



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2000: 432

BETWEEN:

ANDREW SIMMONS

-and-

CHRISTOPHER SIMMONS

Plaintiffs

-v-

ANN FRITH CARTWRIGHT

-and-

HILARY SUSAN HILL

Defendants

RULING

Date of Hearing: May 7, 2008
Date of Ruling: May 21, 2008

Mr. Ben Adamson, Conyers Dill & Pearman, for the Applicants/ Defendants

Mr. John Riihiluoma, Appleby, for the Respondents/Plaintiffs

Introductory

1. The Applicants apply by Summons dated February 6, 2008 to strike-out the present action for want of action. It is common ground that if the Respondents' claims are not now time-barred, the present proceedings may not properly be struck-out because fresh proceedings could simply be commenced. The action may be said to have been asleep (in terms of substantive Court actions) for nearly five years. The last out-of-court step in the action was apparently taken by the Applicants'/Defendants' attorneys over four years before they applied to strike-out the action for want of prosecution.
2. The central issue upon which the application turns is whether or not present claims are or are not time-barred, a novel point being raised by the Applicants' counsel on the interpretation of section 16 as read with section 20 of the Limitation Act 1980. The present claims seek, essentially, a declaration that the Respondents either own or have an equitable interest in certain land which was willed to the Second Defendant by the Respondents' late step-mother. If the 20 year limitation period for actions for the recovery of land applies, no question of striking-out the action arises. If a six-year limit applies, the case for striking –out is an arguable one.
3. The history of the action in chronological terms may be described briefly:
 - (a) December 22, 2000: Specially Indorsed Writ issued;
 - (b) January 10, 2001: Defendants entered an appearance;
 - (c) March 7, 2001: Defence filed;
 - (d) April 27, 2001: Further and Better Particulars of Defence requested;
 - (e) August 20, 2001: Summons for security for costs issued;
 - (f) October 5, 2001: Security for Costs ordered in the amount of \$20,000 by Consent;
 - (g) March 15, 2002: Pre-trial directions ordered by Consent;
 - (h) April 18, 2002: Further and Better Particulars of Defence filed;
 - (i) January 7, 2003: Plaintiffs apply for a Further and Better List of Documents;
 - (j) February 20, 2003: Court gives directions relating to discovery sought by Plaintiffs;
 - (k) January 26, 2004: Defendants' letter Request for Further and Better Particulars;

- (l) February 6, 2008: Defendants issue a Summons to strike-out for Want of Prosecution.
- (m) February 12, 2008: Plaintiffs file Notice of Intention to Proceed;
- (n) April 22, 2008: Plaintiffs issue Summons for Leave to Amend Specially Indorsed Writ;
- (o) April 30, 2008: Plaintiffs provide Further and Better Particulars requested in January 2004.

Factual findings/pleaded case

- 4. The present application was argued with respect to the Respondents'/Plaintiffs' case as set out in the Amended Specially Indorsed Writ, it being conceded that without prejudice to the strike-out application, the amendment application should be granted with the usual order being made as to costs.
- 5. The original claim was essentially based on an alleged agreement ("the Agreement") made in or about May, 1978 between the Plaintiffs' now deceased father and their now deceased step-mother ("the Deceased"). However it was also alleged that as a result of representations made by the Deceased that she would devise a certain apartment to them in consideration for payments of \$5000 per quarter ("the Apartment"), her administrator was estopped from denying that either (a) the Plaintiffs were entitled to damages for the consequential loss, or (b) that the Apartment was held on constructive trust for their benefit. The Defence alleged that (a) the Second Defendant was one of a class of beneficiaries of the trusts which paid her the \$5000 per quarter in accordance with the settlor's letter of wishes, and (b) the payments relied upon by the Plaintiffs were not made by them.
- 6. The Amended Claim in paragraph 9 most significantly alleged that "*the Deceased by her words and conduct induced the Plaintiffs to believe that there was between the Plaintiffs and the Deceased an agreement, arrangement or understanding that in return for the said quarterly payments that the Deceased would on her death bequeath to the Plaintiffs the Apartment or its monetary equivalent and the personal estate.*"
- 7. The original claim thus is based on an alleged oral agreement between persons who died in 1987 and 2000, respectively. The Amended Claim is based on communications between the Plaintiffs and the Deceased between in or about 1978 and in or about 1998.
- 8. The Plaintiffs do not allege that either Defendant had any knowledge of the matters relied on. The case appears to turn wholly or substantially on the oral evidence of the Plaintiffs themselves and the construction of very few documents.

Applicable limitation periods

9. It is clear that the contractual claims became time-barred as such six years after the date when the Respondents/Plaintiffs first learned of the breach of which they complain, seemingly after the death of the Deceased on August 10, 2000 (at the latest), or six years after the date (January 6, 1997) when she devised her property to the Second Defendant, in breach of the alleged Agreement (at the earliest).
10. Whether the equitable claims are now time-barred is less straightforward, however. Mr. Adamson submitted that since the primary claim was a contractual one, to which the standard six-year limitation period applied, the alternative equitable estoppel claim would be subject by analogy to a similar limitation period (Limitation Act 1984, section 37).
11. Mr. Riihiluoma relied upon two longer limitation periods, however. Firstly, as regards the claim that the Apartment is held on constructive trust for the benefit of the Plaintiffs, either wholly or to the extent of the value of the payments the Deceased allegedly received on the assumption that they were to be devised the property, this was a claim for the recovery of land. A 20 year limitation period was claimed (Limitation Act 1984, section 16). Secondly, as regards the claim to personal property from the deceased's estate to which the Plaintiffs also claim to be entitled, the Plaintiffs also rely on a 20 year limitation period (Limitation Act 1984, section 24(a)).
12. The supposed claim to personalty from the estate of the deceased, properly analysed, is not in fact legally distinguishable from the legal and equitable claims to an interest in the Apartment, because it is not on its face a claim on behalf of an ordinary estate beneficiary at all. It is not alleged that the Plaintiffs are beneficiaries under the Deceased's Will or that the Will ought to be set aside and the Plaintiffs are entitled to the personalty under the law relating to intestacy. Section 24(a) of the Limitation Act provides as follows:

*“24 Subject to section 23(1) and (2) —
(a) no action in respect of any claim to the personal estate
of a deceased person or to any share or interest in any
such estate (whether under a will or on intestacy) shall
be brought after the expiration of 20 years from the date
on which the right to receive the share or interest accrued...”*
13. The claim to personalty is based on the same averments which support the real property claims. Firstly, it is a contractual claim to which the normal contractual limitation period applies. Secondly, the claim to personalty is advanced on an equitable basis, overlapping with the claims relating to the Apartment. In my judgment the time limits applicable to either claims for breach of trust or breach

14. It remains to consider whether the claims in respect of the Apartment are not similarly governed because they constitute actions for the recovery of land.

Section 16 of the Limitation Act 1984

15. Section 16 of the Act provides as follows:

“Time limit; recovery of land

16 (1) No action shall be brought by any person to recover any land after the expiration of 20 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

(2) Subject to the following provisions of this section, where—

(a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and the right of action to recover the land accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest; and

(b) the person entitled to the preceding estate or interest (not being a term of years absolute) was not in possession of the land on that date, no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of 20 years from the date on which the right of action accrued to the person entitled to the preceding estate or interest or 6 years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

(3) Subsection (2) shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.

(4) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(5) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future

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

(6) Part I of the First Schedule contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.

(7) Part II of the First Schedule contains provisions modifying the provisions of this section in their application to actions brought by, or by a person claiming through, the Crown.”

16. Part I of the First Schedule sets out the circumstances in which rights of action to recover land accrue in cases other than against the Crown. If the Plaintiffs can rely upon section 16, no question of time-bar (as regards the filing of any fresh claim) arises because adverse possession could not have commenced earlier than August 10, 2000.

17. The real controversy is whether section 16 applies at all to a purely equitable claim. Certain cases provided for in Part I of the Schedule are obviously not applicable to the Plaintiffs’ case: (1) recovery of land plaintiff has been in possession of ;(2) recovery under a will or upon intestacy. However, paragraph 3 of Part I of the First Schedule potentially applies:

“3 Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims, and—

(a) the person making the assurance was on the date when the assurance took effect in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged; and

(b) no person has been in possession of the land by virtue of the assurance, the right of action shall be treated as having accrued on the date when the assurance took effect.”

18. It seems that only three categories of standing are contemplated. Firstly situations where the plaintiff was already in possession of land, secondly where the plaintiff claims under a will or on intestacy, and thirdly where the plaintiff is seeking to recover land “*being an estate or interest in possession assured otherwise than by will to him*”. Mr. Riihiluoma was clearly right when he submitted that the Limitation Act expressly defines “*land*” as including “*any legal or equitable estate therein*” (section 2(1)). However, it is not equally straightforward to conclude that the 20 year time limit prescribed by section 16 and further defined by Part I of the Schedule must automatically be applied to any form of interest in

land, however arising. In my judgment it is important to determine what the word “*assured*” means in paragraph 3 of Part I of the Schedule to the Limitation Act, in the wider context of the statute as a whole. The terms “assurance” also appears in section 16(4), albeit in a context which does not seem to be relevant for present purposes.

19. I find that “*assured*” in the context of paragraph 3 of the First Schedule primarily connotes some written instrument conveying an “*estate or interest*” in land. This conclusion is supported firstly by the natural and ordinary meaning of the word “assured” in its specific statutory context relating to transfers of interests in land. Although the verb “assure” has various meanings, including to insure and to ensure (to make safe) and to promise, the relevant natural and ordinary meaning as regards land is “*to make sure the possession or reversion of; to convey by deed*”; and “*assurance*” means “*the conveyance of lands or tenements by deed; a legal evidence of the conveyance of property*”: C.T. Onions (ed) ‘*The Shorter Oxford English Dictionary on Historical Principles*’¹. This meaning may also be illustrated by reference to usage of the term in other statutes, such as section 11 of the UK Legitimacy Act 1926, which defined disposition as meaning “*an assurance of an interest in property by any instrument whether inter vivos or by will.*”²
20. As Mr. Adamson submitted, section 16 and the First Schedule are primarily designed to deal with claims by persons with clear legal or equitable title against persons who have gone into adverse possession of land. In the present case, the Second Applicant/Second Defendant has legal title to the land under a conveyance, and it is the Respondents/ Plaintiffs who contend that on equitable grounds they ought to be found to be true owners or to possess a lesser equitable interest in the relevant land. Nevertheless, it seems clear from section 20 of the Limitation Act 1984, that (a) actions to recover land are maintainable in respect of equitable interests in land on the same basis as in the case of legal interests, and also that (b) Part I of the Schedule still applies. Section 20 provides:

“20 (1) Subject to section 23(1), the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, as they apply to legal estates. Accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date, as it would accrue if his interest were a legal estate in the land (and any relevant provision of Part I of the First Schedule shall apply in any such case accordingly).

(2) Where any land or rent is vested in a trustee upon trust the right of a beneficiary entitled to bring an action to recover the land or

¹ (Oxford University Press: Oxford, 1933) page 112.

² Cited by Browne-Wilkinson LJ (as he then was) in *In re Billson’s Settlement Trusts* [1984] Ch. 409 at 415G .

rent against the trustee or any person claiming through him, shall be deemed to accrue at and not before, the time when such land or rent is conveyed to a purchaser for valuable consideration and shall then be deemed to accrue only as against such purchaser and any person claiming through him.”

21. So a person entitled to an equitable ownership interest in land or the proceeds of the sale of land held on trust for sale can sue to recover the land itself to the same extent as a legal owner, in accordance with the applicable accrual rules set out in Part I of the First Schedule. It is true that the very terms “*recover the land*” and “*person entitled in possession*,” which appear in both section 20(1) and Part I of the First Schedule suggest that an action to recover land can only be brought by someone who asserts an existing ownership interest in land. An interest which arises from either a conveyance, a contract for the sale of land or perhaps a trust deed. It does not readily suggest a proprietary estoppel claimant who merely seeks to recover compensation from the true owner of the land on the basis that the defendant’s title is subject to a prior equitable claim. The statutory wording does not suggest a claim that although the defendant is admittedly the legal owner of the land, there was an oral agreement that the plaintiff was the beneficial owner. But this is reading Part I of the first Schedule to the Limitation Act in isolation from sections 16 and 20.

22. In my judgment the real distinction lies between claims which assert an ownership interest in land and claims which do not. Section 16 claims appear very clearly to be limited to disputes about title. Section 18 of the 1984 Act provides:

*“18 Subject to this Act at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) **the title of that person to the land shall be extinguished.**”* [emphasis added]

23. It is admittedly not clear on a superficial analysis what types of equitable claims potentially qualify as an action for the recovery of land. No Bermudian or persuasive case law directly on point could be found. Two persuasive authorities provide somewhat ambiguous support, however, for the proposition that the only equitable claims which fall within section 16 of the Limitation Act are claims based on an equitable title to the land in question, as opposed to a claim for equitable compensation which does not impact on the beneficial ownership of the property as a whole.

24. Mr. Adamson argued at the hearing that it was assumed in *Shtun-v-Zalesjska* [1996] 3 All ER 411 that a six year limitation period applied. This implication is not simple to draw because even if the English 12 year limit for actions for the

recovery of land applied, this longer limitation period had clearly expired when the action was struck-out for want of prosecution. The claim however was a claim for a declaration of entitlement to a beneficial interest in a property which was legally registered in the defendant's name. The plaintiff's claim was not based on a conveyance or other assurance, but on oral promises and understandings between himself and a former romantic partner. Although the primary delay considered was post-writ delay, the Court of Appeal decision notes that pre-writ delay may be taken into account in terms of assessing the prejudice caused by post-writ inordinate and inexcusable delay. And the post-writ prejudice need only be more than minimal if the pre-writ delay causes prejudice. In this context, Peter Gibson LJ's reference to "*the prejudice that is likely to have been caused through the delay of four years before the plaintiff commenced proceedings*" makes no real sense at all if the limitation period assumed to be in issue was the 12 year period for actions for the recovery of land, and not the shorter six year period. This case (mainly relied upon by counsel in support of a different point) is of limited assistance on the limitation point because the limitation issue was not explicitly considered.

25. A supplementary authority from a different jurisdiction more clearly supports the proposition that any equitable claim for an interest in land is substantially similar to a legal claim for equivalent relief. In the Newfoundland case of *William Hollett-v-Gordon Hollett* 1993 Nfld & P.E.I.R. LEXIS 905, the Supreme Court held in relation to an action for specific performance of an oral agreement to acquire a half-share in certain land:

"[80] On this analysis, an action for specific performance, where by virtue of prior payment and acceptance of the purchase money, the purchaser can be said to have acquired an equitable interest in the land, should likewise be regarded as a proceeding for recovery of land to which the same limitation period should apply. Proceedings which have the same object and effect should be treated alike."

26. The reasoning in the latter case was that the claim was an equitable claim to an interest in land to which no limitation period applied and that the relevant limitation period to be applied by analogy was the 20 year period applicable to actions for the recovery of land. However, it appears that the Newfoundland statute considered in that case has since been repealed and replaced with legislation under which a ten year limitation period applies to not just actions to recover land, but several other causes of action including "*actions to recover trust property or property into which trust property can be traced*"³. This illustrates the different statutory framework in Newfoundland where it seems there was no express statutory provision that claims to recover land include both legal and equitable claims. This Canadian case is therefore not dispositive of the question in issue. But it does help to illustrate that an equitable claim to an ownership interest

³ Section 7(1), Limitations Act S.N.L. 1995 C.L-16.1.

in land is conceptually the mirror image in equity of a legal claim to an ownership interest in land.

27. Section 20 of the Bermuda Limitation Act expressly provides that the limitation period applicable to actions for the recovery of land applies to proceedings based on an equitable interest in the same manner as it applies to claims based on a legal interest. No question of analogy therefore arises in respect of an equitable claim which might otherwise fall within section 37 of the Act. Accordingly an equitable claim for either (a) specific performance of an oral agreement for the sale or other disposition of land, or (b) a declaration that the plaintiff is the owner of land would in my judgment fall within section 20(1) and qualify for the 20 year limitation period. Absent section 20, it might be argued that the only species of assurance which qualified was a legal assurance in or evidenced by writing. But section 20(1) expressly provides: “*Subject to section 23(1), the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, as they apply to legal estates.*” In equity, oral assurances may be recognized in this statutory context even though writing may be required for legal claims. So not all claims in relation to equitable interests in land fall within the ambit of sections 16 and 20. Section 23(1) provides as follows:

“23 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
(b) to recover from the trustee 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.

28. Accordingly, if the equitable claim is not an action for the recovery land (i.e. a claim based on the assertion that the land is beneficially owned wholly or partially by the plaintiff) but is merely for the recovery of money impressed with a trust which the proceeds of which can be traced into land held by a constructive trustee, section 23 (1) applies. There is no limitation period for such a claim, and section 37 is engaged. Section 37 of the Limitation Act 1984 provides:

“Equitable jurisdiction and remedies

37 (1) The following time limits under this Act, that is to say —
(a) the time limit under section 4 for actions founded on tort;
(b) the time limit under section 7 for actions founded on simple contract;
(c) the time limit under section 9 for actions to enforce awards where the submission is not by an instrument

under seal;
(d) the time limit under section 10 for actions on a specialty;
(e) the time limit under section 11 for actions to recover a sum recoverable by virtue of any enactment; and
(f) the time limit under section 26 for actions to enforce a judgment,

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by this Act has heretofore been applied.”

29. Where a plaintiff seeks equitable relief against a defendant in relation to land without seeking to recover ownership of the land, this Court may apply by analogy a limitation period referred to in section 37(1) depending on what the predominant characteristics of the equitable claim are found to be. A distinction is to be drawn, in this specific statutory context, between an ownership claim and a compensatory claim. Courts are commonly required to distinguish between personal claims (legal) and proprietary claims (equitable). In the context of actions for the recovery of land, however, it is not enough to assert a proprietary tracing claim designed to recover the proceeds of money impressed with a trust into land owned by the defendant. An action only qualifies for the purposes of attracting the extraordinarily long 20 year limitation period (twice that in Newfoundland and almost twice that in England and Wales) if it is designed to recover an ownership interest in land. This distinction flows from the express terms of the statute itself, particularly the provisions of section 20 as read with section 23(1).

Limitation periods applicable to Respondents’/Plaintiffs’ claims and approach to strike-out application

30. The Respondents’/Plaintiffs’ claim for specific performance of the Agreement and consequential relief constitutes an action for the recovery of land for which the limitation period is 20 years and a fresh action would not be time-barred at this stage. The same applies to their original estoppel claim to the extent that they seek a declaration that the Second Applicant/Defendant holds the Apartment on constructive trust for them. On the other hand the damages claim for breach of the Agreement is an ordinary contractual claim which could not at this juncture be started afresh. The new proprietary estoppel claim, pleaded in the alternative in the event that a legal contractual claim fails for reasons which do not extinguish the right to seek equitable relief for the same relevant conduct, is in my judgment analogous to a contractual claim. A six year limitation applies to this as well, and if struck-out for want of prosecution, no fresh action could be commenced at this stage.

31. The Respondents' own evidence indicates that the Deceased felt it was obvious that the Plaintiffs as non-Bermudians could not lawfully become owners of the Apartment and at best could be willed the proceeds of its sale. Mr. Adamson referred in argument to the provisions of section 80 of the Bermuda Immigration and Protection Act 1956 in support of the proposition that the Plaintiffs could not lawfully acquire any legal or equitable interest in the Apartment without a license. The supplementary authority of *Williams-v-Williams*, Court of Appeal for Bermuda, Civil Appeal 1982: 8, Judgment dated November 5, 1982 strongly suggests that that any equitable claim to the Apartment is fatally flawed. As Harvey da Costa JA observed (at page 3 of his Judgment):

“Clearly by virtue of section 80(1(b) Mrs. Williams the person in whom the legal estate is vested could only hold it as trustee upon trust to give effect to the beneficial interest of Mr. Williams as cestui que trust if a license had been granted to her as trustee.”

32. So the legal claim to the Apartment based on the Agreement is obviously flawed due to the absence of privity (not to mention the absence of writing and illegality), and the alternative equitable claim appears very clearly to be fatally flawed on illegality grounds.

Approach to striking-out application: legal and equitable claims to the Apartment

33. Since the Respondents came to Court prepared to meet an application to strike-out on the grounds of want of prosecution, not more substantive grounds, I propose to deal with the application before the Court as follows. I will order that unless the Respondents/Plaintiffs apply within 28 days to show cause on a date to be fixed by the Registrar convenient to counsel and the Court (estimated length of hearing ½ day) why their claims to legal and/or equitable ownership of the Apartment and/or for damages for breach of contract should not be struck-out on the grounds that such claims are bound to fail.

34. Because the limitation period applicable to these aspects of the action is 20 years, which period has not expired, exceptional circumstances would be required to justify striking-out for want of prosecution. Not only would inordinate and inexcusable delay have to be shown; the Applicants/Defendants would have to demonstrate very clearly that the prejudice flowing from the delay is such that a fair trial is no longer possible. The only crucial oral evidence which may be weakened by fading memories is likely to come from the Plaintiffs themselves, the other two potential witnesses having been deceased before the commencement of the present proceedings. In these circumstances, the Applicants/Defendants have not made out the requisite degree of prejudice to their own fair trial rights to justify this Court striking-out the recovery of land claims for want of prosecution within the relevant limitation period.

Approach to striking-out application: equitable compensatory claim

35. As regards the new claim for equitable relief in respect of the payments the Respondents/Plaintiffs say they were improperly persuaded to cause to be disbursed in reliance on representations that provision would be made for them in the Deceased's will, exceptional circumstances are not required to justify striking-out for want of prosecution. The limitation period for bringing this claim expired on a date uncertain in 2006. Nevertheless, the Applicants must demonstrate (in the absence of evidence of intentional delay or breach of any court orders) both (a) inexcusable and inordinate delay, and (b) as a result of the delay complained of a substantial risk that either (i) a fair trial is no longer possible or (ii) they have been seriously prejudiced.
36. There was no pre-Writ delay because the proceedings were commenced within six months of the Deceased's death prior to which the cause of action probably had not accrued. The relevant period of delay encompasses the following periods in relation to evidence that dates back to 1987:
- (a) September 15, 1987-January 1998: representations by Deceased allegedly made;
 - (b) January 6, 1997: Deceased makes Will;
 - (c) March 15, 2002: Pre-trial directions ordered by Consent;
 - (d) April 18, 2002: Further and Better Particulars of Defence filed;
 - (e) January 7, 2003: Plaintiffs apply for a Further and Better List of Documents;
 - (f) **February 20, 2003**: Court gives directions relating to discovery sought by Plaintiffs;
 - (g) **January 26, 2004**: Defendants' letter Request for Further and Better Particulars;
 - (h) **February 6, 2008**: Defendants issue a Summons to strike-out for Want of Prosecution.
 - (i) **February 12, 2008**: Plaintiffs file Notice of Intention to Proceed;
37. The action admittedly went to sleep between January 26, 2004 and February 6, 2008, with the Applicants taking the last step of requesting by letter Further and Better Particulars of the Specially Indorsed Writ. In terms of Court activity however, the Respondents took no steps in the action for a five year period between appearing in Court on February 20, 2003 on the hearing of their own discovery application and their Notice of Intention to Proceed nearly five years later on February 12, 2008. The only excuses for the delay that are proffered are (a) personnel changes took place within the firm of their Bermuda attorneys; (b) other commitments on the part of their Australian attorney impeded progress. It is also asserted that witness statements and amendments to their pleadings were being prepared even though no *inter-partes* correspondence took place. These explanations are inadequate having regard to the length of delay involved. In my

judgment the delay was inordinate and inexcusable with the Respondents taking no Court action to progress the case to trial for almost five years and failing to respond to a request for particulars for over four years.

38. The most tangible evidence of prejudice is the complaint made by the Second Applicant that it is stressful having the present claim hanging over her as she is about to retire as a nurse and cannot properly plan her financial affairs. The suggestion that the passage of time has prejudiced her defence carries little weight. Because she says that the Deceased told her nothing about the Agreement, any fading memory on her part can have no negative impact on her own case. The Respondents/Plaintiffs accept that the First Applicant has no relevant knowledge of the matters upon which they rely. However it seems likely that the Applicants'/Defendants' ability to recall any statements the Deceased may have made to them which positively refutes the equitable claims and/or explains or tends to explain why she made no testamentary provision for the Respondents/Plaintiffs has been diminished. This Court can infer obvious prejudice in the absence of positive evidence: *Shtun-v-Zalesjska* [1996] 3 All ER 411.
39. In this general way, having regard to the fact that any trial of the present application cannot now take place sooner than 20 years after the first relevant representations were allegedly made and 10 years after the Will was made, the failure of the Respondents/Plaintiffs to prosecute the present action with reasonable dispatch has resulted in delay which is inherently prejudicial to the Applicants/Defendants. In my judgment this case is a borderline case in terms of how the discretion to strike-out for want of prosecution ought to be exercised. I am satisfied that there was inordinate and inexcusable delay which has not created a substantial risk that a fair trial is no longer possible, but which has caused serious prejudice to the Applicants/Defendants. Moreover, the claims advanced are not obviously strong.
40. The only factor which clearly tips the scales against striking-out, however, is the fact that in cases involving claims to family property, the emotional significance of the proceedings to the claimants in my view requires greater weight to be given to the right to a full hearing on the merits than might otherwise be the case. The Applicants/Defendants themselves allowed the action to go to sleep, and did not seek the assistance of peremptory orders from this Court to compel their opponents to proceed. So the delay did not involve any direct breach of orders of this Court. Moreover, since the Respondents are foreign plaintiffs, the Applicants are protected from the commercial exigencies of the present proceedings by way of an order for security for costs⁴.
41. Since a fair trial for the Applicants is not substantially prejudiced, and the delay is more likely to weaken the Respondents'/Plaintiffs' positive case than the Applicants'/Defendants' negative case, I decline to strike-out the equitable

⁴ The passage of time may warrant the \$20,000 initially posted being reviewed.

compensation claim for want of prosecution in the exercise of the Court's discretion.

Approach to striking-out: other claims

42. As regards the legal claims (a) in respect of the Deceased's personal property, and (b) the claim for damages for breach of the Agreement, the same analysis applicable to the equitable compensation claims applies and the application to strike-out for want of prosecution is dismissed on the same grounds.

Conclusion and costs

43. The Respondents'/Plaintiffs' application for leave to amend the Specially Indorsed Writ having been granted upon the usual terms as to costs, I refuse the application to strike-out for want of prosecution.
44. As regards the legal and equitable claims for specific enforcement of the Agreement and for a declaration that the Respondents/Plaintiffs are the true owners of the Apartment, the application is refused on the grounds that a fresh claim could still be filed and no exceptional circumstances justifying striking-out have been made out. These claims are actions for the recovery of land within sections 16 and 20 of the Limitation Act 1984, as Mr. Riihiluoma contended. However the equitable and legal compensatory claims are subject to the contractual limitation period, either directly or by analogy, and are not actions for the recovery of land, as Mr. Adamson rightly contended.
45. As regards the equitable (and legal) compensation claims (including the overlapping claim in respect of the Deceased's personal property) in respect of which any new claims would now be time-barred, a *prima facie* case for striking-out for want of prosecution has been made out. Nevertheless, on balance, the Respondents/Plaintiffs should be afforded an opportunity to have their day in Court. These claims appear likely to have considerable emotional significance to the Respondents/Plaintiffs, even though they do not appear (based on the material presently before the Court) to be obviously strong. I also take into account the fact that the Applicants can be protected from the financial risks of this litigation by appropriate orders by way of security for costs. The strike-out application is refused.
46. However, it seems obvious on the basis of the material presently before the Court that the legal and equitable claims for title to the Apartment and/or for damages for breach of the Agreement are liable to be struck-out on the grounds that they are bound to fail. It seems plain and obvious that (a) the alleged contract cannot be enforced by the Plaintiffs as third parties to the Agreement; and (b) no contract can validly be entered into under Bermuda law nor any trust validly created conveying the legal and/or equitable title to Bermuda land to persons (such as the Respondents/Plaintiffs) who do not possess either Bermudian Status or a license

to own the relevant Bermuda real property. This conclusion is supported by apparently binding Court of Appeal for Bermuda authority, and it does not seem to be open to this Court to reach a contrary conclusion.

47. Accordingly, the Respondents/Plaintiffs are ordered to apply to this Court within 28 days for a ½ day hearing on a date convenient to counsel and the Court to show cause why these claims should not be struck-out. If no application is made, the relevant claims shall be struck-out.
48. As I indicated provisionally at the conclusion of the hearing, it seems to me to be most appropriate to penalize the Respondents/Plaintiffs for the prejudice that their delay has occasioned in costs. I therefore order that the costs of the present application shall be the Defendants' costs in the cause, so that the Respondents/Plaintiffs shall not be entitled to recover these costs in any event.

Dated this 21st day of May, 2008

KAWALEY J