

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2017/CLE/qui/00601**

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

**AND**

**IN THE MATTER of all those TWO pieces parcels or lots of land being Lot Numbered 28 and 29 of Churchill Subdivision situate about 800 feet North of Soldier Road in the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas.**

**AND**

**IN THE MATTER OF the Petition of NAOMI ROKER**

**(in respect of Lot No. 29)**

**AND**

**IN THE MATTER OF the Petition of HERBERT ROKER and NAOMI ROKER**

**(in respect of Lot No. 28)**

**Before:** The Honourable Chief Justice Sir Ian R. Winder

**Appearances:** Norwood Rolle for the Petitioners  
Arlene Horton-Strachan for the Adverse Claimants Brenda Lee Forbes and Earl Cephas Forbes

**Hearing date(s):** 12 December 2019, 28 January 2020, 1 September 2021, 23 August 2022, 3 December 2022, 19<sup>th</sup> July 2023 and 21 July 2023

**JUDGMENT**

## WINDER, CJ

This is the Petition of Herbert Roker (Herbert) seeking Certificates of Title for Lots 28 and 29 Block 1 of the Churchill Subdivision in the Eastern District of the Island of New Providence. The claim to Lot 29 is made on behalf of the Estate of Naomi Roker (Naomi). Naomi was Herbert's wife. The claim to Lot 28 is made jointly by Herbert and the Estate of Naomi. The possessory claim to Lot 29 is opposed by the Adverse Claimants Brenda Lee Forbes and Earl Cephas Forbes. The claim to Lot 28 is not opposed by any adverse claimants.

### Background

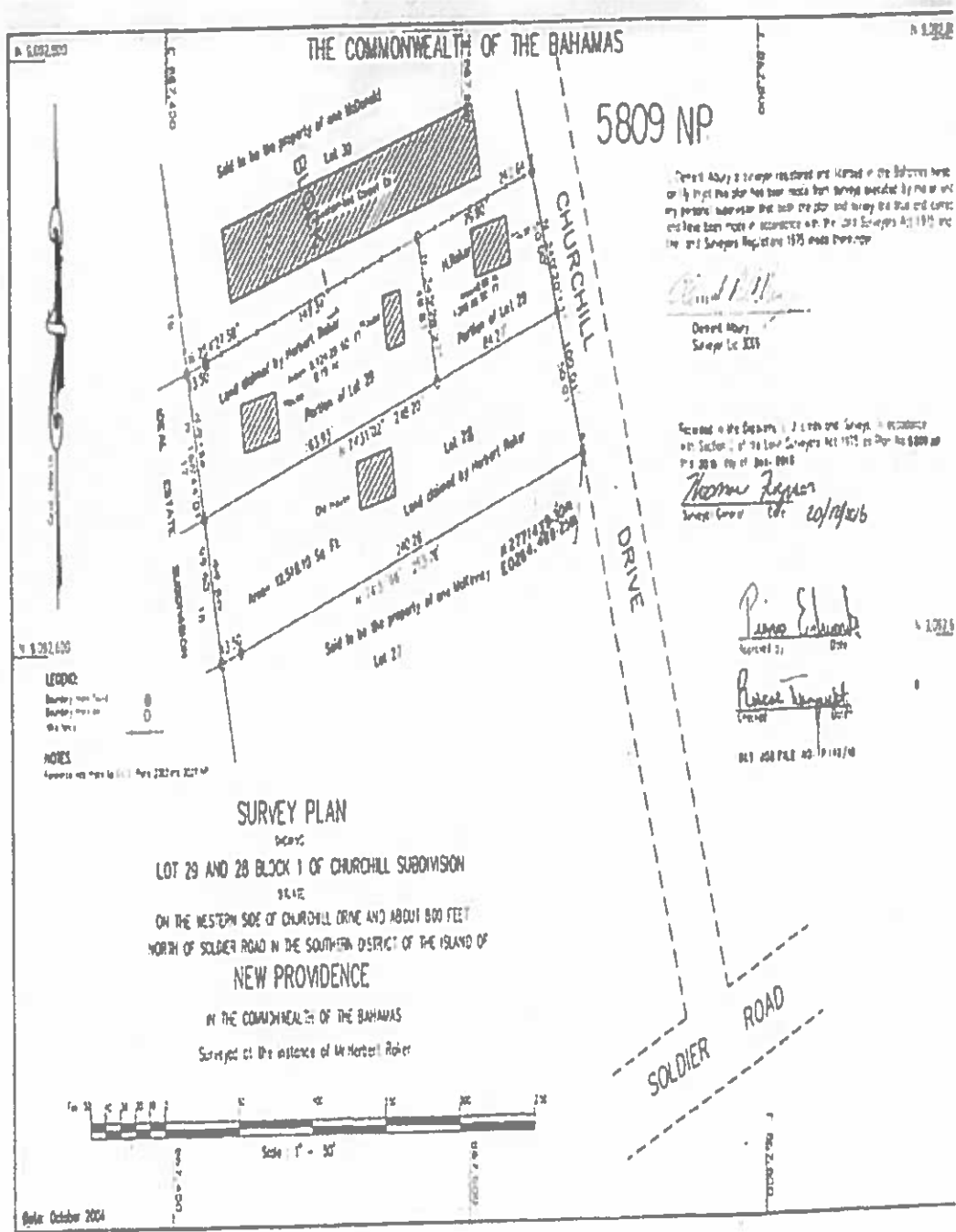
[1.] The Petition was filed on 11 May 2017 and pleads a possessory claim. In support of the Petition, the Petitioners filed a joint affidavit on 11 May 2017, the affidavit of Herbert dated 13 June 2017, the affidavit of Richard McDonald dated 13 June 2017, the affidavit of Allworth Pickstock dated June 13 2017 and the affidavit of Clement Albury also dated 13 June 2017.

[2.] The Abstract of Title was filed on 16 May 2017 and sets out their claim to the property, in part, in the following manner:

PETITION		
2005 13 <sup>th</sup> January	28.	By Petition of this date in Action 2005/CLE/qui/634 the Petitioner, together with her husband, Herbert Roker, made application under the said Act for a determination that she, together with her husband, are the owners of the subject property (Lot No. 28) together with Lot No. 29 in the said Subdivision.
Notes:		(i) Summons for Directions was filed the same date; (ii) There is no record of that Summons being heard; (iii) There was no publication of the Notice pursuant to section 6 of the Act.
2014 19 <sup>th</sup> November	29.	By Order of the Supreme Court dated this date the Petitioner was granted leave to withdraw the said Petition mentioned at para 28 herein in accordance with an application filed the 15 <sup>th</sup> September, 2017.
		(i) Copy of the said Order and Notice of Withdrawal will be produced.

		OCCUPATION/POSSESSION LOT No. 28 and Lot No. 29.
1984	30.	<p>In or about this year John Forbes put the Petitioner, Naomi Forbes, in possession of Lot No. 29 Block 1 in the Churchill Subdivision, to whom the Petitioner paid lease up to the time of his death in 1991. Upon entering into possession of Lot No. 29 the Petitioner, Naomi Forbes, ALSO entered into possession of Lot No. 28 in the said Subdivision. The Petitioner, Naomi Forbes, began constructing her home on Lot No. 28 in 1989 and completed the same in or about 1992. Sometime after the completion of her home, the Petitioner was joined, in her undisturbed uninterrupted and continuous occupation of Lot No. 28, by her husband.</p> <p>After entering into occupation of Lot No. 29 the Petitioner remained in quiet undisturbed and continuous physical possession of the same, exercising rights of ownership by weeding it, keeping it clean, planting flowers and the usual Bahamian seasonal crops and protecting it from being trespassed upon by others until in or about 2017 when a person by the name of Earl Forbes attempted to enter the same.</p>
2007 19 <sup>th</sup> September	31.	<p>By a generally indorsed Writ of Summons intituled (sic) Earl Forbes as Plaintiff and Hubert Roker and Naomi Roker as Defendants 2007/CLE/GEN/01232 issued this date a person by the name of Earl Forbes claimed to be “the owner and entitled to possession of the premises situated at Churchill Development”.</p> <p>Note: (i) A copy of this document will be produced.</p>
2007 19 <sup>th</sup> October	32.	<p>On this date the Defendants entered their Memorandum and Notice of Appearance.</p>
2009		<p>On this date the Plaintiff issued his Statement of Claim wherein he stated that he is “the owner of all that lot of land situated at number 29 block number 1 in the Church Hill Development...” and claims possession thereof.</p> <p>Note: (i) Copy of this document is produced (ii) There have been no other activity in this matter subsequent to the filing of the Statement of Claim.</p>

[3.] The plan of the Petitioners filed on 22 November 2000, 5809NP, is set out below:



[4.] Notice of the Petition was duly advertised pursuant to the Directions Order made on 26 September 2017. Naomi died in July 2018 prior to the commencement of the trial and therefore Herbert carried on the claim on behalf of her estate. The trial began on 12 December 2019 and during the course of the taking of the evidence the Court determined that it was appropriate to serve notice of the proceedings on the family of the Adverse Claimants. Whilst the Adverse

Claimants assert that the notice did not come to their attention, they successfully applied to be joined as Adverse Claimants under Section 7 of the QTA.

[5.] The Adverse Claim of Brenda Lee Forbes and Earl Cephas Forbes along with the affidavits in support and Abstract of Title was filed on 3 February 2022.

[6.] The Adverse Claimants each claimed a documentary title to the western (Brenda Lee Forbes) and eastern (Earl Tony Forbes) portions of Lot 29. The purported chain of title is as follows:

(1) Conveyance: North and South Holdings Limited to Agnes and Cephas Forbes dated 23rd July, 1956 and recorded in the Registry of Records in Volume 56 at pages 510 to 514, lot #29, Block 1 Churchill Subdivision.

(2) Cephas Forbes, by a Deed of Gift, dated 4<sup>th</sup> August 1971, conveyed the western moiety of lot #29 to his brother John Forbes. John Forbes by his will, appointed his brother Allan Forbes and his wife Ruth Forbes as Executor and Executrix and devised as follows;

*“all of his real estate to his Trustee upon trust for his wife Ruth Sylvia Forbes during her life; upon trust for such of my said children, namely, John Forbes Jr. Reginal Forbes (sic), Joseph Washington Forbes, Edna Mae Forbes, Brenda Lee Forbes, Stephanie Deloris Forbes and Linda Elizabeth Forbes as shall be living.”*

Brenda Lee Forbes claim is from the estate of her father John Forbes.

(3) Earl Tony Cephas Forbes, lawful son of Cephas Forbes, who died intestate was granted Letters of Administration from the Supreme Court in the Estate of his father in 2000 in action 302/2000. A Deed of Assent in his father Estate for the eastern moiety or one half of Lot #29, Block 1 Churchill Subdivision dated 16<sup>th</sup> August 2002 recorded in the registry of records in Volume 8416 at pages 432 to 447. Earl Tony Cephas Forbes mortgaged this property to Scotia Bank as security for the mortgage and a search of the records, did not find a recorded satisfaction of this mortgage.

[7.] At the trial of the Petition, the Court heard from Herbert Roker, Richard McDonald, Clement Albury, Brenda Lee Forbes and Earl Cephas Forbes.

[8.] The central issue for determination is whether the possessory title claimed by Hubert to Lots 28 and 29 has extinguished the documentary claim of the Adverse Claimants and or the documentary title owner

Law, Analysis and Disposition

[9.] As to the activities on Lots 28 and 29, the evidence which I accept, having seen and heard the witnesses as they gave evidence and observed their demeanor, is as follows:

- (1) Cephas Forbes and John Forbes were brothers. Cephas and his wife Agnes Forbes acquired Lot 29 from North and South Holdings Limited on 23 July 1956. Cephas gifted the western portion of Lot 29 to his brother John Forbes on 14 August 1971, retaining the eastern portion.
- (2) The Adverse claimants are the heirs of Cephas Forbes and John Forbes and therefore represent the documentary title owners. Lot 29 was occupied by many tenants of the siblings over the years including Sonia Dean, Harry Dean and Amos Rahming.
- (3) Naomi was permitted onto the front portion (the eastern portion) of Lot 29 by John Forbes by way of an annual rent of \$50.00 in or about 1990. Naomi was a relative of John and it appears that following a stint in prison she was allowed by her relative to construct a home onto the property. Naomi paid the \$50.00 rent to the late John Forbes annually until his death and thereafter paid the same amount to his widow Ruth Forbes until the year 2001.
- (4) I did not find that Herbert and Naomi went onto Lot 28 when they built the house in 1992 or at all.
- (5) Naomi constructed her house on the property and obtained utilities and a Certificate of Occupancy, from the relevant government agencies and entities, in 1992. At some point she fenced in Eastern and Southern boundaries of Lot 29 as these boundaries had not been enclosed by neighbours as the others. The fence to the Southern boundary of Lot 29 separates it from Lot 28. I will find that she did not fence in the entirety of any of the properties until 2010.
- (6) On 6 October 2001, Ruth Forbes issued a ‘Notice to Vacate’ to all tenants on the property, including Naomi and simultaneously waived the rent for the year 2002. Naomi refused to vacate the property but the others did.
- (7) I did not accept the evidence that when the other tenants vacated the western portion of Lot 29, Herbert and Naomi entered into occupation of that portion as well. There are three buildings on Lot 29 and only one was occupied by Naomi and Hubert. I am satisfied that Naomi and Hubert occupied only the eastern portion of Lot 29, where their house was built. While I am prepared to find that the fence was placed across the front of the property denying access to the property, I am not prepared to find that this occurred prior to 2010.

- (8) Earl took out a mortgage over his portion of Lot 29 on the 23 December 2002 in favor of Scotiabank and made payments of real property taxes in 2022. I did not find that the acquisition of a mortgage on the property by Earl from Scotiabank Bahamas Limited extended the limitation period in his or the Bank's favour.
- (9) On 13 June 2005 Naomi and Hubert jointly commenced Action 2005/CLE/qui/634 claiming to own Lots 28 and 29. On 16 December 2014 they sought leave to discontinue that action.
- (10) Action # 2007/CLE/gen/01232 was commenced in the Supreme Court by Earl on 19 September 2007 against Hubert and Naomi. The Statement of Claim provides, in part, as follows:

...

6. That on 16<sup>th</sup> day of August, A.D. 2002 Earl Tony Forbes as Administrator to the estate of Cephias Forbes conveyed to Earl Tony Forbes as beneficiary and heir-at-law of Cephias Forbes all that property being a portion of lot number 29 block 1 in the Church Hill Development. The said Assent was recorded at the Registry of Records at volume 8416 at pages 432 to 437.
7. That in or about 2002 the Defendants wrongfully entered onto the land and notwithstanding repeated request by the Plaintiff to vacate and deliver up the same they have failed and refused to do so.
8. That the Defendants intends unless sustained by this Honourable Court to continue to remain in wrongful occupation of the said land and to trespass thereon.

The Plaintiff claims:

- (i) An injunction to restrain the Defendants by themselves and or by servants and or agents or otherwise from remaining on or continuing in occupation of the said land.
- (ii) Possession of the said land situated at Block number 1 of lot number 29 of the Church Hill Development.
- (iii) Damages for mesne profits.
- (iv) Interest.
- (v) Cost.
- (vi) Such further and or any other relief as the Honourable Court deems fit.

Today, that action, some 17 years later has not been prosecuted by Earl beyond the filing of the Statement of Claim, which does not appear to have been served on the Defendants. No order for any ejectment has taken place.

[10.] Section 3 of the QTA provides that:

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

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

8. (1) The court in investigating the title may receive and act upon any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.

(2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or to produce any evidence which by the Conveyancing and Law of Property Act is dispensed with as between vendor and purchaser, or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.

(3) The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court.

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

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

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



(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and use must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": *West Bank Estates Ltd. v. Arthur*, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. On the particular facts of *Cadija Umma v. S. Don Manis Appu* the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the *Red House Farms* case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: per Cairns, Orr and Waller L.JJ. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the

paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

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

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

**Possession by adverse possessor**

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

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

[15.] It is difficult to contest that Naomi was in factual possession of the eastern portion of Lot 29 where she built her home. She was in occupation and conducted all of the activities an owner would. She later partially fenced-in the property and conducted surveys. She refused to move off the property when asked by Ruth Forbes to do so in 2001 (notwithstanding Ruth was not the owner of that portion of Lot 29). She also refused to vacate when sued by Earl in action 2007/CLE/gen/01232.

[16.] The commencement of the action by Earl, some 17 years ago which has not been pursued to a successful conclusion, does not operate to stop time running against him, so as to interrupt the possession of Naomi. The Trinidadian High Court case of *Henry v Brazel* Claim No. CV 2014-04517 provides a useful discussion on this issue. In that case *Rajkumar J* (as he then was) stated:

**Effect of Non-Pursuit of Previous Action**

20, See Adverse Possession: Stephen Jourdan at pages 270-271 para 15-16; also referring to Brampton –v- Burchall (1842) Beav 67; Dixon –v-Gayfere (1853) 17 Beav 421 at 427 and Markfield Investments Limited –v- Evans [2001] 1 WLR 1321:

“that the commencement of an action to recover the disputed land will stop time running. However, if such an action is commenced, but not pursued to judgment, and is eventually discontinued, struck out, stayed or simply abandoned, it has no effect on the running of the limitation period. In Markfield Investments Limited –v Evans, Simon Brown LJ said:

With regard to any particular action the relevant time, and the only relevant time, for consideration of adverse possession is that which has expired before such action is brought. That is the language of section 15 and, as Dillon LJ explained, that is the effect of the legislation. The fallacy in Mr Treneer’s argument is in supposing that because one ignores in the first action any adverse possession which follows the writ, so too that same adverse possession falls to be ignored in the second action. That is just not so and there is nothing in the statute or authorities to suggest that it is. For the purposes of any particular action, the issue of a writ in earlier proceedings is no more relevant than a demand for possession. In Mount Carmel Investments Ltd v Peter Thurlow Ltd such a demand was held not to start time running afresh; no more would the service (still less the mere issue) of some earlier writ. Were it otherwise, as the defendant points out, all the true owner would have to do to avoid adverse possession claims is issue (and perhaps serve) a writ every 12 years without more”.

[17.] I am satisfied that following 2002, as accepted by Earl in Action # 2007/CLE/gen/01232, Naomi went into possession of the eastern portion of the property adverse to the interest of the documentary title owner and remained in such adverse possession

[18.] I am not so satisfied that this is the case for the western portion of Lot 29 or for Lot 28. Notwithstanding there is no Adverse Claimant for Lot 28 I am not satisfied, on the evidence which I heard and accepted, that there was sufficient factual possession and animus possidendi for the grant of a certificate for the 12 year period prior to 2017 when the action was commenced.

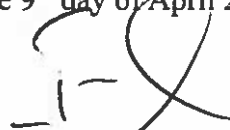
[19.] In the circumstances I grant the following Certificates of Title:

- (a) Hubert (on behalf of the Estate of Naomi) shall receive a Certificate of Title to ALL THAT piece parcel or lot of land being the Eastern portion or Moiety of Lot #29 Block 1 of the Churchill Subdivision subject to a right of way to Brendalee Forbes (on behalf of the Estate of John Forbes); and

(b) Brendalee Forbes (on behalf of the Estate of John Forbes) shall receive a Certificate of Title to ALL THAT piece parcel or lot of land being the Western portion or Moiety of Lot #29 Block 1 of the Churchill Subdivision

[20.] In the circumstances I make no order as to costs.

Dated the 9<sup>th</sup> day of April 2024

A handwritten signature in black ink, appearing to be 'I. Winder', written over a horizontal line.

Sir Ian R. Winder  
Chief Justice