the duties incident to the office of a personal representative, and 'trustee' where the context admits, includes a personal representative…"

80. The close connection between LRA 2002 and LA 1980 is established, Mr Kirby submitted, by the fact that para 11(1) of Schedule 6 to LRA 2002 adopts the definition of adverse possession used in LA 1980:

> "A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c.58) would run in his favour in relation to the estate."

81. This makes it necessary to consider other provisions of LA 1980 which preclude a period of time running. Mr Kirby referred specifically to s.21(1)(b), under which no period of limitation applies to an action by a beneficiary "under a trust" to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use. He also referred to paragraph 9 of Schedule 1, which provides:

> "Where any settled land or any land subject to a trust of land is in the possession of a person entitled to a beneficial interest in the land (not being a person solely or absolutely entitled to the land) no right of action to recover the land shall be treated for the purposes of this Act as accruing during that possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land."

82. These provisions have the effect of ensuring that the possession of a trustee of registered land is not adverse as against a beneficiary and the possession of a beneficiary is not adverse as against another beneficiary.

83. In *Earnshaw v Hartley* [2000] Ch 155, the Court of Appeal interpreted paragraph 9 of Schedule 1 to LA 1980 as applying to residual legatees, even without reference to the extended definition of "trust" in the Trustee Act 1925. In that case, the mother of four children (a son and three daughters) died intestate in 1983. The farm in which she lived with her son continued to be occupied by the son and the defendant, whom he married in 1995. On the son's death in 1995, the three daughters claimed to be entitled to a quarter share each in the estate and sought the sale of the farm. The defendant claimed that the son and she successively had been in adverse possession since 1983. That claim to adverse possession was dismissed by the judge, and by the Court of Appeal.

84. The daughters relied on paragraph 9 of Schedule 1 to LA 1980. One of the arguments advanced on behalf of the defendant in that case was that even if the farm could be said to be held on a trust for sale, neither the son nor the daughters had a beneficial interest in the proceeds of sale, but only a right to require the mother's estate to be duly administered and to receive a quarter share of the net estate on completion of the administration, relying on *Livingston* and on *Re Leigh's Will Trusts*.

85. Nourse LJ rejected that argument, at p.161B-C, holding it to be wholly artificial:

> "As Buckley J said in *In re Leigh's Will Trusts* … a person absolutely entitled to a share of an unadministered estate does "have an interest of a kind" in the assets of comprised in it. In my judgment it is a sufficient interest for the purposes of paragraph 9."

86. Buxton LJ, agreeing at p.161H to 162A, said:

> "using language in a completely non-technical sense, I would be surprised to find that, where four persons have equal interests of some sort in property, one of those four can deprive the others of their interests by being permitted by them to occupy the property for a substantial period of time. Not only would that appear inequitable, but also the occupier would in a general sense be occupying against his own interest: the same interest as was held by his fellow beneficiaries."

87. Mr Kirby submitted, in reliance on Bennion, Bailey and Norbury on Statutory Interpretation ("***Bennion***"), 8th ed., para 18.9, that where two Acts of Parliament are in *pari materia* the definition in one Act may be treated as applicable to the use of the term in the other. According to para 21.5 of ***Bennion***, however, two or more Acts may be described as in *pari materia* where they have been given a collective title, they are required to be construed as one, they have identical short titles (apart from the year) or they otherwise deal with the same subject matter on similar lines.

88. LRA 2002 and LA 1980 do not fit any of these descriptions. Mr Kirby submitted that they are nevertheless closely connected, so that it is more likely than not that Parliament intended words in Schedule 6 to be interpreted consistently with LA 1980. He further submitted that it would be unlikely that "trust" was intended to have a different meaning in the context of adverse possession claims *between* parties to the trust than in the context of adverse possession claims by outsiders to the trust.

89. I do not accept these submissions. While there is an undoubted connection between LA 1980 and LRA 2002, because of the cross-reference from the latter to the former, the relevance of that is mitigated by the fact that they are dealing with separate regimes (with the latter being concerned only with registered land) in circumstances where the pre-legislative materials make it clear that the two regimes were intended to diverge in key respects.

90. I do not accept, in particular, that Parliament cannot have intended to distinguish between claims for adverse possession as between parties to the trust (or Section 33 trust) on the one hand, and by a stranger to the trust (or Section 33 trust) on the other. They raise different considerations and, as Buxton LJ said in *Earnshaw v Hartley*, it would be strange to find that adverse possession claims could run as between persons with "equal interests of some sort in property".

91. Moreover, Mr Kirby's proposition founders in light of the fact that such a distinction exists in relation to unregistered land: there is nothing in LA 1980 which prevents a stranger from being able to adversely possess land which belonged to a deceased individual whilst their estate was in the process of administration: *Pollard v Jackson* (1993) P&CR 327, per Dillon LJ at p.331.

92. In any event, even under LA 1980 "trustee" does not necessarily extend to personal representatives wherever the term is used, because the extended meaning applies only where "the context admits". For all of the reasons set out above, I consider that the words "subject to a trust" in the context of Paragraph 12 do not extend to land within a deceased's estate in the course of administration.

93. Aside from the argument based on *pari materia*, the fact that Parliament has made express provision, where the concept of trust is intended to encompass personal representatives, points towards the conventional meaning of trust being intended within Paragraph 12.

94. TOLATA, s.18 is a good example of this, providing that the provisions of Part 1 relating to trustees apply to personal representatives. Mr Kirby submitted that s.18(1) was inserted for the avoidance of doubt. I disagree: the implication is that in the absence of that provision, trustees would not include personal representatives.

*Consistency within LRA 2002*

95. Mr Kirby's final point was that the word "trust" should carry the same meaning in all provisions of LRA 2002. He pointed to s.78 which provides that "[t]he registrar shall not be affected with notice of a trust", and submitted that if Freedman J's construction is correct, the presumption would be that s.78 applies only to trusts in the conventional, narrow sense. That would mean, he said, that the registrar could be affected with notice of a legatee's interest in a deceased person's estate, and that would create a significant gap in the "curtain principle" under which interests taking effect in equity are not a matter for registration. The short answer to this, in agreement with the submissions of Mr Roberts, is that a legatee does not have an equitable interest in any part of the deceased's estate, so there is no proprietary interest upon which the registrar could be on notice.

Conclusion

96. For the above reasons, the judge was correct to find that land held by personal representatives in an unadministered estate is not "subject to a trust" within Paragraph 12. I would therefore dismiss this appeal.

**Lord Justice Moylan**

97. I agree.

**Sir Julian Flaux C**

98. I also agree.