COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/gen/01221

BETWEEN

CARLA ANITA CECILIA BRAYNEN TURNQUEST

Plaintiff

AND

WATER AND SEWAGE CORPORATION

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mrs. Krystal Rolle K.C. and Cyd Ferguson for the Plaintiff**
Mr. Dywan Rodgers for the Defendant

Judgement Date: **December 2nd 2022**

JUDGMENT

1. By a Generally Endorsed Writ of Summons filed 17th October 2018 and Statement of Claim filed 8th November 2018, the Plaintiff Carla Anita Cecilia Braynen Turnquest **(the "Plaintiff")** seeks various relief from the Water and Sewage Corporation, the Defendant **(the "Defendant")**, after claiming that it had no right, title, interest or right of occupancy and/or possession of the Plaintiff's property described as:-

   > "a portion of the original Crown Grant (F-28) to Joseph Evans situated on the Eastern Side of Wellfield Road approximately 1,697 feet Southwest of the intersection with the main public highway in the Settlement of Mangrove Cay on the Islands of Andros, Bahamas" **(the "Property")**

2. Her claim arises as a result of the Defendant's alleged trespass on the Property, after they had erected water holding tanks and constructed a road thereon without the knowledge or consent of the Plaintiff.

3. The Plaintiff seeks:-

   i. A Declaration that the Defendant has no right, title or interest or right of occupancy and/or possession to the Property.
   ii. Mesne Profits for each year of the Defendant's unlawful use and occupation of the Property.
   iii. Damages for Trespass to the Property including consequential losses and damages arising therefrom.
   iv. An Order that the Defendant deliver up possession of the Property to the Plaintiff.
   v. An Order and/or Mandatory Injunction that the Defendant forthwith remove the water holding tank as well as any other of its chattels and/or possessions from possessions from the Property which was erected without the knowledge and/or

consent of the Plaintiff and which remain on the Property without the consent of the Plaintiff.

vi. An injunction restraining the Defendant whether by itself its servant, agents and/or otherwise from entering upon or crossing on the Property or from continuing the said acts of trespass thereon and/or from committing any further acts of trespass thereon whether in exercise of an alleged claim of right or otherwise.

4. The Defendant denies that the Plaintiff is the lawful owner of the Property as it claims that the Plaintiff has no documentary nor possessory title to it. It also denies that the amount of $20,000.00 which was erroneously paid by the Defendant to the Plaintiff is not an acceptance of the Plaintiff's documentary title. It is the Defendant's position that they have always had reservations and concerns as to whether the Plaintiff was the true and lawful owner of the Property.

5. The Plaintiff filed a summons seeking summary judgement and/or judgement on admissions from the Defendant however, her application was dismissed.

ISSUES

6. The claims made by the Plaintiff against the Defendant can be summarized into one main issue namely; Whether the Defendant trespassed on the Property and if so what damages were suffered as a result?

EVIDENCE

PLAINTIFF'S EVIDENCE

7. The Plaintiff was the daughter of the late Carl A. Braynen who had acquired the Property on the 7th January 1963 from Lauretta Braynen as the Administratrix of the Estate of Albert Braynen **(the "1963 Conveyance")**. Her father, who died testate on 8th October 2007, had devised all his property to her and by Deed of Assent dated 14th October, 2009, the Plaintiff assented to this devise to her as Executrix of his Will, thus conveying to herself the Property in question.

8. Lauretta Braynen was her paternal grandmother and Albert Braynen was her father's grandfather. In her capacity as Administratrix, Lauretta Braynen sold 660 acres of land situate in Mangrove Cay to Carl A. Braynen by the 1963 Conveyance for the sum of £1,000.00. The Plaintiff's father had informed her that he had owned the said acreage which he wanted to develop. Before they could visit the land her father died.

9. After her father's death, the Plaintiff through her company Mangrove Properties Ltd., hired Mr. Emile Ledee, a land surveyor **("Mr. Ledee")** and his company Bahama Geomatics Ltd. between the years 2009 to 2011 to conduct a survey of the Property. Mr. Ledee prepared a survey plan and registered the plan with the Department of Lands & Survey as Plan 600 AN **(the "Survey Plan")**. Mr. Ledee advised her that during his surveying of the Property he discovered the presence of the Defendant's water holding tanks, pipes, fencing and related apparatus which occupied 15.192 square feet of the Property. The Defendant had also created an access road, known as "Wellfield Road" on the Property for the purpose of ingress and egress to and from the tanks.

10. The Plaintiff believed the Defendant's water holding tanks were erected in or about 2007. She became the legal and beneficial owner of the Property in 2009 and it was around this time that she was made aware of the Defendant's alleged trespass on the Property and objected to its unauthorized use and presence on the Property.

11. Based on the information from Mr. Ledee, the Plaintiff obtained legal representation, who initiated written contact with the Defendant which continued over a six year period. On 6th November 2012, her Attorney wrote to the Defendant advising them that their use of the Property was unauthorized and demanded payment for mesne profits, damages for trespass and unauthorized usage **(the "6th November Letter")**.

12. By the 6th November Letter, the Plaintiff offered to lease or sell portions of the Property to the Defendant who in turn informed her that they would need some time to investigate title before giving her an answer. The Defendant did not claim to be the owner of the Property. By letter dated the 7th January 2016, the Defendant acknowledged occupying approximately 15,200 square feet or just over one third of an acre under Crown Gant to Joseph Evans. It also proposed to lease by extended lease or outright purchase the Property which proposal was also contained in a subsequent letter dated the 30th May 2016.

13. After receiving offers from the Defendant and having the Property appraised at $44,000.00, the Plaintiff offered by letter dated the 13th November 2017 to lease the occupied portion of the Property to the Defendant for $4,000.00 per month and to accept mesne profits for the past unauthorized occupancy and usage at $4,000.00 monthly by a lump sum payment. By letter dated the 10th April 2018, the Plaintiff's attorney wrote to the Defendant indicating her intention to commence an action against them if no substantive response was received to her proposal.

14. In May 2018, the Defendant invited the Plaintiff to submit an invoice for partial settlement of her claim for compensation for the use of the Property. The invoice submitted was entitled, 'Confirmation of Partial Settlement of Claim'. The description on the invoice was "*regarding the submitted and pending trespass claim of Carla Braynen-Turnquest against the Water & Sewage Corporation in respect of her property situated at Mangrove Cay, Andros Bahamas and pending the final amicable settlement and resolution of the same Carla Braynen Turnquest accepts from Water & Sewage Corporation the sum of $20,000.00 as a good faith partial settlement of the said claim*".

15. The Defendant issued a cheque dated 25th May, 2018 for $20,000.00 which was expressed to be "*initial payment for use of private land by the Corporation in Mangrove Cay, Andros*". The first time the Defendant claimed to own the Property was in March 2019. In January 2018, she and the then chairman of the Defendant, Mr. Adrian Gibson **("Mr. Gibson")** met without any legal advisors. Mr. Gibson informed her that he had seen the file and told her that the matter should have been dealt with by the former administration. He did not make any claim that the Defendant owned the Property.

16. The Plaintiff described the Property as a prime piece of property, located on the highest hill in Andros. It had a beautiful high vista with panoramic views. As a real estate professional, she knew the value of property with such features. She was unsure of when the water holding tanks were erected by the Defendant and disagreed that none of

the documents before the Court specified the Property in question or spoke to the address of the Property.

17. During cross examination, the Plaintiff denied that she was not the beneficial owner of the Property. She identified the Property on the plan attached to the 1963 Conveyance by the markings thereon made by Mr. Ledee as she was not a surveyor. She did not have any documentation which could explain how Albert Braynen came into possession of the Property. She did not know how the Last Will and Testament of the late William Henry Sweeting dated the 30th August 1875 was connected to Albert Braynen and she was unaware of any document which demonstrated that William Sweeting gave any property to him. She did not know whether any of the documents attached to Lauretta Braynen's application for Letters of Administration addressed the Property.

18. Mangrove Properties Limited was a company which she incorporated and she and Mr. Ledee were its beneficial owners. It was formed with the intention of developing an Eco Resort and not to quiet the Property. She was aware that there was an encroachment on the Property by a school but she did not bring an action against the school because it was for the betterment of the children.

19. She was also aware of houses on other parts of the Property however, she did not bring an action against those home owners and she had never investigated their root of title. The houses were located on the part of the property which was right across from the sea and could be considered prime pieces of property. Where the water holding tank was located however, was on one of the highest hills in Mangrove Cay.

20. She disagreed that the water holding tanks were erected as far back as 1978 but she could not say when she thought they were erected. Based on the Ministry of Works and Utilities 1983 memorandum from R.M.E. Hewitt to the Permanent Secretary of Ministry of Works & Utilities **("1983 Memo")** the water holding tanks were on the Property. She denied that her title to the Property was being questioned in the 22nd April 2016 letter from Glen Laville but stated that they had asked for a proposal in the event she did provide them with title. The Plaintiff could not say if there was a document provided which had been included in the invite by the Defendant to submit an invoice as it was information provided to her by her attorney.

21. In re-examination, the Plaintiff stated that the 1983 Memo did not say where the water holding tanks were located therefore she could not say if they were there or not. Her surveyor had informed her that it was possibly the highest point in Mangrove Cay which would provide views of Lisbon Creek and the sea. Due to her meeting with the then chair, Mr. Gibson, she had no intention of filing a suit against the Defendant. During her visit in 2009, she walked the boundaries of the Property but did not review the entire Property as there were a lot of trees on it.

22. Mr. Ledee averred that he was retained by the Plaintiff in 2009 to survey the 660 Acres. He reviewed the 1963 Conveyance and a number of previously recorded plans and carried out a physical boundary survey which assisted him in identifying the boundaries of the property described in the 1963 Conveyance. His work started in 2009 and ended in 2011. During this time he had to accurately account for the total acreage of the Crown Grant F-28 to Joseph Evans that William Henry eventually acquired. The actual total acreage was 2,117.07 acres, Arthur Thomas obtained 1, 123.88 acres, Phoebe Ann Braynen 862.51 acres and Seva Butler 130.68 acres.

23. Mr. Ledee determined that the 660 acres conveyed to Carl Braynen by the 1963 Conveyance and had formed part of the Phoebe Ann Braynen Estate. Once he, determined this he informed the Plaintiff that the Defendant had constructed a road, storage tanks, fence line and water line on the Property forming a part of the Phoebe Ann Braynen Estate, which was later acquired by the 1963 Conveyance.

24. During cross-examination, Mr. Ledee explained that when a survey is conducted of a Crown grant, the acreage is often actually larger than what is stated on the Crown Grant. If the Crown grant provides that a property should run from sea to sea then the survey should go from sea to sea. Any documents used to prepare the survey would have to be submitted to the Department of Lands and Survey and they should have been kept in a file.

25. The 1875 William Sweeting Will **("Sweeting Will")** was listed as R8. The job file was listed as P-19 of 2011. Albert Braynen, as far as he knew, was a descendant of Phoebe Ann Grant based on the Deed of Assent. He denied that there were no documents confirming his. He further averred that William Sweeting had gone into ownership of the property after Joseph Evans. He was unable to map out the alleged 660 acres based on the Conveyance, nor could he do so based on a Will.

26. He was uncertain whether he investigated the school on the Property. He agreed that there were private residences encroaching on the Property, located across the road from the ocean which was a few hundred feet away. The work performed for the Plaintiff was not on the ocean. If the Crown Grant was for 1500 acres, the excess land would not necessarily belong to the Crown. If there were discrepancies with his work it would have been addressed by the Department of Lands and Surveys.

27. Mr. Ledee explained that the reason there would be a discrepancy between an old Crown Grant and a current survey, is that the original Crown Grant would run from sea to sea, from the southern end of the island to the northern end of the island. If a Crown Grant stated that a property was bounded by the sea, ownership is determined from the sea in the north. Based on his survey, the northern boundary ran along the northern shoreline. The red lines thereon highlighted the boundaries of a subdivided parcel. The boundaries of the Property went from east to west and the black line shown represented the 731.83 acres.

28. In re-examination, Mr. Ledee stated that after conducting the survey on the Property, the acreage turned out to be more than the 1500 acres. After he compiled and obtained as much documentation as he could, he went to Andros and looked for monuments on the ground. These monuments were referred to as boundary survey information and could be stones, an X in the rock, concrete, steel or metal or old galvanized pipes in the ground. They would have been placed there by previous surveyors.

29. Knowing that he had to retrace the Joseph Evans Crown Grant, he tried to find as much information as he could to understand where the boundaries should be. The location of the markers found should be reflected on the plan. He found various survey markers at Lisbon Creek. He did not personally place any survey markers on the Property. The physical markers would corroborate the plan. He found enough survey information along Lisbon Creek that would help him determine the southern boundary of the Joseph Evans Crown Grant.

30. Mr. Ledee then surveyed to the eastern shoreline, the eastern part of Lisbon Creek and traversed north to an area referred to as Swain. He walked, measured angles and distances from the government control station which had site co-ordinates. Through a process known as prorating and proportion, the 660 acres became 731.83 acres. The property claimed by the Defendant is within the 731.83 acres.

31. He explained the rule of proration which was a principle in surveying and by its application the 660 acre tract was identified on his plan as 731 acres. The Property was larger than as it stated on the Crown Grant. The 1875 Sweeting Will described a portion of the Crown Grant. He was able to determine that the land described in the 1963 Conveyance was a part of the Phoebe Ann Braynen Estate because he visited the area. He performed the survey and established where the boundaries of the Joseph Evans Crown grant were.

32. He proceeded to survey through the southern, eastern and north-western portion of Mangrove Cay to determine where the boundaries of the entire Joseph Evans estate was. He then applied the proportions of that estate based on his reading of the 1875 Sweeting Will. He used the various boundaries of the survey plan which would have been previously executed along with the boundary survey monuments and calculated Phoebe Ann's portion.

33. He agreed that the 660 acres was located on the western boundary, a portion of the western boundary of the original 1500 tract. Mr. Ledee went on to explain the process of submitting a plan. There would be a work file with previous survey plans which may or may not be recorded and he did review those. If applicable, he would review Wills. These steps would help him to confirm whether or not somebody owned the property.

34. After completing the plan, conducting the survey and research, locating the shoreline, the roads and the buildings, he would tie his boundary survey into the National Grid in order for the Department of Lands and Survey to review his work. He would plot his work to ensure that it is consistent with all of the other information available. The Department would then determine whether there was an encroachment, review the field notes to ensure his work was within statutory standards. They would use the co-ordinates from him and plot them on a document known as a DOS sheet. If his co-ordinates were inconsistent they would ask him to review them.

35. Signatures on a plan signified that the Department of Lands and Survey approved it. The surveyor general's signature would indicate that the standards as set out in the Land Surveyors Act 1975 had been met. If the plotting was incorrect the Surveyor General would not sign it until it was corrected. He was not called upon to make any corrections to the Survey Plan. There had been instances where a plan was recorded with an error as there are no absolute guarantees. He was not aware of any errors being discovered subsequently in his plan.

36. The distance from the western boundary to the eastern boundary was 2, 188.84 feet. The Plaintiff could get 660 acres just along the western boundary without including the disputed line.

37. Mr. Ledee later provided copies of the recorded survey plans referred to when he indicated the existing survey markers on plan 600-AN and the plans relied on for that purpose. The plans were: -

    - Plan by Aranha & Chee-A-Tow being Job No. 503/59 dated 25th September, 1959 **(the "25th September 1959 Plan")**,
    - Plan by Aranha & Chee-A-Tow being Job No. 684/60 dated 26th August, 1960 **(the "26th August 1960 Plan")**, and
    - Plan 77 Andros by Aranha & Chee-A-Tow recorded 19th July, 1960 **(the "19th July 1960 Plan")**.

38. Mr. Alvan K. Rolle, a qualified Appraiser for over twenty nine years **("Mr. Rolle")**, averred that he had been hired by the Plaintiff to prepare an appraisal report for a portion of land in Mangrove Cay, Andros. The estimated fair market value of the Property was forty four thousand dollars and a monthly lease of four thousand dollars was recommended therein **(the" Appraisal Report")**.

39. At trial, Mr. Rolle testified that he did not personally perform any survey of the Property but relied on a survey plan to prepare the Appraisal Report. He explained that his note in his report which stated that there were no available comparables for Andros Island meant that he was unable to locate any sales for that area. He visited the 15,159 square feet shown on his diagram and saw a building which represented a school along with residential homes around the facilities.

40. Mr. Rolle did not walk the Property and he did not investigate the title for the Property because it was not his job to do so. He also did not check to see whether other utility companies had any plants on the island. It was not his job to determine who owns a property but to determine how much property is worth.

DEFENDANT'S EVIDENCE

41. Mr. Cyprian Gibson, the Family Island Manager of the Defendant **("Mr. Gibson")** asserted that he had been informed by the Defendant's General Manager, Mr. Elwood Donaldson **("Mr. Donaldson")**, that after conducting an in depth investigation of the issue, it was determined that the Defendant went into possession of the Property sometime in 1978 and constructed a well field and water distribution system on the Property. They had maintained the well field and water distribution system since 1983 and had maintained and enjoyed uninterrupted possession of the Property for as long as he had been employed with the Defendant.

42. During cross-examination, Mr. Gibson averred that he did not have any personal knowledge as to when the Defendant entered into possession of the Property. He had never seen the 4th June 2018 letter to Rolle & Rolle which enclosed a check representing the initial payment for use of private land by the Defendant. However, it was safe to presume that the letter came from the office of the Defendant's General Manager.

43. Mr. Gibson agreed that in addition there was another letter from two of the Defendant's general managers, Mr. Glen Laville and Mr. Elwood Donaldson, who offered to purchase or lease the property from the Plaintiff subject to her confirming her documentary title.

44. During re-examination, Mr. Gibson stated the purpose of the water holding tanks was to provide water to the Mangrove Cay community.

45. Mr. Gilbert Thompson, a partner in the law firm of the Defendant's attorney who specialized in conveyancing and property/land law **("Mr. Thompson")** stated that Mr. Donaldson had instructed him to conduct an Opinion on Title over the Property. After several title searches, it was his professional opinion that the Plaintiff did not have good marketable title to the Property as she had no documentary title whatsoever and the Defendant was in possession of the said Property.

46. The Plaintiff's title to the Property was and is inferior to the possessory title held by the Defendant. He went further to elaborate that although the Plaintiff inherited the Property from her deceased father by virtue of two Deeds of Assent, the Property is not described in the Will of the late Carl Braynen and neither in the aforementioned Deeds of Assent.

47. Mr. Thompson also asserted that Mr. Braynen, with no formal legal training, prepared the 1963 Conveyance himself, and could not properly transfer the title of the Property. There was no plot plan attached to the 1963 Conveyance and the description of the Property stated that Mr. Braynen had acquired 660 Acres more or less being a portion of 860 acre tract granted in the Joseph Evans Crown Grant.

48. The 1963 Conveyance stated that the property in question was more particularly described in the Will & Testament of the late William Henry Sweeting **(the "Sweeting Will")** which had absolutely no connection to the late Albert Braynen and predated the 1963 Conveyance by over 80 years. Moreover, the Sweeting Will gifted three properties at Mangrove Cay, Andros; 860 acres to Arthur Sweeting which bordered the South Eastern portion of Joseph Evans Crown Grant, 660 acres to Phoebe Braynen which bordered the South Western portion of Joseph Evans Crown Grant, 100 acres to Seva Butler which bordered the Northern portion and the sea of Joseph Evans Crown Grant.

49. It was unknown how the property purportedly purchased by Mr. Braynen increased from 660 acres to 731.83 acres. Crown Grant F-25 to Joseph Evans was stated on the plans but such a Crown Grant did not exist. The plan could not be correct because the property which had been purportedly conveyed to Carl Braynen clearly showed that the Northern portion of the Joseph Evans tract was gifted to Seva Butler in the Sweeting Will however, the plan filed showed a tract of land on the Western portion of the Joseph Evans tract which went all the way to the sea. This would mean that Albert Braynen purportedly acquired 660 acres which included portions of the properties given to Seva Butler and Phoebe Braynen.

50. Mr. Thompson continued that the late Albert Braynen could only get documentary title from the Estate of the late Joseph Evans or an individual who had obtained their documentary title from the Estate of the late Joseph Evans. The documents relating to the letters of administration in the Estate of the late Albert Braynen did not mention any property in Mangrove Cay, Andros. The 660 acres conveyed to Carl Braynen should have been listed on the Oath for an Administrator filed in the Estate of the late Albert Braynen but they were not.

51. Mr. Thompson stated that he was instructed by Mr. Donaldson and verily believed that the Defendant went into possession of the 15, 192 acres of property at Mangrove Cay,

Andros sometime in 1978 when it constructed the well field and water distribution system. Even if that information was incorrect, the Defendant would have had possession and control over the Property from 1983.

52. There was correspondence which demonstrated that the Defendant also had possession and control over the Property from 2001; over eighteen years ago. The Defendant continues to possess the Property as it still operates the well field and water distribution system. The Plaintiff could not say that she had ever been in possession or control of the Property from 1978 to date.

53. During cross-examination, Mr. Thompson stated that the purpose of the title search was to locate some sort of connection between the Joseph Evans Crown Grant and the Braynen family. He found no document which assisted in confirming any connection. His search showed no other person owning the Property. Any possessory title would have to be perfected by a Quieting Action. The Defendant claimed a strictly possessory title and there was no title perfected by Quieting but the Plaintiff could not show any documentary connection. Given the presence of section 3 (4) of the Conveyancing and Law of Property Act, title only needed to be proved for a period of 30 years. The Defendant was entitled to search past that 30 year period.

54. In re-examination, Mr. Thompson averred that the 1963 Conveyance was prepared by the Plaintiff's father and he had observed that there was no evidence provided to show any third party connection outside of her own relatives.

55. Mr. Stafford Coakley, a licensed land surveyor, **("Mr. Coakley")** averred that he was instructed by Mr. Thompson to review plans showing Crown Grant F-28 to Joseph Evans and to review and consider certain documents pertaining thereto. The property inherited by the Plaintiff was not described in the Will of the late Carl Braynen or in the Deed of Assent. The 1963 Conveyance contained a vague property description and there was no plot plan attached and no boundaries given which would assist in specifically identifying where property was situated.

56. The 1963 Conveyance stated that the property in question was more particularly described in the Last Will and Testament of the late William Henry Sweeting dated the 30th August 1875 which gifted property at Mangrove Cay to Arthur Thomas Sweeting of 860 acres which bordered the South Eastern portion of the Joseph Evans Crown Grant; 660 acres to Phoebe Ann Braynen which borders the South Western portion of the Joseph Evans Crown Grant; 100 acres to Seva Butler which borders the Northern portion of the Joseph Evans Crown Grant.

57. The property described in Plan Number 600 AN is a 731.83 acres tract bordering the Western portion of Joseph Evans Crown Grant and did not match the property listed in the 1875 Sweeting Will.

58. During cross examination, Mr. Coakley averred that as a registered land surveyor, once a survey was completed, a plan would be submitted to the Surveyor General for registration. A part of the Surveyor General's mandate is to ensure that the plan is accurate. If it is inaccurate, he has the ability to reject it or point out the errors to address them. He confirmed that plan 600-AN was a registered plan. He did not communicate to the Surveyor General that Plan 600-AN did not match any of the properties described in the 1875 Sweeting Will. It was a concern advanced for the purpose of the trial.

59. If the individuals in the Surveyor General who were hired to check plans discovered any deficiencies they were supposed to make a note of it. He did not know whether the checkers had access to the 1875 Sweeting Will. Mr. Coakley conducted a physical inspection of the site which was different from a survey. His evidence given was based on that physical inspection and the Will that he saw. There were no fixed measurements in the Plan 600-AN, which would have given the surveyor the discretion to decide if he would fix any boundary lines and then take the measurements.

60. In re-examination, Mr. Coakley testified that surveying checks consisted of checking the measurements, bearings and direction of any monument found on a property, to ensure that it conforms with whichever plan is made available. Once the checker placed his signature on the plan, another person would not have gone out in the field to double-check his work unless the property was adjoining crown land. There was nothing in the 1875 Sweeting Will which accurately explained where each person's lot was.

61. A notice of intent to survey was not done in this case which would have caused a notice to be published on the property and the official government notice board that anyone who had interest in the property would have been present for the survey. If they had the 1875 Will, the described acreage would be 660 acres and not 700 plus+. The 660 acres did not extend to the water tanks. The description in the 1875 Sweeting Will was specific and everything was predicated on the western boundary of the Hudson Tract.

62. Mr. Allan Alvin Young, a Registered land Surveyor in the Commonwealth of The Bahamas, the State of Florida and Guyana **("Mr. Young")** for over 57 years replaced Mr. Coakley who died in the middle of the trial. He averred that he had served as a Senior Crown Land Surveyor in the Lands and Surveys Department and a Senior Land Surveyor in the Department of Housing until his retirement in 2000 when he started his private practice.

63. After reviewing the 25th September 1959 Plan, the 26th August 1960 Plan and the 19th July 1960 Plan, in order to determine the southern boundary of the property being claimed by the Plaintiff, it was his professional opinion that Plan 600-AN was based on an insufficient physical survey, inadequate survey evidence, discrepancies and/or errors in research information. He explained that plan 600-AN showed a tract of land which contained 731.83 acres and gave the impression that it was a portion of Crown Grant F-28 to Joseph Evans in Mangrove Cay even though it references Crown Grant F-25 to Joseph Evans.

64. Plan 600-AN only pertained to a 731.83 acre portion of the Joseph Evans Crown Grant and did not address any other portion. In order to properly partition a portion of Crown Grant F-28, the whole of Crown Grant F-28 must and should have first been established and it would be impossible to determine the southern boundary of any portion of the Joseph Evans Crown Grant by reference only to the 25th September 1959 Plan, the 26th August 1960 Plan and the 19th July 1960 Plan, which were the only source/reference documents which Mr. Ledee may have looked at and considered when determining the southern boundary of the property being claimed by the Plaintiff. He noted that the 25th September 1959 Plan and the 26th August 1960 Plan were not recorded in the Department of Lands and Survey which meant that two of the three plans referenced by Mr. Ledee in determining the southern boundary of the Property were not recorded in the Department.

65. The 19th July 1960 Plan was the only plan recorded and it only referred to two tracts of land which are approximately twenty acres in size. In his professional opinion that could not have assisted Mr. Ledee in determining the southern boundary of a property which he claims is over 700 acres in size. On plan 600-AN, thirteen survey markers were found. The symbol legend for "Survey Marker Found" indicated that those markers were found along Lisbon Creek some 1163 feet southward of the 731.83 acres tract.

66. On Plan 600-AN, insert "A" appears or purports to indicate that field work was conducted to locate the Main Public Highway, Mangrove Cay High School, a Tractor Cleared area, an Occupied area, Water & Sewerage Corp. Storage Tanks and Wellfield Road. It was important to note that the symbol legend for "Computed Survey Marker" indicated that the boundary of the 731.83 acres tract was "Computed" or estimated. The term "Computed Survey Marker" indicated a physical field survey was not carried out to mark the boundary of the 731.83 acres tract which would include the southern boundary.

67. Plan 600-AN also contained a clause in the notes which stated that all survey information is subject to change at the time of a physical survey. This indicated that the survey of Plan 600-AN was incomplete and required further field work to be carried out. He explained that once "Computed Survey Marker" and "All Survey Information is subject to change at time of physical survey" appeared on a plan, it meant that a full physical survey of the land had not been completed. The Department of Lands and Survey should not have recorded Plan 600-AN once they saw those phrases as additional survey work needed to be done in order to determine the southern boundary of the tract of land being claimed by the Plaintiff.

68. In order to locate any grant or parcel of land, a physical survey must have been fully conducted. It was not enough to just walk the property as physical evidence must have been found to prove that you are in the right location and mapping out the correct co-ordinates. It was also not enough to rely upon a few markers as people could inadvertently and intentionally move and/or destroy markers. It was not enough to accept a marker.

69. Mr. Ledee had only relied upon plans prepared by others which may not have necessarily been correct. Two of the three plans were not recorded in the Department of Lands and Surveys and the third plan related to two tracts totaling approximately twenty acres which should not have been relied on. The plans by Aranha & Chee-A-Tow were relied upon to locate and orient the overall Plan 600-AN but they were insufficient to correctly position and locate the 731.83 acres claimed by the Plaintiff.

70. Plan 600-AN was an incomplete boundary survey and was not in accordance with generally accepted standards of surveying practice. There was insufficient information for Mr. Ledee or anyone to correctly identify the southern boundary of the property alleged to be owned by the Plaintiff.

SUBMISSIONS

PLAINTIFF'S SUBMISSIONS

71. The Plaintiff submitted that she was the documentary title holder of the Property and that the Defendant trespassed upon the same. It was an entrenched principle of law that a plaintiff making a claim for trespass, must prove that his title is better than that of a defendant.

72. In **Wallace and another v Nairn Jr [2017] 2 BHS J. No. 27** Isaacs JA referred to **Ocean Estates Ltd. v Pinder [1969] 2 AC 19** and the dicta of Lord Diplock where he stated:-

> **"At common law as applied in The Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute' title. 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 party 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 years period of continuous and exclusive possession by the trespasser."**

73. Similarly in **Bannerman Town**, **Millars and John Millars Eleuthera Association and others v Eleuthera Properties Ltd [2016] 2 BHS J No. 61**, Lord Briggs stated:-

> **"... the duty of the judge is simply to determine and declare which of the claimants has the better title. Within the common law there is of course no such concept as an absolute title, and as the author of Megarry & Wade states in The Law of Real Property Eighth Edition: "Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the claimants."**

74. Section 3 (4) of the **Conveyancing and Law of Property Act (the "CLPA")** states:-

> **"(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."**

75. Lord Briggs further stated in **Bannerman Town**, **Millars and John Millars Eleuthera Association and others v Eleuthers Propertyoies Ltd (supra):-**

> **"A party to a quieting title action seeking to assert documentary title to land is not prima facie required to rely on or deduce title to the land exceeding 30 years unless the court so directs. Neither is an investigating judge prima facie required to have any party seeking to rely on documentary title, deduce documentary title beyond 30 years. However, if during the course of the investigation questions as to the validity of the documentary title arise, the learned trial judge is required by Quieting Titles Act and the Conveyancing and Law of Property Act to direct that further evidence be provided."**

76. The Plaintiff submitted that she has a title which she could force on the Defendant by Vendor/Purchaser Summons by reason of Section 3(4) of the CLPA. The burden of proof is on the Defendant to prove that it has possessory title to the Property as she has

demonstrated a documentary title, and therefore the Defendant must prove that it has dispossessed her or one of her predecessors in title.

77. There must not merely be the physical possession of the Property by the Defendant, there must also be the intention to exclude all others from the land especially the documentary title owner. In **High Point Estates v Higgs [2003] BHS J No. 74** Mohammed J stated :-

> **"The Defendant with no paper title must show factual possession and an intention to possess if he is to dispossess the Plaintiff."**

78. The Plaintiff also relied on the rule in **Browne v Dunn (1893) 6 R. 67** which states:-

> **"If, on a crucial part of the case, a party intended to ask the jury to disbelieve the evidence of a witness, that party should cross- examine that witness or at any rate make it plain, while the witness was in the box, that the evidence was not accepted. This case is the basis for the term "rule in Brown v Dunn" adopted in many common law jurisdictions."**

79. This rule has been consistently followed in numerous authorities. In **Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and aother [2005] EWCA Civ 267**, the Court stated: -

> **"[57] Prior to the hearing before us we drew the attention of the parties to the decisions of the House of Lords in Browne v Dunn (1893) 6 R 67.....**
> **[58] Browne v Dunn is only reported in a very obscure set of reports. Probably for that reason it is not as well known to practitioners here as it should be although it is cited in Halsbury's Laws of England para 1024 for the following proposition:**
> **'Where the courts it to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part of the whole of his evidence."**

80. The Court in **Markem Corp and another** also referred to the judgment of Lord Herschell in **Allied Pastoral Holdings Pty Ltd v Federal Commr of Taxation [1983] 1 NSWLR 1** which also followed the rule in Browne v Dunn: -

> **"Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."**

81. In **Colco Electric Co. v. Gold Circle Co. [2003] BHS J. No. 53**, Lyons SJ (as he then was) affirmed that the rule in Browne v Dunn was applicable to Bahamian jurisprudence:-

> **"There is one very important rule of evidence relevant in particular in civial trials where the normal circumstance is that both parties' cases go into evidence. It is called the Rule in Browne v Dunn (1894) 6 R 67 (HL). The rule is as much an ethical requirement as it is practical. It is observed by counsel because in its observance it assists the court to do justice on the merits".**

82. In many instances, the Plaintiff's evidence was not challenged by the Defendant on cross-examination nor was any contrary proposition put to the Plaintiff's witnesses while they were in the witness box. It was not open to the Defendant to invite the Court to accept such contrary propositions.

83. Specifically, Mr. Ledee was not cross-examined by Counsel for the Defendant on his supplemental witness statements which was tendered for evidence prior to the day he gave his viva voce evidence. As such, the Plaintiff invited the Court to accept that there were pre-existing survey makers at the southern boundary of the Property which were depicted on three recorded plans.

84. Similarly, Mr. Rolle was not cross-examined with respect to his actual assessment of the market value and rental value of the Property nor was he questioned about his methodology and the manner in which he arrived at his assessments. It was never suggested that his assessments were too high or erroneous.

85. It was undisputed that Plan 600AN was duly registered under the Land Surveyors Act 1975. It bore the Surveyor's Certificate which states: -

"I, Emile Ledee, a surveyor registered and licensed in the Bahamas hereby certify that this plan has been made from surveys executed by me or under my personal supervisions that both the plan and survey are correct and have been made in accordance with the **Land Surveyors Act, 1975** and the Land Surveyors Regulations, 1975.

86. The **Land Surveyors Regulations** set out extensive and comprehensive requirements which a plan must meet before it can be lodged with the Surveyor General for his approval and registered, **Section 26 of the Regulations** stipulates the details a plan must include: -

"The other details required to be shown on a plan are as follows –

- **(a) the lot numbers and title references (if any) to all land parcels abutting on the area comprised in the survey as well as the names of the adjoining owners or occupies where these are known or can be ascertained;**
- **(b) the number assigned to each separate new parcel or lot created by the survey for which a title is to issue. These numbers shall be shown in a style not to be confused with lot numbers of abutting land;**
- **(c) the accurate position and extent of all buildings, fences, walls, or other features on, or adjacent to or within 50 feet (15 metres) of any boundary, and where it is possible, evidence of an old title or claim and the age of the fature should be ascertained ans shown on the plan;**

(d) **reference to any previously approved plans that affect the survey, shown in their correct relation to the land affected, as well as in tabular form in the corner of the plan;**
(e) **the correct name and number of the block, the name of the locality or district, the name and number of the section and the islands;**
(f) **the name of the person for whom the survey was made and the dates during which the survey was executed."**

87. **Section 27 (3)** speaks to surveys which establish old boundaries: -

"In all cases where old boundaries are re-established by a survey made under these Regulations the surveyor shall make a full report to the Surveyor-General concerning the evidence used to locate the boundary and forward a copy thereof to the Registrar-General.

88. **Section 20(2)** then provides for the plan to be lodged with the Surveyor General who shall issue a receipt on receiving the plan.

89. **Section 3(1)(b)** states: -

"There shall be a Surveyor-General who shall be a surveyor and who shall....approve such plans and diagrams if satisfied that such Surveys have been carried out, and the plans and diagrams have been prepared in accordance with the regulations."

90. The Surveyor General affixed his signature to Plan 600 AN after the words "Recorded in the DLS in accordance with section 3 of the Lands Surveyors Act, 1975. His signature is confirmation that the Regulations were satisfied and Plan 600 AN was accurate.

91. Lyons J in **Roberts v Wallace [2004] BHS J. No. 420** stated:-

"29 I am entitled to assume Mr. Thompson is a registered (or licenced) surveyor. Section 14 of the Land Surveyors Act (Ch 251) makes it an offence for any person other than a licenced surveyor to carry out a survey. The plans put forward by the plaintiff fall within the definition of a "survey" in that they purport to determine and demarc the boundaries of the land claimed by the plaintiff. (See section 2(1) of Land Surveyors Act).....32 I am entitled to assume, as this is the plaintiffs own evidence in support of his case, that all is above board and correct. I am also entitled to assume, unless evidence is presented to the contrary, that Mr. Thompson did his job professionally and followed the requirements of the regulations stipulated by his governing professional body."

92. If Plan 600 AN was inaccurate, Section 3(1)(d) vested him with the power to cancel, amend or otherwise impugn a Registered Plan on the basis that it was inaccurate. Section 3(1)(d0 states: -

"There shall be a Surveyor-General who shall be a surveyor and who shall..... (d) cancel or amend or require any surveyor to amend, in accordance with the provisions of any law, any survey, plan or diagram found to be incorrect, outdated or inadequate."

93. The Court ought not to interfere with or oust the statutory duties of the Surveyor General on the Defendant's invitation to declare Plan 600 AN as inaccurate. The Court also should not lend any credence to assertions of inaccuracy from a surveyor who had not conducted a survey of the Property or communicated his alleged concerns to the

Surveyor General. Mr. Coakley's concerns were only advanced for the purpose of the action and was orchestrated by the Defendant to defeat the Plaintiff's claim. Accordingly, the Court should find that Mr. Coakey's criticisms of Plan 600AN wholly unreliable and they should be rejected.

94. The assertion of a lack of independence on the part of Mr. Ledee, was irrelevant. It was important to understand the nature of expert evidence in the context where independence was required and where the **Ikarian Refer** principles founded in **National Justice Companie Naviera SA v Prudential Assurance Co Ltd ("the Ikarian Reefer") [1993] 2 Lloyd's Rep 68** were operative.

95. In **Henfied v Carey [2019] 1 BHS J. No. 23**, Winder J (as he then was) stated in relation to the Ikarian Reefer principle: -

> **"Ordinary witnesses of fact are not allowed to give opinion evidence. They can only say what they saw and what they heard. Expert witnesses however, are able to give opinion evidence.....because an expert expresses an opinion, it doesn't mean that I have to accept it. Here however, where competing opinions are lined up on the two sides of this dispute, it's really a matter of assessing and attributing weight to the various opinions."**

96. Mr. Ledee conducted a survey and prepared a plan which he submitted to the Surveyor General who registered it and which meant upon its filing that it became a public document. The Plaintiff suggested that it may have been the reason the Court in **Roberts v Wallace** made a determination without the appearance of Donald Thompson. His factual evidence was in relation to the plan he prepared and submitted and was later approved. He was not giving opinion evidence therefore the **Ikarian Reefer** principles were not operative.

97. The Plaintiff invited the Court to expunge paragraphs 5,7,8,9,10,11,16,17,18,19,22,23 and 24 from the witness statement of Allan Young filed 22nd June 2020 as they were outside what the Court had permitted. Mr. Young's evidence on Mr. Ledee's use of the three plans was confusing and premised on a misconception.

98. There was no reliable evidentiary basis to impugn the evidence of Mr. Ledee, his survey or Plan 600 AN. There was an abundance of evidence which demonstrated that the Defendant's water holding tanks and apparatus were on the Property. The Surveyor General examined and approved the depiction of the water holding tanks and fences on the Property and proceeded to register Plan 600AN as having satisfied section 26 (2) of the Regulations which stated: -

> "The other details required to be shown on a plan are as follows – the accurate position and extent of all buildings, fences, walls, or other features on, or adjacent to or within 50 feet (15 metres) of any boundary..."

99. The oral evidence of Mr. Ledee also supported the factual finding that the water holding tanks were on the Property despite Mr. Coakley's evidence that the water holding tanks and apparatus were not on the Property. Mr. Coakley could not both impugn Plan 600AN and rely on it.

100. The Plaintiff submitted that the parties had filed an agreed statement of facts and issues on 4th December 2019. The evidence adduced at trial had definitely answered all issues in the Plaintiff's favor. As to the issue of whether the Defendant has any claim, title or interest in the subject land the Plaintiff submitted that the Defendant did not claim a possessory title which in any event could not be established without evidence of

possession. There was no evidence of when the Defendant entered into possession of the Property. The Court could not speculate on what was a necessary and critical fact for the claim of possessory title.

101. The Defendant's sole witness of fact had no knowledge of when the Defendant entered into possession. The Defendant's factual witness admitted that he had no personal knowledge of when the Defendant entered into possession of the Property. The Defendant's sole documentary evidence did not demonstrate possession or ownership. The letters exhibited by the Defendant did not either. There was no evidence of fact adduced as to the location of the Property referenced in the letter 14th April 1983. The letters dated 11th and 12th January 2011 did not demonstrate an assertion of possession and ownership by the Defendant.

102. The latter letters were sent by Glen Laville, the same General Manager who offered to lease or buy the Property from the Plaintiff on more than one occasion. The lack of mandatory intention to dispossess was quite evident even after the trial. The Defendant also had no claim of right, title or interest in the Property.

103. There was no other documentary chain of title besides that of the Plaintiff. The Plaintiff's reliance on the 1963 Conveyance was not disputed and there was no evidence to suggest that it was fraudulent.

104. The Plaintiff was entitled to claim mesne profits in the amount of Five Hundred Forty Four Thousand Dollars. The amount was calculated as follows:-

$48,000.00 per year x 11 years and 4 months

105. The interest claimed on the mesne profits amount to Four Hundred Thirty Two Thousand Six Hundred Fifty One Dollars and Forty Cents and was calculated as follows:-

Interest on $544,000.00 at 7% from 4th October 2009 to 10th February 2021

106. The Plaintiff's total claim is therefore in the amount of One Million Two Hundred Twenty Six Thousand Six Hundred and Fifty One Dollars and Forty Cents.

DEFENDANT'S SUBMISSIONS

107. The Defendant submitted that the only issue for the Court to determine was who could prove the better title to the Property.

108. The Defendant asserted that it has possessory title and that the Plaintiff had no form of title or right to the Property. The Defendant submitted that the Plaintiff's documentary title is wholly defective. There was no document which revealed how the late Albert Braynen acquired any property on the island of Andros in order to be able to sell it to Carl Braynen in 1963. The Defendant puts the Plaintiff to strict proof to identify the Property and prove actual ownership of the Property. The 600AN Plan does not assist the Plaintiff in proving the title to the land.

109. From 1978 to 2012, the Defendant had undisturbed use of the land. This was considerably more time than the twelve year period required by the **Limitation Act Section 16(3)** which provides:-

> **"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 he expiry of the period during which the action could have been brought by the Crown or of twelve ears from the date on which the right of action accrued to some person other than the Crown, whichever period first expires."

110. There is no corroborated evidence before the Court to suggest that the Defendant knew of the Plaintiff's existence, or of her predecessor's alleged interest in the Property. The Defendant also agreed with the Plaintiff's submission that she only needed to show that her title to the land was better than that of the Defendant.

111. In **Ocean Estates Ltd. v Pinder [1969] 2 AC 19** the House of Lords held:-

"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 years period of continuous and exclusive possession by the trespasser."

112. The Plaintiff's case was predicated on the assertion that she was at all material times the legal and beneficial owner of the Property. Mr. Ledee is a joint business partner of the Plaintiff and had every benefit to gain from alleging that the Property belonged to the Plaintiff and that the Defendant was a trespasser.

113. In examining the 1875 Sweeting Will, there were no boundaries or dimensions relating to the 660 acre tract of land. Further there was no plan or map attached, therefore the document lent no assistance in plotting of Plan 600 AN. There was also no document which revealed how the late Albert Braynen acquired any property on Andros to sell to Carl Braynen in 1963 and therefore the Plaintiff's documentary title was wholly defective.

114. The Defendant submits that the **CLPA** should be used and applied carefully in order to prevent the creation of title in circumstances, where it has been proven that on the preponderance of evidence, there are significant flaws in the documentary title of the Plaintiff.

115. **Section 3(4) of the CLPA** provides:-

(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter.

116. Mr. Ledee, as the partner of the Plaintiff, was not an expert witness and his evidence should not be treated as the evidence of an expert. In **Essex County Council v UBB Waste (Essex) Ltd (No. 2) [2020] EWHC 1581 (TCC)** Pepperall J opined:-

"35. As with the witnesses of fact, I turn then to set out my general impression of the expert witnesses. More detailed analysis of expert issues follows when addressing individual issues."

INDEPENDENCE, IMPARTIALITY & OBJECTIVITY

36. Expert evidence should be independent, impartial, objective and never descend into advocacy. The *Guidance for the Instruction of Experts to give Evidence in Civil Proceedings* issued by the Civil Justice Council in 2014 explains, at paragraph 11:

> "Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

37. In *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68, Cresswell J observed, at page 81:

> "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness ... should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider facts which could detract from his concluded opinion ..."

38. In The Queen (on the application of Factortame) v. The Secretary of State for Transport [2002] EWCA Civ 932, [2003] Q.B. 381, Lord Phillips MR said, at [70]:

> "Expert evidence comes in many forms in relation to many different types of case. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the *Civil Procedure Rules*."

39. In *Rowley v. Dunlop* [2014] EWHC 1995 (Ch), David Richards J (as he then was) said at [19]-[21]:

> "19. The essential character of expert evidence is that it should be the independent product of the expert uninfluenced by the pressures of litigation and that it should be objective and unbiased evidence on matters within the expert's evidence: CPR 35PD.2.1-2.2.
>
> 20. The qualities of independence and lack of bias may be compromised by the expert's connections with the litigation or the parties or those who may benefit from the litigation. It is always a matter for the court to decide whether any such connections disqualify the expert from giving evidence or whether, as may often be the case, they go not to the admissibility of the evidence, but to the weight to be attached to it.

> **21. Such connections may take a number of forms, of which three are the most obvious. First, the expert may have a financial interest in the outcome of the litigation. Only rarely will the court admit the evidence of such an expert ... Secondly, the expert may have a conflicting duty. Whether this will disqualify the expert from giving evidence will depend on the circumstances of the case ... Thirdly, an expert may have a personal or other connection with a party, which might consciously or subconsciously influence, or bias, his evidence. Such connections will not normally of themselves disqualify the witness, but will go to the weight to be attached to the evidence ..."**
>
> **40. The problem of partisan expert evidence in the TCC was recently considered by Fraser J in *ICI Ltd v. Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC). At [237], the judge restated the principles drawn from the case law and the Civil Justice Council's guidance and stressed that partisan expert is not the norm in the TCC."**

117. The Plaintiff did not have documentary title to the Property. The documentary title relied on was wholly deficient and flawed. The Defendant did in fact have superior title having been in possession of the Property. The Defendant was in undisturbed possession of the 15, 192 square feet of the Property for at-least twenty five years.

118. In **The Petition of Eleuthera Land Company Limited et al [2019] 1 BHS J. No 36**, the Court stated: -

> **"Williams on Vendor and Purchase 4th Edition provides a good definition of what constitutes a good root of title. The authors state 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."**

119. In addition to the 1963 Conveyance not having any adequate description of the Property it failed to have a plan attached. The Plaintiff could not establish through its evidence that Albert Braynen had any title or right to the Property. The Plaintiff was seeking to have the Defendant finance her Eco Resort project. She admitted to a school allegedly encroaching upon the Property, although she did not bring an action or claim against them.

120. The action was a document-heavy dispute. In a well-known passage in **Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep. 1**, Robert Goff LL (as he then was) indicated that it was necessary to approach the assessment of factual witnesses "by reference to the objective facts proved independently of their testimony, in particular, by reference to the documents in the case, and also pay[ing] particular regard to their motives and to the overall probabilities."

121. The dots in the Plaintiff's case do not connect as the Plaintiff herself admitted that there were no documents in evidence which proved how Albert Braynen came into possession of the Property. When one pays regard to the Plaintiff and Mr. Ledee's motives, it was in their interest as joint venture business partners to allege that Phoebe

Braynen was related to Albert Braynen for the purpose of transferring the 660 acres she allegedly received under the 1875 Sweeting Will.

122. In relation to expert witnesses, **Essex County Council v UBB Waste (Essex) Ltd. [2020] EWHC 1581** provided: -

> **"35. Ad with the witnesses of fact, I turn then to set out my general impression of the expert witnesses. More detailed analysis of expert issues follows when addressing individual issues.**
> **INDEPENDENCE, IMPARTIALITY & OBJECTIVITY**
> **36. Expert evidence should be independent, impartial, objective and never descend into advocacy. The Guidance for the Instruction of Experts to give Evidence in Civil Proceedings issued by the Civil Justice Council in 2014 explains, at paragraph 11:**
>
> > **"Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators.**
>
> **37. In The Ikarian Reefer [1993] 2 Lloyd's Rep. 68, Creswell J observed a page 81:**
>
> > **"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.**
> > **2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise....An expert witness....should never assume the role of an advocate.**
> > **3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider facts which could detract from his concluded opinion..."**
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> **38. In The Queen (on the application of Factortame) v The Secretary of State for Transport [2002] EWCA Civ 932, [2003] q.b. 381, Lord Phillips MR said at [70]:**
>
> > **"Expert evidence comes in many forms inr elation to many different types of case. It is always desirable than an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded having regard to the overriding objective of the Civil Procedure Rules".**
>
> **39. In Rowley v Dunlop [2014] EWHC 1995 (Ch). David Richards J (as he then was) said at [19]-[21]:**
>
> > **19. The essential character of expert evidence is that it should be the independent product of the expert uninfluenced by the pressures of litigation and that it should be objective and unbiased evidence on matters within the expert's evidence: CPR 35PD.2.1-2.2.**

20. The qualities of independence and lack of bias may be compromised by the expert's connections with the litigation or the parties or those who may benefit form the litigation. It is always a matter for the court to decide whether any such connections disqualify the expert from giving evidence or whether, as may often be the case, they go not to the admissibility of the evidence, but to the weight to be attached to it.

21. Such connections may take a number of forms, of which three are the most obvious. First, the expert may have a financial interest in the outcome of the litigation. Only rarely will the court admit the evidence of such an expert.... Secondly, the expert may have a conflicting duty Whether this will disqualify the expert from giving evidence will depend on the circumstances of the case ..... Thirdly, an expert may have a personal or other connection with a party, which might consciously or subconsciously influence or bias, his evidence. Such connections will not normally of themselves disqualify the witness, but will go to the weight to be attached to the evidence ..."

40. The problem of partisan expert evidence in the TCC was recently considered by Fraser J in ICI Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC). At [237], the judge restated the principles drawn from the case law and the Civil Justice Council's guidance and stressed that partisan expert is not the norm in the TCC."

123. There was no expert evidence before the Court which would prove that PLAN 600AN was correct. There was no or insufficient documentary evidence before the Court to make a determination as to where the Plaintiff's alleged Property truly lay. It was incumbent for Mr. Ledee or an expert witness to use all the referenced documents to demonstrate where the Property was situated. The documents used by Mr. Ledee were not in evidence to test their veracity and inaccuracy and the 1875 Sweeting Will and the 1963 Conveyance did not give any assistance to the location of the Property.

DECISION

124. The Plaintiff claims that she is the legal and beneficial owner of the Property located in Mangrove Cay, Andros by way of documentary and possessory title. In support of her claim she relies on the survey plan prepared by Mr. Ledee filed as 600AN to determine the location of the Property. As a result of this ownership, she alleges that the Defendant trespassed on the Property. Trespass is the "unjustifiable intrusion by one person upon land possessed by another."

125. The tort of trespass was considered in the appellate decision **Fairness Limited v. Steven Bain et al SCCivApp No. 30 of 2015** by Allen P where she stated:-

"28. Trespass is defined in Volume 97 (Tort) of the Fifth Edition of Halsbury's Laws of England (2015) as the unlawful presence on land in the possession of another. Indeed, according to that text, a person trespasses on land "if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession..."

.....

30. Moreover, so far as they are relevant to this case, the defences available against a claim for trespass are as set out at paragraphs 581, 583, 584, and 587 of the same volume and edition of Halsbury's:

> **"581 A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right; but he may not set up the title of a third person unless he claims under or by authority of such a person.....**
>
> **587. A claim of trespass to land is barred by lapse of the statutory period of limitation, which, except in certain specified cases, is six years from the cause of action arose."**

.....

41. In my view, the learned Chief Justice had no choice but to find that the respondents were trespassers, for once the respondents' documentary title fell away, they were without any title to the land. Indeed, adverse possession gives no interest or title unless or until it is declared by the Supreme Court on the conclusion of an investigation under the Quieting Titles Act. Before such title is declared, possession of the land remains just that; and the person, as Lyons J. said in Arawak Homes Ltd. v John Sands and Smith, Smith & Co.(Sued as a Firm) who enters and remains on land knowing someone else is the owner of the land as the respondents appear to admit, remains a trespasser until the land is so quieted."

126. In **Orlean Clarke et al v Kathreen Barry (aka Kathleen Clarke) in her capacity as Administratrix of the Estate of Benjamin Lawrence Johnson, Deceased) SCCivApp No 99 of 2019**, Barnett P considered who could commence a claim in trespass over land.

> **"16. A claim in trespass is based on an unjustifiable intrusion by one person upon land in the possession of another person. It can be brought at the suit of a person in possession of land. "Possession means generally the occupation or physical control of land". See Clerk & Lindsell On Torts 16th editions para 23-08. A person in possession of land can maintain a claim in trespass even in circumstances where he is not the owner of the land. On the face of the pleadings the plaintiffs are in occupation of the land and have been for a long period of time."**

127. 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."**

128. The Defendant claims that the Plaintiff does not have good title to the Property because of the defects in her title documents. In the wake of this claim, the documentary title of the Plaintiff must be examined in order to determine if the Plaintiff's title to the Property is good. The Defendant allegedly has two water tanks and a water storage facility on the Property in issue and they had them on the Property from at least 1983.

129. By **Section 3(4) of the CLPA** the owner of land is only required to prove a title of thirty years and if a Crown Grant is involved then it is extended to the year of the Crown Grant:-

> **"A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."**

130. The Plaintiff first relies on the Crown Grant F-28 to Joseph Evans dated 27th July 1787 as her root of title which grants One Thousand Five Hundred Acres situate upon Andros Island to Joseph Evans. This Crown Grant contains the portion of the land referred to as the Property and had a plan attached to the same.

131. Some almost one hundred years later, William Henry Sweeting purported to be the owner of the property which had been granted to Joseph Evans and he devised it as follows:-

- To my son Arthur Thomas for his natural life, at his death to be equally divided among his lawful children eight hundred and sixty acres of my tract of land on Andros Island situate between Southern and Middle Bights opposite Mangrove Cay, part of a tract originally granted to a certain Joseph Evans the said eight hundred and sixty acres to adjoin the Eastern line of said original tract of land granted to John Kemp,
- To Phoebe Ann Braynen I give devise and bequeath for her life time and at her death to be equally divided among her lawful children, six hundred and sixty acres of the aforesaid tract on Andros Island originally granted to Joseph Evans, the said Six Hundred and Sixty acres to adjoin a portion of the Western line of said original tract,
- To my sister Seva Butler, widow, I give, devise and bequeath One hundred acres of the aforesaid original tract on said island which is to adjoin on the West and formerly granted to Thomas Hodgson and ..... on the sea.

132. In The Schedule of the Personal Estate and Effects of Albert Braynen, attached to the Renunciation of Letters of Administration filed 10th April 1952 by Lauretta Braynen in the Estate of the late Albert Braynen no mention is made of the Property. Lauretta Braynen being the daughter of Albert Braynen who died on 9th June 1929.

133. In the Return filed 16th April 1952 by Lauretta Braynen in the Estate of Albert Braynen late of Fresh Creek, Andros, Carpenter, there is also no mention made of the Property.

134. The same is true for the Administration Bond filed 16th April 1952.

135. On 18th October 1957, Lauretta Braynen swore an Affidavit stating that she knew of the Forty Six Acre tract of land at Fresh Creek which was purchased by Peter Coakley, Maurice Minnis, William Cargill and Joseph A. Braynen. She worked the land from the year 1910 until 1951, first with her father the late Albert Braynen until his death in 1929 and thereafter with her husband the late Herbert Leonard Braynen until 1951 when the Andros-Bahamas Development Company Limited took over.

136. This tract of land was described to be bounded Northeastwardly by land now the property of Andros-Bahamas Development Company Limited Southeastwardly partly by land now the property of the said Andros-Bahamas Development Company Limited and partly by land originally granted to a certain Richard Boyd Southwestwardly by a piece parcel or strip of land now or lately reserved by the Crown as a reservation for a road Ten (10) feet wide and Northwestwardly by a tract of land originally granted to Phyllis Braynen. The said tract of land was worked by Richard and Arementha Braynen, Albert Braynen, William and Lilla Cargill, Lauretta and Herbert Leonard Braynen and Lillian Clare.

137. By the 1963 Conveyance, Lauretta Braynen then purported to grant and convey to Carl Braynen Six Hundred Sixty Acres more or less being a portion of a Eight Hundred Sixty Acres of tract of land granted to Joseph Evans and situated in the settlement of Mangrove Cay, Andros.....between Middle and Southern Bight more particularly described in the Will of William Henry Sweeting late of Mangrove Cay Andros. There is no plan attached to this Conveyance.

138. By his Will dated 13th September 2007, Carl Albert Braynen gave, devise and bequeathed to the Plaintiff all of his real and personal property whatsoever and wheresoever situate. He did not specifically mention the Property. The documents in support of the probate application were not provided which would usually set out a list of the deceased's assets.

139. A Deed of Assent with respect to the estate of Carl Albert Braynen was granted to the Plaintiff on 14th October 2009.

140. A review of the aforementioned title documents reveals a large gap between the Crown Grant to Joseph Evans and the 1875 Sweeting Will. There is no evidential connection between the two and it begs the question of how William Sweeting came into possession of the Property. Moreover, the probate documents filed in the estate of the late Albert Braynen make no mention of the Property as being property owned by the late Albert Braynen. Further there are no documents submitted which show how the Property came to be owned by the late Albert Braynen.

141. The description of the property set out in the 1957 Affidavit of Lauretta Braynen does not match the description of the property set out in the 1875 Sweeting Will. Additionally, the Affidavit infers that the said Lauretta, who was sixty three years old at the time of the affidavit, had worked a forty-six acre tract of land for a period of forty-one years. She knew that the property was purchased by Peter Coakley, Maurice Minnis, Willia Cargill and Joseph A. Braynen. She first worked the land with her father Albert Braynen from 1910 to 1929. Thereafter, from 1929 onward she worked the land with her husband, the late Herbert Leonard Braynen until 1951 when the Andros-Bahamas Development Company Limited took over the Property. The reference to working the

land presumably infers physical possession of the land however, there is no evidence of any quieting by Albert Braynen or anyone,.

142. Reliance on the 1963 Conveyance is also questionable as there is no plan attached to describe the Property referred to nor is there a proper description of the property. Reference is made to the Six Hundred and Sixty Acres from Joseph Evans to Phoebe Ann Braynen but the failure to mention any conveyance from Phoebe Ann Braynen to anyone else raises doubt as to the validity of the title.

143. Given the aforementioned inaccuracies cited in my investigation of her title, inclusive of the lack of the description of the Property in the 1963 Conveyance and the lack of a plan, I am not satisfied that the Plaintiff can prove a good and marketable documentary title to the Property as is required to be shown by section 3(4) of the CLPA.

144. In **I.F. Propco Holdings (Ontario) 39 Ltd. v. Huyler [2018] 1 BHS J. No. 197**, a case which also dealt with a claim of trespass, Charles J was tasked with a similar review of title documents in order to determine which of the parties had documentary title to the property in question. She held that the plaintiff was the documentary owner of the property as the defendant had adduced insufficient evidence that her late husband's family had owned the property.

145. In light of the fact that a Will being relied on did not make mention of the property Charles J held,

> **"She and her witness relied on the Last Will and Testament of Clotilda Huyler which makes no reference to the disputed property. It is passing strange that such a vast acreage was omitted from the Will of Clothilda Huyler."**

146. I too am concerned that the 660 acres of land was omitted from the Will of the late Albert Braynen. Moreover, as aforementioned there is no proper description of the Property in the 1963 Conveyance nor is there a plan attached.

147. **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 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."**

148. There is no document produced by the Plaintiff which meet this definition. The fact that the conveyance to Carl Braynen is over thirty years is not dispositive of the issue. When the title is being disputed, more is required to establish a good root of title. Accordingly, I do not find that the Plaintiff is the owner of the Property by documentary title and the 1963 Conveyance provides no proof of ownership of the property in dispute as it is not a good root of title.

149. The survey which consumed much evidence and submission in my opinion is secondary only to the issue which the Court must first determine.

150. A land survey is a review of land to determine its physical boundaries and provides a description of what is on the property surveyed inclusive of physical structures and natural markers. It does not determine who owns the land, even though it may make references to title deeds. The title deeds will normally give the Surveyor some indication of where the land to be surveyed is located. The survey when completed will still not be proof of the ownership of the land. The title deeds, as confirmed by the Court or a court order declaring ownership in a disputed claim is dispositive of ownership.

151. The parties dispute whether Plan 600AN is accurate. The Plaintiff who relies on it to show the boundaries of the Property of course submits that it is. However, the Defendant submits that it is not and questions the conduct of Mr. Ledee in the survey and work done in order to prepare Plan 600AN. In addition to Plan 600AN, there is evidence agreed to by both parties which shows that both parties accepted that the Defendant's water holding tanks and storage were situate on the Property.

152. Both parties have, as they should, vigorously fought to highlight the discrepancies and consistencies in each other's case. Ultimately, the Court, in following set guidelines and principles of evidence and procedural rules must make a determination of which evidence to consider and the veracity of the same. In considering the evidence before me, I find that the property claimed by the Plaintiff is that on which the water holding tanks and storage are situate.

153. The issue of whether the 600AN is correct or valid does not in my view dispose of the issue. I accept, however, that the survey was properly registered with the Department of Lands & Surveys and is proof of property surveyed therein, however it does not prove that the Plaintiff owned the Property.

154. I must now consider whether the Plaintiff or the Defendant holds a possessory title to the Property. By her evidence, the Plaintiff averred that she became the legal and beneficial owner of the Property in 2009. Between 2009 and 2011, she hired Mr. Ledee to survey the property. She does not live on the Property and the survey she had conducted in 2009 is evidence of her intention to possess the property.

155. The 1983 Memorandum dated 14th April 1983, from the Assistant Registrar of the Ministry of Works & Utilities to its Permanent Secretary, reflects the presence of a wellfield and water distribution system owned by the Defendant in Mangrove Cay. This was a document contained in the parties' Agreed Bundle of Documents. Although the maker of the 1983 Memo was not a witness in the trial to speak to the contents of the document, it is evidence of possession of the Property by the Defendant, in support of its latter correspondences questioning title and its defence against the Plaintiff. Further, I am satisfied that considerable weight should be given to this document as it was made prior to the claim by the Plaintiff and prior to her acquiring property which her father had devised.

156. While this memorandum does not specify the exact location of the property on which the wellfield and water distribution system are located, subsequent correspondence confirms that they are located on the Property in dispute. Their presence is not disputed as it forms the basis of the Plaintiff's claim. By this evidence, the Defendant has been in physical possession of the property for thirty-eight years. Apart from the presence of the well field and tanks, the only other evidence of any possession is a school, and some houses which are acknowledged by the Plaintiff as not hers and belong to other persons or entities. There is no evidence that her father physically possessed the land. Any evidence of prior possession ended in 1951 according to the affidavit of Lauretta Braynen if the property referred to therein is the same and prior to her father acquiring the property. In fact the affidavit speaks to the property being taken over by the Andros-Bahamas Development Company Limited.

157. The payment of the twenty thousand dollars by the Defendant to the Plaintiff confirms the Defendant's intention to possess the Property. Mr. Adrian Gibson, as chairman of the Defendant, issued the Defendant's cheque in the aforesaid amount to the Plaintiff's attorney, as a good faith partial settlement of her then purported claim.

158. In **In the Petition of Eleuthera Land Company Limited (supra),** Charles J also considered the intention to possess:-

> "**Intention to possess**
>
> **125 Slade J. in Powell defines the *"animus possidendi"* in this way:**
>
> **"(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." [Emphasis added]"

159. I also addressed this question of the intention to possess in the Petition of Wilfred Butler Jr. et al in which I referred to the Privy Council Decision of **Bannerman Town, Millars and John Millars Eleuthera Association (Appellant) v Eleuthera Properties Ltd. (Respondent) (Bahamas) [2018] UKPC 27** where the Board 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."**
>
> **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 coowners of the land pursuant to Ann Millar's will. Such a belief, even if mistaken, is sufficient for the purposes of intention to possess: see Roberts v Swangrove Estates Ltd [2008] Ch 439. All that is common ground.**
>
> **52. Possession of land may be exercised jointly, and vicariously. Where a number of persons are proved to have occupation and use of land together, and the question arises whether they had joint possession of the whole of the land, this will usually turn upon the agreement, arrangement or shared common intention (if any) between them: see eg Bigden v London Borough of Lambeth (2001) 33 HLR 43; Brown v Faulkner [2003] NICA 5(2); Churcher v Martin (1889) 42 ChD 312 and (in Canada) Afton Band of Indians v Attorney General of Nova Scotia (1978) 85 DLR (3d) 454.**

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.

160. 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."**

161. The Property being claimed by the Plaintiff is a large tract of land. There is no evidence of the Surveyor placing new markers or fencing on the land or any overt act of ownership. The payment by the Defendant to the Plaintiff reflects that in May 2018, the Defendant did not have the intention to possess the Property to the exclusion of the Plaintiff. This was short lived however, as the 16th November 2018 letter from the Defendant's attorney questioned the Plaintiff's ownership of the Property. Thereafter, by letter dated 11th February 2019 the payment of the twenty-thousand dollars was requested to be returned to the Defendant. However, possession is not determined to be undisturbed until legal action is commenced to address such claims and a finding is made with respect to the same.

162. Additionally, other than the Plaintiff's claim that Mr. Gibson stated that the matter should have been handled by the previous administration and prior to the payment, the Defendant never accepted that the Plaintiff was the legal and beneficial owner of the Property.

163. The Plaintiff had the intention to possess but not to the exclusion of all others as she did not seek to have the school or residential homes situated thereon removed from the Property. She in fact indicated that she was aware of their presence but because it was a school she did not intend to seek possession. In **Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd (Bahamas) [2018] UKPC 27**, Lord Briggs, when considering possessory title, found that the parties failure to prevent use of the land by others will not support their claim to possession of the whole land in question.

> **"Finally, the isolated occasion upon which EPL initiated possession proceedings against the occupier of a particular small part of the Property in 2009, thereby securing his departure, cannot in the Board's view have amounted to taking possession of the whole of the Property. This is so whether or not any court order had to be obtained, as to which the evidence is not clear. Like the Association, EPL made no separate claim for title to any part of the Property as opposed to the whole."**

164. It is commonly accepted within the jurisdiction, that a person's documentary title is not absolute. Accordingly, if another person can prove a better title whether documentary or possessory, the Court will make a finding in favor of the better title. Barnett CJ (as he then was) also came to this conclusion in **In the Matter of the Quieting Titles Act, 1959; In the Matter of the Petition of Shameka L. Morley** [2010] 3 BHS J No. 82 where he stated: -

> **"23 It is common ground that the documentary title to the Lot was vested in Budget Properties Limited. The Petitioner's own Abstract of Title confirms this fact. Budget Properties held its interest in the Lot on trust for Mrs. Spriggs, she having paid for the Lot. As owner of the documentary title, Mrs. Spriggs is deemed to be in possession of the Lot #7.**
> **24 In Powell v McFarlane [1977] 38 P&CR 452 Slade J said:**
>
> > **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.**
>
> **This decision was expressly approved by the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419.**
> **25 Mrs. Spriggs can only be disentitled by someone who had been in adverse possession for 12 or more years. Such possession must be exclusive and continuous. Prior to the presentation of this Petition, neither the Petitioner nor Mr. Franklyn Farrington had been in such adverse possession."**

165. Accordingly, even if I am mistaken in finding with respect to the Plaintiff's title, the Defendant occupied the Property undisturbed and was utilizing the water tanks and water storage facility units from at least 1983 when the 1983 Memo was issued confirming their presence thereon. The Plaintiff herself acknowledged that she became the owner of the Property in 2009 which is when she became aware of the Defendant's occupation of the Property, some twenty six years later which exceeds the statutory time set for possession. The hiring of Mr. Ledee to survey the Property would not have been a sufficient act to constitute actual possession.

166. After considering all of the evidence and the submissions of the parties, I find therefore that the Plaintiff did not have factual and physical possession nor the intention to exclusively possess the Property in question in order to oust the possession of the Defendant which the Plaintiff claimed to have owned by virtue of the 2009 Deed of Assent. I am also not satisfied that her predecessor in title held good title in order to devise the same to her. I also find that the Defendant had factual and physical possession of the Property as well as the intention to possess for more than the requisite period as set out in the Limitation Act. I am satisfied that the survey which was duly registered with the Department of Lands and

Survey only set out the boundaries to the Property in question but did not determine who owned it.

CONCLUSION

167. The Plaintiff's Writ of Summons filed 17th October 2018 is hereby dismissed.

168. The Plaintiff shall return to the Defendant the sum of Twenty Thousand Dollars.

169. The Plaintiff shall pay to the Defendant the costs of the action to be taxed if not agreed.

Dated this 2nd day of December 2022

The Hon. Madam Justice G. Diane Stewart