



Hilary Term  
[2025] UKPC 5  
Privy Council Appeal No 0091 of 2020

## **JUDGMENT**

**Denise Barnes (Appellant) v Pearl Moxey and  
another (Respondents) (Bahamas)**

**From the Court of Appeal of the Commonwealth of  
The Bahamas**

before

**Lord Reed  
Lord Leggatt  
Lord Stephens**

**JUDGMENT GIVEN ON  
30 January 2025**

**Heard on 11 April 2024**

*Appellant*

Thomas Roe KC

Sharon Wilson KC

(Instructed by Charles Russell Speechlys LLP (London))

*Respondents*

Janet L R Bostwick-Dean

Tavarrie D Smith

(Instructed by Bostwick & Bostwick (Bahamas))

## **LORD STEPHENS:**

### **1. Introduction**

1. This appeal concerns a family dispute as to the title to a home situate at, and known as, Lot No 109 of the Boyd Subdivision in the Western District of the Island of New Providence (“the Property”).

2. Denise Barnes (“Denise”) claims title under a conveyance of the Property to her dated 8 May 2003 by the executor of the estate of Pearl Leona Moxey, her maternal grandmother (“the Conveyance”). In the alternative, she claims title by adverse possession based on her open occupation of the Property, with the intention to exclude all other persons, since 8 May 2003. Her first cousins, Pearl LC Moxey (“Pearl”) and Charles J Moxey (“Charles junior”), as the administrators of the estate of their father, Charles Moxey (“Charles senior”), claim that their father’s estate is entitled to a half share in fee simple in the Property under the will of Pearl Leona Moxey (“the Will”). They challenge the lawfulness of the Conveyance and contend that Denise did not acquire title to the Property by adverse possession as there was deliberate concealment of facts relevant to Charles senior’s estate’s right of action.

3. Denise has been in open occupation of the Property, with the intention to exclude all other persons, since 8 May 2003. It was not until 10 August 2015, some 12 years and three months later, and therefore outside the 12-year limitation period in section 16(3) of the Limitation Act 1995, that the estate of Charles senior commenced proceedings against Denise by way of counterclaim asserting entitlement to possession of the Property based on a “one half undivided interest as tenants in common in the Property.”

4. This appeal raises two issues. Unless both are answered in favour of the estate of Charles senior, the appeal must be allowed. The first issue is whether the estate of Charles senior can avail itself of the “deliberate concealment” exception in section 41(2) of the Limitation Act 1995 to the running of the 12-year limitation period. If so, then the second issue is whether the estate of Charles senior is right to contend that the Conveyance was ineffective to convey the entire interest in the Property to Denise, instead conveying to her only a half share.

5. It is convenient for the Board to determine first the “deliberate concealment” issue. Unless the estate of Charles senior can successfully rely on this exception to the running of the 12-year limitation period, Denise’s title is secure because of her long open and exclusive occupation of the Property. In such circumstances it will be unnecessary to determine whether Denise had obtained a valid title to the entire interest in the Property by the Conveyance.

## 2. Factual background

6. Pearl Leona Moxey, the matriarch of her family, owned an unencumbered fee simple in the Property. The Property was the family's homestead.

7. By the Will, Pearl Leona Moxey appointed her son Eddison Moxey ("Eddison") as sole executor and devised the Property to her other son Charles senior and to Eddison "in equal shares as tenants in common in fee simple."

8. Pearl Leona Moxey also had three daughters, whose married names are Barbara Barnes ("Barbara"), Keva Johnson ("Keva") and Talitha Strachan ("Talitha").

9. The siblings Charles senior, Eddison, Barbara, Keva and Talitha all grew up in the Property.

10. Denise is the daughter of Barbara.

11. Pearl and Charles junior are the children of Charles senior and his partner Camille Yvette Gooding Fleurimond ("Yvette").

12. On 1 July 1983, Pearl Leona Moxey died.

13. On 25 March 1987, Probate of the Will was granted by the Supreme Court to Eddison. The Supreme Court lodged the grant of probate in the Registry of Deeds on 18 August 1987, thereby enabling any interested member of the public to discover that the Property had been devised by Pearl Leona Moxey to Charles senior and Eddison in equal shares as tenants in common in fee simple.

14. Eddison, as executor of the Will, took no steps to vest two undivided shares in the Property in himself and Charles senior respectively.

15. At the time of their mother's death, Charles senior was living in the Property, Eddison was living on the Island of Grand Bahama and Barbara and Denise were living next door to the Property. After their mother's death, Eddison continued to reside on the Island of Grand Bahama, Charles senior continued to reside in the Property, and Barbara continued to reside next door as did Denise until she moved into the Property on 8 May 2003. Pearl and Charles junior occupied the home as children. Yvette also resided at the Property at various times.

16. In November 2002, Charles senior was ill and was convalescing at Barbara's home following a period of hospitalisation. Whilst Charles senior resided in Barbara's home, a dispute arose between Barbara and Yvette because of which Barbara evicted Yvette and Pearl from the Property. Charles junior remained in the Property.

17. On 20 January 2003, Charles senior died intestate.

18. A few days after Charles senior's funeral, Barbara changed the locks on the Property and excluded Charles junior from it. In this way, Charles junior and Pearl, who would have been entitled to a half share in the Property under the estate of their father, were excluded from the Property by their aunt, Barbara, and subsequently by her daughter and their cousin, Denise.

19. By the date of Charles senior's death in 2003, there were no debts owed by the estate of Pearl Leona Moxey. The trial judge, Winder J ("the judge"), found that Eddison had taken no steps "as he ought to have during the life of Charles [senior]" to vest the tenancy in common in equal shares in fee simple in the Property in himself and Charles senior respectively (para 18(b)).

20. Under the laws of intestacy, Pearl and Charles junior are entitled to the estate of Charles senior.

21. Pearl was 17 and Charles junior 16 at the date of their father's death.

22. On 3 February 2003, Eddison granted a power of attorney, irrevocable for 12 months, to Barbara. The power of attorney authorised her, on his behalf, to: (a) apply for letters of administration for the estate of Charles senior; (b) conduct and complete the sale of the Property out of the estate of Charles senior; and (c) receive the proceeds of sale on his behalf. In so far as the power of attorney authorised Barbara to conduct and complete the sale of the Property out of the estate of Charles senior, it is evidence of the fact that both Eddison and Barbara knew that the estate of Charles senior had a beneficial interest in the Property. Based in part on this evidence, the judge found that Barbara was "fully aware that the Estate of Charles [senior], which ought to have been represented by his children, [was] interested in a half share of the Property" (para 14).

23. After the death of Charles senior, Eddison set about selling the Property to Denise. The judge found that Eddison authorised Barbara to act on his behalf in the sale of the Property to Denise and that Barbara was giving instructions on the sale for Eddison (paras 11, 13(d)).

24. On 20 March 2003, Eddison, as executor of the estate of Pearl Leona Moxey, entered into an agreement in writing with Denise for the sale of the Property to her for the sum of \$100,000. There was no evidence of any prior marketing of the Property by Eddison to secure the best price for the Property (para 13(e)). The judge found that the sale to Denise was at a considerable undervalue (para 13(f)) and was not an arm's length transaction.

25. Denise obtained a loan of \$95,000 from RBC Finco Finance Corporation of Bahamas Limited ("Finco") to fund the purchase price, with the loan being secured by a mortgage on the Property.

26. Mrs Bridgette Francis-Butler, attorney, acted not only for Eddison in relation to the sale of the Property but also for Denise and for Finco (paras 13(g) and 30). The judge found that Mrs Francis-Butler was acting as the agent for both Denise and Eddison (para 29). He held that the attorney was also "fully aware that the Estate of Charles [senior], which ought to have been represented by his children, were interested in a half share of the Property" (para 14). The judge held that Mrs Francis-Butler "was [Denise's] agent for the transaction and as such any information coming to her knowledge must be imputed to Denise" (para 31). On that basis, Denise was also "fully aware that the Estate of Charles [senior], which ought to have been represented by his children, were interested in a half share of the Property" (para 14).

27. On 8 May 2003, Eddison, as the executor of the estate of Pearl Leona Moxey, executed the Conveyance of the Property to Denise.

28. The entirety of the net proceeds of sale of the Property was divided into two equal parts. One half, being \$48,107.75, was paid to Eddison and the other half should have been, but was not, paid to the estate of Charles senior. It was a matter for those administering the estate of Charles senior to decide whether any debts were owed by the estate and if so to whom and in what amount. However, rather than administrators being appointed, and the other half being paid to the administrators, it was distributed by Barbara (or at her instructions) as she saw fit. Barbara had no authority to act on behalf of the estate of Charles senior. Among the distributions she made were: (a) a payment to herself of \$20,246.76 for services she says she provided as caregiver to Charles senior; (b) a payment of \$11,298.99 in respect of medical bills of Charles senior, though Pearl and Charles junior state that a collection agency is still claiming payment for unpaid bills from the estate of Charles senior; (c) payments of \$3,000 to each of Pearl and Charles junior; and (d) other payments as Barbara saw fit to settle what she saw as debts of Charles senior. There was no evidence, prior to 2014 or 2015, that Pearl or Charles junior knew of the sale to Denise, the amount of the purchase price, or that the purchase price was unlawfully distributed.

29. Denise has been in factual possession of the Property with the intention to exclude all other persons from at the latest 8 May 2003. She deprived those entitled under the estate of Charles senior, Pearl and Charles junior of any use or enjoyment of the Property.

30. On 19 June 2003, Denise swore an affidavit, in support of an application to the Ministry of Finance for stamp duty exemptions in relation to the conveyance of the Property to her. In the affidavit, Denise stated that the value of the Property, prior to proposed renovations, was appraised at \$188,000. Denise had acquired the Property, worth \$188,000, for \$100,000. Furthermore, Eddison, who had sold the Property at an undervalue, deprived the estate of his brother, Charles senior, and thereby deprived his niece, Pearl, and his nephew, Charles junior, of an additional \$44,000 representing Charles senior's half share in the Property.

31. In or about September 2003, Barbara told Yvette that the Property had been left by Pearl Leona Moxey in the Will to "the sisters", that is to Barbara, Keva, and Talitha. Pearl overheard this conversation. As noted above, the judge found, at para 14, "that Barbara ... [was] fully aware that the Estate of Charles [senior] which ought to have been represented by his children, were interested in a half share of the Property." On this basis, the statement which Barbara made to Yvette that the Property had been left in the Will to "the sisters" was untrue to Barbara's knowledge. The appropriate inference is that Barbara lied to make Pearl and Charles junior believe that their father's estate did not have an interest in the Property.

32. On 31 October 2003, Barbara commenced an application to the Supreme Court for letters of administration in the estate of Charles senior. The application was unsuccessful due to the failure of the applicant to clear off the interest of Pearl and Charles junior.

33. The Conveyance to Denise was registered on 21 November 2003.

34. Between 2003 and 2013, Denise spent \$80,000 in renovating the Property and she either resided in or leased the Property.

35. In May 2014, Charles junior saw a "For Sale" sign at the Property. Pearl says that this caused her to conduct a search of the title to the Property in the Registry of Deeds and that she found the Will. She states that this was the first time she had seen it. As a result, she became aware that the Property had not been left to "the sisters" as Barbara had told her mother, Yvette. Rather, the Property had been left to Charles senior and Eddison in equal shares as tenants in common in fee simple. On 15 June 2015, after Pearl had found out this information, she and Charles junior asserted their right to possession of the Property by breaking into and going into occupation of it.

36. On 19 June 2015, Denise commenced this action and obtained an order restraining Pearl and Charles junior from trespassing on the Property until trial.

37. On 8 July 2015, Pearl and Charles junior vacated the Property. On the same date, they were appointed in a limited capacity as the personal representatives of the estate of Charles senior.

38. On 10 August 2015, some 12 years and three months after Denise went into open and exclusive occupation of the Property, the estate of Charles senior commenced proceedings against Denise and Eddison by way of counterclaim. They asserted that the estate of Charles senior was entitled to possession of the Property based on a “one half undivided interest as tenants in common in the Property” and that Eddison and Denise “deliberately hid from [Pearl and Charles junior] that they were entitled to a one-half share in the Property.” The estate of Charles senior also claimed damages for having been deprived of the use and enjoyment of the Property since Charles senior’s death on 20 January 2003.

39. Eddison entered an appearance to the counterclaim but did not submit pleadings or participate at trial.

40. On 28 October 2015, letters of administration were granted to Pearl and Charles junior in relation to the estate of Charles senior.

### **3. The proceedings below**

#### *(a) The judge’s determination of Denise’s interlocutory application to strike out the counterclaim*

41. On 27 November 2015, Denise applied to have the counterclaim struck out on the grounds that it was time-barred, and that the reliance by the estate of Charles senior on deliberate concealment was frivolous. In a judgment dated 25 January 2016, the judge dismissed Denise’s application, holding, at para 26, that there was a triable issue as to concealment. At para 24, the judge stated:

“On the facts, it seems to me that [in] the absence of actual knowledge, no one other than a party to the sale transaction could have become aware of the sale to the Plaintiff until the conveyance was lodged for record on November 21, 2003. *Mere occupation did not, of itself, connote ownership.* Notwithstanding the fact that at least one of the Defendants



was still a minor in November 2003 (the other had been an adult for a month), the transaction could have been discovered by a reasonable search of the registry. If there was concealment, time could not [begin] to [run] prior to November 21, 2003, in which case the 12-year limitation period would not have expired until November 21, 2015. The Counterclaim having been lodged in August 2015 would therefore have been made during the currency of the limitation period.” (Emphasis added).

42. The issue which the judge decided in his judgment dated 25 January 2016 was whether the counterclaim should be struck out. He concluded that the issue of concealment was “a triable issue”. He did not purport to, nor did he, determine the issue of concealment. Rather, the issue of concealment was to be determined at trial. However, at trial, rather than presenting evidence as to concealment, cross-examining as to that issue and presenting submissions in relation to it, counsel representing the estate of Charles senior simply relied on the erroneous submission that by virtue of the judgment dated 25 January 2016 “the issue of limitations in this matter is res judicata”, and that “it is not open to [Denise] to again raise the limitation point at this stage.” This position was maintained on behalf of the estate of Charles senior in the written closing submissions at trial. Accordingly, the sole argument raised by the estate of Charles senior in relation to limitation was the incorrect assertion that the limitation issue was res judicata because of the judgment dated 25 January 2016. Indeed, even before the Board, counsel representing the estate of Charles senior maintained the erroneous assertion that the issue of limitation was res judicata because of the judgment dated 25 January 2016. Counsel submitted to the Board that, as Denise had “failed to appeal the [25] January 2016 ruling ... on the limitation period[, it] stands and is binding on the parties” and “[i]n the circumstances, [Denise] cannot raise the limitation period as a ground of appeal before the Board.”

*(b) The judgment at the conclusion of the trial*

43. Between 24 and 27 October 2017, the judge conducted the trial of the action. In a careful judgment dated 28 January 2019, the judge found in favour of the estate of Charles senior.

44. First, the judge determined the issue as to whether the Conveyance was effective to convey the entire interest in the Property to Denise. The judge referred, at para 15, to section 22(1) of the Administration of Estates Act 2002 which, in so far as relevant, provides:

“A personal representative may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, but before selling for the purposes of distribution, the personal representative shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold ....”

The judge held, at para 18, that the Property was not sold for the purpose of paying any debts of the estate of Pearl Leona Moxey, as there were none. He also held that it was not sold for the purpose of distributing the estate among the persons entitled thereto. The judge concluded, at para 21, that “Eddison [as the executor of the estate of Pearl LC Moxey] did not have the power to sell that undivided one-half interest in the Property which had been devised to” Charles senior by the Will. Therefore, the Conveyance was ineffective to convey the entire interest in the Property to Denise but instead conveyed to her a half share.

45. Secondly, the judge considered and determined the limitation issue in favour of the estate of Charles senior. The judge did so on three grounds, none of which had been advanced at trial on behalf of the estate of Charles senior given that the only issue which had been advanced was that the issue of limitation was *res judicata*.

46. First, at para 36, the judge held that the limitation period did not begin to run until 21 November 2003, when the Conveyance from Eddison to Denise had been lodged at the Registry of Deeds, since “[m]ere occupation [of the Property by Denise] did not, by itself, connote ownership.” Therefore, 12 years had not elapsed when the counterclaim was filed on 10 August 2015.

47. Secondly, at para 37, the judge referred to the evidence that in September 2003 “Barbara, Eddison’s agent by power of attorney, sought to mislead [Pearl and Charles junior], through their mother/guardian, Yvette, that the [Property] had been left to Charles [senior’s] sisters.” Relying on that evidence, the judge held that there had been deliberate concealment by Barbara and Eddison of the fact “that Charles [senior’s] interest in the Property had been sold to Denise by Eddison.” The judge then identified the earliest date on which this fact, namely the sale to Denise, could with reasonable diligence have been discovered. He stated that “[n]o one could have become aware ... that the transaction took place until the recording of the conveyance in November 2003.”

48. Thirdly, at para 38, the judge relied on section 30 of the Limitation Act which provides that:

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

The judge held that the claim by the estate of Charles senior could “be described as a recovery of land claim” and therefore “there would be no accrual of time between the death of Charles [senior] and the grant of letters of administration. Time in relation to the counterclaim would therefore not start to run until the grant of letters of administration on 8 July 2015.”

49. By his order, the judge granted a declaration that Denise holds the Property jointly for herself and for the estate of Charles senior as trustee. He ordered Denise to convey an undivided half interest to the estate of Charles senior and to account to the estate for 50% of the income derived from leasing the Property from 2011 to 2013, less a proportion of the cost of renovations. The judge also held that as Pearl and Charles junior had not been appointed as administrators of the estate of Charles senior when they went into occupation of the Property between 15 June 2015 and 8 July 2015, they were liable in trespass to Denise for their occupation of the Property over that period. The judge awarded Denise damages of \$250 in respect of that trespass.

*(c) The judgment of the Court of Appeal*

50. Denise appealed against the judge’s order. The Court of Appeal (Isaacs, Jones and Evans JJA), in a comprehensive and detailed judgment delivered by Evans JA on 7 October 2019, with which the other justices agreed, dismissed the appeal.

51. The Court of Appeal held, at para 40, that “[s]ection 22(1) of the Administration of Estates Act is not difficult to understand; it clearly restricts the power of a personal representative to sell property to where it is necessary for the payment of debt or to facilitate the distribution of the assets of the estate.” The sale could not have been for the purpose of the payment of the debts of the estate of Pearl Leona Moxey as there were no such debts. In relation to the purpose of distribution of the assets of the estate of Pearl Leona Moxey, the Court of Appeal observed that section 22(1) required that the persons entitled to the property proposed to be sold must be consulted, provided they are of full age. The issue which arose was whether, where there are persons not of full age, the personal representative could ignore the obligation to consult them prior to selling for the purpose of distribution. The Court of Appeal concluded, at para 41, that:

“[It] could not have been the intention of Parliament that the interests of minors would be completely ignored when

properties to which they have an interest is being sold. It seems to [us] that a personal representative would be required to seek the approval of the court or, at minimum, the approval of the parents or guardian of the minor in question.”

As no such approval had been sought, the Court of Appeal held that the judge was correct to find that Eddison, as the executor of the estate of Pearl Leona Moxey, did not have the power to sell the undivided one-half interest in the Property which had been devised to Charles senior by the Will.

52. In relation to the limitation period, at para 70, the Court of Appeal agreed with “the finding of the learned judge that on the evidence, the earliest that [Pearl and Charles junior] would have been aware that [Denise] was laying claim to the subject property was November 2003 when the conveyance was recorded.” Therefore, the Court of Appeal agreed “with the judge’s finding that the [claim by the estate of Charles senior] was brought within the limitation period.”

#### **4. The relevant statutory provisions and legal principles**

53. Section 16(3) of the Limitation Act 1995, in so far as relevant, provides:

“No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person ....”

54. Denise went into occupation of the Property on 8 May 2003 with an intention to possess the Property to the exclusion of all other persons. The action, by way of counterclaim, by the estate of Charles senior to recover possession of the Property based on a half share in it was filed on 10 August 2015. Therefore, the action by the estate of Charles senior is statute-barred unless it can avail itself of an exception. The relevant exception for the purposes of these proceedings is “deliberate concealment” within section 41(2) of the Limitation Act.

55. Section 41(2) of the Limitation Act 1995, read with section 41(1), provides:

“ (2) ... where in the case of [an action for which a period of limitation is prescribed by this Act] any fact relevant to the plaintiff’s right of action has been deliberately concealed from the plaintiff by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the defendant’s

concealment of the fact in question or could with reasonable diligence have discovered it.”

56. The Board makes several observations in relation to the exception of deliberate concealment in section 41(2) of the Limitation Act 1995.

57. First, the concealment must be in relation to “any fact relevant to the plaintiff’s right of action.” As explained in *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679 (“*Potter*”), at para 96, the right of action must refer to the right of action asserted by the plaintiff in the proceedings before the court, and a “fact relevant to the plaintiff’s action” means a fact without which the cause of action is incomplete.

58. Secondly, the deliberate concealment must be by “the defendant”. However, “the defendant” is given an extended meaning by section 41(6) which provides that:

“(6) References in this section to the defendant include reference to the defendant’s agent and to any person through whom the defendant or the defendant’s agent claims.”

Accordingly, deliberate concealment is not restricted to deliberate concealment by the defendant in person but rather can be deliberate concealment by the defendant’s agent or, for instance, by any person through whom the defendant claims.

59. Thirdly, the equivalent phrase “the defendant or his agent or of any person through whom he claims or his agent” in section 26 of the Limitation Act 1939 was considered by the Court of Appeal in England and Wales in *Eddis v Chichester Constable* [1969] 2 Ch 345. In arriving at the true construction of that phrase, Lord Denning MR, at pp 356-357, referred to section 31(4) of the Limitation Act 1939 which stated that:

“A person shall be deemed to claim through another person, if he became entitled by, through, under, or by the act of that other person to the right claimed, ....”

Section 2(4) of the Limitation Act 1995 is the equivalent subsection in that Act to section 31(4) of the Limitation Act 1939. In so far as relevant, section 2(4) provides:

“A person shall be deemed to claim through another person if the person become entitled by, through under or by the act of that other person to the right claimed ....”

Lord Denning stated that he “read [section 31(4) of the Limitation Act 1939] as meaning that a person is deemed to claim property through another person, *if he derives his title to the property from that person.*” (Emphasis added). He considered that this interpretation of section 31(4) of the Limitation Act 1939 was in accord with the interpretation placed upon section 26 by Danckwerts J in *Baker (G L) Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216, 1223. The same conclusion can be reached in relation to section 41(2) of the Limitation Act 1995 read with section 2(4).

60. Fourthly, a claimant relying on section 41(2) of the Limitation Act 1995 “must prove the facts necessary to bring the case within the paragraph”: see *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384 (“*Cave*”) at para 60, *Potter* at para 68 and *Paragon Finance Plc v D B Thakerar & Co* [1999] 1 All ER 400, (“*Paragon*”) at para 418.

61. Fifthly, the standard of proof is the usual balance of probabilities standard, and inferences can be drawn from suitable primary facts: see *Potter* at para 68.

62. Sixthly, the onus on the claimant in relation to section 41(2) is to establish the elements of both deliberateness and concealment: see *Potter* at para 97.

63. Seventhly, as a matter of ordinary English, the verb “to conceal” means to keep something secret, either by taking active steps to hide it, or by failing to disclose it: see *Potter* at para 65. A person who hides something can properly be described as concealing it, whether or not there is an obligation to disclose it: see *Potter* at para 98. Therefore, section 41(2) of the Limitation Act 1995 should not be read as containing a requirement that the concealment must be in breach of either a legal duty, or a duty arising from a combination of utility and morality: see *Potter* at para 104.

64. Eighthly, for a fact to be “deliberately concealed from the plaintiff” for the purposes of section 41(2), whether the concealment is by way of a positive act or by a withholding of relevant information, the concealment must be an intended result: see *Potter* at para 70. For concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to: see *Potter* at para 77. To establish that the defendant had “deliberately” concealed a fact which was relevant to the claimant’s right of action, it is not necessary to show that the defendant was aware of the relevance of the fact to the right of action: see *Potter* at paras 48, 80, 105 and 129. Knowledge is both actual and can on occasions be constructive on the basis of wilful blindness: see *Potter* at paras 48, 106 and 129. “Deliberately” does not mean

recklessly: see *Potter* at para 108. Proof of an intention to conceal, particularly where an omission rather than a positive act is relied on, is often very difficult: see *Potter* at para 77. Section 41(3) of the Limitation Act 1995 can assist in overcoming this difficulty. Section 41(3), in so far as relevant, provides that "... deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach of duty." However, the estate of Charles senior has not relied on section 41(3) of the Limitation Act 1995.

65. Ninthly, the period of limitation will begin to run when the claimant has discovered the defendant's concealment of the fact in question or *could* with reasonable diligence have discovered it. In *Paragon*, Millett LJ gave what the Supreme Court called "[a]uthoritative guidance" (see *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2022] AC 1, para 203) about reasonable diligence in the context of the fraud exception to the running of the limitation period. Millett LJ, at page 418, stated:

"The question is not whether the Plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take." (Emphases in the original).

The principles are the same in the context of the exception of deliberate concealment: see *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501, [2021] QB 1183, para 46.

## **5. Application of the statutory provisions and legal principles to determine whether the counterclaim by the estate of Charles senior is barred by the expiry of the limitation period**

66. The judge held that "[m]ere occupation [of the Property] did not, of itself, connote ownership." The Board agrees that "mere" occupation of the Property is insufficient to establish adverse possession of it by Denise. Rather, Denise must also establish "an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title": see *Buckinghamshire County Council v Moran* [1990] Ch 623, 643. The required intention is to possess. There is no requirement to establish an intention to own or even an intention to acquire ownership: see *Buckinghamshire County Council v Moran* at p 643 and *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419, paras 42 and 43. The judge's statement

that “[m]ere occupation [of the Property] did not, of itself, connote ownership” on one view suggests he considered it was necessary for Denise to establish an intention to own the Property before she could establish that she was in adverse possession of it. If so, then the judge was in error and the first ground, see para 46 above, relied on by the judge for finding in favour of the estate of Charles senior in relation to the issue of limitation was incorrect.

67. As the Board has indicated, Denise went into open and exclusive possession of the Property on 8 May 2003. The counterclaim by the estate of Charles senior is statute-barred unless it can avail itself of an exception to the running of the 12-year limitation period. The relevant exception is “deliberate concealment” within section 41(2) of the Limitation Act.

68. In addressing the exception of deliberate concealment, the judge was hampered by the failure, by counsel representing the estate of Charles senior, to advance any positive case in relation to this issue instead of making the elementary error of asserting that the interlocutory judgment of 25 January 2016 created a *res judicata*. The Board is restricted to the factual findings made by the judge. If based on those findings the Board allows the appeal, it does so with express regret given the deplorable way in which Pearl and Charles junior have been treated by their relatives and the real concern that further facts favourable to the estate of Charles senior could have been proved.

69. The judge held that there had been deliberate concealment by *Barbara* and *Eddison* of the fact “that Charles [senior’s] interest in the Property had been sold to Denise by Eddison.” The judge then identified the earliest date on which this fact, namely the sale to Denise, could with reasonable diligence have been discovered. He stated that “[n]o one could have become aware ... that the transaction took place until the recording of the conveyance in November 2003.” The judge’s reasoning was upheld by the Court of Appeal: see para 52 above. The Board makes two points in relation to that analysis.

70. First, the judge and the Court of Appeal, with all respect to them, were in error in characterising the fact that the Property was purportedly conveyed to Denise by the estate of Pearl Leona Moxey as a “fact relevant to the plaintiff’s right of action” within section 41(2) of the Limitation Act 1995. It is not a fact that Pearl and Charles junior needed to know in order to plead the claim on behalf of the estate of Charles senior. Rather, they needed to know that: (a) Denise was in possession of the Property with an intention to exclude all other persons; and (b) the estate of Charles senior was beneficially entitled to a tenancy in common in fee simple in the Property. For the purposes of the exception of deliberate concealment, it matters not whether the fact of the Conveyance was concealed or when it was or could with reasonable diligence have been discovered. Therefore, the judge and the Court of Appeal were in error in holding that the limitation period did not begin to run until November 2003. The judge’s finding



in favour of the estate of Charles senior in relation to limitation, see para 47 above, on this second ground was incorrect.

71. Secondly, the finding of the judge was that there had been deliberate concealment of the Conveyance by both *Barbara* and *Eddison*. The judge did not find deliberate concealment by Denise who claimed title to the Property by adverse possession. In relation to Denise's claim to title by adverse possession, she was the sole "defendant" to the counterclaim brought by the estate of Charles senior. Section 41(2) of the Limitation Act 1995 requires concealment by the "defendant." Section 41(6) provides an extended definition of a "defendant" to include concealment by "the defendant's agent" or by "any person through whom the defendant ... claims." In relation to Denise's claim to title to the Property by adverse possession she relies solely on her own occupation of the Property. She does not make a claim by adverse possession through Barbara or Eddison or through any other person. Therefore, that part of the extended definition of "the defendant" in section 41(6) of the Limitation Act 1995 does not assist the estate of Charles senior. Therefore, on the facts of this case, the deliberate concealment must be by Denise or by her agent. Deliberate concealment by Barbara or by Eddison is insufficient unless they are Denise's agents. The judge did not find that either Barbara or Eddison was an agent for Denise.

72. The third ground relied on by the judge was that, by virtue of section 30 of the Limitation Act 1995, time did not start to run until the grant of letters of administration to Pearl and Charles junior on 8 July 2015: see para 48 above. Section 30 deals with the fact that, whereas executors take office at the moment of the testator's death, administrators do not take office until they are appointed by the court. Section 30 provides that, for the purposes of limitation in relation to actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. Properly construed, the effect of this provision is not to postpone the running of time where a person dies intestate until letters of administration have been granted, as the judge thought. It is to deem any administrator to have been appointed at the date of death, so that time runs in the same way against a deceased person's estate regardless of whether an executor or an administrator is appointed. The judge was therefore in error in holding that the limitation period did not begin to run until 8 July 2015 and his third ground for finding in favour of the estate of Charles senior in relation to issue of limitation was also incorrect.

73. None of the three grounds relied on by the judge for finding in favour of the estate of Charles senior in relation to the issue of limitation is correct. Having so decided, the Board has considered whether the issue of limitation can be decided in favour of the estate of Charles senior on an alternative basis.

74. For the estate of Charles senior to succeed in relation to limitation based on concealment, it has to establish deliberate concealment by Denise or by her agent from those entitled to the estate of Charles senior of either: (a) the fact that Denise was in possession of the Property with an intention to exclude all other persons; or (b) the fact that the estate of Charles senior was beneficially entitled to a tenancy in common in fee simple in the Property. The burden of proof is on the estate of Charles senior to establish deliberate concealment of either of those facts: see para 62 above. The burden of proof is also on the estate of Charles senior to establish that those entitled to the estate could not with reasonable diligence have discovered either of the facts: see para 65 above.

75. The fact that Denise was in occupation of the Property with an intention to exclude all other persons as from 8 May 2003 was not concealed by Denise or by anyone. Rather, Denise was in open occupation of the Property, the locks to the Property had been changed, and Pearl and Charles junior, together with their mother Yvette, were excluded from the Property.

76. The only fact that was potentially deliberately concealed from those entitled to the estate of Charles senior was that the estate was beneficially entitled to a tenancy in common in fee simple in the Property.

77. The judge found that Barbara had positively acted to conceal from Pearl and Charles junior the fact that the estate of Charles senior was entitled to a half share in the Property when Barbara informed Yvette that the Property had been left to “the sisters.” The judge also found that Barbara’s concealment of this fact was deliberate. However, that was not a finding that Denise had deliberately concealed this fact nor that Barbara, in deliberately concealing this fact, was acting as Denise’s agent.

78. The judge did not find any *positive* concealment by Denise, or her agent, from Pearl and Charles junior, of the fact that the estate of Charles senior was entitled to a half share in the Property. Therefore, to avail itself of the concealment exception, the estate of Charles senior has to rely on an omission to inform Pearl or Charles junior either by Denise or by her agent, rather than a positive act of concealment.

79. The judge found that Denise knew that the estate of Charles senior was interested in a half share in the Property. However, a finding that Denise knew that the estate of Charles senior was interested in a half share in the Property is not a finding that she deliberately concealed that fact from those entitled to the estate. For concealment of that fact to be deliberate, Denise must have considered whether to inform Pearl and Charles junior of the fact and decided not to. The judge was not asked to and did not make any such finding.

80. The question then becomes whether the fact that the estate of Charles senior was beneficially entitled to a tenancy in common in fee simple in the Property was deliberately concealed by any agent of Denise. The judge found that Mrs Francis-Butler was acting as an agent for Denise and that Mrs Francis-Butler was “fully aware that the Estate of Charles senior, which ought to have been represented by his children, were interested in a half share of the Property.” However, a finding that the attorney knew that the estate of Charles senior was interested in a half share in the Property is not a finding that the attorney, as Denise’s agent, deliberately concealed that fact from those entitled to the estate. For concealment of that fact to be deliberate, the attorney must have considered whether to inform Pearl and Charles junior of the fact and decided not to. The judge was not asked to and did not make any such finding.

81. The judge’s factual findings are insufficient to establish the exception of concealment to the running of the 12-year limitation period. Therefore, the appeal in relation to the issue of limitation must be allowed.

82. The Board adds that the estate of Charles senior also faced difficulties in relation to the issue of limitation for two further reasons.

83. First, under section 41(2) of the Limitation Act 1995 the onus is on the estate of Charles senior to establish that it could not with reasonable diligence have discovered the fact that the estate of Charles senior was beneficially entitled to a tenancy in common in fee simple in the Property. The Will under which Charles senior had been devised an equal share as a tenant in common in the Property had been available for public inspection in the Registry of Deeds since 18 August 1987. The judge was not asked to find that the terms of the Will could not with reasonable diligence have been discovered by Pearl or by Charles junior given their age at the date of their father’s death. What constitutes reasonable diligence in the case of a child may be different from what constitutes the same in the case of an adult. However, the estate of Charles senior did not seek to, nor did it, discharge the onus of proving, on the balance of probabilities, that the fact that the estate of Charles senior was beneficially entitled to a tenancy in common in fee simple in the Property could not with reasonable diligence have been discovered.

84. Secondly, another difficulty faced by the estate of Charles senior was the evidence at trial that prior to his death Charles senior told Yvette that “the house was left to him [Charles senior] and his brother.” Based on this evidence, the appellant suggests that, prior to the death of Charles senior, Yvette, Pearl and Charles junior knew that the estate of Charles senior had an interest in the property and that it is not possible to conceal a fact if it is known. The judge was not asked to, nor did he, grapple with this evidence. Therefore, there are no findings of fact on this critical element of section 41(2) of the Limitation Act 1995 as to whether the fact that the estate of Charles senior

was beneficially entitled to a tenancy in common in fee simple in the Property was concealed at all.

## **6. Conclusion in relation to the issue of limitation**

85. The counterclaim brought by the estate of Charles senior was brought outside the 12-year limitation period. The judge's judgment contains insufficient factual findings to establish the concealment exception to the running of limitation period. Therefore: (a) the counterclaim is statute-barred; (b) Denise has established title to the Property by adverse possession; (c) the appeal must be allowed; and (d) Denise is entitled to a declaration that Pearl and Charles junior are not entitled to occupy, enter, or be in possession of, and have no right, title or interest in, the Property.

## **7. Whether Denise obtained a valid title to the entire interest in the Property by the Conveyance**

86. In view of the Board's conclusion in relation to the issue of limitation, it is not necessary for the Board to decide this issue.

## **8. Overall conclusion**

87. For the reasons set out above, the Board will humbly advise His Majesty that: (a) the appeal be allowed; and (b) a declaration be made in favour of the appellant that Pearl L C Moxey and Charles J Moxey are not entitled to occupy, enter or be in possession of, and have no right, title or interest in, the Property situate at, and known as, Lot No 109 of the Boyd Subdivision in the Western District of the Island of New Providence.