COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/qui/01564

IN THE MATTER of **ALL THOSE** pieces parcels or lots of land situate at "*Signal Point*" also known as "*Sumner Point*" on the Island of Rum Cay one of the Islands of the Commonwealth of The Bahamas and designated Lots 2, 3, 5, 9 and 10.

AND IN THE MATTER of the Quieting Titles Act, 1959.

IN THE MATTER of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust).

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Timothy Eneas with him Ms. Knijah Knowles for the Petitioners
Ms. Travette Pyfrom for the Adverse Claimant, the Wahoo Resort Foundation

Hearing Dates: 11, 16, 18 March 2020 (Dealt with on written submissions)

Quieting Titles Act, 1959 – Quieting Titles Rules, 1959 – Adverse Claim – Adverse claim filed out of time – Extension of time to file adverse claim – Jurisdiction – Statutory mandatory time bar – Whether Court has power to extend time specified in the notice to file adverse claim – Investigative nature of quieting petitions – Whether strict rules apply

Locus Standi of Adverse Claimant – Application to dismiss adverse claim – Licensee's standing to file adverse claim under section 7(2) of the Quieting Titles Act, 1959, no claim to documentary or possessory title – Licensee's alleged occupation with permission of a party to the proceedings (The Crown) - Crown claiming ownership of the fee simple - Licence acknowledged by Crown – Adverse claim dismissed on its merits

The Petitioners filed a Petition claiming ownership in fee simple of five parcels or lots of land situate on the island of Rum Cay ("the Subject Properties"). Notice of the Petition was advertised in the usual way stating that adverse claims shall be filed and served on or before 24 April 2017. The Wahoo Resort Foundation ("the Foundation") filed an adverse claim out of time on 27 April 2017 claiming an interest in possession of the Subject Properties as a licensee of the Crown. By Summons dated 12 October 2017 the Petitioners made application for an order that the adverse claim filed on behalf of the Foundation was barred by the provisions of section 7(2)

of the Quieting Titles Act, 1959. In response to the Petitioners' application the Foundation filed a cross-summons requesting that the time limited for the filing of adverse claims be extended pursuant to Order 3 rule 5 of the Rules of the Supreme Court and further that the Foundation be granted relief from sanction pursuant to Order 31A rule 25. The Petitioners opposed the Foundation's application for an extension of time on jurisdictional grounds contending that the barring pursuant section 7(2) of the Quieting Titles Act, 1959 was mandatory and absolute and further that the Foundation had no locus standi to file and maintain an adverse claim in quieting proceedings as a licensee where no claim to title was asserted. The Petitioners also seek a dismissal of the claim on its merits.

HELD: Finding that the Foundation has no *locus standi* in this Quieting Petition and has also failed to establish any entitlement or right to a Certificate of Title on the merits, the Adverse Claim filed by the Foundation on 27 April 2017 is dismissed with costs to the Petitioners to be taxed if not agreed.

1. Section 7(2) of the Quieting Titles Act, 1959 provides that if an adverse claim is not filed within the time period fixed by the notice, it shall operate as an absolute bar to any adverse claim filed after the expiry of the time fixed by the notice. The Court, however, permitted the Foundation to participate in the proceedings even though it filed its adverse claim three days late holding that because quieting petitions are investigative in nature, strict procedural rules as obtain in adversarial proceedings, do not apply. Otherwise, if a prospective claimant is shut out, the proceedings may result in a judgment in rem: **True Blue Co. Ltd v Moss and others** (No. 3/1968) (1965-70) 1 LRB 250, C.A. not followed.

2. Section 7(2) of the Quieting Titles Act, 1959 mandates an adverse claim within the words "an adverse claim or a claim not recognized in the petition" to be one which asserts a 'claim of title': **Re Ferguson** (1996) Carswell PE1 applied. **Strachan v Strachan** [2016] 1 BHJ No. 134 distinguished.

3. By its own evidence and pleading, the Foundation acknowledges that it is merely a licensee of the Crown. The Foundation also asserts that it claims no title in its own right to the fee simple of the Subject Properties.

4. The Crown purports to acknowledge the Foundation as its licensee and accordingly there is no dispute between the Foundation and the Crown as to the nature of relationship between them (i.e. one of licensor and licensee) which on established authority confers no interest in the Subject Properties upon the Foundation as licensee. No document was produced to verify that relationship between the parties. In any event, such a license is a "*bare license*" and as such confers no interest in the land on the Foundation: See ***Elements of Land Law*, Kevin Gray, 4th ed. 260** at paragraph 4.6 and **Errington v Errington and Woods**[1952] 2 K.B. 290 at page 296, per Denning L.J.

5. The Crown has filed an adverse claim in the action claiming ownership of the fee simple title to the Subject Properties (at this hearing, the Crown now alleges it is the owner of 15 acres) and is represented in the proceedings by the Office of the Attorney General.

Therefore, the Foundation's participation in the proceedings has been and continues to be entirely unnecessary and is an abuse of the process of the Court with the effect of running up costs and delaying the fair trial of the action.

6. Any alleged possession of Subject Properties on the part of Foundation is by law the possession of the Crown and as such the Foundation has no possessory interest of its own to claim: **Bannerman Town & Anor v Eleuthera Properties Limited** [2018] UKPC 27 distinguished.

JUDGMENT

Charles J:

Introduction

[1] Wahoo Resort Foundation ("the Foundation") is one of the two Adverse Claimants in this Quieting Petition. The Foundation closed its case on 10 March 2020. After hearing the evidence of the witnesses for the Foundation, I requested the Petitioners and the Foundation to provide written submissions relative to the issue of whether the Foundation has sufficient standing to maintain an adverse claim in the proceedings.

[2] For reasons given below, I found that the Foundation, a licensee of the Minister of Crown Lands ("the Crown"), has no *locus standi* in this Quieting Petition and its adverse claim ought to be dismissed with costs to the Petitioners to be taxed if not agreed. I also found that the Foundation has failed to establish any entitlement or right to a Certificate of Title on the merits. Put differently, the Foundation asserts no claim to the fee simple of the subject properties either documentary or possessory nor is the Foundation entitled to any possession. Therefore, the Foundation cannot, in law, be properly be described as a rival or competing claimant.

Background

[3] The Petition together with the supporting documents including the Statement of Facts were filed on 23 November 2016.

[4] Pursuant to an order of the Court dated 21 February 2017 and filed on 28 February 2017 ("the Order"), the Court directed Notice of the Petition to be advertised in The Tribune and the Nassau Guardian newspapers on three (3) consecutive occasions requiring adverse claims to be filed within thirty (30) days after the date of the last advertisement. Notice of the Petition was advertised in the Tribune on 3, 13 and 23 March 2017 and in The Nassau Guardian on 3, 13 and 23 March 2017 ("the Notice").

[5] By the terms of the Notices, the last day for the filing of adverse claims was 24 April 2017.

[6] On 27 April 2017, the Foundation filed, in these proceedings, a document entitled Adverse Claim ("the Foundation's Adverse Claim"). It cannot be disputed that the Foundation's Adverse Claim was filed out of time - three days late.

[7] The Foundation also filed a further document entitled Affidavit in Support of Adverse Claim on 28 April 2017 ("the Foundation's Affidavit in Support"). The Foundation's Affidavit in Support was also filed outside of the time period fixed in the Notice for the filing of adverse claims.

[8] On 22 June 2017, the Petitioners filed the Affidavit of Vanessa M. R. Hall deposing to the steps taken by the Petitioners in compliance with the Order.

[9] By Order dated 4 July 2017, the Court directed a Notice, pursuant to section 7(1) of the Quieting Titles Act, 1959 ("the Act'), to be served on the Attorney General's office for and on behalf of the Minister responsible for Crown Lands ("the Crown") ("the July Order").

[10] Notice of the Petition pursuant to the July Order was served on the Office of the Attorney General on 5 July 2017 notifying the Attorney General on behalf of the Crown of the requirement to file an adverse claim on or before 27 July 2017 ("the Crown's Section 7(1) Notice"). An Affidavit of Service deposing to the service of a copy of the Crown's Section 7(1) Notice (together with a copy of the Plan of the

Subject Properties) was sworn and filed herein by Vanessa M. R. Hall on 22 August 2017.

[11] No adverse claim was filed herein on behalf of the Crown within the time period fixed in the Crown's Section 7(1) Notice.

[12] On 12 October 2017, the Petitioners filed a summons ("the Petitioners' Summons") supported by the Affidavit of Erin Hill seeking, among other things, an order that the Foundation's Adverse Claim was out of time and barred by section 7(2) of the QTA. A date for the hearing of the application was set for 1 February 2018.

[13] A document entitled Abstract of Title of the Wahoo Resort Foundation was filed on 23 January 2018 after the filing of the Petitioners' Summons and the Affidavit of Erin Hill.

[14] On 29 January 2018, the Foundation filed a Summons together with an Affidavit by Virginia T. Bullard seeking an order extending the time period within which to file its Adverse Claim and Relief from Sanctions for failing to comply with the Notice.

[15] On 30 January 2018, a document intituled Adverse Claim together with an Affidavit Verifying Adverse Claim was filed by the Attorney General on behalf of the Crown.

[16] Pursuant to the Petitioners' Summons the parties appeared before the Court on 1 February 2018. Upon hearing Counsel for all parties, the matter was adjourned to 25 May 2018 for the hearing of the Petitioners' Summons.

[17] A document intituled Witness Statement of Dawne Sturrup was filed on behalf of the Crown on 1 March 2018.

[18] On 9 May 2018, the Petitioners filed a Summons which mirrors their Summons filed on 12 October 2017. It seeks an order that the Adverse Claim of the Crown was filed out of time and is invalid and that the claim is therefore barred by section 7(2) of the QTA.

[19] The Petitioners' Summons was part heard on 25 May 2018 and concluded on 15 June 2018. The Court reserved its Ruling on the issue of the applications for an extension for time and on the question of the Foundation's standing.

[20] The Petitioners relied on the Bahamian Court of Appeal case of **True Blue Co. Ltd. v Moss and others** (No 3/1968) (1965-70) 1 LRB 250. Over fifty years ago, the Court of Appeal considered the effect of the failure to file an adverse claim within the time fixed by the notice and the effect of the bar in section 7(2) of the Act. At page 253 of the report Sinclair P. held as follows:

> "**The real question for decision, however, is whether the last sentence of section 7(2) is mandatory and operates as an absolute bar to any adverse claim filed after the expiry of the time fixed by the notice. It will be recalled that that sentence reads:**
>
> > **"the failure of any such person to file and serve a statement of his claim within the time fixed by the respective notices aforesaid shall operate as a bar to such claim."**
> >
> > **For, if it is mandatory, no rule of court can be prayed in aid to revive such claim. In Craies on Statute Law (6th edn, 1963) p 319 under the heading "Judge - made rules" it is stated:**
> >
> > > **"Like rules made under other Acts, if they have meaning and effect inconsistent with the Act authorising them, they are pro tanto, ultra vires. 'If a rule,' said Hannen J. in Irving v Askew (1870) LR 5 QB 208 at 211, 'were really repugnant to the provisions of the Act, I should think that the rule, though made under the express powers of the Act, would not override its enactments.' In Exp Davis (1872) LR 7 Ch App 526 at 529, James L.J. said (with reference to the Bankruptcy Rules, 1870): 'The Act of Parliament is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act."**
>
> **Mr. Thompson for the respondents contended that the word "bar" in the final sentence of section 7(2) should be construed as a discretionary bar and not a final bar. That construction, he submitted, was necessary to carry out the intention of the statute which was to give the court the widest powers to investigate title, and all persons having a claim to the title should have a right to be heard; it was particularly important that a prospective claimant should not be shut out as the proceedings may result in a judgment in rem.**

> **I am unable to accede to Mr. Thompson's argument. It would mean construing "shall" as "may", a construction which is not open in the context. To my mind the language is as plain as it could be and is intended to be mandatory so that if an adverse claim is not filed within the time fixed by the notice, there is an absolute bar to that claim in those proceedings. No rule, or even the inherent jurisdiction of the court, can be prayed in aid to extend the time fixed by the notice to enable the claim to be revived.**" [Emphasis added]

[21] Learned Counsel Mr. Eneas appearing for the Petitioners argued that by reason of **True Blue Co. Ltd** the Petitioners are of the view that the Foundation's Adverse Claim, having been filed after the time limited for the filing of adverse claims, is out of time resulting in the claim being barred by section 7(2).

[22] He opined that although it may be suggested by the Foundation that the Court may, notwithstanding the bar imposed by section 7(2), direct a fresh notice of the Petition to be served on the Foundation pursuant to section 7(1) of the Act, it is submitted that the Court may only do so in circumstances were the alleged adverse claim evidences a claim adverse to or not recognized in the Petition. In view of the mandatory absolute bar of any claim alleged to vest in the Crown as a consequence of its failure to file an adverse claim in response to the section 7(1) notice, any claim to ownership of the Subject Properties by the Crown is now mandatorily absolutely barred by section 7(2) and therefore any claim through the Crown as asserted by the Foundation is unsustainable and must necessarily fail.

[23] The Court did not give a written ruling as it did not find the Petitioners' submissions to be extremely persuasive. Section 7(2) of QTA is indeed mandatory. It provides that if an adverse claim is not filed within the time period fixed by the notice, it shall operate as an absolute bar to any adverse claim filed after the expiry of the time fixed by the notice.

[24] That said, I permitted the Foundation to participate in these proceedings although it filed its adverse claim three days late. In my opinion, since quieting petitions are investigative in nature, strict procedural rules that obtain in adversarial trials, should not apply. To apply strict rules seem draconian especially if the adverse

claim is not inordinately late and does not affect the hearing of the petition. Furthermore, if a prospective adverse claimant is shut out, the proceedings may result in a judgment in rem. I therefore did not follow the Court of Appeal decision in **True Blue Co. Ltd** which was decided over fifty years ago.

[25] Be that as it may, the Court emailed all Counsel and requested that they prepare for the hearing of the substantive matter. That hearing commenced on 10 March through to 14 March 2019. It then resumed on 10 March 2020 to 12 March 2020. The proceeding is still continuing due to objections raised by the Petitioners with respect to the qualifications of the expert witness for the Crown. That issue needs no further elaboration as it is not related to the present issue of standing of the Foundation.

[26] At the continuation of the Quieting Petition on 10 March 2020, the Foundation closed its case. During the testimony of Mr. Cummings, the Court inquired of him whether he was claiming possessory or documentary title or both (to the Subject Properties). Mr. Cummings expressed that he was claiming as a licensee of the Crown. The Crown is an Adverse Claimant in the proceedings.

[27] That answer by Mr. Cummings prompted the Court to ask both Counsel to lay over submissions on the Foundation's purported *locus standi* in the proceedings.

[28] Learned Counsel Mr. Eneas submitted that notwithstanding any conclusion which the Court may have arrived at regarding whether the Foundation had the requisite standing to file an adverse claim, it is clear, having now heard the evidence, that the Foundation's claim in the proceedings is bound to fail on the grounds that it has failed to establish any title or interest which would entitle it to a Certificate of Title.

[29] Furthermore, say the Petitioners, the Foundation's adverse claim must fail on the grounds that it has no *locus standi* and on the merits.

Discussion and analysis

[30] The Petitioners contended that the Foundation has no standing under section 7(2) of the QTA to file an adverse claim and consequently the Foundation is not a proper party to the proceedings.

[31] The Foundation argued that it is a proper party. Learned Counsel Ms. Pyfrom, appearing for the Foundation submitted that the argument advanced by the Petitioners, that the Foundation has no locus to maintain an adverse claim in the action resulting from the absence of a claim to a documentary or possessory title, is fundamentally flawed for several reasons. She submitted that section 7(2) of the QTA provides a single course of action to persons wishing to have their claim/right or interest investigated in quieting actions: the filing of an adverse claim.

[32] According to Ms. Pyfrom, section 7(2) refers to filing of adverse claims or claims not recognized in the petition by filing of a statement of claim as provided for in Form 3 of the Schedule.

[33] The section, she says, does not define nor does it limit in any way "*claims not recognized in the petition*". However, the claims recognized in the petition are usually claims to a documentary or possessory title. All other claims arguably fall under the heading "*claims not recognized in the petition*." It follows from section 7(2) that the court in investigating title must also consider those claims. The way in which those claims (*not recognized in the petition)* are brought in, is by the filing of a statement of claim as provided for in Form 3: an adverse claim form.

[34] Ms. Pyfrom argued that to suggest that the 7(2) claims must be possessory or documentary must be incorrect as it makes nonsense of the words "*claims not recognized in the petition*." She produced not one single authority to demonstrate what are those other claims not recognized in the petition.

[35] Counsel endeavoured to persuade the Court that such an interpretation as suggested by the Petitioners' Counsel is too narrow and would effectively limit the ambit of the investigation which the Court is mandated to carry out under the Act.

She argued that the Act is wide reaching enough to encompass all claims and requires an investigation into all claims, for example, the references in section 3 to "any person" who claims to have "any estate" and any attempt to define who can file and in respect of what interest they can file an adverse claim is entirely contrary to the provisions of the statute. Counsel referred to the case of **Knowles v Hudson** (no citation provided) which has no relevance to the issue at hand.

[36] Counsel next submitted that if the Act was intended to address merely possessory and documentary claims, there would be no need for section 7(2) to include "*any claim not recognized in the petition*." In that respect, she submitted that section 24 of the QTA is supportive of this position. Section 24 provides as follows:

> **"No objection to a petition shall be allowed upon the ground that the petitioner should first have brought an action, and if it appears upon the determination of the investigation that the petitioner is entitled to the possession of the land the court may grant an order against <u>any other party</u> to the proceedings for the delivery of possession thereof to the petitioner."**

[37] She submitted that a person in possession who is not claiming possessory or documentary title but who is a party to the proceedings may be ordered to deliver possession. Then she posed the question: "How can a court make an order for delivery up without first investigating how that party came to be in possession?"

[38] I am afraid that this submission does not assist the Court is determining whether the Foundation has locus standi in the present matter since it is a licensee of the Crown who is already an Adverse Claimant in the proceedings.

[39] Counsel explained that the incidences of possession are not limited to possession in the sense of adverse possession. Possession may be with the permission of the owner or it may be pursuant to a lease. It may be vicarious or joint. It may be expressed or implied.

[40] In that regard, she referred to the Privy Council judgment in **Bannerman Town & Anor v Eleuthera Properties Limited** [2018] UKPC 27, where Lord Briggs, on the nature of possessory claims, said:

> **"51. Possession of land is generally described as having two elements, factual possession and the intention to possess: see JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419. In the present case there is no difficulty about a general intention to possess by the various Descendants who gave evidence, since they believed that they were co- owners of the land pursuant to Ann Millar's will. Such a belief, even if mistaken, is sufficient for the purposes of intention to possess see Roberts v Swangrove Estates Ltd [2008] Ch 439. All that is common ground.**
>
> **52. Possession of land may be exercised jointly, and vicariously. Where a number of persons are proved to have occupation and use of land together, and the question arises whether they had joint possession of the whole of the land, this will usually turn upon the agreement, arrangement or shared common intention (if any) between them: see eg Bigden v London Borough of Lambeth (2001) 33 HLR 43; Brown v Faulkner [2003] NICA 5(2); Churcher v Martin (1889) 42 ChD 312 and (in Canada) Afton Band of Indians v Attorney General of Nova Scotia (1978) 85 DLR (3d) 454.**
>
> **53. There is an element of uncertainty in those authorities whether the requisite mutual meeting of minds must amount to an agreement or to an arrangement, or to a common intention shared between them. It is not necessary that there should be a formal contract. But the mere aggregate of the separate intention of each occupier, which is neither communicated to nor shared with any of the others, will be insufficient. The requirement is for a shared common understanding, sufficient to render multiple occupants of land joint possessors of it. It is quite separate from the general requirement of an intention to possess. Rather, it forms part of the analysis of possession in fact.**
>
> **54. <u>Possession may be vicarious in the sense that A may occupy land on behalf of B, such that B rather than A is in possession of it</u>: see eg Bligh v Martin [1968] 1 WLR 804. <u>Vicarious possession may arise where, for example, A is the licensee, agent or agricultural contractor of B. Again, this will depend upon the existence of some agreement or arrangement between them</u>."** [Emphasis added]

[41] Again, I see no relevance of **Bannerman** to the issue at hand.

[42] Section 7(2) of the QTA provides:

> *"***Any person having dower or a right to dower or an adverse claim or a claim not recognised in the petition shall before the expiration of the times fixed respectively in the notices referred to in subsection (1) of section 6 of this Act or subsection (1) of this section for the filing of adverse claims, file and serve on the petitioner, or his attorney, a statement of his claim in Form 3 of the Schedule, verified by an affidavit to be filed therewith. The failure of any such person to file and serve a statement of his claim within the time fixed by the respective notices aforesaid shall operate as a bar to so such claim."**

[43] The section authorizes "**[a]ny person having dower or a right to dower or an adverse claim or a claim not recognized in the petition"** to file a claim in the proceedings.

[44] Learned Counsel Mr. Eneas correctly submitted that a claim falling within the words "…*an adverse claim or a claim not recognized in the petition…*" must be a claim of *title* either *documentary* or *possessory*. Further, the legal authorities clearly establish that (i) a bare licensee acquires no interest in the land over which he has been granted a license and (ii) any possession of the land by the licensee is deemed to be the possession of the licensor. See: **Elements of Land Law**, Kevin Gray, 4th Ed. 260 at para. 4.6.

[45] Mr. Eneas submitted that section 7(2) of the QTA mandates an adverse claim within the words "*an adverse claim or a claim not recognized in the petition*" to be one which asserts a '*claim of title'*. His submission is supported by **Re Ferguson** (1996) Carswell PE1, a Canadian Quieting Titles Case from Prince Edward Island where, MacDonald C.J., in the Trial Division, in considering section 16(1) of the Quieting Titles Act (similar in all material respects to section 7(2) of the Bahamian QTA) said:

> "**6 Section 16(1) of the Q*uieting Titles Act* reads, in part, as follows:**
>
> **Any person having an adverse claim or a claim not recognized in the petition may at any time before the certificate is granted or the conveyance is executed, file**

> **and serve on the petitioner, his attorney or agent, a statement of his claim.**
>
> **7 Therefore, in order to bring an adverse claim under section 16(1), the adverse claimant must be able to make a claim of title…**
>
> **…**
>
> **9 Therefore, in my view, the adverse claimant has established neither paper title (through a properly executed deed of conveyance) nor adverse possession, the requirements for which are set out in my decision when I was sitting as a member of the Appeal Division of this Court in MacIsaac v. MacEachern (1977), 13 Nfld. and P.E.I.R. 375. Consequently, the adverse claimant has no standing under the Quieting Titles Act to bring such a claim. Therefore, the claim of Richard Ching is dismissed.**"

[46] Learned Counsel Ms. Pyfrom, in her Supplemental Submissions, disagreed and stated that having regard to the Court of Appeal case of **Strachan v Strachan** [2016] 1 BHJ No. 134, which is binding on this Court, **Re Ferguson** is distinguishable. She quoted from the headnote and paragraphs 31 and 32 of **Strachan**. She submitted that, in any event, the adverse claimant in **Re Ferguson** never resided on or used the property for any purpose. He had no valid root of title. The Court dismissed his adverse claim because he had no dealings with the property.

[47] In my opinion, the facts in **Strachan** are very distinguishable to the facts of the present case. **Strachan** dealt with fraud and deceit and has no relevance to the issue at hand. In my opinion, Counsel has struggled hard to find an authority in order to distinguish **Re Ferguson.**

[48] That being the case, in the present Quieting Petition, the Foundation does not assert *dower* or a *right to dower* nor does the Foundation assert any '*claim of title*' to the Subject Properties. The Foundation claims merely as licensee and has not produced a single authority which supports a contention that a bare licensee can maintain an adverse claim in quieting proceedings.

[49] According to Mr. Eneas, the grounds upon which the Petitioners object to the Foundation's standing are as follows:

(i) The Foundation, by its own evidence and pleadings, asserts that it is merely a licensee of the Crown who it alleges is the owner of the fee simple estate of the Subject Properties;

(ii) The Foundation contends that it entered upon the land pursuant to and with the permission of the Crown and, as such, asserts no claim to title in its own right to the fee simple of the Subject Properties;

(iii) The Crown purports to acknowledge the Foundation as its licensee and accordingly there is no dispute between the Foundation and the Crown as to the nature of relationship between them (i.e. one of licensor and licensee) which on established authority confers no interest in the Subject Properties upon the Foundation as licensee;

(iv) The Crown has filed an adverse claim in the action claiming ownership of the fee simple title to the Subject Properties (at this hearing, the Crown now alleges that it is the owner of 15 acres) and is represented in the proceedings by the Office of the Attorney General; and;

(v) Any alleged possession of the Subject Properties on the part of Foundation is by law the possession of the Crown and as such the Foundation has no possessory interest of its own to claim.

[50] Each of the grounds is considered below.

(i) The Foundation's evidence and pleadings

[51] In the first paragraph of the Foundation's Adverse Claim filed on 27 April 2017, it is stated that the Foundation claims "…*to be entitled to an interest in possession as a licensee of the Crown in the land the subject of the Petition*".

[52] Also, in the penultimate paragraph of the Foundation's Affidavit in Support of the Adverse Claim filed on 28 April, 2017, the affiant, on behalf of the Foundation, deposes:

> "**(9) <u>As far as the Foundation is aware the land the subject of this Petition is ungranted Crown land which has never been in the exclusive control or possession of the Petitioner or their predecessor, Sumner Point Properties Limited.</u>**"

[53] By its own evidence and pleading, the Foundation acknowledges that it is merely a licensee of the Crown. Mr. Cummings also alluded to this in his oral testimony before the Court.

(ii) The Foundation's acknowledgment of the alleged title of the Crown and its entry on the land with the Crown's permission

[54] In paragraphs 23 to 27 of the Foundation's Submissions dated 11 March 2020, the Foundation states as follows:

> "**23. <u>WRF claim is that it entered onto the land pursuant to and with the permission of the Crown. It claims to be a Licensee of the Crown which the Crown acknowledges</u>.**
>
> **24. There is unchallenged evidence of meetings which have taken place between the relevant government agencies and with members of the Foundation all related to the Foundations presence on the land.**
>
> **25. Clearly there was an arrangement between the Foundation and the government *vis-a-vis* the Foundation's possession of the land.**
>
> ***26.*** **The Petitioners argument is that there is no physical license to support the claim. The position in law is that a physical license is not necessary. Evidence of an arrangement between the relevant parties is sufficient. There is also no requirement that the arrangement or agreement or understanding be in writing.**
>
> ***27.*** **Possession is sufficient; "*possession, for however short a time, may be sufficient to found a cause of action in trespass against someone thereafter coming onto the land*."**"

[55] From the above, it is crystal clear that the Foundation is not asserting any claim to title in its own right to the fee simple of the Subject Properties.

(iii) The Crown's acknowledgement of the Foundation as its licensee

[56] In support of the Foundation's claim, the Crown has acknowledged, in the Affidavit of Thomas Ferguson, Surveyor General (Acting) sworn on 13 February 2019 and filed on 18 February 2019, that it has issued a license to the Foundation. At paragraph 17 of Mr. Ferguson's Affidavit, he stated:

> "**That I have been advised that the Crown has issued a licence to the Wahoo Foundation in this matter, and as such, has been exercising every right as the owner over the subject land.**"

[57] I agree with learned Counsel Mr. Eneas that based upon the Foundation's own pleadings and affidavit evidence in support of its claim, it is clear that the Foundation's only claim in these proceedings is as '*licensee*' of the Crown. The Foundation makes no claim to ownership, documentary, possessory or otherwise to the fee simple of the Subject Properties. It has expressly stated that as far as it is aware the land, the subject of the Petition, is ungranted Crown land.

[58] Furthermore, and as the Petitioners correctly argued, although the Crown purports to acknowledge the Foundation as its licensee there is no contract or other documentation to verify the terms of the licence between them. In fact, the relationship between the parties giving rise to the alleged license is described by the Foundation, in its Submissions of 11 March 2020 as "…*an arrangement…*".

[59] Any such arrangement can only be described as a permission from the Crown authorizing the Foundation to enter upon the 15 acres which the Crown now claims ownership of (which includes a portion of the Subject Properties). Such a license is a "*bare license*" and as such confers no interest in the land on the Foundation. The learned author, Kevin Gray in **Elements of Land Law, 4th ed.** 260 at paragraph 4.6 states:

> "**The licensee's immunity in trespass does not connote that a bare licensee has acquired possessory or proprietary rights in land. In the time-honoured words of Vaughan CJ in Thomas v Sorrell, a licence 'properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.' The licence has, in other words, a purely permissive quality. It confers no entitlement on the entrant, but merely ensures that he cannot be treated as a trespasser.**"[Emphasis added]

[60] Also, in **Errington v Errington and Woods** [1952] 2 KB 290 at page 296, Denning LJ said:

> "**The classic definition of a licence was propounded by Vaughan C.J. in the seventeenth century in Thomas v. Sorrell: 'A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful." The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not.**"[Emphasis added]

(iv) The Crown is an adverse claimant in the proceedings

[61] The Crown has also filed an adverse claim in the proceedings.

[62] There is no dispute between the Foundation and the Crown regarding the alleged license and accordingly there is nothing in the case or the evidence presented by the Foundation which is material to the investigation which could not be advanced by the Crown.

[63] It is evident from the conduct of the proceedings thus far that the claims and cases advanced by the Foundation and the Crown are aligned with both parties working in tandem to contest the claim of the Petitioners.

[64] Therefore, the Foundation's participation in the proceedings has been and continues to be entirely unnecessary and is an abuse of the process of the Court with the effect of running up costs and delaying the fair trial of the action.

(v) Any alleged possession on the part of the Foundation is deemed to be the possession of the Crown

[65] Mr. Eneas correctly submitted that it has long been established that possession of a licensee is at law the possession of the grantor of the license (in this case the Crown): see **Adverse Possession, 2nd edition, Stephen Jordan, QC**, page 159 at paragraphs 7-127 to 7-128, where the learned author stated:

> "**7-127 In the same way, if a person takes possession by virtue of a licence granted by another, it is the licensor who is treated as being in possession. In Harper v Charlesworth, the plaintiff granted a licence to take grass from the disputed land. The court held that the plaintiff was in possession of the licence, Bayley J said: 'When, therefore, Wallace took the grass, he took it as the representative of the plaintiff, and that was a pernancy of the profits by the plaintiff.' In other words, the act of the plaintiff's licensee in taking the grass were treated as being carried out on behalf of the plaintiff. In Sze v Kung, a squatter in possession was granted a permit to occupy the land by the Crown. The Crown had, in fact, no right to grant that permit. The Privy Council held that the effect to the permit was to make the squatter's possession that of the Crown. Lord Hoffmann (giving the judgment of the Privy Council) said: 'For the purposes of limitation, therefore, possession from 1961 must be regarded as having been in the Crown, which possessed through its licensee, the defendant.'**
>
> **7-128 In Brazil v Brazil, Sze v Kung was followed. It was held at a permission to use the disputed land given by someone other than the true owner prevented the squatter from being in adverse possession, and meant that his possession was that of the person who gave the permission. David Donaldson QC sitting as a Deputy High Court Judge, said:**
>
> > '**[27]...the need for the possession to be adverse means that a possession based on licence or permission cannot be relied upon. And the decision of the Privy Council in Sze v Kung, makes clear that this applies even where the licence or permission is given by some person other than the true owner or on his behalf, since the possession is then that of the licensor**.'

See **Harper v Charlesworth** (1825) 4 B&C 574 at page 1178; **Sze v. Kung** [1997] 1 WLR 1232 and **Brazil v. Brazil** [2005] ALL ER (D) 311 of the Submissions and Authorities Bundle of the Petitioners dated 16 March 2020.

[66] I find much force in the submissions of learned Counsel Mr. Eneas that by reason of the authorities [supra], the Foundation has no possession of its own to assert in

these proceedings. Any possession acquired by its alleged occupation of the 15 acres is the possession of the Crown.

[67] Further, I find that in addition to the fact that the Foundation has no *locus standi* in this Quieting Petition, the Foundation has failed to establish any entitlement or right to a Certificate of Title on the merits.

Other related matters

Disclosure

[68] The Foundation alleged that there has been some deficiency in the Petitioners' compliance with their duty to disclose material facts in connection with the filing of the Petition.

[69] Given my findings [supra], I do not believe that this issue needs any further consideration.

Foundation's name struck from the Register

[70] During the trial, it was established that at the time of the hearing on 14 March 2019, the Foundation's name was struck off the Register of Foundations.

[71] In her Supplemental Submissions, Ms. Pyfrom submitted that the Foundation was restored to the Register on 1 April 2019.

[72] Based on my findings, this issue also does not warrant any further consideration.

Conclusion

[73] In my opinion, learned Counsel for the Foundation fought hard to make a case for the Foundation which was evidently unsustainable on the ground that the Foundation does not and cannot assert a claim to the title to the Subject Properties as required by section 7(2) of the QTA. It asserts no claim to the fee simple of the Subject Properties either documentary or possessory nor is the Foundation entitled to any possession. Accordingly, the Foundation cannot properly be described as a rival or competing claimant.

[74] The effect of the Foundation's evidence and pleadings, as noted above, is that it is a licensee of the Crown with no legal or equitable interest in the Subject Properties and therefore has no entitlement or right to apply to the Supreme Court for a Certificate of Title.

[75] In addition, the Foundation has no *locus standi* in these proceedings.

[76] In the premises, I will dismiss the Adverse Claim filed by the Foundation on 27 April 2017 with costs to the Petitioners to be taxed if not agreed.

[77] Last but not least, I thank both Counsel for their industry and dedication in transmitting their submissions to the Court expeditiously.

Dated this 27th day of March, A.D., 2020

Indra H. Charles
Justice