IN THE SUPREME COURT OF THE PITCAIRN ISLANDS
HELD IN ADAMSTOWN, PITCAIRN ISLANDS

SC 3/2021
[2022] PNSC 1

IN THE MATTER OF **THE ESTATE OF LEN CARLYLE BROWN**

AND

IN THE MATTER OF an application for relief under the Probate and Administration Ordinance 2000, section 8 of the Lands Court Ordinance, section 13 of the Land Tenure Reform Ordinance and an application for declaratory relief under the Constitution and the inherent jurisdiction of the Court

BETWEEN **OLIVE FAYE CHRISTIAN**

Applicant

AND **LANDS COURT**

First Respondent

AND **ATTORNEY-GENERAL**

Second Respondent/Intervenor

Hearing: 12 June 2022 (Pitcairn)/13 June 2022 (NZ)

Counsel: G M Illingworth QC and A K Hyde for Applicant
No appearance by or on behalf of Lands Court
D E Kelly for Attorney-General, as Intervener

Judgment: 18 August 2022 (Pitcairn)/19 August 2022 (NZ)

JUDGMENT OF HEATH CJ

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The application

[1] On 20 December 2019, this Court appointed Ms Olive Christian (Olive) as executrix (the probate order) of the estate of her late father, Mr Len Brown (Len).[1] She was appointed on terms that did not authorise her to deal with land to which Len had referred in his will. Any questions concerning land, trees and buildings were left to the Lands Court.[2]

[2] On 15 February 2021, Olive applied, in her capacity as executrix, for an order reviewing the way in which the Lands Court had (or had not) carried out its obligations in regard to Len's land, as contemplated by the probate order.[3] The application complains of "unacceptable administrative handling, delay and disregard for the rule of law" in the way in which the Lands Court acted.

[3] On examination, Olive's application raised important questions of private and public law that stem from reforms to the land tenure system in Pitcairn in 2000 (the 2000 reforms).[4] Those reforms were intended to substitute leasehold interests in land for freehold interests that, until that time, had been registered as such in the name of the individual proprietors. Olive's application raises the question whether a will made prior to the 2000 reforms by a

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1 The Court's order is set out at para [20] below. The relevant terms of the Will are set out at para [13] below.

2 The Lands Court was established by the Lands Court Ordinance: see paras [11] and [41] below.

3 The application was made under s 8 of the Lands Court Ordinance, in accordance with s 13 of the Land Tenure Reform Ordinance. Both provisions are set out at para [8] below.

4 Three Ordinances, read together, made up the 2000 reforms: The Land Tenure Reform Ordinance, the Lands Court Ordinance and the Probate and Administration Ordinance. See para [10] below. The rationale for and philosophical underpinnings of the 2000 reforms are set out at paras [38] and [39] below.

testator who died after they came into force can be executed according to its terms. In particular, if a testator who died after the 2000 reforms came into force had intended to leave freehold land to a named beneficiary in a will, what interest (if any) passes on his or her death?[5] This is an issue that has the potential to affect many Pitcairners.

[4] At an early stage of the proceeding, it became apparent to the Attorney-General that it was necessary for the Pitcairn Government to be heard on the important question of law that arose. The Attorney-General sought leave to intervene in order to make submissions on points of principle and policy. The Attorney's application was granted by Blackie CJ, on 18 August 2021.

[5] At a case management conference held on 17 May 2022, I directed that private and public law aspects of the application be heard separately, and that the private law claims would be heard first. I heard the argument on private law issues in June 2022. This judgment determines the points that were argued. A second hearing will be convened to deal with public law claims.

[6] The private law issues involve the interpretation of a series of Ordinances enacted in 2000, to ascertain which Court has jurisdiction to deal with land, buildings and trees that have been bequeathed in Len's will and the extent (if any) to which any such assets may now pass. The public law issues arise out of contentions that changes apparently made by the 2000 reforms did not, when interpreted in light of constitutional considerations, alter Len's ability to bequeath the freehold interest that he held at the time his will was made in November 1991.

[7] Following my decision to compartmentalise the private and public aspects of the claim, I directed that the Attorney would continue to appear as an Intervenor, to assist the Court on the questions of private law to be argued during the first part of the hearing. If, however, it was necessary to consider the public law question of whether the 2000 reforms had achieved their purpose in relation to the abolition of freehold interests in land, the Attorney would appear to present an adversary argument on behalf of the Crown, in right of the Pitcairn Islands. The Attorney has been joined as a second defendant for that purpose.

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5 Section 2 of the Wills Ordinance defines the term "bequest" in a manner that includes real property that would usually be described as the subject of a "devise".

[8] Understandably, Olive's application was filed in an informal way. To sharpen the focus of my inquiries, I granted leave for her counsel, Mr Illingworth QC, to file a formal Statement of Claim, to capture all issues that require determination. That was done on 19 May 2022. Although the Statement of Claim broadens the ambit of Olive's application, I consider that I have jurisdiction to deal with all aspects. Section 8 of the Lands Court Ordinance and s 13 of the Land Tenure Reform Ordinance respectively provide:

a) Section 8 of the Lands Court Ordinance:

> **8.** *Every decision of the Court shall be subject to review by the Supreme Court in accordance with the provisions of section 13 of the Land Tenure Reform Ordinance.*

b) Section 13 of the Land Tenure Reform Ordinance:

> **13.**—(1) Every decision of the Court under the provisions of this ordinance shall be subject to review by the Supreme Court in its civil jurisdiction on the application of any person having an interest therein made in writing within three calendar months after the date of such decision, or of its own motion.
>
> (2) The Registrar of the Court shall send written particulars of every such decision to the Registrar of the Supreme Court as soon as practicable after the making thereof.
>
> (3) The Supreme Court shall review the said decision in accordance with procedure prescribed by rules of Court.
>
> (4) *The Supreme Court shall have power to make such further enquiries or to hear such additional evidence or submissions as it may think fit and may confirm or quash such decision or remit the same to the Lands Court for reconsideration*.
>
> (Emphasis added)

[9] On 4 May 2022, I made directions under sections 15E and 15F of the Judicature (Courts) Ordinance for the first part of the hearing to take place in Pitcairn, with counsel and myself participating from New Zealand by audio-visual link. A hearing was held on 12 June 2022 (Pitcairn)/13 June 2022 (New Zealand), in accordance with that direction.

Background

[10] The 2000 reforms consisted of three new Ordinances (the Land Tenure Reform Ordinance, the Lands Court Ordinance and the Probate and Administration Ordinance)

which, read together, were intended to make fundamental changes to the land tenure system operating in Pitcairn. Each of the Ordinances came into force on 1 August 2000, and replaced the pre-existing Lands and Administration of Estates Ordinance,[6] which, self-evidently, was concerned with both land and the administration of deceased estates.

[11] On enactment of the 2000 reforms, the Lands and Estates Court established by the (now repealed) Lands and Administration of Estates Ordinance was abolished. A new Lands Court was established to replace it. By s 3(1) of the Lands Court Ordinance and s 2(2) of the Probate and Administration Ordinance respectively, jurisdiction over land and the administration of deceased estates was divided between the Lands Court and the Supreme Court.

Len's will

[12] Len was born on Pitcairn Island on 30 March 1926. Having made his last will in 1991, Len passed away on 1 November 2019. Although his will was made before the 2000 reforms came into force, its administration is governed by the Probate and Administration Ordinance.[7]

[13] The relevant part of Len's will of 20 November 1991 states:

> I give, devise and bequeath "all my personal possessions and property, including land, trees and buildings wherever situated, to my wife Thelma Adelia Brown and upon her death or should she predecease me to be equally divided, with the exceptions of my land known as Brown's Hui and our house and house land, for our five children namely Olive Faye, Len Calvin Davis, Kay Lester, Clarice Valda and Coralie Yvonne. The house and house land is to [be] left to Clarice Vada Brown. All household appliances and chattels are to remain in the house and to be the right of Clarice to keep or dispose of as she decides. Janelle Tiare Brown is to have residence in this house until such time as she wishes to leave Pitcairn permanently or marries. Brown's Hui is to be left entirely to my daughter Coralie Yvonne Brown.

[14] The will refers specifically to Len's "house and house land" and to "Brown's Hui". At the time that the will was made, Len was the registered owner of both the house land and Brown's Hui. In all, he was the registered owner of sections 45 (Brown's Hui), 107 (as

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6 By way of background, see Henderson, Jenkins and Hoogsteden, *Pitcairn Island Land Title Reform: Altering the Land Ownership and Land Use Patterns in the Furthermost "Pink Bit"* (2007). This paper was prepared for a conference on Strategic Integration of Surveying Services in Hong Kong in May 2007. The paper has the added authority of Mr Jofe Jenkins as one of its authors. He has been deeply involved in surveying Pitcairn Island. The paper can be found at: Microsoft Word - ts03A_01_henderson_jenkins_hoogsteden_1213.doc (oicrf.org) (last accessed on 18 August 2022 NZ time).

7 Probate and Administration Ordinance, s 2(3).

caretaker), 101 and 102 (part of his house land). At the time the will was made, all of that land was held under a freehold title. That position pertained at the time the 2000 reforms were enacted and came into force.

[15] The Land Tenure Reform Ordinance authorised the Governor of Pitcairn to fix a date (the "suspension date") on which it would come into force, so that "Land Allocation Titles" could be issued by the Lands Court to replace the existing freehold titles with a leasehold interest. The Land Tenure Reform (Amendment) Ordinance was enacted on 30 October 2006 (the 2006 Amendment). It amended a number of provisions in the principal Ordinance, in anticipation of steps that were about to be taken to notify the suspension date. Relevantly, for present purposes, the 2006 Amendment required the Land Commission (on completion of its functions under s 3(2) and (3) of the Land Tenure Reform Ordinance) to "cause full details of its findings to be conveyed to the Registrar" of the Lands Court.[8] It also added "commercial land" to the list of leasehold estates set out in s 5(1) of the Land Tenure Reform Ordinance.[9]

[16] On the following day, 31 October 2006, the Governor issued a "Notice of Appointment of Suspension Date", by which 1 December 2006 was fixed as the date on which "all existing freehold title to any interest in private land in the Islands shall be deemed to be suspended for the purposes of" the Land Tenure Reform Ordinance.[10] When Pitcairners ceased to hold freehold interests, the land reverted to the Sovereign. The Island Council now holds that land on behalf of Her Majesty. On the grant of a Land Allocation Title, the landholder was to hold a leasehold estate in the relevant land, "without consideration of rent from the Island Council".[11]

[17] On 7 November 2006, Ms Heather Christie, from the Governor's Office, wrote to Len, in his capacity as a registered freehold owner or trustee of land in Adamstown. While the copy of the letter produced is addressed only to Len, it is common ground that a similarly worded letter was sent to other landowners at the same time. The letter purported to explain the impact of the 2000 reforms on individual owners of land, and to indicate what steps they needed to take to protect their interests. Relevantly, the letter stated:

> …

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8 Land Tenure Reform (Amendment) Ordinance 2006, s 5, inserting a new s 3(8) into the principal Ordinance.

9 Ibid, s 6, set out at para [68] below. A definition of the term "commercial land" was added to s 2(1) of the principal Ordinance by s 2 of the 2006 Amendment.

10 More specifically, see paras [44]–[70] below.

11 Land Tenure Reform Ordinance, s 5(1), set out at para [66] below.

> As from 1 December 2006 all existing freehold land titles on Pitcairn will be suspended, and Land Allocation Titles may be issued instead. In addition, an annual land tax for unutilised land will be introduced, at a rate for the first 12 months of $NZ 0.50c per square metre for non-resident owners.
>
> If you wish to have a Land Allocation Title issued for your section/s in Adamstown and have not already applied, you will need to notify the Lands Court in writing, identifying the section/s concerned. If the owner is not resident on Pitcairn Island, the land concerned will be assessed at the end of 2007 for Land Tax for the period December 2006 to December 2007.
>
> If you do not advise us that you wish to take this opportunity, a Land Allocation Title will not be issued to you, the land will not be subject to tax and you will cease to be the lawful owner. Should a third party apply for a title to that section in the future, you will be contacted again, and given a final opportunity to apply for a Land Allocation Title issued in your name. If you choose not to take up the opportunity at that stage the Land Allocation Title may be issued to the third party.
>
> …

[18] The letter went on to set out, by reference to an attached plan of sections in Adamstown, the land in which Len was shown to have an interest as at 7 November 2006:

> The details of the land in which you have an interest are as follows:
>
> Owner of:
>
> Section 113 (area 541m). No application has yet been made for this section.
> Section 100 (area 1234m). Registered in the names of you and Thelma. No application has yet been made for this section.
> Section 68 (area 3959m). Registered in the names of you and Thelma. An application has been made by David Brown for this section.
> Section 59 (area 246m). No application has yet been made for this section.
> Section 45 (area 694m). An application has been made by David Brown for this section.
> Section 16 (area 496m). Registered in the names of you and Thelma. An application has been made by Dave Brown for this section.
> Section 11 (area 632m). An application has been made by Dave Brown for this section.
> Section 6 (area 2918). Registered in the names of you and Thelma. An application has been made by Dave Brown for this section.
>
> Trustee of:
> Section 107 (area 529m). Owned by Laura Christian. No application has yet been made for this section.

[19] At some point between 7 November and 1 December 2006, after the letter was sent, Len applied to the Lands Court for Land Allocation Titles. On 1 December 2000, Land

Allocation Titles were granted for section 100 and section 107, both plots of land being categorised as "house land". The official form of Land Allocation Title describes "House Land" as being for the "life of the applicant/s", which, subject to rights held by a spouse or dependents, is consistent with s 5(1) of the Land Tenure Reform Ordinance.[12] Issue has been joined on whether the letter sent to each landowner contained material misrepresentations about the impact of the 2000 reforms, and (if so) whether that affects the entitlement of landowners under the 2000 reforms. That question will be addressed at the second hearing.

[20] Originally, Len's will named the Island Secretary as executrix. She renounced that appointment. On 9 December 2019, Olive (as one of Len's children), applied (through the Registrar of the Supreme Court) for the issue of Letters of Administration with Will Annexed. On 20 December 2019, Olive's application was granted by Blackie CJ, albeit with two important qualifications as to the nature of the property with which she was authorised to deal. Relevantly, the order provided that:

> [2] … *any grant of administration will be limited to moveable property of the Deceased* being his pension and other money now held by the Island Treasury and his other possessions comprising personal effects.
>
> [3] … as the Will pre-dates the Lands Court Ordinance, any grant of Administration will include the following wording:
>
> > *"this grant of Administration excludes all reference in the Will as to land, trees and buildings as these are matters for determination by the Islands Lands Court"*
>
> (Emphasis added)

[21] It is clear that Len intended that his property would pass to his wife, Thelma, should she be living at the time of his death.[13] Sadly, Thelma passed away in September 2001. As at the date of Len's death, there were five beneficiaries: Olive, Len Calvin Davis (known as Dave), Kay Lester, Clarice Valda and Coralie Yvonne Brown. In addition, Janelle Tiare Brown was to have residence of Len's house for so long as she remained permanently in Pitcairn or married. Only Olive and Dave remain as permanent residents of Pitcairn.

[22] The will had the effect of dividing Len's property as follows:

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12 Section 5(1) of the Land Tenure Reform Ordinance is set out at para [66] below.

13 See the relevant part of Len's Will, set out at para [13] above.

a) His "house and house land" was to be left to Clarice.[14]

b) All household appliances and chattels were to remain in the house and it was for Clarice to decide whether to keep or dispose of them.

c) Land known as Brown's Hui was to be left to Coralie.

d) All other personal possessions and property, including land, trees and buildings, were to be equally divided among the five children; Olive, Dave, Kay, Clarice and Coralie.

[23] Under well-established Pitcairn custom, trees do not necessarily pass with the land when the latter is transferred to a new owner. Trees are regarded as owned by the person who planted them, or to whom they were handed down by a former owner. In response to a direction made earlier in this proceeding, the Lands Court provided a report, dated 18 March 2022. In it, the Lands Court explained the nature of the custom:

> 44. There is a long tradition on Pitcairn of gifting and bequeathing trees separately to land, which has continued despite the reform of the land tenure system. Typically, the person who originally planted the tree is considered to own the tree and able to pass the tree to their descendants. The Land Tenure Reform Ordinance makes provisions for interests in trees to be noted on the register in relation to a land title, but typically this has not been done. However, there is much oral history about tree ownership known to Pitcairners.

[24] The reason why custom became so important in Pitcairn land law is apparent from an extract from *Laws of Pitcairn, Henderson, Ducie and Oeno Islands* (Revised edition, 1971):[15]

> The greatest conflict that appears from the various accounts of the land tenure system is as to whether that system is based on the concept of individual ownership or communal ownership or on that of family ownership. An analysis of the various reports and accounts would appear to reveal however, that in fact a multiple system was in operation involving all three concepts as well as two separate types of usufructuary rights. Over the whole of this was also superimposed two separate and distinct types of trusteeships. It is in

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14 Clarice no longer resides on Pitcairn and has appointed Olive's son, Shawn Christian, as "caretaker" of the house land. Shawn has subsequently applied for a Land Allocation Title in respect of the land: see paras [56], [58] and [59] below.

15 McLoughlin, D "The Development of the System of Government and Laws of Pitcairn Island From 1791 to 1971" in *Laws of Pitcairn, Henderson, Ducie and Oeno Islands*, Rev. Ed., 1971, Part 13. By way of background, see also Henderson, Jenkins and Hoogsteden, *Pitcairn Island Land Title Reform: Altering the Land Ownership and Land Use Patterns in the Furthermost "Pink Bit"* (2007). This paper was prepared for a conference on Strategic Integration of Surveying Services in Hong Kong in May 2007. The paper has the added authority of Mr Jofe Jenkins as one of its authors. He has been deeply involved in surveying Pitcairn Island. The paper can be found at: Microsoft Word - ts03A_01_henderson_jenkins_hoogsteden_1213.doc (oicrf.org) (last accessed on 16 August 2022 NZ time) at pp 57–58.

> consequence no wonder that the reports of the various visiting officials and others were confusing and contradictory.
>
> It has been generally accepted that, at least by 1830, the whole of Pitcairn Island had been divided between the families of the mutin-eers with the result that there were no lands available for acquisition by outsiders other than by way of purchase or gift from an existing landowner or by marriage to an existing landowner. From an examination of contemporary accounts it would appear, however, that this is a misconception, or at least an over simplification, of the position that in fact existed. Whilst the whole island may well have been appropriated to the families of the mutineers, it would appear that this was on the basis of communal ownership with rights on the part of individuals to mere occupancy and not of ownership. This concept is common in Pacific island communities and presumably had its origins in Tahitian custom, as certainly did the Pitcairn custom whereby individuals have had the right to plant trees, and reap the fruits therefrom, on lands under the occupancy of others. Law No. 6 of the 1838 Constitution made it clear that the concept of land, tenure was that of occupancy of communal lands; and Law No. 7 of that Constitution made it equally clear that the right to cut and remove timber was a communal one independent of any right to occupancy of the lands on which such timber was growing.
>
> …
>
> It is from this basic communal system that the existing land customs on Pitcairn have evolved retaining the concept of usufructuary rights and the communal "goat lands" but gradually converting the right of occupancy into that of ownership.
>
> ….

[25] On 29 November 2019 (less than a month after Len's death but before Olive's formal appointment as administrator of his estate), Olive visited the sections of land remaining in her late father's name with a representative of the Lands Court Registrar. The report prepared after that visit indicates that Olive wished to make clear which trees "were either planted by or handed down" to Len. An amended report referred to several trees located across three sections of land: sections 16, 45 and 68. The report was published on the public notice board in Adamstown in July 2020.

[26] In August 2020, the Lands Court received an objection from Mr Jay Warren (Jay) in relation to one of the listed trees, a Miro tree on section 45 (Brown's Hui). On 3 December 2020, the Lands Court heard evidence about the disputed Miro tree. In a decision given on 7 December 2020, the Court concluded that neither Olive nor Jay had been able to provide clear evidence in support of their claims to the tree. While the Lands Court ought to have made a decision on the available evidence (its failure to do so left relevant rights in limbo).

Olive has since accepted that the Miro tree on Brown's Hui should be regarded as owned by Jay. In all other respects, the identified trees were, at the time of his death, owned by Len.

[27] Notwithstanding the terms of Blackie CJ's order granting Letters of Administration in favour of Olive on 20 December 2019, the Lands Court did not proceed to inquire into ownership of land and buildings to which Len's will referred, as required by the probate order.[16] The Lands Court's failure to do so expeditiously was the catalyst for Olive's application to this Court.[17] Unfortunately, due to a number of allegations that Olive made about the conduct of members of the Lands Court,[18] that Court has decided not to proceed with this case (or any others) pending determination of the present application.

The statutory scheme for land and estates

(a) The governance structure of Pitcairn

[28] In *Christian v The Queen*,[19] the Privy Council confirmed that the laws and institutions of Pitcairn had been established pursuant to s 2 of the British Settlements Act 1887 (UK). That proposition was reaffirmed by the Privy Council in *Warren v The State*.[20] In *Warren*, Lord Hughes and Lord Lloyd-Jones, for the Board, held that "it is clearly established that the 1887 Act [permitted] the Crown to set up a non-representative legislature which might otherwise be contrary to the Bill of Rights" of 1688. The present Pitcairn Constitution Order (the Constitution Order) of 2010 confirms that Pitcairn is to be governed in accordance with the annexed Constitution for Pitcairn (the Constitution). While executive authority is vested in Her Majesty the Queen, in practice, it is exercised through the Governor or his or her lawful delegates, after consultation with the Island Council.[21]

[29] While the Governor, in consultation with the Island Council, "may make laws for the peace, order and good government of Pitcairn", he or she is not "obliged to act in accordance with the advice of the Island Council".[22] As a result, the Governor exercises plenary powers to enact Ordinances, which operate as the laws of Pitcairn. Article 37(2)–(7) of the Constitution provides:

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16 Set out at para [20] above.
17 See para [2] above.
18 The Lands Court is made up of inhabitants of Pitcairn Island: see para [42] below.
19 *Christian v The Queen* [2006] UKPC 47, [2006] PNPC 1; at paras 2–4 (Lord Hoffmann), 33 (Lord Woolf) and 47 (Lord Hope).
20 *Warren v The State* [2018] UKPC 20; [2018] PNPC 1 at paras 22–30.
21 Constitution, arts 33 and 34. The powers of the Island Council, established by art 34 of the Constitution can be found, primarily, in ss 6 and 7 of the Local Government Ordinance.
22 Ibid, art 36.

> (2) All laws shall be styled "Ordinances" and the words of enactment shall be "Enacted by the Governor of the Islands of Pitcairn, Henderson, Ducie and Oeno".
>
> (3) Matters having no proper relation to each other shall not be provided for by the same law.
>
> (4) No law shall contain anything foreign to what the title of the law imports.
>
> (5) No provision having indefinite duration shall be included in any law expressed to have limited duration.
>
> (6) All laws shall be distinguished by titles, and shall be divided into successive sections consecutively numbered, and to every section there shall be annexed a short indication of its contents.
>
> (7) All laws shall be numbered consecutively in a separate series for each year commencing with the number one, and the position of each law in the series shall be determined with reference to the day on which the Governor made the law.

[30] While in a Parliamentary democracy it is often necessary for courts to divine a common intention from those members who passed the Bill, in this case, the focus is on the Governor's intention when enacting the 2000 reforms. There is no evidence about the extent of consultation with the Island Council before the 2000 reforms were enacted. Nor is there anything to indicate whether the Island Council concurred with the terms of the Ordinances, as enacted.

(b) The pre 2000 reforms position

[31] Before the 2000 reforms, the Lands and Administration of Estates Ordinance had defined the term "land" to include "any estate or interest in land, or things growing thereon and all buildings and other things permanently affixed thereto".[23] It defined the term "estate" as "the estate in Pitcairn Island of a deceased inhabitant thereof".[24]

[32] The Lands and Estates Court had exclusive jurisdiction over both land and estates.[25] The Supreme Court's jurisdiction was limited to a power of "revision" of decisions of the Lands and Estates Court. Those powers of "revision" were defined by reference to s 10 of the Justice Ordinance, which governs appeals to the Supreme Court from the Island Court.[26]

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23 Land and Administration of Estates Ordinance 1967, s 2, definition of "land".
24 Ibid, s 2 definition of "estate".
25 Ibid, s 3(1).
26 Ibid, s 8.

[33] All members of the Lands and Estates Court were permanent residents of Pitcairn Island. The constitution of that Court reflected the need and desirability for local knowledge when dealing with both land and estates. The Court comprised a President (who was the Island Magistrate), together with four other members appointed by the Island Council, as constituted under the Local Government Ordinance.[27]

[34] Section 5 of the Lands and Administration of Estates Ordinance, gave the Lands and Estates Court the following jurisdiction:

> 5. The Court shall be charged with the following duties –
>
> (a) *to inquire into the ownership of all lands on Pitcairn Island*;
>
> (b) to cause the boundaries of all lands on Pitcairn Island in respect of which the ownership has been determined by the Court to be demarcated on the ground;
>
> (c) to cause a register to be kept and maintained in respect of all lands on Pitcairn Island the ownership of which has been determined under the provisions of this Ordinance, and of all leases and other dealings in such land;
>
> (d) *to determine the manner in which land on Pitcairn Island shall devolve*;
>
> (e) *to hear and determine all applications for the administration of estates on Pitcairn Island, to make orders for the distribution of such estates and the appointment of administrators thereof*;
>
> (f) *to hear and determine all disputes relating to the ownership of land on Pitcairn Island*;
>
> (g) *to determine all other questions relating to lands and estates on Pitcairn Island as may be referred to it by the Council or by any inhabitant of Pitcairn Island, under any of the provisions of this Ordinance*.
>
> (Emphasis added)

[35] The important point, for present purposes, is that the Lands and Estates Court had jurisdiction both to inquire into the ownership of all land on Pitcairn Island[28] and to hear and determine all applications for the administration of deceased estates;[29] including

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27 Ibid, s 3(3).
28 Ibid, s 5(a).
29 Ibid, s 5(e).

determination of the manner in which land was to devolve,[30] and the making of orders for the distribution of estates.[31]

(c) Background to the 2000 reforms

[36] Prior to enactment of the 2000 reforms, land on Pitcairn was held as a freehold title by those registered as having that interest, with all such rights, privileges, powers and obligations in relation to such land as were incidental to Pitcairn custom as, from time to time, determined by the Lands and Estates Court.[32] The 2000 reforms changed that position by abolishing freehold title and replacing it with a leasehold interest, to be evidenced by a Land Allocation Title.[33]

[37] The Land Tenure Reform Ordinance also placed limits on the use to which particular leasehold interests could be put. In addition, s 6(a)(i) of the Land Tenure Reform Ordinance implied in every leasehold estate arising from the grant of a Land Allocation Title a covenant, on the part of the grantee, "not to … assign, transfer or otherwise alienate the land or any part thereof … without the consent in writing of the [Island] Council previously obtained and the approval of the Lands Court".

[38] The background to the 2000 reforms is helpfully discussed in a paper prepared by Kate Henderson, Jofe Jenkins and Chris Hoogsteden in 2007.[34] After discussing the history and social context, the authors wrote:[35]

> **2.1 Land Tenure**
>
> Land tenure is the ***relationships or interests*** that people have with land both collectively and individually. (Payne, 1997) Practically, tenure consists of different relationships or interests (termed rights) which override, complement, overlap and compete. Many land tenure systems are incorporated in land administration systems which define the practical regulation of land controls for acquisition, usage, and transfer of land. Land tenure problems arise when rights/rules are poorly defined causing tenure insecurity. Changes in tenure often follow. Equally, changes in land tenure are often met with resistance and hostility from older generations or vested interests, which would prefer the *status quo*.

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30 Ibid, s 5(d).
31 Ibid, s 5(e).
32 Lands and Administration of Estates Ordinance, s 11(1).
33 See para [16] above.
34 Henderson, Jenkins and Hoogsteden, *Pitcairn Island Land Title Reform: Altering the Land Ownership and Land Use Patterns in the Furthermost "Pink Bit"* (2007). See also, para [24] above.
35 Ibid, para 2.1 and 2.4, pp 6-7.

> Pitcairn Island has had a mixture of customary, communal, freehold, leased and community land. A large part of the land tenure was unrecorded until well into the 19th century with a number of customary rights applying on the Island. These rights involved the use of Island resources although, as the Islanders have gained more freehold rights over land, the customary rights have fallen away. Common land falls under the Island Council which maintains it for public use including public land such as the school grounds and landing bay for the long boats. *Until the Ordinance of [2000], most land on Pitcairn was owned as freehold with the potential for owners to lease it out to others.*
>
> …
>
> **2.4 "Borrowing" and its Effects**
>
> Accumulation of land by landowners, and the unavailability of other land due to trusteeship and ownership uncertainties, caused a system to be introduced where a person can 'borrow' land from a landowner to use as house land or for cultivation. Landowner permission is usually obtained but it comes with any conditions that the landowner sees fit. Borrowers often feel insecure in their land rights which discourages them from putting in time and effort when they may not receive the benefits. (PUC, 2006)
>
> Through the 1930s the growing population made land tenure issues and ownership rights even more significant especially as it would inevitably have an effect on economic development. However this problem coincided with a decline in ship visits. Over time, a large proportion of the younger population left Pitcairn and settled in New Zealand. This reduced the demand for land and the need for a tenure reform at the time. However land issues continued but the fear of upsetting folk inhibited the younger islanders from speaking out. Unequal distribution of land and uncertainty of boundaries and ownership lead to the 1967 Lands and Administration of Estates Ordinance. (PUC, 2006)
>
> (Original emphasis in bold; emphasis added in italics)

[39] The philosophical underpinnings of the 2000 reforms were summarised by the authors as follows:[36]

> **3.1 The Philosophical Base and Processes**
>
> Pitcairn's land tenure system is currently going through a significant change in an attempt to create a new but secure tenure system that best suits the current situation whilst maintaining the unique culture and society of the Island. Change was instigated by the [2000] Land Tenure Reform Ordinance which vests all land with the Island Council which will lease it to the Islanders for various lease periods dependent on proposed land use.
>
> *The Ordinance* outlines how the new system will be implemented, the process of acquiring land through the new lease application system, how leased land can be utilized, how a lease can be terminated, and the process of dealing with land

[36] Ibid. para 7 p 8.

of absentee land owners or excessive land acquisition through an annual land tax. *It lists enforceable covenants for land parcels, and the consequences for non-compliance. Opposition to the new system is coming mainly from those Islanders who believe that they will lose land because the amount they currently own is likely to be considered* **excessive to their 'reasonable needs'.** *Others admit that they see the benefits of the system but are disappointed about various rights and traditions that will be abolished*.

…

Good land tenure and registration systems should be designed for the needs of the society. Consultation and investigating alternative options are essential. *However, the British High Commission [in New Zealand, where the Governor of Pitcairn is based] appears to have decided on the new tenure system and registration system without full consultation and, apparently, without fully considering alternatives or whether the design actually suits the unique Pitcairn situation. Common land still exists but every family has had private land to bequeath, lease or sell. The freehold land is to be vested in the Island Council and individuals will have to apply for a lease over the land they desire to use regardless of whether the land was originally theirs.*

…

The new tenure system is intended to ensure security of ownership through the new registration system that will be created with the new lease data. (Past registration systems were poorly maintained and some records books lost.) The new system will record every lease and corresponding details i.e. parcel dimensions and ownership details. The Ordinance provides assurance that the register is authenticated and enforced by law. This provides lessees with security that their claim to the land is recorded safely and correctly.

The new land tenure system will eliminate some land and property rights that the Islanders have had since the first settlement including the right of transfer. The Ordinance states specifically … that it is illegal to mortgage, charge or sub-lease land held as a leasehold estate. *The use and control rights of landowners have also been restricted since the leased land must be used for a certain purpose, i.e. house land; garden land; orchard land; forest land; or commercial land. Previously the landowners had freedom in the use of their land and how to maintain it*. *The Ordinance attaches covenants to every leasehold estate which force the lessee to maintain the land and buildings* **to the satisfaction of the Council.** *This can also be seen as a restriction on the rights of the Islanders as they are required to keep the land and buildings to the Council's standards rather than their own.*

….

(Original emphasis in bold; emphasis added in italics)

(d) The 2000 reforms

[40] While the Lands Court Ordinance defines the term "land" as including "any estate or interest in land or things growing thereon and all buildings and other improvements permanently affixed thereto",[37] there is nothing in it to indicate that the Lands Court should have power to deal with any aspect of the administration of deceased estates. By contrast, the Probate and Administration Ordinance vests exclusive jurisdiction "in all matters of probate, administration and intestate succession" in the Supreme Court, both in respect of movable and/or immovable property.[38]

[41] The Lands and Estates Court was abolished and replaced by the Lands Court when the Lands Court Ordinance came into force in August 2000.[39] Section 5 of the Lands Court Ordinance states:

> **5.** The Court shall be charged with the following duties—
> (a) to exercise a supervisory jurisdiction over all lands on Pitcairn Island;
> (b) to cause the boundaries of all lands on Pitcairn Island in respect of which the ownership has been determined according to law to be demarcated on the ground;
> (c) to cause a register to be kept and maintained in respect of all lands on Pitcairn Island the ownership of which has been determined under the provisions of this ordinance and of the Land Tenure Reform Ordinance 2000;
> (d) to hear and determine all applications for the grant of Land Allocation Titles under Part III of the Land Tenure Reform Ordinance 2000;
> (e) to hear and determine all disputes relating to the ownership of land on Pitcairn Island;
> (f) to determine all other questions relating to lands on Pitcairn Island as may be referred to it by the Council or by any inhabitant of Pitcairn Island under any of the provisions of this ordinance or the Land Tenure Reform Ordinance 2000.

[42] Subject to provisions dealing with specific types of conflicts of interest, the Lands Court is constituted by a President (the Mayor of the Island, *ex officio*) and four other members who are to be appointed by the Island Council, to hold office for a term of two years from the date of appointment.[40] All members are permanent residents of Pitcairn. As with the former Land and Estates Court, the membership reflects the need and desirability for local knowledge in dealing with questions involving land.

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37 Lands Court Ordinance, s 2, definition of "land".
38 Probate and Administration Ordinance, s 2(2).
39 Lands Court Ordinance 2000, s 3(1).
40 Ibid, s 3(3).

[43] While the Supreme Court, by s 9 of the Lands Court Ordinance and s 13 of the Land Tenure Reform Ordinance, exercises a supervisory jurisdiction over the Lands Court, it has "exclusive jurisdiction in all matters of probate, administration and intestate succession in estates comprising movable or immovable property or both".[41] For example, it is for the Supreme Court to grant Letters of Administration, with or without a will annexed, and, in doing so, it is entitled to proceed "as far as may be as in cases of probate".[42] Where necessary, the Supreme Court is required to determine "the assets and liabilities of the deceased" and ascertain "the value of the movable property comprised therein as correctly as the circumstances allow".[43]

[44] Section 3(1) and (2) of the Land Tenure Reform Ordinance established a Land Commission comprising elected members of the Island Council and other persons appointed by the Governor from permanent residents of the Islands to identify and establish the boundaries of "all garden land, orchard land and forestry land, and to cause the same to be divided into viable blocks according to the classification of the land". "House land" was excluded because land situated in Adamstown had already been surveyed.

[45] While s 4(1) of the Land Tenure Reform Ordinance provided for the Governor to appoint a date from which all freehold titles to land would be suspended and the land subjected to the jurisdiction of the Lands Court to allocate leasehold titles, the "suspension date" was to be appointed "after the completion of the functions of the Land Commission" under s 3. An issue has arisen as to whether the "suspension date" of 1 December 2006 was appointed before or after the Land Commission completed its functions.[44]

[46] Section 4(3) sets out the criteria that the Lands Court is to apply when considering whether to grant a Land Allocation Title:

> (3) In considering any application or any competing applications, the Court shall have regard to the following factors—
>
> - the reasonable needs for the sustenance of the applicant and his or her family;
> - the capability of the applicant to hold and manage the land concerned in a profitable manner;
> - the economy and export trade of the Islands;

41 Probate and Administration Ordinance, s 2(2).
42 Ibid, s 2(1), definition of "administration" and s 9.
43 Ibid, s 3.
44 See para [48] below.

- the historical association of the applicant and the forebears of the applicant with the land concerned.

The issues

[47] Ms Kelly, for the Intervenor, has proposed that the private law issues are:

a) What were the assets of the deceased, in terms of land, trees, and buildings, at the time of his death?

b) Is it lawful for those assets to be passed by will to the beneficiaries, and does the law provide any limitations on who those assets can be passed to?

c) Which court has jurisdiction in relation to the land, trees and buildings referred to in the will?

d) What orders and practical steps are required, if any, to give effect to the will?

[48] At the hearing, Mr Illingworth agreed that Ms Kelly had stated the issues accurately but submitted that, in addition, I should determine, as a matter of interpretation, whether completion of the Land Commission's work was a condition precedent to the fixing of a "suspension date" for the Land Tenure Reform Ordinance. Ms Kelly expressed concern that this was an issue better addressed at the second stage of the hearing because of the need to gather further evidence on when the work of the Commission ceased. I accept Ms Kelly's submission on that point. Presently, there is insufficient evidence before me to establish when the Commission completed its functions. I have decided it is better to leave all questions of statutory interpretation and evidence on this topic to the second stage of the hearing.

Structure

[49] While covering all of the issues identified by Ms Kelly, I propose to analyse them under the following headings:

a) Should the Chief Justice have excluded land, buildings and trees from the assets of Len's estate that Olive, as executor, was entitled to administer? (the probate order issue)

b) What assets are comprised in Len's estate and pass to beneficiaries under his will? (the estate assets issue)

c) What orders should be made by the Supreme Court to give effect to my conclusions on the probate order and estate assets issues? (the relief issue)

The probate order issue

[50] The Probate and Administration Ordinance explains the role that the Supreme Court plays in the administration of a deceased estate. In summary:

a) The Court must determine the assets and liabilities of the deceased. It must also ascertain the value of the movable property comprised in the estate, "as correctly as the circumstances allow".[45]

b) The Court may refuse to issue probate or Letters of Administration until "all inquiries which the Court sees fit to institute have been answered to its satisfaction".[46]

c) The Registrar of the Court has power to administer estates and, if so appointed by the Court, acts under the direction of the Court and is entitled to indemnity on that basis.[47]

[51] There is nothing in the Land Tenure Reform Ordinance or the Lands Court Ordinance to suggest any ouster of the Supreme Court's jurisdiction over land that is bequeathed under a will. To the contrary, the following provisions of the Probate and Administration Ordinance affirm that no such impediment exists:

> **2**.-(1) In this ordinance
>
> …
>
> "immovable property" shall include a chattel real;
>
> …

45 Probate and Administration Ordinance, s 3.
46 Ibid, s 5.
47 Ibid, s 13.

(2) Subject to this ordinance, the Supreme Court shall have exclusive jurisdiction in all matters of probate, administration and intestate succession in estates *comprising movable or immovable property or both*.

…

3. The Court shall determine the assets and liabilities of the deceased and shall ascertain the value of the movable property comprised therein as correctly as the circumstances allow.

…

14. Where it appears to the Court that the assets of a deceased *person do not exceed movable property to the value of two hundred dollars or immovable property comprising one section of house land or both* such movable and immovable property, the Court may without any probate or letters of administration or other formal proceedings, after paying the debts of the estate from the proceeds of such movable property (if any), transfer the net assets of the estate to such person or persons as may be entitled and shall not be liable to any action or claim in respect of anything done under this ordinance.

…

(Emphasis added)

[52] Those provisions indicate that this Court must take affirmative steps to ensure that deceased estates are properly administered, and their proceeds distributed in terms of a will or, in the case of an intestacy, in accordance with the terms of the First Schedule to the Probate and Administration Ordinance.[48] In my view, the Probate and Administration Ordinance, when read as a whole, requires the Supreme Court to identify the nature and extent of any interests in land to devolve to named beneficiaries in a will.[49] There is nothing in the Probate and Administration Ordinance to suggest that the Supreme Court cannot make orders in relation to land, buildings and trees comprised in a deceased estate. The more difficult point (with which I deal when considering the estate assets issue) is under what circumstances, if any, (some or all categories) of land held under a Land Allocation Title can devolve by will to named beneficiaries.

[53] Once probate (or Letters of Administration) has been granted, the Supreme Court has power to revoke or alter them, for reasons to be recorded.[50] The probate and administration jurisdiction is to be exercised in accordance with "procedure established by rules of Court to

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48 Ibid, s 16.

49 In particular, see s 3 of the Probate and Administration Ordinance.

50 Ibid, s 6.

be made by the Chief Justice and until such rules have been made or so far as occasion may require the Court shall observe as nearly as local circumstances permit the practice and procedure observed by and before courts of justice in England in the exercise of the corresponding jurisdiction, powers and authority".[51] To date, no relevant rules have been made by a Chief Justice. Counsel have been unable to refer me to any relevant English practice or procedure that would assist in determining how the current issues should be resolved.

[54] In my respectful view, acknowledging that he did not have the benefit of full legal argument on a complex issue, the former Chief Justice fell into error in qualifying the grant of Letters of Administration in a manner that limited Olive's powers as executrix to movable property. It was for the Supreme Court, acting under s 3 of the Probate and Administration Ordinance, to determine what property (movable and immovable) was comprised in the estate.[52] While the estate is under the Supreme Court's jurisdiction, it may cause inquiries to be made before granting probate or Letters of Administration. Any questions must be answered to its satisfaction before a grant is made.[53]

[55] In my view, the better course would have been to defer granting Letters of Administration until the Supreme Court had undertaken necessary inquiries to determine what assets were, in fact, part of the estate and how they should be administered. The Supreme Court's role in the administration of deceased estates strongly suggests "inquiries" of the type encompassed by s 5 may include questions regarding land being put to the Lands Court which the Supreme Court considers would be better answered using the broad inquisitorial powers and procedures granted to that Court by the Lands Court Ordinance.[54] Alternatively such inquiries might involve hearing legal argument on questions that fell outside the scope of the Lands Court jurisdiction.

The estate assets issue

(a) Background

[56] There is no doubt that the chattels and other personal property to which Len referred in his will are capable of being bequeathed to a named beneficiary. The problem arises with

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51 Ibid, s 20.
52 See para [51] above.
53 See para [50]b) above.
54 See Lands Court Ordinance, s 7.

property described as the "house and house land" and "Brown's hui" which were specifically bequeathed to Clarice and Coralie respectively by the will.[55]

[57] Although Brown's Hui was left to Coralie in the will, one of Len's sons (Dave) applied for and was granted a Land Allocation Title in the category of "garden land" on 1 December 2006. That means that Brown's Hui falls outside the scope of the will, on any view of what land can be bequeathed. Len had ceased to have any interest in that land at the date of his death.[56]

[58] Len's house is located, in part, on section 100. Olive seeks a declaration that this land, together with surrounding plots known as sections 107, 101 and 102, be regarded as part of Len's estate. At the time of Len's death, he held Land Allocation Titles for both sections 100 and 107, even though before the 2000 reforms he was registered as a trustee/caretaker[57] of section 107. Len had no registered interest in sections 101 and 102, either before or after the 2000 reforms. Although he applied to register an interest over part of section 102 in 2012, that was never finalised.

[59] Olive's wish is to secure the house and house land left to Clarice in the will. Clarice is no longer a permanent resident of Pitcairn, and has nominated Olive's son, Shawn Christian (Shawn), to be "caretaker" of the house land. Section 2(1) of the Land Tenure Reform Ordinance defines the term "trustee" as "the trustee or caretaker of any land". Section 8 of the Land Tenure Reform Ordinance explains that this type of trusteeship is designed to apply to absentee landowners. If the land passed to Clarice, she would be regarded as an "absentee owner". Section 8 provides:

> **8.** If any person holding an interest in land by virtue of a Land Allocation Title shall leave the Islands to settle elsewhere indefinitely, the said interest in land shall become subject to the following provisions—
>
> (a) house land—
>
> (i) the land shall be held in trust for the owner, provided that the dwelling is maintained in a habitable state and the land is kept clear;
>
> (ii) Annual Land Tax shall be payable by the owner in accordance with the standard rate with effect from the date of departure from the Islands and shall be paid to the Registrar of the Court by 31 December in each year;

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55 The relevant part of Len's Will is set out at para [13] above. A summary of the specific bequests is at para [22] above.

56 As to the term of a Land Allocation Title for "garden land", see s 5()1) of the Land Tenure Reform Ordinance, set out at para [67] below.

57 See paras [59] and [60] below.

(iii) the Court shall review each trusteeship annually to decide whether the dwelling has been kept habitable and the land kept clear and upon the Court reaching a decision that the said condition has not been met, the estate of the owner shall revert to the Island Council pending further allocation by the Court.

(b) garden land—the estate shall revert to the Island Council twelve months from the date of departure of the owner.

(c) orchard land and forestry land—the estate shall be held on trust for the owner until a date 10 years after the departure of the owner, when by operation of law it shall become the property of the trustee at that time.

[60] Part V of the Lands Court Ordinance explains the nature and function of a person named by an applicant for a Land Allocation Title as a "caretaker", during his or her absence from the Island. Sections 15 and 16 of the Lands Court Ordinance state:

> **15.**—(1) Any person who is registered under the provisions of this ordinance as the owner of any estate in land and who intends to leave Pitcairn Island for any indefinite period shall, before leaving the Island, make application to the Court for the appointment of some fit and proper person to be named by the applicant as the caretaker in charge of such land during his or her absence from the Island.
>
> (2) If, upon the hearing of any application made under the provisions of subsection (1), the Court is satisfied that the proposed appointment is in conformity with the provisions of this ordinance and that the person nominated by the applicant has consented to act as caretaker of such land, it shall make an order directing that the person nominated be registered in the Lands Register as the caretaker of such land or, if not so satisfied, require the applicant to nominate some other person to act as caretaker of such land and, upon the applicant nominating a person to the satisfaction of the Court as aforesaid, the Court shall make an order directing that that person be registered in the Lands Register as the caretaker of such land.
>
> **16.** *Every caretaker registered under the provisions of this ordinance shall, while so registered, be subject to all of the liabilities and obligations in connection with the land in respect of which he or she is so registered as are imposed on the owner of such land and, subject to any conditions imposed or approved by the Court, shall have the right to the use and enjoyment of the land in respect of which he or she is so registered and to all crops, fruits and other produce standing or growing thereon to the same extent as the owner on whose behalf he or she is so appointed*.
>
> (Emphasis added)

[61] Subsequently, Shawn has applied to the Lands Court for a Land Allocation Title for what he described as "Len Brown's House Land", said to comprise 3000m². Shawn's

application was filed before Olive's application to this Court was made. The Lands Court has not yet dealt with Shawn's application.

[62] Len's will refers also to "land, trees and buildings" in that part of the will dealing with personal and other property. I treat that part of the will as incorporating those plots of land to which Olive, on behalf of the estate, has laid claim but in respect of which Len had no registered interest at the time of his death.

(b) The "house land"

[63] To consider how "house land" is to be treated for the purposes of the law of succession, it is necessary to review in some detail the way in which other interests evidenced by Land Allocation Titles have been expressed.

[64] Prior to the 2000 reforms, it was possible for a testator to leave his or her interest in land for beneficiaries under a will. Section 3 of the Wills Ordinance of 1967 (which remains in force) provides that every person of "sound mind" may dispose of "all the property which he or she owns or to which he or she is entitled at the time of … death". The term "property" is defined by s 2 of the Wills Ordinance to include "both real and personal property". That definition is consistent with s 2(2) of the Probate and Administration Ordinance, which refers to both "movable or immovable property".[58]

[65] Before a Land Allocation Title was issued for the "house land", Len held a freehold interest in that land. The term "land" was defined by the Land and Administration of Estates Ordinance, at the time that Len's will was made, as including "any estate or interest in land, or things growing thereon and all buildings and other things permanently affixed thereto".[59] A freehold interest in land of the type held by Len before 1 December 2006, fell within the scope of property that Len was entitled to leave to named beneficiaries by will. That raises the question: what, if anything, changed when the Land Allocation Title provisions of the Land Tenure Reform Ordinance came into force?

[66] The first change was that the freehold interest was replaced by a leasehold estate in the land, in respect of which the lessor was to be the Island Council. On a date to be appointed by the Governor, the Lands Court was to be authorised to grant Land Allocation Titles. From the appointed day until the date on which a Land Allocation Title was issued for

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58 Section 2(2) is set out at para [51] above.

59 Lands and Administration of Estates Ordinance, s 2, definition of "land".

a specific plot of land, the "freehold title to any interest in private land in the Islands [was] deemed to be suspended".[60]

[67] The second change was to put land into five categories, which governed both the length of the lease and the use to which the land could be put. Those changes are reflected in the language of the central provision, s 5(1) of the Land Tenure Reform Ordinance:

> **5. –** (1) Every Land Allocation Title shall create a leasehold estate in the land affected, to be held, without consideration of rent, from the Island Council as lessor, for the following terms
>
> - house land— for the lifetime of the applicant and the spouse and dependents of the applicant
> - garden land— for terms of five years renewable as of right during the life of the applicant
> - orchard land— for the life of the orchard
> - forestry land— for the life of the forest
> - commercial land— for a term of twenty years:
>
> Provided that every Land Allocation Title shall be in the form of a grant of the leasehold estate in the land affected and shall so far as practicable be in the terms set out in the Schedule. The lease shall provide for such appurtenances, encumbrances and Notes as the Lands Court shall direct at the time of issue or subsequently. The lease document shall be prepared in duplicate, sealed with the seal of the Court and signed by the President and the Registrar. One copy shall be issued to the lessee owner and the other retained by the Registrar of the [Lands] Court. Notes included by the [Lands] Court at the time of issue or subsequently may state the substance of conditions and shall be binding upon the lessee and any third party until they are amended or terminated at the direction of the [Lands] Court. Any such Note may make special provision for rights of access to and gathering produce from any tree or trees existing on the land prior to the grant of the leasehold interest to a succeeding owner.

[68] The Schedule to the Land Tenure Reform Ordinance, to which the proviso to s 5(1) refers, was added by the 2006 Amendment.[61] Until that time, s 5(1) simply referred to the creation of a leasehold estate in one of four categories: "commercial land" was added to s 5(1) by the 2006 Amendment. The Schedule is in the following form:

> SCHEDULE
>
> Pitcairn, Henderson, Ducie and Oeno Islands
>
> Land Allocation Title
>
> Pursuant to Section 4(8) of the Land Tenure Reform Ordinance 2001, **Allotment** , being square metres more or less, situated at, , is hereby leased to

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60 Land Tenure Reform Ordinance, s 4(1), set out at para [69] below. See also para [15] above.

61 Land Tenure Reform (Amendment) Ordinance 2006, s 6, amending s 5(1) of the principal Ordinance.

This Land Allocation Title is for the purpose of land. The term of this Land Allocation Title is as set out in Section 5(1) of the Land Tenure Reform Ordinance 2001.

Appurtenances:

Encumbrances:

Notes:

Date of grant:

Signed: ....
Registrar, Lands Court President, Lands Court
(See plan of land annexed hereto)]

[69] As at 30 November 2006, Len held a freehold interest in the house land. Subject to public law arguments yet to be advanced, that changed on 1 December 2006 when Land Allocation Titles were issued. Section 4(1) of the Land Tenure Reform Ordinance explained the circumstances in which the Lands Court could exercise jurisdiction to grant a Land Allocation Title. In general terms, s 4(2) identified those persons entitled to apply for Land Allocation Titles for "house land, garden land, orchard land and forestry land"; s 4(3) set out the criteria to be applied by the Lands Court on any application for a Land Allocation Title; s 4(4) made it clear that the Lands Court had no power to refuse an application for a Land Allocation Title made by an existing owner of a suspended interest in that land; s 4(6) created a presumption for the grant of a Land Allocation Title by "a former resident of the Islands, or child or grandchild of a former resident" in circumstances where a parcel of land had not been claimed by the existing owner of a suspended interest;[62] s 4(7) set out the circumstances in which a trustee of any land in the name of a deceased person could be accepted as the owner of that land; and, s 4(8) explained that the suspended interest would be extinguished on the grant of a Land Allocation Title. In full, those provisions state:

> **4.**—(1) On a date to be appointed by the Governor by order, after the completion of the functions of the Land Commission under the provisions of section 3 of this ordinance (hereinafter referred to as "the suspension date"), all existing freehold title to any interest in private land in the Islands shall be deemed to be +
>
> suspended and the Court shall thereafter have jurisdiction to allocate title to all land, other than public land and reserves, in accordance with applications made under the following provisions of this section.
>
> (2) Subject to the provisions of this ordinance, all permanent residents and former permanent residents of the Islands and their children

[62] Neither the term "resident" nor "former resident" are defined in s 2(1) of the Land Tenure Reform Ordinance. Nevertheless, it seems clear that the legislative intent was to use the definitions of "permanent resident" and "former permanent resident" found in that provision; the status of each being governed by the Immigration Control Ordinance of 2006.

and grandchildren (having reached the age of 18 years), may apply to the Court for the allocation of land in any of the classifications of house land, garden land, orchard land and forestry land, provided that the applicant is resident at the time of application and fully intends to remain as a resident:

Provided that any person formerly resident in the Islands who prior to the commencement of this ordinance left the Islands to settle elsewhere indefinitely and who immediately prior to the suspension date is registered in the Register of Land Titles as the owner of the freehold interest in any land on Pitcairn, shall be deemed to be eligible to apply to the Court under this subsection and to be an existing owner for the purposes of subsection (4) of this section:

And provided that, upon the granting of a Land Allocation Title to any such non-resident applicant, he or she shall be deemed to be a landowner who has left the Islands to settle elsewhere indefinitely with effect from the date of the said grant, for the purposes of section 8 of this ordinance.

(3) In considering any application or any competing applications, the Court shall have regard to the following factors—

- the reasonable needs for the sustenance of the applicant and his or her family;
- the capability of the applicant to hold and manage the land concerned in a profitable manner;
- the economy and export trade of the Islands;
- the historical association of the applicant and the forebears of the applicant with the land concerned.

(4) The Court shall not have power to refuse an application for the grant of a Land Allocation Title made by an existing owner of a suspended interest in that land.

…

(6) In the case of an application for the grant of a Land Allocation Title by a former resident of the Islands, or child or grandchild of a former resident, with respect to a parcel of land not claimed by the existing owner of a suspended interest therein, there shall be a presumption in favour of granting the application, subject to the requirement that for a period of three years after the date of issue of the Land Allocation Title the applicant shall personally reside, or in the case of agricultural or commercial land, work on the said land.

(7) For the purposes of this section, a person registered immediately before the suspension date as trustee of any land on behalf of the estate of a deceased person, in respect of which land there is no claim or pending claim by any person purporting to have a beneficial interest therein, shall be deemed to be the owner of such land.

(8) Upon the granting of an application, the suspended ownership of the applicant, if any, shall be thereby extinguished and a new title, to be known as a Land Allocation Title, shall be inscribed in the appropriate register in favour of the applicant forthwith.

[70] On a plain and ordinary interpretation of s 5(1)[63], the following position emerges:

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63 Section 5(1) is set out at para [66] above.

a) The only persons entitled to the "house land", are the holder of the leasehold interest, his or her spouse and dependents. The interest enures for the relevant person's lifetime.

b) Any interest that the leaseholder may have held in "garden land" terminates upon his or her death.

c) Any interest in "orchard land" or "forestry land" terminates at the end of the life of the orchard or forest respectively.

d) Any interest in "commercial land" enures for a period of 20 years from the date on which a Land Allocation Title is issued.

[71] Putting "house land" to one side for a moment, that interpretation of s 5(1) would result in the following analysis of what a testator in Len's position could have owned and bequeathed at the date of his or her death:

a) It would not have been possible to bequeath "garden land". Any interest in "garden land" ceased as at the date of testator's death.

b) It would have been possible to bequeath any interest in "orchard land" or "forestry land", on the basis that beneficiary is entitled to the leasehold interest for the remainder of the life of either the orchard or the forest.

c) It would have been possible to bequeath any interest that the testator may have had in "commercial land," for the remainder of the term of 20 years for which he had originally received a Land Allocation Title. Only the balance of the term of the lease could devolve.

[72] That analysis demonstrates that (at least) interests in "orchard land", "forestry land" and "commercial land" could be left by will to named beneficiaries. Therefore, the 2000 reforms did not result in a complete prohibition on the ability of the holder of a Land Allocation Title to pass an interest in land under a will to named beneficiaries.

[73] The position is more complex with regard to "house land". Section 5(1) of the Land Tenure Reform Ordinance states that a leasehold estate in "house land" is granted "for the lifetime of the applicant [for the Land Allocation Title] and the spouse and dependents of the

applicant". Len's wife, Thelma, pre-deceased him. Thus, in terms of s 5(1), the duration of the leasehold interest in the house land was for the life of his "dependents". The house land was left to Len's daughter, Clarice, who is of full age and no longer resides on the Island. To date, there has been no suggestion that there are any individuals alive who are (or were at the date of his death) Len's "dependents". However, for reasons given later, it may be necessary for further evidence to be adduced on that topic.[64]

[74] A number of provisions in the 2000 ordinances have been brought to my attention as potentially indicating an intention to allow house land to devolve in the absence of a living spouse or dependents of the original Land Allocation Title applicant. It is necessary to consider the way in which those provisions should be interpreted.

[75] As a matter of English law, interpretation of a statute involves ascertaining its meaning by reference to both context and purpose.[65] In discussing the use of extrinsic aids to interpretation, Lord Hodge (with whom Lord Briggs, Lord Stephens and Lady Rose agreed) said:[66]

> 30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

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64 See para [85] below.

65 For example, *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 (HL), at para 8 (Lord Bingham).

66 *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3 at para 30.

[76] The best extrinsic aid to interpretation is found in the Legal Report to the Land Tenure Reform Ordinance. That report expresses an opinion that the Governor may make the Ordinance on behalf of Her Majesty. Relevantly the Report states:

> This ordinance is intended to establish a Land Commission among the inhabitants of Pitcairn of which the principal function will be within one year to effect the identification, survey and registration of all land known as garden land, orchard land and forestry land.
>
> The ordinance is further intended to convert all freehold estate in land to leasehold estate in land held free of rent from the Island Council. *The broad purpose of this measure is to secure the greatest availability and the best use of all habitable and arable land, to discourage both the undue aggregation of land by individuals and the sterilisation of usable land in the ownership of non-residents in each case by the imposition of an annual land tax*.
>
> No existing owner may be refused a title to a leasehold interest in that land, if it is applied for. Pitcairners living abroad who wish to return and reside permanently on the Island will qualify for the right to the grant of a leasehold interest if such land is available. Land will not otherwise be capable of alienation to non-residents.
>
> *The term of a leasehold interest in house land is for the lives of the grantee and of the spouse and dependants of the grantee*. The leasehold terms of garden and orchard land are at the option of the grantee for the life of the grantee. The term of forestry leasehold is coterminous with the life of the forest.
>
> The provisions of the ordinance will be administered by the Lands Court. Every decision of the Court may be reviewed by the Supreme Court on the application of any interested person.
>
> (Emphasis added)

[77] As previously stated,[67] unlike most other common law jurisdictions, Pitcairn does not have a Parliament that makes its laws. That focuses attention on the intention of the Governor in enacting the Ordinance. Two aspects assume some importance. The first is the nature of the Legal Report. The second concerns the need to take particular care when determining the meaning of words in an Ordinance that may require a nuanced interpretation to meet local needs. As to the latter, I now refer to a number of the statutory provisions involving the interpretation of Ordinances.

[78] The Constitution Order, made by Her Majesty in Council, promulgated the Constitution. Article 26 of the Constitution emphasises the need, if possible, for legislation

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67 See paras [28]–[30] above.

to be interpreted in accordance with the rights and freedoms bestowed by it. Article 42(1) provides that "the common law, the rules of equity and the statutes of general application as in force in England for the time being shall be in force in Pitcairn". However, article 42(2) (reinforced by s 28 of the Interpretation and General Clauses Ordinance of 1952) makes it clear that applicable English law must be interpreted in light of local circumstances. Articles 26 and 42(2) of the Constitution and s 28 of the Interpretation and General Clauses Ordinance respectively provide:

a) The Constitution

> **26**. So far as it is possible to do so, legislation of Pitcairn must be read and given effect in a way which is compatible with the rights and freedoms set forth in this Part.
>
> …
>
> **42**. …
>
> (2) All the laws of England extended to Pitcairn by subsection (1) shall be in force in Pitcairn *so far only as the local circumstances and the limits of local jurisdiction permit* and subject to any existing or future Ordinance, and for the purpose of facilitating the application of the said laws it shall be lawful to construe them with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render those laws applicable to the circumstances.

b) The Interpretation and General Clauses Ordinance

> **28**. Where by any Order of the Queen in Council or ordinance, any Act of the Parliament of the United Kingdom or the law of any other country is extended or applied to the Islands such Act or law shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make the same applicable to the circumstances.
>
> (Emphasis added)

[79] The language employed in s 10(3) of the Interpretation and General Clauses Ordinance provides limited support for the proposition that rights that existed before the 2000 reforms should be treated as maintained. Section 10(3) provides:

> (3) Where an ordinance repeals any other enactment, then, *unless the contrary intention appears*, the repeal shall not—

> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
>
> (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) affect any investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing ordinance had not been made.
>
> (Emphasis added)

[80] The opening words of s 10(3) make it clear that its operation is subject to any "contrary intention" appearing in the Ordinance repealing any other enactment. Notwithstanding the terms of s 10(3), subject only to public law arguments I am yet to hear, I consider that the wording of s 5(1) is sufficiently clear to evidence a contrary intention to remove the ability of a person who owned a freehold title to house land to bequeath that by will to a named beneficiary.

[81] The term "dependents" is used, in s 5(1) of the Land Tenure Reform Ordinance, to explain the duration of an interest in house land. In the context of a community consisting of no more than 50 people, s 42 of the Constitution is relevant in determining the scope of the term.[68] At common law, the term "dependant" is most often used to refer to a person who is reliant upon another for financial help or, possibly, shelter. Generally speaking, a person to whom s 5(1) refers as a "dependent" is one who has not attained his or her age of majority (in Pitcairn, 18 years)[69] or is vulnerable, through illness or otherwise. Whether the term should be given that meaning in Pitcairn, for the purposes of fixing the duration of an interest in house land under s 5(1) of the Land Tenure Reform Ordinance, depends upon the circumstances in which a person might be regarded as dependent on another, when judged against the nature of the Pitcairn community.

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68 Section 42 of the Constitution is set out at para [78] above.

69 Children Ordinance, s 2(1), definition of "child".

[82] In my view, s 5(1) of the Land Tenure Reform Ordinance uses the term "dependent" to emphasise that a person, to come within that category, must be regarded as dependent upon the existing Land Allocation Title holder for financial or other support. For Pitcairn purposes, I consider it is important to recognise that in other legislation the term "dependant"[70] is specifically defined in s 2 of the Immigration Control Ordinance of 2006 as follows:

> **2.**—(1) In this ordinance, unless the context otherwise requires,
>
> **dependant**, in relation to a person, means
>
> (a) the spouse of that person; and
>
> (b) a child, step-child, adopted child, grandchild, parent, step-parent, grandparent, brother, sister, half-brother or half-sister of the person if the dependant is wholly or substantially dependant upon that person;

[83] While, at least for immigration purposes, there is a broader category of person who may be regarded as "wholly or substantially dependent" on another, the wording of s 2(1) of the Immigration Control Ordinance does demonstrate that (for the purposes of Pitcairn law), whatever relationship exists (for example, a child or sibling), the question is whether that person "is wholly or substantially" dependent upon the person seeking to emigrate to Pitcairn.

[84] In my view, a similar interpretation is appropriate for the "house land" provisions of s 5(1) of the Land Tenure Reform Ordinance. That approach is consistent with s 4(3) of the Land Tenure Reform Ordinance which speaks more generally about a "family" when providing criteria for the Lands Court to decide "any application or any competing applications" for a Land Allocation Title. It also recognises the need for a more flexible approach to succession to interests in house land that the nature of the Pitcairn community demands.

[85] Len's interest under the Land Allocation Title for the "house land" ceased when he died. The duration of the Land Allocation Title was extended if Len's spouse was alive at the time of his death. In that situation, the Land Allocation Title would last until his spouse's death. But, as Thelma pre-deceased Len, the only way in which the Land Allocation Title could be extended was if there were any members of a broader family group who could

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70 For present purposes, while the word "dependant" means someone who is "dependent" on another, in the context in which the terms are used in s 5(1) of the Land Tenure Reform Ordinance and s 2(1) of the Immigration Control Ordinance, I consider they should be regarded as synonymous.

establish that they were "wholly and substantially dependent" on Len. I hold that the deceased's interest in house land passes by operation of law to either his or her spouse or (if he or she is no longer living) to dependents. In my view, the creation of a specific class of persons who can all, properly, be regarded as dependent upon the use of the house land, supports the view that a deceased's interest under a Land Allocation Title for house land passes by operation of law. The class of dependents must be determined as at the time the will speaks, namely the date of the testator's death. That avoids any problem that might otherwise exist if a person to whom an interest is purportedly granted in a will was in the class of "dependents" at the time the will was made but no longer fits within that category at the date of the testator's death.

[86] If any disputes arose among persons in the class of "dependents", the mechanism for resolving them would rest with the Lands Court rather than the Supreme Court. The Lands Court's jurisdiction springs from s 5(f) or (g) of the Lands Court Ordinance; in particular, the latter under which it is given power "to determine all other questions relating to lands on Pitcairn Island as may be referred to it … by any inhabitant of Pitcairn Island under any of the provisions of this Ordinance or the Land Tenure Reform Ordinance".[71]

[87] While, to date, there has been no suggestion that any of the broader family were, at the time of his death, "wholly or substantially dependent" on Len, I do not foreclose the opportunity for evidence to be adduced on that topic. Until now, the legal position in relation to determination of who constitutes a "dependent" has been unclear.

[88] Returning to the question of whether an interest in "house land" can pass under a will, there are two other statutory provisions that assume some relevance. The first is s 14 of the Probate and Administration Ordinance; the second is s 11 of the Land Tenure Reform Ordinance.

[89] The Probate and Administration Ordinance contemplates estates "comprising movable or immovable property or both".[72] There is a suggestion, in s 14 of that Ordinance, that house land might pass by will in a case involving a "small estate". Section 14 states:

> **14.** Where it appears to the Court that the assets of a deceased person do not exceed movable property to the value of two hundred dollars or immovable property comprising one section of house land or both such movable and

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71 Section 5 of the Lands Courts Ordinance is set out at para [34] above.

72 Probate and Administration Ordinance, s 2(2).

> immovable property, the Court may without any probate or letters of administration or other formal proceedings, after paying the debts of the estate from the proceeds of such movable property (if any), transfer the net assets of the estate to such person or persons as may be entitled and shall not be liable to any action or claim in respect of anything done under this ordinance.

[90] I have considered whether, in a situation to which s 14 of the Probate and Administration Ordinance applies, "one section of house land" may be left by will to someone who was not dependent upon Len as at the date of his death. Or, could an order only be made in favour of one of a defined class of dependants? The purpose of s 14 is to provide an exception to the general way in which it is necessary for the Supreme Court to administer a deceased estate. It is premised on the need for proportionality when balancing the value of the estate against the costs of taking steps to obtain probate or Letters of Administration and to secure distribution. It gives a discretion to the Court to proceed in a summary way. However, the Court's power to transfer "the net assets of the estate" is qualified by the requirement that any transfer be to an "entitled" person. In my view, read consistently with s 5(1) of the Land Tenure Reform Ordinance, the Court's power to make an order is limited to the class of "spouse" or "dependents" to which s 5(1) refers. They are the only persons who, under s 5(1), are "entitled" to receive the benefit of the Land Allocation Title for house land that was originally granted in favour of the deceased. Read in that way, the existence of a discretion to transfer an interest in house land is not inconsistent with the way in which s 5(1) operates.

[91] It would not be consistent with s 5(1) of the Land Tenure Reform Act for the Supreme Court's power under s 14 to encompass someone who is not a "dependent" to whom the house land might otherwise pass for the duration of his or her life. Nevertheless, in deciding which of a number of dependents should be "entitled" to receive the house land by order under s 14, it would be necessary for the Court to make a choice. The basis on which such a choice could be made requires consideration.

[92] The Supreme Court's jurisdiction under s 14 is limited to transferring "the net assets of the estate to such person or persons *as may be entitled*" (emphasis added).[73] In my view, should the Court be placed in a position whereby it was required to choose between competing dependents, I consider that it would be appropriate for the Supreme Court to make inquiry of the Lands Court to determine which of the competing dependants ought to be

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[73] Probate and Administration Ordinance, s 14, set out at para [89] above.

entitled to receive the benefit of the Land Allocation Title. That approach would enable the specialist Lands Court to exercise a power akin to its express jurisdiction in s 4(3) of the Land Tenure Reform Ordinance, to consider, when determining in whose favour a Land Allocation Title should be granted, "any application or any competing applications".[74] It would also be consistent with the powers of the Lands Court under s 5(f) and (g) of the Lands Courts Ordinance.[75]

[93] Nor do I consider there is anything inconsistent with that approach in s 11 of the Land Tenure Reform Ordinance. Section 11 provides:

> **11.**—(1) It shall be unlawful to enter into an agreement for, and the Court shall have no jurisdiction to approve, the transfer *inter vivos* of any interest in land to a person who is not a permanent resident of the Islands.
>
> (2) Nothing in subsection (1) shall be so construed as to prevent the transmission of an interest in land, whether by will or intestate succession, to any descendant of the owner or any other person entitled under the provisions of this ordinance to own land in the Islands, whether permanently resident in the Islands or not.

[94] Section 11(1) prohibits an *inter vivos* transfer of any interest in land to a person who is not a permanent resident, whereas s 11(2) makes it clear that prohibition does not apply to testamentary dispositions. The ability to pass an "interest in land" under s 11(2) is limited to those interests that are capable of passing.

[95] To reiterate, house land is not capable of being passed by will to a named beneficiary. Rather, it passes by operation of law to a spouse or dependents. The term of the Land Allocation Title for house land expires at the latest of the death of the Land Allocation Title holder, his or her spouse or any dependents wholly reliant upon him or her.[76]

[96] By way of summary:

a) An interest in "house land" acquired under a Land Allocation Title enures for the lifetime of the person who applied for the title, his or her spouse and any persons dependent upon the person holding the title.[77]

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74 Section 4(3) of the Land Tenure Reform Ordinance is set out at para [69] above.
75 See para [86] above. Section 5 of the Lands Courts Ordinance is set out at para [34] above.
76 See paras [85] and [86] above.
77 See paras [80]–[88] above.

b) On the death of the original applicant for a Land Allocation Title in house land, the interest passes by operation of law to the spouse or dependents. Therefore, an interest in "house land" is not capable, in law, of devolving upon named beneficiaries in terms of any will that the Land Allocation Title holder may have made.[78]

c) Accordingly, Len's interest in the house land does not pass by will to the named beneficiary, Clarice.

(c) Buildings and trees

[97] There is no definition of the term "land" in the Probate and Administration Ordinance. Nor does one appear in the Land Tenure Reform Ordinance; that Ordinance defines the particular leasehold interests in land created to replace freehold title. The only generic definition of "land" is contained in s 2 of the Lands Court Ordinance, which provides:

> "land" includes any estate or interest in land or things growing thereon and all buildings and other improvements permanently affixed thereto;

[98] The Lands Court has already decided that, save for one Miro tree to which Jay is entitled, all trees claimed by Olive form part of Len's estate.[79] In determining the assets and liabilities of the estate,[80] I rely on the Lands Court's decision. In doing so, I endorse its approach to determination of entitlement to trees by reference to custom.[81] I do not consider that the words "or things growing thereon" in the definition of "land" in s 2 of the Lands Court Ordinance is a sufficiently clear indication that Pitcairn custom as to trees has been abolished.

[99] The only building in which Len had an interest at the time of his death was the house situated on the house land. In the absence of any definition of "land" in the Probate and Administration Ordinance, I consider that it is appropriate to use the Lands Court Ordinance definition as that was enacted as part of the 2000 reforms. Applying the definition of "land" from the Lands Court Ordinance, the house forms part of the house land.

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78 See para [95] above.
79 See paras [23] and [26] above.
80 Probate and Administration Ordinance, s 3.
81 See the relevant part of the report of the Lands Court set out at para [23] above.

The relief issue

[100] The first question, in relation to relief, is whether it is appropriate to grant any declaratory relief until the public law issues have been resolved following the second stage hearing. I have reached the view that there are only two aspects of my decision on which relief can be given at this stage. The balance of my conclusions have been expressed as provisional in this judgment and should be regarded as such pending completion of the second stage of the hearing. In addition, a successful claim of misrepresentation based on the Governor's delegate's letter of 7 November 2006 may affect the type of interest that could pass.[82]

[101] The two issues on which I am prepared to make orders involve the need to set aside the probate order made by Blackie CJ and to declare that the trees identified in the Lands Court's report (save for one to which Jay is entitled) form part of Len's estate.[83] I do not, at this stage, make an order as to what other property forms part of Len's estate because my present view on the question of "house land" may be affected by public law arguments. I emphasise that all relief indicated is subject to argument on the public law issues.

Result

[102] I make an order, under s 6 of the Probate and Administration Ordinance that the Supreme Court's grant of Letters of Administration with Will Annexed to Olive on 20 December 2019 be revoked on the basis that the grant ought not to have been qualified by removing Olive's power to deal with any interest in land that had passed under Len's will. I am not prepared, until the issue involving "house land" has been finally determined, to make any further grant in favour of Olive. The Supreme Court will assume responsibility for administering Len's estate until such time as this proceeding has been completed.

[103] I make a declaration under s 3 of the Probate and Administration Ordinance that the trees to which the Lands Court's report of 18 March 2022 refers (save for the Miro tree on Brown's Hui that is to be regarded as Jay's property) form part of Len's estate and may be dealt with on that basis. If any further direction is required pending a formal grant of Letters of Administration in favour of Olive, leave to apply is reserved for the Court to make such direction as may be necessary.

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82 See paras [17] and [18] above.

83 The orders are set out at paras [102] and [103] below.

[104] Some concern was expressed at the hearing about the Lands Court's decision not to proceed with any applications while this judgment was pending. As will be seen, there are discrete areas in which the Supreme Court and the Lands Court can exercise powers to resolve particular issues when questions arising out of the administration of estates and ownership of land converge. It is premature to make any formal orders in relation to the respective jurisdiction of the Supreme Court and Lands Court until after the public law questions have been decided. The outcome of those arguments may affect the form of land tenure in force in Pitcairn, whether any interest in "house land" can be devolved by will and the demarcation of jurisdiction between the Supreme Court and the Lands Court.

[105] I expressly defer all questions of interpretation relating to the "condition precedent" argument in respect of s 3 of the Land Tenure Reform Ordinance to be dealt with at the same time as the public law issues.[84] For the avoidance of doubt, that leaves open all evidential and legal issues in respect of the "condition precedent" issue.

[106] I reserve the question of what directions should be made for the public law hearing. I direct the Registrar to convene a case management conference with counsel, to discuss timetabling issues of a procedural nature that can ensure that a prompt hearing of second stage issues can be arranged. My intention is that the second stage arguments be heard before the end of 2022.

[107] I reserve leave to both parties to apply for any further directions, having regard to the relief I have granted and the other conclusions that I have reached on private law considerations.

[108] Olive's application is adjourned to a date to be fixed following a case management conference.

[109] Costs are reserved.

[110] I thank counsel for their assistance; in particular Ms Kelly for her industry and conscientious submissions as Intervenor which were presented in a neutral and helpful way.

Paul Heath

[84] See para [48] above.

Chief Justice