

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2011/CLE/qui/00661

IN THE MATTER of the Quieting Titles Act, 1959

AND

IN THE MATTER of All that piece parcel or tract of land comprising 37.02 acres situate 1.5 miles East of the Township of Governor's Harbour on the South side of the Banks Road in the Island of Eleuthera one of the Islands of the Commonwealth of The Bahamas

AND

IN THE MATTER of the Petition of Rushel Rowena McKlewhite, the Executrix of the Estate of the late DAVID CHARLES "BILLY" McKLEWHITE

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Elliott Lockhart QC with him Ms. Gia Moxey for the Petitioner
Mrs. Onan Lamour-Williams for the Adverse Claimants

Hearing Dates: 18 April, 26 April, 12 May 2016
29 March, 30 March, 29 September, 19 October, 20 November, 15 December, 20 December 2017, 20 November 2018

Civil – Quieting Proceedings — Documentary Title – Possessory Title - Role of Court – Investigative in nature to determine and declare who has the better title – Quieting Titles Act, 1959

Adverse Possession – Factual possession – Intention to possess - Whether paper owner dispossessed – Limitation Act 1995, s. 16(3) – Whether Petitioner and Adverse Claimants entitled to equal undivided interest

The Petitioner and the Adverse Claimants are blood relatives. The Petitioner brought this quieting petition under section 3 of the Quieting Titles Act, 1959. In his Petition, he claims to be the owner in possession of the property. He asserts that he and his predecessors have been in exclusive and continuous possession of the property since in or about the 1960's and save for him and his predecessors, no other person has occupied the property or interfered with his occupation.

In the Petitioner's Abstract of Title, he alleged that sometime in the 70's, he and his mother entered into possession and began farming thereon jointly. His mother died in 1981. Two witnesses for the Petitioner alleged that the Petitioner permitted them to dump garbage and

excavate fill from the quarry for the payment of a fee. They were also aware that the Petitioner closed the property with a chain link. The Petitioner's daughter confirmed that her deceased father, the Petitioner, placed a chain with a lock across the main entrance of the property and she holds the key to that locked fence. She also stated that she has never seen the Adverse Claimants on the property.

The Petitioner therefore claims a possessory title to the property.

The Adverse Claimants claim a documentary as well as a possessory title in the property. They say that their interest in title passed by way of succession from their predecessors stemming from the estate of James Bethel whose estate was duly probated in the Supreme Court which issued Letters of Probate to the Executrix, Alice Maude Charles in Supreme Court Action No. 113 of 1955.

It is against this brief background that the Court consider the competing claims to determine and declare which of the claimants has the better or superior title.

HELD: the Petitioner's claim for possessory title is dismissed. After due inquiry, the Court finds the both the Petitioner and the Adverse Claimants are entitled to an undivided right to title and interest in the property comprising 37.02 acres by virtue of inheritance.

1. 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: per Lord Diplock in **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19 at page 25 and **Strachan & Others v Camperdown Holdings Limited** SCCivApp. No.224 of 2014 referred to.
2. It is an elementary principle of law that a person's title to land including the person who has the documentary title ("the paper owner") is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that a person who is in possession as a trespasser/squatter without the permission of the paper owner can obtain a good title if the paper owner fails to assert his superior title within the requisite limitation period. After the limitation period has expired, the paper owner, who has slept on his rights, will be barred from asserting them against the persons in adverse possession and his rights will be extinguished.
3. In order to dispossess the documentary title owner, a trespasser must establish both (a) factual possession and (b) the requisite intention to possess. **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 and **Powell v McFarlane** 91977) 38 P & CR 452 referred to.
4. The Petitioner has not shown that he and his predecessors have been in exclusive possession of the property for a continuous period of 12 years to oust the documentary title holders. The evidence indicates that the Petitioner and his mother, Jacqueline Thompson entered into possession of the property sometime during the 1970's and they farmed a portion of the property until his mother died on 17 December 1981. At most, the farming lasted for 11 years. The witnesses for the Petitioner was unable to give specific dates when the Petitioner permitted them to dump garbage and excavate fill from the quarry. In any event, these activities were concentrated on a portion of the land. The Adverse Claimant, Florence Sands said that she was well aware that the Petitioner was

using portions of the property to which she had no issue as they are all entitled equally to the property. The placing of a chain link and no-trespassing and no-dumping signs were done in or about 2007, i.e. 4 years prior to the filing of the Petition.

JUDGMENT

Charles J

The application

[1] By Amended Petition filed on 4 November 2013, David Charles “Billy” McKlewhite, (“the Petitioner”), now deceased but represented in these proceedings by his daughter, Rushel Rowena McKlewhite who is the Executrix of his Estate (“Ms. McKlewhite”) claims to be the owner in possession of 37.02 acres of land situate 1.5 miles East of the Township of Governor’s Harbour on the South side of the Banks Road in the Island of Eleuthera (“the property”). The Petition is supported by:

- (i) The Statutory Affidavit of the Petitioner filed on 18 May 2011 in accordance with section 5 of the Quieting Titles Act, 1959 (“the QTA”);
- (ii) A Plan No. 984/EL which is filed and registered pursuant to section 2 of the Land Surveyors Act, Chapter 251 and section 4(h) of the QTA;
- (iii) An Amended Abstract of Title of the Petitioner filed on 15 September 2015 and;
- (iv) The Affidavits of Austin Knowles Sr. and Clifford Sands.

[2] On 4 April 2014, Florence Sands, Felicia Bethel and Alberta Culmer (“the Adverse Claimants”) filed an adverse claim which was supported by an Abstract of Title filed on 24 July 2014. The Adverse Claimants opposed the Petitioner’s application and seek an Order that they be added as equally entitled to an undivided right to title and interest in the property by virtue of inheritance and to be named as possessory coparceners along with the Petitioner.

Procedural history

- [3] This matter first came before me on 18 April 2016 when the Court gave some directions in preparation for trial to commence on 26 April 2016. On that day, the Court heard a Summons by the Petitioner, filed on 25 April 2016, to strike out the adverse claim against William Thompson, Gina Thompson, Patrice Thompson, Alfred Laing, Gary Laing and Wonda Bullard. The Court struck out the adverse claim for non-compliance with Rules 5, 6 and 7 of the QTA.
- [4] I am now only concerned with the claims between the Petitioner and the Adverse Claimants.
- [5] The Court then proceeded to hear the Petitioner's Petition when it was informed that the parties have reached a settlement but they needed about three weeks to work out the particulars of the Order. Thereafter, the matter was adjourned to Thursday 12 May 2016 at 10:00 a.m. for report with a view for presentation of an agreed order to the Court.
- [6] On 12 May 2016, the parties, through their Counsel, informed the Court that a settlement could not be reached. As a result, new trial dates were fixed for 29 and 30 March 2017. A site visit took place on 29 September 2017 and on 19 October 2017, the hearing continued via video link, essentially to place on record, distinctive features on the property which were pointed out by various witnesses during the site visit. On 20 November 2017, both Counsel made oral submissions. Supplemental submissions were received from the Adverse Claimants on 15 December and 20 December 2017 respectively.
- [7] On 20 November 2018, the Court gave a detailed Ruling but faced with technical difficulties could not issue the Written Judgment on that day. The Court now issues the Written Judgment. For purposes of an appeal, time will begin to run from 14 January 2019.

Background

- [8] The Petitioner and the Adverse Claimants are blood relatives. The Petitioner brought this Quieting Petition under section 3 of the QTA. In his Amended Petition, he claims to be the owner in possession of the property. In his Abstract of Title filed on 4 November 2013, the Petitioner asserted that he was born on 14 May 1947 to Charles McKlewhite and Jacqueline Thompson nee McKlewhite (“Jacqueline Thompson”). He next asserted that sometime during the 1970’s, he and his mother entered into possession of the property and began farming thereon jointly. He exercised acts of ownership over the property as evidenced by the affidavits of Austin Knowles Sr. (“Mr. Knowles”) and Clifford Sands (“Mr. Sands”).
- [9] On 15 September 2015, the Petitioner amended the Abstract of Title to include that on 7 February 2011, he agreed to sell the property (comprising 36 acres) to Eleuthera Botanical Gardens in his capacity as Administrator of the Estate of Jacqueline Thompson. So, it seems reasonable to infer that the Petitioner is also asserting a documentary title to the property as is set out in his Amended Abstract of Title filed on 15 September 2015. If that is the case, then the Petitioner has not shown how Jacqueline Thompson came to be in possession of the property.
- [10] The Petitioner focuses his claim to the property on his Amended Petition, that is, a possessory title.
- [11] The Adverse Claimants claim a documentary as well as a possessory title to the property. They say that their interest in title passed by way of succession from their predecessors stemming from the Estate of James Bethel whose estate was duly probated in the Supreme Court which issued Letters of Probate to the Executrix, Alice Maude Charles in Supreme Court Action No. 113 of 1955 and which is duly recorded in the Registry of Records for and in the Commonwealth of The Bahamas in Volume 7 [New Series] at Folio 719.

[12] It is against this brief background that I consider the competing claims. However, before doing so, I remind myself of the observation of Lord Diplock in **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19 at page 25, where he said:

“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 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.”

[Emphasis added]

[13] Lord Diplock’s judicious observation was restated and amplified by our Court of Appeal in **Strachan & Others v Camperdown Holdings Limited** SCCivApp. No. 224 of 2012. Crane-Scott JA in delivering the judgment of the Court espoused at paras 13 to 22:

“13 In a recent decision of this Court (differently constituted) in the consolidated appeals of **Bannerman Town, Millars and John Millars Eleuthera Association et al v. Eleuthera Properties Ltd** SCCivApp Nos: 175,164 and 151 of 2014, it was held that the overriding principle which should guide a judge in quieting actions is: *"simply to determine and declare which of the claimants has the better title"*.

14 At paragraph 29 of its decision in **Bannerman**, the Court considered the Privy Council appeal from this jurisdiction in **Ocean Estates Limited v. Norman Pinder** [1969] 2 AC 19 in which, Lord Diplock explained:

"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."

15 It should also be said that while the court in quieting proceedings is tasked with determining and declaring which of the competing claimants to land has the better title, the court's role in the quieting process to be

conducted under the Act is quite unique in that the court also functions as an investigator. Section 3 states:

"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 in accordance with the provisions of the Act."

16 The investigatory role which the court is required to perform in the quieting process is buttressed by other provisions of the Act designed to publicize the proceedings with the aim of inviting the filing within such time as the court may specify of adverse claims (if any) for investigation by the court during the proceedings. Section 6 for example, mandates the court to direct notice of the proceedings to be published in the newspapers. Additionally, the court is required by section 7 of the Act to direct that notice of the proceedings be served on any person (known or unknown) who appears to have, *inter alia*, an adverse claim in respect of the whole or any part of the land to be quieted.

17 The relative informality of the investigatory exercise to be conducted under the Act *vis-à-vis* other proceedings is most acutely seen in section 8 which permits strict rules of evidence to be dispensed with if the court is satisfied that the admission of evidence will assist the court in its task of investigating, determining and ultimately, declaring the true facts in relation to the question of title.

18 Section 8 provides:

"8. (1)The court in investigating the title may receive and act on 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...., 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." [*emphasis added*]

19 When investigating the strength of a documentary title under the Act, the court will (in a manner not unlike a conveyancer) examine the abstract of title, *inter alia*, to check that there is an unbroken chain of ownership on paper beginning with the owner in the root document and ending with the most recent owner. The investigation will also involve verification of the

abstract by physical inspection of the original deeds and checks to discover whether there is evidence of occupiers who may adversely affect the documentary title claimed. See Halsbury's Laws of England, Volume 23 -- Conveyancing: paragraph 139 - Investigation of Title: Unregistered Land.

20 However, unlike the conveyancer, section 8 of the Act permits the Court in investigating title to land which is to be quieted, to receive and act on any evidence on a question of title whether or not admissible in law, if the evidence satisfies the Court of the truth of the facts intended to be established.

21 In short, while the Court must necessarily have regard to the documents or other evidence which is presented in support of a claim to a documentary title, section 8 allows for flexibility in the investigation process and expressly permits the Court to receive and to act upon any evidence on a question of title (whether or not ordinarily admissible in law) provided the Court is satisfied of the truth of the facts intended to be established.

22 The objective of the Act is to provide a statutory mechanism for title to land in The Bahamas to be quieted through the Supreme Court. To this end, the court's role under the Act is to fully investigate the claim (or claims), receive evidence with respect thereto, determine the truth of the facts intended to be established by the evidence and ultimately, act on and declare the ownership of the land on the basis of the evidence before it. The process is completed with the grant of a certificate of title to the person who, in the view of the court, has established title thereto. Where there are rival claims to the land to be quieted, the judge's primary function, following the investigation, as stated in Bannerman and Ocean Estates (above), is simply to determine and declare which of the claimants has the better title."
[Emphasis added]

[14] I now proceed to consider each claim bearing in mind that my task is simply to determine and declare which of the claimants has the better or superior title.

The Petitioner's claim

[15] The Petitioner claims a possessory title to the property. By the time this matter came before me, the Petitioner had already passed away so his daughter, Ms. McKlewhite took over these proceedings.

[16] Ms. McKlewhite swore a witness statement on 26 April 2016. She stated that her father was born on 14 May 1947 and he died on 2 February 2014. Jacqueline Thompson was her paternal grandmother and the late Alice Maude Charles was

her great grandmother. She stated that the title to the property is set out in the Amended Abstract of Title.

- [17] Ms. McKlewhite further stated that sometime in or around 1974/1975, as a child, she visited the property with her younger sister, Purtina McKlewhite. She saw her grandmother harvest onions, sweet peppers, tomatoes, bananas, watermelons and more on the land. The farms were inland and more to the back of the property.
- [18] At paragraph 7 of her witness statement, Ms. McKlewhite averred that from in or about 1960's, her father, who owned many heavy duty equipment would use them on the land to collect quarry which he piled up into large heaps and sold as a means of income, thus the first big hole came into existence.
- [19] Ms. McKlewhite further stated that for more than 20 years, her father had allowed the Government to use the property as the community's dumping ground site until the hole was almost filled to its maximum capacity. This was permitted because people would indiscriminately dump their garbage on to the Queen's Highway.
- [20] She said, at paragraph 9, that sometime later, the entrance to the property was blocked with three loads of quarry and it still remains there today. This was observed during the site visit.
- [21] Ms. McKlewhite stated that many persons including Mr. Sands, Paul Knowles and many others were allowed to collect quarry thus the second hole came into existence.
- [22] Ms. McKlewhite further stated that, in 1990, the infamous Club Med had closed down and there was a large quantity of waste. Her father gave permission to Mr. Knowles for the waste to be discarded on the property, resulting in the first hole being filled completely.

- [23] She said that her father placed a chain with a lock across the main entrance of the property which is located on the Banks Road to minimize public dumping. Persons who wished to dump their garbage sought permission from her father.
- [24] Ms. McKlewhite further stated that, presently, there is a locked fence that secures the front portion of the property. She holds the key to the lock. In addition, a no-trespassing sign and a no-dumping sign have been placed at the entrance of the property.
- [25] Under cross-examination by learned Counsel Mrs. Lamour-Williams who appeared for the Adverse Claimants, Ms. McKlewhite stated that her father told her that from in or about 1960's, he had owned a number of heavy duty trucks which he had used on the property to collect quarry and sell as a means of income. According to her, he would have been about 27 years of age.
- [26] Upon re-examination, she stated that, apart from her father, no one else and specifically the Adverse Claimants, occupied the property. Ms. McKlewhite stated that she had never seen any of the Adverse Claimants on the property. She stated that she holds the key to the property and persons wishing to go onto it would have to seek her permission. She stated that the road leading to the Queen's Highway entrance is closed. So also is the road leading to the Bank's Road entrance.
- [27] On a site visit on 29 September 2017, Ms. McKlewhite pointed out the chain which she said was placed on the property by the Petitioner. She also identified the pit. Although not documented in her witness statement, she stated that (i) the Petitioner caused a survey to be done on the property about eight years ago and no one stopped him from doing so; (ii) also, some eight years ago, a gate was erected to prevent the dumping of garbage on the property and (iii) one Lloyd Johnson installed that gate in or about 2007 at the behest of the Petitioner.
- [28] The next witness to testify on behalf of the Petitioner was Mr. Knowles. He testified that he had known the Petitioner since he was about 20 years old. He is now 76 years old (2016). He is familiar with the property. He stated that the Petitioner is

the owner of the property. Mr. Knowles worked as a sub-contractor for Club Med for more than 20 years subsequent to 1977 and he used the quarry pit on the property to dump garbage. He sought the permission of the Petitioner to do so and paid him approximately one thousand dollars monthly. He asserted that there is an unpaved road to access the property from the Queen's Highway. He also stated that he knows one Willie Thompson also used the quarry from the property to build the roads in Eleuthera. He also knew that Jacqueline Thompson farmed the property. She grew tomatoes, cabbages, cassava, vegetables, pumpkin, peas, corn and watermelons. He knows that Willie Thompson and Jacqueline Thompson are the step-father and mother of the Petitioner.

[29] Mr. Knowles testified that he knows the Petitioner and his predecessors had full use, enjoyment and occupation of the property and the Petitioner closed the property with a chain link to prevent persons from dumping old cars onto the property. On the site visit, Mr. Knowles pointed out the two pits. He did not point out any farming activity on the property as there was none.

[30] Under cross-examination, Mr. Knowles stated that Jacqueline Thompson farmed the property about 50 years ago. She farmed by the pit. According to him, there was only one pit. He said that the Petitioner closed off the road to the property but the property is not enclosed.

[31] The final witness to give evidence on behalf of the Petitioner was Mr. Sands. He stated that he always knew the Petitioner to be the owner of the land. He sought permission from the Petitioner to excavate the fill from the quarry pit to build the roads in Eleuthera. He paid the Petitioner about three thousand five hundred dollars for several loads of fill. On the site visit, he pointed out the two pits and the entrance to the Banks Road as well as the Queen's Highway. He also pointed out cut lines and surveys which he said he carried out. He said that no-one objected to him cutting the lines.

[32] Under cross-examination, Mr. Sands testified that the property is enclosed. It is fenced. He said that he used one quarry pit.

[33] Upon re-examination, Mr. Sands stated that when he cleared the pathway for the surveyors, the work was being done for the Petitioner. He testified that he had never seen any of the Adverse Claimants at any time on the property.

The Adverse Claimants' claim

[34] The Adverse Claimants are Florence Sands, Felicia Bethel and Albertha Culmer. Their claim is based on documentary as well as possessory title.

[35] In a nutshell, the Adverse Claimants allege that they, like the Petitioner, are entitled to an undivided share or interest in the property and neither party's interest should be extinguished. They say that they (as well as the Petitioner) are all heirs to the estate originally acquired by the late James Bethel by which both parties inherit by virtue of their parents and relatives passing on by way of succession. The Petitioner is in fact a direct descendant of the Executrix named in the Last Will and Testament of the said late James Bethel, being the same person to whom Letters of Probate was granted to in the estate of late James Bethel. The named Executrix, Alice Maude Charles, is the grandmother of the Petitioner.

[36] The Adverse Claimants called Florence Sands and Glen Rodger Griffin to testify on their behalf.

[37] Florence Sands testified that she was born in Eleuthera on 28 November 1937. She is now in her 80's. Along with the other two Adverse Claimants, who are her sisters, they lived in Eleuthera all of their lives. She stated that they are all intimately familiar with the property which was reputed to be owned by their deceased grandfather, James Bethel.

[38] Ms. Sands stated that she did not know either of her grandparents. She heard of them through her late father, William Tolbert Bethel. She was told that her grandfather had relocated to the United States of America. What she knows is that

her grandfather was a farmer and the names of properties such as “The Wall” and “Grand Long” have been associated with him.

- [39] She stated that she believes the property is the same property known to her family and the Eleuthera community as “Grand Long.” As a child growing up in Eleuthera, she knew that of her grandfather’s children, only her father and her aunt, Alice Maude Charles remained in Eleuthera. The Petitioner is the lawful grandson of her aunt, Alice. She is also aware that her grandfather left a Will dated 10 June 1947 leaving all of his property situate at Governor’s Harbour, Eleuthera to his six children to be divided equally among them: Tab. 1 of the Adverse Claimants’ Bundle of Documents filed on 21 April 2016. Two of those children are her father and her aunt, Alice. She does not know her father’s other siblings who are mentioned in the Will. In addition, she is unaware whether or not they have children.
- [40] Ms. Sands testified that during her father’s life, he was primarily a carpenter who farmed on a part-time basis. His farming activities were concentrated at the property known as “The Wall” which is located in the immediate vicinity of the property. She knew her aunt Alice to farm “The Wall” as well. Her father died sometime between 1970 and 1974.
- [41] Ms. Sands stated that her aunt Alice resided at Cupid’s Cay with her daughter Jacqueline Thompson, the mother of the Petitioner. She knew that Jacqueline Thompson did not farm “Grand Long” which is the subject property. She did not know the Petitioner to farm on this property either.
- [42] She testified that she received information that the Plan of the property shows a quarry pit. She was aware that the Petitioner had a contract with the government to patch the roads. The pit was dug to provide “fill” for the road work. She is also aware that, for a few years, the property had been used as a dump site where residents would dump their garbage. The Petitioner also used the property for that

purpose as well. A road led to the property. A gate was put up about 2 to 3 years ago blocking access to the property. The property is not enclosed.

[43] Ms. Sands stated that, about the year 2000, the Petitioner came to speak to her about the estate of James Bethel. She said that he told her that they needed to straighten out all of the properties as persons were interested in purchasing them. She said that he did not specifically indicate which property but she knew that he was speaking of "The Wall" and "Grand Long." She said that the Petitioner told her that he could not do anything without her. She told him to get the papers prepared but he never returned.

[44] Ms. Sands stated that she knew the Petitioner was using portions of the land but this did not create any issue as she was aware that the property was to be shared equally among the children of the late James Bethel. Therefore, she assumed that the Petitioner was claiming his portion but not the entire property.

[45] She said that shortly after her conversation with the Petitioner, his daughter, Ms. McKlewhite came to see her about the property encouraging her to sort out the properties since her father could not do anything without her. Ms. Sands said that she heard nothing from the Petitioner or Ms. McKlewhite. She became aware of the Quieting Petition when it was brought to her attention.

[46] Ms. Sands said that she knows the Petitioner and his estate has an interest in the property. She regarded the property as belonging to the heirs of James Bethel but, to her knowledge, neither the Petitioner nor his mother Jacqueline Thompson were ever in exclusive possession of the property.

[47] Under cross-examination, Ms. Sands was asked if she could point out Grand Long on the Plan. She stated she could not as her eyes are failing but she might be able to do so if there was a visit to the property. She stated that since the death of her father, she and/or the other Adverse Claimants have not gone back to the property. She knows of a tract of land situate at Grand Long, Eleuthera, bounded on the North by land the property of T.T. Bowles, on the East by Grand Long Pond, on

the South by land the property of Rosetta Forbes, on the West by land the property of WMB Johnson. Ms. Sands said that she knows the land as she used to go there. Under cross-examination, she maintained that James Bethel was her grandfather. It was suggested to her that the property has no pond and it was not occupied by James Bethel. She said that she challenged the Petitioner many times about the property but they never went to Court. She was unable to identify "The Wall" on the Plan because she does not see well. Ms. Sands said that she owns the property because it belonged to her father.

[48] Under further cross-examination, Ms. Sands testified that she could not identify a specific portion of the land that they farmed. She said that the Petitioner never asked her permission to do anything on the property, He did as he saw fit.

[49] Under re-examination, Ms. Sands stated that the children of her aunt, Jacqueline Thompson, also own the property with her. She said that the Petitioner does not have more right than her to be on the property. He needed her permission but he never sought it. She was adamant that the property belonged to her father.

[50] During the site visit, Ms. Sands identified the quarry pit but stated that it was not there when she farmed the property with her father. She pointed out a general area in the hill where she farmed and showed the Court the entrance by which she accessed the property. She also pointed out a swampy area. She said that there was no farming by the swamp. She said that she was about twenty-five years old when she farmed the property.

[51] Ms. Sands called her brother, Glen Rodger Griffin as her witness. He is a contractor. He was born on 15 May 1944. He has been living at Governor's Harbour all of his life. He said that the property is the very same property known to the Eleuthera Community as "Grand Long." It is situated on the south side of the Bank's Road and East of Charlow's Pond also known to the Eleuthera Community as "Grand Long Pond."

- [52] Mr. Griffin stated that, as a young boy, he accompanied William Tolbert Bethel, known to him as Mr. Will and/or Will Larcus and others including the Adverse Claimants to farm on a portion of the property. Mr. Will was his stepfather. He said that, to his knowledge, the property had not been farmed since Mr. Will farmed it. In later years, it was used as a dumping ground. He also identified the quarry pit on the property. According to him, it was used to assist with numerous road building projects on the island. He said that he knew the Petitioner to be involved in the business of road building. He also knows that the Petitioner was the son of Jacqueline Thompson.
- [53] Mr. Griffin was able to identify the property by photographs: Tab 5 of the Adverse Claimants' Bundle of Documents. He was however unable to determine all of the photographs.
- [54] Under cross-examination, Mr. Griffin stated that he never farmed the property by himself. He was unable to say whether any of the Adverse Claimants farmed but he insisted that Mr. Will farmed the property. He said he was about thirteen years old when he went to the property with Mr. Will. He could not point out the exact spot but the general area where Mr. Will farmed. He said that the pit was not there when they were farming. Mr. Griffin said that, as a boy, he knew the Petitioner to be on the property.
- [55] Under re-examination, Mr. Griffin stated that he was aware that the Petitioner rented out portions of the property for dumping purposes.
- [56] During the site visit, Mr. Griffin identified the two pits on the property as well as the second access road. Other than that, there was nothing else that he could have identified because, in fact, there is nothing else to identify besides vast areas of unproductive/waste lands. Mr. Griffin was also aware that the people who dumped garbage on the property were permitted to do so by the Petitioner. He was not aware that the property was surveyed.

The issues

[57] The following issues fall for determination namely:

- (1) Whether the Petitioner has been in exclusive possession of the property for the period prescribed by section 16(3) of the Limitation Act, Chapter 83?
- (2) If not, whether the Petitioner has similar interests in the property as the Adverse Claimants with documentary title by virtue of succession in the property under the QTA and;
- (3) Whether both parties are entitled to be granted separate Certificate of Titles evidencing their undivided equal share in the property?

The Limitation Act

[58] Section 16 (3) of the Limitation Act, Chapter 83 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....”

The law

Possession and Adverse Possession

[59] It is an elementary principle of law that a person’s title to land including the person who has the documentary title (“the paper owner”) is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that a person who is in possession as a trespasser/squatter without the permission of the paper owner can obtain a good title if the paper owner fails to assert his superior title within the requisite limitation period. After the limitation period has expired, the paper owner, who has slept on his rights, will be barred from asserting them against the persons in adverse possession and his rights will be extinguished.

[60] However, in order to do so, a trespasser/squatter must establish both (a) factual possession and (b) the requisite intention to possess. This basic proposition was

re-stated by Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 quoting Slade J. in **Powell v McFarlane** (1977) 38 P & CR 452, 470 stated at paragraph 40:

“(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”).”

[61] Later on, in the same paragraph, Lord Browne-Wilkinson simplified the two elements necessary for legal possession in this manner:

“1. a sufficient degree of physical custody and control (“factual possession”);

2. An intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“intention to possess”).”

Factual possession

[62] In **Pye**, Lord Browne-Wilkinson, in adopting the definition of factual possession by Slade J in **Powell**, said at para. 41:

“(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] 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 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....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.”

Intention to possess

[63] **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]

Court's analysis and findings

Issue 1 – Whether Petitioner had been in exclusive possession for 12 years?

[64] In the present case, in order for the Petitioner to succeed in establishing a possessory title to the property under the Limitation Act, he must demonstrate that he and/or his predecessors had been in exclusive possession of the property for a continuous period of 12 years to oust the documentary title holders.

[65] Learned Queen's Counsel, Mr. Lockhart who appeared for the Petitioner submitted that the Petitioner and his predecessors have been in exclusive and continuous possession of the property since in or about the 1960's and that, except for them, no other person(s) has/have occupied the property or interfered with the Petitioner's occupation.

[66] He submitted that the Petitioner's case is that the property was used as a dumping ground by the public who sought permission from him. He next submitted that the Petitioner's evidence was corroborated by the testimony of Mr. Knowles and Mr. Sands who both testified that they knew the Petitioner and his predecessors had full use, enjoyment and occupation of the property. They also testified that the Petitioner enclosed the property with a chain link to prevent the public from dumping old cars and their garbage onto the property.

[67] Learned Queen's Counsel submitted that the Adverse Claimants claim documentary as well as possessory title to the property. With respect to

possessory title, the Adverse Claimants sought to demonstrate a possessory title to the property by way of farming by their step-father. Mr. Lockhart submitted that the evidence is that such farming ended sometime in 1963 and Ms. Sands admitted that since her father died, she has not visited the property which would have been in the early 70's. Therefore, the Adverse Claimants' claim to possessory title must fail. I agree.

[68] Mr. Lockhart QC next argued that with respect to documentary title, the Adverse Claimants allege that their interest in title passed by way of succession from their predecessors stemming from the estate of James Bethel which does not go beyond the Grant of Probate in 1955. According to him, there are no documents vesting this property or any portion of it in the Adverse Claimants which is an intricate part of this action, and more particularly, since the Adverse Claimants are only claiming a portion or an interest in the property.

[69] Mr. Lockhart QC next submitted that the Will of James Bethel failed to identify the property at all or with any specificity and dimensions. He said that the Estate of Alice Maude Charles, to which the Adverse Claimants refer, relates solely to the Petitioner. He submitted that, assuming but not conceding any documentary title in the Adverse Claimants, such would have been ousted by the Petitioner when he took possession of the property in the 1960's for his own use and enjoyment.

[70] The key issue for determination is whether the Petitioner and his predecessors have been in exclusive and continuous possession of the property since in or about the 1960's and that, except for them, no other person(s) has/have occupied the property or interfered with the Petitioner's occupation.

[71] The Petitioner's daughter, Ms. McKlewhite stated that, in or about 1960's, her father owned a number of heavy duty trucks which he used to collect quarry. Her father would have been about 13 years of age at that time. She attempted to explain that her father owned it with his step-father but, it is a fact that she was not even born. She said that her father relayed this account to her. This is hearsay

evidence. That said, I did not find Ms. McKlewhite to be a wholly credible witness. As such, I accepted some parts of her evidence and reject other parts.

- [72] She also testified that sometime in and around 1974/75, as a child, she visited the property with her younger sister and she saw her grandmother harvested onions, peppers, tomatoes, bananas, watermelons and more on the land. She said that the farms were inland and more to the back of the property.
- [73] Besides the fact that she would have been very young at that time, her evidence contradicted the evidence of Mr. Knowles who, under cross-examination, stated that Jacqueline Thompson farmed the property about 50 years ago, that is, in the mid- 60's.
- [74] In the Petitioner's Amended Abstract of Title, he alleged that sometime the 1970's, he and his mother entered into possession and began farming thereon jointly. The Abstract of Title is effectively his "pleading:" see Henry P. in **Darling v Arawak Homes** [1991] BHS J. No. 168. It is plain that the evidence as it relates to farming by Jacqueline Thompson is contradictory.
- [75] The pleading is also in stark contrast with the submissions of learned Queen's Counsel Mr. Lockhart who argued that the Petitioner and his predecessor have been in exclusive and continuous possession of the property since in or about the 1960's.
- [76] Evidence relating to acts allegedly done by the Petitioner and/or his predecessor in the 1960's came from Ms. McKlewhite and Mr. Knowles. Ms. McKlewhite was told by her father that he owned a number of heavy duty trucks which he used to collect quarry. As already indicated, her father would have been about 13 years of age at that time and she was not yet born. Although he did not give a specific date, Mr. Knowles stated that Jacqueline Thompson farmed some 50 years ago.
- [77] I should state that, having observed the demeanour of Ms. Sands, I found her to be credible notwithstanding that there were some discrepancies in her evidence.

However, she was adamant that Jacqueline Thompson did not farm “Grand Long” which is the property and she did not know the Petitioner to be involved in farming also.

[78] Besides the alleged farming, there is also evidence that the Petitioner rented the property as a dump and to excavate fill from the quarry. Both Mr. Knowles and Mr. Sands stated that they always knew the property belonged to the Petitioner. Mr. Knowles said that he paid the Petitioner \$1,000 monthly to dump garbage in the quarry pit on the property. Mr. Sands stated that he also paid the Petitioner to excavate the fill from the quarry to build roads in Eleuthera and to dump garbage and old building materials from Club Med in the quarry pit. I do not disbelieve these gentlemen. However, the witnesses failed to mention exactly when and for how long these activities took place. In any event, a site visit proved that the use of the property as a dumping ground was restricted only to a portion of the property nearest to the main entrance and not the entire 37.02 acres.

[79] On the other hand, Ms. Sands made it clear that she was well aware that the Petitioner was using portions of the property to dump garbage and she had no issue with that since she knows that the property was to be equally divided among the children of the late James Bethel.

[80] In a further attempt to demonstrate factual possession of the property, Ms. McKlewhite said that the Petitioner placed a chain across the main entrance of the property to minimize public dumping and persons wishing to dump sought permission from her father. Ms. McKlewhite said that there is a locked fence that secures the front portion of the property and she has the key to the lock. In addition, a no-trespassing and no-dumping sign have been placed on the property.

[81] That said, I am satisfied that the Petitioner had permitted the use of a portion of the property located closer to the Bank’s Road entrance for the dumping of garbage and quarrying activities. On a site visit, there was no visible sign(s) of

anything taking place on the property – no farming, no quarrying or dumping of garbage. The property comprises of unproductive/waste lands.

- [82] That said, I accepted Ms. Mcklewhite’s evidence that persons wishing to go onto the property will have to go to her because she is in possession of the key to the locked fence that secures the front portion of the property. On the site visit, the Court observed that there is a chain placed across the main entrance to the property. The other entrance to the property, though not enclosed, appears inaccessible and is miles away from the front portion of the property. The Court was driven to the other entrance because of the distance.
- [83] The law on adverse possession is well-established. In the present case, for the Petitioner to succeed, he has to establish both (a) the factual possession and (b) the requisite intention to possess. The factual possession required depends upon the land in question. In **Treloar v Nute** [1976] 1 WLR 1295 (CA) a piece of agricultural land was regarded by the court as factually possessed when animals were grazed on it, spoil dumped in a gully, timber and stone stored on it, and squatters rode motorcycles on it; but even that was 'on the borderline'.
- [84] Next, the Petitioner must demonstrate the requisite intention to possess. It is the intention to do so in his own name and to exclude the world at large (and the Adverse Claimants).
- [85] The placing of a notice on land warning intruders to keep out, coupled with the actual enforcement of such notice, is an example of an act to demonstrate an intention to possess although the erection of a sign and a fence intended to keep sheep in a field and not the paper owner out, was insufficient in **Inglewood Investment Co Ltd v Baker** [2002] EWCA Civ 1733, [2003] 2 P & CR 319; **Batt v Adams** [2001] EGLR 92.
- [86] The enclosure of land by a newly constructed fence is another. As Cockburn CJ said in **Seddon v Smith** (1877) 36 LTR 168, 'Enclosure is the strongest possible

evidence of adverse possession', though he went on to add that it is not indispensable.

[87] Another example of an intention to possess is the locking or blocking of the only means of access (Slade J in **Powell** at pp.477- 478). Blocking the only access by padlocking an existing gate was enough in **Buckinghamshire CC v Moran** [1989] 2 All ER 225. Where, however, the only access was padlocked but the occupier allowed the paper owner's tenants access and provided keys for that purpose, the occupier acknowledged the paper owner's tenants' right to be on the land. Such an action was wholly inconsistent with an intention to possess the land in a way sufficient to defeat the paper owner's title see **Battersea Freehold and Leasehold Property Company Limited v Wandsworth LBC** (2001) EGCS 36.

[88] In the present case, I am afraid that the Petitioner has not establish that he and his predecessors had been in exclusive possession of the property for 12 years to oust the documentary title holders.

[89] To recapitulate, in his Amended Abstract of Title, the Petitioner indicated that he and his mother, Jacqueline Thompson entered into possession of the property sometime during the 1970's and that they farmed the property ever since. It is also evident from the same Abstract of Title that the Petitioner's mother died on 17 December 1981. So, the Petitioner's mother tenure lasted at most, for 11 years. Furthermore, there is no evidence that he personally farmed the property. The law recognizes 12 years.

[90] Then, neither Mr. Knowles nor Mr. Sands were able to specifically state when and for how long they used portions of the property to dump garbage and excavate fill from the quarry. I accepted the evidence of Ms. McKlewhite that the Petitioner placed a chain link to ward off persons wishing to dump garbage on the property and he also erected no-trespassing and no-dumping signs on the property in or about 2007; i.e. 4 years prior to the filing of the Petition. In any event, all of these

activities were concentrated on a small portion, nearer to the Banks Road entrance.

- [91] Additionally, I agree with learned Counsel, Mrs. Lamour-Williams that if the Petitioner had the intention to dispossess the Adverse Claimants, he took an exceptionally long time to do so because he indicated he was in possession since the 1970's. He filed the Amended Petition in 2013 when he was negotiating the sale of the property.
- [92] Importantly, an acknowledgement of the owner's interest may negative the element of intent. The Petitioner acknowledged that there was a joint interest in the land before he filed the Petition. He went to the home of Ms. Sands (whom I found to be truthful) and spoke with her regarding the properties of the estate of the late James Bethel. Ms. Sands said that the Petitioner told her that they both needed to deal with the properties because there were persons who were interested in purchasing (the properties).
- [93] Shortly thereafter, Ms. McKlewhite approached Ms. Sands concerning the same matter. Ms. McKlewhite said that Ms. Sands should work with her father in sorting out the properties because the Petitioner cannot do anything without Ms. Sands. Ms. Sands said she waited to hear from the Petitioner and he never returned.
- [94] Of significance, it was only upon application by Notice of Motion filed on 12 March 2015, on behalf of Eleuthera Botanical Garden LLC., did the Petitioner amend the Abstract of Title; the effect of which was to include that, on 7 February 2011, the Petitioner agreed to sell the property to Eleuthera Botanical Gardens.
- [95] I agree with Mrs. Lamour-Williams that the Petitioner knew he was not the only owner of the property, nor was he a trespasser as he implied in this Petition. He is a co-owner along with the Adverse Claimants, being heirs of the Estate of James Bethel originally and then passed to his children which included William Tolbert Bethel (the Adverse Claimants' father) and Alice Maude Charles (the Petitioner's

grandmother). Consequently, the Petitioner does not have a superior title than the Adverse Claimants to the property.

Evidence proving documentary title

- [96] The Adverse Claimants claim that they have a documentary title to the property. As already stated, they claim that their interest in title passed by way of succession from their predecessors stemming from the estate of James Bethel whose estate was duly probated in the Supreme Court which issued Letters of Probate to Alice Maude Charles in Supreme Court Action No. 113 of 1955 which is duly recorded in the Registry of Records. In his Will, James Bethel devised the property to his six children including William Tolbert Bethel, the father of the Adverse Claimants and Alice Maude Charles, the grandmother of the Petitioner: Tab.3 of the Bundle of Documents for the Adverse Claimants.
- [97] The Oath of the Executor in the estate of the late James Bethel refers to the real property comprising of the estate of James Bethel and the property (the subject of this Petition is noted at item '5' therein: Tab 2 of the Bundle of Documents for the Adverse Claimants). Ms. Sands confirms in her Affidavit filed and referred to in the Abstract of Title of the Adverse Claimants that the property is known to the community of Eleuthera as Grand Long.
- [98] Learned Queen's Counsel Mr. Lockhart submitted that the Will of James Bethel fails to properly identify the property with any specificity and dimensions. I agree. However, the Petitioner has not proved that he and his predecessors have been in exclusive possession of the property for 12 years. He is therefore unable to extinguish the Adverse Claimants of the property because the Adverse Claimants rely on the position that they, along with the Petitioner, acquired the property by virtue of a Grant of Probate (although lacking in specificity) emanating from their forefathers, with the Adverse Claimants having acquired their interest in the property prior to the Petitioner.

[99] For these reasons, I do not find that the Petitioner is a sole owner of the property by virtue of it passing under the Will of his mother, Jacqueline Thompson on 17 December 1981. Like the Adverse Claimants, I too accept the Petitioner's position that the property was passed to him from his mother's estate, but, it was done so by virtue of it being passed down from his grandmother, Alice Maude Charles. Where the claim is documentary, the transmissibility of the interest will be affected by, among other things, issues involving succession.

Conclusion

[100] In conclusion, I find that both the Petitioner and the Adverse Claimants are heirs to the estate originally acquired by the late James Bethel by which both parties inherit by virtue of their parents and relatives passing on by way of succession.

[101] In the premises, I hereby order that both the Petitioner and the Adverse Claimants be issued with separate Certificates of Title evidencing that they both have undivided interest in the property called and known as "Grand Long" comprising 37.02 acres situate 1.5 miles East of the Township of Governor's Harbour on the South side of the Banks Road in the Island of Eleuthera one of the islands of the Commonwealth of The Bahamas.

[102] Given the outcome, it is agreed that there will be no order as to costs.

Dated this 14th day of January, A.D. 2019.

**Indra H. Charles
Justice**