HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

JEANETTE RAMONA CLAY APPELLANT

AND

MARK GREGORY CLAY & ORS RESPONDENTS

Clay v Clay [2001] HCA 9
15 February 2001
P52/2000

ORDER

1. *Appeal allowed.*

2. *First respondents to pay the costs of the appellant.*

3. *Set aside paragraphs 1, 2 and 4 of the orders of the Full Court of the Supreme Court of Western Australia made on 28 July 1999 and in lieu of paragraph 2 order that the appeal be and is hereby dismissed.*

4. *Questions of costs of the proceedings in the Full Court of the Supreme Court of Western Australia remitted to the Full Court of the Supreme Court of Western Australia to be determined in a manner consistent with the reasons for judgment of this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

C J L Pullin QC with M H Zilko for the appellant (instructed by Durack & Zilko)

M G Clay for the first-named first respondent and first-named second respondent (appeared in person) and appeared for the second and third-named first respondents

No appearance for the second and third-named second respondents

CATCHWORDS

Clay v Clay

Equity – Fiduciary duty – Guardian of infant children purchased asset at market value from unadministered estate of infants' deceased father – Children were residuary beneficiaries of that unadministered estate – Children sought rescission of sale 21 years later – Whether claim barred by *Limitation Act* 1935 (WA) – Whether guardian a trustee of an "express trust" – Whether guardian in breach of fiduciary duty in making purchase.

Equity – Express trust – Whether fiduciary in whom title is not vested is an "express trustee" of property.

Words and phrases – "express trust".

Age of Majority Act 1972 (WA), s 5.
Guardianship of Children Act 1972 (WA), s 10(1).
Limitation Act 1935 (WA), s 47.
Supreme Court Act 1935 (WA), s 25(2).
Trustees Act 1962 (WA).

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. This is an appeal from the Full Court of the Supreme Court of Western Australia (Wallwork, Owen and Parker JJ)[1]. The Full Court allowed in part an appeal against the dismissal by White J of an action against the present appellant, and granted relief which the appellant disputes in this Court. The appellant seeks the restoration of the orders of White J and an order that the appeal to the Full Court be dismissed.

2 The litigation has arisen from disputes between members of the Clay family and it is necessary to outline some matters of family history.

The estate of Mr James Clay

3 James Edward Carter Clay, whom we shall identify as Mr James Clay, was twice married. The children of the first marriage were Paul James Clay, born in 1954; Moira Helen Clay, born in 1956; and Mark Gregory Clay, born in 1957. They are the first respondents to the present appeal and Mr Mark Clay appears for himself and his siblings. After the death of his first wife, Mr James Clay married again. His second wife, Jeanette Ramona Clay (whom we shall identify as Mrs Clay), is the appellant. There was one child of the second marriage, Jeanette Simone Clay, born in 1964; she is not a party to the present litigation.

4 Mr James Clay died on or after 20 November 1970. The date of his death may now be given with some certainty, but this was not apparent at the time. Mr James Clay disappeared while flying a light aeroplane and the wreckage was not discovered for several years thereafter. On 4 September 1972, the Supreme Court of Western Australia in its probate jurisdiction and upon the application of Mr David Merritt Speed of the firm of Muir Williams Nicholson & Co, Solicitors of Perth, granted leave to swear that the death of Mr James Clay occurred on or after 20 November 1970 near Coolangatta in Queensland. On 10 October 1972, the Supreme Court granted to Mr Speed probate of the will of Mr James Clay made on 17 October 1969. Mr Speed was one of the executors named therein; the other was Norfolk Estates Limited ("Norfolk Estates") which did not have power under the laws of Western Australia to act as executor.

5 By cl 3 of the will, Mr James Clay devised and bequeathed his estate upon trust for sale with power to postpone. The estate was to be held upon trust for

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1 *Clay v Clay* (1999) 20 WAR 427.

such of Mr James Clay's children who survived him and attained the age of 25 years. They were to take in equal shares as tenants in common (cl 4). Paragraph (a) of cl 5 conferred a power to make advancements to Mrs Clay of up to $20,000 in each year from Mr James Clay's death, with a power under par (b) to appropriate out of corpus the sum of such advancements in exoneration of the residue of the estate. Clause 5 also conferred powers to apply corpus for the education, maintenance or other benefit or advancement of the children (par (d)), to divide in specie the assets of the estate (par (e)), and to maintain existing investments and to vary, transpose or enlarge them (par (g)). The power conferred by cl 5(d) was to apply for the children income and amounts up to one half of the corpus to which any child was entitled in expectancy.

6 Immediately before his death, Mr James Clay's four children were living with him and Mrs Clay as members of the one family at a residential property in Claremont known as 24 Queenslea Drive ("Queenslea Drive"). This had been Mr James Clay's family home during at least the latter years of his first marriage and was the family home during the second marriage until his death. At the time of Mr James Clay's disappearance a house was under construction at Jutland Parade, Dalkeith, and Mrs Clay and the four children later moved there; it appears that, for financial reasons, Jutland Parade could not be retained and it was sold by the estate. The family moved back to Queenslea Drive. It is still the home of Mrs Clay.

7 On 7 March 1973, Mr Speed, as executor and trustee of the estate of Mr James Clay, executed a transfer of Queenslea Drive to Mrs Clay for a consideration of $45,000. The instrument of transfer was dated 7 March 1973 and registered on 21 May 1973. It is this transfer and the retention of Queenslea Drive by Mrs Clay that give rise to the issues now before this Court. It should be noted immediately that the Full Court held that, on the evidence, the trial judge was entitled to be satisfied that the $45,000 consideration paid to Mr James Clay's estate by Mrs Clay was the market value of Queenslea Drive; it followed that the estate had not suffered any loss by reason of the sale[2]. Nevertheless, the Full Court went on to conclude that Mrs Clay had acquired Queenslea Drive in 1973 in breach of her fiduciary duty as guardian of her three stepchildren and that, despite the lapse of time before the institution of the litigation, the action against her was not statute barred[3].

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2 (1999) 20 WAR 427 at 443.

3 (1999) 20 WAR 427 at 458-459, 460-461.

8 At the time of her acquisition of Queenslea Drive, there was no doubt, in respect of at least three of the four children, that Mrs Clay was their guardian. Section 10(1) of the *Guardianship of Children Act* 1972 (WA) ("the Guardianship Act") stated:

> "Subject to the provisions of this Act, a surviving parent shall be the guardian of a child, either alone or jointly with any guardian appointed by a deceased parent or by the Court."

The effect of the definition of "child" in s 4 was that that term meant any boy or girl under the age of 18 years and, in relation to the parties to a marriage, included any child of either party accepted as one of the family by the other party. Mr Paul Clay had attained his majority when he turned 18 years on 7 December 1972, that is to say before the date of the transfer of Queenslea Drive. The reduction of the age of majority to 18 by s 5 of the *Age of Majority Act* 1972 (WA) had been effective upon the commencement date of 1 November 1972. Nothing in the litigation appears to have turned upon the further circumstance that the Guardianship Act was enacted just two years after the death of Mr James Clay. The Full Court said[4]:

> "There can be no doubt that Mrs Clay became the guardian of the four children at the time of the death of Mr Clay, ie her husband and their father. That was so both at common law and by statute."

9 On the petition of Mr Speed, and upon satisfaction that the estate of Mr James Clay was insolvent, on 8 August 1974 Burt J of the Supreme Court of Western Australia, in the exercise of federal jurisdiction invested by the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act"), ordered under s 247 of that statute that the estate of Mr James Clay be administered in bankruptcy. By force of s 249 of the Bankruptcy Act[5], "the divisible property" of the estate vested in the Official Receiver in Bankruptcy and was divisible amongst the creditors of Mr James Clay and the estate in accordance with the Bankruptcy Act. The expression "the divisible property" included the capacity to take proceedings for exercising all such powers in, over, or in respect of, Queenslea Drive as, on

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4 (1999) 20 WAR 427 at 436.

5 Section 249 was amended by s 141(1) of the *Bankruptcy Amendment Act* 1980 (Cth), but the effect of s 141(2) was that the section in its previous form continued to apply to the estate of Mr James Clay.

8 August 1974, might have been exercised by Mr Speed as executor for the benefit of the estate. Section 248(1) applied to the administration in bankruptcy various other provisions of the Bankruptcy Act, including s 127. The litigation has been conducted on the footing that, on 8 August 1994 (20 years after the date of order of Burt J), the effect of s 127 and s 248(3) was that "the divisible property" of the estate was deemed to be vested in the trustees of the estate and that no claim to it thereafter might be made under the bankruptcy laws. However, to the extent that "the divisible property" that was so vested in the trustees of the estate comprised the taking of proceedings by them to rescind the transfer of Queenslea Drive, the trustees would have to meet any statute of limitations under the law of Western Australia which might properly be pleaded against them by Mrs Clay.

10 In 1984, Mr Speed had been convicted of trust account defalcations and in 1985 he had been struck off the roll of legal practitioners. He died in 1992. By his last will, Mr Speed appointed Mr Noel Speed the executor of his estate. By deed dated 14 May 1993, Mr Noel Speed appointed Mr Mark Clay and Mr Andrew Roberts trustees of the estate of Mr James Clay. Thereafter, on 19 August 1993, probate of Mr Speed's estate was granted to Mr Noel Speed. The primary judge later found that, at any material time, Mr Speed had been the only trustee of the estate of Mr James Clay, and the Full Court did not disturb that finding. However, by deed dated 1 December 1993, Norfolk Estates purported to appoint Mr Mark Clay and Mr Roberts as trustees of the estate of Mr James Clay and to retire. By a further deed of the same date, Mr Mark Clay and Mr Roberts appointed the second respondents (Mr Mark Clay, Mr T C Edwards and Delta Consulting Australia Pty Ltd) the new trustees of the estate of Mr James Clay; the deed also provided for the retirement of Mr Roberts. Thus it was in the second respondents that on 8 August 1994 the divisible property was deemed by s 127 of the Bankruptcy Act to be vested.

The litigation

11 Thereafter, the second respondents (as first plaintiffs) and the first respondents (as second plaintiffs) brought against Mrs Clay an action in the Supreme Court of Western Australia (No CIV 2167 of 1994). The action was tried by White J in 1997 and the claim by the plaintiffs was dismissed. The second plaintiffs, that is to say Mr Mark Clay, his brother Paul and sister Moira, then appealed to the Full Court, joining Mrs Clay and the trustees, the previous first plaintiffs, as second respondents.

12 In the Statement of Claim, the relief sought fell into two categories. The first comprised an order setting aside the purchase of Queenslea Drive by

Mrs Clay, and an order that she convey it to the first plaintiffs, the trustees of the estate of Mr James Clay, with a declaration that she held Queenslea Drive as constructive or express trustee for that estate. In the second and alternative category, the relief sought was a declaration that Mrs Clay held three of four undivided shares in Queenslea Drive as express trustee one for each of her stepchildren, the second plaintiffs, with an order that she convey those undivided interests to them. In the Full Court, the first category of relief, involving the rescission of the purchase and reconveyance of Queenslea Drive to the trustees, was not pressed; it was submitted that, because only three of the four of Mr James Clay's children were parties, the appropriate remedy was a trust in respect of three of four quarter shares in Queenslea Drive[6]. Mrs Clay did not plead any one or more of laches, acquiescence and delay to these claims. However, she did plead that the right of action of the plaintiffs was barred by the provisions of the *Limitation Act* 1935 (WA) ("the Limitation Act").

13 The Full Court allowed the appeal in part. Save as it provided in its order 1, the Full Court dismissed the appeal. The substance of order 1 is set out in par 1.1. This states:

> "With effect from 1 May 1973, [Mrs Clay] holds and has held [Queenslea Drive] on trust:–
>
> 1.1.1 as to one undivided fourth share for [Mark Gregory Clay];
>
> 1.1.2 as to one undivided fourth share for [Paul James Clay]; and
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> 1.1.3 as to one undivided fourth share for [Moira Helen Clay],
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> subject to a charge in favour of [Mrs Clay] over each of those three undivided fourth shares for payment of one quarter of the Allowance (as defined in paragraph 1.2 of this Order)."

The term "the Allowance" was defined in par 1.2 as to mean the $45,000 purchase price with simple interest thereon at the judgment rate from 1 May 1973 up to the date of delivery by the Full Court of its reasons on 7 May 1999, together with any net increase in the current market value of Queenslea Drive at 7 May 1999 attributable to the combined effect of various improvements made to Queenslea Drive by Mrs Clay and defined as "the Changes". Upon payment in cash of three-quarters of the Allowance to Mrs Clay by Mark Clay, Paul Clay

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6 (1999) 20 WAR 427 at 435.

and Moira Clay, Mrs Clay was to convey to each of them an estate in fee simple as to one undivided fourth share in Queenslea Drive (par 1.5). Mrs Clay was to be entitled to exclusive use and occupation of Queenslea Drive from 7 May 1999 until 7 December 1999 (par 1.6). Upon expiration of that period, Queenslea Drive was to be sold and the net proceeds of sale distributed between Mrs Clay and her three stepchildren in equal shares (par 1.10).

14 The complex terms of order 1 were indicative of the great difficulty of achieving an accounting between Mrs Clay and the stepchildren which was fair between them, on the assumption of breach of fiduciary duty by Mrs Clay, given her residence at Queenslea Drive over a period of 20 or so years before the commencement of this prolonged and expensive litigation, and the other circumstances of the estate and the parties.

15 The determinative passages in the reasoning of the Full Court which led it to make order 1 are as follows[7]:

> "With some hesitation, in the end it appears that the preferable view is to recognise in this case that by acquiring Queenslea Drive from Speed Mrs Clay had placed herself in a position that there was a sufficient risk that her personal interest in acquiring and retaining Queenslea Drive might impede the faithful performance of her duty as guardian to watch out that Speed duly administered the estate, as to constitute the acquisition of Queenslea Drive a breach of her fiduciary duty as guardian.
>
> …
>
> It is necessary, therefore, to consider whether relief may be granted to the [stepchildren] for the breach of duty thus identified, despite the passage of time, ie whether the limitation provisions may be called in aid by Mrs Clay."

Their Honours concluded that the claim by the stepchildren was not statute barred because it "can now be seen to be founded in the breach of the express trust constituted by s 10 of the [Guardianship Act]"[8].

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7 (1999) 20 WAR 427 at 458-459.

8 (1999) 20 WAR 427 at 460.

16 These conclusions respecting the existence of an express trust and the consequent inapplicability of any limitation statute are challenged by Mrs Clay in this appeal. She does so by the following steps.

Limitation bars and trusts

17 The breach of the express trust, if such trust existed, occurred in 1973 at a time when Mrs Clay was in possession of Queenslea Drive. Section 4 of the Limitation Act provides that "[n]o person shall … bring an action to recover any land … but within twelve years next after the time at which the right … to bring such action, shall have first accrued to some person through whom he claims". The term "Land" is defined in s 3 as including all corporeal hereditaments whatsoever, and any share, estate, or interest in any of them. The term "Action" is defined in the same provision as including a civil proceeding commenced in the Supreme Court of Western Australia by writ or in such other manner as may be prescribed by the Rules of Court.

18 Furthermore, s 24, which is modelled on s 24 of the *Real Property Limitation Act* 1833 (UK) ("the Real Property Limitation Act"), states:

> "No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he claims therein in equity."

19 The relief sought by the trustees of the estate of Mr James Clay (the first plaintiffs at trial) included an order that Mrs Clay convey Queenslea Drive to them. The relief sought by the stepchildren, the second plaintiffs and present first respondents, in the alternative to that sought by the trustees, included an order that Mrs Clay, as express trustee, convey to each of the three of them one undivided fourth share in Queenslea Drive. To all this relief, the 12 year period specified in s 4 applied either directly or indirectly by reason of the operation of s 24.

20 Section 16 of the Limitation Act provides that a person who is an infant at the time at which a right of action to recover any land shall have first accrued may, notwithstanding that the limitation period of 12 years has expired, bring an action to recover such land "at any time within six years next after" attaining majority. Paul Clay turned 18 on 7 December 1972, Moira Clay on 20 January 1974 and Mark Clay on 5 June 1975. Counsel for Mrs Clay correctly submitted

that, even on the construction of the section which was most favourable to the stepchildren, the extended limitation period effected by the extension under s 16 expired for the youngest of the three in 1993[9]. The litigation by the three siblings against Mrs Clay was instituted in 1994, on any view outside the period permitted by the limitation provisions.

21 In respect of the litigation instituted by the stepchildren, did any different result obtain by reason of the circumstance that relief was sought against Mrs Clay as express trustee of Queenslea Drive for the undivided interests claimed by them?

22 Two statutes of Western Australia particularly are material. The first is the *Supreme Court Act* 1935 (WA) ("the Supreme Court Act"). This reproduced, but in some respects in an expanded form, various provisions of the *Supreme Court Act* 1880 (WA)[10]. Sections 7 and 8 of the 1880 statute had copied respectively ss 24 and 25 of the *Supreme Court of Judicature Act* 1873 (UK) ("the Judicature Act"). Section 25 of the Judicature Act dealt with the jurisdiction of the new High Court of Justice, consequent upon the union of the pre-existing courts of common law, equity, admiralty, divorce and probate. Section 25(2) stated:

> "No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

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9 The youngest stepchild (Mark Clay) attained his majority in 1975. This construction involves the counting of the 12 years to commence only on the attainment of majority, with the addition to that 12 years of another six years. Another construction of s 16 which may more closely follow its text clearly would operate against the stepchildren. On this construction, s 16 does not provide an extension of time where the six year period after the attainment of majority would have expired within the regular limitation period of 12 years. That 12 year period commenced with the accrual of the cause of action in 1973, when the transaction was completed, and expired in 1985. Any period of six years conferred by s 16 upon the youngest stepchild would begin when he attained his majority in 1975 and end in 1981, still within the 12 year period. It is unnecessary for the appeal to determine the correct construction of s 16.

10 Section 3 of the Supreme Court Act repealed the earlier statute.

Section 25(2) of the Supreme Court Act reproduced this provision, save for the addition of the introductory words "[e]xcept as provided by the Trustee[s] Act 1900 [WA]" ("the 1900 Act"). The 1900 Act was repealed by s 4 of the *Trustees Act* 1962 (WA) ("the 1962 Act"); s 13(1) of the 1900 Act was a forerunner of s 47 of the Limitation Act. It will be necessary to refer further to the significance of this statutory chain later in these reasons.

23 Section 25(2) of the Judicature Act (and thus s 25(2) of the Supreme Court Act) was designed to restate and not to alter the pre-existing law[11]. The *Statute of Limitations* 1623 (Eng) dealt with actions in what today would be classed as contract and tort; it did not operate directly upon equitable remedies but in some respects equitable remedies were barred by courts of equity by analogy to the statute[12]. However, in relation to the relationship between trustee and beneficiary, there was no apt analogy. The possession of trust property by the trustee was not for his own enjoyment, as would have been required for any safe analogy with common law causes of action, but was for the benefit of the beneficiaries[13], "with the result that time did not run in his favour against them"[14]. Furthermore, as Professor Waters has explained[15]:

> "[O]ver and beyond this technical point, the beneficiary was not only dependent upon the honesty and attentiveness of the trustee, he was also vulnerable to dishonesty and neglect on the part of the trustee, as equity courts saw it, because only in courts of equity was the beneficiary's

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11 *In re Jordison, Raine v Jordison* [1922] 1 Ch 440 at 483-484; Brunyate, *Limitation of Actions in Equity*, (1932) at 55-56; *Ashburner's Principles of Equity*, 2nd ed (1933) at 508; cf *The West Australian Trustee Executor & Agency Co Ltd v Tate & Von Pestalozzi* (1949) 51 WALR 46 at 54-56.

12 *Cohen v Cohen* (1929) 42 CLR 91 at 99-100; *Mayne v The Public Trustee* (1945) 70 CLR 395 at 401-402.

13 *Hovenden v Lord Annesley* (1806) 2 Schoales and Lefroy 607 at 632-633, a judgment of Lord Redesdale LC.

14 *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408.

15 *Law of Trusts in Canada*, 2nd ed (1984) at 1015. Some changes with respect to claims in equity respecting land were made by s 24 of the Real Property Limitation Act, the progenitor for Western Australia of s 24 of the Limitation Act, to which reference already has been made.

> interest recognized. In fact the trustee had every opportunity of abusing his obligations. Consequently equity courts permitted no time to run against the trust beneficiary, and the trustee was thus denied the protection which others enjoyed."

24 In England, the law as restated in 1873 in the broad terms of s 25(2) of the Judicature Act was significantly altered by s 8 of the *Trustee Act* 1888 (UK) ("the 1888 Act"). Section 8 is the progenitor of the second statutory provision of Western Australia which is of primary importance here. This is s 47 of the Limitation Act. The intervening link in the chain in Western Australia was s 13 of the 1900 Act. The object, in broad terms, of s 8 of the 1888 Act and its derivatives was that, in general, the honest trustee should enjoy with others an ultimate freedom from the risk of litigation. It was followed in England by s 3 of the *Judicial Trustees Act* 1896 (UK) which conferred a power of curial relief in respect of breaches of trust where the trustee had acted "honestly and reasonably" and "ought fairly to be excused"[16]. The effect of s 8 of the 1888 Act was that, unless the trustee had been guilty of fraud or was still retaining the trust property or had converted it to his own use, the limitation period was to run against the beneficiary from the date when the beneficiary became vested in possession of his interest; there was no limitation protection for a trustee who retained trust property improperly at the time of the action or who had employed the trust property for his own benefit, or for the trustee who was personally guilty of fraud[17].

25 Section 47(1) of the Limitation Act states that certain paragraphs thereof are to apply:

> "[i]n any action or other proceeding against a trustee or any person claiming through him, or in reference to any trust, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was a party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use".

Section 47(3) is in the following terms:

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16 This provision, in Western Australia, is now represented by s 75 of the 1962 Act: see *Maguire v Makaronis* (1997) 188 CLR 449 at 473-474.

17 Waters, *Law of Trusts in Canada*, 2nd ed (1984) at 1016-1017.

> "For the purposes of this section the expression 'trustee' includes an executor or administrator, who for such purposes is included in the term trustee, and includes a trustee whose trust arises by construction or implication of law as well as an express trustee, and the provisions of this section relating to a trustee shall apply as well to several joint trustees as to a sole trustee."

One of the provisions stated in s 47(1) as applying in the stated circumstances is spelled out in par (a). This states:

> "All rights and privileges conferred by this Act or any statute of limitations shall be enjoyed in the like manner and to the like extent as would have been the case if the trustee or person claiming through him had not been a trustee or person claiming through him."

26 It is significant for present purposes that in s 47(3) the term "trustee" is defined as including an "express trustee". Further, the rights and privileges conferred by the Limitation Act or any other statute of limitations which otherwise were to be enjoyed by trustees do not apply, as s 47(1) states, where the claim "is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use".

27 On the hypothesis under consideration, those terms would apply to Mrs Clay if, in respect of Queenslea Drive, she is an "express trustee" within the meaning of the definition in s 47(3) of the Limitation Act. As indicated above, the Full Court decided that Mrs Clay was an "express trustee" in the relevant sense because she was rendered an "express trustee" by the operation of s 10 of the Guardianship Act.

Express trustee

28 Several questions had to be answered in order for the Full Court to reach its conclusion adverse to Mrs Clay. The first was whether s 10 of the Guardianship Act rendered Mrs Clay a trustee in the accepted sense of that term. The second, assuming an affirmative answer to the first, was whether the trustee of a trust constituted, not by the constitutive acts of a settlor but by force of statute, answered the description of an "express trustee" for the purposes of s 47 of the Limitation Act.

29 The Full Court said that both points had been conceded by Mrs Clay[18]. Certainly the existence of Mrs Clay's guardianship was not disputed; there may be a question which arises from the attainment of majority by Mr Paul Clay before the transaction respecting Queenslea Drive but that may be put aside until later in these reasons. Mrs Clay's counsel, who appeared at trial and in the Full Court, denied any such concession had been made. Nothing in the record before us was pointed to as stating that concession. This Court should proceed as if the issue were a live one.

30 It is convenient to turn immediately to the second point, that concerning the expression "express trustee" in the definition in s 47(3) of the Limitation Act.

31 In *Sands v Thompson*[19], Fry J construed the phrase "vested in a trustee upon any express trust" in s 25 of the Real Property Limitation Act. His Lordship said[20]:

> "My notion of an express trust is that it is a trust which has been expressed, either in writing or by word of mouth, and that it does not include a trust which arises from the acts of the parties."

The case decided that, whilst, in a loose sense, a mortgagee to whom the mortgage debt has been repaid is a trustee for the mortgagor, the equitable duty to reconvey the legal estate to the mortgagor did not render the mortgagee an express trustee within the meaning of s 25 of the Real Property Limitation Act.

32 The decision of the Privy Council in *Taylor v Davies*[21] is immediately in point. The case turned upon the construction of the Ontario equivalent of s 47 of the Limitation Act in question in this litigation, both provisions being derived from s 8 of the 1888 Act. Their Lordships held[22] that a fiduciary in whom assets

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18 (1999) 20 WAR 427 at 459.

19 (1883) 22 Ch D 614. The case was inaptly cited by the Full Court in apparent support of the proposition that s 10 of the Guardianship Act rendered Mrs Clay an express trustee: (1999) 20 WAR 427 at 459.

20 (1883) 22 Ch D 614 at 617.

21 [1920] AC 636.

22 [1920] AC 636 at 647, 650; see also the judgment of Kearney J in *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 371-372.

were not vested could not be an "express trustee" within the meaning of the section.

33 Where assets are so vested, it appears that there may be an express trust in the statutory sense, although the trust obligation is imposed not by a declaration of trust or settlement as understood in private law but by force of another statute. In *Toates v Toates*[23], the English Court of Appeal considered the effect of the *Land Transfer Act* 1897 (UK). This provided that, on death, the real estate of a deceased person, notwithstanding any testamentary disposition, devolved to and became vested in the personal representatives. It was held that this statutory regime constituted the personal representatives an "express trustee" within the meaning of s 25(2) of the Judicature Act. The 1897 statute declared that, for the purposes of such vesting, the personal representative was to hold the real estate as trustee for the persons in law beneficially entitled thereto.

34 However, in *Toates*, Warrington LJ expressed his decision in terms of present relevance for the operation of s 10 of the Guardianship Act. His Lordship said[24]:

> "The question is whether these provisions constituted the personal representative an express trustee, and to this I think there is only one answer. The Act expresses in precise terms the persons for whose benefit the legal personal representative shall hold, that is, for the persons by law beneficially entitled, whether it be the heir, in the case of an intestate, or the devisee if there be a will. It is by virtue of an instrument – namely, by Act of Parliament – that the trust is created, and there is plainly an express trust."

That returns one to the first point, the operation of s 10 of the Guardianship Act.

35 It should be accepted that a trust may arise from legislation which does not expressly so provide by, for example, using the word "trust". The decision of this Court in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*[25] indicates that this must be so. However, the mere

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23 [1926] 2 KB 30.

24 [1926] 2 KB 30 at 34.

25 (1993) 178 CLR 145 at 165-166; see also *Victoria v Sutton* (1998) 195 CLR 291 at 300 [18], 314 [68].

circumstance that, by statute, one party is placed in the position of a fiduciary to a second party does not render the first party a trustee. In *Erwin v Shannon's Brick, Tile and Pottery Co Ltd*[26], Jordan CJ rejected the submission that, because the plaintiff in an action under the *Compensation to Relatives Act* 1897 (NSW) stood in a fiduciary relation to the class of dependants for whose benefit the action was brought, the plaintiff was a trustee having the authority to compromise actions given by s 49 and s 5 of the *Trustee Act* 1925 (NSW). Jordan CJ said[27]:

> "But a person is not necessarily a trustee, whether express, implied or constructive, by reason merely of the fact that he owes fiduciary duties to others. Section 6B of the Compensation to Relatives Act would appear to be simply a machinery provision operating to enable a member of a class to sue to enforce rights to compensation vested in himself and others, not a provision which vests the substantive rights of the whole class in whoever happens to be plaintiff and gives him an incidental right to enforce these rights by action."

36 It is here that the reasoning upon which the Full Court determined the appeal breaks down. Section 10 of the Guardianship Act, whilst rendering a surviving parent the guardian of a "child" within the meaning of the definition of that term in s 4, did not render the guardian a trustee. There was, by force of the section, no vesting of any property in the guardian to be held on the terms of any trust.

The guardian as trustee

37 The law on the subject is summed up as follows in Scott and Fratcher, *The Law of Trusts*[28]:

> "A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. Like a trustee, a guardian is a fiduciary. He is not, however, a trustee in the strict sense. He is entrusted with the possession and management of his ward's property but

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26 (1938) 38 SR (NSW) 555.

27 (1938) 38 SR (NSW) 555 at 563.

28 4th ed (1987), vol 1, §7 (footnotes omitted).

> he does not take title to it. Actions against third persons with respect to the property are brought in the name of the ward, whereas trustees sue in their own names."

This possession and management extends to such matters as the giving by the guardian of a valid receipt for a legacy bequeathed to the ward and the receipt of rents and profits from assets to which the ward is entitled[29] but that, as the learned authors indicate above, does not involve the vesting of title to the ward's property in the guardian.

38 That understanding of the matter accords with what was written two centuries ago by Fonblanque[30] (in a passage approved by Lord Eldon LC in *De Manneville v De Manneville*[31]), and later by Story[32] and by Pomeroy[33]. The matter was put by Story as follows[34]:

> "[A]lthough guardianship may properly be denominated a trust in the common acceptation of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter trusts are invariably applied to property (and especially to real property) and not to persons."

Article 7 of the *Restatement of Trusts, Second*[35] tersely states:

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29 *Re Moffat* [1916] St R Qd 21 at 25-26.

30 In his revision of Ballow's work, *A Treatise of Equity*, (1793), vol 2, Bk 2, Pt 2, Ch 2, s 1, note (a).

31 (1804) 10 Ves Jun 52 at 63 [32 ER 762 at 767].

32 *Commentaries on Equity Jurisprudence, as Administered in England and America*, 13th ed (1886), vol 2, §1330.

33 *Pomeroy's Equity Jurisprudence*, 5th ed (1941), vol 4, §1097. See also Bogert, *Trusts and Trustees*, 2nd ed rev (1984), vol 1, §13.

34 *Commentaries on Equity Jurisprudence, as Administered in England and America*, 13th ed (1886), vol 2, §1330.

35 vol 1, Ch 1 (1959).

"A guardianship is not a trust."

39 It is true that in eighteenth century authorities, beginning with the judgment of Lord Macclesfield LC in *The Duke of Beaufort v Berty*[36], guardianship in socage (a common law guardianship which could arise only in the case of a legal estate[37]) and under the statute 12 Car II c 24 were said both equally to involve trusteeship. As late as 1851, in *Mathew v Brise*[38], Sir John Romilly MR held that the only basis to attract the jurisdiction of the Court of Chancery to take accounts between guardian and ward after the infant had attained majority was that the guardian "was in the nature of a trustee". In 1885, Field J put the matter somewhat more precisely in *Plowright v Lambert*, saying[39]:

> "I need not say it is familiar to everybody who practises in this division that the fiduciary relation, as it is called, does not depend upon any particular circumstances. It exists in almost every shape. It exists, of course, notoriously in the case of trustee and *cestui que trust*; it exists in the case of guardian and ward, of parent and child, of solicitor and client."

Some of the decisions were referred to without further analysis by the trial judge in *Bennett v Minister for Community Welfare*[40].

40 However, in *Countess of Bective v Federal Commissioner of Taxation*[41], Dixon J held that the obligation of a guardian "to apply moneys in the

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36 (1721) 1 P Wms 703 [24 ER 579].

37 Simpson, *A Treatise on the Law and Practice Relating to Infants*, (1875) at 192-195.

38 (1851) 14 Beav 341 at 346 [51 ER 317 at 319].

39 (1885) 52 LT 646 at 652.

40 [1988] Aust Torts Rep ¶80-210 at 68,089; decided on other grounds (1992) 176 CLR 408, but see the observations by McHugh J at 426-427.

41 (1932) 47 CLR 417.

maintenance of children or others does not involve the liability which arises from an ordinary trust"[42]. His Honour continued[43]:

> "It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees. They need not vouch the items of their expenditure, and, if they fulfil the obligation of maintenance in a manner commensurate with the income available to them for the purpose, an account will not be taken. Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness. It would defeat the very purpose for which the fund is provided, if its administration were hampered by the necessity of identifying, distinguishing, apportioning and recording every item of expenditure and vindicating its propriety … Courts of equity have not disguised the fact that the general rule gives to a parent or guardian dispensing the fund an opportunity of gaining incidental benefits, but the nature and extent of the advantages permitted must depend peculiarly upon the intention ascribed to the instrument."

This treatment of the subject by Dixon J indicates that, consistently with the view taken by Scott and other learned writers, the relationship of guardian and ward is not that of trustee and beneficiary, but is a fiduciary relationship with particular characteristics.

41 It is to be recalled that, in the past, the term "trustee" sometimes was used to describe the position of a director in relation to the company in question[44]. Such a use of the term "trustee" could at best be metaphorical because property

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42 (1932) 47 CLR 417 at 420.

43 (1932) 47 CLR 417 at 420-421.

44 *Re International Vending Machines Pty Ltd and the Companies Act* [1962] NSWR 1408 at 1419-1420; *Mulkana Corporation NL (in liq) v Bank of New South Wales* (1983) 1 ACLC 1143 at 1148-1150; 8 ACLR 278 at 283-285; Sealy, "The Director as Trustee", (1967) *Cambridge Law Journal* 83.

of the company was not vested in the directors. Again, in *Knox v Gye*[45], Lord Westbury said:

> "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee …
>
> The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration – in other words a complete trustee – holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord *Mansfield*, that nothing in law is so apt to mislead as a metaphor."

42 It also should be observed that the doctrine that no trust will be valid unless there exist the "three certainties" of words, subject-matter and object post-dated the eighteenth century cases. The requirement is generally taken to date from 1840, in the statement of principle by Lord Langdale MR in *Knight v Knight*[46]. Moreover, the distinction between trusts and powers in times past had not been clearly developed. In *Reynolds v The Lady Tenham*[47], it was said that "the appointment of a guardian is a bare power and trust". The term "power" is used in this field of discourse in the sense of "the authority to deal with or dispose of property which one does not own and which may or may not be vested in one [and] a power can exist independently of a trust"[48]. "Power" is thus apt to describe the situation whereby a guardian is entrusted with the possession and management of the property of the ward but does not take title to it.

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45 (1872) LR 5 HL 656 at 675-676.

46 (1840) 3 Beav 148 at 172-173 [49 ER 58 at 68]. See, earlier, the judgment of Lord Eldon LC in *Wright v Atkyns* (1823) Turn & R 143 at 157 [37 ER 1051 at 1056].

47 (1723) 9 Mod 40 at 42 [88 ER 302 at 303].

48 Underhill and Hayton, *Law Relating to Trusts and Trustees*, 15th ed (1995) at 20-21; see also *Thomas on Powers*, (1998) at 1-01.

43 Finally, reference was made in submissions to *Keech v Sandford*[49]. In *Chan v Zacharia*[50], Deane J explained that, while the "rule" in that case illustrates the general principle governing liability to account for personal benefit or gain, it is:

> "a rule concerned with the operation of presumptions in the application of that general principle to particular types of property. 'In the case both of leases renewable by right or custom and of leases not so renewable the renewal is prima facie considered to have been obtained by virtue of the interest' under the prior lease[51]."

Moreover, it should be noted that, whilst *Keech v Sandford* did involve an infant, the sub-lease of the market in question[52] had been devised by the sub-lessee to trustees, Sandford and Millegan, for the benefit of the infant niece of the testator. Sandford was both guardian and trustee of the infant who had a beneficial interest in the sub-lease itself which was trust property. The Lord Chancellor ordered that the renewed sub-lease be assigned to the niece who, by then, was married to Keech[53]. The case thus is no authority that guardianship alone amounts to trusteeship.

44 There are two points arising from interaction between statutes of Western Australia that should be mentioned. Section 25(2) of the Supreme Court Act commenced on 1 May 1936 whilst s 47 of the Limitation Act had commenced on 14 April 1936[54]. This reversed the order of the United Kingdom legislation whence these provisions derived. That order would indicate that s 25(2) restated

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49 (1726) Sel Cas T King 61 [25 ER 223].

50 (1984) 154 CLR 178 at 201.

51 *Griffith v Owen* [1907] 1 Ch 195 at 204 per Parker J.

52 The head lessor was the Crown; the head lessee and sub-lessor, Frost, obtained a new head lease and granted a new sub-lease to Sandford: see Paling, "The Pleadings in Keech v Sandford", (1972) 36 *The Conveyancer and Property Lawyer* (NS) 159 at 160.

53 See Cretney, "The Rationale of Keech v Sandford", (1969) 33 *The Conveyancer and Property Lawyer* (NS) 161 at 163-168.

54 (1999) 20 WAR 427 at 460.

the general law and s 47 then qualified it. The sequence of events in Western Australia, on its face, suggests a mishap whereby the revised general law was then displaced by a restatement of the general law in its pristine form. It is unnecessary here to resolve that apparent conundrum. Both laws operate by reference to an "express trust" and Mrs Clay was not trustee of any such trust. Nor is it necessary to consider another point adverted to by the Full Court. This concerns the continuing force, if any, to be given to the opening words of s 25(2) (with their reference to the 1900 Act) after the repeal of the 1900 Act by the 1962 Act[55].

45 The essential point is that no legislation operated here to displace the limitation barriers imposed by ss 4 and 24 of the Limitation Act. The submissions for Mrs Clay that the Full Court erred in basing its orders respecting Queenslea Drive on the footing that she was an express trustee by reason of the operation of s 10 of the Guardianship Act should be accepted.

Breach of fiduciary duty

46 We should add that, in any event, we do not accept the reasoning whereby the Full Court concluded that Mrs Clay acted in breach of her fiduciary duties as guardian in acquiring Queenslea Drive from the estate of her late husband to provide a home for herself and the children. It is a truism that the scope of her fiduciary duty was, to adopt the words of Mason J[56], to be "moulded according to the nature of the relationship and the facts of the case". His Honour also observed that, in some cases, "the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest … cannot be usefully applied in the absolute terms in which it has been stated"[57].

47 Further, it is as well here to bear in mind the statement by Deane J in *Chan v Zacharia*[58]:

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55 (1999) 20 WAR 427 at 460.

56 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102; see also *Maguire v Makaronis* (1997) 188 CLR 449 at 463-464.

57 (1984) 156 CLR 41 at 102-103.

58 (1984) 154 CLR 178 at 205.

> "[O]ne cannot but be conscious of the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases[59]. There is 'no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them'[60]."

48 The passage in the judgment of Dixon J in *Countess of Bective*[61], set out earlier in these reasons, illustrates the application to the relationship of guardian and ward of the points made by Mason J in *Hospital Products Ltd v United States Surgical Corporation* and Deane J in *Chan v Zacharia*. In the present case, the Full Court correctly explained[62] that, at the relevant time, the children, as residuary beneficiaries of the unadministered estate, neither beneficially owned nor had beneficial interests in Queenslea Drive[63]. This was not a case of a guardian buying either the property of the ward or the beneficial interest of the ward in property[64].

49 The result is that neither of the special rules, identified as the "self-dealing rule" and the "fair-dealing rule", applied in the circumstances of this litigation. In other respects, there has been some debate concerning the scope of these "rules" and the relationship between them[65]. Brief mention of the subject should be made.

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59 See *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 383; Cretney, "The Rationale of Keech v Sandford", (1969) 33 *The Conveyancer and Property Lawyer* (NS) 161 at 168ff; Oakley, *Constructive Trusts*, (1978) at 57ff.

60 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251 per Lord Selborne LC.

61 (1932) 47 CLR 417 at 420-421.

62 (1999) 20 WAR 427 at 454.

63 See *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312-314.

64 cf *Larnach v Alleyne* (1862) 1 WW 342; (1865) 2 WW & A'B 39.

65 See McPherson, "Self-dealing Trustees", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 135; *Lewin on Trusts*, 17th ed (2000) at 20-55ff.

50 The "self-dealing rule" is expressed in terms more stringent than the "fair-dealing rule"[66]. The "fair-dealing rule" provides that a transaction whereby the beneficial interest of a beneficiary is purchased by the trustee is not voidable *ex debito justitiae*, but may be set aside, unless the trustee can show that no advantage has been taken of the position of trustee, that full disclosure has been made to the beneficiary, and that the transaction is fair and honest. Where the trustee meets these burdens, the result is that the interest acquired by the trustee is placed beyond any claim by the beneficiary or those claiming under the beneficiary. In any event, in the present case, none of the children had any beneficial interest in Queenslea Drive to be acquired by Mrs Clay.

51 Shortly stated, the "self-dealing rule" is that the sale by the trustee of the trust property to himself is voidable by any beneficiary *ex debito justitiae*, however honest and fair the transaction and "even if [the sale] is at a price higher than that which could be obtained on the open market"[67]. This "rule" may represent the conflation of several principles. First, at common law in such circumstances the contract lacked "intrinsic validity"[68]; there was no contract which could be sued upon, the principle being "that no man can be at the same time plaintiff and defendant"[69]. Secondly, at common law, a person could not convey a freehold estate to himself, nor assign a leasehold term or other personal property, and, in general, choses in action were not assignable; attempted dispositions would be nullities at common law; however, under the Statute of

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66 *Harris v Jenkins* (1922) 31 CLR 341 at 355-356; *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503 at 511; *The Union Trustee Company of Australia Ltd v Gorrie* [1962] Qd R 605 at 614; *Tito v Waddell (No 2)* [1977] Ch 106 at 240-241; *In re Thompson's Settlement* [1986] Ch 99 at 110-111; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 894-896; *Ingram v Inland Revenue Commissioners* [2000] 1 AC 293 at 305, 310, upholding the dissenting judgment of Millett LJ [1997] 4 All ER 395 at 424-425; Ford and Lee, *Principles of the Law of Trusts*, 3rd ed (1996), §§9660-9790.

67 *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 425.

68 *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 423, 426.

69 *The People's Prudential Assurance Co Ltd v The Australian Federal Life and General Assurance Co Ltd* (1935) 35 SR (NSW) 253 at 265.

Uses a conveyance might vest a freehold estate in the conveyor[70]. Further, a distinction is to be drawn between conveyances of legal title and the overreaching of beneficial interests in the subject-matter of the conveyance. Thus, in equity, these attempted dispositions also would be breaches of trust by the trustee and would not displace or override the interests of the beneficiaries[71]. Equity would intervene to support the beneficiaries, for example, by orders for delivery up of the purported conveyance[72] and for an accounting[73].

52 In many jurisdictions, including Western Australia, statute has altered the common law rules described above. For example, s 44 of the *Property Law Act* 1969 (WA), which resembles s 24 of the *Conveyancing Act* 1919 (NSW) and s 49 of the *Property Law Act* 1952 (NZ)[74], states:

> "A person may convey property to himself or to himself and another person or persons."

Section 7 of the Western Australian statute defines property to include "real and personal property and any estate or interest therein and any thing or chose in action".

53 It appears to have been the view of Long Innes CJ in Eq[75] that the statutory changes in New South Wales left the "self-dealing rule" unaltered in its strict operation, as a particular application of the principles respecting conflict

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70 *Rye v Rye* [1962] AC 496 at 507, 511, 513; *Carson's Real Property Statutes*, 2nd ed (1910) at 603.

71 McPherson, "Self-dealing Trustees", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 135 at 148.

72 See *Bromley v Holland* (1802) 7 Ves Jun 3 at 21 [32 ER 2 at 9].

73 *Lewin on Trusts*, 17th ed (2000) at 20-57.

74 See *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503 at 512; Conacher, Note, (1962) 36 *Australian Law Journal* 45.

75 *The People's Prudential Assurance Co Ltd v The Australian Federal Life and General Assurance Co Ltd* (1935) 35 SR (NSW) 253 at 265.

between duty and interest. In New Zealand, Salmond J said[76] that the "self-dealing rule" was based on considerations of public policy and was:

> "not based on any technical considerations relative to any difficulty, real or supposed, in the way of a person transferring property to himself".

After all, the "self-dealing rule" applies to conveyances which might have been effective at common law because they were made not to the conveyor but to a nominee of the conveyor[77]. Nevertheless, there is in England some disagreement in the authorities as to those circumstances, if any, in which the "self-dealing rule" does not apply in its full stringency and the trustee may be allowed to uphold the transaction in question by meeting the more generous criteria of the "fair-dealing rule"[78].

54 It is unnecessary further to pursue questions respecting these special "rules". This is because, as pointed out above, the children neither owned Queenslea Drive beneficially nor had beneficial interests therein. The Full Court dealt with the matter on a consideration of the general principles respecting the avoidance of conflict between duty and interest.

55 The Full Court emphasised that, as the sale of Queenslea Drive had been for value, the rights of the children to due administration had not been adversely affected or destroyed by the sale[79]. Nevertheless, the Full Court described the case as "borderline … in many respects"[80]. Their Honours went on, in a passage set out earlier in these reasons, to conclude that there was "a sufficient risk" that the personal interest of Mrs Clay in acquiring and retaining Queenslea Drive might impede the discharge of her duty as guardian to see to the due administration of the estate of which the wards were residuary beneficiaries.

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76 *Robertson v Robertson* [1924] NZLR 552 at 553.

77 *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 425; McPherson, "Self-dealing Trustees", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 135 at 143-144.

78 See *Holder v Holder* [1968] Ch 353; *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503 at 511; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 894-896; *Lewin on Trusts*, 17th ed (2000) at 20-60A.

79 (1999) 20 WAR 427 at 454-455.

80 (1999) 20 WAR 427 at 458.

56 However, the better view is that there is no sensible real or substantial possibility of conflict in the necessary sense. Indeed, the Full Court itself, in an earlier passage in its reasons, pointed to the determinative considerations. The Full Court said[81]:

> "A number of factors in the circumstances of this case could provide reason for viewing the conduct of Mrs Clay as not involving a breach of the duty she owed as guardian. She dealt with the trustee who had a power of sale, not with her wards. She did not deal in property of her wards. She dealt in good faith. She paid market value and no loss accrued to the estate. The acquisition was not in breach of any duty she owed with respect to the property acquired. She was guardian by virtue of her capacity as sole surviving natural and step-parent of the wards, a very particular type of fiduciary role albeit that it may have some of the indicia of a trustee role. She may be seen to be acting at once in her [wards'] interest and her own by providing a home for her wards as well as herself, especially as Queenslea Drive offered particular emotional support for her wards, as well as herself, which would be lost to all of them if she did not acquire it."

57 To these considerations there might be added the following: that the wards had no immediate right to Queenslea Drive in specie, and that, by the time their shares in residue vested in possession, the value of their entitlement was liable to be and, indeed likely to be, in the reduced circumstances of the estate, significantly depleted by payments for the advancement of Mrs Clay under cl 5(a) and (b) of the will and for the benefit of the children under cl 5(d), perhaps supplemented by payments under the powers of maintenance and advancement conferred by ss 58, 59 and 60 of the 1962 Act[82].

58 Mrs Clay has made out her case in this Court that, in purchasing Queenslea Drive, she did not act in breach of her fiduciary duties as guardian.

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81 (1999) 20 WAR 427 at 458.

82 Clause 6 of the will directed that every distribution and advancement made in accordance with the will "shall be effected only on Norfolk Island". It is unnecessary here to consider the significance of that provision for the application of the laws of Western Australia, such as the 1962 Act.

Conclusions

59 Mrs Clay's success in this Court with her submissions respecting the statutory bar and, in any event, the absence of breach of fiduciary duty, make it unnecessary to determine further issues which were debated on the appeal. The first concerned the construction of s 50(1) of the 1962 Act. In certain circumstances this operates to make valuations made by a trustee in good faith binding on all persons beneficially interested under the trust. The second matter concerns the proposed further ground of appeal that, in any event, there could have been no conflict of duty and interest respecting Mr Paul Clay because he achieved his majority at a time before the transaction respecting Queenslea Drive was implemented.

60 The appeal should be allowed with costs. As with the unsuccessful special leave applications which were dismissed on the day of the hearing of the appeal, the first respondents to the appeal should pay the costs of the appellant in this Court. We would not visit a costs order upon the second respondents, the present trustees of the estate. One of these is Mr Mark Clay, who sought to appear on behalf of all the trustees, but, whilst the other trustees were served, it is not evident that there has been the necessary concurrence between them as joint trustees.

61 Order 1 of the orders of the Full Court made on 28 July 1999 should be set aside and order 2 thereof should be amended to read:

"The appeal be and is hereby dismissed."

The present second respondents did not appeal from the decision at trial and were joined as respondents in the Full Court appeal. Order 4 of the orders of the Full Court obliged Mrs Clay to pay 50 per cent of the costs in that Court of the appellants, the present first respondents. Order 4 also applied to the costs of what appears to have been a cross-appeal by Mrs Clay respecting reliance upon s 50 of the 1962 Act.

62 Mrs Clay seeks an order from this Court dealing with the costs orders of the Full Court but remitting to the Full Court the matter of an application by her for a special order for costs of the Full Court proceedings. In the circumstances, we would make no order in this Court respecting the costs of the proceedings in the Full Court save to remit questions of costs in that Court to that Court for its determination in a manner consistent with the outcome in this Court.