# COMMONWEALTH OF THE BAHAMAS

# IN THE SUPREME COURT

# COMMON LAW AND EQUITY DIVISION

## 2012/CLE/qui/00579

**IN THE MATTER OF** the Quieting Titles Act, 1959

**AND IN THE MATTER OF** the Petition of Eleuthera Land Company Limited, a company incorporated and existing under the laws of the Commonwealth of The Bahamas

**AND IN THE MATTER OF** a tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera.

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Vann Gaitor with him Mrs. Tara Cooper-Burnside and Ms. Lashay Thompson of Higgs & Johnson for the Petitioner
Mr. Timothy Eneas with him Ms. Vanessa Hall of McKinney Bancroft & Hughes for the Adverse Claimant, Stephen Henry Johnson
Mr. Carl Bethell QC (until 7 December 2016) and thereafter Mr. Serfent Rolle for the Adverse Claimants, Aaron Harold Knowles and Bryan Carl Steven Knowles

**Hearing Dates:** 25 July, 26 July, 27 July, 28 July, 29 July, 29 November, 1 December, 2 December, 7 December 2016, 29 June 2017, 6 March, 7 March, 8 March 2018.

**Civil - Quieting titles proceedings - Quieting Titles Act, 1959, Ch. 393 sections 3, 8 among others - Role of Court in Quieting Titles Proceedings – Investigating Owner's Documentary Title – Allegation of fraudulent conveyance – Evidence of Handwriting experts – Section 10 of Registration of Records Act, Chapter 187 – Priority of Conveyances – Sections 3(3) and 3(4) of Conveyancing and Law of Property Act, Chapter 138 – Duty to disclose - Crown Grant – Extrinsic Evidence – Intestate succession – Hearsay evidence - Possessory Title – Period of Limitation – Adverse Possession – Factual possession - Animus possidendi or intention to possess - Requisite standard to be reached to obtain a Certificate of Title**

The Petitioner, Eleuthera Land Company Limited ("ELC"), filed a Petition on 1 May 2012 by which it claimed to be the owner of a tract of land comprising 33.94 acres ("the Property") situated between Little Oyster Pond and Big Oyster Pond about three miles south-east of the settlement

of Governor's Harbour, Eleuthera, one of the islands within the Commonwealth of the Bahamas. By its Petition, ELC requested that its title be investigated, determined and declared by the Court.

ELC claimed to be the owner of the Property by virtue of a documentary title as well as a possessory title. The Petitioner based its claim on a Conveyance dated 18 January 1941 ("ELC's Conveyance"), by which one Robert Henry Knowles, also known as Reverend Knowles, granted the Property to ELC. The Property stems from a Crown Grant in favour of one Thomas Knowles for which the consideration was paid on 17 January 1962. The Crown Grant is dated 17 September 1920.

Initially there were three Adverse Claimants to the Property, namely: (i) Aaron Harold Knowles Jr. and Bryan Carl Steven Knowles (the "Knowles Claimants"); (ii) Stephen Henry Johnson (the "Johnson Claimant"); and (iii) Akobie C. Cumberbatch (as Attorney by Power of Attorney for Agatha A. Bethel Cumberbatch). The Adverse Claim filed by Akobie C. Cumberbatch was struck out of the action by Order of the Court dated 21 March 2014.

The Knowles Claimants are the grandsons of Reverend Knowles, whom they claim is the heir of the Crown Grantee, Thomas Knowles Jr. Reverend Knowles is the father of the late Aaron Harold Knowles a.k.a Aaron Harold "Kiki" Knowles Sr. who is the father of the Knowles Claimants. The Knowles Claimants, who are the Co-Executors of the Estate of the late Aaron Harold Knowles, claimed to have a documentary title to the Property by virtue of a Deed of Gift dated 7 December 1948, by which Reverend Knowles purported to grant and convey the Property to his son. Aaron Harold Knowles Sr. The Deed of Gift and the Petitioner's Conveyance are competing documents in respect of the Property and the Knowles Claimants claimed that the Petitioner's Conveyance is a forgery.

Stephen Henry Johnson claimed to have a documentary title to the Property as well as a possessory title by virtue of the possession of his predecessors in title. He claimed to have inherited the Property from his uncle, Reynolds Dewitt Johnson, whose title he says stemmed from a Conveyance dated 11 May 1901 made between Reginald R. Johnson and his grandfather Albert Ernest Johnson. Mr. Johnson disputed the contention of the Petitioner and the Knowles Claimants' that the Crown Grantee was Thomas Knowles Jr. and contended that the property devolved to the devisees under the Will of Thomas Knowles Sr. Mr. Johnson also disputes the claim by ELC and the Knowles Claimants that Reverend Knowles was the heir- at- law of the Crown Grantee.

ELC, the Knowles Claimants and the Johnson Claimant seeks the grant of a Certificate of Title in respect of the Property in their favour.

**HELD: finding that Petitioner has a better claim to documentary title than the two other Adverse Claimants and finding also, that the Johnson Claimant has not dispossessed the Petitioner of its documentary title. Additionally, the Petitioner has a better claim to possessory title than the Johnson Claimant. Consequently, the Petitioner is granted a**

**Certificate of Title in accordance with the Quieting Titles Act in respect of the Property described in the Petitioner's Abstract of Title filed on 1 May 2012.**

1. At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants: per Lord Diplock in **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19 at page 25 and **Strachan & Others v Camperdown Holdings Limited** SCCivApp. No.224 of 2014 referred to.

2. The Petitioner has established a better or superior documentary title to that of the Knowles Adverse Claimants whose allegation of fraud fails. The Petitioner has also established a better documentary title to that of the Johnson Claimant whose documentary root of title is derived from the 1901 Conveyance and the 1937 Conveyance. Both conveyances are defective to constitute a good root of title because (i) the Property was never part of a larger tract of land comprising 50 acres and (ii) the 1937 Conveyance is void for uncertainty as the tract to which it relates is not clearly identifiable.

3. It is an elementary principle of law that a person's title to land including the person who has the documentary title ("the paper owner") is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that another person may dispossess the paper owner if the paper owner fails to assert his superior title within the requisite limitation period, in this case, 20 years.

4. In order to dispossess the Petitioner of its documentary title, the Johnson Claimant must establish both (a) factual possession and (b) the requisite intention to possess. **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30, **Powell v McFarlane** 91977) 38 P & CR 452 and **In the Petition of the Settlement of Hunters on the Island of Grand Bahama** [2013] 1 BHS J. No. 6 referred to.

5. The Johnson Claimant has failed to show that he has been in exclusive, continuous, open and peaceable possession of the Property for a continuous period of 20 years, or even 12 years, to oust the Petitioner. The evidence adduced by the Johnson Claimant is weak and tenuous. In addition, even if this Court were wrong to find that the Petitioner has a better documentary title, on the evidence adduced, this Court further finds that the Petitioner has a better possessory title than the Johnson Claimant, it having been in exclusive, open, continuous and undisturbed possession of the Property since 1941.

6. The evidence suggests that the Johnson Claimant is uncertain as to where his 50 acre tract lies.

**JUDGMENT**

**Charles J**

**Overview**

[1] This is a Quieting Petition made pursuant to section 3 of the Quieting Titles Act 1959, Ch. 393 ("the Act"). It concerns 33.94 acres of vacant land situate on the Island of Eleuthera between Governor's Harbour and Palmetto Point ("the Property") and more particularly described as:

> **"A tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera."**

[2] On 1 May 2012, the Petitioner, Eleuthera Land Company Limited ("ELC") filed the present Petition supported by the verifying affidavit of William McPherson Christie ("Mr. Christie"), who sadly passed away while this action was extant, claiming to be the owner of the Property and requesting that its title be investigated, determined and declared by the Court.

[3] At the outset, there were three Adverse Claimants to the Property namely: (1) Stephen Henry Johnson (the "Johnson Claimant"); (2) Akobie C. Cumberbatch and (3) Aaron Harold Knowles Jr. and Bryan Carl Steven Knowles (the "Knowles' Claimants"). By Order of the Court dated 21 March 2014, Akobie C. Cumberbatch was struck out as a party to the present action.

[4] ELC claims to be the owner of the Property by documentary as well as possessory title. It bases its documentary claim to the Property on a Conveyance dated 18 January 1941 ("the 1941 Conveyance") by which Robert Henry Knowles, also known as Reverend Robert Henry Knowles ("Reverend Knowles"), granted the property to ELC. The Property stems from a Crown Grant dated 17 September 1920 ("the Crown Grant") in favour of Thomas James Knowles. It is recorded in Book Y 10 at page 424.

[5] Further, ELC alleges that it has been in continuous and exclusive possession and control of the Property from the time of its purchase on 18 January 1941, a period of over 74 years, up to the present and during that time, no other person has made any formal claim to the Property save for these proceedings.

[6] The Knowles Claimants are the grandsons of Reverend Knowles, whom they allege, is the heir of the Crown Grantee, Thomas James Knowles. Reverend Knowles is the father of Aaron Harold Knowles, also known as Aaron Harold "Kiki" Knowles Sr. ("Aaron Harold Knowles Sr.") who is the father of the Knowles Claimants. They claim a documentary title to the Property by virtue of a Deed of Gift dated 7 December 1948 (the "Deed of Gift").

[7] ELC and the Knowles Claimants rely on the same documentary root of title. However, the dispute between the two parties arose because Reverend Knowles, appeared to have conveyed the Property twice: in 1941 to ELC and in 1948, to the father of the Knowles Claimants. The Knowles Claimants allege that the 1941 Conveyance to ELC is a fraudulent document. ELC denies the allegation.

[8] Stephen Henry Johnson ("the Johnson Claimant") is not related to ELC or the Knowles Claimants. He claims documentary title based on a root of title other than the Crown Grant. The documentary title which he relies upon commences with a right title and interest conveyance from Reginald R. Johnson to Albert Ernest Johnson dated 11 May 1901 and recorded in Volume L. 10 at pages 73 to 74 ("the 1901 Conveyance"). By an Indenture of Conveyance dated 2 March 1937 ("the 1937 Conveyance") and recorded in Book D. 14 at pages 537 to 540, Albert Ernest Johnson conveyed his right title and interest in the "Spring Tract" comprising 50 acres in fee simple to his use and upon his death to his children, Reynolds Dewitt Johnson, Ruth Isabel Johnson and Harry Charles Johnson. Reynolds Dewitt Johnson acquired the interests of his siblings Ruth Isabel Johnson and Harry Charles Johnson during his lifetime. The Johnson Claimant alleges that he was the sole beneficiary under the Will of Reynolds Dewitt Johnson and by Deed of

Assent dated 4 July 1977, he acquired the 50 acres tract which included the Property. The Johnson Claimant also claims a possessory title from 1977.

[9] The Johnson Claimant alleges that Reverend Knowles was not the heir-at-law of Thomas James Knowles and as such, no title in the Property passed to Reverend Knowles from the estate of Thomas James Knowles. The Johnson Claimant alleged that this contention is fatal to the claim advanced by the Knowles Claimants as they do not assert a possessory title.

**The legal framework**

**Role of the Court**

[10] The Petition is brought pursuant to section 3 of the Act which provides as follows:

> "**Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted in accordance with the provisions of the Act."**

[11] It is plain from section 3 that the role of the Court is that of an investigator. In **Strachan & others v Camperdown Holdings Limited** SCCivApp. No. 224 of 2012, our Court of Appeal gave some guidance on the court's role. In delivering the judgment of the Court, Crane-Scott JA, put it this way at paras [13] to [22]:

> **"13 In a recent decision of this Court (differently constituted) in the consolidated appeals of Bannerman Town, Millars and John Millars Eleuthera Association et al v. Eleuthera Properties Ltd SCCivApp Nos: 175,164 and 151 of 2014, it was held that the overriding principle which should guide a judge in quieting actions is: *"simply to determine and declare which of the claimants has the better title".***
>
> **14 At paragraph 29 of its decision in Bannerman, the Court considered the Privy Council appeal from this jurisdiction in Ocean Estates Limited v. Norman Pinder [1969] 2 AC 19 in which, Lord Diplock explained:**
>
> > **"At common law as applied in The Bahamas which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute title". Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants."**

**15 It should also be said that while the court in quieting proceedings is tasked with determining and declaring which of the competing claimants to land has the better title, the court's role in the quieting process to be conducted under the Act is quite unique in that the court also functions as an investigator. Section 3 states:**

> **"3. Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted in accordance with the provisions of the Act."**

**16 The investigatory role which the court is required to perform in the quieting process is buttressed by other provisions of the Act designed to publicize the proceedings with the aim of inviting the filing within such time as the court may specify of adverse claims (if any) for investigation by the court during the proceedings. Section 6 for example, mandates the court to direct notice of the proceedings to be published in the newspapers. Additionally, the court is required by section 7 of the Act to direct that notice of the proceedings be served on any person (known or unknown) who appears to have, *inter alia,* an adverse claim in respect of the whole or any part of the land to be quieted.**

**17 The relative informality of the investigatory exercise to be conducted under the Act *vis-à-vis* other proceedings is most acutely seen in section 8 which permits strict rules of evidence to be dispensed with if the court is satisfied that the admission of evidence will assist the court in its task of investigating, determining and ultimately, declaring the true facts in relation to the question of title.**

**18 Section 8 provides:**

> **"8. (1)The court in investigating the title may receive and act on any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.**
>
> **(2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or...., or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.**
>
> **(3)The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court." *[emphasis added]***

**19 When investigating the strength of a documentary title under the Act, the court will (in a manner not unlike a conveyancer) examine the abstract of**

**title, *inter alia,* to check that there is an unbroken chain of ownership on paper beginning with the owner in the root document and ending with the most recent owner. The investigation will also involve verification of the abstract by physical inspection of the original deeds and checks to discover whether there is evidence of occupiers who may adversely affect the documentary title claimed. See Halsbury's Laws of England, Volume 23 -- Conveyancing: paragraph 139 - Investigation of Title: Unregistered Land.**

**20 However, unlike the conveyancer, section 8 of the Act permits the Court in investigating title to land which is to be quieted, to receive and act on any evidence on a question of title whether or not admissible in law, if the evidence satisfies the Court of the truth of the facts intended to be established.**

**21 In short, while the Court must necessarily have regard to the documents or other evidence which is presented in support of a claim to a documentary title, section 8 allows for flexibility in the investigation process and expressly permits the Court to receive and to act upon any evidence on a question of title (whether or not ordinarily admissible in law) provided the Court is satisfied of the truth of the facts intended to be established.**

**22 The objective of the Act is to provide a statutory mechanism for title to land in The Bahamas to be quieted through the Supreme Court. To this end, the court's role under the Act is to fully investigate the claim (or claims), receive evidence with respect thereto, determine the truth of the facts intended to be established by the evidence and ultimately, act on and declare the ownership of the land on the basis of the evidence before it. The process is completed with the grant of a certificate of title to the person who, in the view of the court, has established title thereto. Where there are rival claims to the land to be quieted, the judge's primary function, following the investigation, as stated in Bannerman and Ocean Estates *(above),* is simply to determine and declare which of the claimants has the better title."** [Emphasis added]

[12] Further judicial reinforcement for the investigative role of the Court under section 3 of the Act is the case of **Armbrister and others v Lightbourn and another** [2012] UKPC 40; Privy Council Appeal No. 0034 of 2010. At para [7], Lord Walker stated:

**"[7] The purpose of the [Quieting Titles] 1959 Act is to provide a judicial process for the determination of disputes as to title to land in the Bahamas. The process is initiated by a petition presented by a claimant. The petition is advertised, and adverse claims may be made by rival claimants. The procedure is in the nature of a judicial inquiry and it ends in a judgment in rem which, subject to appeal, finally settles entitlement to the land, not**

**merely as between the parties, but for all purposes. This judicial procedure meets an economic and social need in the Bahamas, where many of the outlying islands were, for much of the Commonwealth's history, sparsely populated and only sporadically cultivated. Much of the land belonged to landlords who were not permanently resident, and travel was slow. Parcels of land often had no clearly-defined boundaries based on comprehensive surveys…."**

[13] The Court must also be scrupulously vigilant against abuse of the statutory procedure. At para [7], Lord Walker summed it up this way:

> "…**But while the 1959 Act meets an economic and social need, there has also been a warning from a lecturer, familiar with the 1959 Act both as a legislator and as a practising member of the bar, that bench and bar must be vigilant to prevent the statutory procedure being abused by "land thieves" (the Hon Paul L. Adderley in an address to the National Land Symposium on 17 March 2001). It is no accident that the Judicial Committee has over the years heard many appeals raising questions of title to land in the Bahamas, including *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] AC 1072, *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, *Higgs v Nassauvian Ltd* [1975] AC 464, and *Higgs v Leshel Maryas Investment Co Ltd* [2009] UK PC 47."**

[14] Where a petition concerns a claim to title in fee simple, the Court must, on the completion of the investigation, declare one of the parties to the proceedings as having a better title. In **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19, Lord Diplock said, at page 25:

> **"At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."** [Emphasis added]

[15] This point was fortified in the Bahamian Court of Appeal case of **Personal Representatives of the Estate of Ruth Ingraham v. Personal Representative of the Estate of Herbert H. Heastie and Wenfred Heastie** [SCCivApp & CAIS No. 138 of 2011]. At page 2, Allen P. stated:

> **"The Chief Justice's function was to investigate and discover who had the better title, not who had a good title. There was cogent evidence that the petitioner had the better title to the land. Consequently, we found the Chief Justice erred in finding that he had no title. Having considered all of the evidence, we find that the petitioner had indeed proven better title to the property then the adverse claimants."**

[16] Conteh JA at page 4 added:

> **"If I may just add further, the whole purpose of Chapter 142, as its title implies, Quieting Titles Act, but, as the Chief Justice left it, no title was quieted and left it to be agitated forevermore. <u>There has to be a determination between the claimants, whether the petitioner or the adverse claimants, as to which of them has the better title</u>."** [Emphasis added**]**

**Procedure under the Act**

[17] The procedure under the Act is relatively informal. Section 4 requires the petition to be in the form set out in the Schedule and supported by the documents identified in the section. Section 8 permits strict rules of evidence to be dispensed with. It states as follows:

> **"(1)The court <u>in investigating the title</u> may receive and act on any evidence that is received by the court on a question of title, or any other evidence, <u>whether the evidence is or is not admissible in law</u>, if the evidence <u>satisfies the court of the truth of the facts intended to be established thereby</u>.**
>
> **(2) <u>It shall not be necessary to require a title to be deduced</u> for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or..., or to <u>produce or account for the originals</u> of any recorded deeds, documents or instruments, <u>unless the court otherwise directs</u>.**
>
> **(3)The evidence may be by affidavit or orally or <u>in any other manner or form satisfactory to the court.</u>"** [Emphasis added]

[18] Hearsay evidence is admissible. However, the court will determine what weight, if any, is to be given to it. In **Kenneth McKinney Higgs and Another (Substituted for Clotilda Eugenie Higgs, Deceased) Appellants v Nassauvian Ltd Respondent** [1974] UKPC 24 at page 4 of the UK PC Judgment, Sir Harry Gibbs said:

> **"…In part, this evidence was hearsay – a circumstance which, under the Quieting Titles Act 1959 (section 8 (1) did not render it inadmissible but which of course affected its weight…."**

[19] Section 3(3) and (4) of the Conveyancing and Law of Property Act is also important to the operation of section 8(2) of the Act. It provides as follows:

> **"(3) Recitals, statements and description of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of truth of such facts, matters and descriptions.**
>
> **(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."**

**Evidence of the Parties**

[20] The evidence in chief in support of the respective claim of each party is by witness statements. ELC presents the evidence of the following witnesses:

1. **William McPherson Christie** – Three Witness Statements; the first was filed on 18 March 2014; the second on 11 June 2015 and the third on 10 June 2016;
2. **Terry Ellis Sands** – Witness Statement filed on 17 March 2014;
3. **Hubert Williams** – Witness Statement filed on 17 March 2014 and a Supplemental Witness Statement filed on 6 May 2014;
4. **Priscilla Benner** – Witness Statement filed on 23 July 2014;
5. **Todd Turrell** – Witness Statement filed on 10 June 2014;
6. **Grant R**. **Sperry** – Expert Witness Statement filed on 20 June 2016.

[21] The Johnson Claimant filed the evidence of the following witnesses:

1. **Stephen Henry Johnson** – Witness Statement filed on 18 March 2014;
2. **Arnett Johnson** – Witness Statement filed on 1 October 2015;
3. **Shaun Gierzewski** – Witness Statement filed on 1 October 2015.

[22] The Knowles Claimants relied on the witness statement and Reports of the following witnesses:

1. **Aaron H. Knowles Jr.**– Witness Statement filed on 28 April 2016;
2. **F. Harley Norwitch** – Expert Report exhibited to the Witness Statement of Aaron Harold Knowles Jr.
3. **Thomas Vastrick** – Expert Report exhibited to the Witness Statement of Aaron Harold Knowles Jr.

[23] All parties were cross-examined and re-examined.

[24] All three parties claim to have documentary title to the Property so the ultimate task of the Court is to determine which party can prove the best documentary title.

[25] Both ELC and the Knowles Claimants assert that their respective root of title is derived from the Crown Grant dated 17 September 1920 to Thomas James Knowles. It seems to me that a convenient starting point might be to examine that Crown Grant and the documentary title of both these parties.

**Discussion and disposition**

**Documentary title of ELC**

[26] Most of the evidence asserting documentary title on behalf of ELC came from the late Mr. Christie. An Attorney-at-Law and a Realtor, Mr. Christie was the secretary and a director of ELC from about 1953. He represented ELC in most of its many land purchases and sales in the island of Eleuthera. He also held the office of President of ELC from 1978 until his death about a year ago.

[27] Mr. Christie alleged that he is well acquainted with the Property since the late 1960's when ELC acquired several adjoining tracts of land on the Caribbean side of the Main Eleuthera Highway (which comprised 231 acres) with a view to developing a residential subdivision and marina.

[28] According to him, ELC's root of title emanates from the Crown Grant dated 17 September 1920. By its terms, the Crown granted and conveyed to "Thomas Knowles, his Heirs and Assigns":

> **"All that Tract containing Thirty-three acres gross or Twenty acres net of Crown Land situate on the Island of Eleuthera near Great Oyster Pond and bounded Northwardly by land granted to Esther Bethel, Eastwardly by Crown Land, Southwardly by land granted to James Pinder, and Westwardly by land granted to T.T. Bowles and James R. Moss respectively."**

[29] In its Abstract of Title supported by the affidavit of Mr. Christie, both filed on 1 May 2012, ELC alleges that, subsequent to the Crown Grant, on 18 January 1941, Reverend Knowles as legal and beneficial owner granted and conveyed to ELC:

> **"ALL the right title interest property claim and demand both present and future vested or contingent at law or in equity of him the Vendor of in and to ALL that piece parcel or tract of land situate at Great Oyster Pond in the Island of Eleuthera containing Twenty (20) acres more or less and originally granted to a certain Thomas Knowles by a Crown Grant dated the Seventeenth day of September in the year of Our Lord One thousand Nine hundred and Twenty and now of record in the Registry of Records in Book Y.10 at page 424 the said piece parcel or tract of land being…."**

[30] At paragraph 6 of Mr. Christie's affidavit sworn to on 1 May 2012, he deposed as follows:

> **"According to ELC's records, Robert Henry Knowles, acquired the Property from his father, Thomas Knowles who died intestate having survived all of his brothers and sisters who had no children. Thomas Knowles had previously acquired the Property by way of a Crown Grant dated 17 September 1920 (the "Crown Grant"). I was further informed that Robert Henry Knowles farmed on the Property exclusively for many years prior to moving to Nassau in 1928 leaving the Property unoccupied."**

[31] Mr. Christie stated that the area in which the Property is located is referred to as "Spring Hill" or "Spring Tract." The Property adjoins Great Oyster Pond and is described in the Crown Grant as comprising "*thirty -three acres gross or twenty acres net"*. He believed that it is so described because it includes wet lands and usable area comprising about 20 acres.

[32] Mr. Christie further stated that around the time of the 1941 Conveyance, Reverend Knowles represented to ELC that he was the son of Thomas Knowles, the Crown Grantee. In that regard, Reverend Knowles commissioned the local constable, Roderick Pinder to obtain signed statements from Zacheus Gardiner, John J. Bethel, Elijah Demeritte and John Tinker; each dated 22 October 1940. Those persons were old residents of Governor's Harbour who attested that Reverend Knowles owned "that tract of land known as Spring Tract" which he believed referred to the Property and that Reverend Knowles was the son of Thomas Knowles. These statements were given to ELC by Reverend Knowles when the Property was purchased in 1941: Tab 3 of Mr. Christie's Witness Statement filed on 18 March 2014 ("Christie W.S. 1")

[33] Mr. Christie noted that there is an obvious break in the chain of documentary title between Thomas Knowles and Reverend Knowles. Indeed, there is no document of title to demonstrate how Reverend Knowles acquired the Property. However, according to the family tree prepared by William Holowesko ("Mr. Holowesko") of the Bahamas Title Research Company Limited, who researched the documentary title to the Property, he opined that Reverend Knowles was the son and likely heir-at-law of Thomas Knowles, the Crown Grantee. A copy of the family tree is exhibited at Tab. 4 of Christie W.S. 1. The Johnson Claimant disputes this assertion.

[34] The evidence of ELC in this respect was corroborated by the Knowles Claimants during the testimony of Aaron Knowles Jr. while under cross-examination by learned Counsel, Mr. Eneas who represents the Johnson Claimant, on 7 December 2016 at page 13; lines 10-12:

**Mr. Eneas:** You are claiming that Robert Henry Knowles, your grandfather, is the heir of Thomas James Knowles.

**Mr. Knowles:** Absolutely.

[35] Mr. Christie testified that ELC sought to ameliorate its documentary title to the Property. On or about 11 September 1944, ELC requested the assistance of George J. Bethel in an effort to obtain affidavits deposed by Zacheus Gardiner, John J. Bethel, Elijah Demeritte and John Tinker: See Tab. 5 of Christie W.S.1. He said that in or about the 1960's, he made inquiries regarding the whereabouts of Zacheus Gardiner, John J. Bethel, Elijah Demeritte and John Tinker. He wanted to obtain the affidavits from them but his inquiries revealed that they were all deceased.

[36] Mr. Christie also testified that he also made inquiries about the family of Reverend Knowles. He learnt that he had a son named Aaron Knowles Sr. who worked at the Central Garage on Bay Street in Nassau. On or about 6 October 1962, he wrote to Aaron Knowles Sr. to request his assistance with clearing up the documentary title to the Property. He recalled that around that time, Alice Knowles, the mother of Aaron Knowles Sr. and the widow of Thomas Knowles approached him to purchase her dower interest in the Property. Some negotiations took place but a sale never materialized as she was asking for too much. Furthermore, he had discovered that Alice Knowles had left her husband, Thomas Knowles and was living with another man and her claim to dower was thereby vitiated. Copies of correspondence with Aaron Knowles and W.E. Callender, the attorney for Alice Knowles are exhibited at Tab 6 of Christie W.S.1.

[37] Mr. Christie next testified that sometime later in or about 1964, on behalf of ELC, he sought to obtain a Deed of Assent from Aaron Harold Knowles Sr., in respect of the Property: see Tab. 7 of Christie W.S. 1. To his knowledge, the estate of Thomas Knowles and Reverend Knowles have not been administered.

**Documentary title of the Knowles Claimants**

[38] In their Adverse Claim, the Knowles Claimants claim the entirety of the 33.994 acres tract of land conveyed from Reverend Knowles to his son, the late Aaron Harold Knowles Sr., by Deed of Gift.

[39] Like ELC, the Knowles Claimants' root of title has its genesis from the Crown Grant dated 17 September 1920. In their Abstract of Title filed on 29 April 2014, they allege that on 7 December 1948, Reverend Knowles, as beneficial owner, granted and conveyed to his son, Aaron Harold Knowles by Deed of Gift, in consideration of his natural love and affection for the Donee, his son and in further consideration of the sum of one pound:

> **"ALL that tract of land containing Thirty-Three (33) acres gross or Twenty (20) net of Crown Land situate in the Island of Eleuthera near Great Oyster Pond and bounded Northwardly by land granted to Esther Bethel, Eastwardly by Crown Land, Southwardly by land granted to James Pinder and James R. Moss respectively."**

[40] According to the Knowles Claimants, on 28 November 1950, Alice Louise Knowles, widow of Reverend Knowles, renounced her Dower to "the said hereditaments" in favour of Aaron Harold Knowles Sr. The Renunciation of Dower is recorded in Book F 19, at pages 549 to 551.

[41] On 26 August 2011, Aaron Harold Knowles Sr. died at the Princess Margaret Hospital.

[42] On 18 October 2013, the Grant of Probate was issued in favour of the Knowles Claimants as Co-Executors of the Estate of Aaron Harold Knowles Sr.

[43] As indicated, the Knowles Claimants claim only documentary title to the Property since no evidence was adduced with respect to a possessory title. The evidence supporting their claim for documentary title came from Aaron Harold Knowles ("Mr. Knowles Jr"). He said that he discovered the existence of this Quieting Petition when he received a telephone call from Mr. Christie who approached him after having seen the publication of several gazetted notices issued in connection with

the application then being made for a Grant of Probate in the Estate of his late father, Aaron Harold Knowles Sr. Mr. Christie asked him if the Estate were in possession of the original Crown Grant to Thomas James Knowles and in the course of discussion, he became aware of the present action.

[44] Mr. Knowles Jr. said that Mr. Christie then forwarded to him a true copy of the Conveyance upon which ELC relies to prove its documentary title to a 20 acres tract within the Property.

[45] Mr. Knowles Jr. said that, upon viewing the Conveyance dated 18 January 1941, he became immediately concerned due to the fact that the signatory to the Conveyance signed as “Rev. R.H. Knowles”, because every document which he was able to locate and which was signed by his grandfather, was signed “Rev. Robert H. Knowles”, with his first name written out in full. Further, he said that there appears to be no record of his grandmother ever having renounced her Dower interest in the property as a consequence of the 1941 Conveyance.

[46] Mr. Knowles Jr. testified that in 1948, Reverend Knowles conveyed the Property to his father, Aaron Harold Knowles Sr. A certified copy of the entry recording the Conveyance in the Registry of Deeds and Documents, recorded in Book C -18 at pages 81 to 83 is exhibited: Tab. 38 of Bundle of Witness Statements Vol. 2.

[47] Mr. Knowles Jr. asserted that his grandmother renounced her Dower in favour of his father by a Renunciation of Dower dated 28 November 1950.

[48] He testified that, fortunately, the Estate was in possession of an Original Conveyance of land in an area called “Ocess Addition” dated 16 June 1948 which bears the unquestioned original signature of his grandfather, Rev. Robert Henry Knowles: Tab. 39.

[49] Mr. Knowles Jr. testified that in or about 20 October 2014, the Knowles Claimants commissioned a Report by a handwriting expert, Mr. F. Harley Norwitch of Norwitch Document Laboratory: Tab. 40. According to him, the Norwitch Report

expressed the Opinion that the variations between the (unquestioned) signatures of Reverend Knowles and the (questioned) signature on the 1941 Conveyance, were within "*parameters of individual variation*" and that they were "*probably written*" by the (same) person. Mr. Knowles said that the Knowles Claimants were of the view that Mr. Norwitch had compared the incorrect signatures and/or had otherwise reached the wrong conclusion.

[50] Mr. Knowles Jr. testified that they commissioned a Second Report from a second expert, Mr. Thomas Vastrick ("the Vastrick Report"): Tab 41.

[51] By reason of the fact that Reverend Knowles signed "Rev. R.H. Knowles" on the 1941 Conveyance, the Knowles Claimants are of the view that that Conveyance relied upon by ELC is a fraudulent document because it bears *"two fraudulent and false signatures written thereon by some person personating or holding himself out to be Rev. Robert Henry Knowles and/or were fraudulently appended thereto with the knowledge and/or connivance of the Petitioner ((ELC), its servants, agents, principals or shareholders, or some person, however connected to the Petitioner, who sought thereby to falsely confer a colourable title to the property upon the Petitioner*."

[52] The gist of the submission advanced by learned Counsel Mr. Rolle who appeared for the Knowles Claimants is that the 1941 Conveyance relied upon by ELC was not signed by Reverend Knowles and is therefore null and void.

[53] Indeed, the 1941 Conveyance relied upon by ELC and the 1948 Conveyance relied upon by the Knowles Claimants are competing documents in respect of the Property. The law is that where issues of this nature arise, priority is given to the conveyance which was lodged and recorded first in time. This is provided for by section 10 of the Registration of Records Act, Ch. 187 which states:

> **"If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within The Bahamas, or of any estate, right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant,**

> **release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grant, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the Registry shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or mortgagee claiming under such conveyance, assignment, grant, release, bargain, sale or mortgage, so first lodged and accepted for record shall be deemed and taken to be good and valid and shall in no wise be defeated or affected by reason of priority in time of execution of any other such documents:**
>
> **Provided that the section shall not apply to any disposition of property made with intent to defraud."** [Emphasis added]

[54] As ELC's conveyance was recorded first in time, the law deems it good and valid. However, the Knowles Claimants seeks to rely on the proviso to section 10 to ground their claim that ELC's 1941 Conveyance is a forgery and therefore, their 1948 Conveyance ought to prevail.

[55] Learned Counsel Mr. Gaitor appearing for ELC submitted that the statement, on its face, is scandalous because no particulars are given of the various elements of fraud alleged in paragraph 15 of the Witness Statement of Mr. Knowles Jr. except for the allegation that the signatures of Reverend Knowles on the 1941 Conveyance are fraudulent and false.

[56] In civil cases, the general standard of proof which the evidence adduced must meet for a decision by the Court is on a preponderance of probability. In applying that standard, however, the Court must bear in mind that the degree of probability will vary from case to case and will depend to some extent, on the type of case in which proof is required. Therefore, where an allegation of fraud or deception is made as in this case the evidence adduced in support of such allegation should be clear and cogent. In other words, the more serious the allegation, the clearer and weightier must be the evidence adduced in support of it: **Takitota v The Attorney General and others** [2004] BHS J. No. 294, per Sawyer P at para [54].

[57] I agree with Mr. Gaitor that the Knowles Claimants must prove their forgery claim by adducing strong and cogent evidence. Nonetheless, as this is a quieting petition, where the Rules of the Supreme Court are inapplicable and the Quieting

Rules appears to be more flexible, I shall carry on with the allegation of fraud which the Knowles Claimants have raised.

[58] As submitted by learned Counsel Mr. Gaitor, I myself am of the opinion that the threshold for fraud was not met even by the expert testimony of their own expert, Mr. Vastrick. During cross-examination, Mr. Vastrick could not say whether the 1941 Conveyance and/or the 1948 Conveyance were executed by different persons: see Transcript of Proceedings of 2 December 2016 at page 70, lines 23-32 and page 71, lines 5-7. His evidence is as follows:

> "Q. So, is there any level or probability attached to your conclusion according to the standard that you operate by?
>
> **A.** There would just be a level of probability to be more likely or not that there were two writers between the conveyance writing and the 1948 versus the 1941 writing. **It is certainly limited, I want to make that very clear, I am not stating flat out there were two different writers.** I am saying based on the evidence, the evidence is more supportive of two different writers than of the same writer.
>
> Q. **Are you ruling out all together that the documents were written by the same person?**
>
> A. **No**."

[59] Additionally, when Mr. Vastrick was questioned about the adequacy of the writing samplings provided to him to evaluate writing features, characteristics and writing variation of Reverend Knowles, he conceded that a meaningful conclusion could not be arrived at with just one known signature sample, as in this case. His evidence on this point is set out below: Transcript of Proceedings of 29 July 2016, at page 71 lines 22-30:

> "Q. Do you believe that a single known signature, I am talking because it is original, in this case is adequate for evaluating writing features characteristics and writing variation of a writer, just one signature during the course of his lifetime?
>
> A. It would be adequate for a complete examination. It would provide adequacy for a comparison **but it will not be adequate for any significant, meaningful conclusion**." [Emphasis added]

[60] On further cross-examination, Mr. Vastrick also accepted that one's handwriting can undergo changes as one ages, can be impacted by illnesses and that the quality of one's handwriting generally gets worse with age: Transcript of Proceedings of 29 July 2016 at page 75 lines 9-21 and lines 26-30. Undoubtedly, these factors are significant because there is a seven year gap between the 1941 Conveyance and the 1948 Conveyance. It means that Reverend Knowles was about 76 years old when he allegedly signed the 1941 Conveyance and about 83 years of age when he allegedly signed the 1948 Conveyance. Reverend Knowles died about 10 months after 1948 Conveyance was allegedly signed. It is correct that the Court ought to bear in mind these factors when considering whether the forgery claim advanced by the Knowles Claimants has been made out.

[61] In addition, some very compelling evidence came from Mr. Vastrick during cross-examination by learned Counsel Mr. Gaitor. It can be found at the Transcript of Proceedings on 29 July 2016 at page 72, lines 19-20 and page 83 at lines 24-29. This is how it went:

| | |
|---|---|
| "**Mr. Gaitor:** | So, therefore, pointblank, you are not saying that the 1941 signatures are fraudulent? |
| **Answer:** | **I am not saying any signature is fraudulent."** |
| **"The Court:** | So let me lump those two in '41 as one signature, and the one in '48 is another one. You were able to conclude that they are different but you cannot say which one is forged, if there is a forgery of signature? |
| **Answer:** | Yes. That is accurate." |

[62] Mr. Gaitor emphasized that Mr. Vastrick's testimony is not inconsistent with the testimony of Grant Sperry ("Mr. Sperry"), the expert witness called by ELC. During re-examination of Mr. Sperry: (Transcript of Proceedings on 27 July 2016 at page 33, lines 26-32 and page 34, lines 8-12), he stated:

| | |
|---|---|
| **"The Court:** | Perhaps you have answered it already, you are not able to draw a conclusion. |
| **Mr. Sperry:** | Yes. |

**The Court:** The question signature of 1941, are you able to say to the Court whether or not those two signatures were written by the same person?

**Mr. Sperry:** Yes, ma'am. They appear to be written by the same person.

**The Court:** Okay. The three at the bottom, would you say they were written by the same person?

**Mr. Sperry:** They appear to be written by the same person….The top two signatures certainly are different in terms of their abbreviation, their different style of signature. Whether or not the Rev. Knowles signed his name like that precisely, R.H. Knowles, I certainly do not have any samples of that. So the top two signatures internally within the Knowles in terms of where the pen stops and lifts and their relationship are consistent with the bottom three signatures. They are different style but internally they are consistent. But the bottom line, my Lady, is that I do not have enough known writing to assess Rev. Knowles range of writing variation. And writing variation is defined as the natural deviation that occurs between any two writings. It is based on the fact that we are not machines. We are looking at a 1948 signature to a 1941 signature. Obviously, if it is the same person they are older. In this case, that 1948 signature certainly show some degradation over the '41 signature which I will suspect. The R. H. Knowles signatures from '40 to '41 do not show that degradation but that is still a different writing style.

**The Court:** Within a year a person could change so materially?

**Mr. Sperry:** Not really. The point I am trying to make is that the N-O-W-L, the way that the pen stops between the N and the O. The formation of the letter O is consistent between the two question signatures and the three known signatures. So, there is an internal consistency here that even though we have a different writing style between the 1941 and 1940, people have different writing styles. Sometimes people sign their names G. R. Sperry, sometimes Grant R. Sperry depending on the circumstances. **So, I did not have enough writings to assess variation. However, I note similarities. I certainly did not see what we would call fundamental differences. In other words, differences in letters indicative of another writer.** But the jury is out, as it were, in terms of my conclusion. **I do not have enough**

**writings to form that conclusion or possibility."** [Emphasis added]

[63] Based on the testimony of both expert witnesses, fraud has not been proved.

[64] Furthermore, in assessing the allegation of fraud raised by the Knowles Claimants, learned Counsel Mr. Gaitor invites the Court to draw certain adverse inferences toward them based upon the following facts which became apparent during the trial:

(i) The Knowles Claimants obtained an initial expert report from Mr. Norwitch who was not called as a witness but who, in his Report stated that:

> **"The questioned signatures, for the most part, fit comfortably within the parameters of individual variation displayed in the standard material and display the same significant individual characteristics present in those signatures. These individual characteristics, in combination, are sufficiently distinctive to conclude, to a degree of probability, that the questioned signatures were written by the person who wrote the specimen signatures. Indications normally associated with the simulation, such as hesitation, tremor, and a slow "drawn" appearance, are not present.**
>
> **In view of the above findings, it is the opinion of this examiner [Mr. Norwitch] that the questioned signature on the Conveyance in Item A [1941 Conveyance] was probably written by Robert Henry Knowles]. Further, it is the opinion of this examiner that the questioned signature on the Receipt in Item D [Original receipt dates 25 April 1940] was very probably by Robert Henry Knowles.**
>
> **The limited quantity (3) of known signatures precludes more definitive opinions than those offered above."**

(ii) The analysis in the Norwitch Report is supported by the findings of ELC's expert witness, Mr. Sperry: see Transcript of Proceedings of 27 July 2016 at page 22, lines 7-17; Witness Statement of Grant Sperry, Bundle of Witness Statements, Vol 2, Divider 1, Tab. 2. In fact, Mr. Sperry opined that it was not uncommon for individuals to sign their names in various ways and that it was not known whether Reverend Knowles had an alternate handwriting: see: Transcript of Proceedings at page 26 line 2 and lines 8-9. He further

testified that no two writings by the same writer will ever be the same: page 30 lines 9-10 and that the signatures provided for examination appeared to be written by the same person: page 34 lines 21-30 although he could not conclude whether the signatures on the 1941 Conveyance or 1948 Conveyance were fraudulent: page 33 lines 26-32 and page 34 lines 1-10.

(iii) The Knowles Claimants rejected the Norwitch Report on the basis that the examiner "*had compared the incorrect signatures and/or had otherwise reached the wrong conclusion*." However, the Norwitch Report distinctly shows that the examiner compared the signatures on ELC's 1941 Conveyance (Item A – the questioned signature of Reverend Knowles), the Knowles Claimants' 1948 Conveyance (Item B – the represented known signature of Reverend Knowles), a 1940 Conveyance (Item C – the represented known signature of Reverend Knowles) and a 1940 Receipt (Item D – the questioned signature of Reverend Knowles. I agree with learned Counsel Mr. Gaitor that the Knowles Claimants, simply unhappy with the conclusions drawn in the Norwitch Report commissioned another report, the Vastrick Report, which did not do much justice to them after all. Mr. Vastrick was unable to say whether any signature was fraudulent.

(iv) The Knowles Claimants failed to provide their second expert, Mr. Vastrick, with all documents containing the signatures of Reverend Knowles as they had done with the previous expert. They only provided Mr. Vastrick with ELC's 1941 Conveyance and their 1948 Conveyance and excluded the 1940 Conveyance and 1940 Receipt notwithstanding the fact that counsel for the Knowles Claimants accepted that the documents were in his possession at the time of instructing the second expert.: Transcript of Proceedings of 29 November 2016 at page 1, lines 23-32 and page 2, lines 1-7.

(v) The Knowles Claimants' contention that ELC's 1941 Conveyance is a forgery because it is signed "Rev. R. H. Knowles" and their grandfather, Reverend Knowles signed every document they were able to locate as "Rev.

Robert H. Knowles" was not investigated or even considered in the Vastrick Report and is not supported by any of the reports from the three experts. The assertion is based purely on speculation by the Knowles Claimants. Furthermore, the Knowles Claimants were only able to produce a single document with Reverend Knowles' signature for consideration and comparison by the experts for the purpose of these proceedings.

(vi) Although the Knowles Claimants insist that their grandfather affixed her signature on every document as "Rev. Robert H. Knowles", the 1948 Deed of Gift on which they rely was signed by one "**Robert A. Knowles**." If this Deed of Gift was truly executed by Reverend Knowles, one is left to wonder why he incorrectly stated his middle initial. Learned Counsel Mr. Gaitor rhetorically asked: was it due to old age and dementia? Or was that Deed of Gift not executed by Reverend Knowles at all? In other words, was that Deed of Gift a forgery? However, what is certain is that Reverend Knowles died on 9 April 1949, a short time after the Deed of Gift was executed.

(vii) The 1940 Conveyance and ELC's 1941 Conveyance both include affidavits of due attestation signed by Floyd Weech before Notary Public, Sir Stafford Sands, a respected attorney and former cabinet minister. The affidavits of due attestation annexed to the said Conveyances confirm that Mr. Weech witnessed the due execution of both documents by Reverend Knowles. Under cross-examination, Mr. Aaron Harold Knowles Jr. accepts that it is possible his grandfather signed the 1940 document but still insists that ELC's 1941 Conveyance - witnessed by the same persons - is a forgery. This just does not make sense. As ELC asserts, the Knowles Claimants must prove their forgery claim with clear, strong and cogent evidence. There is no evidence before this Court to show that the affidavit of due attestation relating to ELC's 1941 Conveyance is a fraud. If such affidavit is not fraudulent, it follows that ELC's 1941 Conveyance is not fraudulent as well.

(viii) On cross-examination, Mr. Aaron Harold Knowles Jr also confirmed that his father, Aaron Harold Knowles, Sr., (the donee of the Deed of Gift) was aware of ELC's 1941 Conveyance and never contested the document during his lifetime.

[65] For all of the reasons given, the forgery allegation advanced by the Knowles Claimants is tenuous and must fail. ELC has established a better documentary title to that of the Knowles Claimants.

**Documentary Title of the Johnson Claimant**

[66] Stephen Henry Johnson ("the Johnson Claimant") also claims a documentary title to the Property. The documentary title to the Property is set out in the Abstract of Title filed on 4 June 2013 and the Further and Better Particulars of Mr. Johnson dated 11 March 2014.

[67] By the Abstract of Title, the Johnson Claimant's root of title is derived from an Indenture of Conveyance dated 11 May 1901 made between Reginald R. Johnson and Albert E. Johnson ("the 1901 Conveyance") whereby Reginald R. Johnson granted and conveyed unto Albert E. Johnson the following hereditaments:

> **"… [A]ll his right title and interest in all that tract of land known as the Spring Tract situate at Governor's Harbour aforesaid".**

[68] The Johnson Claimant says that Albert E. Johnson a.k.a. Albert Ernest Johnson was his grandfather on his father's side of the family. Albert E. Johnson fathered five lawful children namely: Albert Ernest Johnson Jr., Roland Hubert Johnson, Harry Charles Johnson, Ruth Isabel Johnson and Reynolds Dewitt Johnson. Albert Ernest Johnson Jr. was the first born. Roland Hubert Johnson was his father and the second child of his grandfather.

[69] By an Indenture of Conveyance dated 2 March 1937 ("the 1937 Conveyance"), Albert Ernest Johnson Sr. granted and conveyed unto Reynolds Dewitt Johnson, Ruth Isabel Johnson and Harry Charles Johnson the following:

**"…Also my right title claim and interest in a certain undivided tract of land known as "Spring Tract" containing about fifty (50) acres in the tract which said tract adjoins Little Oyster Pond…."**

[70] Ruth Isabel Johnson died intestate without children on 13 July 1943. Her 1/3 undivided interest in the 50 acres devolved to her father, Albert Ernest Johnson Sr. as her lawful heir pursuant to the provisions of the Inheritance Act, 1833.

[71] Following the death of Albert Ernest Johnson Sr. on 17 September 1943, the property described in the 1937 Conveyance vested in his children, Reynolds Dewitt Johnson, Ruth Isabel Johnson and Harry Charles Johnson in fee simple as tenants in common.

[72] The legal and/or beneficial undivided 1/3 interests of each of the children (Reynolds Dewitt Johnson, Ruth Isabel Johnson and Harry Charles) in the undivided 50 acres in the Spring Tract described in the 1937 Conveyance ultimately devolved and vested in the Johnson Claimant, under the laws of succession by virtue of the following:

**(i) Devolution of Ruth Isabel Johnson's 1/3 undivided interest to Reynold Dewitt Johnson:** paras [20] to [25] of Witness Statement of Stephen Henry Johnson filed on 18 March 2014.

(a) Ruth Isabel Johnson died seised of a 1/3 undivided interest without having married and without children on 13 July 1943.

(b) Ruth Isabel Johnson's 1/3 undivided interest passed to her father (Albert Ernest Johnson Sr.) on 13 July 1943 (the date of her death) as her lawful heir.

(c) Albert Ernest Johnson Sr. died seised of Ruth Isabel Johnson's 1/3 undivided interest intestate on 17 September 1943.

(d) Upon the death intestate of Albert Ernest Johnson Sr., Ruth Isabel Johnson's 1/3 undivided interest vested in Albert Ernest Johnson Jr. as her oldest surviving brother and heir-at-law as of that date.

(e) Albert Ernest Johnson Jr. died on 11January, 1969 seised of a 1/3 undivided interest leaving him surviving Reynolds Dewitt Johnson his lawful brother and heir-at-law.

(f) By an Assenting Conveyance dated 6 November 1969 and made between Reynolds Dewitt Johnson (Administrator of the Estate of the late Albert Ernest Johnson Jr.) and Reynolds Dewitt Johnson (as the heir-at-law) recorded in the said Registry of Records in Volume 2857 at pages 231 to 233, Ruth Isabel Johnson's 1/3 undivided interest in the 50 acres was vested in Reynolds Dewitt Johnson as the heir-at-law of the Estate of the late Albert Ernest Johnson Jr. The 50 acres is described in the Schedule to the Assenting Conveyance using the same description found in the 1937 Conveyance.

**(ii) Devolution of Harry Charles Johnson's 1/3 undivided interest:** paras [26] to [28] of Witness Statement of Stephen Henry Johnson filed on 18 March 2014.

(a) Harry Charles Johnson died intestate in 1948. His death is confirmed in (i) the Affidavit of Reynolds Dewitt Johnson (Affidavit of Heirship) sworn on 11 August 1969 and (ii) the Grant of Letters of Administration issued to Reynolds Dewitt Johnson by the Supreme Court of the Commonwealth of The Bahamas on its Probate Side dated 22 August 1969.

(b) Upon the death of Harry Charles Johnson, his 1/3 undivided interest in the 50 acres passed by operation of law to Albert Ernest Johnson Jr. as his heir-at-law and oldest brother. Albert Ernest Johnson Jr. died on 11 January 1969.

(c) By an Assenting Conveyance dated 6 November 1969 and made between Reynolds Dewitt Johnson (Administrator of the Estate of the late Harry Charles Johnson) and Reynolds Dewitt Johnson (as the heir-at-law) and recorded in the said Registry of Records in Book 2053 at pages 242 to 256, Harry Charles Johnson's undivided 1/3 interest in the 50 acres was vested in Reynolds Dewitt Johnson as the heir-at-law of the Estate of the late Harry Charles Johnson. The 50 acres is described in the Schedule to the said Assenting Conveyance using the same description found in the 1937 Conveyance.

**(iii) Devolution of Reynolds Dewitt Johnson's 1/3 undivided interest:** see: Witness Statement of Stephen Henry Johnson filed on 18 March 2014 and various exhibits to the Witness Statement.

(a) By reason of the matters referred to above, the entire undivided interest in the 50 acres which was originally vested in Albert Ernest Johnson Sr. was unified in Reynolds Dewitt Johnson by the Assenting Conveyances each dated 6 November 1969 and referred to above: see also a chart illustrating the unification of the 1/3 undivided interests attached to the Witness Statement of Stephen Henry Johnson.

(a) By his last Will and Testament dated 30 May 1975 Reynolds Dewitt Johnson gave devised and bequeath unto Stephen Henry Johnson "…*all his real and personal property whatsoever to my friend and nephew Stephen Henry Johnson…*".

(b) Reynolds Dewitt Johnson died on 4 June 1977 seised of the unified undivided interest in the 50 acres of land

(c) Probate in the Estate of Reynolds Dewitt Johnson was granted to the Stephen Henry Johnson, on 1 July 1977 and by Deed of Assent dated 4 July 1977 and recorded in the Registry of Records in the City

of Nassau in the Island of New Providence one of the Islands of the Commonwealth of The Bahamas in Volume 2857 at pages 231 to 233 the undivided interest in the 50 acres was vested in Stephen Henry Johnson.

[73] The 50 acres is described in the Schedule to the Oath for the Administrator attached to the Grant of Probate using the same description found in the 1937 Conveyance: "all right title claim and interest in a certain undivided tract of land knows as "Spring Tract" containing about fifty (50) acres in the tract which said tract adjoins Little Oyster Pond".

**Discussion**

[74] Learned Counsel Mr. Eneas fought hard to show that the above-referenced conveyances and probate documents represent a complete documentary title showing the devolution and vesting of an undivided 50 acre interest in the Spring Tract in the Johnson Claimant from at least the year 1937 to the present.

[75] ELC and the Knowles Claimants hold an entirely different view.

[76] Learned Counsel Mr. Rolle submits that the 1901 Conveyance relied upon by the Johnson Claimant does not describe the Property at all and thus cannot constitute a good root of title and the 1937 Conveyance/Deed of Gift is void due to uncertainty of the land being referred to, expands upon the acreage claimed; fails to recite the basis of the Donor's "right, title, claim, or interest", and accordingly does not constitute the better title to the land in dispute. Mr. Rolle submits that the entire chain to documentary title is fatal to the legal maxims "*nemo dat quod non habet"* and "*ex nihilo nihil fit".*

[77] Mr. Rolle next submits that there is a question of fact, which has not thus far been resolved as to exactly what tract or tracts of land might have been referred to in antiquity as "the Spring Tract". This is most particularly so as there is no allotment on any historical Plan showing anything described as "the Spring Tract".

[78] There are several named tracts of land originally granted by the Crown which lie in the vicinity of the two ponds, Little Oyster and Great Oyster; namely to Thomas Knowles (33 acres, net 20 acres), James Moss (29 acres) and Thomas Bowles (7 and 9 acres). Collectively these allotted tracts of land total between 65 and 78 Acres, depending on which Acreage is ascribed to the Thomas Knowles Tract).

[79] He further submits that any purported disposition of any smaller tract or allotment thereof, without any reference to the original Grantee must, therefore, necessarily be very specific as to the boundaries of any such land purportedly disposed of, so as to effectively delineate and sever the same from the total.

[80] Additionally, says Mr. Rolle, the devise in the 1858 Will of Thomas Knowles squarely places the land he called "The Spring Tract" in the James Moss tract of 29 acres, as it specifically states that the "20 acres" was bounded on the south by Little Oyster Pond, and on the north by land owned by one John Griffins. Indeed Tab. 15 of the Agreed Bundle of Documents shows an old government Survey Plan which shows due north of the land referred to in the said Will, a commuted portion of an original grant of 93 acres to Esther Bethel "**now owned by....Griffins**". This places the land, referred to in the Will, squarely within the James Moss Tract. He concludes that the land so described in the said Will cannot have been the Property.

[81] Like Mr. Rolle, learned Counsel Mr. Gaitor submits that the Abstract of Title filed by the Johnson Claimant to support his claim commences with the 1901 Conveyance whereby Reginald R. Johnson granted and conveyed unto Albert E. Johnson "*… all his right title claim and interest in certain undivided tract of land known as "Spring Tract"* ***situate at Governor's Harbour aforesaid***."

[82] Two things are pellucidly clear in the 1901 Conveyance namely: (i) the land that was conveyed has no dimension and/or size and (ii) it is situated at Governor's Harbour. The Property lies several miles to the East of Governor's Harbour.

[83] In relying on the 1901 Conveyance as the starting point in tracing his root of title, the Johnson Claimant is privy to that deed and thereby estopped from denying its terms. In the House of Lords case of **Greer v Kettle** [1938] A.C. 156, Lord Maugham said, at page 10:

> **"When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all."**

[84] I agree with both Mr. Gaitor and Mr. Rolle that the 1901 Conveyance relates to some other land situate at Governor's Harbour and not the Property.

[85] In addition, to establish a good root of title, a document must contain a recognisable description of the property to which it relates. In **Bannerman Town, Millars and John Millars Eleuthera Association and others v Eleuthera Properties Limited** SCCivApp Nos. 175, 164 and 151 of 2014, Allen P. explained the requirements of a good root of title as follows:

> **"Root of title is not defined by statute. However In Collie v. The Prime Minister [2012] 1 BHS J. No. 18, the court accepted the definition from Williams on Vendor and Purchaser at paragraph 23:**
>
> > **"*Williams on Vendor and Purchaser* 4th Edition provides a good definition of what constitutes a good root of title. The authors state at page 24: "must be an instrument of disposition dealing with or proving on the face of it without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title."**[Emphasis added]

[86] Fundamentally, this is the same definition accepted by the parties in this action taken from Megarry and Wade: The Law of Real Property 4th Ed. at page 580 which describes a good root of title as:

> **"…a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title."**

[87] In order to establish a good root of title a document must contain a **recognisable description of the property to which it relates**. It is beyond doubt that the 1901 Conveyance lacks that requirement and therefore, it is insufficient to constitute a good root of title to the Property.

[88] The next document in the Abstract of Title relied upon by the Johnson Claimant is the 1937 Conveyance between Albert Ernest Johnson and his children, Reynolds Dewitt Johnson, Ruth Isabel Johnson and Harry Charles Johnson. The property is described as:

> **"… a certain undivided tract of land known as "Spring Tract" containing about fifty (50) acres in the tract which said tract adjoins Little Oyster Pond."**

[89] Learned Counsel Mr. Eneas submits that it is settled law that there is a presumption that where a person deals with an interest in land by conveying the same it is presumed that he was entitled to the estate unless the contrary is proved. In this regard, he refers to **Ocean Estates v. Pinder** [supra] where Lord Diplock said, at page 19:

> **"…for where a person has dealt in land by conveying an interest in it to another person there is a presumption, until the contrary is proved, that he was entitled to the estate in the land which he purported to convey."**

[90] He also submits that in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession: **Powell v McFarlane** [1977] 38 P & CR, pages 452 and 472.

[91] Mr. Eneas contends that neither ELC nor the Knowles Claimants have produced any cogent evidence disputing the property by Albert Ernest Johnson in the year 1937. Further, he contends that the possession of the property by Albert Ernest Johnson is supported by the evidence of Mr. Stephen Johnson in which he recounts that he was told by his uncle Reynolds Dewitt Johnson that the Spring Tract was situate between the Little Oyster Pond and Great Oyster Pond and that

his grandfather, Albert Ernest Johnson farmed and reared livestock on the 50 acres (which included the Property).

[92] Learned Counsel Mr. Eneas submits that the Johnson Claimant acquired a 50 acres undivided interest in the Spring Tract which property includes the Property in dispute and that the Johnson Claimant is the successor in title to the Property held by Albert Ernest Johnson.

[93] In his written submissions at Sub-Heading VI, Mr. Eneas dealt with the location of the Spring Tract. To my mind, it is a critical issue in order for the Court to determine where exactly the Property is situated or conversely, where exactly the 50 acres undivided interest in the Spring Tract which Albert Ernest Johnson purported to convey to his three children in the 1937 Conveyance is situated.

[94] Both ELC and the Knowles Claimants dispute that the reference to the Spring Tract in the parcels clause in the 1901 Conveyance and the 1937 Conveyance refer to the Property. As already stated, the 1901 Conveyance describes the property as "*the Spring Tract situate at Governor's Harbour".* A site visit confirms that the Property lies several miles to the East of Governor's Harbour.

[95] The 1937 Conveyance also uses the formulation "…*tract of land known as the Spring Tract…"* Mr. Eneas submits that any ambiguity relating to the parcels in both Conveyances including the location of the Spring Tract may be resolved by having recourse to extrinsic evidence.

[96] At paragraphs 6.9 to 6.25 of his written submissions, Mr. Eneas deals with the location of the Spring Tract resorting to extrinsic evidence. For purposes of this judgment, I would not repeat it since I do not agree that the matters referred to in paragraphs 6.1 to 6.22 establish that the land between the two ponds comprised 68 acres of land more or less and is known as the "Spring Tract."

[97] In my opinion, both the 1901 Conveyance and the 1937 Conveyance are insufficient to constitute a good root of title to the Property. In fact, it appears to me that the Johnson Claimant is "lost" as to where his property lies.

[98] As Mr. Gaitor postulates, the 1937 Conveyance is deficient to constitute a good root of title to the Property for the following reasons:

(i) The Property was never a part of a larger tract of land comprising 50 acres. The evidence before the Court is that the Property was the subject of a Crown Grant pertaining to a tract *"containing thirty-three acres gross or twenty acres net of Crown Land"*.

(ii) The 1937 Conveyance relates to land which *"adjoins Little Oyster Pond*" whereas the Property does not in any way adjoin Little Oyster Pond.

(iv) There is no clarity regarding what comprises "the Spring Tract". The evidence before this Court, adduced by Mr. Christie and Mr. Sands in particular, is that the general area around Little Oyster Pond and Great Oyster Pond is referred to as "Spring Hill", "the Spring", "Spring Tract" and other derivatives including the word "Spring."

(v) The land adjoining the western boundary of the Property ("the Morris Tract") is owned by ELC and the chain of title to the Morris Tract does not include the 1937 Conveyance.

[99] Mr. Gaitor submits that the result is the 1937 Conveyance is void for uncertainty as the tract of land to which it relates is not clearly identifiable and in the circumstances, ELC's documentary title to the Property is superior to that of the Johnson Claimant.

[100] Mr. Gaitor next argues that in an effort to discredit the Crown Grant which commences the root of the documentary title of ELC and the Knowles Claimants, learned Counsel Mr. Eneas, suggested, during his cross examination of Mr. Christie, the following:

(i) Thomas Knowles Sr., i.e. the father of Thomas James Knowles, owned the Property and he bequeathed it to Ann Knowles, Thomas James Knowles, Sarah Johnson, Phillis Demeritte and Harriet Hudson by his Will dated 14 August 1858: Agreed Bundle of Documents at Tab 20;

(ii) Reverend Knowles was not the heir-at-law of Thomas James Knowles; and;

(iii) Thomas Knowles Sr. and not Thomas James Knowles was the beneficiary of the Crown Grant.

[101] Learned Counsel Mr. Gaitor contends that all of the suggestions are unsustainable as detailed below.

**The Property and the property referred to in the Will of Thomas Knowles Sr. are not one and the same**

[102] By his Will dated 14 August 1858, Thomas Knowles Sr. made the following devise:

> **"I bequeath to my beloved Wife Ann Knowles, Thomas James Knowles, Sarah Johnson, Phillis Demeritte and Harriet Hudson all the real estate I may die possessed of to share and share alike in the following lands…<u>Spring Tract, 20 acres on the North by John Griffins land, on the South by Little Oyster Pond, on the West by James Moss' land, on the East by Charles Demeritte's land</u>."**[Emphasis added]

[103] It is manifestly clear from the devise itself (above) that the property described in the Will and the Property are not one and the same because the boundaries are different. The property referred to in the Will is bounded on the South by Little Oyster Pond and on the East by land owned by Charles Demeritte whereas the Property in dispute is bounded on the South by vacant land and on the East by Great Oyster Pond.

[104] In his cross examination of Mr. Christie, Mr Eneas suggested that the diagram attached to the Conveyance dated 6 April 1893 ("the Morris Conveyance"): Tab 8 of Christie W.S. 2 and the Plan at Tab 15 of the Agreed Bundle of Documents support the view that (i) there has been some "accretion" to the southern boundary of the

Property and (ii) the Property was bounded on the South by Little Oyster Pond at some point in time.

[105] I agree with learned Counsel Mr. Gaitor that there is no evidence, scientific or otherwise, to support this allegation. The Morris Conveyance relates only to the property West of the Property and does not purport to describe the southern boundary of the Property. Additionally, every single historical conveyance or plan before this Court which deals with or depicts the boundaries of the Property, demonstrates that the Property was not bounded on the South by any pond, but rather land owned by a person whose last name was Pinder – see for example (i) the diagram or plan attached to the Crown Granted dated 10 November 1898 to Thomas Bowles which shows the that the Property at that time was bounded on the South by land granted to James Pinder and (ii) the tracing of a survey plan of crown lands lying between Governor's Harbour and Savannah Sound, Eleuthera (Plan No. 34C Eleuthera) prepared in 1927, which shows that the Subject Property was still bounded on the South by land owned by James Pinder.

**It is more likely than not that the Crown Grant was made in favour of Thomas James Knowles.**

[106] Mr. Gaitor argues that although it is unclear from the evidence whether Thomas Knowles Sr. or Thomas James Knowles was the Crown Grantee, the evidence demonstrates that:

(i) According to Mr. Holowesko's research, one Thomas Knowles paid £6.00 in respect of the Crown Grant on 17 January 1862; (Mr. Eneas questions the amount and the year when it was paid);

(ii) The Crown Grant was made on 17 September 1920;

(iii) Thomas Knowles Sr. made a Will on 14 August 1858 and that Will was lodged for record on 13 October 1862; and

(iv) One "Thomas Knowles" of Eleuthera is recorded to have died on 8 May 1890 at the age of 56 years: Tab 28 of Agreed Bundle of Documents and one

"Thomas M. Knowles" of Rock Sound, Eleuthera is recorded to have died on 20 January 1927: Tab 31 of Agreed Bundle of Documents;

(v) No adverse claim has been filed by any person whose title is derived from Thomas Knowles Sr.'s ownership of the Property; and

(vi) The Knowles Claimants have the Original Crown Grant in their possession.

[107] According to Mr. Gaitor, based on these facts, either Thomas Knowles Sr. or Thomas James Knowles could have made the payment in respect of the Crown Grant. He suggests that Thomas Knowles Sr. died between 14 August 1858 (when he executed his Will) and 13 October 1862 (when the Will was recorded). Given that he was dead when the Crown Grant was made and there are no adverse claimants whose title is derived from Thomas Knowles Sr.'s ownership of the Property, the Court may reasonably infer that the Crown Grantee was not Thomas Knowles Sr. Moreover, given that the Knowles Claimants, whose documentary title is based on Thomas James Knowles' ownership of the Property, is in possession of the Original Crown Grant, it is more likely than not, on a balance of probabilities, that Thomas James Knowles was indeed the Crown Grantee. In all the circumstances, it is possible that neither of the death records at Tab. 28 and Tab. 31 of the Agreed Bundle of Documents relates to Thomas Knowles Sr. or Thomas James Knowles. These submissions are indeed very compelling and I agree with them.

**It is more likely than not that Reverend Knowles was the heir-at-law of Thomas James Knowles.**

[108] Mr. Gaitor submits that although there is no documentation which clearly proves that Reverend Knowles was the heir-at-law of Thomas James Knowles, there is intrinsic evidence to support such a finding.

[109] First, the statements (though unsworn) of John J. Bethel, Elijah Demeritte and John Tinker respectively, confirms that Reverend Knowles was the son of Thomas James Knowles and the owner of the Property (presumably by inheritance). Secondly, the evidence of Aaron Harold Knowles Jr, a descendant of Thomas James Knowles and

Reverend Knowles unequivocally supports this position and thirdly, as already stated, no adverse claim has been filed by any person whose title is derived from Thomas Knowles Sr.'s ownership of the Property. This is significant because it infers that no other person was the heir-at-law. Indeed, these submissions are very forceful and I agree with them.

[110] ELC accepts that their title to the Property is not perfect. If it were, there would have been no need to ask the Court to investigate their title and declare ELC the owner of the Property. As a matter of fact, Mr. Christie acknowledged that there is an obvious break in the chain of documentary title between Thomas Knowles and Reverend Knowles. Besides, there is no document of title to show how Reverend Knowles acquired the Property.

[111] Imperfect as it is, I agree with learned Counsel Mr. Gaitor who was ably assisted by Mrs. Cooper-Burnside, that ELC's documentary title to the property is better than that of the Johnson Claimant and the Knowles Claimants who could not have proven the allegation of forgery that they raised.

[112] I therefore find that ELC has the best documentary title to the Property.

**Possessory Title**

[113] Both ELC and the Johnson Claimant claim a possessory title to the Property.

[114] ELC claims to be the owner in unencumbered fee simple in possession of the Property. ELC claims to have been in continuous, exclusive and undisturbed possession of the Property since Reverend Knowles conveyed it to ELC on 18 January 1941 up to the present time.

[115] The Johnson Claimant claims that he has been in continuous, exclusive and undisturbed possession of the Property since 1977 and he has occupied and no one else has claimed the Property.

**Adverse Possession - The Limitation Period**

[116] It is not in dispute that the applicable law relating to adverse possession is determined by the date of the entry into possession of the land in dispute by the person claiming adverse possession.

[117] Where the entry took place **prior to 28 March 1995** (the date of the commencement of the Limitation Act, 1995) the old law under the Real Property Limitation Act, (1874) and The Real Property Limitation (No.1) Act (collectively "the 1874 Limitation Acts") will apply to the proceedings. The period of limitation for the commencement of an action for the recovery of land under those statutes is **20 years.**

[118] This was emphasized by the Privy Council in **Kenneth McKinney Higgs, Sr. v. Leshel Maryas Investment Company Ltd. and Annamae Woodside** [2009] UKPC Case Ref 47; Privy Council Appeal No. 0012 of 2009. At para [27], Lord Scott said:

> **"It is not in dispute that, under the Real Property Limitation Acts 1833 and 1874, which apply to the Bahamas, a 20 year period of uninterrupted adverse possession is necessary in order to bar an otherwise good documentary title."**

[119] Where the entry into possession took place **after 28 March 1995** ("the 1995 Limitation Act"), **the 12 year limitation period under that statute applies**.

[120] Based on the finding of the Court that ELC has the superior documentary title and is the "paper holder" to the Property, the burden shifts to the Johnson Claimant to prove that he has dispossessed ELC through continuous and exclusive possession of the Property for a period of 20 years prior to the commencement of these proceedings in May 2012.

[121] As previously stated, the Johnson Claimant says that he has been in continuous, exclusive and undisturbed possession of the Property since 1977 and since his occupation, no one else has claimed the Property.

## The law of possession

[122] It is an elementary principle of law that a person's title to land including the person who has the documentary title (in this case, ELC) is only good in so far as there is no other person who can show a better title. However, in order to do so, the other party must establish both (a) factual possession and (b) the requisite intention to possess. This basic proposition was re-stated by Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 quoting Slade J. in **Powell v McFarlane** (1977) 38 P & CR 452, 470 stated at paragraph 40:

> **"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.**
>
> **(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")."**

[123] Later on, in the same paragraph, Lord Browne-Wilkinson simplified the two elements necessary for legal possession in this manner:

> **"1. a sufficient degree of physical custody and control ("factual possession");**
>
> **2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").**"

## Factual possession

[124] In **Pye**, Lord Browne-Wilkinson, in adopting the definition of factual possession by Slade J in **Powell**, said at para [41]:

> **"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it**

**is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession…. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."**

**Intention to possess**

[125] **Slade J.** in **Powell** defines the "*animus possidendi*" in this way:

> **"(4) The *animus possidendi,* which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case, the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."** [Emphasis added]

[126] With respect to the burden of proof, **In the Matter of ALL THAT piece parcel or lot of land situate in the Settlement of Hunters on the Island of Grand Bahama** [2013] 1 BHS J. No. 6, Sir Michael Barnett CJ stated at paras [85] – [87]:

> **"85 As opined by Adams, J. in the case of Re Roman Catholic Apostolic of the Bahamas [1984] BHS J. No. 34 at paragraph 52:**
>
> > **"As regards the burden and nature of proof and the desired quality of possession, the adverse claimant by himself and his predecessors had to meet the criteria indicated in Sherren v. Pearson 14 Can S.C.R. 581 where Ritchie C.J. said at p. 585:**
> >
> > > **'To enable the trespasser to recover he must show an actual possession, an occupation exclusive, continuous, open or**

**visible, and notorious for the twenty years. It must not be equivocal, occasional or for a temporary or special purpose.'"**

**86 It used to be that in order for a trespasser to establish a squatter's title he had to prove that he or his predecessors took active control over every portion of the land he was claiming (see Scarr J in The Grand Bahama Port Authority Limited v Smith, No. 170 of 1961).**

**87 However, in Higgs v Nassauvian Ltd [1975] A.C. 464, the Privy Council held that "there was no general principle that to establish possession of an area of land a claimant had to show that he had made physical use of the whole of it and that acts done on part of the land could establish possession of the whole land". The court decided that whether those acts did establish possession was a question of fact and degree and depended on a consideration of all the circumstances."**

[127] Further, in order to succeed in a claim for adverse possession, the [adverse] claimant must show positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. The mere fact that the title owner is shown to have made no use of the land during the period does not necessarily amount to discontinuance of possession. See: Winder J in **In the matter of the Petition of Ezekiel Stubbs** [2014] 2 BHS J. No. 46 at para [36]. At paragraph 37 of the Judgment, Winder J cited a passage from the learned author, Samson Owusu in the treatise "**Commonwealth Caribbean Land Law**, p. 280, in discussing adverse possession, in stating:

**"These should be acts, which are inconsistent with the enjoyment of the soil by the person entitled to the land. The land should have been used in a way, which altered or interfered in a permanent or semi permanent way with the land. A classic case is where the disputed land is fenced and substantial structures are constructed on it by the squatter, leaving in its trail substantial traces of use."**

[128] In addition, the quality of the possession by an adverse claimant must be considered. In **Ezekiel** Stubbs, at paras [39] –[43], Winder J stated:

**"39 As to the quality of the possession, the principles to be considered were discussed by Bain J in *CLE/qui/00289/2009*. According to Bain J., the relevant guide is the rule in *Leigh v Jack* which was restated by the Court of Appeal in *Wallis's Cayton Bay Holiday Camp Ltd. v Shell Mex and BP Ltd. 1975 QB 94*. In that case a strip of land was intended by the owner to be the site of a garage, which would front upon a projected road, which in fact never**

**materialized, and meanwhile was occupied successively as part of a farm and part of a holiday camp. The Court of Appeal held that the owner had not been dispossessed. Lord Denning M.R. stated the principle in the following terms, at p. 103:**

> **"There is a fundamental error in that argument. Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. That is shown by a series of cases in this court which, on their very facts, show this proposition to be true. When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see Leigh v. Jack (1879) 5 Ex.D. 264; Williams Brothers Direct Supply Ltd. v. Raftery [1958] 1 Q.B. 159; and Tecbild Ltd. v Chamberlain (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words."**

**40 It was found that "[t]he use of the property by the Petitioner farming, was not inconsistent with the intended use of the documentary title holder. And the documentary tile (sic) holder had instructed the caretaker of the property to plant fruit trees and set up a plant nursery." Further, "[t]he Petitioner has not proved to the satisfaction of the court that he was in adverse possession of the property for twenty years and that he dispossessed the title of the documentary title holder". The court is not satisfied that the Petitioner was in possession of the property as alleged. The alleged possession by the Petitioner was too sporadic and ill-defined to confer any interest on the Petitioner.**

**41 The Privy Council has discussed abandonment and lack of continuity in the possession by the person claiming adverse possession in case of *The Trustees, Executors and Agency Company Ltd and Templeton v Short (1888) 13 App Cas 793* which concerned the application of the New South Wales equivalent of our Real Property Limitation Act (No. 2), Ch. 71. *Hall J* in the case of *Nottage v. Finlayson [1994] BHS J. No. 35* adopted the reasoning of the Privy Council in this case. At page 798 Lord MacNaghten, giving the judgment of the Board said:**

> **"Their Lordships are ... of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of**

**law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant ...**

**It is sufficient to refer to *McDonnell v. McKinty 10 Ir. L. R. 514*, Lord St. Leonards' Real Property Statutes, p.31, and *Smith v. Lloyd 9 Exch. (Welsby, H. & Gor.) 562*. In the latter case, which was decided in 1854, Parke, B., giving the judgment of the Court, says:- We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in McDonnell. v. McKinty, and the principle on which it is founded."**

**42 Finally, in the case of *Farrington v. Bush (1974) 12 JLR 1492*, Graham Perkins JA of the Jamaican Court of Appeal summarized the law as it related to acts of possession as follows:**

**Adverse possession of land is, and always has been, a complex concept. It involves the co-existence of two essential elements, namely, the assumption of actual physical possession by, and the presence of a particular mental element directed towards the true owner in, the adverse possessor. It is, in our view, a mistake to think that mere entry upon, and user of, the land of another can, without more, be equated with an assumption of possession. It must be possession of such a nature as to amount to an ouster of the original over of the land. See, e.g. *William Bros. v. Raftery [1958] 1 Q.B. 159*. To support a finding of adverse possession there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner. Where alleged acts of possession are intrinsically equivocal they will almost always be found to be mere acts of trespass. In this context, an equivocal act means an act of such a nature as to provide an equal balance between an intention to exclude a true owner from possession and an intention merely -to derive some enjoyment or benefit from the land wholly consistent with such use as the true owner might wish to make of it. See *Ticbild Ltd. v. Chamberlain (1969) 2 P. & C. Report 633*. In order to determine the precise nature of an alleged act of possession, the geography and nature of the land are to be regarded as critical considerations. Equally important, from the point of view of the true owner, is the nature of the user of which his land is shown to be capable and his intention in relation thereto.**

> **43 In *Farrington* the acts of possession being advanced were monthly visits to the land, clearing the land, putting up a no trespassing sign, setting out boundary markers and registering the land under an "invalid conveyance". The Jamaican Court of Appeal rejected this as it found that the acts were equivocal an insufficient. The Claimant was under the mistaken belief that the land was conveyed to him and the acts were as consistent with that belief as with an intention to establish title by adverse possession."**[Emphasis added]

[129] On the basis of these well-established principles, a party without documentary title, i.e. a party wishing to establish adverse possession, needs to demonstrate actual possession, an occupation exclusive, continuous, open or visible, and notorious which must not be equivocal, occasional or for a temporary or special purpose. Further, that party must show that such acts amounted to actual possession with the requisite intention to possess the property in question.

**Evidence of Possessory Title by the Johnson Claimant**

**Stephen Henry Johnson**

[130] Stephen Henry Johnson testified that in July 1977, he entered into possession of the 50-acre tract which includes the Property, the subject of these proceedings, and has remained in exclusive continuous and undisturbed occupation until the filing of the Petition.

[131] On 3 June 2013, the Johnson Claimant swore an affidavit in which, among other things, he deposed that he first became acquainted with the 50 acre tract in or about 1972 when he travelled to Eleuthera for the first time to visit the land owned by members of his family.

[132] He testified that prior to his visit to Eleuthera and after his father's death, he grew closer to his uncle, Reynolds Dewitt Johnson, who spoke of "the 50 acre tract" and his other properties at Cupid's Cay and Baker's Bluff, Eleuthera. He said that his father, Albert E. Johnson Jr. was from Governor's Harbour, Eleuthera and that during the periods 1901 to 1932 his grandfather farmed the land and reared livestock on the 50 acre tract which stopped after the hurricane in 1932.

[133] He said that after visiting the land in 1972, in the years following, he visited the 50 acre tract in just about every year for the purpose of ensuring that there was no encroachment on the property. At no time did he ever encounter anyone trespassing on the 50 acre tract not has anyone asserted a claim to the said tract prior to the commencement of this Petition.

[134] Mr. Johnson said that his uncle told him that the Property was situated between Little Oyster Pond and Great Oyster Pond. He also stated that when he first visited the Property in 1972, he recollected that the 50 acre tract including the Property was covered with thick bush and had a track road running from the main Eleuthera Highway through the Property and down to the sea.

[135] Mr. Johnson deposed that, in 1975, his uncle informed him that he would leave the 50 acre tract together with the other properties to him. He said that in his uncle's Last Will and Testament, he was named the sole beneficiary of his estate. His uncle died on 4 June 1977 and subsequently, he became entitled to the Property.

[136] Mr. Johnson testified that following his acquisition of the 50 acre tract in July 1977 and up to 2007, he visited Eleuthera in just about every year for the purpose of ensuring that there was no encroachment on the 5o acre tract. On many occasions, particularly in the early 1970's and continuing up to 1990 he would camp on the top of the hill South of the closest point between Little Oyster Pond and Great Oyster Pond. Mr. Johnson said that in recent years, his visits became less frequent. However, it was always his dream to develop the Property but he never had the finances or the technical assistance for such a project.

[137] Additionally, Mr. Johnson testified that, while camping in the area, he had also fished the Little and Great Oyster Ponds and the nearby sea. He had also visited an old farm on the Property to harvest bananas and papayas and other ready crops. Over the years, he said, that it appeared that there were from time to time squatters farming a small portion of the Property but this activity was sporadic and not marked with any consistency. He deposed that there would be periods of years

where there was no activity and then the area would appear to have been chopped and burnt. The patch on the Property is off to the East of the track road running through the Property below the middle of the Property and is concealed. He said that he had never encountered anyone on the field but he would check that area on each occasion he visited. He also said that he was never able to identify the persons conducting the farming on the patch and had he encountered them, he would have removed them from the Property.

[138] Mr. Johnson stated that in or about 1996, he attempted to find a purchaser or a partner to develop the 50 acre tract and, in taking advice on the matter, he was advised by his former attorney Dr. Dexter Reno Johnson that it was preferable to have an Assenting Conveyance which his attorney prepared: Assenting Conveyance dated 18 September 1996.

[139] Mr. Johnson stated that the 50 acre tract (which includes the Property) has been in his family since 1901 and he has never abandoned his interest and no one has occupied the Property for a sufficient period of time to extinguish or otherwise bar his title.

[140] In his Second Witness Statement filed on 23 June 2016, Mr. Johnson alluded to the meeting between himself and Mr. Christie referred to in paragraph 33 of his first witness statement (filed on 18 March 2014). At paragraph 33, he deposed as follows:

> **"At some point during the 1980's I became aware that the Eleuthera Land Company Limited ("hereinafter called "ELCL") was purporting to lay claim to land in the vicinity of Little Oyster Pond. Upon receiving this information I made enquiries at the Supreme Court Registry and discovered that Mr. William McPherson Christie was the person with whom I should pursue my enquiries. I attended the office of Mr. Christie with my documents of title and informed him of my entitlement to the 50 acre tract. It is my recollection that the matter was addressed at a court hearing where Mr. Christie was able to convince the court and myself that ELCL was not claiming the land the subject matter of my entitlement. Shortly thereafter I acquired a copy of the preliminary layout plan of the Oyster Harbour Development dated February 1980 and prepared at the instance of ELCL: Tab. 19. On the plan the Property is identified as '*Private Property'* and I assumed that the reason the plan identified the Property as *'Private Property'* was because ELCL did not have**

> **any claim to the Property and further the location of the Property described as *'Private Property'* was consistent with the information given to me by Mr. Christie as being the location of the 50 acre tract."**

[141] In paragraph 6 of his Second Witness Statement, Mr. Johnson deposed as follows:

> **"My statements concerning the meeting between myself and William McPherson Christie ("Mr. Christie") referred to in paragraph 33 … were based upon my recollection of the matter and I did not have any documents in my possession at the time of the preparation of my first witness statement relating to the proceedings commenced by myself against the Petitioner in [sic] Supreme Court in Action No. 450 of 1981 ("the 1981 Proceedings") nor did I recall the name of my attorney in the action. My files and papers relating to the 1981 Proceedings were mislaid many years ago."**

[142] In effect, throughout his Second Witness Statement, Mr. Johnson attempts to rebut various statements made by Mr. Christie. I agree with learned Counsel Mr. Gaitor that such rebuttal did not add to his assertions in paragraph 33 of his First Witness Statement.

**Arnett Johnson**

[143] Mr. Johnson called his wife Arnett Johnson ("Arnett") as his witness. She and Mr. Johnson were married on 23 February 1980. She stated that she met her husband in or about 1972 and became acquainted with his family history from speaking with him and his mother. She understand from her mother-in-law that her husband's family was from the Island of Eleuthera.

[144] She averred that in the early days, she became acquainted with Reynolds Dewitt Johnson ("Reynolds"). He said that at that time, Reynolds resided in the same house with her husband in New Providence. Her husband was very close to Reynolds and for that reason, he left his property to her husband.

[145] Arnett first heard of the Property in 1977. She knows that her husband always regarded himself as the sole owner of the Property left to him by his uncle, Reynolds. From the time she met her husband, she knew him to travel to Eleuthera in just about every year and sometimes several times a year. She was also aware that he and several friends camped on the Property in the area between Little and

Great Oyster Ponds. She accompanied her husband to purchase groceries for the trips to Eleuthera and on one occasion, she recalled accompanying him to purchase tents for them to sleep while camping. According to her, these camping trips will last for a week or two and even a month.

[146] Arnett said that she asked her husband the purpose of camping in that area and he assured her that he wanted to make his ownership of the Property known to anyone who may own other land in the area. She averred that her husband was very conscious of asserting and safeguarding his title to the Property acquired from his uncle, Reynolds. He knew the value of his inheritance and wanted to ensure that we would all benefit from the properties in future.

[147] Arnett said that she visited the Property with her husband and their youngest daughter for the first time in or about 2006, According to her, they drove through the Property twice on that trip and on the second occasion, they parked their vehicle in a small clearing and her daughter and Stephen went to inspect the Property.

[148] Arnett further stated that on that occasion, the Property was accessible by a rough track road running through it. The Property was undeveloped and covered with thick bush.

[149] Arnett deposed that she again visited the Property in or about 2009/2010 when she and her husband travelled to Eleuthera upon hearing that Stephen's house in Cupid Cay had burnt down.

[150] Arnett said that on each of the occasions that she visited the Property, she never observed any signs on or near the Property to suggest that it was owned by anyone else. No one interfered with their access or entry on the Property and at no time did they see anyone else on or occupying the Property.

**Shaun Gierzewski**

[151] Shaun Gierzewski ("Shaun") was born on 14 February 1980 and he is now, 39 years old. He met Mr. Stephen Johnson in or about mid 1990's. At that time, he was a young boy residing at Betsy Village in Governor's Harbour. He said that Mr. Johnson owns a house on Cupid's Cay.

[152] Shaun said that Mr. Johnson visited Eleuthera regularly and they developed a close relationship. During that time, he became aware that Mr. Johnson owned property outside of Governor's Harbour near Palmetto Point and on a few occasions, he accompanied him to that property.

[153] He said that the "property" they visited was between Little and Great Oyster Pond and he had been shown a survey plan of the Property (shown in pink) and he can confirm that it is the same property that he and Mr. Johnson visited: Exhibit SG1 at Tab. 1 attached to his witness statement: Divider L.

[154] Shaun alleged that he knows the area well as he would frequent the land between the two ponds to go shooting for birds and to fish the coast at the Southern end of the track road which lead from the public road and runs through the Property. He said that the track road has been there for as long as he could remember. He was never aware that the track road was a private road as he always thought that it was a public way as it has been used for all of his life by the inhabitants and residents of Governor's Harbour and Palmetto Point to access the South coast. He said that the track road is one of only two accesses to the South coast between the town welcome signs demarcating Governor's Harbour and Palmetto Point. According to Shaun, he has never seen any signs or chains restricting access to the track road.

[155] Shaun further alleged that as young boys, they would hike through the track road, enter the sea and dive the shoreline back to Governor's Harbour spearing fish as they made their way towards Governor's Harbour.

[156] Shaun also alleged that he is aware that the area is frequently used for shooting birds and that the track road is sued by such person to access the shooting spots between Little and Great Oyster Ponds.

[157] Shaun concluded his testimony by stating that he was under the belief that the Property was Crown Land until Mr. Johnson advised him that he owns the Property. He is not aware that ELC is the owner of the Property or any other property in the vicinity. She said that at no time has anyone restricted his use of the track road or told him that he cannot shoot birds on the land between Little and Great Oyster Pond or fish from the South coast.

**Evidence of possessory title by ELC**

**William McPherson Christie**

[158] Mr. Christie deposed that in February 1973, ELC arranged for the property to be surveyed by Nassau Engineering Company Limited ("NECL") which was also wholly owned by Sir Harold. The survey prepared plan laid out the property according to the Plan attached to the 1941 Conveyance, which Plan was copied from the Crown Grant. The Crown Grant described the property as containing "33 acres gross or 20 acres net of Crown Land." Mr. Christie deposed that the property is wet land and only about 20 acres was suitable for farming.

[159] He further averred that in March 2010, ELC arranged for the property to be re-surveyed and a plan of it recorded in the Department of Lands and Surveys by Caribbean Surveys Ltd. The survey followed exactly the survey markers established by the survey plan prepared by NECL.

[160] From 1973 to the present date, Mr. Christie alleged that he had visited the property two or three times a year during his frequent visits to Eleuthera. During those visits, he would drive through the property and other properties forming the "Oyster Harbour" proposed development to view the state of the properties which ELC was holding for future development or sale. He said that on each such occasion, he observed the property to be unoccupied and undisturbed. Further, apart from the

road, the property and the adjoining properties of ELC was covered with high coppice.

[161] Mr. Christie deposed that about 20 years ago, at his direction, ELC put a chain across the road leading to the property at its junction with the Eleuthera main road. This was done to prevent persons from dumping garbage in the road through the property. According to Mr. Christie, the chain remained in place for several years but was not kept up thereafter when the dumping of garbage in the road ceased. He stated that several times over the past 38 years, ELC arranged for the road to be cleared of garbage, the bushes were cleared and the surface of the road smoothed. These acts were done, according to Mr. Christie, to facilitate the showing of the property to prospective investors which he had personally done over the 38 years.

[162] Mr. Christie averred that "Oyster Harbour" was listed for sale with H.G. Christie Limited Real Estate brokers and their agents visited the property many times with the approval of ELC. In addition, Mr. Terry Sands, a real estate broker, resident in Palmetto Point, showed the property and ELC's other properties to prospective purchasers on numerous occasions and he is very familiar with the property.

[163] Mr. Christie stated that from the time of its purchase of the property in 1941, that is, over 70 years, ELC has been in exclusive possession and control of the property and during that time, no other person has made any claim to it.

[164] Mr. Christie was extensively cross-examined by learned Counsel Mr. Eneas and Mr. Bethell QC. In my opinion, he withstood the rigours of cross-examination.

**Terry Sands**

[165] Mr. Sands was the next witness who testified on behalf of ELC. He said that he is a businessman and a real estate broker. He is now 79 years old and resided at Palmetto Point all his life except for about two years when his family moved to Nassau. He knew and was well acquainted with Sir Harold. He knew Sir Harold to be the owner of HG Christie Ltd and ELC which was one of the main real estate

companies in Eleuthera at that time. He said that ELC is still a major player in real estate on the island.

[166] Mr. Sands testified that he has seen a plan of the property and is well acquainted with it. It is located in the Spring area, about 1.5 miles West of Palmetto Point. The Spring area starts before the hill going West from Palmetto Point towards Governor's Harbour.

[167] Mr. Sands further testified that the Spring area is also known as "The Spring" or "Spring Tract". Under cross-examination by learned Counsel, Mr. Eneas, Mr. Sands insisted that if you hear someone referring to "The Spring" or "Spring Tract"; they would not be referring to any particular lot of land but instead the general Spring area. He said that he has passed the Spring Tract all his life.

[168] In addition, Mr. Sands stated, under oath, that the property is overgrown with thick bush. It was always been that way except that a road was cut through the property in the 1960's and a chain was placed at the entrance in the 1980's. He said that after the road was cut, ELC cut a boat ramp in the rock at the sea shore and people used to go fishing from there. He said that he went sailing through Little Oyster Pond on one occasion. Mr. Sands testified that it was his understanding that the Christies were going to construct a marina in Little Oyster and saw subdivision plans for the area.

[169] Mr. Sands said that in his earlier real estate days, he got permission from ELC on several occasions to cut back the bush in order to show the property to potential purchasers. When the chain was there, he would get the key from Asa Bethel who was the caretaker of ELC's properties in Eleuthera, to enter the property.

[170] He testified that in the late 1980's or early 1990's, he showed the property to Ben Albury, an architect, Cedric Parker, a Nassau lawyer and other persons whom he understood were agents for certain foreign persons who were interested in purchasing the property from Mr. Christie together with other properties in the surrounding area. The property they were interested in was sea to sea. They had

a diagram/plan of the area. Mr. Sands said that, from his understanding, the sale fell through at the government approval stage.

[171] Mr. Sands further testified that during his visits to the property, he never saw anyone camping in the road or any signs of farming or livestock but he is aware of dumping that occurred on the property.

[172] Mr. Sands is also aware that ELC had placed a chain across the road to the property to prevent the dumping of garbage which ELC was continually removing so that the road was clear. The last time he went on the property was 2005.

[173] He said that he was informed that ELC had purchased the said tract from Reverend Knowles and during the past 35 to 40 years, he had never heard of anyone making any claims to ownership of the tract other than ELC who, to his knowledge, owned and controlled the tract for 35 to 40 years.

[174] Mr. Sands testified that he is not acquainted with the Johnson Claimant. He does not know him to be a native of Eleuthera. He knew of certain Johnsons living in the area of Palmetto Point and Governor's Harbour but he does not know that they are related to the Johnson Claimant or the persons named in the Abstract of Title of the Johnson Claimant. He said that the Johnsons from Palmetto Point are related to him and are from Harbour Island descent. The other Johnsons in Governor's Harbour have lived in Governor's Harbour since he can remember and are well known to him.

[175] Mr. Sands next testified that Governor's Harbour and Palmetto Point are small settlements and everyone is familiar with each other. If there were any other Johnson families in the area during the 1950's to the 1960's, it is likely that he would have known them. He has heard that certain Demerittes own property to the east of the property across the main highway.

[176] He was also rigourously cross-examined by Learned Counsel Mr. Eneas and Mr. Bethell QC. I found him to be very persuasive in his evidence particularly when he

stated that if there were any other Johnson families in the area during the 1950's to the 1960's, it is likely that he would have known them.

**Priscilla Benner**

[177] Ms. Priscilla Benner gave evidence. She swore a witness statement on 21 July 2014 which was filed on 23 July 2014 ("Benner W.S."). She is the niece of Sir Harold. She has held the position of secretary and treasurer of ELC since 13 May 2000. She has also been a director since July 2000 and a director of the parent company, HG Christie Bahamas since 1979.

[178] She is familiar with the property. According to her the property is situated between Little Oyster Pond and Great Oyster Pond and is about three miles southeast of the Settlement of Governor's Harbour. The broader area is locally known as the "Spring" or "Spring Tract" or other derivatives of the "Spring" description.

[179] She testified that the property was acquired by ELC by conveyance from Reverend Knowles dated 18 January 1941. Over a period of time, ELC also acquired numerous adjoining tracts of land in the Oyster Ponds area with a view to eventually developing the entire area into a residential subdivision and marine.

[180] She is aware that ELC used its financial resources to cut a road through the property sometime in the 1960's. The road is about one mile long and stretches from the main Eleuthera Highway through various other properties owned by ELC and running out to the sea.

[181] In the 1980'S, the records show that ELC leased various small parcels of land on the property to several local tenant farmers and received annual payments from them for use of the land as is common in the Bahamas. She said that Asa Bethel was the agent of ELC who looked after the property and certain other properties belonging to ELC. She said that he provided the Company with periodic reports on the tenant farmers and their payments: See Tab 1 of Benner W.S.

[182] Ms. Benner stated that over the years, ELC received reports that unauthorized persons were dumping garbage on the property. On or about 12 June 1989, ELC paid Asa Bethel to organise and assist with clearing the property and to remove the garbage. On or about June 2003, Daryl Goede, a contractor to H.G. Christie Ltd, again reported that garbage was being dumped on the property. ELC authorised Mr. Goede to hire a contractor to remove the garbage. Copies of invoices are at Tab.2 of Benner W.S. Learned Counsel Mr. Eneas in cross-examining Ms. Benner submitted that the invoice is irrelevant as it related to Double Bay. A scrutiny of the invoice reflects that it refers to “Double Bay and Oyster Pond Road”.

[183] Ms. Benner stated that in 1989, ELC sought to secure the property from trespassers by putting up a chain across the entrance to prevent access to the road leading to the property and further dumping of garbage. After the chain was installed, the directors of HG Christie Bahamas or their family members and real estate agents would get the key from Asa Bethel to enter the property and the adjoining areas for viewing purposes. She stated that the cement posts were destroyed by vandals some time later.

[184] Ms. Benner testified that she believes that she first visited the property on or about 6 November 1998 during a trip to Eleuthera with other directors. According to her, during that trip, we visited various parcels of land owned by ELC and HG Christie Bahamas which included the property. On that occasions, she observed that the property was overgrown with thick bush except for the road running from the Eleuthera main public road through to the edge of the property.

[185] She also stated that she visited the property during at least one subsequent trip to Eleuthera. She specifically recalled a visit on 4 January 2004 when Mr. Christie and herself flew to the island for a business meeting. After the meeting, she drove to Oyster Pond to check on the property. While riding along the road running through the property, they met Eddie Lauth driving out of the property and they spoke to him briefly. Mr. Lauth was the developer at the old Club Med who was

interested in a joint venture with ELC to develop the property. She said that he visited the property with their permission.

[186] Ms. Benner next testified that in or about 2007, ELC decided to apply for a permit to construct canals to open Little Oyster Pond and Great Oyster Pond to the sea for the purpose of developing a residential subdivision and marina. She said that she has discovered documents which indicate that ELC first seriously explored this venture in or about 1979 when it instructed Kenneth Wadman to produce a subdivision layout plan of the Oyster Pond area (the "1979 Plan"). The property is shown on the 1979 Plan but is not included in the subdivision layout because, as she understood, there were certain issues with ELC's documentary title to the property that had not been resolved by a quieting petition.

[187] Ms. Benner further stated that in connection with its application to develop the marina, ELC commissioned Turrell Hall & Associates Inc., to prepare an Environmental Impact Assessment (EIA) for submission to the BEST Commission. The Report cost the Company $200,000 plus disbursements. The decision of the BEST Commission remains pending. This was affirmed by Mr. Turrell during his evidence.

[188] Says Ms. Benner, that overall, the records of ELC show that from the date of the Conveyance in 1941, ELC has treated the property as its own and has invested significant monies in respect of it. Up to the commencement of this action, she was unaware of any claim to the property by third parties.

[189] Under cross-examination by Mr. Eneas, Ms. Benner stated that she was aware of issues concerning title to the property. In my opinion, she was frank, sincere and forthright in her testimony.

**Hubert Williams**

[190] Mr. Hubert Williams ("Mr. Williams") was called to testify on behalf of ELC. He has been a licensed land surveyor from 1966 to now. He is also a photogrammetrist

which qualifies him to interpret aerial photographs and produce large scale maps from the same. Using tools such as a stereoscope, he is able to determine the heights and position of various objects shown in aerial photographs.

[191] He was employed by the Department of Lands & Survey between 1973 and 2000, firstly as a Surveyor Trainee then a photogrammetrist from 1978 to 1986, then as a Senior Surveyor from 1994 until 2000. He has given evidence in a number of Supreme Court matters both verbally and in writing.

[192] Mr. Williams testified that on or about 20 February 2014, Mr. Christie requested his assistance in identifying the history of activity over a parcel of land located at Great Oyster Pond which is the Property.

[193] He testified that he reviewed aerial photos of the land lodged for public record in the Department of Lands and Surveys for the years 1942, 1958, 1970 and 1974. Aerial photos are normally taken every four years to update and monitor land development in New Providence and the Family Islands. He was able to identify areas of extensive clearings in the 1942 photos, an indication of extensive farming on and surrounding the land in question. He also identified a foot path that runs along the western shoreline of Great Oyster Pond. The footpath is not to be confused with the road built by ELC which road runs through the Property.

[194] Mr. Williams saw the same footpath on the 1958 photos. On the 1970 photos, Mr. Williams was able to identify a road running from the Queen's Highway and southwards through the Property as well *as* the footpath along the western edge of Great Oyster Pond.

[195] The 1974 photos suggest that the areas which were being farmed were inactive. Active clearing is shown on the western boundary of the Property.

[196] In summary, he asserts that there was extensive farming activity on and around the Property in 1942. The 1958 photos show that the land in question was covered in bush at varying heights which indicates that the land was farmed before the date

of the 1958 photos but overgrown by 1958. The 1970 photos show the road running through the Property from Queen's Highway to the sea and the 1974 photos show a widened road running through the Property.

[197] In his Supplemental Witness Statement filed on 6 May 2014, Mr. Williams stated that he reviewed two satellite images of the Property taken in March 2005 obtained from the Land Use and Policy Administration Project (LUPAP), which was implemented in or about 2005. Mr. Williams testified that the satellite images show that the land in question was covered with thick bush and that there were no areas of clearing that could be consistent with farming.

[198] Under cross-examination, Mr. Williams did not shirk. He was a very good witness and a man with a wealth of experience in land matters.

**Todd Turrell**

[199] Todd Turrell ("Mr. Turrell") also gave evidence at this hearing. He swore a witness statement on 10 June 2014. He is an Ocean Engineer and President of Turrell, Hall & Associates. His evidence was that he has done work in the Bahamas over 30 years in connection with the engineering, design and construction of various marinas in the Bahamas. He has done Environmental Impact Assessments ("EIA's") for several marine projects in the Bahamas including the Lyford Cay Marina and the Albany project in New Providence, Winding Bay Resort in Abaco and Eddie Lauth's re-development of Club Med in Governor's Harbour, Eleuthera.

[200] Mr. Turell stated that he was familiar with the land around Great Oyster Pond and Little Oyster Pond and he took an interest in the land about 20 years prior to his statement. He said he was told by Carole Salmon Hutchinson, a relative of Mr. Christie, that her family owned much of the land around the two ponds and was considering the development of a marina in the area.

[201] He was introduced to Mr. Christie about 12 years prior. ELC hired him in March 2012 to do an EIA report in connection with the opening of Great and Little Oyster Ponds to the sea and the construction of a marina around the ponds. The EIA

report was submitted to the BEST Commission on 10 August 2012 and he was told that ELC was awaiting a decision of that Commission.

[202] Mr. Turrell said he visited ELC's land in the area of the ponds, including the Property in April 2012. He said the Property was mainly comprised of "disturbed coppice" which, according to him, meant that there was secondary growth vegetation on the Property as the original vegetation was likely storm-disturbed or farmed in early times.

[203] Since he became familiar with the land around Great Oyster Ponds and Little Oyster Ponds many years prior, he knew the same to be undeveloped and overgrown by forest except for a road running between the two ponds from Queen's Highway to the sea. In the last couple of years, he noticed some clearings on the land in the area near the road between the two ponds.

[204] Mr. Turrell's evidence is useful because ELC's engagement of Mr. Turrell is consistent with the behaviour of an owner and developer of property on which significant development was intended to be carried out.

[205] On the whole, I found the evidence adduced by the witnesses for ELC to be more plausible. Their respective evidence on possessory title was supported, in large measure, by documentary evidence.

**Analysis**

[206] The Court, having found that ELC has the superior documentary title to the Property, the burden shifted to the Johnson Claimant to show that his possession or occupation of the Property was adverse to that of ELC.

[207] In establishing a possessory title to the property under the Limitation Act, Learned Counsel Mr. Gaitor submits that the Johnson Claimant must demonstrate that he and/or his predecessors had been in exclusive possession of the property for a continuous period of 12 years to oust ELC.

[208] In my interpretation of the 1874 Real Property Limitation Acts and the 1995 Limitation Act, I believe that the Johnson Claimant has to prove that he and/or his predecessors had been in undisturbed continuous possession for 20 years. But it matters not since the Johnson Claimant alleges that he has been in possession of the Property from July 1977. The 12 year period pursuant to section 16(3) of the 1995 Limitation Act to establish possessory title would have been satisfied by July 1989. Indeed, even the 20 years under the 1874 Limitation Acts would have been established by 1997, long before the present action would have commenced.

[209] In reviewing the evidence of Mr. Johnson, he said that he visited the land for the first time in or about 1972. He learnt of the "properties" in Eleuthera from his uncle Reynolds. He said his uncle Reynolds told him that the 'Property' was situate between Little Oyster Pond and Great Oyster Pond. He said that, at the time, the 50 acre tract, including the Property was covered with thick bush and there was a track road running from the main Eleuthera Highway through the Property down to the sea.

[210] Having seen and heard Mr. Johnson, I am not satisfied that he knows the precise location of the 50 acre tract as his uncle never really took him there and showed him where the 50 acre tract is situated. He is clearly mistaken since the Property is 33.994 acres inclusive of swamp or 20 acres net. Land to the East was and is Crown Land. Lands to the North, South and West belong to ELC. The road which Mr. Johnson described as a tract road was put on the Property by ELC. I found as a fact that, on a balance of probabilities, I prefer the evidence adduced by the witnesses for ELC.

[211] Mr. Johnson said that following his acquisition of the 50 acre tract of land in July 1977 and up to 2007 he visited "*Eleuthera in just about every year for the purpose of ensuring that there was no encroachment on the 50 acre tract*". He said that in the early 1970s and continuing up to the year 1990 he would camp on the top of the hill south of the closest point between Little Oyster Pond and Great Oyster Pond. He said in recent years his visits have become less frequent. He said no

one ever challenged his title to the 50 acre tract or his right to enter and occupy the same. Apparently, Mr. Johnson did not know that all lands in the area were owned by persons other than his grandfather Albert Johnson. Mr. Johnson did not mention the chain across the road. Persons desiring access to the Property needed a key to access the Property by means of the road which was built by ELC.

[212] The old farm patch which he claimed to have visited and which he pointed out at the time of the site visit is south of the southern boundary of the Property. During cross-examination and also during the site visit, Mr. Johnson acknowledged that he did not create the tiny farming patch which happened to be outside the boundary of the Property.

[213] Having analysed his evidence, I am of the considered opinion that Mr. Johnson does not know where the purported 50 acre tract of land is situate. As learned Counsel Mr. Gaitor correctly points out, Mr. Johnson is still searching for the 50 acres which his uncle devised to him.

[214] His wife, Arnett said that the first time she visited the Property was in 2006. They drove through the Property twice on the first trip. She visited the Property a second time in or about 2009/2010.

[215] Under cross-examination, she relied on what her husband told her about going to the Property and camping on it, sometimes for a week and on other occasions, for a month. She was unable to say where on the Property Mr. Johnson camped. When she visited the Property, she never came out of the car as she is afraid of snakes.

[216] With respect to the evidence of Shaun, he was a young man when he first met Mr. Johnson and they became friends. He said that he and Mr. Johnson visited the Property on a few occasions. He said that he knew that the track road was in existence for as long as he could remember and that he thought it was a public way. He said that he never knew of any signs or chain restricting access to the track road. The Court is left to wonder which “property” he and Mr. Johnson visited.

[217] Shaun also stated that he thought that the area was vacant Crown Land. He was unaware that the Property or any other property in the area was owned by ELC.

[218] Under cross-examination, he said that Mr. Johnson told him that he owned the Property. He also said that he and Mr. Johnson went to the Property a few times, probably less than 20 times. He also said that when they visited the Property, he and Mr. Johnson would just 'hang out' for about 'half an hour'. He said that sometimes, Mr. Johnson would go by himself. He would drop him there.

[219] Under cross-examination by Learned Queen's Counsel Mr. Bethell, Shaun said that he knows that Mr. Johnson slept on the Property once because he did not stay by him. He said that he knows the entire area to be called "Spring" but he does not know where 'Spring' starts and where it ends.

[220] Under re-examination, he said that there are four ponds in the area, He said that Mr. Johnson referred to the area as 'Spring.'

[221] The evidence of Mr. Johnson, the main witness for the Johnson Claimant, boils down to this. His father passed away in 1965 when he was 11 years old. After the death of his father, he grew closer to his uncle, Reynolds Dewitt Johnson who spoke of the '50 acre tract' and his other properties at Cupid Cay and Baker's Bluff, Eleuthera. His uncle devised the **50 acres in the tract which tract adjoins Little Oyster Pond**. From July 1977, he has owned the Property exclusively, continuously, openly and visibly because he visited the land from 1972 and in the years following. He visited the 50 acre tract in just about every year for the purpose of ensuring that there was no encroachment on the property. He also camped on the Property and fished the Little and Great Oyster Ponds. He had also visited the old farm on the Property to harvest bananas and papayas and other ready crops. I had the added opportunity of seeing and hearing Mr. Johnson during his testimony and simply put, I do not believe his evidence. It did not correspond with the evidence of Shaun who, according with him, he would accompany Mr. Johnson on the Property and they will hang out for half of an hour on those visits. Arnett did

not add much to the evidence as she was relying on what her husband told her and on the two occasions that she visited the Property, she remained in the vehicle as she is afraid of snakes. In addition, it is somewhat strange that Mr. Johnson will 'befriend' a man as young as Shaun and take him to the Property. There is evidence that he was friendly with Shaun's stepfather. I must admit that Mr. Sands gave powerful evidence when he stated that Governor's Harbour and Palmetto Point are small communities and if there was another Johnson from that area, he would have known. He is in his late 70's.

[222] In my judgment, the evidence adduced by the Johnson Claimant is very weak and tenuous to establish actual possession of the Property or the requisite intention to dispossess ELC, the "paper holder." Furthermore, Mr. Johnson's purported use of the Property was not an occupation that was exclusive, continuous, open and visible. His purported use was not inconsistent with the intended use of the Property by ELC. It became evident during the site visit that Mr. Johnson is really combing the area for his 50 acre tract. It is my fervent hope that he will find 'his' property sooner than later.

[223] Even if I were wrong to find that ELC has a better documentary title than the Johnson Claimant, on the issue of possessory title, I find that ELC has been in continuous occupation of the Property since 1941. I accept the evidence of the witnesses for ELC on the many acts that they have done continuously and continually over the years. The acts relied upon by ELC includes:

1) clearing and cleaning of the Property including the removing of garbage dumped from time to time thereon by members of the public;

2) cutting a road through the Property;

3) placing a chain link fence at the entrance;

4) monitoring the Property through agents of ELC;

5) leasing the Property to be farmed by tenants and securing rents from those tenants;

6) conducting surveys of the land for future development of a residential subdivision and marina at tremendous financial cost;

7) commissioning plans to be drawn for residential community and marina village at great cost;

8) commissioning an EIA on the Property for submission to the BEST Commission; and

9) making of application to the government for permission to carry out development of the Property in accordance with its plan for development and for various permits to enable development.

[224] Besides being the documentary owner of the Property since 1941, ELC began occupation of the Property in or about 1965 with the cutting of the road. As the various witnesses for ELC testified, the acts of possession continued, uninterrupted over the years until today. In my opinion, they are sufficient to establish factual possession and the intention to possess. The acts done by the Johnson Claimant, if any, is a far cry from factual possession and the intention to possess.

[225] Consequently, I find that ELC has been in occupation of the 33.994 acres of land situated between Little Oyster Pond and Great Oyster Pond ("the Property") openly, peacefully and without interruption as if it were the true owner for more than twenty years from the date of the Conveyance in 1941. I therefore find that ELC has a better possessory title than the Johnson Claimant.

**Duty to make full and fair disclosure**

[226] The Johnson Claimant complains that ELC has failed to make full and fair disclosure on matters relevant to the title to the Property. According to learned Counsel Mr. Eneas, the failure of ELC to do so, has resulted in the Johnson Claimant incurring substantial costs in these proceedings in connection with investigating matters which ought to have been disclosed to the Court and to the parties at the commencement of these proceedings.

[227] Mr. Eneas has exhaustively set out the law as well as the matters which are relevant to the Property, known to ELC and which were not disclosed: see XII of his very comprehensive submissions.

[228] Given the conclusion that I have reached, this submission may be relevant in reducing any costs which the Johnson Claimant may be ordered to pay to ELC.

**Other issues**

[229] Learned Counsel Mr. Eneas in his 99-page long Closing Submissions and his 15-page Reply Submissions was very copious and meticulous. I have considered them but I do not believe that they warrant any further discussions. I commend him for his gusto and youthful enthusiasm.

**Conclusion**

[230] In my view, none of the claims is perfect and without flaw. But, by law, I am merely required to investigate who has the better or superior title between the competing parties. I simply cannot reject all claims: see **Personal Representatives of the Estate of Ruth Ingraham** [supra].

[231] Given the evidence which is before me, I have no doubt that ELC has a better title, both documentary and possessory, than the Knowles Claimants or the Johnson Claimant.

[232] I will therefore grant a Certificate of Title to the Petitioner, Eleuthera Land Company, in accordance with the provisions of the Act. The Petitioner will have its costs, to be taxed if not agreed.

**Dated this 7th day of May, A.D., 2019**

**Indra H. Charles**
**Justice**