

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Equity Side 19/1964

**IN THE MATTER of the Quieting Titles Act 1959**

**AND**

**IN THE MATTER OF** ~~an undivided one half~~ the entire fee simple estate and interest in and to All that tract of land containing Two hundred and Thirty-six and Sixty-six hundredths (236.66) acres situate approximately half a mile south of Marsh Harbour Settlement in the Island of Abaco and bounded on the North partly by Crown Land partly by land originally granted to John Cash and now claimed by Roy G. Newbold on the East by the Sea on the South partly by land claimed by the descendants of John Sweeting and partly by vacant Crown land and on the West by vacant Crown Land.

**AND**

**IN THE MATTER OF** the Petition of **ANTHONY KEY** (Petitioner by way Substitution for the late **SHEPHERD KEY** pursuant to the Order filed herein on the 13th day of September A.D. 2019)

**Before Hon. Chief Justice Sir Ian R. Winder**

**Appearances: Miles Parker for the Petitioner**

**Timothy Eneas, KC with Ms. Alexandria Russell, Mr. Pericles Maillis, Mr. Terry North with Mr. Darzhon Rolle, Mrs. Caryl Lashley, Mr. Vann Gaitor, Mr. Norwood Rolle, Ms. Karen Butler and Ms. Shantelle Munroe for the various Adverse Claimants**

**7 November 2022**

**DECISION ON PRELIMINARY ISSUE**

## WINDER, CJ

This is the hearing of a preliminary issue in this long standing Quieting Petition, which was agreed to be determined by the parties in advance of the trial of the action which is fixed for 1 May 2023.

- [1.] The parties have agreed the terms of the preliminary issue as follows:
- (i) What is the operative date of the amendment enlarging the Petitioner's claim to the entirety of the Subject Property (i.e. (i) does the amendment relate back to the date of the filing of the original Petition or does it take effect from (ii) the date of the order authorizing the amendment, (iii) the date upon which there was full compliance with the order or (iv) some other date).
  - (ii) What is the legal effect of the amendment and the re-advertisement of the Amended Petition on any adverse claims asserting claims to title pursuant to the applicable law of limitation (i.e. did the amendment/readvertisement of the Amended Petition affect the running of time for limitation purposes and if so, what is the legal effect of the amendment and the re-advertisement on existing and new adverse claims).

## Background

[2.] The Agreed Statement of Facts provide as follows:

1.1 The Petition ("*the Petition*") together with the supporting Affidavit ("*the Affidavit*"), Statement of Facts ("*the Statement of Facts*") and Abstract of Title ("*the Abstract of Title*") were filed on 15<sup>th</sup> January, 1964. These documents set out a claim to an undivided one-half estate and interest in a tract of land containing two hundred and thirty-six and sixty-six hundredths (236.66) acres situate approximately half a mile south of Marsh Harbour Settlement in the Island of Abaco ("*the Subject Property*"). Copies of the Petition (*Exhibit 1*), Affidavit (*Exhibit 2*), Statement of Facts (*Exhibit 3*) and the Abstract of Title (*Exhibit 4*) are attached hereto.

1.2 Following the 1964 filing of the Petition and supporting documentation numerous adverse claims were filed in the proceedings claiming portions of the

Subject Property. Subsequent thereto the claims of numerous Adverse Claimants filed in the proceedings were dismissed by the Court prior to 1993.

- 1.3 By an Indenture of Conveyance dated 14<sup>th</sup> July, 1993 and made between Monetary Investment Limited and the Petitioner, the Petitioner claims to have acquired the remaining interests in the land thereby entitling the Petitioner to the fee simple estate in the entirety of the Subject Property. An Amended Abstract of Title was filed in the action on behalf of the Petitioner on the 1<sup>st</sup> December, 1993 (*Exhibit 5*).
- 1.4 The period following the year 1993 through to 2007 witnessed little activity in the action but included a hearing in the year 1996 before Strachan J. concerning the way forward.
- 1.5 Pursuant to a summons dated and filed 7<sup>th</sup> May 2007 on behalf of the Petitioner (*Exhibit 6*) His Lordship, Mr. Justice Lyons, by Order dated 9<sup>th</sup> May, 2007 and filed on the 4<sup>th</sup> June, 2007 (*Exhibit 7*) granted the Petitioner leave to amend the Petition to reflect the Petitioner's claim to the entirety of the fee simple estate in the Subject Property. Additionally, the Order directed the re-advertisement of the Amended Petition and provided directions for the service and posting of the Amended Petition. The re-advertisement of the Amended Petition was ordered to take place within Eight (8) weeks from the date of the Order.
- 1.6 There is no record of the amendment to the Petition or the re-advertisement having been effected following the 9<sup>th</sup> May, 2009 Order and consequently by the Order of His Lordship Mr. Justice Winder dated 10<sup>th</sup> May, 2016 and filed on the 23<sup>rd</sup> June, 2016 the Petitioner was ordered to file an Amended Petition inclusive of a duly updated perimeter plan of the Subject Property on or before the 10<sup>th</sup> August, 2016 (*Exhibit 8*). The said Order directed the re-advertisement of the Amended Petition and included directions for the service and posting of the Amended Petition.
- 1.7 On the 10<sup>th</sup> August, 2016 a Re-Amended Petition (*Exhibit 9*), Amended Notice of Petition (*Exhibit 10*) and Plan (*Exhibit 11*) were filed in the action. The Amended Petition was finally re-advertised as directed on the 30<sup>th</sup> April, 2017 (with time for entering claims 60 days thereafter).
- 1.8 Pursuant to a series of orders resting with the Order of Mr. Justice Ian Winder made on the 7<sup>th</sup> June, 2017 and filed on the 26<sup>th</sup> June, 2017 (*Exhibit 12*) the time period for filing adverse claims, affidavits in support and a filed plan

(unregistered) was extended for a period not to exceed 28 days from the 7<sup>th</sup> June, 2017.

1.9 Following the re-advertisement of the Amended Petition numerous adverse claims were filed in the proceedings including the adverse claims of the parties set out in the second schedule (“*the Schedule*”) hereto.

1.10 In the ruling of His Lordship Mr. Justice Winder dated 10<sup>th</sup> May, 2016 delivered on the 21<sup>st</sup> August, 2018 (*Exhibit 13*) in connection with the Petitioner’s Order 18 rule 19 application (*Exhibit 14*), His Lordship *inter alia* ordered the Petitioner to, if necessary, amend, update or restate the Petition, Abstract of Title and the Statement of Facts within 28 days of the ruling. No documents pursuant to this order were filed on behalf of the Petitioner.

1.11 By the Order of Justice Mr. Ian Winder dated 3<sup>rd</sup> March, 2022 the Petitioner was directed to file a Re-Amended Abstract of Title on or before the 29<sup>th</sup> April, 2022 and the Adverse Claimants were directed to file their Abstracts of Title on or before the 30<sup>th</sup> day of June A.D. 2022 (*Exhibit 15*). The time period for the Petitioner to file his Re-Amended Abstract of Title was extended to the 31<sup>st</sup> May, 2022 and the time period for the Adverse Claimants to file their Abstracts of Title was extended to the 29<sup>th</sup> day of July A. D. 2022.

1.12 On the 31<sup>st</sup> May, 2022 the Petitioner filed a Re-Amended Abstract of Title. On the 28<sup>th</sup> July 2022, the following Adverse Claimants, filed their Abstracts of Title: Sky Abaco Developers Limited, Lowe's Pharmacy Limited, Walter Phillip Sweeting and Martha Eunice Roberts (as joint Executors and Trustees of the Estate of Mary Edna Albury), Colin Patrick Bethel, MSL Holdings Limited and Marcol Investments (1994) Limited.

1.13 By Order dated the 26<sup>th</sup> August, 2022 the time period for the filing of Abstracts of Title by the Adverse Claimants was extended to the 31<sup>st</sup> October, 2022.

[3.] I accept the Adverse Claimants’ summary of the issues for determination as follows: The Petitioner contends that the amendment takes effect as of the date of the filing of the original Petition on the 15 January, 1964 by operation of the “relation back” theory. On this contention the Petitioner submits that time for limitation purposes stopped running in favour of an adverse claimant on the 15th January, 1964 and accordingly any adverse claimant relying on adverse possession must establish the requisite possession prior to that

date. The Adverse Claimants dispute the Petitioner's argument and contend that the "relation back" theory has no application in the context of an amendment which necessitates and results in the joinder of new parties to the proceedings. In such cases the effective date for limitation purposes is the date of joinder. The Adverse Claimants contend that on the facts of this case, the relevant date for limitation purposes is the date of the filing of their respective adverse claims. Accordingly, any adverse possession up to that date is admissible to establish title to the parcels claimed.

[4.] The Petitioner relies on the dicta of *Conteh JA* in the Court of Appeal case of *Paulista Ltd v. Alfredo Neves Penteadro Moraes; Moraes v. Paulista* [2013] 1 BHS J No. 21. He states:

"An amendment duly made, with or without leave, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends. This rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made. Thus, when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the beginning: 'the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed' per Collins MR in *Sneade v. Wotherton Barytes & Lead Mining Co.* Similarly, in relation to pleadings: "once pleadings are amended, what stood before amendment is no longer material before the Court and no longer defines the issues to be tried' per Hodson LJ, in *Warner v. Sampson* (1959) 1QB, 297 at 321; (1959) 1 All ER 120. CA. (emphasis ours)"

[5.] The Adverse Claimants say that the case of *Paulista Ltd.* is distinguishable on the grounds that: (i) the question of a limitation defence to the amendments did not arise; (ii) The defendants who were added by the trial judge had not at the date of the appeal, joined the action as in the present case; and, *Conteh JA* was only stating broad principles. The Adverse Claimants contend that the Court is bound by the rule of practice as expressed in *Weldon v Neal* (1887) 19 Q.B.D. 394 which was confirmed in the House of Lord's case of *Ketteman* is the governing authority on the issue.

[6.] The Adverse Claimants say that the advertisement of the Amended Notice was ordered by the Court as a direct result of the Petitioner's amendment and necessarily

contemplated the filing of new adverse claims in respect of the enlarged interest. They say that the Petitioner's stated position ignores the foundation of the rule of practice as confirmed in the case of *Ketteman v Hansel Properties Ltd.* 1987 IAC 86. *Ketteman*, they say, confirmed that the applicable basis for the rule of practice is the "no useful purpose" theory. That theory, they say, provides that "...where a person is added as defendant in an existing action, the action is only deemed to have been begun as against him on the date of amendment of the writ; that the defence that the claim is statute-barred therefore remains available to him; and that, since such defence affords a complete answer to the claim, it would serve no useful purpose to allow the addition to be made."

[7.] The cases relied upon by the Adverse Claimants of *Weldon v Neil*, *Liff v Peasley* and *Ketteman* are distinguishable on the mere fact that these are quieting proceedings, not a tortious claim in negligence or slander or for breach of contract.

[8.] These cases are also distinguishable having regard to the nature the amendment made. This was not an amendment to join parties, as in the cases relied upon by the Adverse Claimants, but an amendment to enlarge the Petitioner's interest in property already being quieted. Those cases (*Weldon v Neil* and *Liff v Peasley*) speak to the Court refusing the amendment to add parties in cases where the addition would deprive the parties being added of a defence under the relevant limitation law. The issue was stated succinctly in *Liff v Peasley and Another* [1980] 1 WLR 623 per *Brandon LJ*, on page 639(a):

"It is an established rule of practice that the court will not allow a person to be added as defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim. Alternatively, if the court has allowed such addition to be made ex parte in the first place, it will not, on objection then being taken by the person added, allow the addition to stand. I shall refer to that established rule of practice as "the rule of practice."

In those circumstances, the amendment would serve no useful purpose and ought to be refused. The amendments in this case have all been granted, in the presence of many of the now adverse claimants and or their attorneys now before the Court.

[9.] I readily accept that, on the face of it, having regard to the 57 years which have elapsed since the filing of the petition it must raise concerns. As it relates to this particular claim however, no new area of land is being claimed as the amendment was to enlarge the claim from the undivided half interest in the entirety of the subject property to the undivided whole interest in the same property.

[10.] I accept the submission of the Petitioner that:

“from the date of the filing of the Petition herein the entirety of the subject property was the subject of this action as the claimed undivided interest impacted the entirety of the subject land and is indivisible but for an action by way of partition.

Further they say,

“the undivided interest encompasses the whole of the subject property, and its holders have equal rights to the entire property. The undivided interest is not separated into parts or shares and until this is done the Petitioner’s claim was as to his interest in the whole, as it was not possible to determine which particular part of the subject property, other than the whole was owned by the Petitioner under the Petition as filed.”

[11.] In the circumstances, anyone who claim a title by virtue of having entered the property prior to 15 January 1964 is not prejudiced by the enlarged claim. Anyone claiming a possessory title and entering the property prior to the amendment (or the re-advertisement) cannot claim to have been prejudiced by virtue of the amendment as there is no new land or “terra firma” being claimed by the Petitioner. The Petitioner merely claims to have enlarged the extent of his title to the same land. However, persons laying claim through the undivided ½ interest which was recognized by the Petitioner’s original claim are open to make adverse claims in relation to the amended new interest claimed in response to the re-advertisement.

[12.] I did not accept the analogy of the Adverse Claimants that the relation back process, as espoused by *Conteh JA*, even if only in broad terms, ought not to be followed in this

case, as the nature of the amendment was one which “necessitates and results in the joinder of new parties to the proceedings”. If the amendment had added additional acreage to what was claimed by the Petitioner originally, there may have been some merit in the assertion of the Adverse Claimants. But that is not the case here as whilst the amendment and re-advertisement did invite persons with an interest to join the action, if they had a claim against the Petitioner, it did not specifically join anyone to the action. The invitation, regardless of the wording, must relate the newly added claim. In the circumstances, I was not persuaded by the several authorities advanced by the Adverse Claimants on this issue which related primarily to amendments joining new parties in ordinary civil claims.

[13.] Having considered the submission of the parties and considered the material presented in arguments, I hold that the appropriate answer to the preliminary issue raised is that the operative date of the amendment enlarging the Petitioner’s claim to the entirety of the subject Property, for persons claiming a possessory title, remains the date of the filing of the original Petition, 15 January 1964. The amendment/readvertisement of the Amended Petition did not affect the running of time for limitation purposes for these persons.

[14.] For persons claiming to have an interest in the undivided half interest, which has only now become a part of the claim by virtue of the amendment, the relevant date, for all purposes, is the date of the amendment. It is these persons who are properly affected by the amendment and for whom the re-advertisement was a necessity. It could not be otherwise as the Petitioner himself did not possess this expanded interest at the date of the filing of the Original Petition.

Dated the 7<sup>th</sup> day of February 2023

A handwritten signature in black ink, appearing to be 'I R Winder', written in a cursive style.

Sir Ian R. Winder  
Chief Justice