COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
No. 2018/CLE/gen/01248

B E T W E EN:

EDWARD O'DONNELL

First Plaintiff

AND
DIANE WARD

Second Plaintiff

AND

PAULINE CHESTNUT

Defendant

Before:	The Honorable Mr. Justice Loren Klein
Hearing Date:	9 November 2020 and 21 January 2021
Appearances:	Keri Sherman and Luther McDonald for the Plaintiff
	Wayne Munroe K.C and Palencia Hunter for the Defendant

RULING

KLEIN, J.

Real property—Writ Action—Claim for declaration of ownership of beachfront property in South Bimini by documentary title holders—Claim for Trespass and Injunction against occupier—Documentary title holders U.S. citizens—No action taken to possess land physically and documentary title holder infrequent visitors to South Bimini—Counterclaim for Adverse Possession—Claim of Undisturbed and Exclusive Possession—Real Property Limitation Act, 1995—Limitation Period—Acknowledgement of Title—Running of Time—Quieting Titles Act, Ch. 393—Certificate of Title set aside for fraud —Effect of setting aside title for fraud—Whether earlier QTA action still "extant"—Pleadings—Parties bound by their pleadings—Adverse possession—No particulars of adverse possession pleaded

INTRODUCTION AND BACKGROUND

[1] The Plaintiffs are husband and wife. They are citizens of the United States of America, who purchased a beachfront property in the seagirt subdivision of Port Royale, South Bimini (Lot 39, Block 1) on 5 June 2001.

[2] Their dream was to construct a vacation home on the island. Beginning in 2002 and continuing until 2004, they began receiving letters and telephone calls from a Port Royale resident named Pauline Chestnut (a.k.a. Pauline Rorabaugh), the Defendant in this action. Ms. Chestnut

was to become their rival and antagonist for many years over the ownership of Lot 39 ("the property").

[3] Ms. Chestnut and her husband Ken Rorabaugh are the owners of Lot 57, which is located almost directly behind Lot 39, separated by a roadway. In her letters, Ms. Chestnut expressed a growing desire to purchase Lot 39 and made several offers to the Plaintiffs, which were rejected. The correspondence tailed off in 2004 and there was no further communication between the Defendant and the Plaintiffs for several years.

[4] In the subsequent years, the property became overgrown and beachfront sections were eroded by seasonal hurricanes. It appears that the Defendant took steps to maintain the property by clearing the vegetation, replacing sand lost to erosion, and allegedly constructing a length of seawall along the seaward boundary.

[5] In 2011, without notice to the Plaintiffs, the Defendant commenced an action in the Supreme Court under the Quieting of Titles Act ("QTA") (No. 1657 of 2011) ("the first action") asserting possessory title to the property based on possession for an undisturbed period of more than 12 years beginning in 1993. She was subsequently granted a Certificate of Title ("COT") to the land by Evans (Milton) J, on 26 April 2013. Acting under the COT, the Defendant made various improvements to the property and allowed it to be used by persons in the community for recreational purposes.

[6] In or about 2011, the Plaintiffs decided to sell the property. By letter dated 11 May 2012, they gave the offer of first refusal to the Defendant at a reduced price of 25% less than the listed price (which was not stated in the letter). There was no response by the Defendant. On a visit to South Bimini in July 2014 to view the property and meet with the realtor engaged to sell the property, the Plaintiffs noticed that a "rock wall" had been erected on one of the boundary lines and a portion of "sea wall" constructed along the seaward end. They confronted the Defendant about this, who asserted that the property was hers. The Plaintiffs sought legal advice and their attorneys wrote the Defendant and her husband advising them to cease trespassing on the property.

[7] It was at this point that the Defendant, through her attorneys, issued a letter to the Plaintiffs informing them of the COT. The letter asserted that the Plaintiffs' title had been extinguished by the COT, and as the Defendant was acting under color of title, no trespass had been committed. The Defendant then, through her attorneys, warned the Plaintiffs not to interfere with her use and enjoyment of the property, otherwise further action would be taken.

[8] In response, the Plaintiffs initiated action 1861 of 2014 on 14 November 2014 ("the second action"), seeking to have the COT set aside pursuant to s. 27 of the QTA on the grounds of fraud. The allegations were that the Defendant provided false testimony in the quieting titles action, in which she was the petitioner. In particular, it was contended that she gave evidence that she did not know who owned the property when she well knew that the Plaintiffs were the documentary owners, failed to serve them with the Notice of Petition as required by s. 7 of the QTA, and failed

to bring to the notice of the Court that she had previously acknowledged their title. The COT was eventually set aside by order of the Chief Justice (Act). Stephen Isaacs on 8 January 2018, with costs to the Plaintiffs.

[9] I pause here to observe that the order setting aside the COT records that it is made "*by consent of the parties*", and counsel for the Defendant made something of this in written and oral submissions. In her witness statement (at para. 25) the Defendant stated that: "…*Nonetheless, my counsel and I agreed to have the Certificate of Title set aside because the Plaintiffs were not personally notified of the quieting action*." However, the operative paragraph of the Order records that the Certificate of Title is "…*hereby declared null and void and is set aside pursuant to the provisions of Section 27 of the Quieting Titles Act, 1959 as the same was obtained by means of fraud and falsehood*."

[10] I will return to the setting aside of the COT, as it is important for another issue that arises in this matter. But I will observe at this point that notwithstanding its description as a consent order, this was *not* a consent order in the true sense. It may be that the Defendant did not (and could not) object to the order. But the law is clear that a COT granted by the Court can only be set aside in one of two ways: (i) either by the process of appeal; or (ii) by an action to set aside the certificate under s. 27 of the Act as being fraudulently obtained (see **Clarke et. al. v Wilkinson**, BS (1985) SC 49, per van Sertima, J (actg)).

[11] Notwithstanding the setting aside of the COT, the Defendant continued to assert possessory title to the property and the right to use it, forcing the Plaintiffs to seek a Court order to prevent her doing so. On 22 January 2019, Stewart J granted an injunction restraining the Defendant, her servants or agents from trespassing, attending at or entering upon or interfering with the plaintiffs' possession of the lot. Undeterred, the Defendant applied to have the injunction discharged on the grounds that the 2011 action was "still extant", and that she still retained some color of title based on her possessory interest to use and possess the land to the exclusion of the Plaintiffs. However, the injunction was retained in place pending the trial of the action.

Summary of the claims

[12] The actions before the court are rival claims to ownership of the property, one based on documentary title (or "paper title" as it is sometimes called) and the other based on actual possession of the property over a long period of time, or adverse possession.

[13] The Plaintiffs commenced this action by specially indorsed Writ of Summons issued 25 October 2018 ("the current action") seeking a declaration that they are the beneficial owners in fee simple of the property by virtue of the 2001 conveyance. They also claimed damages for trespass, a permanent injunction to restrain the Defendant from interfering with the Plaintiffs' possession of the property, and costs.

[14] By Defence dated 31 May 2019, the Defendant admitted the documentary title of the Plaintiffs. However, she counter-claimed for a declaration that she is the rightful owner of the property, having entered it in 1993 and never having been "*disturbed or challenged in her use and occupation of subject property*" until the issue of the Plaintiffs' writ in 2019. She therefore claimed a possessory title on the basis of 12 years' undisturbed possession, which is alleged to have extinguished the documentary title of the Plaintiffs.

[15] By their defence and reply to the counterclaim, the Plaintiffs denied the claim to possession and asserted that in any event, the alleged period of possession relied on by the Defendant was interrupted by her acknowledgement of the Plaintiffs' title to the land.

[16] The Second Plaintiff filed a witness statement in support of the Plaintiffs' case and was cross-examined at trial. The Defendant's evidence consisted of her witness statement and statements filed by her husband, Ken Rorabaugh, and Michael Cox and Robert Gandy, all of whom also gave oral evidence.

The issues

[17] The main issue to be decided in the claim and counterclaim is whether the title of the documentary title holders or the claim of adverse possessor is to prevail. However, this may be distilled into several sub-issues as follows:

(i) whether the Defendant has established adverse possession for the requisite limitation period so as to extinguish the title of the Plaintiffs;
(ii) whether the Defendant acknowledged the title of the documentary owners for the purpose of s. 38-40 of the Limitation Act;
(iii) what is the effect on the current action of the setting aside of the Defendant's COT granted in the 2011 Quieting Title Action; and
(iv) whether the Plaintiffs' action for trespass is maintainable against a Defendant who is asserting adverse possession.

The law and legal framework.

General principles

[18] At the root of this case is the operation of the common law doctrine of adverse possession, which has been productive of numerous rival claims to land ownership in the absence of a land ownership register. Pursuant to that doctrine, a claimant who has been in adverse possession of land for a certain period of time may challenge (and defeat) the paper owner's title. The position was memorably stated by Lord Diplock, delivering the judgment of the Privy Council, in the case of **Ocean Estates v. Pinder** [1969] 2 AC 19 as follows [at pp. 23-24]:

> "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 relative strength of the titles proved by the rival claimants."

[19] Although that statement remains good law, it has been qualified in respect of proceedings under the QTA by a series of later Privy Council cases (see in particular **Armbrister & Anor. v Lightbourne & Anor.** [20212] UKPC 40, and **Bannerman Town et. al. v. Eleuthera Properties Ltd.** [2018] UKPC 27). In the latter case, the Board made clear that having regard to the nature of a certificate of title granted under the QTA, which was akin to absolute title, the court had to do something more than just decide as between rival claimants who had the better title. It had to ascertain which of the claimants actually established title [at 38]:

> "Thus, although title to unregistered land is normally thought of in purely relative terms, the issue in any proceedings being who has the better title, a certificate of title confers something more like absolute title, of the quality conferred by registered title under a system of land registration. For this reason, the court needs to be cautious about certifying title under the Act, as the Board warned in the *Armbrister* case."

[20] It is important to point out, however, that the current proceedings is not a quieting titles action although, as has been explained, there have been earlier proceedings under the QTA, to which reference will be made.

The Limitation Act

[21] The law to be applied is a combination of the provisions of the relevant limitation Act and a body of case law on adverse possession. The current Act is the Limitation Act 1995, which entered into force on 31 August 1995. It replaced a series of older Limitation Acts that stipulated various limitation periods for the barring of actions for recovery of land (the most recent of which was the Real Property Limitation (1874) Act), and reduced the relevant limitation period from 20 to 12 years.

[22] The 1995 Act was a consolidating Act and, in addition to reducing the applicable limitation periods, it included many amendments and modernizing provisions that had been added in comparable UK legislation since the passage of the 1874 Act. In this regard, s. 25 importantly clarified the status of the title acquired by the adverse possessor after the requisite limitation period expired. The material provisions of the 1995 Act are as follows:

> "s. 16(3): 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."
>
> 17.(1) Where the person bringing an action to recover land, or some person through whom such person claims, has been in possession thereof and has while entitled thereto been

dispossessed or discontinued possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

"s. 25(1): At the expiration of the period prescribed by this Act for any reason to bring an action to recover land, the estate or interest of that person in the land shall vest in the person who is then in adverse possession of the land within the meaning of section 24."

"s.29: For the purposes of this Act, no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, and no continual or other claim upon or near any land shall preserve any right to recover land."

"s.38(1): Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of any property, and—

(a) the person in possession of the land or personal property, acknowledges the title of the person to whom the right of action accrued; or….[…]

the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment."

"s. 39. For the purposes of section 40 –

(a) an acknowledgement shall be in writing and signed by the person making the acknowledgement; and…".

"40. (1) An acknowledgement of the title to any land, or mortgaged personally, by any person in possession thereof shall bind all other persons in possession during the ensuing limitation period of limitation."

Law relating to adverse possession

[23] While the statute sets out the relevant limitation periods barring actions for recovery of land, the question of what acts may constitute adverse possession and the quality of such acts required to displace or oust a legal owner have been developed over many years under the common law.

[24] In **Perry v Clissold** [1907] AC 73, Lord Macnaghten said [at p.79]:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

[25] One of the leading statements of the principles relating to adverse possession is to be found in the judgment of Slade J. in **Powell v McFarlane** (1977) 38 P&CR 452, which was approved by the UK Court of Appeal in **Buckinghamshire County Council v. Moran** [1990] Ch. 623, and the House of Lords in **JA Pye (Oxford) Ltd. v Graham** [2002] UK HL 30. In that case, Slade J. set out four main principles that have been oft-repeated and applied in many (if not most) of the cases decided under the QTA [at 470-471]:

> "(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 such 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 posited*").
> (3) Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession, though 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 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. […]
> (4) The *animus posited*, 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 realize 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. <u>What is really meant, in my judgment, is that, the *animus posited* involve the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with paper title if he be not himself the possessor, so far as is reasonable practicable and so far as the processes of the law will allow</u>." [Emphasis supplied.]

[26] As set out in this case, to establish adverse possession, an occupier must show that he had both the requisite intention to possess the land and factual possession of the land. Possession however is a protean term, and the mere use and occupation of property will not necessarily amount in law to adverse possession. It is a fact-specific question and the quality of the possession sufficient to dispossess a documentary owner will vary from case to case depending on the nature of the land in question.

[27] For example, in **Wallis's Cayton Bay Holiday Camp Ltd. v Shell Mex and BP Ltd.** [1975] QB 94, a strip of land intended to be developed into a garage was occupied successively as a farming area and as a holiday camp. The claim in adverse possession failed, Lord Denning M.R. stating as follows [at. 103]:

> "Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. That is shown by a series of cases in this court, which on their very facts, show this proposition to be true. When the true owner of land intends to use if for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonable purpose, like growing vegetables. Not even if this temporary or seasonal purposes continues year after year for 12 years, or more: see *Leigh v. Jack* (1879) 5 Ex. D. 264; *Williams Brothers Direct Supply Ltd. v Raftery* [1958] 1 Q.B. 159; and *Tebald Ltd. v Chamberlain* (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words."

[28] In a recent authority under the Quieting Titles Act (**Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd.** [2018] UKPC 27), the Board dealt with the issue of the sufficiency of acts said to constitute physical possession. The respondent acquired a conveyance of the property in 1988 (which turned out to be defective), and relied on its acts of surveying the property, clearing vegetation at the boundary markers twice a year, restoring some boundary markers, cutting down underbrush on an overgrown track road to save time walking around the boundary and erecting "private property" signs as evidence of possession. The Board held that these activities did not qualify as possession of the property for the purposes of establishing a possessory title. The Board explained:

> "Leaving aside the required intention to possess, factual possession requires some occupation, use or other dealing with the land as an occupying owner might have been expected to undertake. It will be a fact-specific question in the sense that the characteristics of the land in question will be of primary relevance. In the present case, the Property was unsuitable between 1988 and 2010 for much more than the intermittent activities of subsistence farming, crabbing and so forth already described, although it may have had long-term development value. Although a buyer of development land with documentary title may be deemed to be in possession of it unless the contrary is proved, a person without documentary title who neither occupies nor uses the land, because he has only a wish to use it for development at some time in the future, must nonetheless do something sufficient to constitute the taking of possession of it if he is to acquire title."

[29] Further on the topic of the requisite factual possession, I also find very instructive (and I am content to adopt) the summary provided by Winder CJ in *Dean (nee Strachan) v Ocean Point Estates Ltd*. (2014/CLE/gen/01934) [27]:

> "[…] The factual possession required is qualified as 'complete and exclusive physical control' over the land, which must be open, not secret; peaceful, not by force; and adverse, not by the consent of the true owner' (*Buckinghamshire CC v Moran* [1990] Ch 632, per Slade J in *JA Pye (Oxford) Ltd. v Graham* [2003] 1 AC 419, per Lord Browne-Wilkinson). It has been considered and prescribed in *Lord Advocate v Lord Lovat* (1880) 5 App. Cas. 272 as mandating that the possession be 'open, notorious and unconcealed'. The acts of possession must be such that it would be noticed by the documentary owner, reasonably careful of his own interest (*Re Riled and the Real Property Act* [1965] NSWR 994)."

[30] As indicated, in addition to satisfying the elements of factual possession and the intention to possess, the possession must also comply with the provisions of the Limitation Act. Time begins to run for the purposes of the limitation period when the documentary owner has been dispossessed or has discontinued possession and adverse possession has been assumed by some other person, being the trespasser in whose favor the period of limitation can run (see sections 17(1), 24(1) of the Limitation Act). However, the running of time is a dynamic process and time may stop running in any of the following circumstances: (a) where the documentary owner takes action to re-enter or physically recover the land, or brings an action for recovery; (b) if the occupier abandons the property; and (c) if the person in adverse possession acknowledges the title of the documentary owner (see ss. 38 - 40 of the Limitation Act). Any break in possession by one or more of the above events completely resets the clock, and resumption of possession thereafter starts time running afresh (s. 24(3)).

[31] It is also important to note that possession of land may be exercised jointly and vicariously, in that several persons may have a common intention to possess the land, or that party "B" may do so on behalf of "A", such as where B is the licensee or agent of A, and A claims through B. Further, a person in adverse possession may convey or dispose of his possessory interest to another person before the expiry of the limitation period, such that the successor may combine his period of adverse possession with that of the predecessor for the purposes of the Act.

Law relating to trespass

[32] I must also turn briefly to the law relating to trespass, as the Plaintiffs are also seeking damages for trespass.

[33] In ***Montague Investments Ltd v Westminster College Ltd 2015/CLE/gen/00845,*** Charles J set out the law relating to trespass as follows [21]:

> "Trespass to land is a medieval concept, much developed by the common law. Any unjustifiable intrusion by one person upon land that is in possession of another amounts to

> a trespass. It is a trespass to place anything on or in the land which is in the possession of another: *Simpson v Weber* (1925) 41 TLR 302. It matters not how trifling the nature of the action is, a suit in trespass will lie."

[34] It is clear, however, that a person with documentary title to land may maintain an action for trespass against a person who is in adverse possession of that land if the action to recover the land is brought before the expiration of the relevant limitation period. In **Ocean Estates v Pinder** *(supra)*, the Board said:

> "It follows that as against a defendant whose entry to 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 by the Real Property Limitation Act by effluxion of time of the 20-year continuous and exclusive possession by the trespasser."

[35] Later in that passage the Board said:

> "[I]t is clear law that the slightest acts by the person having title to land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired: see *Bristow v Cormican* (1878) 3 App. Cas. 641, Lord Hatherley at p. 657, and *Taotie v. Danquah* [1961] 1 WLR 1238."

[36] Implicit in these statements is the principle that after the expiration of the limitation period, the trespasser acquires a new title based on his adverse possession, and therefore an action for trespass cannot avail as against him: see the Court of Appeal's decision in **Rolle v Meadows** (Skycap. No. 128 of 2020), where the Court decided not to follow an earlier decision (**Fairness Limited v Bain et. al**., Skycap. No. 30 of 2015) in which it was held that a person in adverse possession remains a trespasser until his title is declared under the QTA. In **Rolle v Meadows**, the Court of Appeal said [at 36]:

> "…this is a claim to recover land and if the appellants had been in adverse possession for a period of 12 years immediately preceding the issue of the Writ, the respondent's title would have, by operation of law, been vested in the appellants and the respondent would have had no right to relief of vacant possession nor to damages for trespass."

[37] Thus, whether or not the action for trespass is maintainable depends on whether the defendant is able to successfully establish adverse possession for the relevant limitation period.

Injunction

[38] As the plaintiff also seeks a perpetual injunction against the defendant, I briefly set out the law and legal principles relative to the same.

[39] Section 21 (3) of the Supreme Court Act, Ch. 53 provides:

> "(3) If, whether before, or at, or after the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the Court thinks fit, whether the person against whom the injunction is sought is or is not in possession under claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title, and whether the estates claimed by both or either of the parties are legal or equitable."

[40] As to the principles to be applied, I adopt the brief statement by Balcombe LJ in **Patel and others v. WH Smith (Ezio) Ltd. and another** [1987] 2 All ER 569, where he said:

> "It seems to me that, first, *prima facie* a landowner whose title is not in issue is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him. In support of that proposition there are two comparatively recent cases at first instance. The first is *Woolverton & Wilson Ltd. v Richard Costain Ltd.* [1970] 1 All ER 483, [1970] 1 WLR 411, which was a reserved judgment of Stamp J, and from the report I noted that *Behrens v Richards* [1905] 2 Ch. 614 was cited in argument, though the judge does not refer to it in his judgment. Stamp J said… [at 413]:
>
> > 'It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction; for if there is no damage done the damage recovered in the action will be nominal and if the injunction is refused the result will be no more than a license to continue the tort to trespass for a nominal payment.' "

The Evidence

The Plaintiffs'

[41] The Second Plaintiff filed a witness statement on 5 November 2020. She is a retired Circuit Court Judge (Judicial Circuit of Florida) and she and her husband (who is a retired attorney) purchased Lot 39, Block 1, Port Royale Subdivision on 5 June 2001 from John and Elizabeth Kroetz. The conveyance is recorded in the Registry of Records (Vol. 8346, pp. 462-473).

[42] She stated that they visited the property annually during 2004–2011. Shortly after the purchase, the Defendant contacted her Chambers in Miami to express interest in purchasing the property. The Defendant had previously written letters to the Kroetzes expressing interest in purchasing the property and trying to ascertain the new owners, which were forwarded to the Plaintiffs.

[43] The handwritten letter of 6 January 2002 addressed to the Kroetzes said in part:

> "I have a house in S. Bimini Bahamas (Pictures Enclosed). I know you sold your lot a few years ago. I live in Fla. And I believe you sold to an att. in Miami. I want to buy that lot, and any help you can give me will be appreciated."

[44] In 2002, the Plaintiffs received a letter from the Port Royale Homeowner's Association ("the HOA") welcoming them to the community and indicating that their names had been entered as owners to Lot #39, Block 1. Further, the Plaintiffs wrote the HOA on 20 January 2003 providing their names and address, which were listed with the Home Owner's Association. They remained members of the Association until 2007, when they ceased paying their dues, apparently on the basis that fees were not applicable to undeveloped property. The Second Plaintiff stated that at various times the Defendant, her husband Ken Rorabaugh, and her father Paul Chestnut, were members of the Board of the HOA, and as a result were aware that the Plaintiffs owned the property.

[45] She stated that the Defendant contacted her via telephone and by sending several letters to her home address in Miami Shores during 2003 and 2004 expressing an interest in purchasing the property. In a letter dated 5 January 2003, the Defendant offered to purchase the property for $75,000. That letter began "*Thank you for receiving and returning my calls*". In another letter dated 13 October 2003, she indicated that "*I haven't heard from you since the beginning of September*."

[46] In a letter dated 2 February 2004, addressed to "Diane Ward and Family", she explained that the offer of $75,000 for the property was a "good offer" when compared with the selling price of similar properties. Among other things, she proposed an exchange of properties she owned in Florida for the Bimini property and lamented the time she and her family spent maintaining the property during her family trips to South Bimini:

> "I am still interested in the lot and I have 2 lots 1¼ acre in Deltona (30 minutes from Orlando Disney) and (30 mins. from Daytona Beach) you could build 2 houses here in the States for the costs of building one in the Bahamas. Be willing to exchange them." […]
> "I know that you are a judge and I respect that. But as a neighbor behind you and you have a full-time neighbor to the right of you, who want you as an American to respect the Bahamas land and if you were their (*sic*) full time. And maintain it! Jim will tell you most foreigners pay the Haitians to maintain their lots at $125 each month to mow and weed or come once a month to mow and maintain the lot themselves. I appreciate as a neighbor maybe you could ask Jim to mow it. I hate spending ½ day maintaining someone else's lot when I am only their (*sic*) 2 days."

She attached to her letter a map of the Port Royal Subdivision identifying the property as "Diane's" along with various photographs showing the property from the road and ocean views.

[47] In or around 2011, the Defendant erected a "dolphin" sign on the property (i.e., a post with a dolphin image attached) and placed large coral rocks along portions of the borders of the property, apparently similar in form to rocks placed along the boundaries of the Defendant's

property. The Plaintiffs had a survey of the property done by Chee-A-Tow & Company Ltd. in 2012 and a re-staking of the boundaries. By letter dated 11 May 2011, the Plaintiffs wrote the Defendant and offered the property to her for a reduced price (25% less than the asking price) with the right of first refusal. The Defendant did not respond to this offer and after the expiration of thirty days, the Plaintiffs listed the property for sale with Mario Carey Realty ("MCR Realty").

[48] In 2014, on a visit to South Bimini, the Plaintiffs discovered the rock wall and seawall that had been erected on the property. They questioned the Defendant about the structures, whose response was that property belonged to her. As a result, the Plaintiffs engaged an attorney to serve a demand letter on the Defendant and her husband advising them to cease and desist trespassing on the property. The Plaintiffs recommenced efforts to sell the property during 2018, and it was listed with MCR Realty for $475,000. During May of 2018, when the real estate agents visited to erect for-sale signs on the property, they were confronted by the Defendant, and the following day discovered that the signs had been removed and destroyed. Following this, the Plaintiffs submitted complaints to the Attorney General and the Superintendent of Police stationed at Bimini, before resorting to the litigation.

[49] On cross-examination, the second plaintiff was challenged on the lack of frequency of her visits to South Bimini. She indicated that she visited once or twice a year from 2004 to 2011. Questioned as to whether or not she saw the signs posted on the property in 2011 in connection with the legal action, she indicated that she saw the seawall that was erected and other "strange signs" such as the dolphin sign on the property, but did not observe notices related to the quieting titles proceedings.

The Defendant's evidence

[50] According to the Defendant's evidence, she entered the property, which is located opposite her home, in 1989 (although, as discussed later, 1993 is the date pleaded in the counterclaim). It was then overgrown by bushes and was considered a health and safety hazard to the community. As a result, she hired several men to clear the property, using a tractor, backhoe and bobcat, and also engaged the help of family members. The property was kept clear to be used as a beach access and recreation area for picnicking. She also planted fruit trees and plants on the property, built a rock wall to enclose the property on the southern boundary and a portion on the seaside.

[51] The island was impacted by a hurricane in 2005 which caused significant erosion to the property. The Defendant alleges that she expended funds on 12 truckloads of fill to build up the seaside boundary of the property and made efforts to save some storm-damaged palm trees. Between 2013-2014, she and her husband built a 100-foot long retaining wall to stop further erosion of the property and replaced over 28 x 100 feet of erosion with landfill, which amounted to over 30 truckloads of fill. She recounted that in 2013, she and members of the community used the property to host an annual event for the children of Port Royale.

[52] She claimed that during this period she was never challenged in her use of the property until served with the Plaintiffs' writ in 2019. She admitted that she contacted the Second Plaintiff in 2003 to inquire whether they were the purchasers of the lot and wrote further letters relating to the possible purchase of the property and its maintenance, but claims she never got a response. In 2011, she issued a quieting titles action in the Supreme Court and was granted a COT in 2013. She denied ever receiving the 2011 letter from the Plaintiffs offering the property for sale.

[53] On cross-examination, the Defendant was pressed on the 2003 and 2004 letters, and conceded that she acknowledged the Plaintiffs as the owners of the land. However, she attempted to qualify this by stating that she was not "*certain*" that the Plaintiffs were the owners, as she did not conduct a property search to ascertain this. She was unable to provide the dates of the photographs exhibited to her witness statement purporting to show work done on the property to maintain it and remedial work following beach erosion caused by the hurricanes.

[54] Ken Rorabaugh is the husband of the Defendant and was the President of the Port Royal HOA in 2020. His evidence was that the Defendant had been dealing with the property for over 30 years. He recalled that when the Defendant entered the property it was overgrown and "*posed a safety hazard for my family and others in the community*". He therefore assisted her in keeping the lawn mown as required by the HOA and hired men to assist with cleaning the property.

[55] His evidence supported the Defendant's allegations that they kept the property clear, used it as a beach access and for recreational purposes, as well as planted trees and shrubs and constructed a rock wall on it. In this regard he added that "…*to improve the appearance of the subject property, the defendant added a rock garden, a six-foot yellow bench and several other outdoor furniture as picture. She also added a gazebo for wedding use at no cost to the community*." Asked if he was aware of the correspondence between the Defendant and the Plaintiff relating to the possible purchase of the property, he indicated that he had not seen the letters until the litigation started. However, he did acknowledge during cross-examination that at some point after 2014 he spoke with the First Plaintiff "*to come to some kind of settlement*", although he (the First Plaintiff) was unwilling to do so.

[56] Matthew Cox is a retired teacher from Florida. He stated that he lived in Port Royale for between 2-10 months each year for the past 32 years and is familiar with the property. Robert Gandy is also a teacher, living in Florida, and his family is the owner of Lot 40 in the Subdivision, where his family has lived for the past 25 years. He only visits South Bimini during the summer, Christmas, or other major vacation breaks.

[57] Both Mr. Cox's and Mr. Gandy's witness statements contained the formulaic statement that they believed the Defendant to be the owner of the property by long and undisturbed possession from 1989. They both confirm the activities that were taken on the property to maintain it and to repair the erosion caused by hurricanes.

[58] Mr. Cox stated that the property is in direct view of his family's property and any activity on it was noticeable. He opined that without the maintenance done to the property, the "*marketable value of the subject property and adjoining lots would have decreased as the lot became overgrown, harboring vermin, and posing a health and fire hazard to adjacent properties*". Further, he indicated that the maintenance done by the defendant and her husband "…*has contributed to the whole Port Royal community, particularly from the erosion of adjoining properties*."

[59] Mr. Gandy referred to Hurricane Frances of 2004, and stated that "*his family was worried about the subject property earring into our lot*." He also stated that a seawall was built in 2014 and that without this seawall "*Hurricane Maria would have done a lot more erosion and caused damage to our lot*." Gandy recalls visiting Bimini in 2011 and seeing the "*Quieting documents of possession*" posted on the property and at the "*administrative Hall bulletin board*". He also refers to seeing Sheldon Pitt on Lot 39 in 2011, who he said asked him and his father about the ownership of Lot 39. They told Pitt that the property was owned by Ken and Pauline Rorabaugh.

[60] On cross-examination, both Mr. Cox and Mr. Gandy testified that they were unaware as to whether there was any communications between the Defendant and the Plaintiffs with respect to the possible sale of the property.

DISCUSSION AND ANALYSIS

Whether the defendant has established adverse possession for the requisite limitation period so as to extinguish the title of the plaintiffs

[61] It is immediately apparent that there is some confusion as to the date on which the defendant claims to have entered the property. The defendant pleads in her counterclaim that she is the owner of the property by virtue of having entered it in *1993* and that her use and occupation of the property has not been "disturbed or challenged" during that period. However, in her witness statement in support of this action, she claims that she "*entered the subject property in 1989*" (para. 8), and this date is also stated as the entry date by two of her supporting witnesses. It is also to be noted that in the QTA action she also relied on entry from 1993.

[62] It is trite law that a party is bound by his or her pleadings (Order 18, r. 7; **Bruce v Oldham's Press Ltd.** [1936] 1 KB 697). In this regard, counsel for the Plaintiffs referred to the Antigua and Barbuda Court of Appeal case of **Ruth Browne v Claire Perry** (Civ. App. No. 12 of 1988, unrest.), in which acknowledgement of the paper owner's title was alleged to have been made in 1983, which defeated the claim to possessory title at first instance. However, the Court of Appeal found that the date actually pleaded was 1985, and Moe J.A. said:

> "[P]leadings by a party provide a measure for comparing the evidence adduced by a party with the case which he has pleaded and any variation between the case as pleaded and that established and the extent of that variation were all matters which affect the acceptability

of a party's case. Reference may be made to *Bullen, Leake and Jacobs, Precedents of Pleadings* (12th Ed.) at pages 17 and 18.

> 'The respective case of the parties can only be considered in the light of and on the basis of pleadings, which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters such as to put forward the real questions in controversy between the parties.' "

[63] I am therefore constrained to accept 1993 as the date for entry.

[64] Before examining the quality of the Defendant's alleged possession, it is appropriate to consider whether the requisite limitation period could conceptually have expired before the action by the Plaintiff to recover the land, and the counterclaim by the Defendant. The writ was issued on 25 October 2018 and served on the defendant on 3 May 2019. The Defendant filed her Defence and Counterclaim for a declaration of adverse possession on 31 May 2019. The first issue is therefore whether 12 years of continuous, uninterrupted possession expired between 1993 and 2019.

[65] The period from 1993 to 2019 would amount to some 26 years. But as indicated, the process of ascertaining the limitation period it is not just a calculation of chronological time. There are a number of events that are capable of stopping time running in favor of an adverse possessor, and several are present and relied on by the Plaintiffs, namely: (i) the alleged acknowledgement of the Plaintiffs' title by the Defendant in 2003 and 2004; (ii) the successful 2014 action by the Plaintiffs to set aside the COT; and (iii) the institution of the 2011 Quieting Titles action itself.

Acknowledgement of title in 2003, 2004

[66] As set out above, pursuant to ss. 38-40 of the Limitation Act, an acknowledgement of the paper owner's title interrupts the possession and starts time running afresh.

[67] I was not addressed on the law relating to acknowledgement of title, but I take the liberty of setting out the principles as they were discussed by the UK Court of Appeal in the context of similar statutory provisions in the case of **Allen v Matthews** [2007] All ER (D) 223. There, the Court of Appeal said as follows:

> "75. For a document to constitute an acknowledgement of title all that is required is that, as between himself and the owner of the paper title, the person in possession acknowledges that the paper title owner has better title to the land. Whether or not such a particular writing amounts to an acknowledgement depends on the true construction of the document in all the surrounding circumstances: **Edginton v Clark** [1964] 1 QB 367 9CA). In that case it was held that a letter written to the agents of the freeholder offering to purchase the site was sufficient to acknowledge title even when the evidence was that the person in possession did not know the identity of the freehold owners. […] **Lambeth London Borough Council v Bugden** [2000] EWCA Civ 302,

(2001) 33 HLR 43 concerned a petition signed by squatters in a block of flats against the sale of the flats by the paper owner to a third party. Mummery LJ held that the petition was an acknowledgement of title (at para.45):

> "A request for a license to occupy the property (or a request for something else) is not the only means by which a person in possession may acknowledge that another person has the better title to the property. This petition is a clear acknowledgment by those signing it that another person (i.e., the council) has the better title to Oval Mansions. It seeks to persuade the council not to sell Oval Mansions, where they live, to a named third party….The petition does not question the power of the council to sell or challenge its right to do so, let alone assert a better title to Oval Mansion so as to obstruct a sale by the council. The document implicitly recognizes the power and right of the council to sell, but petitions it not to go ahead with the sale…"

77. In the present case the solicitors wrote to the trustee in bankruptcy, in whom Mr. Allen's interest was vested: "*We should be obliged if you would advise us as to what your intentions are with regard to the property. Has a buyer been found for the same, and if so is there any likelihood that our client will receive any monies*." I do not consider that this can mean anything else than an acknowledgement that the trustee has the right to sell and a query as to whether their client will receive any of the proceeds in the bankruptcy. I am satisfied that the judge was right to hold that it was a clear acknowledgement that the trustee had a better title to the Property."

[68] The first instance judge had found that the letter was an acknowledgment of title:

> "37. …It is a clear acknowledgement by the person signing it that the trustee has a better title to the property. It does not challenge the trustee's right to sell the property or question that right let alone assert a better title. It simply seeks information as to what will happen if the Trustee in Bankruptcy exercises the title…."

[69] The Court of Appeal accepted that the letter had been an acknowledgement of title but found that it had not been effective to stop time running (as had been found by the judge) because it had been written on behalf of a company that was not in existence at the time (having been struck off the register) and therefore could not be said to have been written on behalf of someone in possession.

[70] I would also refer briefly to the UK House of Lords case of **Ovule and another v. Bossert** [2009] AC 990, where that Court held that an offer to purchase is an expressed (or at the very least, implied) acknowledgement of title which was sufficient for the purposes of s. 29 of the UK Act. However, in that case the Court held that the letter, which was a without-prejudice letter written during negotiations in earlier proceedings, was not admissible on the grounds of privilege attaching to such communications.

[71] I should point out that the Courts in both cases were looking at the provisions of s. 29(2), and s. 30 of the UK Limitation Act 1980, which provide in material part as follows:

> "s. 29(2): "…if the person in possession of the land…in question acknowledges the title of the person to whom the right of action has accrued – (a) the right shall be treated as having accrued on and not before the date of the acknowledgement; …".
> "s. 30(1): To be effective for the purposes of section 29 of this Act, an acknowledgement must be in writing and signed by the person making it. (2) For the purpose of section 29, any acknowledgement….- (a) may be made by the agent of the person by whom it is required to be made under that section; and (b) shall be made to the person, or to an agent of the person whose title or claim is being acknowledged…".
>
> s. 31: "…an acknowledgement of the title to any land…by any person in possession of it shall bind all other persons in possession during the ensuing period of limitation."

[72] These provisions are comparable to ss. 37-40 of the Limitations Act 1995, with one significant difference. Section 30 of the UK Act requires *all* acknowledgements (including those made personally under s. 29 of that Act) to be in writing and signed by the person in possession or his agent. However, under the 1995 Limitation Act, s. 39 only requires a written document signed by the person making the acknowledgment or his agent for the purposes of s. 40 of the Act, that is, for it to be binding on persons who may come into possession *other* than the maker or recipient. Where the acknowledgment is made personally, it only requires the simple acknowledgement of the title of the person to whom the right has accrued. This distinction is not important to this case, as the documents relied on for acknowledgment were in any event handwritten letters signed by the Defendant.

[73] In the letter of 15 January 2003 (in which she thanks the second defendant for "*receiving and returning my calls*"), the Defendant describes the specific admeasurements and location of the Plaintiffs' property (100' by 150') and stated that "*I have made copies of everything that has been sold in the last five years*." In her letter of 2 February 2004, she clearly identified the location and dimensions of the property, including attaching a copy of the Port Royal Subdivision Plan with an arrow directed to Lot 39 and indicating in her own manuscript "Diane's Property".

[74] The Defendant was far more equivocal and evasive when she was cross-examined about the letters. She was asked several times whether she acknowledged that the Plaintiffs were the owners of the property, to which she initially answered either "*no*" or gave an evasive answer such as "*I had no indication legally that she was*" or suggested that she did not know for sure because the letters were not acknowledged. However, under vigorous cross-examination she eventually conceded as follows:

> "Q: Okay. And so you acknowledged that she [the second plaintiff] was the owner and you acknowledged that she should pay and in fact you went on to tell her what the likely costs of maintaining…?
> A: Yes."

[75] This evidence was in stark contrast to the testimony presented during the QTA proceedings, as revealed by this exchange in the transcript in the QTA proceedings on 5 February 2013:

> "The Court: Now, did you conduct any investigations as to who the homeowner might have been?"
> The Witness: No, sir. But we have been there, the neighbors have been there 20 to 40 years and they have never seen anybody occupy the land. That is a small community."

[76] I must say that I found the Defendant's evidence to the effect that she did not have full knowledge or understanding of who owned the property to be less than candid, if not discreditable. The letters written to the Plaintiffs were clear. The Plaintiffs had also written to her by letter in May of 2011 offering to sell (even though the Defendant denied receiving this letter). Further, the Defendant would have been aware that the Plaintiffs were attempting to sell the property from the listing and posting of signs on the property by the Plaintiffs' real estate agent in 2018, as she had confronted them.

[77] There is, also, another letter that I should mention for completeness, which is a letter dated 11 February 2015, written by the attorney then representing the Defendant to the Plaintiffs' attorneys. In that letter, it was indicated that "*the client is truly desirous of buying the subject property*", but demurred at the price and indicated that any offer price should reflect deductions for the Defendant's investment in the land. Mr. Munroe KC submitted that this letter was without prejudice, and should not be considered, as it was written during the pendency of the 2014 action. Mr. McDonald KC argued that the letter was included in the agreed bundles and no objection had been taken to its admissibility. Furthermore, it was only being relied on to show that the Defendant indicated a further wish to buy the property and felt that she was entitled to compensation for improvements she made to the property.

[78] As already pointed out, an offer to purchase property constitutes acknowledgement of the offeree's title for the purposes of s. 38-40 (see **Ovule,** *supra*). However, as the Plaintiffs were not specifically relying on this document as an acknowledgement for the purposes of the Limitation Act, it was not necessary to rule on its admissibility. If they had been relying on it for that purpose, I would have, on the authority of **Ovule,** ruled it inadmissible on the grounds of litigation privilege.

[79] However, I find on the evidence that the Defendant acknowledged the Plaintiffs' title during 2003 and 2004 in her letters, so that the Plaintiffs are entitled to the protection of ss. 36-40 of the Act. Therefore, for the purposes of their counter-claim for adverse possession, time would have been interrupted in 2003 and 2004. Therefore, only 10 years would have expired between 1993 and 2003, and the 12-year limitation period would have begun to run afresh in 2004.

The 2014 action

[80] Even if the alleged possession continued after 2004, the plaintiffs contend that the 2014 action also had the effect of arresting the running of time, as it was an action to recover possession of land. In that action, the plaintiffs sought a declaration setting aside the COT, and also sought a declaration that they were the "*documentary title owners of the said property in uninterrupted*

occupation and possession of the land from 2001 to the present". The COT was set aside, although the Court did not make the declaration sought. I will have more to say about the effect of setting aside the COT a little later in this Ruling.

[81] In **Rolle v Meadows** (CSci. App. No. 128 of 2020), the Court of Appeal quoted with approval the passage from *Halsbury Law of England Vol. 28* (4th ed.), where it is stated:

> "An action to recover land is an action to obtain any land by judgment of a court and is not limited to actions which claim possession. A foreclosure action by a mortgagee is treated as an action to recover land; other types of action by a mortgagee are treated as actions to recover money charged on land and are dealt with subsequently in this title."

[82] The 2014 action (which incidentally was brought by Writ) clearly constituted an action for the recovery of land, and would have prevented the plaintiffs from being barred under the limitation Act, as 12 years had not accrued since the acknowledgement in 2004. For reasons that will be explained, however, I do not think it had the effect of stopping time running in favor of the Defendant.

The effect of setting aside the COT granted in the 2011 QTA action

[83] The precise legal effect of setting aside the COT arises because the Defendant pleads several times in her Defence that the quieting title action remains "extant". The Plaintiffs directed significant argument towards the point that the judgment setting aside the COT was a final one, which was not appealed by the Defendant, and therefore it was final and disposed of the action. In this regard, they cited a number of cases on the finality of actions (*res judicata*) and the doctrine of *functus officio*, as well as the limits of the "*Re Barrell"* jurisdiction to interfere with final and perfected orders (see **Re Barrell Enterprises** [1972] 3 All ER 631). I do not need to refer to any of these well-known authorities, because I think the Plaintiffs have misconstrued the effect of an action to set-aside a judgment for fraud. The arguments on this point are therefore misconceived.

[84] In **Takhar v Grace field Developments Ltd.** [2020] AC 450 ("Takhar"), Lord Sumption JSC said (a passage quoted with approval in the recent UK Court of Appeal Case of **Tinkler v Esken Ltd. (formerly Stobart Group Ltd.)** [2023] 3 WLR 457):

> "61. The cause of action to set aside a judgment in earlier proceedings for fraud is independent to the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of issue estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parries: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 21 (Viscount Dilone). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance *qua* judgment. It follows that *res judicata* cannot therefore arise in either of its classic forms."

[85] Where a judgment is obtained setting aside an earlier judgment for fraud, the effect will be to "*restore the parties to their former situation, whatever their rights may be*" (per Sir George Jessel MR, *Flower v Lloyd* (1877) 6 Ch. D. 297); or "…*take the parties back to the position as it was before the trial so that a new trial on honest evidence can then take place*" (*Grant and Mumford, Civil Fraud: Law, Practice & Procedure*, 1st ed.(2018), para. 38-017).

[86] Therefore, it is clear that the Plaintiffs cannot rely on the 2014 writ (and the 2018 Order) as setting up any *res judicata* between the parties. As indicated by the cases cited, fraud unravels everything, and the position is as if the quieting titles action was never decided. In any event, it is important to note that the Court seemingly only dealt with the prayer to set aside the COT, and there was no hearing of the claim for the declaration as to their ownership rights. So that issue was not prosecuted to a conclusion. Therefore, after the setting aside of the COT the Defendant was at liberty to either apply to the Court for directions to properly serve the Plaintiffs and have the claim substantively determined as between the parties, or institute a new action under the QTA.

[87] The Defendant did not in fact prosecute the quieting titles action any further and, instead, met the 2019 action by the Plaintiffs with a counterclaim for a declaration of ownership based on adverse possession. Thus, the more pertinent question that arises is what is the effect of the setting aside of the COT on the Defendant's adverse possession counterclaim and, more specifically, whether the Defendant is able to pray in aid her alleged continuous occupation during the eight years post the quieting title proceedings?

[88] The suggestion that time might continue to run in favor of the occupier after the filing of a QTA action seems to go against the orthodox position that has been affirmed by the Courts of The Bahamas. The cases have held that since an application to quiet land under the QTA is an action for the recovery of land within the meaning of the Limitation Act, time ceases to run on the filing of the petition by the petitioner/adverse petitioner: **Mather v The Grand Bahama Port Authority Ltd.** [1965-70] 1 L.R.B. 103; **Nesbitt et al. v Archer et. al.** BS 2007 CA 25.

[89] That much is clear. But the question as to whether time ceases to run as a result of an earlier petition to recover the land which is not pursued to conclusion (or where the COT is set aside, which is the issue arising here) for the purposes of a subsequent action is not as well ventilated in the case law. The Board dealt in passing with a similar scenario in the *Eleuthera Properties* case, and said as follows:

> "[A]lthough time stops running in favor of a claimant relying upon adverse possession upon the presentation of a petition under the Quieting Titles Act, the Board is not persuaded that time ceases to run upon the presentation of some earlier petition which is then not pursued to a conclusion, merely because there are some common parties to both petitions."

[90] The UK Court of Appeal addressed a similar issue in **Markfield Investment Ltd. v Evans** [2001] 2 All ER 238. There, an action was brought for possession of property against an adverse claimant on 7 August 1990 and dismissed for want of prosecution on 5 January 2009. Another

claim was brought on 22 July 1999 and the preliminary issue for the court was whether the first action, despite its dismissal for want of prosecution, had the effect of preventing the respondent in the second action from praying in aid her continued occupation during the eight-and-a-half years while the action remained on foot as years of adverse possession. The Court was considering s. 15 of the UK Limitations Act, which is similar in meaning and effect to s. 27 of our Act, and answered the question as follows: [20]:

> "20. 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 s. 15 and, as Dillon LJ explained, that is the effect of the legislation. The fallacy of Mr. Tremere'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. This is just not so and there is nothing in the statute or authorities to suggest that. For the purposes of any particular action, the issue of a writ in earlier proceedings is no more relevant that a demand for possession. In the *Mount Carmel Investments* case such a demand was held not to start time running afresh; no more would the service (sill less the mere issue) of some earlier writ. Were it otherwise, as the respondent points out, all the true owner would have to do to avoid adverse possession is to issue (and perhaps serve) a writ every 12 years without more.
>
> 21. In summary, there is no question of the issue of a writ 'stopping time from running' (itself a non-statutory concept and perhaps a misleading rather than helpful expression). The issue of a writ, for the purposes of the action which it begins, prevents the true owner from being time-barred under s. 15 providing 12 years' adverse possession have not already accrued. It serves no other purpose."

[91] Thus, based on the above analysis, I would find that time could (and did) run in favour of the Defendant post the filing of the quieting titles proceedings. This means that between the 2004 acknowledgement and the filing of the current proceedings in 2019, some 16 years expired, which possibly could have had the effect of extinguishing the right of the Plaintiffs under the Limitation Act. However, the real question is whether the Defendant has provided sufficient evidence to satisfy the burden of establishing adverse possession during that period.

Whether adverse possession?

[92] I start by pointing out a basic deficiency in the pleadings. The entirety of the pleadings of the counterclaim in adverse possession are as follows:

> "1. The Defendant is the owner of the Subject Property having entered the same in 1993 and never been disturbed or challenged in her use and occupation of the subject property.
> 2. The Defendant continued in her occupation of the Subject Property in free undisturbed possession until she was served with the Plaintiffs' Writ of Summons in this action on 2nd May, 2019."

[93] A bare allegation that a party has been in free and undisturbed occupation of a particular piece of property from a particular date is *not* a proper pleading of adverse possession. The mere statement of a general proposition of law without pleading the acts which are said to justify that conclusion is insufficient: **Re Parton, Townsend v Parton** (18820 45 L.T. 755; **Middlesex County Council v. Nathan** [1937] 2 KB 272. No particulars of the adverse possession are pleaded showing how the possession was said to be continuous over the period in question, and the court is left unfortunately to try and piece together from the written and oral evidence the acts the Defendant relies upon to establish a claim to adverse possession. Had an objection been taken on this ground by the Plaintiffs as a preliminary issue or at trial, I would have dismissed the counterclaim.

[94] In written closing submissions, counsel for the Defendant urged the court to accept the following averments from the witness statement of the Defendant as evidence of exclusive and continuous possession for the period alleged:

a. Para. 8: "*That I entered the subject property in 1989 and hired several workmen to work along with my husband and they used a tractor, backhoe and bobcat to assist with clearing the subject land*."

b. Para. 9: "*That I planted over a dozen coconut trees and grape trees, lilies, aloe, some trees have grown 30 feet. I also planted several small bushes namely crotons, plumeria, frangipanis, and fruit trees like guava, mangoes, pineapples, and citrus which was doing well if I washed the sea spray off*."

c. Para. 10*: " That my husband and I had kept the subject cleared throughout the years using a mower, sand soil fill, weeding, trimming, picking the stickers seeds and hauling the trimmings to dump*."

d. Para. 11: "*That my husband and I use the subject property as beach access and Recreation area. I also built a rock wall to enclose the subject along the Southern boundary on Ocean Drive and on a portion of the Subject Property on the seaside*."

e. Para. 13: "*That I continued in my occupation of the subject property undisturbed. My husband and I allowed other Neighbor's in the community to use the said land as a beach access and in Recent times, to improve the appearance that Subject Property, I added a rock garden, a bench and an area for picnicking*."

f. Para. 14: "*That I along with several other Members of the community of Port Royale, host an annual event for the Children of North and South Bimini on the Subject Property and the same Will be used for future events*."

g. Para. 15: "*That after the hurricane in 2005, There was so much erosion to the Subject Property on the seaside boundary And save some of the pine trees on the said land although several of the Larger palm trees were destroyed by the hurricane*."

h. Para. 18: "*That in 2013 – 2014, my husband Assisted with installing the retaining wall and brought in fill to stop the Erosion which was affecting our adjoining property and neighbor's Property. That we had to build a 100 – foot wide retaining wall*."

I. Para. 19: "*That in 2013 -2014, I replaced 28 Feet x 100 feet of erosion with land fill over 30 plus loads to prevent it From going around ours and our neighbor's retaining walls and taken Them down*."

j. Para. 27: "*That during the years, my husband and I lived in Port Royale Subdivision, and cleaning and developing the Subject property, we have never seen the Plaintiffs on the subject property nor on the island until they showed up in 2014*."

k. Para. 29: "*That since entering the subject Property in 1989, I have invested approximately $250,000.00 in Maintenance and improvement to the subject property*."

l. Para. 30: "*That I have been in undisturbed Occupation of the subject property since 1989, and notwithstanding my Communication with the Plaintiffs, it was always my intention to possess The subject property and I did possess the same through continuous Possession, my possession always infringed on the rights of the Documentary owner, my possession was obvious, and I was always in Actual and excusive possession of the subject property.*"

m. Para. 31: "*That throughout of the subject property, the plaintiffs never Sought to re-enter or take possession of the same until served with The Writ of Summons on this action on the 2nd May 2019*."

[95] I will deal with each of these in turn.

[96] As to "a", I am constrained to reject the allegation of entry onto the property in 1989. What was pleaded was entry in 1993, and the Defendant is bound by her pleadings. Therefore, anything that took place on the property in 1989 and prior to 1993 is irrelevant to the claim for adverse possession. I note in passing that in oral submissions, Mr. Munroe KC contended that the 1874 Limitation Act applied and that 20 years would have expired between 1989 and 2009. This contention must be rejected, however, as it is inconsistent with the pleaded case of more than 12 years' possession beginning in 1993, and in any event (as I have found) possession was interrupted in 2003 and 2004.

[97] I will deal with "b" and "c" together. The witness statement does not say when the planting of any trees, fruit trees, flowering plants or shrubs was done. The photos which are tendered in support of the witness statement show what appear to be several palm trees and other vegetation on the property. However, no time period is provided for when any of these trees or shrubs were planted and I would not be prepared to hold that the sporadic planting of trees or plants is sufficient to establish continuous and exclusive occupation. I say this especially having in mind the Defendant's evidence (to which I shall return) that at least part of the motivation for the planting of trees and other plants was to improve the appearance of the property. Further, as is stated in all of the cases (see, **Eleuthera Properties**), the character of the land is one of the primary considerations. It has to be remembered that this was not farm land, but choice, beachfront

residential property in a developed subdivision. Having regard to the nature of the property, I hardly think that sporadic planting of trees or shrubs as part of a beautification project is sufficient evidence of exclusive possession or use of the property inconsistent with the intended use of the property.

[98] Similarly, I do not think that the mere clearing of the property "*throughout the years*" is sufficient evidence of exclusive possession, for several reasons. Firstly, the Defendant testified that part of the reason was to keep the property free of bugs and rodents, and thereby prevent them infesting neighboring property, including hers. Secondly, the Defendant seems to have harbored the view that the Plaintiffs owed her and her family for her efforts in keeping the property clean. She hinted at this in one of the letters to the Plaintiffs and stated this to the real estate agent engaged by the Plaintiffs to list the property for sale. This is inconsistent with any intention to own or possess the land.

[99] As to "d", which referred to the use of the property as a beach access and recreation area, again I am not of the opinion that this helps the Defendant's claim to possession. Firstly, the use of the property as a community recreation area is not consistent with any intention "*on one's own behalf to exclude the world at large.*" If anything, using the property for beach access might have created something in the nature of a right of way or easement, but that is not what is being claimed here. As for the partial enclosure by the "rock wall", it is clear that this rock wall did not enclose the entire property. Similarly, the seawall placed on the seaward side was not intended to enclose it, but to retard further beach erosion and to counteract any secondary erosion to neighboring properties. It is apparent that the use of the land was not solely that of the Defendant, but was intended to benefit the community as a whole.

[100] The allegations at "e" do not help to further the claim at all. As indicated, formulaic statements along the line that a claimant "*continued in my occupation of the subject property undisturbed*" are mere surplusage do not add anything to the claim for possession. Furthermore, there is no reference to the time period indicated for this possession. As to the improvements to the land and the use for public beaching purposes, I have already indicated that such sporadic activities do not amount to sufficient possession given the character of the land. The allegation at "f" of the annual event for children hosted on the property also falls into the same category.

[101] The statements at "g", "h" and "i" deal with the issue of beach erosion. On the evidence, I am not prepared to hold that the installation of the retaining wall in 2014-2015 and the dumping of loads of fill are sufficient indicia of acts of occupation. I say this for several reasons. Firstly, by the Defendant's own evidence, the fill and the retaining wall were "*to stop the erosion which was affecting our adjoining property and neighbor's property*". These were either acts of self-help or intended to benefit other properties, and not acts of adverse possession directed exclusively at the property. Secondly, although the Defendant exhibited photos showing a large portion of seawall, there is nothing in the photo to show that it fronts Lot 39, or fronts it exclusively. The map produced by Chee-A-Tow based on the 2012 survey commissioned by the Plaintiffs and extracted from the plan of the Port Royal Subdivision, depicts the larger expanse of "bulkhead" on

Lot 38 (adjoining Lot 39). It appears, therefore, that there was a general issue with erosion of the beachfront properties. Furthermore, considering that the property is located within a subdivision with a governing HOA, it would be surprising if this kind of work could be done without the approval (and perhaps even some funding) of the HOA.

[102] The fact that the Defendant did not see the Plaintiffs on the land (as alleged at "j") when they were allegedly looking after it, does not advance her claim for adverse possession. The law is clear that a party has to establish his claim to adverse possession based on the strength of his title, not the weakness in any other person's title. In any event, the fact that the Plaintiffs were not seen on the property is neither here nor there. They were the acknowledged documentary owners by the Defendant. They had their agents enter the property and survey it in 2012 and had it listed for sale in 2018; they took out an action in 2014, and the current action in 2019.

[103] As the Board said in **Ocean Estates v. Pinder**, the slightest acts by a person with documentary title may suffice to convey an intention to recover land. In this regard, the observations of the Privy Council in **Eleuthera Properties** discounting the effect of a survey can be distinguished on the basis that the claimant's purported documentary title was invalid, and the PC were therefore speaking in the context of a party without documentary title, and in respect of vast tracts of farm land.

[104] With respect to the alleged investments in the property ("k'), as has been mentioned, anything prior to 1993 has to be discounted. It seems highly unlikely that the defendants invested anything near $250,000 in the property, and they have not put any evidence of that before the court. If they have made the significant investment they claim in the property, this might entitle them to an equitable claim for improvement or a set-off in damages, but that is a different matter. But again, it does not necessarily help to establish adverse possession. For example, even if a significant investment were made in the property (and the most significant event referred to in the evidence is the building of the seawall and refilling of sand), that may have occurred as a one-off incident, and is not necessarily referable to any long and continuous occupation.

[105] The statement at "l" that the Defendant was in undisturbed possession since 1989 and had the intention to possess since then and that she has was "*always and actual exclusive possession of the property*" is not only superfluous, but incorrect. It has already been stated that the 1989 date cannot be used as the entry date, since it is not pleaded. Furthermore, the statement that the Defendant "*always intended to possess*" the subject property is inaccurate. In fact, in answer to a direct question to the Court in the quieting titles action as to when the intention was formed to possess the property, the Defendant said under oath that it was sometime "*after 1993*". In any event, based on her own evidence, it does not appear that the Defendant was a full-time resident of South Bimini until some point after 2002, as she indicates in her 2002 letter that she "*lives in Florida*" and her 2004 letter laments the fact that she was using a ½ day to maintain the Plaintiffs' lot when she was only there for two days.

[106] Again, the allegation that the plaintiffs never sought to "re-enter" or "take possession" of the property does not help the defendant. Apart from being incorrect, the point has been made that the Defendant has to positively establish adverse possession for the relevant limitation period to extinguish the rights of the paper title owner.

[107] I must say that I was generally unimpressed with the evidence of the Defendant. In fact, in their closing submissions, counsel for the Plaintiff invited the court to find that "*the defendant has shown a propensity to lie or mislead in order to advance her claim*". I would not put so fine a point on it, but I would conclude that the Defendant has asserted contrary and contradictory positions before the court in connection with the various claims made regarding this property, and has obviously embellished and overstated her claim to procure a certain outcome.

[108] In all the circumstances, I find the evidence adduced in respect of adverse possession between 2004 and 2019 to be patchy, imprecise, and lacking in detail and chronology of continuity. It my judgment, it does not amount to sufficient evidence of adverse possession to discharge the burden of proof on a claimant setting up title by adverse possession, especially having regard to the nature of the property in question. But, even apart from the evidence being insufficient to establish exclusive possession for the requisite statutory period, many of the stated reasons for the defendant's entries and activities on the property (which were in some cases altruistic or for self-help) negative any intention to possess the property to the exclusion of all others. I therefore find that the adverse possession claim has not been established. The counterclaim fails and is dismissed.

[109] In my judgment, the Plaintiffs, as documentary title holders, have not had their title extinguished by the expiration of more than 12 years' adverse possession and I would grant the declaration that they are the fee simple owners in possession of Lot 39, Block 1, Port Royale Sub-division. I would therefore also, as a matter of course, grant the injunction preventing the Defendant or her agents from trespassing on the Plaintiff's property.

[110] As the Plaintiffs have succeeded in their claim for an injunction, they would in law be entitled to damages for such trespass. But on the evidence before the court, it is difficult to come to any conclusion that any harm was done to the property, although it is trite law that trespass is actionable *per se*. In fact, the evidence is that the property benefitted from the actions of the occupier. The only damage referred to is the damage to the for-sale signs, which were erected by the plaintiffs' real estate agents, and which were said to cost about $100.00 each. Photos are showing at least four of these destroyed signs. In the circumstances, I would award nominal damages for trespass, which I will assess summarily in the amount of $1,000.00.

DISPOSITION AND CONCLUSION

[111] In summary, based on my findings above, I will make the following orders:

1. A Declaration is granted that the Plaintiffs are the beneficial owners in fee simple of Lot 39, Block No.1, Port Royale Subdivision, South Bimini, The Bahamas.
2. A perpetual injunction restraining the Defendant, whether by herself or by her employees, agents, heirs or otherwise, from trespassing and/or otherwise interfering with the Plaintiffs' property;
3. I refuse and dismiss the Defendants' counter-claim for a declaration that she is the possessory title holder of the property by virtue of undisturbed possession in excess of 12 years under the Limitation Act;
4. Damages for trespass, which I summarily assess in the amount of $1,000.00.
5. Costs to the Plaintiffs to be taxed if not agreed.

Klein J.

27 May 2024