

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2000/CLE/qui/00042

IN THE MATTER OF All Those pieces parcels or lots of land comprising 18,650 square feet and being Lot 136 and portions of Lots 135 and 137 of the Crown Allotments situate at Dunmore Town, Harbour Island, one of the Islands of the Commonwealth of The Bahamas

AND

IN THE MATTER OF the Petition of Ian "Cookie" Ross substituted Petitioner in place of Frederick Ross under the Quieting Titles Act 1959

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Richard Lightbourn for the Petitioner
 Sidney A Dorsett for the Adverse Claimant

23 July 2021, 28 June, 15 July and 22 November 2022

JUDGMENT

WINDER, CJ

This is the Petition of Ian Cookie Ross (Ross) seeking a certificate of title for three parcels of land comprising 18,650 square feet and being Lot 136 and portions of Lots 135 and 137 of the Crown Allotments situate at Dunmore Town, Harbour Island. Ross prays that his title to the property be investigated under the Quieting Titles Act, 1959 (the QTA) and a Certificate of Title with respect to that land be granted to him.

1. Ross is the successor to his father the late Frederick Ross, the original petitioner who claimed title by virtue of a documentary title and possession. Ross' claim to Lot 135 and 136 are not challenged. Ross' possessory title to the Lot 137 is opposed by the Adverse Claimant Rosita Denise Roberts-Kariuki (Roberts Kariuki) has documentary title to and an interest in Lot 137. The judgment is principally concerned with the dispute relative to Lot 137.

2. Ross claims quiet undisturbed possession of a tract of land which abuts his business. The property was originally developed by Frederick Ross the original petitioner. At the time of the filing of his Petition Frederick Ross alleges that his possession was for in excess of 20 years. Ross' neighbour, Roberts-Kariuki, also claims possession of the entirety of Lot 135, her alleged possession being adverse to Ross. Roberts-Kariuki claims a documentary title to Lot 135 which she says has not been defeated by any possession claimed by Ross.

3. The documents filed on behalf of Ross to commence this action were:

- i. Abstract of Title filed 22 November 2000
- ii. Plan filed 22 November 2000
- iii. Affidavit in support of Petition filed 22 November 2000

4. The Abstract of Title filed by Ross, in relation to Lot 135 provides:

15. Frederick Ross proceeded to occupy what he thought comprised Lots 135 and 136, however modern survey shows that the lots were not properly aligned and accordingly the Petitioner proceeded to occupy a portion of Lot 137 and the owner of Lot 31, one Samuel Higgs, proceeded to occupy a portion of Lot 135.

The Affidavits hereinafter recited support the position that the Petitioner has occupied exclusively the property the subject of this Petition for more than 20 years.

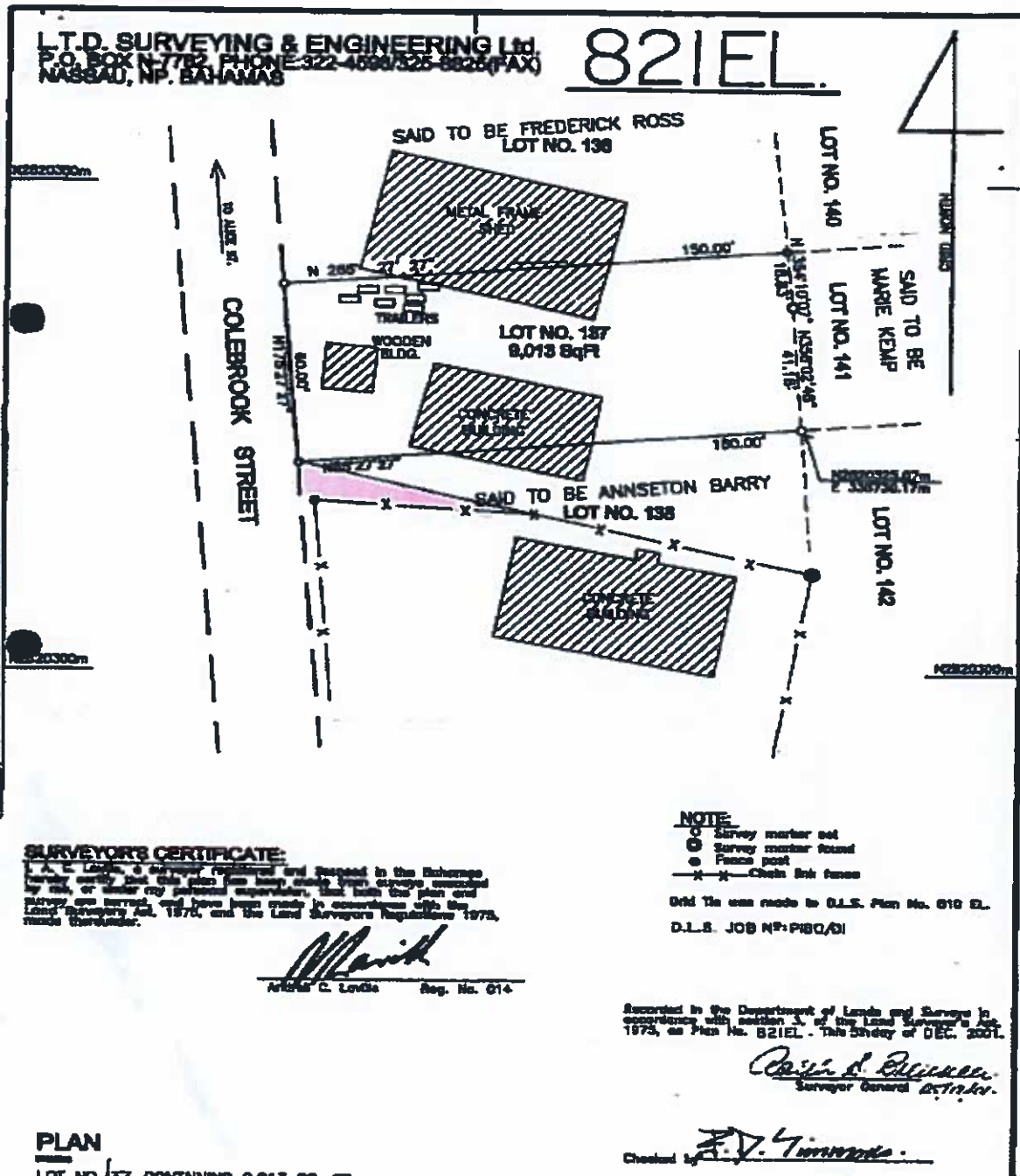
16. On this date Frederick Ross of Dunmore Town, Harbour Island deposed as follows:

"I, FREDERICK ROSS of Dunmore Town, Harbour Island one of the Islands of the Commonwealth of the Bahamas, hereby make oath and say as follows:-

1. I am 78 years of age having been born at Greenock, Scotland on the 17th day of May, 1920
2. I have lived at Harbour Island aforesaid since the year 1948.
3. By two Indentures of Conveyance dated respectively the 4th day of September, 1967 and the 4th day of June, 1974 copies of which are annexed hereto and marked "FR.1" I acquired two parcels of land at Harbour Island aforesaid comprising Lots Nos. 135 and 136 of the Crown Allotments.
4. At the time that I purchased Lot No. 136 from the late Dr. Paul Albury, he pointed out the location of the property and on the basis of that advice I proceeded to construct my warehouse on the property during the year 1968 and have since that date conducted my business known as "Ross's Garage" on that property. In the year 1974 I acquired Lot No. 135 from Joan Albury the wife of the said Dr. Paul Albury and have been in continual and undisturbed possession of the property shown on the plan annexed hereto and thereon coloured Pink (hereinafter referred to as "the said hereditament") from the requisite date that I acquired the lots until the date hereof and which until the survey hereinafter mentioned was thought by me to comprise Lots 136 and 135.
5. At no time during the aforesaid period has anyone questioned by ownership of the said hereditaments.
6. As the result of a recent survey of the said hereditaments conducted by Caribbean Surveys Limited during February of 1998 it has transpired that the said hereditaments do not comprise Lots 136 and 135 but comprise Lot 136 and portions of Lots 137 and 135.
7. The requisite boundaries to the North and South of the said hereditaments have been mutually agreed with the owners thereof, namely Samuel Higgs and Anthony Roberts.
8. I have been in exclusive possession of the said hereditaments for more than twenty (20) years and by virtue thereof would have dispossessed any party which may assert an interest therein.

6. The Adverse Claimant settled a survey plan 821EL which is set out below:

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7. Roberts-Kariuki's abstract of title is set out as follows:

1. 4th May, 1942
On this date the said lot was conveyed by Mary Susan Cleare to Hanna L. A. Cleare in fee simple in possession free from encumbrances. This document is recorded in Volume 118 at pages 320 to 322.
2. 4th March, 1974
On this date the said lot was conveyed by Hanna L. A. Cleare to Anthony William Roberts and Stephanie Malverne Roberts in fee simple in possession free from encumbrance. This document is recorded in Volume 2226 at pages 342 to 344.
3. 26th September, 1977
On this date the said lot was conveyed by Anthony William Roberts and Stephanie Malverne Roberts to the Royal Bank of Canada in fee simple by way of Mortgage to secure the repayment of the sum of \$20,000.00. This document is recorded in Volume 2839 at pages 539 to 551. This Mortgage has since been satisfied satisfaction thereof is recorded in Volume 2839 pages 539 to 551.
4. 6th October, 2000
On this date Anthony William Roberts conveyed his interest in one-half or moiety of the said lot to Stephanie Malverne Roberts in fee simple subject to the Mortgage recited in 3. above. This document is recorded in Volume 7979 at pages 331 to 341.
5. 5th December, 2000
On this date Stephanie Malverne Roberts conveyed the said lot to Stephanie Malverne Roberts and Rosita Denise Roberts in fee simple subject to the Mortgage recited in 3. above. This document is recorded in Volume 7992 pages 166 to 169.
6. 5th December, 2000
On this date the said lot was conveyed by Stephanie Malverne Roberts and Rosita Denise Roberts to Scotiabank (Bahamas) Limited in fee simple by way of Mortgage to secure the repayment of \$150,000.00. This Mortgage remains unsatisfied.

8. At trial Ross gave evidence and called Judith Wilson, Richard Malcolm and Loran Jonathan Sturup in support of his claim. Roberts-Kariuki, her sister, Tonia Roberts-Percentie and her father, Anthony Roberts, each gave evidence in support of the Adverse Claim.

9. The evidence of Ross and his witnesses were that the disputed property was mistakenly treated as theirs since as far back as 1968 when Frederick Ross built his metal building on a portion of Lot 137. The error was common as all of parties encroached on a small portion of their southern neighbours' property.

10. The evidence of Roberts- Kariuki and her witnesses, although having to concede that all of the lot owners treated their lots at an angle to Colebrooke Street rather than perpendicular, all say that Ross and his family did not have exclusive occupation of the disputed property. They sought to utilize photographs and to recount incidents following hurricanes to demonstrate how the parties treated the ownership of the disputed property. They also, quite surprisingly, assert occupation of property behind the metal frame building of Ross asserting that gardening, harvesting of firewood and animal husbandry took place there.

Law, Analysis and Disposition

11. Section 3 of the QTA provides that:

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

An investigation must therefore be conducted into the competing claims. This *investigation* is being conducted by the Court pursuant to the QTA. By section 8 of the QTA it is provided that:

8. (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.

12. The appropriate starting point in considering competing claims remains the Privy Council decision in *Ocean Estates Ltd. v. Pinder* [1969] 2 AC 19. In that decision Lord Diplock opined at page 25 paragraph A, as follows:

"Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."

13. The law therefore is that in order to succeed in his claim, a party must demonstrate a documentary title or that, he or his predecessor went onto the land as trespasser and by virtue of such possession beyond the limitation period, had extinguished the documentary title of his opponent or its predecessors in title. In considering the meaning of *possession*, Slade J. in *Powell v. McFarlane* (1977) 38 P & CR p452 at 470 held that:

(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").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and use must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation

according to the resources or status of the claimants": *West Bank Estates Ltd. v. Arthur*, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. On the particular facts of *Cadija Umma v. S. Don Manis Appu* the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the *Red House Farms* case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: per Cairns, Orr and Waller L.JJ. 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.

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

14. The principles enunciated in *Powell v. McFarlane* have been approved in the Privy Council decision of *Armbrister et al. v. Lightbourn et al.* [2012] UKPC 40.

15. On the issue of factual possession, the learned authors of *Commonwealth Caribbean Property Law* states at page 246 as follows:

Possession by adverse possessor

The factual possession required must have characteristics similar to those required for a claim to an easement by prescription, viz, the possession must be open (*nec clam*), peaceful (*nec vi*) and adverse (*nec precario*). Furthermore, factual possession must be accompanied by an *animus possidendi*, that is, an intention to enjoy possession to the exclusion of the paper owner.

The requirement of openness means that the possession of the claimant must be 'notorious and unconcealed', for otherwise the paper owner would not be made aware of the need to challenge the adverse possessor before expiry of the limitation period. On the other hand, it is not necessary that the paper owner should have been aware that he had a good title, nor that the adverse possessor should have had knowledge of the true ownership of the property. It is sufficient that he performed acts which were 'inconsistent with [the paper owner's] enjoyment of the soil for the purposes which he intended to use it'.

16. Ross says in his evidence that:

"Shortly before the commencement of these proceedings we were having instances of persons removing parts from the golf carts and boats and in order to provide greater security for the customers and the business it was decided to fence in the entire property and at that point my father determined to commence these quieting proceedings and engaged the services of Denis "Theophilus a licenced surveyor who carried out numerous surveys on Harbour Island to carry out for him. Mr Theophilus commenced the survey in 1998 and in the course of conducting his survey Mr. Theophilus requested that he meet with the adjoining owners so as to have their agreement as to the location of their respective boundaries.

"It was believed that Mr. Anthony (Tony) Roberts with his wife were the owners of Lot 137 to the South and I collected Tony from his place of employment in the Narrows where he was working on a house at that time and brought him to Ross Garage. I was present with my father and Mr. Theophilus and Mr. Roberts when Mr. Theophilus pointed out to Mr. Roberts the stakes which he understood to be the Southeastern and Southwestern boundary points of my father's property being the mutual boundary points and Mr. Roberts agreed them to be correct and I then took him back to his workplace."

17. According to Ross, he has produced a documentary title to Lots 135 and 136 of the Crown Allotments and that by virtue of his exclusive and continuous occupation of the disputed property for a period in excess of 20 years they have dispossessed the paper title of Roberts-Kariuki and her family to a portion of Lot 137. He also says that any claim by Roberts-Kariuki and her family to the disputed property would have been barred by his exclusive undisturbed possession for a period in excess of 20 years.

18. Ross' account is supported by the evidence of Judith Wilson and the correspondence of Land Surveyor Dennison Theophilus to Mr. Ralph Brennen dated 3 October 2000. The letter of Mr. Theophilus provided as follows:

SURVEY REPORT

CROWN ALLOTMENT LOTS 135 and 136 SITUATED ON THE EASTERN SIDE OF COLEBROOKE STEET, DUNMORE TOWN, HARBOUR ISLAND

In February of 1998, we surveyed Crown Lots #31, #135 & 136, based on DLS plan EL56. We discovered then that Mr Ross and his neighbours were not occupying the land the way the Lots were called for. At that time, Mr Ross and Mr Anthony Roberts agreed on what they recognized as their boundary. Samuel Higgs did not agree.

On a recent trip to Harbour Island I was informed by Richard Lightbourne of the law firm of McKinney, Bancroft and Hughes, that Mr. Ross and Mr Higgs had agreed on how they wanted the boundary between them established. On September 2 2000, I met the two parties on the site and surveyed the boundaries the way they wanted it.

The origin of our grid coordinates is DLS plan #342EL.

The area of the property is 18650 sq. ft. Our client is Mr. Frederick Ross.

19. At the time of the trial, Ross advised that Theophilus was unable to participate in the trial. An unexecuted affidavit was settled for his execution but was never executed although manuscript notations, purportedly by Mr. Theophilus, are contained on the draft. Paragraph 6 of the draft Affidavit states:

6. At the time that I conducted the survey, I spoke both with Mr. Anthony Roberts and Rev. Samuel Higgs and explained to them that the lots were laid out at an angle to Colebrooke Street as opposed to being perpendicular to Colebooke Street as provided in the plan of the Crown Allotments. Mr. Roberts and Mr. Ross both accepted the boundary as shown on the said plan, but Rev. Higgs did not."

Section 8 of the QTA permits the Court, in the course of an investigation to receive and act upon evidence which may not be otherwise admissible ordinarily. Section 8 of the QTA provides:

8 (i) 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.

20. Roberts-Kariuki says that:

1. The adverse claimant, Rosita Roberts, was at all material times in possession of the subject matter of the petition except for an area allegedly mistakenly encroached upon by the petitioner. She will contend that the petitioner

is entitled to what he encroached upon and, within reason, a set-back distance on two sides of his building.]

2. The issues in this case are therefore:

(a) whether or not the petitioner is entitled to be awarded a Certificate for all the land erroneously claims allegedly by adverse possession;

(b) whether the adverse claimant should receive a Certificate for the land she claims less a diminution representing the area of the alleged mistaken encroachment.

3. The petitioner insists that he is entitled to the land described in his petition and will not consider the adverse claimants position at (b) which should have enabled a Consent Order.

4. The plan relied on by the petitioner fails to include the septic tank of the adverse claimant and to the extent the same is omitted, confirms the prematurity of the petition which relates to land, never in fact occupied as the septic tank area was at all material times exclusively used by the adverse claimant. To this extent the petition encompasses, rightly, an area of encroachment and erroneously an area occupied solely by the adverse claimant and in respect whereof the petitioner well knows, and most respectfully so, he cannot succeed.

5. Finally, the adverse claimant says that the petitioner, having been altered to the prematurity of his claim and yet pursuing that refusal of the adverse claimant's most reasonable position, gives this Honourable Court ample jurisdiction to exercise its discretion by imposing costly sanctions: *Dunnett v. Railtrack* applies.

21. Mr Anthony Roberts gave evidence and denies that he agreed the boundary between himself and Frederick Ross. Having seen and observed the witnesses as they gave their evidence, I accept Ross' evidence that Mr Roberts, Mr Higgs and Frederick Ross ultimately agreed the common boundaries between their properties when the property was surveyed by Mr. Theophilus in 1998.

22. On the evidence which I accept, it is not seriously disputed on that Frederick Ross, by his activity, had taken possession of some portion of the disputed property, being a portion of Lot 137. His metal frame building, built since at least the 1970's, rests on the disputed property.

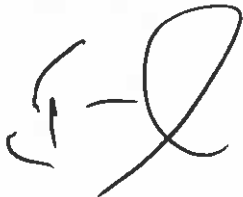
23. All of the owners of Lots 31, 136, 137, 138 treated their lots as laid out at an angle to Colebrooke Street as opposed to being perpendicular to Colebooke Street as provided in the plan of the Crown Allotments. The result was that in as much as Frederick Ross treated a portion on lot 137 as his own, Roberts-Karuiki and her family treated a similar

portion of Lot 138 as theirs, notwithstanding it belonged to Annseton Barry. Roberts-Karuiki's plan #821EL in support of her Adverse Claim, prepared by A. C. Laville, demonstrates her occupation of Lot 138 (the property of Annseton Barry) by a portion of her building. Additionally, the occupied property is enclosed by a chain link fence separating that part of Lot 138 from the remainder of Annseton Barry's home. It certainly appears that given that they have occupied it as their own for more than 20 years Annseton Barry has accepted the location of her Northern boundary by constructing a chain-link fence.

24. I am satisfied that Frederick Ross was in factual possession with the requisite animus possidendi for a period beyond the statutory period provided under the Limitation Act. A Certificate of Title should therefore be issued to him with respect to the property subject to the exceptions and qualifications set out in the QTA.

25. I am satisfied that at some point in the process over the past 20 years and the prosecution of this petition there was some indication to suggest that the disputed property could run through a portion of the Septic tank of the Adverse Claimant. That has been cleared by a more recent placement of the survey pin on the property. In the circumstances, there was some degree of justification for the Adverse Claimant entering the process albeit not for her to remain. In all the circumstances I make no order as to costs.

Dated this 8th day of June 2023

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

Sir Ian Winder
Chief Justice