

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION
2016/CLE/qui/01399

IN THE MATTER OF ALL THAT piece or parcel of land containing Sixteen and One Hundred and Seventy-Eight Thousandths (16.178) acres situate on the Southern Side of Tonique Williams-Darling Highway and approximately One Thousand One Hundred (1,100) feet west of round-a-bout at Sir Milo Butler Highway in the Western District of New Providence one of the Islands of the Commonwealth of The Bahamas which said piece or parcel of land has such position shape marks boundaries and dimensions more particularly described by and delineated on the diagram or Plan No. 5726 NP and thereon coloured Pink.

AND

IN THE MATTER of The Petition of Donald Steven Bain

AND

IN THE MATTER of the Quieting of Titles Act, 1959, (Chapter 393)

Before: The Hon. Madam Justice G. Diane Stewart
Appearances: Mr. Wellington Olander for the Petitioner
Ms. Krystian Butler for the Adverse Claimant
Judgment Date: 20th January, 2023

JUDGMENT

1. By a Petition and Affidavit in support both filed 3rd October 2016 the Petitioner, Donald Steven Bain (the “Petitioner”) prayed that his title to certain property be investigated under the Quieting Titles Act, 1959 (the “Act”) and that a Certificate of Title with respect to that land be granted to him. The property is described as:-

“ALL THAT piece parcel of Land containing by measurements 16.178 acres situate on the Southern Side of Tonique Williams-Darling Highway and approximately 1,100 ft. west of the round-a-bout at Sir Milo Butler Highway in the Western District of the Island of New Providence in the Commonwealth of The Bahamas the boundaries of which are as follows: bounded on the NORTH by Tonique Williams-Darling Highway and running thereon Fifty-one and Thirty-Two Hundredths (51.32) feet; bounded on the EAST by land owned by the Bahamas Hotel Catering and Allied Worker’s Union and running thereon Two Thousand One Hundred Fifty-Nine and Thirteen Hundredths (2,159.13) feet; bounded on the SOUTH partly by Sir Milo Butler Highway and running thereon Two Hundred Twenty Six and Twenty Six Hundredths (226.26) feet and partly by Crown Land and running thereon Three Hundred Eighty-Five and Forty-Three Hundredths (385.43) feet and bounded on

the WEST by land owned by Judea Baptist Church and running thereon Two Thousand Three Hundred Forty One and Eighty-One hundredths (2,341.81) feet which said piece parcel or tract of land has such position shape marks and dimensions as are shown on the plan file (DLS Plan No.5726 NP) herein and coloured PINK thereon. (the "Property")

2. The Petitioner produced an unfiled Abstract of Title but at trial made it clear that he was not relying on any of the title documents therein as he was seeking only possessory title of the Property.
3. Notice of the Petition was duly advertised pursuant to the Directions Order. This was confirmed by the Affidavit of Compliance filed 29th April 2021.
4. An adverse claim was filed by Third Base Investment Ltd. but was struck out by Order filed 28th July 2020 as it was found to be frivolous and an abuse of the process of the court. By letter to the court dated 21st February 2021, the Office of the Attorney General confirmed that no government ministry, department of public corporation had any interest in the Property.
5. On 7th December 2016, John Wendell Archer and Samuel Spurgeon Archer (as Executors of the Estate of John Spurgeon Archer who along with Ruby Fox were the executors of George Henry Archer (the "Adverse Claimants") filed an Adverse Claim (the Adverse Claim). Prior to filing any affidavit in support, or Abstract of Title or Plan of the property related to their claim the Adverse Claimant filed a Summons on 2nd February 2017 seeking an order that ***"the Petitioner be restrained whether by himself or his servants or agents or howsoever otherwise from excavating, depleting or diminishing the value of the property the subject of this action."***
6. At the hearing of the Summons the Petitioner undertook ***"whether by himself his servants or agents or howsoever otherwise not to excavate deplete or diminish the value of the property the subject of this action until this matter is finally determined by the Court"***. The Order filed 17th December 2019 confirmed this undertaking.

The Petitioner's Case

7. By his Affidavit in Support, the Petitioner averred that his ownership of the Property arose from a possessory title pursuant to the Limitations Act as he was in open and undisturbed possession of the Property for a period in excess of twelve years immediately preceding the filing of the Petition. There was no charge, encumbrance, dower or right to dower affecting his title to the Property.
8. Apart from himself, no other entity of person was in occupation of the Property and all improvements made to it were carried out by him without hindrance or complaint from anyone else. He was the only person in possession of the Property and no one else.
9. The Petitioner explained that the deposit receipt produced in evidence for a building permit application from the Ministry of Works dated 16th July 2009 was for a building structure on the Property. Photographs of the building, of which he was the owner, were provided which were taken a month prior to the hearing. Mr. Bain explained that he

shared a western boundary with Worker's House which was situated in the same complex as Bank of The Bahamas. Their western boundary was his eastern boundary.

10. While he had obtained a permit to erect a building at the rear of the Property, it was never built as he did not obtain the requisite excavation permit because the Department of Physical Planning requested proof of title to the Property. Since 2017, he had not gotten a response but he knew that it was because he needed to provide proof of his title. He had referred to a conveyance in his 2017 letter to the Department however, there is no conveyance in existence conveying the Property to him.
11. In September 2003, he owned and operated a company called BBH Trucking, a heavy equipment business. He had leased the rear portion of a property owned by Mr. Lambert Rahming on Tonique Williams-Darling Highway for the company's operation (**the "Rahming Property"**). The Rahming Property became too small to accommodate his heavy equipment which resulted in his parking his dump trucks, backhoes, ladders and cranes on the vacant property adjacent to the Rahming Property.
12. To do so, he had to clear the front portion of the Property. He used the cleared portion as storage, for staff parking and to park his vehicles and equipment. In 2003, upon the commencement of his occupation of the Property, there was no evidence of any other occupation. The portion of the Property that he stored his vehicles on and had his staff parking was immediately south of the Highway. In 2005, he cleared down another portion of the Property for his personal use. In 2006 he ventured further on the property, cleared down another portion and commenced with the business of screening soil and selling sand, rock, rough fill and soil.
13. In 2009 he submitted an application to the Ministry of Works for a building permit to commence construction of a building on a portion of the Property and was issued building permit no. 1142971 in 2010. Thereafter, he commenced construction of a building on a portion of the Property which was completed in 2016. During the construction process, some of the construction workers informed him that Mr. Joseph Archer, who he personally knew, visited the Property and told them that they were building on his property. Mr. Archer did not provide them with any documentation in support of this contention nor did he speak to him directly.
14. He made a complaint to the Carmichael Road Police Station about Mr. Archer and continued his construction on the Property. The building which was constructed was first used as an office building and later as both his office and residence. In 2012, he cleared another piece of the Property which he made into a plant nursery. In late 2015, he hired Mr. Donald Thompson, a licensed surveyor to survey the Property. The plan from the survey was recorded on 27th January 2016 with the Department of Lands and Surveys as Plan No. 5726.
15. He also started planning to develop the Property and had plans drawn for a commercial-industrial complex, which he submitted to the Ministry of Works on 20th June 2016. He excavated the land starting from the rear but he was forced to discontinue after the Department of Physical Planning had informed him that he needed an excavation permit.
16. He began the process of applying for the permit by consulting with a technical engineer who had experience in physical planning. He also wrote to Mr. Charles Zonicle, the

Acting Director of the Department of Physical Planning for approval in principle of the commercial-industrial complex. On 1st September 2017 he applied for an excavation permit, the approval of which is subject to his ownership of the Property.

17. The Petitioner averred that he has been in undisturbed possession of the Property since 2003. He added that there is presently a concrete platform at the front of the Property bordering on the Highway along with his residence and office.
18. During cross-examination, the Petitioner averred that when he took possession of the Property in 2003 there was nothing else situate on it as it was only a grass filled area. He initially cleared about one hundred to one hundred and fifty feet of the Property, about eighty to one hundred feet from the road. He would park some of his equipment on the Property either overnight, a few hours or a few days. While he leased an area at the back of Lambert Rahming's building, his business grew which caused him to run out of space with the extra equipment. He disagreed that the equipment would not be parked on the Property constantly.
19. He had hired a woman to research the ownership of the Property but she was never able to provide him with the name/s of the owners. The information that she did provide related to property occupied by Mr. Lambert Rahming and Judea Baptist Church, which was the reason he did not present that evidence in these proceedings. He had obtained the documents which he relied on for his Abstract of Title on the advice of his Attorney to support his claim for the proceedings and he had seen them even though they were not exhibited to his Abstract of Title.
20. During re-examination, the Petitioner affirmed that the parking of the equipment on the Property was continuous. At his company's highest operational period he had twenty four dump trucks. The company did most of its hauling at night to avoid traffic because it was constant.
21. By his Affidavit filed 5th January 2017, Craven Devon McKenzie, who was forty-eight at the time and a Heavy Equipment Operator by profession, stated that he was well acquainted with the Property. He had become acquainted with the Property on or about the year 2003 when the Petitioner hired him to perform excavation work to the Property. To his knowledge, no one challenged the Petitioner's claim to the Property; the Petitioner being in undisturbed possession on or before the year 2003.
22. Orson Mark Sealey, by his affidavit filed 5th January 2017, was a fifty-seven year old Account Executive. He averred that he was well acquainted with the Property. He was employed by the Petitioner as the Operations Manager of BBH Trucking Ltd; which was located on the Property. He added that the Petitioner was conducting business and screening aggregates on the Property since or before the year 2003 and had enjoyed quiet and undisturbed possession of the Property. The Petitioner landscaped part of the Property and built the company's office thereon. He was not aware of any claims made against the Property by any other person at any time or times.
23. Mr. Donald Thompson, a licensed surveyor for more than thirty years ("**Mr. Thompson**") averred that he had become aware of the Property, in 1995 when he had to survey property to the east of it for the Bahamas Hotel Catering and Allied Workers Union ("**Workers House**"). In or around 1998, he surveyed the property to the west of

the Property for the Trustees of the Judea Baptist Church. He had not been approached about his presence on the Property during any of the surveys.

24. The Property had been vacant from 1990 to 2009 when he observed construction being carried out on it. He later found out that the construction was being carried out by the Petitioner. Around January 2016, he surveyed the Property for the Petitioner and prepared the Plan filed on 21st October 2016 which showed 16.178 acres situate on the Southern side of Tonique Williams-Darling Highway, approximately 1,100 feet west of the round-a-bout at Sir Milo Butler Highway. Mr. Thompson stated that when he surveyed the Property he was not disturbed by anyone and that the Petitioner was the only person he knew to be in occupation of the same.
25. In cross-examination, Mr. Thompson was deemed an expert in land surveying, spoke to survey 5726-MP as registered in the Department of Lands and Survey. It was a survey conducted by him of the tract of land situated on Harold Road, Tonique Williams-Darling Highway. It was registered on 27th January 2016. He had previously conducted the survey for the Bahamas Hotel Catering and Allied Workers Union. In 1998 or 2000 he also carried out a survey in the area of Judea Baptist Church. The Property was cleared in spots but contained bush in others. As a result, he was familiar with the boundaries on either sides of the Property.
26. The Property was mostly vacant along with heavy duty equipment, mining of rocks and fill and other activities. When he conducted the survey for the Union, the majority of the boundary was fenced in and when he conducted the survey for the Church, he did not remember any activities on the Property.
27. During re-examination, Mr. Thompson stated that the only time he saw activity on the Property was in 2009 and when he conducted the survey for the Petitioner at that time the Property on the Union side was fenced in but the Property was not enclosed. In 2016 he did see some mining operations and construction thereon. The survey for the Church was conducted in the 1990's and for the Union several times in the late 1990's and early 2000's. In 2009 he was locating and checking boundaries for the Union when he saw activity on the Property. There was a fence although several parts of the fence was destroyed. He could not say when the fence was placed there.
28. The Petitioner had given him instructions to survey the Property but he did not give him a title deed. He had told him what his intentions were and that he was trying to establish boundaries for a quieting action. In most cases it was usual for people requesting his service to provide him with a title deed. He knew that the western and eastern boundaries were defined by the Church on the west and the Workers House on the east, the Tonique Williams Highway on the north and Milo Butler Highway at the south.
29. When he attended the Property with the Petitioner in 2016 he saw a foundation being erected and an old road at its front entrance but he did not photograph it. He traversed along the east boundary of the Property. It took them seven days to traverse the boundary because it was bushy and they had to cut lines out.
30. Mr. Hubert Williams stated that at the request of the Petitioner, he looked at aerial photographs of the area between the years 1984 to 2004 which included the parcel of land as surveyed by Mr. Donald Thompson and registered in the Department as plan number 5725. He obtained copies of these aerial photographs which were lodged in the

Department of Lands & Survey.

31. Those photographs would usually be taken for the government of The Bahamas every four years in order to update large scale maps of New Providence.
32. He looked at photographs dated 1974, 1982, 1989, 1998 and 2004 which were taken from a height of five thousand feet although one was taken from a little lower height.
33. In the 1974 photograph, the boundary lines were not clearly defined or visible. The bush in the middle of the Property was much higher in elevation than the north and southern section. The variation in growth signified that there was some sort of occupation or farming going on at both ends. There were no track roads or foot paths within or running into the Property.
34. In the 21st December 1982 photograph, there did not appear to be any activity on the Property and the pattern on the land was similar to that in 1974.
35. In the 5th September 1989 photograph, the Property appeared to have cleared areas consistent with clearing for a quarry. There was no building constructed but there was evidence of the beginning of the construction of the Milo Butler Highway.
36. In the 8th November 1995 photograph again the Property is covered with bush at varying heights and all of the boundary lines are visible. The Workers House project was visible but he did not see any structures on the land in question.
37. In the 25th January 2004 photograph, again the Property is covered in bush at varying heights. All of the boundary lines were visible and the Workers House Building was visible. He did not see any structures on the Property.
38. Mr. Williams was not cross-examined by the Adverse Claimant.

The Adverse Claimant's Case

39. Mr. Samuel Spurgeon Archer, by his Affidavit filed 23rd February 2017 averred that he and his brother John Wendell Archer, were the joint executors of the estate of John Spurgeon Archer and the Adverse Claimants in this action.
40. By his evidence in chief he stated that he was 60 years old and when he was around the age of twelve, his father John Spurgeon Archer would take him to a property on Harold Road where he was building a dwelling home which they currently live in. His father had also erected a wall to the north and the west of the dwelling home which was built to the east of the City Dump Road off of the Highway. After the house had been built, his father began farming to the south of the property.
41. Mr. Archer stated that his father would tell him that they had a Lime Kiln which they would use to burn conch shells and obtain lime. His father also spoke about a well which was to the southwest corner of the home. When his father was alive, he allowed his niece and her husband Ruby and Bill Simmons to excavate and remove fill from the property south of the home. By the early eighties, their home was completed however, their entire family did not move into the home until around 1985. He and his father

continued to work the land and farm and he eventually built a junkanoo shack on this land.

42. Mr. Archer stated that the Petitioner initially occupied the Rahming property and later relocated to the Property which he was trying to acquire. He had police officers, namely Mr. Gus Outten (deceased) and Chief Superintendent Bullard notify the Petitioner that he was illegally occupying and mining land which was owned by Mrs. Manuella Archer.
43. Mr. Samuel Archer further averred that there were originally two hundred acres owned by Mrs. Archer but now there was only ninety two acres remaining as other persons had quieted portions and there was a compromise with the government for another portion. Harold Road Properties Limited was incorporated during the hearing of a quieting matter and Munroe & Associates and Pericles Maillis were the President and Vice President of that company. He and his brother were the executors of John Spurgeon Archer's estate who in turn was one of the executors for Manuella Archer's Estate along with George Henry Archer's daughter, Ruby Ann Fox.
44. The property granted in the Certificate of Title was not this Property, but it was related as there were two adjoining tracts owned by Mrs. Manuella Archer. He had taken photographs of the Petitioner in 2016, excavating the Property and forwarded them to his attorney in order to apply for an injunction. In 2015, the Petitioner had begun constructing a small structure on the Property. His deceased brother knew the Petitioner and he had asked him to inform the Petitioner that he was occupying property owned by Mrs. Manuella Archer. The Petitioner reported them to the Flamingo Gardens Police Station for harassment.
45. While the Petitioner was excavating the Property, he attended the Property with officers from the Royal Bahamas Police Force and informed them that the Petitioner was mining on Property which belonged to the estate of Manuella Archer. The Petitioner had originally occupied the Rahming land. He then moved on to the Property either in 2014 or 2015. The officers would approach him and he would stop the mining for a day or two before continuing his operation. The mining was conducted on the southern boundary which was to the western boundary of the Property.
46. During cross-examination, he explained that he represented the executors of the estate of Manuella Archer. There was no grant of probate, only a certificate of title. He relied on his father's will. He could not say whether or not his father farmed on the Property.
47. In the documents forming a part of an application for a grant of probate in the estate of Manuella Archer, the schedule of real estate stated that at the time of her death she own 149.95 acres of land based on her will. The property on Harold Road was originally divided into two tracts of land. It was originally a two hundred acre tract and secondly a two hundred and sixty acre tract of land. The former was the portion of the property a Deed of Compromise was received for in 2004. In that action, he was an adverse claimant. The land he received the Deed for was to the east of the Property.
48. During cross-examination, Mr. Archer stated that the letter dated 22rd March 1960, from Higgs and Johnson to Mr. Jack Jordan, had no relation to the Property as it related to land owned by Manuella Archer in Abaco. The Property was a portion of the land owned by the estate of Manuella Archer based on her last will and testament. The Deed of Settlement and Compromise related to property on Harold Road. The property was

divided into two tracts of land and were originally two hundred and a two hundred and sixty acres each.

49. The two hundred acre tract of land was the portion of the property they initiated court proceedings for in order to receive a Certificate of Title and instead received a Deed of Compromise. The property was to the east of Harold Road and the Milo Butler Highway, the Property was to the west of Milo Butler Highway. The Certificate of Title was granted to Harold Road Properties Limited.

SUBMISSIONS

The Petitioner's Submissions

50. The Petitioner relied on the relevant provisions of the Act which permits any person who claims to have any estate or interest in land to apply to the Court to have his title investigated in order to determine and declare that a certificate of title be granted. Section Four of the Act provides for the form of the application and what documents should be filed in support:-
51. Section Six of the Act mandates advertisement and notification of the application. No further application is allowed to be heard until after the expiration of the time fixed in the notice. Section Seven of the Act mandates a notice to be served on any adverse claimant and Section Eight allows the taking of evidence at the hearing of the petition optional.
52. After the hearing of the petition, the Court, is empowered to declare that a certificate of title is or is not to be issued to the petitioner as the legal and beneficial owner in fee simple of the subject land in certain circumstances:-

“16. Without limiting the generality of the provisions of section 3 of this Act, the court shall have power to declare by a certificate of title in the form prescribed by section 18 of this Act that the petitioner is the legal and beneficial owner in fee simple of the land mentioned in the petition in any of the following circumstances —

- (a) where the petitioner has proved a good title in fee simple to a share in land and has proved such possession as, under the Limitation Act, would extinguish the claim of any other person in or to such land;**
- (b) where the petitioner has proved such possession of land as, under the Limitation Act, would extinguish the claim of any other person in or to such land;**
- (c) where the petitioner has proved that he is the equitable owner in fee simple of land and is entitled at the date of the petition to have the legal estate conveyed to him.”**

53. The Petitioner claims a certificate of title by possessory title and submits that he must prove that he was in possession of the Property adverse to any documentary owner of the Property. In his Abstract of Title, the Petitioner referred to a Conveyance dated 7 April 1978 and recorded in the Registry of Records in Volume 3158 at pages 599 to 603, of 260 acres and made between Richard Johnson, as Executor of the Estate of Sarah Mildred Minnis and as Executor of the Estate of Mary Ellen Cox as Vendor and Timothy Cox Estate Limited as Purchaser.

54. This 260 acres track was in Blue Hills and there was no plan attached to the Conveyance. The Property is not located in the area known as Blue Hills. Therefore, he submits that the Property is not a portion of the property conveyed to the Timothy Cox Estate Limited.
55. The Notice of Petition was properly advertised in the Nassau Guardian and the Tribune. There was no adverse claim filed by the Timothy Cox Estate Limited or any person claiming to have acquired land from Timothy Cox Estate Limited.
56. Section Seventeen of the Act enables the Court to make other orders in relation to a petition:-

“17. (1) After the court has completed the hearing of an application made under section 3 of this Act it may —

- (a) dismiss the application;**
- (b) dismiss the application and grant a certificate of title in the prescribed by section 18 of this Act to any person who shall have filed an adverse claim in accordance with the provisions of section 7 of this Act;**
- (c) grant a certificate of title in the form prescribed by section 18 of this Act to the petitioner;**
- (d) grant separate certificates of title in the form prescribed by section 18 of this Act to the petitioner and to any person who shall have filed an adverse claim in accordance with the provisions of section 7 of this Act in respect of the whole or separate parts of the land described in the petition.**

(2) The court may give one certificate of title comprising all the land described in the petition or may give separate certificates of title as to separate parts of the land.”

57. The Petitioner relied on Section 16(3) of the Limitation Act which fixes the period of twelve years for any owner of land to recover possession, after which he or she is barred from seeking recovery:-

“(3) No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person:

Provided that, if the right of action first accrued to the Crown and the person bringing the action claims through the Crown, the action may be brought at any time before the expiry of the period during which the action could have been brought by the Crown or of twelve years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.”

58. The Petitioner claims possession of the Property by his being in possession for more than twelve years.
59. In **Anthony Armbrister and Others v Marion Lightbourn and Others 2012 UKPC 40** the Judicial Committee of the Privy Council on appeal from the Court of Appeal of The Bahamas outlined the process of quieting titles —

“7. The purpose of the 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. 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 practicing 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 264, and *Higgs v Leshel Maryas Investment Co. Ltd.* [2009] UK PC 47.

8. Procedure under the 1959 Act is relatively informal. The strict rules of evidence do not apply. The procedure is comparable to that which applies on the investigation of title on an ordinary sale, out court, under an open contract. Each rival claimant must prepare an abstract of title and adduce evidence in support of it. Section 8 of the 1959 Act provides:

"(1) The court in investigating the title may receive and act upon 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 to produce any evidence which by the Conveyancing and Law of Property Act is dispensed with as between vendor and purchaser, 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."

The Adverse Claimants' Submissions

60. The Adverse Claimants contend that the Petitioner did not satisfy the criteria of possessory title over the Property. The Abstract of Title which was required by the Act was not relied on. The Petitioner was not in occupation of the Property without hindrance or complaints as he acknowledged that Joseph Archer informed his construction workers that they were building on his property. Joseph Archer also advised the Petitioner that he was occupying property which did not belong to his which led to him seeking police assistance with respect to being harassed by Joseph Archer.

61. In *Lord Advocate v Lord Lovat (1879-80)* L.R. 5 App. Cas. 273, 288, it was held that one of the elements that should be present when establishing an adverse title is the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest. This element should be taken into account in determining the sufficiency of the possessory title claim by the Petitioner. The deceased conducted himself as someone informing a trespasser of a wrongful act in order to protect their interest in the Property.

62. The evidence of Donald Thompson, who stated that there had been no activity on the Property until 2009 was contradicted by the Petitioner who suggested that before 2005,

there was activity on the Property. By the Petitioner's own evidence, he did not commence clearing the Property until 2005 which demonstrates that he did not meet the twelve year requirement as mandated by the Act and his possessory title should fail.

63. One of the main elements in a claim of adverse possession is the animus possidendi which entailed the squatter having an intention to possess land. In **Powell v. McFarlane (1977) 38 P & CR 452, 471**, Slade J defined the intention:-

“an 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.”

64. By the Petitioner’s own admission, he never had the “intention to possess” the land and “exclude the world at large” but to simply have more space to park his vehicles, place his equipment and staff parking as the land he was first leasing was too small. In **Owusu S. (2006) Commonwealth Caribbean Land Law Routledge-Cavendish** the concept of intention to possess was conceptualized. Where the acts of possession were certain, unequivocal and affirmative, the requirement of animus possidendi loses its importance as an ingredient of a claim of adverse possession, but where it is required to be proved as a separate condition, it should be evidence that the acts of the squatter were aimed at dispossessing the world at large, including the true owner.
65. The Petitioner has not satisfied key elements to prove animus possidendi and has therefore not made out a satisfactory claim for adverse possession and should not be awarded a Certificate of Title to the Property.

DECISION

66. The court conducted a visit to the locus in quo and walked through a portion of the Property and was able to see the perimeters of the portion not traversed as the balance of the Property was hardly penetrable because of the heavy covering by bush.
67. The Property is bordered on the west by the Judaea Church property and the Rahming property, and on the east by the Workers House property. There is a road which gives access to the southern portion of the Property. There is a broken fence line on the eastern portion which separates the Property from the Workers House property.
68. There is evidence of excavation at the end of the access road. After the excavation there is only undeveloped land with bush thereon and no clear access through the same.
69. The Petitioner seeks a Certificate of Title with respect to the Property on the ground that he has obtained a possessory title after occupying the same without hindrance or interference from any other person for at least twelve years. This petition requires the court to investigate the title to the Property and to determine if the Petitioner has proved that he has acquired possession of the Property.
70. Similarly, the Adverse Claimants have entered an opposing claim for a Certificate of Title based on the Act.

71. The Privy Council decision of **Bannerman Town, Mills and John Millars Eleuthera Association (Appellant) v Eleuthera Properties Ltd (Respondent) (Bahamas) [2018] UKPC 27** is presently the locus classicus with respect to quietings under the Act along with establishing the legal principles governing possession of land. Lord Briggs in Bannerman stated:-

“The Quieting Titles Jurisdiction

33. The jurisdiction under the Quieting Titles Act in the Bahamas is, (as elsewhere, for example in parts of Canada), a statutory graft upon a body of law about the ownership of unregistered land, the main purpose of which is to remedy perceived defects in that law (compared for example with systems of land registration) which harm the public interest by adversely affecting the marketability, and therefore beneficial use and development, of land. The Act necessarily takes for granted and adopts parts of the procedure for the deduction and proof of title under that system of law, which is itself partly common law and partly statutory. For present purposes the relevant statutory elements are to be found in the Conveyancing and Law of Property Act 1909 (Bahamas) as amended, and the Limitation Act 1995 (Bahamas) replacing earlier statutes of limitation and reducing the relevant limitation period for present purposes from 20 to 12 years.....

...

38.....the statutory process for obtaining a certificate of title under the Act has both constraints and opportunities which set it apart from the deduction and proof of title as between vendor and purchaser. The main constraint is that, whereas the vendor and purchaser process affects no one other than themselves, even if a dispute is resolved by the court on a vendor and purchaser summons (for which see section 4 of Page 13 the Conveyancing Act), the process of quieting titles is designed to lead to a certificate which, save in cases of fraud, is good against the whole world, in favour of the person or persons (petitioner or adverse claimants) who succeed in proving their title: see sections 19 and 27 of the Quieting Titles Act. Thus, although title to unregistered land is normally thought of in purely relative terms, the issue in any proceedings being who has the better title, a certificate of title confers something more like absolute title, of the quality conferred by registered title under a system of land registration. For this reason, the court needs to be cautious before certifying title under the Act, as the Board warned in the *Armbrister* case.

72. Despite the Court's jurisdiction to investigate the title of a petitioner or adverse claimant it is not mandated to issue a certificate of title.

41. But none of this means that the court has the duty, or even the power, to create title by use of the machinery conferred by the Act, where in truth no title at all is proved. Section 17 of the Act gives the court a discretion whether to dismiss the application entirely, to dismiss it and grant a certificate of title to an adverse claimant, to grant a Page 14 certificate of title to the petitioner, or to grant separate certificates of title to different parts of the land to the petitioner and to one or more adverse claimants. In *Nova Scotia (Attorney General) v Brill* [2010] NSCA 69, para 37, Fichaud J said this, speaking of the Quieting Titles Act 1989 in the Nova Scotia Court of Appeal:

“The QTA does not enable a court to create title. Rather it authorises a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the QTA.”

The Board considers that the same principles apply to the Bahamian Act.

73. The Board agreed with the Bahamian courts' reliance of what was considered to be a good root of title.

43.The judge relied upon the following definition of a good root of title in Megarry and Wade's Law of Real Property (4th ed) at p 580:

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

To substantially the same effect is the definition in Williams on Vendor and Purchaser (4th ed, 1936) at p 124. It is a time-honoured and practical definition, which is not challenged in these proceedings.

73. 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 [2019] 1 BHS J. No. 36, Charles J also considered what was a good root of title:-

"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."

74. The Adverse Claimants claimed that Manuella Archer had inherited a total of 480 acres of land on Harold Road but by varied acts of possession, only 149.5 acres remained at her death of which the Property was a part.

75. There is no evidence of any documentary title to the Property. Neither the Petitioner nor the Adverse Claimants claim to have a documentary title to the Property. The Adverse Claimants claimed to hold the property as executors of their fathers estate who in turn was the Executrix of Manuella Archer who herself had inherited the property.

76. Neither party has a document which is able to satisfy the definition of a good root of title and therefore must solely rely on proving a possessory claim to the property.

77. Possession is comprised of two elements. The first is physical possession and the second is the intention to possess the land. The latter element will prevail even if the intention to possess is mistaken. In *Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd* [2018] UKPC 27, Lord Briggs stated,

“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”...

78. Further, the Board also stated:-

50. While occupation or use of land is a familiar non-technical concept, possession of land is a legal term of art. Possession, for however short a time, may be sufficient to found a cause of action in trespass against someone thereafter coming upon the land. But possession sufficient to bar a prior title (whether itself documentary or possessory) must be proved for the whole of the time prescribed by the relevant Limitation Act: see *Perry v Clissold* [1907] AC 73, per Lord Macnaghten at p 79:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

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.

54. 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: see eg *Bligh v Martin* [1968] 1 WLR 804. 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.

79. The Board also referred to Simpson v Fergus (1999) 79 P & CR 398 where LJ Walker stated:-

“Possession is a legal concept which depends on the performance of overt acts, and not on intention (although intention is no doubt a necessary ingredient in the concept of adverse possession). It may or may not be sufficient in international law to annex an uninhabited and uninhabitable rock by planting a flag on it. ... but to establish exclusive possession under English law requires much more than a declaration of intention, however plain that declaration is. Actual occupation and enclosure by fencing is the clearest, and perhaps the most classic, way of establishing exclusive possession (though even enclosure is not invariably enough): ... it may well not have been feasible for Mrs Simpson (or for Mr Humphries before her) to have fenced off the parking spaces, although conceivably it might have been possible to do so with some form of moveable barrier, moveable posts, chain or whatever. Had either Mr Humphries or Mrs Simpson attempted to do that, matters might have come to a head much sooner. But to my mind, it is not correct, and would indeed be a serious heresy, to say that because it is difficult or even impossible actually to take physical possession of part of a reasonably busy service road, that simply for that reason some lower test should be imposed in deciding the issue of exclusive possession

80. The Board further also considered different acts (non-exhaustive) which could possibly amount to possession.

71. The Board's view is however that EPL's conduct in relation to the Property in and after 1988 falls well short of qualifying as possession of the Property, or of any part of it. Leaving aside the required intention to possess, factual possession requires some occupation, use or other dealing with the land as an occupying owner might have been expected to undertake. It will be a fact-specific question in the sense that the characteristics of the land in question will be of primary relevance. In the present case, the Property was unsuitable between 1988 and 2010 for much more than the intermittent activities of subsistence farming, crabbing and so forth already described, although it may have had long-term development value. Although a buyer of development land with documentary title may be deemed to be in possession of it unless the contrary is proved, a person without documentary title who neither occupies nor uses the land, because he has only a wish to use it for development at some time in the future, must nonetheless do something sufficient to constitute the taking of possession of it if he is to acquire title.

72. Taking the various aspects of EPL's conduct in relation to the Property in turn, the 1988 survey can hardly qualify, since it was undertaken prior to the execution of the 1988 Conveyance. The subsequent clearing of boundary lines by Mr Patram between 1994 and 2004 does not in the Board's view qualify as taking possession. The two long boundaries to the Property on its east and west sides were, respectively, the high tide line abutting the Atlantic Ocean and the line of the government's public highway. Both were entirely accessible to the world at large and the clearing of undergrowth (if that is what clearing the boundary lines means) did nothing to enclose the Property nor inhibit its use by others in any way. The evidence as to what constituted, on the ground, the northern and southern boundaries is less clear, but again, merely removing undergrowth obstructing the boundary lines does not amount to the taking of possession.

73. Nor does the occasional placing and replacement of signs saying Private Property. In *Simpson v Fergus (1999) 79 P & CR 398*, the question was whether the

plaintiffs had established sufficient possession (to support an action in trespass) over a private service road at the rear of their property to which they had no documentary title, but which they had marked out with parking spaces together with a notice saying "Private Land No Unauthorised Parking". The English Court of Appeal held that this amounted not to possession, but merely to a declaration of intent to possess, insufficient to support an action in trespass against neighbours parking their vehicles on the private road. Having acknowledged that what may amount to possession will depend upon the characteristics of the land in question, Robert Walker LJ said this, at pp 402-403:

"Possession is a legal concept which depends on the performance of overt acts, and not on intention (although intention is no doubt a necessary ingredient in the concept of adverse possession). It may or may not be sufficient in international law to annex an uninhabited and uninhabitable rock by planting a flag on it. ... but to establish exclusive possession under English law requires much more than a declaration of intention, however plain that declaration is. Actual occupation and enclosure by fencing is the clearest, and perhaps the most classic, way of establishing exclusive possession (though even enclosure is not invariably enough): ... it may well not have been feasible for Mrs Simpson (or for Mr Humphries before her) to have fenced off the parking spaces, although conceivably it might have been possible to do so with some form of moveable barrier, moveable posts, chain or whatever. Had either Mr Humphries or Mrs Simpson attempted to do that, matters might have come to a head much sooner. But to my mind, it is not correct, and would indeed be a serious heresy, to say that because it is difficult or even impossible actually to take physical possession of part of a reasonably busy service road, that simply for that reason some lower test should be imposed in deciding the issue of exclusive possession."

81. After reviewing the evidence and hearing the evidence of the parties, I am persuaded by the evidence of Mr. Hubert Williams as to the status of the property from 1974 through 2004 which could prove occupation by any of the parties or any person.
82. Mr. Williams averred that based on the aerial photographs taken there was only farming from 1974 to 1989. Neither party led any evidence of farming on the Property. Mr. Archer's evidence speaks to farming behind his father's home which is to the east of the City Dump and not on the property in issue. The Petitioner by his own evidence only entered the property in question in 2003.
83. His intention at the time was to store his vehicles and provide parking for his staff. This property was immediately south of the Tonique Williams-Darling Highway. It is clear that his intention was to possess this portion of the property since 2003. There is no evidence of how much of the Property he possessed in 2003. In 2003 and 2005 he cleared down further portions of the property. He commenced construction of a building in 2010 which he completed in 2016. He also began excavation of land in the rear of the building in 2016. All of the subsequent acts show an intention to possess the land upon which the various actions were carried out but commencing at different times.
84. Mr. Donald Thompson inferred that he saw activity on the property in 2009.
85. Mr. Archer confirmed in his evidence that he went on the property in 2016 to attempt to stop the Petitioner for continuing the mining on the property.

86. There is no evidence of any occupation of any property south or southeast of the excavation site.
87. In order to prove possession, the Petitioner must prove uninterrupted possession for twelve years and must prove possession of the entire property that he seeks to obtain the title for.
88. This action was commenced in 2016. The requisite period would run from 2004 to 2016. During this period, he only possessed land at the front of the property. There is no definitive evidence of his showing overt acts of possession over the balance of the property. The court can infer from the evidence led that the property upon which the building is situate had been cleared prior to the construction of the building.
89. During this period the Petitioner possessed the land in the front portion of the Property and I am not satisfied that he possessed any more of the Property for the requisite period.
90. After examining the physical evidence hearing and reviewing the testimony of the witnesses, I find that the Petitioner can only be granted a Certificate of Title to the cleared and utilized portion of the Property bounded on the north by the Tonique Williams-Darling Highway, on the east by the Workers Union Property, on the west by the road running from the Tonique-Williams Highway to the end of the cleared property and on the south by the end of the cleared property with the concrete pavement. Any further acts of possession do not meet the requisite period to prove a possessory title.
91. I am not satisfied that the Adverse Claimants have proven possession of this Property at all except they attempted to prevent the excavation of a part of the land. The excavation only commenced in 2016 and does not fulfill the requisite period of possession
92. The Petitioner is hereby restrained permanently from any further acts of excavation on this property.
93. A survey plan is to be obtained from Mr. Donald Thompson specifying the exact measurements of the land granted to be obtained at the cost of the Petitioner and agreed by the Adverse Claimants.
94. I accordingly hereby grant to the Petitioner a Certificate of Title to that portion of the Property as specified in paragraph 90 of this judgment and as delineated in the Plan drawn by Mr. Donald Thompson and agreed by the Adverse Claimants.
95. As the Petitioner was only partially successful to a small portion of the land, I order that each party bear their own costs.

Dated this 20th day of January 2023


Hon. Madam Justice G. Diane Stewart