

COMMONWEALTH OF THE BAHAMAS 2018

IN THE SUPREME COURT

Common Law and Equity Side

2015/CLE/qui/01157

IN THE MATTER of The Quieting Titles Act 1959

AND

IN THE MATTER of the Petition of Robert Barry, Hugo Barry and Eardley Barry

AND

IN THE MATTER of ALL THOSE pieces parcels or lots of land comprising 46.55 acres: Parcel A – 13.51 acres known as the Corpet, Parcel B - 31.21 acres known as Durham 1 and Parcel C - 1.83 acres known as Durham 2 situate in the Settlement of The Bluff in North Eleuthera in the Northern District of the Island of Eleuthera one of the Islands of the Commonwealth of The Bahamas along the coastline running thereon approximately Five Hundred and Thirty-Eight (538) feet south of Hudson Street and the Public Dock bounded by property of Francis Parker. Lot Number 2, Peter Smith Lot Number G 166 Thomas Saunders Lot Number 6, James Brown Lot Number 7, James Dorsett Lot Number 9 bounded west of Quley Neely, Olive Burrows and the Ball Park and Bounded by Dickerson Bay Beach by the Sea

Before Hon. Chief Justice Sir Ian R. Winder

**Appearances: Sonia Timothy for the Petitioners
Caleb Dorsett for the Adverse Claimant**

21 and 22 June 2022, 3 and 22 November 2022 and 12 April 2023

JUDGMENT

WINDER, CJ

This quieting action relates to three tracts of land purportedly situated in the Bluff, North Eleuthera. The three tracts, totaling 46.55 acres, are identified as Parcels A, B and C on a plan settled by the late Hubert Williams and designated 1026 EL. The Petitioners pray that their title to the property be investigated under the Quieting Titles Act, (the QTA) and a Certificate of Title with respect to that land be granted to them.

[1.] The Petition was filed on 18 March 2015. Affidavits in support of the petition were filed by the Petitioners, Samuel Neely, Mildred Neely and James Kirkwood Brown. The Abstract of title of the Petitioners, filed on 16 September 2015, cite the following:

April 1790 The property known as Durham 1B- 31.21 acres and Durham 2C – 1.83 acres is rooted in a crown grant dated April 1790 to Richard Durham and William Durham respectively on 14th December 1839 as tenant in common.

May 1790 That the trace of land known as the Corpet A- 13.51 acres, being part of the unification of the whole 46.55 acres were originally owned by the late Hy Sweeting dated March 1790 and James Kelly Jr., is rooted in a crown grant 28th May 1790. The said land was sold to the late James Lowe, who owned and occupied and possess it until his death. The aforementioned Crown Grants were recorded in the office of the Department of Lands and survey on the Island of New Providence Bahamas in book G- P20 and book G-P214. (see the same annexed hereto).

1807 Elizabeth Durham Neely, (Neilly) (Nealy) the great, great, great, great grandmother of the Petitioners was born on the aforementioned land. She was married to Charles Neely, (Neilly) (Nealy). This couple had two sons namely Edwin Osbourne Neely, (Neilly) (Nealy) and Samuel Charles Neely, (Neilly) (Nealy). This family (great, great, great grandparents of the Petitioners) lived and worked and entered into exclusive and undisturbed possession of the aforementioned land known as Corpet and Durham.

August 1892 Edwin Osbourne Neely, (Neilly) (Nealy) married Athelieh Atheretta Neely, (Neilly) (Nealy) Nee Lowe. The other son Samuel Charles Neely, (Neilly) (Nealy) married Teodocia Anderson Neely, (Neilly) (Nealy) in 1890. This family continued exclusive and undisturbed possession of the aforementioned land.

November 1894 Selena Verdalla Neely, (Neilly) (Nealy) was born to Edwin Osbourne Neely, (Neilly) (Nealy) and Athelieh Atheretta Neely, (Neilly) (Nealy) Nee Lowe. Later on, the 18th June 1916 she married her close relative Audley Cleveland Neely, (Neilly) (Nealy). This family continued exclusive and undisturbed possession of the aforementioned land. Audley Cleveland Neely,

(Neilly) (Nealy) and Selena Verdalla Neely, (Neilly) (Nealy) are the grandparents of the Petitioners. The petitioners recall at an early age working on this land, harvesting fruits and packaging them for shipment to Nassau. This family continued exclusive and undisturbed possession of the aforementioned land.

September 1918 Samuel Eardley Neely, (Neilly) (Nealy) was born to Audley Cleveland Neely, (Neilly) (Nealy) and Selena Verdalla Neely, (Neilly) (Nealy) on 30th September 1918. Later, on 19th February 1921 another son namely Edwin Gladstone Neely was born to Audley Cleveland Neely, (Neilly) (Nealy) and Selena Verdalla Neely, (Neilly) (Nealy). Selena Verdalla Neely, (Neilly) (Nealy) continued to work and possessed the land exclusively and undisturbed until the time of her death in 1985.

1985 After the death of their grandparents the Petitioners continued to possess the aforementioned land exclusively and undisturbed. The Petitioners continued to harvest fruits on the land. They also engaged the services of James Brown of the Bluff North Eleuthera to look after the land when they were away. In 2006, the Petitioner Eardley Barry relocated to the Bluff Eleuthera and he continued exclusive and undisturbed occupation of the land. However, he received information that Cecil Hilton and his nephews Keith and Collin Saunders are responsible for clearing a portion of the property.

[2.] Notice of the Petition was duly advertised pursuant to the Directions Order.

[3.] A joint Adverse Claim was brought in the names of Keith Cornwill Saunders, Adhar Holdings Limited, Colin Saunders and Cecil Hilton on 29 May 2015. In that Adverse Claim the Adverse Claimants asserted a title based upon 4 separate conveyances to the whole of the property from Eunice Saunders between January and May 2007.

[4.] On 3 January 2020 the Adverse Claim was amended to replace Adahar Holdings Limited with Roshan Naronha and to remove the reference to any conveyance with the following averment:-

The factual possession of the ancestors of the adverse claimants exceeding 20 years and the further uninterrupted open continuous undisturbed occupation an possession of the Adverse Claimants themselves thereto and any and all other claims which the said adverse claimants shall or may be entitled to rely on during the trial of the action whether in equity or in law.

[5.] On 7 October 2020 each of Cecil Hilton, Cornwill Keith Oneil Saunders, Roshan Noronha and Colin Saunders filed a separate adverse claims to 3.94 acres of land allegedly within the bounds of the property being claimed by the Petitioners. Each of the approximately 4 acre parcels were described as adjacent to each other. Each adverse claimant:

“claim to be the owner in unencumbered fee simple in possession of a portion of the subject matter herein comprising approximately 3.94 acres...”.

Each of Cecil Hilton, Cornwill Keith Oneil Saunders, Roshan Noronha and Colin Saunders filed verifying affidavits asserting that their claim is based on the “long, peaceful, uninterrupted, exclusive use and occupation of the land by their father/grandfather, John Philip Hilton and sister/mother/aunt Eunice Saunders and themselves.

[6.] The Adverse Claimants, at that time claimed 16 acres out of the 43 acres claimed by the Petitioners. At trial the Petitioners called Robert Barry, Hugo Barry, Eardley Barry, Glen Neely, Harrison Barry, Kendal Neely, Gerald Stuart and James Brown. The Adverse Claimants sought to rely on the evidence of Cecil Hilton, Cornwill Keith Saunders, Roshan Noronha, Colin Saunders, Jean Savius and Rosetta Hudson.

[7.] On 1 November 2022, following the taking of the evidence of the Petitioners and the visit to the locus in quo, the Adverse Claimants, for the third time, and again without leave, each amended their Adverse Claims. The Adverse Claimants now each claimed increased sizes of property:

- (1) Cecil Hilton now claimed 4.85 acres of property instead of the earlier 3.94 acres.
- (2) Cornwill Keith Saunders now claimed 5.19 acres of property instead of the earlier 3.94 acres.
- (3) Roshan Noronha now claimed 4.02 acres of property instead of the earlier 3.94 acres.
- (4) Colin Saunders now claimed 5.38 acres of property instead of the earlier 3.94 acres.

By these new increased claims, now totaling 19.44 acres, the Adverse Claimants appear to be seeking to conform to a new plan filed in November 2022.

The Petitioners' case

[8.] At the commencement of the trial, Hugo Barry withdrew as a Petitioner, leaving his brothers to continue the claim.

[9.] The evidence of the Petitioners, as outlined in their joint affidavit, provided as follow:

We, Robert Barry, Hugo Barry, and Eardley Barry of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:

- 1) That we are citizens of the Commonwealth of The Bahamas, residing on the Island of New Providence.
- 2) That we are ages 59, 57 and 52 years of age respectively.
- 3) That we are the great-great-great-grandsons of the late Charles Neely and Elizabeth Durham Neely.
- 4) That all the pieces parcel or lot of land identified as the Corpet, Durham 1, and Durham 2 in our Petition has always been operated as one comprising of 46.55 acres. The land being claimed by the Petitioner in the action herein has to our knowledge now and always been that of our great-great-great-grandmother, the late Elizabeth Durham Neely.
- 5) That the title to the said property known as Durham 1B- 31.21acres and Durham 2C- 1.83 acres is rooted in a crown grant dated April 1790 to Richard Durham and William Durham 14th December 1839 as tenant in common.
- 6) Note that these documents is recorded in the office of the Department of Lands and Survey in the Island of New Providence one of the islands of the Commonwealth of The Bahamas in book G-P20 and book G – P214. A certified copy of these documents are now produced and shown to me marked as exhibit H.R.E.B-1
- 7) The said property known as Durham has been in our family possession undisturbed for six (6) generations from the birth of our great-great-great-grandmother, the late Elizabeth Durham Neely (born 1807) as family tree assent are produce and shown to me marked as exhibit H.R.E.B – 2. A copy of all birth, marriage and death registration are now produced and shown to me marked as exhibit H.R.E.B – 3. This occupation has been exclusive, open and undisturbed and well known to the resident of the settlement of the Bluff Eleuthera.
- 8) That the tract of land known as Corpet A- 1351 acres, being part of the unification of the whole 46.55 acres was originally owned by the late Hy Sweeting and James Kelly Jr., that the said land was sold to the late James

Lowe (our great-great grandfather), who owned and occupied and possess it until his death on the 25th February, 1919 as stated in his last will and testament and that our family have possessed the same, from that time until the present time and no one has disturbed us in our quiet possession and ownership of the said property.

- 9) That the contents of this affidavit are true and correct to the best of our best knowledge information and belief.

[10.] The Petitioners submitted that

Documentary title to these properties are by way of Crown Grant dated April 1790 to Richard Durham and William Durham and recorded in Book G-P20 and Book G-P214. By family tree at Tab 15, the Petitioners have showed their relation to Elizabeth Durham-Neely.

The Petitioner's claim an interest in the subject property by virtue of the land being owned/possessed by their ancestors.

Additionally, the Petitioners are relying on possessory title. The structural remains of a building exist on the property. It is this structure that the Petitioners claim to have been that of their grandmother – Selena Verdalla Neely, who was born on 8th November 1894 and died 20th February 1985.

The witnesses for the Petitioners by Affidavit evidence and viva voce evidence intimate that Selena Neely possessed and farmed the land. They speak of her harvest including mangoes, oranges, grape fruit, sapodilla, coconuts. It is their evidence that some trees were destroyed by hurricanes. From the remaining trees, we respectfully request judicial notice of the height and size of the trees to support their evidence of these trees being on the property prior to 2003. We submit to this Honourable Court that these witnesses are all credible witnesses.

The Petitioners have shown their relation to Elizabeth Durham-Neely.

Conversely, the Adverse Claimants have not provided any documentary chain of title from Richard Durham or William Durham. The recitals in all Conveyances of the Adverse Claimants state "By virtue of an Indenture of Conveyance of unknown date and unrecorded ..." In the absence of any back title, we respectfully submit that there is no clear root of title. There is no good title. We respectfully ask this Honourable Court to reject the documentary title of the Adverse Claimants. They have no paper title to possess.

It is the evidence of the Adverse Claimants, that their possession followed the documentary title. We submit that the Plans attached to the Conveyances do not establish the location of the properties. The Plans attached to the Conveyances were not prepared by a Surveyor. Even the stakes to their property were not installed by a licensed Surveyor, but rather by Savius Jean. In these premises, how did the Adverse Claimants establish their property?

A structure of dimensions 50 feet by 10 feet existed on the property prior to 2013, as per the Survey Plan No. 1026 EL recorded on the 22nd day of August 2013. This is the filed Plan of the Petitioners. Adverse Claimant and Attorney Cecil Hilton speaks to being the owner of this structure. Further, he speaks to it being for the use of Savius Jean. Witness Savius Jean confirms the same. We respectfully submit that this structure exist on open land and does not amount to possession.

There is no adverse claim to Parcel A – 13.51 acres known as Corpet and Parcel C- 1.83 acres known as Durham 2. Further, there is no adverse claim to some 15 acres of Parcel B known as Durham 1. Accordingly, we respectfully ask this Honourable Court to grant a Certificate of Title to these portions.

In respect of the Adverse Claim to some 16 acres of Parcel B known as Durham 1, we respectfully submit that the Petitioners have proven a stronger title to the property. We therefore ask this Honourable Court to reject the documentary claim and possessory claim of the Adverse Claimants to the 16 acres and grant a Certificate of Title to the Petitioners for the 16 acres as well.

The Adverse Claimants case and their evidence

[11.] The evidence of the adverse claimants is perhaps best seen in the witnesses statement Cecil Hilton which provided:

1. I am Cecil Ivern Hilton, Counsel and Attorney –at-law of the Eastern District of the Island of New Providence, in the Commonwealth of The Bahamas. I make this witness statement in respect of my Adverse Claimant opposing the Petition.
2. I am well familiar with the land in dispute as it includes my Father, John Philip Hilton. He first took me there on a morning in June, 1949, which was the day of the election for North Eleuthera and Harbour Island. Our purpose of going was to pick some peas for dinner.
3. Subsequently, I constantly went to go pick pigeon peas and pink sweet potatoes. Most of them were white but there were some sweet pink potatoes; also to cut sugar cane which my father would bundle up and take to the dock for the mail boat to transport to Nassau where they were sold. I remember distinctly he usually did this on a Tuesday because the mail boat left on Wednesdays.
4. Throughout the year and in particular March/April we would harvest sapodillas and mangoes from the subject land to send to Nassau. This continued without interruption until November 1956 when I left Eleuthera for Nassau. He died on the 12th December, 1956. But, each year, from then to now, I would return to Eleuthera around Easter and carry out the same chores; except for one year, that is to say, in 1957 when I did not visit the subject property.

5. However, in 1990 I returned to the land and cultivated a portion of the North-eastern section growing cabbages and onions. This was later extended when my nephew Cornwill sent a shipment of plants from Andros.

6. As there was more activities on the land at this time I hired a caretaker, Jean Savius who has sworn an Affidavit herein. He assisted in the upkeep of my farm. I had visited the subject land on numerous occasions as a child and have never seen the Petitioners or their relatives there at any time.

7. However, I am more familiar with Eardley and Hugo Barry but not their brother, Robert. Of course I know Eardley from travelling on the mail-boat and their father, Bob Barry and their mother, Emerald, since childhood. I spoke at their mother's funeral several years ago.

8. In the course of re-opening the farm on the land I obtained permission to erect a caretaker's cottage around 2008 and it is occupied by Jean Savius. At no time at all, from before my father died on 12 December, A.D., 1956 to present was I interfered with by anyone; other than the usual crop thieves occasionally.

9. Historically, my family has occupied the land where I and my nephews farm since the 1920s because my Father said he grew up farming it and he was the farmer until his death.

[12.] The adverse claimants submitted at paragraphs 47-50 of their closing submission that the evidence of the witnesses all show that at the time of the filing of the petition they were in exclusive, continuous and undisturbed possession

47. It is submitted that the Petitioners and each of them admitted to being untruthful in that they made statements in support of their petition suggesting that they were in exclusive possession of the land which they submitted under cross examination which they knew was untrue.

48. That they were unable to call any credible witness establishing that they were in possession of the land exclusive or otherwise immediately preceding the presentation of their petition.

49. They have admitted that they are aware that the adverse claimants are in possession of documentary title of the property duly stamped and recorded years prior to their application, therefore notwithstanding said documents not being part of the trial bundle the same need not be proved in accordance with section 81 of the Evidence Act.

50. In closing, it is submitted that the Petitioners, in as far as their claim relates to the property of the adverse claimants the same must fail. We invite the court to grant the adverse claimants a certificate of title and award cost against the petitioners to be taxed if not agreed.

Law, Analysis and Disposition

[13.] 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.

[14.] 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."

[15.] 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.

[16.] 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.

[17.] Having seen and heard the witnesses and considered the documentary evidence advanced on behalf of the parties, I prefer the evidence of the Petitioners and their several witnesses. The title is partially documentary and possessory. Although I am satisfied John Brown is illiterate, notwithstanding his sworn affidavit, I accepted that he aided his godmother in the upkeep of the property which the Petitioners now claim. I accepted that they made out the other factual assertions in their Abstract of Title.

[18.] There are no real Adverse Claims to Parcels A and C. In respect to these parcels I am satisfied that the Petitioners have demonstrated the necessary documentary title as well as the animus possidendi and factual possession for the grant of certificates of title to these parcels.

[19.] As to Parcel B, I accepted that the Petitioners have demonstrated a better title to the property than the Adverse Claimants, save for a 4.85 acre portion. As to a possessory claim, I did not find that the Petitioners and their family had been dispossessed of the subject property, save for the area around the dwelling house built by the Adverse Claimants (and occupied by Mr. Savius Jean) and heading towards the sea, I am not satisfied that there has been any other incursion into the Petitioners' title to the property, for the requisite period.

[20.] I am satisfied that the possession and occupation of the Adverse Claimants was of a familial nature by Mr Savius Jean and the ancestors of the Adverse Claimants. This area on the plan and identified as Cecil Hilton and approximating 4.85 acres will be granted to the Adverse Claimants jointly in common with each other.

[21.] I direct that the Petitioners prepare a new plan for the entire property granted to them, excluding the portion which I have granted to the Adverse Claimants.

[22.] I order that each party to bear their own costs of the action.

Dated the 9th day of November 2023


Sir Ian R. Winder
Chief Justice