COMMONWEALTH OF THE BAHAMAS

IN THE SURPREME COURT

Common Law & Equity Division

2002/CLE/gen/02280

IN THE MATTER of the provisions of the Partition Act, Chapter 143.

AND

IN THE MATTER of ALL THAT piece parcel or tract of land situate on the Southwestern Side of the New Harold Road Reservation in the Western District of the Island of New Providence aforesaid comprising Ninety-two and Thirty-three Hundredths (92.33) acres more or less and bounded Northwardly by land the property of the Bahamas Government Northeastwardly by the New Harold Road Reservation leading to John F. Kennedy Drive Eastwardly partly by land property of the Air Ministry partly by other land the property of Nassauvian Limited partly by land formerly leased to the late Hedley Edwards and partly by other land and partly by land reserved for the Bahamas Geodetic Survey southwardly by Crown Land Westwardly partly by land now or formerly the property of The Caves Company Limited and partly by land now or formerly the property of G.A. and S. G. Bostfield which said piece parcel or tract of land has such position shape mars and dimensions as are shown on the diagram or plan attached to a Certificate of Title issued by the Supreme Court of the Bahama Islands to Nassauvian Limited on the 23rd day of February, A.D. 1970 and recorded in the Registry of Records in the City of Nassau in the said Island of New Providence in Volume 1582 at pages 182 to 185 and is delineated on that part which is coloured pink on the said diagram or plan.

BETWEEN

LESHELMARYAS INVESTMENT COMPANY LIMITED

Plaintiff

AND

1. **ALBERT C. HIGGS on behalf of the Estate of KENNETH McKINNEY HIGGS,**
2. **ALBERT C. HIGGS on behalf of the Estate of CLOTHILDA HIGGS, DECEASED, KENNETH MCKINNEY HIGGS, SENIOR,**
3. **JASON WOODSIDE on behalf of the Estate of ANNAMAE WOODSIDE**

4. **PERSONAL REPRESENTATIVE OF THE ESTATE OF LULIE LESLIE, DECEASED**
5. **MANUFACTURERS AGENTS LIMITED**
6. **PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NOTTAGE, DECEASED OSBOURNE HIGGS**
7. **PERSONAL REPRESENTATIVE OF MONICA DELORES HIGGS, DECEASED**

Defendants

Before Hon. Mr. Justice Ian R. Winder

Anthony McKinney QC with Owen Wells for the Plaintiff

Bridget Francis-Butler for the First and Second Defendants

Kahlil Parker QC with Roberta Quant for the Third Defendant

Timothy Eneas QC for the Neely's of Nassau (an Interested Party)

29 November 2021

RULING

WINDER, J

This is but another round in this storied partition claim brought by the Plaintiff (Leshel) concerning approximately Ninety-two and Thirty-three Hundredths (92.33) acres of land in Western New Providence in the vicinity of the old Harold Road.

[1.] Paragraphs 1-11 of the Privy Council decision in **Higgs v Leshelmaryas et als 2009 UKPC 47** (the Privy Council decisison) provides a comprehensive background of this action and is worthy of repeating here:

1. This appeal, which relates to the ownership of land in New Providence Island, has a long litigious history and it is impossible to explain the issues that the Board has now to address without first describing, at least in outline, that history. It is convenient, however, to say at once that the main issue is whether the appellant, Mr Kenneth Higgs, has obtained, whether for himself or on behalf of the estate of his late mother, Clotilda Higgs, of which estate he and a brother of his are the executors, a good possessory title to the land in New Providence Island later described to the exclusion of the other tenants-in-common of the land, and, in particular, the respondent, Leshelmaryas Investment Co. Ltd. ("Leshel").

2. Mr Higgs is, via his mother, a member of the Adderley family, a family which is, and has been for well over a century, a prominent Bahamian family, prominent in the ownership of extensive tracts of New Providence Island and prominent also in Bahamian public affairs. The land to which this appeal relates is a parcel of land comprising 92.33 acres and is situated on the south-western side of the New Harold Road Reservation, Western District, New Providence. The Board will, for convenience, refer to this land as "Tract A". Tract A belonged, together with a great deal of other land in New Providence, to Alliday Adderley who died on 27 September 1885 and, as a result of various transactions that it is not necessary to detail, Tract A became after his death vested in his four children as tenants-in-common. His children were Joseph Richmond Adderley ("Joseph"), William Campbell Adderley ("William"), Sarah Bain ("Sarah") and Daniel D Adderley ("Daniel"). Each, therefore, became entitled to an undivided ¼ share, a freehold estate, in Tract A.

3. It is convenient at this point to notice that the real property law reforms introduced in 1924 and 1925 in England and Wales have never been adopted by The Bahamas, whose real property law remains, so far as relevant to this case, the law as it stood in England prior to the 1924 and 1925 legislative reforms. Accordingly, individual shares in Bahamian land can continue to exist as freehold estates, requiring neither unity of title, interest or time, but only unity of the right to possession (see Halsbury's Laws of England 4th Ed. Reissue (1998) Vol 39(2) para.207).

The devolution of the undivided ¼ shares

4. William's affairs plainly did not prosper. He became insolvent and his undivided ¼ share in Tract A was sold by the Provost Marshall on 25 May 1892. The share was, on 6 January 1964, acquired by a Bahamian company, Nassauvian Ltd, sold by Nassauvian Ltd to Group Three Ltd on 28 June 1990 and by Group Three Ltd to Leshel on 14 January 2002. Leshel are the plaintiffs in the proceedings that have led to this appeal.

5. Daniel died on 28 March 1934. He devised his undivided ¼ share in Tract A to his four children, Richard, Clotilda, Mary Ellen and Roger, as tenants-in-common (subject to a life interest given to another son who died in 1945). Each of Richard, Clotilda, Mary Ellen and Roger therefore became entitled to an undivided 1/16 share in Tract A.

6. Richard died in 1956 having devised his 1/16 share to his siblings, Clotilda, Mary Ellen and Roger, in equal shares, i.e. an undivided 1/48 to each. The Tract A entitlement of each, therefore, became 1/16 plus 1/48 i.e. a 1/12 share.

7. Mary Ellen died intestate in 1967 and a grant of Letters of Administration to her estate was issued to Roger, her heir-at-law. It is so pleaded in paragraph 6 of the Defence of the 3rd defendant, Annamae Woodside, and the Board will assume that the pleading is correct. If that is so, Roger became entitled to Mary Ellen's 1/12 share and, in all, to a 1/6 share in Tract A.

8. Roger died in 1975 having, according to paragraph 7 of the 3rd defendant's defence, devised to one, Elrenia Moxey, 1/3 "of the three-fourth (3/4) share ... of Roger ... in all that one-fourth (1/4) interest ..." of Daniel in Tract A. The Board is unable to understand why it was thought that Roger had a ¾ share in Daniel's ¼ share. Daniel's ¼ share had been divided between his four children. So Roger started with a 1/16 share. He then acquired from Richard a further 1/48 share, bringing his share up to 1/12. He then acquired Mary Ellen's 1/12 share, resulting in a 1/6 share in all, not a ¾ of ¼ share, which would produce a 3/16 share.

9. On the footing that Roger's share in Tract A was, when he died, a 1/6 share, not a 3/16 share, the demise to Ms Moxey was a demise of 1/3 of a 1/6 share i.e. a 1/18 share. The 3rd defendant claims to be entitled to the 1/18 share on the pleaded footing that she was the only lawful child of Ms Moxey who died in 1998 "partially intestate as it relates to her interest under ..." Roger's Will. If that is so, it appears to the Board that the 3rd defendant is entitled to an undivided 1/18 share of Tract A, subject, of course, to the appellant's possessory title claim.

10. Clotilda, who had become Mrs Higgs, died in 1974. She left, apparently, a number of children (see para.4 of the Defence of the 8th defendant), one of whom, the appellant Mr Higgs, became the 1st defendant to Leshel's action. It is not clear from the papers before the Board quite how Clotilda's 1/12 share in Tract A devolved on her death but it appears from the Defence filed on behalf of the estate of Monica Delores Knowles (said to be a daughter of Clotilda) that Clotilda devised 1/7 of her real estate to Monica. Monica died in 2004 and, if the details pleaded in the Defence are correct, Monica's estate is entitled to a 1/84 share in Tract A. The devolution of the other 6/7 of Clotilda's 1/12 share is not disclosed by the papers before the Board but it is a fair certainty that Mr Kenneth Higgs has a share. It is relevant to notice that the possessory title claim to Tract A advanced by Mr Higgs in this action and before the Board is advanced on behalf of the estate of his mother, Clotilda. If, and to the Page 4 extent that, that claim is well-founded, the shares in Tract A of all those who claim through Clotilda will be enhanced accordingly.

11. The papers before the Board do not disclose how the respective ¼ shares in Tract A of Joseph or of Sarah devolved. Joseph appears from the family tree, exhibited to the affidavit of Leslie Miller sworn on 12 July 2002, to have been survived by a number of children and grandchildren and it seems very likely that his ¼ share became divided into many smaller shares (see also para 23 of Mr Miller's affidavit). Sarah, it seems, married, but no other information about her is

available. The shares in Tract A claimable by those claiming under Joseph or Sarah must depend, also, on the viability of the possessory title claim made by Mr Higgs on behalf of his mother's estate.

[2.] At paragraph 61 of the Decision, Lord Scott, writing for the Board, concluded as follows:

> The Board conclude that
> (1) Mr Higgs and his co-executor's appeal against their failure in the Court of Appeal to establish a possessory title that overrides Leshel's documentary title to a ¼ share in Tract A must be dismissed;
> (2) the Court of Appeal's order setting aside the award of specific parcels of Tract A to Leshel, to the third defendant and to Clotilda's estate was correct and should be upheld;
> (3) the remission of the partition action to the Supreme Court for a rehearing was correct and should be confirmed;
> (4) it remains open to Clotilda's executors to contend at the remitted hearing that by their acts of possession over Tract A they have acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel – it will be a case management decision for the judge whether or to what extent fresh evidence, additional to that given at the hearing before Thompson J, will be permitted;
> (5) the fifth defendant's claim to an interest in Tract A was correctly dismissed by Thompson J and should not be treated as revived by the Court of Appeal's order;
> (6) save as mentioned above, the Court of Appeal was correct in setting aside the order of Thompson J.
>
> (Emphasis added)

[3.] This matter came before me following its remittal from the Court of Appeal. The 18 November 2018 decision of the Court of Appeal, with respect that remittal, provided as follows:

> On the undertaking of the Appellants, the Registrar is directed to amend the court's records to reflect Wilfred Able Woodside (Executor of the Estate of Annaemae Woodside (sic)) replace Annaemae Woodside (sic) as the named Respondent in this appeal.
> The court is of the view that there has been a failure of the learned judge to comply with the Order made by the Privy Council to rehear the issue as identified in paragraph 4 of their conclusion contained in paragraph 61 of the decision, where the Board indicated that:
>
> > "(4) it remains open to Clotilda's executors to contend at the remitted hearing that by their acts of possession over Tract A they have acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel – it will be a case management decision for the judge

whether or to what extent fresh evidence, additional to that given at the hearing before Thompson J, will be permitted..."

In the circumstances, we set aside the decision of the learned judge and remit the matter for rehearing before a justice of the Supreme Court to scrupulously adhere to the direction of the Privy Council as identified in paragraph 61 of its decision. To the extent that we have mentioned the appeal is allowed on Ground 1, we decline to make the declarations sought in paragraph 2, and we also decline to make any award as to damages.

[4.] It is paragraph 4 of the Privy Council decision which is the basis of this decision. It was agreed that the Court would determine, as a preliminary issue, as between the First and Second Defendants (collectively "Higgs") on the one hand and the Third Defendant (Woodside) on the other. That issue is whether by their acts of possession over Tract A Clotilda's Estate, Higgs have acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel, in particular Annamae.

[5.] The wisdom in considering the preliminary issue, as outlined above, can be seen in paragraph 59 of the Privy Council decision. Paragraph 59 states:

The Partition
59. Unless the tenants in common entitled to shares in Tract A can agree upon a partition of the land, it seems to the Board, as at present advised, that a sale of Tract A and a division of the proceeds of sale is likely to be inevitable. If Clotilda's executors [Higgs] can succeed in satisfying the judge before whom the remitted action is heard that they have acquired by their possessory acts over Tract A the rights of their co-tenants in common other than Leshel, their individual share will have increased from 1/12 to 3/4. It would be reasonable to expect that they and Leshel could agree upon a division of the land. If they cannot agree, it appears to the Board – although this does not of course bind the judge – the sensible course would be to direct a sale by auction with both parties at liberty to bid.

(Emphasis added)

[6.] It was determined that the Court would receive fresh evidence on the preliminary issue. Higgs was directed to file Points of Claim to outline their claim. The Points of Claim (miss-styled Statement of Claim), filed on 6 August 2021 was settled as follows:

1. The First and Second Defendants are jointly and severally the legal and beneficial owners of an undivided portion of the land the subject of dispute by virtue of documentary and possessory title.
2. The Third Defendant, the Executrix of the Estate of Elmira Moxey, claim to be legally and beneficially entitled to a portion of the said undivided portion of land

by way of documentary title under the Estate of the late Roger Adderley, deceased.

3. The by an (sic) Order of the Court of Appeal dated 5th November, 1970 the said Roger Adderley was granted leave of the Court to withdraw his Appeal claiming an interest in the land the subject of the Appeal. The said Roger Adderley had been outside of the jurisdiction of the Bahamas in excess of Fifty (50) years.
4. The said Rodger Adderley died on the 1st August 1975 and neither the third Defendant nor anyone else claiming under his estate took any steps to protect his purported right, (sic)
5. Save for the one quarter interest of the Plaintiff in the undivided interest in the land the subject of dispute, the first and second Defendants have dispossessed all other co-owners in the subject land (sic).
6. The first and Second Defendants are entitled to the legal and beneficial interest in the remaining three quarter (3/4) interest in the land the subject of dispute by reason of their exclusive undisturbed possession and control of the subject land and by reason of their documentary title.

THE FIRST AND SECOND DEFENDANTS claim:-

a) A Declaration the they (sic) are jointly and or severally entitled to the legal and beneficially ownership to three quarters interest in the land the subject of dispute subject only to the interest of the Plaintiff herein.
b) A Declaration that the third Defendant has no right title or interest in the land the subject of dispute. The Third Defendant has been dispossessed of its purported documentary title by the said first and Second Defendant co-owners.
c) An Injunction restraining the third Defendant, his servants or agents from entering upon the land the subject of dispute (sic)
d) Costs (sic)
e) Such further and other relief as the Court deems just (sic)

[7.] Woodside filed a Defence to the Points of Claim. The Defence, filed on 16 August 2021 was settled as follows:

1. The 1st and 2nd Defendants are put to proof with respect to the contents of paragraph 1 of their Statement of Claim.
2. Save for the fact that the 3rd Defendant has an interest in, and is entitled to, at least a 1/18th share of the subject land, the contents of paragraph 2 of the Statement of Claim are not denied.
3. The 1st and 2nd Defendants are put to strict proof with respect to paragraphs 3 and 4 of their Statement of Claim.
4. Paragraph 5 of the Statement of Claim is denied, and the 1st and 2nd Defendants are put to strict proof with respect thereto. The 1st and 2nd Defendants cannot acknowledge the defeat of their purported claim to adverse possession of the subject land as against the Plaintiff without acknowledging the unsustainability and defeat of their said purported claim to adverse possession thereof as against the 3rd Defendant. The 1st and 2nd Defendants have failed to plead and/or prove a sustainable possessory claim as against

the 3rd Defendant or the Plaintiff herein. Nassuvian (sic) Limited's Supreme Court Action, Action No. 1138 of 1987 (hereinafter referred to as "*the said action*"), as against Kenneth Higgs and Eric Higgs (*Executors and Trustees of the Estate of Clotilda Eugenie Higgs*), the 1st and 2nd Defendants herein, prevents reliance by the 1st and 2nd Defendants on purported acts of adverse possession predating 1987. In order for the 1st and 2nd Defendants to claim adverse possession after the said action in 1987, they must prove that they remained in uninterrupted and peaceful possession of the subject land for twenty years thereafter. However, these proceedings for partition were commenced in 2002, the filing of which interrupted any purported adverse possession by the 1st and 2nd Defendants, well short of the requisite period.

5. Nassuvian (sic) Limited filed the Affidavit of the Late Geoffrey Brown in the said action on the 9th day of November A.D. 1987, wherein Mr. Brown, at paragraph 3 thereof, stated as follows: "*By letter dated the 10th day of September 1987* [...] *McKinney, Bancroft & Hughes the Attorneys for the Plaintiff wrote to James M. Thompson Attorneys for the Defendants informing him that the Plaintiff intended to survey the boundaries of Tract A for the purpose of arranging a partition of the said property...*". It was the 1st and 2nd Defendants' violent interference with Nassuvian (sic) Limited's efforts to survey the subject property for the purpose of arranging a partition of the said property amongst the interested parties therein that occasioned the said action, which action interrupted any purported adverse possession by the 1st and 2nd Defendants as against all interested parties inclusive of the 3rd Defendant. The facts and evidence before the Court herein demonstrate that at no material time were the 1st and 2nd Defendants in open and undisturbed possession of the subject property so as to dispossess the Plaintiff or the 3rd Defendant.
6. As has been maintained by the Plaintiff herein: "*the 1st and 2nd Defendants, and indeed all Defendants, cannot say that they were in open quiet and undisturbed possession of the 92.33 acres for a period of 20 years since the grant was given by the Supreme Court on 23rd of February, 1970.*" The 3rd Defendant does not maintain such a position; the 3rd Defendant maintains that the 1st and 2nd Defendants are unable to say that they were in open, quiet, and undisturbed possession of the subject land so as to dispossess or oust any of the relevant parties to this action.
7. The evidence before the Court herein of the violent behaviour by and/or on behalf of the 1st and 2nd Defendants demonstrates that they never enjoyed the requisite peaceful or peaceable occupation of the subject land so as to constitute *bona fide* or substantive adverse possession.
8. At paragraph 3 of the Statement of Claim filed herein by the Plaintiff, on the 1st day of June A.D. 2004, it claims: "*to be entitled to a one-fourth (1/4) legal and beneficial share or interest in the subject property [...]* ***as a tenant in common with the Defendants and others who are interested*** *in varying percentages or parts in the remaining three-fourths interest in the subject land.* (emphasis ours)" The Plaintiff prays herein inter alia for: "*An Order for Partition of the subject property* ***among the parties interested therein****. [...] Alternatively, an order for the sale of the subject land in lieu of partition pursuant to the Partition*

Act, Chapter 153 and ***the distribution of the proceeds of sale***. (emphasis ours)" The 3rd Defendant continues to support the relief prayed for by the Plaintiff. By their Statement of Claim filed herein on the 6th day of August A.D. 2021, the 1st and 2nd Defendants unreasonably and oppressively seek to concede the Plaintiff's claim on the facts and evidence before the Court herein while at the same time purporting to set up a conflicting and unsustainable claim as against the 3rd Defendant on the same facts and evidence. The 1st and 2nd Defendants cannot approbate and reprobate as to the defeat of their purported claim of adverse possession with respect to the subject land (*quod approbo non reprobo*), which purported claim of adverse possession has been opposed herein by the Plaintiff and the 3rd Defendant, and is defeasible, and has been defeated, on the same facts and evidence.

[8.] At the trial, Higgs called Albert Higgs as a witness. Woodside called Jason Woodside as the witness in their case.

[9.] Albert Higgs' evidence in chief was by way of a witness statement, which provided:

1. That I am one of the lawful sons of the late KENNETH McKINNEY HIGGS, the first Defendant herein and the sole Executor of the Estate of the said deceased by virtue of his Last Will and Testament dated the 18th day of March, 2016. That I am also the grandson and personal representative on behalf of the Estate of the late Clothilda Eugenie Higgs, deceased.
2. Probate in the Estate of the late Clothilda Eugenie Higgs was issued to the late Kenneth McKinney Higgs Sr. and Eric Alliday Higgs now deceased on the 20th day of March, A.D. 1974 in Action No 54 of 1974. The said Clothilda E. Higgs was seised in possession of the land the subject of dispute namely 92.33 acres tract of land situate at Tonique Williams Darling Highway.
3. The said late Clothilda Higgs was one of the beneficiaries under the estate of her father the late Daniel Dewelnair Adderley, who inherited one quarter (1/4) interest under the estate of his late father the late Alliday Adderley, the paper title holder.
4. The first and Second Defendants claim both a documentary and a possessory title. They had been in open undisturbed possession of the subject property in excess of twenty-five (25) years prior to the commencement of the subject proceedings. The evidence before the court was that the Higgs family had been in possession of the whole Tract A since the granting of the Certificate of Title to Nassauvian in 1970. They carried out commercial quarrying activities on the land without interruption nor claim with respect to the rents and profits from the third Defendant nor any other co-tenant Estates of Sarah Bain or Joseph Richmond Adderley). They continue to occupy the same.
5. That by an Order dated the 26th day of March, 2021 I have been substituted in place and instead of the First and Second Defendants herein.
6. This matter commenced by an Application on behalf of the Plaintiff herein for the partitioning of ALL THAT tract of land comprising 92.33 acres tract of land

to the Northwestern Side of Tonique Williams Darling Highway. Leshelmaryas claimed to be entitled to one quarter (1/4) interest in the subject land.

7. By a judgment dated the 24th April, 2006 the Honourable Justice Thompson J ordered the partitioning of the subject tract of land and purported to distribute the same to all interested parties. The first and Second Defendants appealed to the Court of Appeal the entire judgment by Notice of Appeal filed the 1st June, 2006.
8. The Appeal was allowed and the matter was remitted to the Supreme Court, however the first and second Defendants sought and was granted leave to appeal to the Privy Council on the 2nd December, 2006.
9. That by Order of the Privy Council dated 9th December 2009 it was Ordered that the first and Second Defendant's Appeal against the Court of Appeal's decision to establish a possessory title that overrides Leshel's documentary failed. The matter was remitted to the Supreme Court for Partitioning. However, the matter was sent to the Honourable Court for a rehearing to determine the respective interest of the co-owners, other than Leshelmaryas.
10. By the said Privy Council ruling in Action No 0012 of 2009 the Plaintiff herein was granted a one quarter (1/4) undivided interest in the 92.33 acres tract of land situate at Tonique Williams Darling Highway, the land the subject of dispute. The Court stated that "*it remained open to Clothilda's executors to contend at the remittal hearing that by their acts of possession over Tract A they have acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel- it will be a case management decision for the judge whether or to what extent fresh evidence, additional to that given at the hearing before Thompson J, will be permitted.*"
11. The Third Defendant was a named party to the said Appeal to the Privy Council, but failed to appear; however, the said Council remitted the matter to the Supreme Court for rehearing to determine the interest of the third Defendant and any other interested party.
12. Lord Scott in HIGGS v LESHELMARYAS INVESTMENT CO., LTD. [2009] UKPC 47 at paragraph 55 observed that "It appears to be common ground that the third defendant Annamae Woodside, who claims to have succeeded, via Roger, to a share in Tract A never, over the period between 1975, when Roger died to the commencement of this litigation in 2002, made or attempted any entry on to tract A or made any claim to a share in the rents and profits being obtained from Tract A by Clothilda's executors. If the acts of possession relied on by them are of a character and degree sufficient for possessory title purposes, her documentary title must be statute barred unless she can claim the benefit of the notional interruption bought about in 1987 by Nassauvian's action."
13. Particular note ought to be made to the fact that by an Order of the Court of Appeal, dated the 5th November, 1970 Roger C. Adderley, through whom the Third Defendant, Annamae Woodside claims, abandoned his interest in the subject property and sought leave to withdraw his adverse claim as he recognized that he had been out of the jurisdiction of The Bahamas for in excess of 50 years. Any claim that he would have would be through his sister

Clothilda E. Higgs who maintained exclusive undisturbed possession throughout and had alone collected all rents and profits from the use of the subject land.

14. According to paragraph 26 of the ruling of Thompson J, as she then was, dated 24th April, 2006 "No evidence was actually given on behalf of the Third Defendant, who acknowledged that she had never entered into possession".
15. Lord Scott at paragraph 26 of the 2009 Ruling noted that neither the third Defendant not the Eight Defendant filed any pleadings opposing or dealing with the first and Second Defendant's possessory title claim, and have taken no steps to protect those rights (para 58).
16. At the remittal hearing before the Honourable Justice Rhonda Bain no new or additional evidence was given by or on behalf of the said Third Defendant as to her, her servants and or agents' occupation or possession or interest in the subject land. The action was readvertised and no new claimants entered into the action.
17. The said Annamae Woodside also claims to be entitled under the Estate of the late Elrenia Moxey, her mother. She was named the executrix under the said Last Will and Testament dated 5th June, 1986, which did not include the subject property. She however claims in her personal capacity without consideration of the other beneficiaries under the estate of the said Elrenia Moxey who would have been entitled under the Laws of intestacy, should the interest of Roger Adderley have survived the said Order of the Court.
18. The Third Defendant further claimed that she was entitled to rely upon the notional interruption on the land by the Plaintiff or their predecessors in title. There is no evidence before the Court that the Last Will of the late Elrenia Moxey had been proved vesting any title, particularly a portion of the 92.33 acres tract of land, in the third Defendant or any other beneficiary under the said Estate in 1987 or otherwise.
19. That the third Defendant died testate on the 5th day of November, 2013 and Grant of Probate was issued out of the Supreme Court of the Commonwealth of the Bahamas on the 9th day of February, A.D. 2016 to Wilfred Abel Woodside. A copy of the Grant of Probate is recorded in the Registry of Records in the City of Nassau in Volume 12636 at pages 315 to 322.

[10.] Albert Higgs also settled a supplemental witness statement on 13 November 2021. He was subject to cross examination on his witness statements. He confirmed that his family maintained exclusive control of the property to the exclusion of Woodside and all others. That the only interruption was the injunction in favor of Leshel only.

[11.] Jason Woodside's evidence was by way of a witness statement which provided:

1. I am the son of the Late Annamae Woodside, the 3rd Defendant named herein, and a beneficiary of her Estate. Letters of Probate were issued in my Mother's Estate, dated the 9th day of February A.D. 2016, and my father, Wilfred Abel

Woodside, with whom I reside, was named Executor. I have been appointed by my father and my fellow beneficiaries to represent the Estate in this matter.

2. My mother, the 3rd Defendant, was at all material times the Executrix of the Estate of her mother, the late Elrenia Moxey, who inherited her interest in the subject land from Roger Charles Adderley. My late mother was the only lawful child of Elrenia Moxey and claimed her interest therein through the undisputed right title and interest of the late Roger Charles Adderley. There is no evidence before the Court that Roger Charles Adderley abandoned his interest in the subject land, which is denied.
3. The 1st and 2nd Defendants have never been in exclusive or undisturbed possession or control of the subject land, the subject land has been the subject of dispute and litigation for at least the past five or six decades.

[12.] Under cross examination it was clear that Jason was unable to assist his case. He did not know where the property was and had never been in possession of it or sought to occupy it. He could not speak to his mother's occupation of the property at all.

[13.] The kernel of Woodside's case is set out in its submissions as follows:

1. The Privy Council recognized and determined that the 3rd Defendant's interest in the subject land was a 1/18th share.

...

5. The premise of the 1st and 2nd Defendants' application herein, upon their purported Statement of Claim inexplicably filed herein on the 6th day of August A.D. 2021, is fundamentally flawed. The 3rd Defendant's right, title, and interest in the subject land is not properly in dispute. Furthermore, the 1st and 2nd Defendants' reliance upon events in SCCivApp No. 6 of 1970, Kenneth McKinney Higgs Senior et al v. Nassauvian Limited, is wholly irrelevant. The 1st and 2nd Defendants have failed to demonstrate that the late Roger Charles Adderley disclaimed or otherwise divested himself of his right, title, and interest in the subject land. Whether Roger Adderley did or did not participate in an unsuccessful appeal against Nassauvian Limited's interest in the subject land is wholly irrelevant. Furthermore, the question of possession is irrelevant on the facts, as the 1st and 2nd Defendants have demonstrated no relevant period of adverse possession of the subject land so as to oust the title of any of their co-tenants, including the 3rd Defendant.

...

11. The 1987 action compelled the 1st and 2nd Defendants' (sic) to acknowledge their co-tenants' right of entry on and possession of the land. Furthermore, as the Affidavit of Geoffrey Brown, filed in Supreme Court Action No. 1138 of 1987, reflects at paragraph 3 thereof, Nassauvian Limited, the plaintiff therein, entered upon the subject land and sought the injunction therein

pursuant to its desire to conduct a "*survey of the boundaries of Tract A for the purpose of arranging a partition of the said property.*" Nassauvian Limited's actions were expressly intended for the benefit of all the documentary title holders, which included the 3rd Defendant. This is further demonstrated by the pleadings before the Court herein, where the Plaintiff, Nassauvian Limited's successor in title, has resumed efforts to partition the subject land for the benefit of all the documentary title holders and seeks *inter alia "an order for partition of [Tract A] among the parties interested therein.*"

12. The 1987 action ceased time running in favour of the 1st and 2nd Defendants and both the Plaintiff and the 3rd Defendant are able to rely on the same. The 3rd Defendant's interest in the subject land has also not been lawfully or credibly challenged herein and ought to be affirmed in the circumstances.

13. While the Privy Council, by its judgment, may have left it to the 1st and 2nd Defendants to argue the case for their purported adverse possessory claim as against the 3rd Defendant, it is submitted that they have failed to present a reasonable and lawful argument in support thereof. Further, it is submitted that the 1st and 2nd Defendants cannot concede the Plaintiff's defeat of their purported adverse possessory claim on the facts and evidence before the Court herein without acknowledging its unsustainability as against the 3rd Defendant.

[14.] Paragraph 48 of the Privy Council decision provides:

48. However that conclusion does not necessarily, in the Board's opinion, put an end to the issues raised by the first and second defendants' possessory title claim. There is also the point earlier referred to regarding the position as between the first and second defendants on the one hand and the documentary tenants-in-common title other than Leshel on the other. Let it be assumed that the acts of possession on which the first and second defendants relied and of which evidence was given before Thompson J, were of a quality and a frequency sufficient to constitute exclusive adverse possession by the Higgs family of the whole of Tract A for the requisite 20 year period prior to 2002 and subject only to the interruption constituted by the 1987 litigation. That interruption preserved for Nassauvian and its successors-in-title the undivided 1/4 share in Tract A now vested in Leshel. But does it follow that the benefit of that interruption can be claimed also by the other tenants-in-common? The interruption did not consist of an actual re-entry into possession by Nassauvian. It consisted of a specific legal act recognised by the law as, in effect, a notional re-entry. Suppose, for example, the adverse possessors, before they had had 20 years adverse possession, had acknowledged

in writing Nassauvian's documentary title to an undivided 1/4 share of Tract A (see s.14 of the 1833 Act). On what basis could the benefit of that acknowledgement be claimed by the tenants-in-common whose documentary titles had not been similarly acknowledged? This is not a point that was raised or addressed at the hearing by the Board of the appeal and the Board cannot therefore express any conclusions about it but it is a point that the first and second defendants may wish to pursue at the remitted hearing.

[15.] I am satisfied that Higgs can and did dispossess Woodside by exclusive and continuous possession of the property to the exclusion of all others, including Leshel. As the Privy Council pointed out, Leshel's interruption did not consist of an actual re-entry into possession by Nassauvian. It consisted of a specific legal act recognised by the law as, in effect, a notional re-entry.

[16.] In the case of ***Re: Petition of Royal Island Ltd [2011] 2 BHS J. No. 33, Adderley J*** (as he then was) considered whether one co-owner could dispossess another. At paragraph 37 of his judgment, ***Adderley J*** states:

> **37** In ***Higgs v Leshel Maryas*** **Investment Company Limited et al** [2009] UKPC Privy Council Appeal No 12 of 2009 Lord Scott delivering the judgment on behalf of the Board set out how Parliament has affected the common law as it relates to possession by co-owners. At paragraph 50 he stated:
>
> > "50 .... Under common law tenants-in-common of land enjoyed unity of possession. This continues to be the law in the Bahamas - and in other Caribbean jurisdictions. The result of the common law unity of possession of co-owners was that the sole possession by one co-owner of the co-owned land was, *prima facie,* not adverse to the title of any other co-owners. The co-owner in possession would be accountable to the others for rents and profits received but, although the lapse of time might bar the right to an account (see In re Landi, deceased [1939] Ch 828), it would not, without something more than mere possession, bar a co-owner's title.
> >
> > 51. This state of affairs was changed by section 12 of the 1933 "Act "When any one or more of several persons entitled to any land or rent as ..... tenants in common shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or the benefit of any person or person other than the persons or persons entitled to the other share or shares of the same land or rent, such possession or rent shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

This section makes the actual possession by a tenant in common of co-owned land separate from the entitlement to possession of his co-owners who are out of possession (see Carson's Real Property Statutes 2nd Ed (1910) at 149). The proposition is illustrated by *Culley v Doe* (1840) 11 Ad & ECl.1008 (see Denman CJ at 1017) and In re Hobbs (1887) 36 Ch. D 553 in which it was held that a co-owner father, who had for the requisite period received the rents of a property of which his adult son, too, was a co-owner, had thereby barred the title of the son."

38 Adverse Possession was discussed by Slade J in ***Powell v McFarlane*** (1977) 38 P+CR 452 at p:470 as follows:

> "(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)."

At page 470-471 Slade J said in respect of 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."

At page 470-472 Slade J said in respect of intention to possess:

> "Intention, in one's own name and on ones own behalf, to exclude the world at large, including the owner with the paper title if he be not the possessor, so far as is reasonably practicable and so far as the process of law will allow."

The above principle is embodied in s 19 of the Act.

[17.] I accept that Woodside did not re-enter. The narrow issue for determination is whether Woodside could benefit from the interruption in occupation by Leshel, who secured an injunction on 9 November 1987 from ***Gonsalves-Sabola J***. In short, it must be determined whether the injunction, although for the benefit of Leshel, could amount as an interruption of the possession of Higgs not only for Leshel but also for the other co-owners such as Woodside.

[18.] It is my considered view that Woodside must engage in its own acts of interruption to the possession of Higgs. The terms of the injunction sought to restrain *"[Higgs] whether by themselves or by their servants or agents or otherwise from interfering with [Leshel] or its agents in clearing the boundaries or and surveying [the Property]"*.

[19.] Mr Parker QC, for Woodside, argues that as the purpose of the injunction was to permit Leshel to obtain a survey for the purpose of the partition, all co-owners ought to benefit. Respectfully, I did not agree with the submission as neither of the other co-owners were parties to the 1987 action. Further, there is nothing in the terms of the injunction which concerned anyone other than Higgs and Leshel.

[20.] I find, on the evidence, that the possession of Higgs was not only notorious but exclusive. I accepted the evidence of Albert Higgs when he says that Higgs had been in open undisturbed possession of the subject property in excess of twenty-five (25) years prior to the commencement of these proceedings in 2002 and that they continue to occupy the property. Albert Higgs' evidence that he and his family had been in possession of the whole Tract A, since the granting of the Certificate of Title to Nassauvian in 1970, was not seriously challenged. In cross examination, on the issue of the possession, Albert Higgs stated:

> *Roger Adderley [Woodside's predecessor in title] never occupied a piece of the 92 -- 93 acres in his life. Never occupied it. That's Number 1. Pertaining to the 92 acres, it is the home base and possession solely of my father, Kenneth McKinney Higgs. From the time I was -- I know myself, this is the home base for Kenneth McKinney Higgs. There was contention all around the surrounding areas. But never once that here was any contention other than the interference by Leslie Miller. Nobody else never interfered, but Leslie. Never. Including Family Members, sisters, brothers, cousins, aunties, uncles, nobody.*

Later he stated:

> *The '87 incident that took place was an Action brought by Nassauvian. As to relate to any other Claimant, I never seen a Writ or Summons or anybody else bringing an Action other than Nassauvian in relation to the 92 [acres]. So, it is from my observations from years gone by, other than Leslie Miller, there's nobody else disturbed the possession of the 93.16 acres other than Family Members, that may*

come and visit and go or whatever like that. But there's nobody else. Nobody never disturbed or even claimed a piece of the 93 other than Nassauvian. Nobody else.

[21.] The evidence of Albert Higgs could not be challenged by Jason Woodside who did not know where the subject property was or whether his mother engaged in any occupation of the property. In fact, this is not surprising as paragraph 26 of the 24 April 2006 ruling of ***Thompson J*** records an acknowledgement by Annamae Woodside that she had never entered into possession. Annamae Woodside died since 5 November 2013. Albert Higgs' unchallenged evidence was that they [Higgs] carried out commercial quarrying activities on the land without interruption nor claim with respect to the rents and profits from Woodside or any other co-tenant or their estates. Higgs' behavior, of excluding co-tenants which required an injunction in 1987, clearly supports their contention that there was the necessary animus possidendi or intent to exclude all others including the documentary title owners such as their co-owners.

[22.] In all the circumstances therefore I must reject the submission of Woodside, that there was an interruption in the occupation of Higgs that benefitted all co-owners and find that Woodside has been dispossessed by Higgs for a period in excess of the statutory period of 20 years. As it related to the framed issue of:

Whether by their acts of possession over Tract A, Clotilda's Estate (the First and Second Defendants) has acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel, in particular Woodside.

the Court answers the issue in the affirmative.

[23.] I will hear the parties by way of written submissions on the question of costs.

Dated the 4th day of August 2022

Ian R. Winder
Chief Justice