COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 175 of 2014

IN THE MATTER OF ALL THAT parcel of land situate between the Settlements of Wemyss Bight and Millers on the Island of Eleuthera one of the Islands of the Commonwealth of The Bahamas comprising part of a tract of land known as the "Bowles Tract" and a part of the tract of land known as the "Millers Tract" through which runs the Main Public Road and together containing 2,086.24 acres more or less and bounded NORTHWARDLY by a tract of land granted to James Kelly and knows as Gibson Tract EASTWARDLY by the Sea at High Water Mark SOUTHWARDLY by a portion of the said "Millers Tract" WESTWARDLY by the Main Public Road and by the Creek and Exuma Sound which aforesaid parcel of land has such position shape and dimensions as are shown on the plan recorded in Department of Lands and Surveys

AND

IN THE MATTER OF THE QUIETING TITLES ACT, 1959

AND

IN THE MATTER of the Petition of Eleuthera Properties Limited

BETWEEN:

BANNERMAN TOWN, MILLARS AND JOHN MILLARS ELEUTHERA ASSOCIATION

Appellant

AND

ELEUTHERA PROPERTIES LIMITED

Respondent

BEFORE: The Hon. Dame Anita Allen, P
The Hon. Mr. Justice Adderley, JA
The Hon. Mr. Justice Isaacs, JA

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| **APPEARANCES:** | Mr. Richard Lightbourn with Mr. Timothy Eneas and Mrs. Vanessa Hall, Counsel for the Appellant<br>Mr. Neville Smith QC with Lady Sharon Wilson and Mr. Trevor Lightbourn, Counsel for the Respondent |
| **DATE:** | 6 May 2015, 11 May 2015, 12 May 2015, 21 April 2016 |

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 164 of 2014

IN THE MATTER OF ALL THAT parcel of land situate between the Settlements of Wemyss Bight and Millers on the Island of Eleuthera one of the Islands of the Commonwealth of The Bahamas comprising part of a tract of land known as the "Bowles Tract" and a part of the tract of land known as the "Millers Tract" through which runs the Main Public Road and together containing 2,086.24 acres more or less and bounded NORTHWARDLY by a tract of land granted to James Kelly and knows as Gibson Tract EASTWARDLY by the Sea at High Water Mark SOUTHWARDLY by a portion of the said "Millers Tract" WESTWARDLY by the Main Public Road and by the Creek and Exuma Sound which aforesaid parcel of land has such position shape and dimensions as are shown on the plan recorded in Department of Lands and Surveys

AND

IN THE MATTER OF THE QUIETING TITLES ACT, 1959

AND

IN THE MATTER of the Petition of Eleuthera Properties Limited

BETWEEN:

EMILY HALL

Appellant

AND

ELEUTHERA PROPERTIES LIMITED

Respondent

BEFORE: The Hon. Dame Allen, P
The Hon. Mr. Justice Adderley, JA
The Hon. Mr. Justice Isaacs, JA

APPEARANCES: Mr. Michael Kemp, Counsel for the Appellant

Mr. Neville Smith QC with Lady Sharon Wilson and Mr. Trevor Lightbourn, Counsel for the Respondent

**DATE:** 25 November 2015, 11 March 2015, 12 May 2015, 17 July 2015, 20 July 2015, 21 April 2016

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 151 of 2014

IN THE MATTER OF ALL THAT parcel of land situate between the Settlements of Wemyss Bight and Millers on the Island of Eleuthera one of the Islands of the Commonwealth of The Bahamas comprising part of a tract of land known as the "Bowles Tract" and a part of the tract of land known as the "Millers Tract" through which runs the Main Public Road and together containing 2,086.24 acres more or less and bounded NORTHWARDLY by a tract of land granted to James Kelly and knows as Gibson Tract EASTWARDLY by the Sea at High Water Mark SOUTHWARDLY by a portion of the said "Millers Tract" WESTWARDLY by the Main Public Road and by the Creek and Exuma Sound which aforesaid parcel of land has such position shape and dimensions as are shown on the plan recorded in Department of Lands and Surveys

AND

IN THE MATTER OF THE QUIETING TITLES ACT, 1959

AND

IN THE MATTER of the Petition of Eleuthera Properties Limited

BETWEEN:

DORA ADRELLA BOSTON-WHYLLY
BRISTO WALTON WHYLLY
THOMAS WHYLLY Jr

Appellants

AND

ELEUTHERA PROPERTIES LIMITED

Respondent

BEFORE: The Hon. Dame Allen, P
The Hon. Mr. Justice Adderley, JA
The Hon. Mr. Justice Isaacs, JA

| | |
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| **APPEARANCES:** | Ms. Travette Pyfrom, Counsel for the Appellant<br>Mr. Neville Smith QC with Lady Sharon Wilson and Mr. Trevor Lightbourn, Counsel for the Respondent |
| **DATE:** | 11 March 2015, 12 May 2015, 15 July 2015, 17 July 2015, 21 April 2016 |

*Civil Appeal – Real Property – Quieting Title -Abuse of Process-Rule Against Perpetuity – Class Gifts – Adverse Possession – Agreement to Possess- Limitation Period- Quieting Titles Act, Ch 393*

*In 2010 the respondent filed a Petition seeking a Certificate of Title to 2086.24 acres of land in the Island of Eleuthera. The appellants claim that they hold a legal and possessory title to the 2086.24 acres having acquired the same through the 1869 Will of Ann Millar. After an investigation of the respective titles, a certificate of title was granted to the respondent. The grant was subsequently appealed.*

*Held:- appeals dismissed, costs of the appeals to the respondent to be taxed if not agreed (Adderley, JA dissenting)*

***Per Allen, P***

*It has long been established that 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.*

*With that said, the filing of the 2010 Petition was not an abuse of process requiring the interference of this court; the 1995 Action is still extant and capable of being prosecuted should the petitioner in that matter so desire. In the premises, I detect no unreasonableness in the exercise of the learned judge's discretion not to consolidate the 1995 and 2010 actions.*

*The duty to consider evidence and give reasons is well established. After considering the judgment in its entirety, Ms. Hall's assertion that she was not provided reasons for the denial of her adverse claim cannot stand.*

*In order for a gift to be valid it must vest within the perpetuity period; namely no later than 21 years after the life in being at the creation of the interest. The gift can only vest when the individuals, to whom it is intended to be given, can be ascertained. Moreover, where the beneficiaries are a class of persons, the class gift cannot vest until the specific membership of the class is determined. Indeed, even the present evidence in relation to the existence of Charles Millar, who the Association alleged is Dinah Millar's son, is in dispute. In order to give teeth to their submissions, it was incumbent on all of the appellants to establish clearly that the entirety of the class in both gifts was ascertainable within the perpetuity period calculated from the time of Anne Millar's death.*

*After a full consideration of the terms of the devises in the Will and the explanation of the Rule found in the case law, the learned judge's restatement of the law and application to the facts are unassailable. The Association's contention that, as there was evidence that Dinah Millar and her children were alive at the time of Anne Millar's death and therefore that the gifts vest, is insufficient to upset the principle that, under the rule against perpetuities, a class gift cannot be partly good and partly bad. If at the time when the instrument comes into operation, some members of the class are not certain to be ascertained within the perpetuity period, then the whole of the gift is too remote.*

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

*Having determined that the gifts in the Will failed and in the face of claims and evidence indicating that the respondent's documentary title may be invalid as a result of its stemming from the Will, it was incumbent on the learned trial judge, under section 8(2) of the Quieting Titles Act, to further investigate the respondent's title by directing the respondent to establish that its documentary title was a valid one.*

*As such I agree with the appellants' submissions which assert that the learned judge was wrong to hold that the 1959 conveyance was a good root of title. Having found that the devises in the Will were invalid, the judge ought to have required the respondent to provide evidence that its title was valid. In view of the holding that the descendants' conveyances were ineffectual and incapable of transferring title as a result of the failed gifts, I agree with the submission that the respondent's documentary title was no title at all. As a result, the true nature of these proceedings is that of two competing trespassers seeking to establish better possessory title to the property than the other.*

*In adverse possession cases time ceases to run in favor of a petitioner on the filing of a petition. So to, time also ceases to run in favor of an adverse claimant. Notably, Tom and Millar Corporation Limited, a member of the Association, was the petitioner and therefore a party to the 1995 action; and in as much as the petition, and the adverse claim filed by the respondent in the 1995 action pertained to property which included the property under review in the 2010 action, time stopped running in 1995, as between all of the parties to the 1995 action.*

*Based on a series of affidavits filed at Tab 42 of the record of appeal, it would appear that the Whylly family was also parties to the 1995 action. As such, only evidence of possession that occurred up to 1995 by any of the parties to the 1995 action, can, in accordance with the Limitation Act, be considered in these proceedings. In relation to the appeal of Emily Hall however, as she, it would appear, was not a party to the 1995 action, time stopped running between Mrs. Hall and the respondent, when the petition herein was filed in 2010.*

*On a consideration of the evidence and reasoning of the learned judge, I can find no fault in her finding that the evidence of an agreement between the descendants was of recent vintage. In my view, her conclusion was reasonable in all the circumstances of the case. This aspect of the appeal is determinative of the Association's claim to the land. Without evidence of an agreement, the various acts of possession by each claimant are insufficient to ground possession over the entire property.*

*In light of the above and on further consideration of the evidence, I can find no fault with the learned judge's conclusion that "on the evidence before the court, I am not satisfied that any of the adverse claimants, have made out their claim to an interest in the land." I further find no fault in her subsequent decision, "that the Petitioner has made out its claim for a Certificate of Title to the land pursuant to section 16 of the Quieting Tittles Act."*

*Anthony Armbrister et al v Marion Lightbourn et al [2012] UKPC 40 considered*
*Brown v Faulkner [2003] NICA 5(2) followed*
*Dennis Dean and Another v Arawak Homes Ltd (2014) UKPC 24 mentioned*
*East Hill Ltd. (Re) [2000] BHS.J No. 19 distinguished*
*Hale v Hale 3 Ch. D 643 mentioned*
*Henry Pearkes v William Moseley (1880) 5 App Cas 714 considered*
*Hodge v The Governor of the Territory of the Virgin Islands No. BMHCV 298 of 2012 mentioned*
*In re Villar [1929] 1 Ch 243 considered*
*J A Pye (Oxford) Ltd and others v Graham and Another [2002] UKHL 30 applied*
*Jordon v South Shore Investment Co Ltd (No1/1966) (1965-70) 1 LRB 80 followed*
*Kenneth McKinney Higgs, Sr v Leshel Maryas Investment Company Lt et al [2009] UKPC 47 mentioned*
*Leake v Robinson (1817) 2 Mer 363 considered*
*Mahabir Prasad v State of U.P (1970) 1 SCC 764 mentioned*
*Mather v The Grand Bahama Port Authority Ltd (1965-70) 1 LRB 103 followed*
*Ocean Estates Ltd. v Pinder [1969] 2 AC 19 followed*
*Powell v McFarlane (1977) 38 P & CR 452 considered*

*Re Edwards 1976 Law Reports of The Bahamas 1971 – 1976 Vol 1 mentioned*
*Re Scott and Alvarez's Contract [1895] 2 Ch. 603 mentioned*
*Sydall v Castings Ltd [1967] 1 Q.B. 302 mentioned*

***Per Adderley, JA***

*The Learned Judge found that the members of the class of beneficiaries under the Will could not be ascertained within the perpetuity period, which at the time in the Bahamas was the common law period of a life or lives in being plus 21 years. I accept that submission. Ann Millar was herself a life in being at the time she made the will. The bequests were to vest in interest, if at all, upon her death. It was certainly possible at her death that no one would satisfy both the requirement of being a former slave or servant and residing in the Millar's settlement. Upon the gift failing, the property vested in the residuary legatee, Daniel S. Farrington. However no one claiming to represent him or his estate was before the Court.*
*Since the class gift in the Will was not valid and failed, the vendors entered the land as trespassers. They had obtained no interest under Will. To claim title to the land they had to show an adverse possession for at least a twenty year period against the true owner, namely the heirs of Daniel S. Farrington, the residuary legatee. Exclusive possession was a necessary ingredient to gain a possessory title. None of the vendors recited that they had exclusive occupation.*

*In my judgment the 1959 conveyance on its face raises sufficient doubt concerning the vendor's title to this portion of the Property to disqualify it as a root of title. The test of a good title is whether a Court would order specific performance on the available evidence. In my judgment, this is not a case in which a court would have ordered specific performance for several reasons: (1) the vendors' right to convey is in question and (2) the interest, if anything that ABL purportedly obtained is unknown.*

*The judge herself at paragraph 30 of her judgment went behind the 1959 conveyance by referring to the 133 conveyances. Even though such extrinsic evidence may be ordinarily inadmissible in an open contract case, she was perfectly entitled to do so as part of her investigatory power under Section 8(2) of the Conveyancing and Law of Property Act. Ostensibly she did so to determine if they would support the recital in the 1959 conveyance that a good possessory title had been conveyed to Arthur Vining Davis. In these circumstances the appellant was certainly entitled to rely on that fact.*

*On the evidence it is certainly not possible, having regard to the surrounding circumstances and the aliunde evidence, to say that the 1959 conveyance met the requirements of a good root of title. It is not a title which a court, in the circumstances, would force on an unwilling purchaser.*

*It was not entirely correct how the judge characterized the respondent's evidence in paragraph 67 of her judgment: There she stated that "…the Petitioner has relied on the evidence of Hubert Williams, Stafford Coakley, Cranston Petram and Ricardo Fernander to support its claim of continuous, undisturbed possession of the land…" Their evidence was relied upon to attempt to negative the claim of actual possession by the appellant, and to support the deemed possession by the respondent as paper title holder, not its actual possession which it never claimed.*

*Focusing, as she was, on the wrong question, namely whether the Association had dispossessed the respondent's deemed possession by virtue of their purported paper title the judge apparently failed to properly consider the countervailing evidence given by the witnesses for the Association against the acts of dominion by the respondent, and failed to see them as acts of possession by the Association or acts for the requisite period of time.*

*If the evidence had been properly considered, the judge ought to have concluded that there was considerable evidence that persons represented in this action by the Association were in actual occupation of the property over the years, exercising what they considered to be their rights over it in accordance with what they believed were rights accrued as descendants on generation property to the exclusion of non-descendant's, and that these acts negated the alleged acts of dominion by the respondent.*

*I switch now to Dora Andrell Boston-Whylly et al. Counsel sought to trace their title through the Will, but conceded that if the gift in the Will was void their claim would fall with it. Since I have agreed with the Judge that the gift was void for perpetuity, I will not repeat her very comprehensive arguments, and simply agree with the judge, and dismiss the claim. Counsel did, however, submit that even if their claim as presented did not succeed, they had a right to joint possession in common with the other descendants, adopting the arguments of the appellant.*

*I also agree for the reasons given by the judge in paragraph 56 that the appeal of Emily Hall should be dismissed on the first two grounds raised. First she claimed all of the 1995 Land. She abandoned that and then claimed 1100 acres which on cross examination was demonstrably an arbitrary figure. The final claim was one adopting the arguments of the appellant. I agree with the judge's dismissal of the first two claims. The Hall estate is entitled only to the extent that her claim is included in that of the Association. I considered the other issue raised by Mr Kemp on behalf of Mrs Hall that the trial was unfair because 5 persons who appeared as adverse claimants in the 1995 action did not appear during this trial. I dismissed that appeal point, as well,*

*because it was open to those claimants to join in this action.*

*For all the above reasons I would allow the appeal of the appellant, Bannerman Town et al, and quash the certificate granted to the respondent and order that a certificate of title be issued to the respondent under section 15 of the Act with the usual qualifications. I would order costs to follow the event.*

*Alderdale Estate Company v McGrory [1917] Ch 414 mentioned*
*Ambrister et al v Lightbourn [2012] UKPC 40 mentioned*
*Collie v. The Prime Minister - [2012] 1 BHS J. No. 18 mentioned*
*Higgs v Leshell Maeyas Investment Company Ltd. et al [2009] UKPC mentioned*
*In the Matter of The Petition of Marina Dean Quieting Titles Action 1998/CLE/QUI/026 mentioned*
*Mather v The Grand Bahama Port Authority Ltd (1965-70) 1LRB 103 followed*
*Ocean Estates Ltd v Pinder [1969] 2 AC 19 followed*
*Powell v McFarlane (1977) 38 P&CR 452 applied*
*Selkirk v Romar Investments Ltd. [1963] 1 WLR 1415 PC mentioned*
*Sturrup and another v. Gibson and others [2011] 3 BHS J. No. 22 mentioned*

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## J U D G M E N T

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**JUDGMENT DELIVERED BY THE HONORABLE DAME ANITA ALLEN, P:**

1. On 17 March 2010, the respondent filed a Petition in the Supreme Court seeking the investigation, determination and declaration of its documentary title to 2,086.24 acres of land situated southward of Wemyss Bight in the southern part of the Island of Eleuthera in The Bahamas ("the property"). At the hearing of the Petition, the respondent claimed that it acquired the property from Avon Bay Limited via a Conveyance dated 26 October 1988 ("the 1988 conveyance"). Avon Bay Limited acquired the property in 1959 from Arthur Vining Davis by way of Conveyance dated 23 November 1959 ("the 1959 conveyance"); both conveyances are recorded in the Registry of Records.

2. The appellants, (“The Association, Emily Hall, Dora Whylly, Bristo Whylly, Thomas Whylly Jr”) on the other hand, all claim that they hold a legal and possessory title to the property adverse to that of the respondent; having acquired the same as descendants of devisees specifically named in the Will of Ann Millar or descendants of persons who were residing in Millars at the time of her death. It is common ground between the parties that in 1869 the property was owned by Ann Millar as part of a larger parcel of land, and was devised by her Last Will and Testament made on the 12 January 1869 (“the Will”), duly proved in Nassau on 17 August 1871.

3. On 30 May 2014, after an investigation of the respective titles, Hepburn J. granted a certificate of title to the respondent pursuant to the relevant provisions of the Quieting Titles Act, Ch. 393 (”the Act”).

4. The learned Judge found that the 1959 Conveyance was a good root of title, and further found favor in the respondent’s position that the gift of land contained in the Will was void for breach of the rule against perpetuities thereby making the appellants’ purported legal title to the land void.

5. Having concluded that the appellants had no legal title to the property; the learned trial judge went on to consider whether the appellants had sufficient possessory title to oust the asserted documentary title of the respondent. Hepburn J. concluded, at paragraph 78 of her judgment, that, **“on the evidence before the court, I am not satisfied that <u>any</u> of the Adverse Claimants have made out their claim to an interest in the land.” [Emphasis added]**

6. Three separate appeals were lodged before this Court; namely **SCCivApp No. 175 of 2014 Bannerman Town Millars & John Millars Eleuthera Association v Eleuthera Properties Limited , SCCivApp No. 164 of 2014 Emily Hall v Eleuthera Properties Limited and SCCivApp No. 151 of 2014 Dora Boston Whylly et al v Eleuthera Properties Limited**. Each raises very similar issues.

7. Emily Hall ("Ms. Hall) filed five grounds of appeal. They are as follows :-

> **" (i) The learned judge erred in Law by accepting that the Respondent holds documentary title or paper title to the land.**
>
> **(ii) The learned judge ought to have considered the Appellants' evidence in relation to occupation of the subject land to the exclusion of the Respondent**
>
> **(iii) The learned judge erred in law and in fact in accepting the evidence of the Respondent that it was not dispossessed by the Appellants and not considering the evidence of the Appellants**
>
> **(iv) The Learned Judge failed to take into account or give sufficient weight to the Appellant evidence as to factual possession of the subject land**
>
> **(v) The Learned Judge erred and misdirected herself in finding that the Respondent has a paper title or any title."**

8. At the hearing of Ms. Hall's appeal, Counsel for Ms. Hall, in relation to grounds (i) & (v) (above), adopted the arguments of the Association in SCCivApp No. 175 of 2014, and introduced a new ground. The essence of this new ground was that the learned trial judge erred when she refused to order the merger of the Petition in Supreme Court Action No. 25 of 1995 with the respondent's 2010 Petition. In Ms. Hall's view, the filing of the 2010 Petition was an abuse of process.

## Abuse of Process

9. In 1995, the Tom and Millar Corporation Limited ("TMCL") lodged a Petition in the Supreme Court (Action 25 of 1995) seeking to establish title, under the Quieting Titles Act, to some 3,638.05 acres situate south of the tract of land known as Hartford and north of Millars Settlement in the Island of Eleuthera. The respondent, on 29 March 1996, filed an adverse claim to those proceedings asserting that they were the owners of a portion of the land claimed in the 1995 Petition, namely, 2,086.24 acres. The 1995 proceedings were not pursued by TMCL and as such the matter remains extant before the Supreme Court.

10. In the present proceedings, application was made by the appellants for a consolidation of the present action with the 1995 Action. That application was denied by the learned judge in her Order for directions dated 18 November 2011.

11. In Ms. Hall's view, justice dictates that the matters be consolidated. In support of this point, Ms. Hall relied on **East Hill Ltd. (Re) [2000] BHS.J No. 19** a decision of Osadebay Sr. J, as he then was. In that case, a Petition was filed in 1968 under the Quieting Titles Act by Darling Investments Limited. At the expiry of the adverse claims period, no adverse claims had been filed. An application for leave to file an adverse claim out of time was subsequently made in 1968, by Dr. Bodie Sr via Beatrice Outten, acting under a power of attorney. This application for leave was never pursued. Subsequent applications for leave to file an adverse claim out of time were made in 1980

and 1981 by Dr. Bodie Sr; these applications again were not pursued. Notices of Intention to Proceed were filed by Dr. Bodie Sr. in 1984 and 1986; again there was no evidence that these Notices were pursued.

12. Dr. Bodie and East Hill Ltd not having obtained leave to file an adverse claim in respect of the land in question in the 1968 Petition, commenced and filed in 1987, a Petition encompassing the same land, the subject matter of the 1968 Petition. While pursuing the 1987 Petition, Dr. Bodie Sr. in the name of East Hill Ltd also made a new application in the 1968 Petition seeking leave to file an adverse claim out of time. This application for leave was denied in 1989 by Sawyer, J as she then was.

13. At paragraphs 7 & 8 of his judgment in **East Hill Ltd. (Re)** (above), Osadebay Sr. J opined:

> **" 7. An examination of the above and other provisions of the Quieting Titles Act, Chapter 357 discloses a scheme created whereby all claims to the same parcel of land are to be dealt with in one action. It provides for the advertisement of all Petitions thereby providing notice and opportunity for anyone having an adverse claim on the same parcel of land to file an adverse claim within the time frame provided or else such person's claim may be barred. It seems to me however that where a parallel Petition claims in respect of the same and has been properly filed, each Petitioner without knowledge of the existence of any other petitions at the**

time of the filing of his or her Petition, the Court after being satisfied that the Petitions were properly filed, ***may***, in exercise of its powers under the Rules of the Supreme Court, order a consolidation of the Petitions or Actions whereby the first Action in time remains while the others are then treated as Adverse Claims within that first Action. [Emphasis mine]

8. From the facts which I have stated above it was evident that the Petition herein by East Hill Ltd filed on the 7th December, 1987 in respect of the same parcel of land was in fact filed with knowledge of the existence of the pending Petition of Darling Investments Limited filed on 26th March, 1968 approximately nineteen years prior … In fact at the time of the filing of the Petition in [the 1987 action] Dr. Bodie had on behalf of the Petitioner, East Hill Ltd made several applications in [the 1968] action to be allowed to present an adverse claim out of time …

9. I was therefore drawn to the irresistible conclusion that this … 1987 action was an attempt to circumvent the Court's refusal to allow [Dr. Bodie] and East Hill Ltd to present an Adverse Claim in the [1968 action] … it is a very

**familiar principle that you cannot do that indirectly which you are prohibited from doing directly."**

14. On the facts, the present case is distinguishable from **East Hill Ltd (above)**. The appellant in **East Hill Ltd (above)** was seeking to circumvent the decision of the court refusing his applications for leave to file an adverse claim out of time. In the present case, no judgment or decision was obtained against the respondent in the 1995 Action in respect of which it can be alleged that the respondent, by filing the 2010 Petition, was seeking to circumvent.

15. Moreover, the parties to the 1995 action are not prejudiced in the pursuit of their claims by the present Petition. While indeed it may be the case that the 2,086. 24 acres the respondent seeks to quiet forms a portion of the 3,638.05 acres claimed in the 1995 Action, no injustice is done to the petitioner's position in that action.

16. Quieting title actions are an investigation into the title of the property in question. Should the petitioner, TMCL, in the 1995 Action seek to pursue that investigation, as is their right, it is still open to Ms. Hall to establish in that action that she has a better title than any other claimant to that part of the property not disposed of by these proceedings.

17. The filing of the 2010 Petition therefore, was not an abuse of process requiring the interference of this court; and as I have said, the 1995 Action is still extant and capable of being prosecuted should the petitioner in that matter so desire. In the premises, I detect no unreasonableness in the exercise of the learned judge's discretion not to consolidate the two actions; and I would not interfere.

**Lack of reasons**

18. At the hearing of the appeal, and in her skeleton arguments, Ms. Hall asserted that the learned trial judge provided no reasons as to why her adverse claim was refused. Counsel for Ms. Hall argued that the evidence given at trial on behalf of Ms. Hall was not mentioned or discussed by the learned judge.

19. Counsel submitted that the purported lack of reasons is a breach of Ms. Hall's right to a fair hearing afforded to her by Articles 15 (a), (c), 20(8) and 28(3) of the Constitution. In support of these arguments, counsel brought the court's attention to the following cases: **Kenneth McKinney Higgs, Sr v Leshel Maryas Investment Company Lt et al [2009] UKPC 47, Dennis Dean and another v Arawak Homes Ltd (2014) UKPC 24 , Hodge v The Governor of the Territory of the Virgin Islands No. BMHCV 298 of 2012, Mahabir Prasad v State of U.P (1970) 1 SCC 764.**

20. The duty to consider evidence and give reasons is well established. I, however, do not agree with Ms. Hall's assertion that the learned judge did not consider her evidence or provide reasons for denying her adverse claim. Having concluded at paragraph 28 of her judgment that the gifts in the Will of Ann Millar were void for offending the rule against perpetuities, the learned trial judge concluded at paragraph 29 in this way:

> **" 29. To the extent that any of the adverse claimants base their respective claims on their purported respective interests under the Will of Ann Millar such claims must fail and do fail."**

This ruling applies directly to Ms. Hall, she is an adverse claimant who relies on the Will of Ann Millar to establish title to the property and the reasons for the learned judge's conclusion on the Will are clearly set out in her judgment.

21. Additionally, there are other references in the judgment to Ms. Hall. At

paragraph 54, Ms. Hall is listed as an adverse claimant. At paragraph 56, the learned trial judge states:

> **" Emily Hall maintained her separate claim but in the evidence of Edmund Hall Jr., who held a power of attorney for his mother Emily Hall, he testified in cross examination:**
>
> **" Q. And those persons that I just mentioned, they're entitled to share in this land together"**
>
> **A: Yes, in common, yes.**
>
> **Q. And that anybody who asserts that they are solely entitled to this property to the exclusion of everybody else, that would be an incorrect position?**
>
> **A. Once you are descendant, you are entitled to the said land"**

22. Throughout the judgment, the learned judge makes assessment of the evidence adduced in support of the claims of the adverse claimants, which includes assessment of witnesses called on Ms. Hall's behalf. At paragraph 64, the learned judge asserts that all of the witnesses testified that no one lived on the land. Additionally, the learned judge continued the paragraph by indicating that this factor weakened the claim of the adverse claimants. This

is indeed the case of Ms. Hall. Other areas of the judgment are similarly worded and can be applied to her. After considering the judgment in its entirety, Ms. Hall's assertion that she was not provided reasons for the denial of her adverse claim cannot stand.

23. In as much as Ms. Hall has adopted the submissions of the Association in SCCiv App 175 of 2014, in relation to the judge's ruling that the respondent had good title; I adopt and apply my ruling on that point in the Association's case to Ms. Hall's case seriatim.

**SCCivApp No. 151 of 2014 - Dora Boston Whylly et al v Eleuthera Properties Limited**

24. Six grounds of appeal were filed on behalf of the Whylly family. They are as follows :-

> **"a. The Judge was wrong in fact and in law in finding that the conveyance dated 23 November 1959 made between Arthur Vining Davis and Avon Bay Limited was a valid root of title**
>
> **b. The Judge was wrong in law and in fact in finding that the conveyance dated the 26 October 1988 between Avon Bay Limited and Eleuthera Properties Limited was a valid root of title**
>
> **c. The judge erred in fact and in law when she found that the effect of the word "forever" in the Will of Ann Millar rendered the devises void on the grounds that the term "forever" in a will offends the Rule against Perpetuity**

> **d. The learned judge ought to have found as a matter of fact and law that the appellants' title by descent was unbroken and derived from a valid root of title commencing with a Crown Grant dated 15 day of June 1803 in favour of Robert Millar, Ann Millar and George Millar of 1000 acres in South Eleuthera together with a further Grant of 500 acres to Robert Miller dated 5 April 1847 of a tract of land originally granted to William Bowles**
>
> **e. As the [Whylly's] have deduced a documentary title which the court can accept, it is incumbent on [Eleuthera Properties Ltd] to establish that it has dispossessed the Whylly's. As [Eleuthera Properties Ltd] did not prove adverse possession of the claimed land and did not prove an unchallenged title to the land it claimed. A certificate of title ought to have been granted to the [Whylly's]**
>
> **f. The judge did not consider or properly consider the [Whylly's] case or the evidence of the [Whylly's] concerning their and their predecessors' possession of the land. The judge ignored the evidence of the Whylly's in its entirety on the issue of possession and on the unbroken chain of decent of title in their favour originating with the Grants to Robert Millar."**

25. As the Whylly's grounds of appeal are, in essence, the same grounds of

appeal argued by the Association; I again adopt and apply seriatim, my ruling and reasoning in the Association's case to the points raised and argued in the case of the Whylly's.

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26. The Association is a non-profit company incorporated on 15 April, 2011 under the Companies Act, 1992. The objects of the Association are set out in its Articles & Memorandum of Association; they are, *inter alia*, to 1. encourage land ownership … 2. obtain government approval for the transfer of land listed as "Generation Property" to the Association to be used as commonage land for residents and descendants of the settlements 3. survey and subdivide the land into plots of land for distribution to residents and descendants of the settlements at a nominal fee.

27. The Association filed sixteen grounds of appeal before this court. Three of these grounds, are dispositive of the appeal. They are Grounds 1, 7 and 9; they read as follows:-

**Ground 1**

**"The learned Judge erred in law and in fact in holding that '… [h]aving regard to the provisions of section 8(2) of the Quieting Titles Act and subsections 3,4,5 of section 3 of the Conveyancing and Law of Property Act, …' the conveyance between Arthur Vining Davis and Avon Bay Limited dated 23rd November, 1959 ("the AVD Conveyance") was a good root of title to the property the subject matter of the Petition ("the Property"). The learned Judge ought to have found that the 65 conveyances of purported interests in the Property to Avon Bay Limited made subsequent to the AVD Conveyance**

clearly established that the AVD Conveyance was not a disposition of the whole legal and equitable estate in the Property and accordingly the document could not constitute a good root of title to the Property."

Ground 7

"The learned Judge erred in law in holding that the devises in the Will of Ann Millar relating to the Property offended the Rule against Perpetuities.

Ground 9

"The learned Judge erred in law and in fact in holding that it was the burden of the Appellant to prove on the balance of probabilities that it had dispossessed the Petitioner as the holder of the paper title. The learned Judge ought to have found that the Appellant through its predecessors in title acquired an unimpeachable legal title in fee simple to the Property by the year 1946 or 1980 or at the least by the year 2004 and therefore the Appellant was in possession and accordingly it was the burden of the Respondent to prove that it had dispossessed the Appellant or that the Appellant had discontinued or abandoned possession of the Property."

28. Before delving into a consideration of the merits of the referenced grounds of appeal, I find it necessary to state the overriding principle in quieting titles actions; namely, that the duty of the judge is simply to determine and declare which of the claimants has the better title. Within the common law, there is of course no such concept as an absolute title, and as the author of Megarry &

Wade stated in The Law of Real Property Eighth Edition: **"Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants."**

29. Indeed, in **Ocean Estates Ltd. v Pinder [1969] 2 AC 19** at 24, 25, Lord Diplock illustrated what the concept of the relativity of titles meant, and gave the following example: **" 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."**

30. It must be emphasized that this action was, and is not, a contest between a purchaser and a vendor. What needed to be determined was which of the parties had the **better** title. With the aforementioned statement of principles in mind, and in as much as the determination made in Ground 7 affects the determination in Ground 1, I turn to Ground 7 first.

**Ground 7 – The Will**

31. The relevant devises of the Will are as follows:

> **" The tract of land on the Island of Eleuthera known as "Millars Settlement" containing about one thousand acres, part of which however I have already disposed of, I give to my old servants and former slaves Old Scipio and his wife Grace and her children, Sailor George and his wife Sarah and her children, Dinah Miller and her children to be held and enjoyed by them in common and by their descendants forever. [Gift 1]**

> The land adjoining "Millars Settlement" aforesaid (excepting two hundred and fifty acres thereof) part of a tract originally granted to William A Bowles I give and devise unto my old servants and former slaves now residing or who may be residing at the time of my death on Millars Settlement aforesaid including also the last mentioned parties and Old Jack, his wife Chloe and her children, my servants Pender and her children, and Allan Miller to be held and enjoyed by them in common and by their descendants forever. [Gift 2]
>
> And as to all the rest, residue and remainder of my estate both real and personal and wheresoever situated I give, devise and bequeath the same and every part thereof unto my friend Daniel S. Farrington his heirs and assigns forever…."

32. The learned judge declared in paragraphs 23, 24, 25, 27 and 29 of her judgment as follows:

> "23. A devise in a will must vest within the perpetuity period. The perpetuity period consists of a life or lives in being at the time of the gift, together with a further period of 21 years and where gestation actually exists, the period of gestation may be added. A devise in a will is void if there is any chance whatever that it might be capable of

vesting after the perpetuity period has expired. (See Megarry's Manual of The Law of Real property (6th Ed.), page 197).

24. If by the use of the word "forever" in the devises to her old servants and former slaves and their descendants Ann Millar intended that the devisee would own the land forever or permanently, the devises to her old servants and former slaves and their descendants, such devises would be void on the ground that they offend the Rule against Perpetuities, which law was in existence at the date of Ann Millar's Will.

25. Assuming the devises to Ann Millar's old servants and former slaves and their descendants were gifts to a class of persons, they would similarly fail on the ground that they run afoul of the Rule against Perpetuities…

27. Counsel for the Petitioner submitted that (i) it is impossible then and now to ascertain the number or existence of members of the class of descendants covered by the Will of Ann Millar, and (ii) it is certain that all of the members of this class cannot come into existence within the perpetuity [sic]. I accept that submission.

29. To the extent that any of the adverse claimants base their respective claims on their purported respective interests under the Will of Ann Millar such claims must fail and do fail."

33. The Association claims that the rule against perpetuities was irrelevant on the facts before the judge. In their view:

> **" the learned judge interposed matters which were not supported by the evidence and made findings of fact based on assumptions rather than proven facts. The respondent [they assert] did not prove that the gifts were class gifts neither did it prove that the gifts failed due to remoteness. Ann Millar [they posit] identified those of her old servants and former slaves who she intended to benefit under her will. The bequest was to Ann Millar's " old servants and former slaves, old Scipio and his wife Phillis, old Harriet … Dinah Millar and her children etc."**

In the Association's further opinion:

> **"the learned judge ought to have found that Dinah Millar who was alive and who at the date of Ann Millar's death had a son, Cesar, effectively vested the interest so that there was no issue of uncertainty or remoteness. The result was that the gift to Dinah was a valid gift. With respect to the remaining former slaves and servants; there was no evidence before the court that their interests did not vest on Ann Millar's**

> death. There was no basis for the learned judge to conclude that there was an absolute failure of the gift"

34. In relation to the rule against perpetuities, the Association also contends that:

> " [t]he time for the ascertainment of a class is clearly fixed by the express terms of the will [and] the Court must give effect to the words used without recourse to the rules of construction. See The Law Relating to Wills with Precedents of Particular Clauses and Complete Wills, W.J. Williams, B.A., Volume 1, 1952

> [t]he date of the testator's death is the time when the period starts running and the facts must be ascertained; to be a life in being the person must be alive at that moment. The life in being must be mentioned in the devise either expressly or by implication. In determining whether the devises failed due to remoteness the court is concerned with the facts as they stood at the testator's death. There was no evidence that at Ann Millar's death the beneficiaries could not be determined. There was in fact evidence that Dinah Millar who was named in the will and Cesar Millar were alive at the testator's death."

35. To the Association there is no need to apply the rule against perpetuity as the devise itself provides when the class is to be closed. In their view there is no ambiguity as to when the class of beneficiaries referred to in the Will closes. They submit that the class closed at the death of the testator and it is those persons who were residing on the property, at the time of Ann Millar's death, who were the persons that stood to inherit.

36. At the hearing of the appeal, the Association argued that even if there was ambiguity as to when the referenced class closed, the court must apply the rules of convenience and not the rule against perpetuity. The rules of convenience, they assert, stipulate that the court must adopt the construction which closes the gift or the class on the death of the testator. These rules, the association contends, are not predicated on any view of the testator's intention. Mr. Eneas submitted that even if it can be discerned from the Will that it was the intention of the testator to benefit persons into perpetuity, the court in accordance with the rules of convenience should close the class.

37. The Association further argued that it was illogical for the learned trial judge to find that the devises failed because they were void gifts and to then subsequently award a certificate of title to the respondent. This decision, they argue, is a breach of logic, because, in their view, both the appellants and respondent base their claim to the property on persons who claimed to have been the descendants of the old servants and former slaves of Ann Millar.

38. The appellants posit that if the gifts in the Will fail, then neither party has proved valid documentary title. In finding the way she did, the Association opines, the learned judge ruled in favor of some of the descendants under the Will and against others of those descendants; without indicating the evidential basis for this distinction. In support of their arguments, the association placed before the court **In re Villar [1929] 1 Ch 243** and **Henry Pearkes v William Moseley (1880) 5 App Cas 714.**

39. The respondent agrees with the finding of the learned judge. In its view, Ann Millar's gift is a class gift which violates the rule against perpetuity. The respondent argues that where a gift is given to a class of persons, all members of that class must be capable of taking within the perpetuity period. They further assert that as 1. it is impossible then and now to ascertain the number or the existence of the members of the class of descendants covered by the Will and 2 . it is certain that all of the members of the stated class cannot come into existence within the perpetuity period, the gifts must fail. In support of their arguments, the respondent relies on **Leake v Robinson (1817) 2 Mer 363, Henry Pearkes v William Moseley (1880) 5 App Cas 714, Sydall v Castings Ltd [1967] 1 Q.B. 302.**

40. The rule against perpetuities is an ancient one; primarily concerned with limiting or rather invalidating future interests in land which vest too remotely. The writers of The Rule Against Perpetuities, Second Edition, 1962 indicate that the classic statement of the rule runs as follows,

> **"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest..**
>
> **(a) A remainder is " vested " when the persons to take it are ascertained and there is no condition precedent attached to the remainder other than the termination of the prior estates.**
>
> **(b) An executory interest (that is, an interest which cuts off a previous interest**

**instead of following it when it has terminated) is not "vested" until the time comes for taking possession.**

**(c) Most important of all, a class gift is not "vested" until the exact membership of the class has been determined; or, to put it differently, a class gift is still contingent if any more persons can become members of the class or if any present members can drop out of the class."**

41. The learned authors of Megarry's Manual of the Law of Real Property 6th Ed. at page197, state the rule thus:

**" (1) A limitation of any interest in any property, real or personal is void if there is any chance, whatever that it might be capable of vesting after the perpetuity has expired.**

**(2) The perpetuity period consists of a life or lives in being at the time of the gift, together with a further period of 21 years and where gestation actually exists, the period of gestation may be added"**

42. The House of Lords' case of **Henry Pearkes v William Moseley (1880) 5 App Cas 714** is very instructive on the point. There, Lord Penzance quoting the

Master of the Rolls in **Hale v Hale 3 Ch. D 643**, stated:

> **"A will takes effect at the death of the testator and any gift made by it is void for remoteness if it does not necessarily take effect within 21 years from the termination of any life then in being – in other words, unless the objects can necessarily be ascertained within the legal period. That I take it is a proposition which nobody disputes."**

43. Lord Selbourne, Lord Chancellor as he then was, added his understanding of the rule and stated:-

> **"The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and if the whole intention expressed by the words could lawfully take effect. So understanding the rule, the first question in every case of this kind is that of pure and simple construction- what is the meaning of the words which the testator used? What would the effect be, if there was no law of remoteness?"**

44. The purpose of this step in the words of Lord Blackman is to, **"see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness [keeping in mind the rule that] if the gift be to a class some of whom are beyond the limits in the way of remoteness, the whole is void."**

45. Lord Selbourne in discussing the manner in which and the circumstances that need to exist in order to conclude that a gift is indeed to a class of persons opined: **" a gift is said to be a "class" of persons, when it is to all those who shall come within a certain category of description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule of remoteness affects the class as a whole, if it may affect an unascertained number of its members."**

46. **In Re Villar [1929] 1 Ch. 243** is also instructive. In that case, the testator devised and bequeathed all his property to his trustees upon trust. The trustees were to pay and divide the income of the trust equally *per stirpes* among the testator's participating issue. The capital of the trust was not to vest until the expiration of "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my [the testator's] death." The testator died leaving beneficiaries as defined by the will. The trustee brought a case before the courts to determine whether the trusts of income were void for uncertainty or violated the rule against perpetuities.

47. Lawrence L.J opined in that case:

> **" In my judgment the decision in Thellusson v Woodford, which is binding**

on this Court, affords a complete answer to the contention of the appellants that the testator's residuary gift is void, as in infringing the rule against perpetuities. In that case Lord Eldon, after approving of the opinion expressed by Lord Thurlow in Robinson v Hardcastle, that it is competent to a testator to give a life estate, to be appointed by the survivor of 1000 persons, states that "the language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops." Much stress has been rightly laid by the appellants in the present case on the words "not exceeding that to which testimony can be applied," but in my opinion these words were intended to apply to cases such as in In re Moore where it is obviously impossible to ascertain the lives specified. Moreover I think that in cases of that kind the question is not whether the rule against perpetuities has or has not been infringed, but whether the gift is void for uncertainty. If it be impossible to ascertain the lives upon the death of the survivor of which the vesting of the capital is to take effect, such vesting is not in fact postponed beyond the permitted limit, but the gift is void for uncertainty...

In the present case there is in my opinion no infringement of the rule against perpetuities. All that is said is that there will or may be great difficulty in ascertaining the lives upon the death of the survivor of which the ultimate vesting depends. If it could now be established definitely that it is impossible to ascertain who were the descendants of Queen Victoria living at the death of the testator, and that any inquiry for the ascertainment of such descendants which might be directed by the Court would necessarily prove abortive, there would be solid ground for holding that the gift was void for uncertainty. That however cannot be said in this case.

The evidence shows at most that it is difficult at the present time to ascertain who are the lineal descendants in question, and that it may probably be more difficult in the future to ascertain who is the survivor of such descendants. But it cannot properly be said now that it is impossible to ascertain which of the lives mentioned by the testator were in existence at his death, and it is mere speculation whether it would be difficult or easy to ascertain the date of the death of the survivor of such lives. In my judgment

> **the evidence falls far short of proving that the number of lives exceeds that to which testimony can be applied to determine when the survivor of them drops. The mere fact that difficulties may hereafter arise in ascertaining which is the survivor of the lives mentioned by the testator is not in my judgment a ground for holding that the gift in question is void for uncertainty."**

48. After consideration of the authorities mentioned it would appear that in order for a gift to be valid it must vest within the perpetuity period; namely no later than 21 years after the life in being at the creation of the interest. The gift can only vest when the individuals to whom it is intended to be given can be ascertained. Moreover, where the beneficiaries are a class of persons, the class gift cannot vest until the specific membership of the class is determined.

49. As indicated in paragraph 5 above, the Will contained two devises. Gift 1 was of the "Millar's Settlement" to Old Scipio and his wife Grace and her children, Sailor George and his wife Sarah and her children, Dinah Millor and her children to be held and enjoyed by them in common and by their descendants forever. Gift 2 was of the adjoining William A. Bowles tract to her old servants and former slaves residing at the time of the signing of the Will or who may be residing in the Millars Settlement at the time of her death including the last mentioned parties and Old Jack, his wife Chloe and her children, her servants Pender and her children, and Allan Millar to be held and enjoyed by them in common and by their descendants forever.

50. After a full consideration of the terms of the devises in the Will and the explanation of the rule found in the case law, I find the learned judge's

restatement of the law and application to the facts, at paragraphs 25 and 26 of her judgment, unassailable.

51. The Association's contention, that as there was evidence that Dinah Millar and her children were alive at the time of Anne Millar's death and therefore that the gifts vest, is insufficient to upset the principle as stated by Lord Penzance that, **" under the rule against perpetuities, a class gift cannot be partly good and partly bad. If at the time when the instrument comes into operation, some members of the class are not certain to be ascertained within the perpetuity period, then the whole of the gift is too remote…"**

52. In any event, should I be wrong in my view that the gifts violate the rule against perpetuity; the Associations' arguments based on the rules of convenience similarly cannot stand. For that position to have any weight the Association must demonstrate which of the descendants were alive at the time of Ann Millar's death and how the current applications derived their claim through them. No significant evidence of this nature was before the court. Indeed, even the present evidence in relation to the existence of Charles Millar, who the Association alleged is Dinah Millar's son, is in dispute.

53. While the Association has placed into evidence family trees drawn up from their own knowledge, linking them to a beneficiary under the will; this alone is not enough. It was incumbent on the association to establish through some form of extrinsic evidence, not only that the descendant through whom they purport to claim was alive at the time of Ann Millar's death and capable of receiving the gift but also external evidence such as birth, death and marriage certificates to demonstrate how they are connected to this descendant and therefore entitled to claim.

54. As such, in order to give teeth to any of their submissions, it was incumbent on all of the appellants to establish clearly that the entirety of the class in

both gifts was ascertainable not only at the time of Anne Millar's death but also within the perpetuity period which, as previously indicated, is calculated from the time of Anne Millar's death. In light of this, the decision of the learned judge that the gifts fail must therefore stand.

**Ground 1 – Documentary Title/Good Root of Title**

55. As noted, the respondent claimed title to the property by virtue of the following deeds:

> (i) **Conveyance dated 23 November 1959 from Arthur Vining Davis to Avon Bay Limited recorded in the Registry of Records in Volume 230 at pages 88 to 114 ("the 1959 conveyance");**
>
> (ii) **Conveyance dated 26 October 1988 from Avon Bay Limited ('ABL") to the respondent ("EPL") recorded in the Registry of Records in Volume 230 at pages 88 to 114 ("the 1988 conveyance").**

56. All of the appellants contend that the learned judge erred in law and in fact when she held that the 1959 conveyance was a good root of title to the property. The Association further argued that the learned judge erred when she permitted the respondent to commence its documentary title with the 1959 conveyance. The learned trial judge, they assert, was assisted in coming to the aforementioned conclusion by not only inadequately considering documents which were expressly excluded from investigation but by also failing to investigate the 404 conveyances that formed the basis of the 1959 conveyance as she was required to do under the Quieting Titles Act.

57. The main thrust of all of the appellants' arguments can be summarized as follows:

a) That the alleged documentary title asserted by the respondent was no title at all in view of the fact that the descendant's conveyances were ineffectual and incapable of transferring an interest in the property to Mr. Davis which he purported to convey by the 1959 conveyance. As such, the respondent ought to have been required to deduce its title back to a valid root of title.

b) In the appellants' view, as the 1959 and 1988 conveyances are defective, the respondent cannot rely on the presumption of title emanating from the principle that a person who conveys land as beneficial owner is presumed to be entitled to possession of the estate conveyed. Consequently the learned trial judge ought to have held that the claims between the parties to the proceedings were claims by competing trespassers.

c) There was a duty on the Court carrying out the investigations to conduct a full investigation and examination of all of the evidence bearing on the issue of requisite title to the property before making a determination.

In support of their arguments, the Association placed before the court the Privy Council cases of **Anthony Armbrister et al v Marion Lightbourn et al**

**[2012] UKPC 40, In Ocean Estates Ltd v Norman Pinder [1969] 2 A.C. 19, Kenneth McKinney Higgs, Sr v Leshel Maryas Investment Company Lt et al [2009] UKPC 47.** Also placed before the court were the cases of **Re Scott and Alvarez's Contract [1895] 2 Ch. 603, Re Edwards 1976 Law Reports of The Bahamas 1971 – 1976 Vol 1.**

58. The respondent's submissions on this ground are simple. In their view, as the 1988 conveyance is a document showing a title of more than 30 years at the time of the filing of the Petition, it is a good root of title in accordance with section 3(4) of the Conveyancing and Law of Property Act and section 8(2) of the Quieting Titles Act, and as such, the learned trial judge was correct to so find. They rely on the referenced statutory provisions and the definition of good root of title found in The Law of Real Property by Megarry and Wade 4th edition at page 580. There the learned authors state :-

> **" a document which describes the land sufficiently to identify it, which shows the disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title."**

59. Section 8 of the Quieting Titles Act, 1959 states :-

> **" 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."*

60. Section 3 of the Conveyancing and Law of Property Act provides:

> (3) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, *unless and except so far as they shall be proved to be inaccurate*, be taken to be sufficient evidence of truth of such facts, matters and descriptions
>
> (4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown for a certificate of title granted by the court in

accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter

(5) A purchaser of any property shall not require the production, or abstract or copy, of any deed, will or other document, dated or made before the time prescribed by law or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title is recited, covenanted to be produced, or noticed; and he shall assume, *unless the contrary appears, that the recitals*, contained in the abstracted instruments, of any deed will or other document, forming part of that prior title are correct, and give all the material contents of the deed, will or other documents so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by acknowledgment, enrolment or otherwise."

61. In **Jordon v South Shore Investment Co Ltd (No1/1966) (1965-70) 1 LRB 80,** this court describing the essence of proceedings under the Quieting Titles Act, stated:

> **" Proceedings under the Quieting Titles Act are unique in that, for one thing they do not constitute in the ordinary sense a suit inter partes where pleadings are exchanged and issues are joined. The Petitioner and the adverse claimant (if any) outline their claims respectively by the filing of a petition and a statement of claim. Each thus becomes "a party to the proceedings " … In practice the proceedings are carried on very much as in an action, the papers setting forth the claims being treated as in the nature of pleadings and served as such. Each side leads evidence and, if necessary, calls witnesses who are examined in chief, cross examined and re-examined in the usual way up to judgment. It is, or has become, a form of title action. Each party naturally wishes to know what case precisely his adversary seeks to make in the claim to the land so that he may not be taken by surprise and may arm himself with evidence for the purpose of establishing his own case and destroying that of his opponent.** ***In these circumstances it is important that there should be full revelation of the nature and grounds of the claim of each party to the proceedings; this is doubly***

> *so since a duty rests with the court investigating the title to call for such further evidence as it may deem expedient."*

62. Additionally, the Privy Council in **Anthony Armbrister et al v Marion Bethel et all [ 2012] UKPC 40** described the role of the judge when investigating title under the Quieting Titles Act . There Lord Walker stated:

> **" 8. Procedure under the 1959 Act is relatively informal. The strict rules of evidence do not apply. The procedure is comparable to that which applies on the investigation of title on an ordinary sale, out of court, under an open contract. Each rival claimant must prepare an abstract of title and adduce evidence in support of it…**
>
> **9. Section 3(3) and 4 of the Conveyancing and Law of Property Act provides … the qualification to subsection (3) is important. There may be evidence which casts doubt on the correctness of a recital. A striking example of this is provided by the conveyance dated 15 Jan 1944 … which is crucial to the petitioner's claim…"**

63. Considering the above authorities, a party to a quieting title action seeking to assert documentary title to land, is not *prima facie* required to rely on or

deduce title to the land exceeding 30 years unless, in the words of section 8(2) of the Quieting Titles Act, the court so directs. Neither is an investigating judge *prima facie* required to have any party seeking to rely on documentary title, deduce documentary title beyond 30 years. However, if during the course of the investigation questions as to the validity of the documentary title arise, regardless of the age of the title in question, the learned trial judge is required by the Quieting Titles Act and the Conveyancing and Law of Property Act to direct that further evidence be provided. To hold any other way opens the door for the Quieting Title Act and the Conveyancing Law of Property Act to be used as instruments of fraud.

64. At paragraphs 16 – 18 of her judgment, the learned trial judge states:

> **" 16. The ground of the Association's submission is that between the period 16 May 1952 and 23 November 1959 Arthur Vining Davies purported to acquire by right title and interest conveyances and other assurances of the interests of a number of persons (404 in total) in the land claiming to be descendants of devisees specifically named in the Will of Ann Millar or descendants of persons who were residing in Millars at the time of Ann Millar's death.**
>
> **17. Further, subsequent to the AVD Conveyance, Avon Bay continues to acquire purported interests in the land from other individuals who were alleged**

> **to be entitled to an interest in the land as descendants of devisees specifically named in the Will of Ann Millar or descendants of persons who were residing in Millars at the time of Ann Millar's death.**
>
> **18. That raises the question as to whether or not the persons purporting to sell to Arthur Vining Davis and Avon Bay had any interest under the Will of Ann Millar to convey to the two gentlemen."**

The learned judge, having raised the very valid question stated in paragraph 18, did not go on to answer the same.

65. Having determined that the gifts in the Will failed and in the face of claims and evidence indicating that the respondent's documentary title may be invalid as a result of its stemming from the Will, it was incumbent on the learned trial judge under section 8(2) of the Quieting Titles Act to further investigate the respondent's title by directing the respondent to establish that its documentary title was a valid one.

66. In the premises, I find the learned judge's conclusion at paragraph 30 of her judgment unsustainable, where she states:

> **"Save for the 133 persons who sold their interest in the land as occupants of the land, all others recited in their respective conveyances that they were never in**

> **occupation of the land. Each vendor in this latter group sold as a descendant under the Will of Ann Millar. For the reasons I have set out above, none of those has an interest in the land and so they had nothing to convey. Their respective conveyances could not and did not affect the documentary title of Avon Bay Limited to the land."**

It would appear by this ruling that the learned judge validated the conveyance of the possessory title in 133 of the 404 conveyances; a validation that cannot be done in the present case.

67. By holding as she did, Hepburn J is indicating that it is possible to convey possessory title to land without the title being investigated, determined and then certified as having met the requirements under the Quieting Titles, and Limitation Acts. Further, where all 404 conveyances form part of the respondent's abstract of title, it seems illogical to me for the judge to simultaneously conclude that while certain conveyances are incapable of conveying title, this incapacity does not affect Avon Bay Limited's title which is also derived from the Will.

68. In light of the above, I agree with the appellants' submission that the learned judge was wrong to hold that the 1959 conveyance was a good root of title. Having found that the devises in the Will were invalid, the judge ought to have required the respondent to provide evidence that its title was valid.

69. In view of the holding that the descendants' conveyances were ineffectual and incapable of transferring title as a result of the failed gifts, I agree with the appellants' submission that the respondent's documentary title was no

title at all. As a result, the true nature of these proceedings is that of two competing trespassers seeking to establish better possessory title to the property than the other. With that said, I turn to Ground 9.

**Ground 9 – Possession**

70. It is well established that if the law is to attribute possession of land to a person or entity who can establish no paper title to possession it must be shown that for more than 12 years before the filing of the Petition, the claimant had 1. a sufficient degree of physical custody and control ("factual possession") and 2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). See **J A Pye (Oxford) Ltd and others v Graham and Another [2002] UKHL 30.**

71. As noted in **Powell v McFarlane (1977) 38 P & CR 452** and approved by the Privy Council in the Bahamian case of **Armbrister et al v Lightbourn et al [2012] UKPC 40**,

> **" (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… The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. 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 user 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 resourced 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 generalize with any precision as to what acts will or will not suffice to evidence factual possession… 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."**

72. In **Brown v Faulkner [2003] NICA 5(2),** a decision of the Court of Appeal of Northern Ireland, Higgins J, after an extensive consideration of the case law opined as follows :

“ 30. A person who seeks to be registered as the owner of land by way of adverse possession is required to prove a sufficient degree of occupation or physical custody and control of the land over a twelve year period and that the occupation or custody and control was exercised on his own behalf and for his own benefit with an intention to possess the land in question. Where the only conclusion reasonably to be drawn from the use made of the land is that he treated it as his own, then an intention to possess the land may be inferred from such use. Where the use made of the land or acts relied on by the person claiming title by adverse possession are equivocal and open to more than one interpretation then the user or acts in themselves will be insufficient to establish the necessary intention and other evidence will be required.

33. … In Powell’s case, supra, Slade J stated at page 470 that “ Factual Possession signifies an appropriate degree of physical control. It must be single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly.” It is recognized in many cases that the word ‘conclusive’ should read exclusive. In the second sentence in that passage Slade J recognized

there could be a single possession exercised by several persons jointly, or a single possession exercised on behalf of several persons jointly. Thus he envisaged two entirely different situations. The single possession contemplated on behalf of several persons jointly would require possession by a legal entity capable of acquiring possession, exhibiting the necessary animus possidendi and of attaining title to the land. I do not think that a wider family circle comprising two distinct families with no common focal point other than the ownership of separate islands in the Lough qualifies as such an entity.

34. … Where a claim to title by adverse possession depends upon a single possession and the nature of it, would be necessary. There is no evidence that the brothers did any act jointly with an intention to possess the disputed land or from which an intention to possess the disputed land jointly could be inferred. There are findings of independent acts by the respondent and Lord Faulkner's son. Single possession on behalf of others presumes a prior agreement or arrangement that the possession is exercised on behalf of another. There is no evidence of any agreement that someone would take

> **physical custody and control of the land on their behalf nor that such be done with an intention on their part to possess the land. Equally there is no evidence of any agreement between the brothers to exercise physical custody and control of the land on each other's behalf nor, and perhaps more critically, a finding of an intention on the part of each of them to possess the disputed land jointly and on each other's behalf."**

**Requisite Time Period**

73. Section 16 of the Limitation Act, Ch. 83 governs the limitation period applicable to actions to recover land. Section 16 (3) of the Act provides that,

> **" 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 …".**

74. The Petition in the present matter was filed by the respondent in 2010. In the ordinary scheme of things this would mean that any claimant seeking possession of the property must establish that it was in factual possession and not only had, but also maintained, the requisite intention to possess for at least 12 years preceding 2010; namely the period 1998 – 2010.

75. The Association however argues that the present matter is not one that falls within the ordinary scheme of things. At paragraph 6.61 of its submissions,

the Association contends that the respondent's claim to have acquired a possessory title to the property superior to the Association's possessory claim must fail on the basis that following the filing of the 1995 Petition, time, for the purposes of the Limitation Act, stopped running as between the parties to those proceedings. The Association does not list who the parties to those proceedings were. In support of this submission, reliance was placed on a decision of this court differently constituted; namely **Mather v The Grand Bahama Port Authority Ltd (1965-70) 1 LRB 103,** in which Sinclair, P. opined:

> **"I have no doubt that an application to quiet under the Act is an action for the recovery of land within the meaning of section I of the Real Property Limitation Act 1874, and that time ceased to run in favour of the appellant on the filing of the petition…"**

76. I agree with the holding of Sinclair P., that in adverse possession cases time ceases to run in favor of a petitioner on the filing of a petition. So to, time also ceases to run in favor of an adverse claimant.

77. Notably, Tom and Millar Corporation Limited, a member of the Association, was the petitioner and therefore a party to the 1995 action; and in as much as the petition, and the adverse claim filed by the respondent in the 1995 action pertained to property which included the property under review in the 2010 action, time stopped running in 1995, as between all of the parties to the 1995 action.

78. Based on a series of affidavits filed at Tab 42 of the record of appeal, it would appear that the Whylly family were also parties to the 1995 action. As such, only evidence of possession that occurred up to 1995 by any of those parties

can, in accordance with the Limitation Act, be considered in these proceedings. In relation to the appeal of Emily Hall however, as she, it would appear, was not a party to the 1995 action, time stopped running between Mrs. Hall and the respondent, when the petition herein was filed in 2010.

**Agreement to Possess**

79. In accordance with the holding expressed in **Brown v Faulkner (above),** the learned judge concluded that none of the appellants was able to claim possession to the property without providing evidence of an agreement between all of the purported descendants to possess the property on their behalf. In Hepburn J's view, the evidence before her demonstrated that the opposite was the case; indeed, at paragraphs 54 – 55, 57 -58 of her judgment the learned judge explains her reasons:

> **"54. I must state at the very outset that I did not find the testimony of the Association's witnesses that their occupation and possession of the land was joint and for themselves and for the benefit of other descendants of devisees under the Will of Ann Millar who had a life right and the land credible. Their evidence in that regard struck me as being of recent vintage. Perhaps the starkest evidence of that is in the case of the change in position of a number of the adverse claimants in the course of the trial. When the trial began I had before me five separate adverse claimants …**
>
> **55. In the course of the trial Tom and Millar joined forces with the Association**

and counsel informed the court that steps were being taken to have Tom & Millar convey its interest in the land to the Association and Thomas Whyly and Dora Whylly Boston and Bristo Whylly joined forces. Whilst Gary Young maintained a separate claim to the land, in his evidence he made it clear that if he succeeded in his claim, he would have to share the land with the other "descendants" as they were referred to in the trial.

57. Tom and Miller obviously did not claim to occupy the land on anyone else's behalf than its own. In 1995 it filed a petition seeking a Certificate of Title in its sole name to the land and other lands in South Eleuthera. In the instant Petition, Tom & Miller sought its own Certificate of Title to the land. Mitchell McPhee, the father of Errol McPhee challenged Tom & Millar's claim to the land, not on behalf of the descendants but in his own behalf.

58. There is even evidence of a feud between Charles McKinney and George McKinney in which Errol McPhee's father and uncle became involved, Mitchell McPhee siding with Charles Mckinney and Enock McPhee with George McKinney. Their behavior was

> **not consistent with that of persons who believed that all who were descendants of the devisees were equally and jointly entitled to the land."**

80. The Association challenged the learned judge's finding that the claim to a joint and collective title was of recent vintage; interestingly, the Association does not challenge the findings made by the judge at paragraphs 57 and 58 (above). In the Association's view, Hepburn J failed to consider the totality of the evidence in arriving at her 'recent vintage' conclusion.

81. Additionally, the Association argue that:

> **" the collective nature of the occupation of the descendants was an incident of their occupation of the property as tenants in common and no reference was made by the Judge to the documents in evidence confirming that the land was famously held by the descendants as such, including (i) the devise in the Will (ii) Notice of Intended Acquisition published in the Gazette of The Bahamas dated 7th April, 1956 (iii) recitals in the 32 Descendant Conveyances adduced into evidence and (iv) the Affidavit of Augusta Young sworn in the year 1994 deposing to the occupation of the property by the individuals named therein in common with each other."**

82. It is further posited by the Association, that far from being of recent vintage, all of the referenced documents came into existence more than 15 years before the filing of the Petition and ought to have been viewed by the learned judge as establishing objective truthful facts. They further submitted that the above documents coupled with the Charter, the Association's Constitution, and the evidence by the adverse claimants, clearly establish that the occupation by the descendants was a collective one.

83. Additionally, the Association argued that the evidence given by the witnesses stating that it was well understood by persons in the community that the property was ' generation property' constituted evidence of a prior arrangement by the Descendants to collectively occupy and enjoy the land exclusively for the benefit of the Descendants. To the Association, this belief was sufficient to satisfy any requirement which necessitated the establishment of a prior agreement or arrangement before a joint and collective claim could be established.

84. In my view, neither the devises in the Will, nor the Notice of Intended Acquisition placed in the Gazette by the Government, nor the recitals, can be considered as evidence of an agreement by the parties to hold the property in possession on behalf of the other. The draft Charter exhibited at pages 780 – 787 of the record of appeal is just that, a draft of an intention to form an association. There is no indication of who the proposed members to this draft Constitution at the time of its creation were, and no indication of whether the draft was ever finalized and agreed between members. The first concrete documented evidence of an agreement between the purported possessors of the property is the Articles and Memorandum of Association filed in 2011; after the lodging of the Petition.

85. Further, should the view that the draft Constitution provides evidence of the requisite agreement be accepted, the incorporation of the Tom and Millar Corporation Limited ( " TMCL " ) in 1993, along with the existence of the

competing applications of Dora Whylly, Bristo Whylly, Thomas Whylly Jr and Emily Hall, are a direct contradiction of the Association's argument that an agreement to possess on behalf of the other tenants in common, is evident or can be inferred from the facts.

86. Of further note is the point that Errol McPhee, who is described in the letters exhibited at pages 790 and 791 of the record of appeal, as the Acting Chairman & Secretary/President of the Bannerman Town/John Millars Association in 1984 and 1985 respectively and who is also a founding member of the Association, is not listed as a founding member of TMCL in the Affidavit of Barry McKinney. One can reasonably presume that if TMCL was indeed incorporated in 1993 for the benefit of all descendants as stated by Mr. McKinney, the identity of the President of the Association purporting to represent the members would be included.

87. Further support for the view that the agreement between the parties was one of recent vintage can be found in the evidence of Mildred Young, located at page 3817 of the record of appeal where she states:

> **"Q. … Now, have you ever discussed your ownership of this – your interest in this property with the father of your only child?**
>
> **A. Yes, I have**
>
> **Q. Good. When was that?**
>
> **A. 1995, during the petition for Tom Corporation.**
>
> **Q. What did you discuss with him?**

**A. That –**

**Q. Pardon?**

**A. I discussed it that we were going to stop Tom and Millar, even though they are family of ours, and that they don't have any more rights than us. And he told me that they were going to put a claim in as well. And that's when I said " How come you are claiming for what is not yours?" And I said, "Under my dead body."**

88. On a consideration of the evidence and reasoning of the learned judge, I can find no fault in her finding. Her conclusion that the evidence of an agreement was of recent vintage is reasonable in all the circumstances of the case.

89. In my view, this aspect of the appeal is determinative of the Association's claim to the land. Without evidence of an agreement, the various acts of possession by each claimant are insufficient to ground possession over the entire property. In light of this holding, what remains to be considered are the acts of possession attributable to the respondent in relation to Emily Hall and the Whylly Family.

## Possession

90. In relation to the respondent's evidence of possession, the learned judge states at paragraphs 67, 71 – 73 and 75 of her judgment:

**" 67. The Petitioner has relied on the**

evidence of Hubert Williams, Stafford Coakley, Cranston Petram and Ricardo Fernander to support its claim of continuous, undisturbed possession of the land. The evidence of Mr. Coakley, Mr. Petram and Mr. Fernander are especially helpful in this matter as they seek to establish on behalf of the petitioner the fact of whether there were any other persons occupying the said land since 1988.

71. The evidence of Mr. Patram was that he oversaw the reopening and clearing of the boundary lines of the said property twice a year. Mr. Petram also testified that he placed signs on various parts of the subject property to "advise the world" that the land was indeed private land owned by the Petitioner and to warn of possible prosecution in the event of trespass.

72. He testifies that he was employed from 1994 – 2004 and that during the term of his employment he witnessed no occupation of the land by anyone adverse to the Petitioner …

73. Mr. Fernander gave evidence that he has been employed at the Petitoner from 2005 to the time of trial where he

**stated that his duties included clearing the boundary lines of land that belonged to the Petitioner and reporting on any activity on the property that was not authorized by the Petitoner.**

**75. [Mr. Fernander] testified that each of the aforementioned farmers were told that they were on land belonging to Eleuthera Properties Limited and voiced no objection to this. He further testified that between 2006 – 2009 other farm areas were cleared but that in 2009 he observed a tractor clearing land in connection with activities being carried out by Manassah Mackey. He testified that this was reported to Mr. Sands. (The Petitioner was later successful in an action in trespass against Mr. Mackey.)"**

91. The respondent continued to rely on the evidence of Hubert Williams, Stafford Coakley, Cranston Patram, and Ricardo Fernander. Mrs. Hall adopted the Association's arguments in relation to the criticism of the respondent's evidence and relied primarily on the evidence of Edmund Hall, who testified on behalf of his mother, Emily Hall. The Whylly's sought to rely on evidence provided in affidavits filed in the 1995 action and the oral and affidavit evidence of Dora Boston Whylly, Bristo Whylly and Thomas Whylly.

92. In the Association's view, adopted by Ms. Hall, the learned judge was incorrect to accept their evidence; and in particular they posit, that the evidence of Mr. Williams was inconsistent and often times contradictory.

They assert that Mr. Williams stated clearly during cross examination that when he referred to farms in his report he was referring to organized farms in rows, and that the clearings observed in the photographs he referred to could have been farms. To the Association, as Mr. Williams' witness statement focused on farming in the conventional sense and did not address the issue of peripatetic farming, the system of farming predominantly used in The Bahamas, his witness statement could not, contrary to the judge's assertions, be considered as useful evidence.

93. The Association attacked the evidence of Mr. Patram primarily on the basis that the learned judge seemingly adopted his evidence without comment or analysis. In particular, they assert that the learned judge incorrectly indicated that it was Mr. Patram who placed signs around the property; when it was the evidence of Mr. Ferguson that he was responsible for placing the same. They further argue that the learned judge made no reference to the fact that the signs purportedly placed on the property by the respondent were immediately removed. These factors considered together, they complain, indicate that the judge approached the evidence in a cursory manner and was wrong to interpret the same as helpful.

94. I cannot agree with the Association's view that the evidence of the respondent's witnesses could not be considered useful evidence. Though Mr. Williams did indicate on cross examination that his analysis of the photographs did not include peripatetic farming; this alone does not render his evidence useless. The evidence of Mr. Williams clearly supports the evidence of the appellants' witnesses; namely, that there was extensive farming between 1940's and the mid 1980's and that, that farming had substantially declined by then; namely the mid 1980's.

95. The evidence of both Mr. Patram and Mr. Fernander was clear; and in my view, the Association is incorrect in their submission that the learned judge erred when she indicated that it was Mr. Patram who placed signs around the

property. Indeed, a review of the transcript reveals that both Mr. Patram and Mr. Fernander placed signs around the property, signs that indicated that the property was privately owned. Mr. Patram testified that in 1994 he placed signs on the property that remained undisturbed until 1996. It was only at the time of the filing of the 1995 Petition that unidentified individuals began removing the signs.

96. The learned trial judge accepted the evidence of Mr. Stafford Coakley that in 1988 at the instance of the respondent he carried out a survey of the property. Mr. Coakley further stated that as early as 1988 he was contracted by the appellant to re-open the boundary lines around the property; additionally, he said, he directed his crew to clear out track roads on behalf of the respondent and in 2000 he conducted a fly over of the property on behalf of the respondent. During the employ of Mr. Patram between 1994 and 2004, the re-opening and clearing of the boundary lines continued.

97. Indeed, the evidence of Mr. Patram accepted by the learned judge at paragraph 71 indicates that when persons removed the signs of the respondent advising that the property was private property the same was reported to police on behalf of the respondent. The record before this court contains a letter from the officer indicating the same.

98. In my view, the strongest acts of possession are those of the respondent in relation to trespassers found in the evidence of Mr. Patram; for indeed, the respondent has successfully asserted its possession of the land against another in a previous action before the courts. At the hearing of the appeal counsel for the respondent indicated

> **"Mrs. Wilson: ... My Lords, after 2005 there was sometime in 2009 a massive clearing in the north section of this**

**property by Mr. Manassah Mackey who is not a party to this action in any way, but that commenced to what then came to be somewhat of a proliferation of persons.**

**The President: Vanessa who ?**

**Mrs. Wilson: Manassah. He is not a party to this action.**

**The President: Manassah Mackey ?**

**Mrs. Wilson: Mackey yes. In the year 2009 he cleared some four acres of the respondent's land to the north. That necessitated an action being brought in the Supreme Court and which was successfully carried out by the respondent company in this matter and Manassah Mackey vacated the land."**

This trespass action and its disposition were not disputed by any of the appellants. This, combined with the other acts described in the evidence of Messers Coakley, Williams and Fernander above, provide a clear case on the part of the respondent of factual possession of the property, and the intention to possess the same to the exclusion of all others.

99. The Privy Council decision in **Ocean Estates Ltd v Pinder (1969) 2 A.C. 19**

clearly demonstrates that the aforementioned acts were sufficient to establish possession. Therein they opined:-

> **" … the plaintiff has, by the use of the land by their predecessors from 1941 to 1946, by their architects inspection in 1957 and the surveys from 1959 to 1960, established sufficient possession to bring an action for trespass to land and to negative any intention on their part to abandon possession, …"**

100. Before concluding, I must stress and reiterate the sentiments expressed by the learned Law Lords in **Ocean Estates Ltd. v Pinder [1969] 2 AC 19:**

> **" At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925 there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed …"**

101. I have examined closely the evidence of possession presented by Emily Hall and the Whyllys. All of the appellants and the family members which they purport to directly claim possession through, did not live on or left the property well before the commencement of the 12 year period in question; namely 1983. Thomas Whylly, the brother of Dora Whylly, testified that he left

the property in 1950 and did not undertake any farming of the land post 1950.

102. Thomas Whylly further testified that his leaving the property was as a result of his mother desiring that all of her children reside together in Nassau. He further testified that his grandmother, who farmed the property, passed away in 1951, shortly after his leaving. Donna Whylly testified that her father, whose estate she is the representative of, never farmed the land; in actuality it was her Uncle Milton Whylly that conducted the farming. In her view, her Uncle farmed on behalf of the family, no evidence was provided of this agreement.

103. Edmund Halls' evidence was not substantially different. Mr. Hall testified that his family left the island in 1981. His father he claimed continued to farm the property with the assistance of Otis Young. While Mr. Hall testified that his father and Mr. Young harvested truckloads of watermelons he made no distinction of whether these watermelons came from the property or from his father's farm in New Providence. As a matter of fact every time Mr. Hall was questioned about the level of watermelon farming on cross examination, Mr. Hall was at pains to mention that his father also had a farm in New Providence.

104. In light of the above, I can find no fault with the learned judge's conclusion that " on the evidence before the court, I am not satisfied that any of the adverse claimants, have made out their claim to an interest in the land." I further find no fault in her subsequent decision, "that the Petitioner has made out its claim for a Certificate of Title to the land pursuant to section 16 of the Quieting Tittles Act."

105. In the premises, I would dismiss the appeal; affirm the decision of the learned trial judge granting a Certificate of title to the respondent for the 2, 086.24 acres of the property described in the Petition, subject to the exceptions and qualifications contained in section 15 of the Quieting Titles Act. The costs of

the appeal are the respondent's to be taxed if not agreed.

_____

The Honorable Dame Anita Allen, P

106. I agree.

_____

The Honorable Mr. Justice Isaacs, JA

**JUDGMENT DELIVERED BY THE HONORABLE MR. JUSTICE ADDERLEY, JA:**

107. This is an appeal against the judgment of Hepburn J given on 20 May 2014 whereby she granted a certificate of title to the respondent under s. 3 of the Quieting Titles Act Chapter 393 ("the Act") declaring it the legal and beneficial owner in fee simple of 2086.24 acres ("the Property") subject to the usual exceptions and qualifications contained in section 15 of the Act. The Land is situated south of Wemyss Bight in the southern part of the Island of Eleuthera in The Bahamas.

108. There were simultaneous appeals by adverse claimants relating to the Property sub nom **Dora Boston Whylly et al v Eleuthera Properties Limited SCCivApp No. 151 of 2014** ("the Whylly Appeal"), and **Emily Hall v Eleuthera Properties Limited SCCivApp No.164 of 2014** ("the Hall Appeal"). We considered it convenient to combine the decisions on the appeals as the trial judge combined the decision below in her judgment. The action which started

out with six adverse claimants ended up with four because of joinder. The original adverse claimants were:

(i) The Association

(ii) Tom and Millar

(iii) Dora Adrella Whylly-Boston and Bristo Walton Whylly

(iv) Thomas Whylly, Jr

(v) Gary Young

(vi) Emily Hall

These were reduced to the following four:

(i) The Association and Tom and Millar

(ii) Dora Adrella Whylly-Boston and Bristo Walton Whylly; and Thomas Whylly, Jr,

(iii) Gary Young

(iv) Emily Hall

109. The Petition was filed on 17 March 2010. The respondent claimed a paper title. It relied on the following root of title conveyance dated 23 November 1959 from Arthur Vining Davis to Avon Bay Limited recorded in the Registry of Records in Book 9076 at pages 483 to 492 ("the 1959 conveyance"). Having never taken up occupation, it claims possession by virtue of its deemed possession as holder of the paper title.

110. The appellants claimed a possessory title under the Limitation Acts or

alternatively a better title than the respondent. To prove a possessory title the squatter must show continuous exclusive possession of the land for 20 years next before action if the action was brought before September 2007 and for 12 years if it was brought after September 2007. (See **In the Matter of The Petition of Marina Dean Quieting Titles Action 1998/CLE/QUI/026** where Sir Michael Barnett, CJ, as he then was, reviewed the Bahamian authorities).

111. The abstract of title of the respondent who was the Petitioner below consisted of 470 letter size pages including the abstracts of almost 500 recorded conveyances. The trial had 35 days of witness testimony and 9 days of submissions on evidence and the law.

112. The Property was part of previous quieting actions commenced in the Supreme Court, Common Law Action No 229 of 1964 ("the 1964 Petition") by Avon Bay Limited ("ABL") as Petitioner and later Common Law Action No 26 of 1995 ("the 1995 Petition") by Tom and Millar Corporation Limited. The land comprises part of two separate tracts, approximately 250 acres of the "Bowles Tract", and "Tract A" comprising 1700 acres more or less of the "Millers" Tract located in South Eleuthera.

113. A modern survey shows that the land the subject matter of the 1995 Petition is 3637.97 acres as depicted on Plan 505 EL ("the 1995 Land") and includes the Property. The respondent was an adverse claimant in the 1995 action. An application was made to consolidate this action with the 1995 action but the judge exercised her discretion not to do so. The 1964 Action and the 1995 Action are therefore still extant although the files for the 1964 action cannot be located in the court registry. No appeal is before us on that issue.

114. It is common ground that all of the 1995 Land, including the Property, was owned by Ann Millar and devised by her Last Will and Testament made the 12 January 1869 ("the Will") which was duly proved in Nassau on 17 August

1871. She left two devises: one, in the "Millar's Settlement" and the other in the adjoining William A. Bowles tract to her named servants and former slaves then residing or who may be residing in the Millars Settlement at the time of her death and their children " ***to be held and enjoyed by them in common and by their descendants forever.***" The full text of the gift is set out later.

115. The Judge found in favour of the respondent that the gift was void for breach of the rule against perpetuities. She then went on in paragraph 14 to find that the 1959 conveyance was a good root of title as follows:

> **"14. Having regard to the provisions of section 8(2) of the Quieting Titles Act and subsections 3, 4 and 5 of section 3 of the Conveyancing and Law of Property Act, I am satisfied that the AVD conveyance is a good root of title."**

116. In reaching that conclusion it was evident that she analyzed documents prior to the 1959 conveyance because she made the following finding at paragraph 30 in relation to the conveyances to Arthur Vining Davis ("AVD"):

> **"30. Save for the 133 persons who sold their interests in the land as occupants of the land, all others recited in their respective conveyances that they were never in occupation of the land."**

She then found that by the 133 conveyances the persons conveyed a possessory title to AVD.

117. The Judge made no finding in respect of the conveyance dated 26 October 1988 from Avon Bay Limited ('ABL") to the respondent ("EPL") recorded in the Registry of Records in Volume 230 at pages 88 to 114 ("the 1988 conveyanc e").

## Grounds of Appeal

118. Among its 16 grounds of appeal the Association argued that the learned judge was wrong in law to find that the devise in the Will failed and that the 1959 conveyance formed a good root of title. It submitted that the gift to the class of beneficiaries was saved by the "rules of convenience" applicable to class gifts and that each devisee under the Will took an undivided interest as tenants in common in the 1995 Land.

119. The Association also contended that the devise vested in the devisees as a matter of law because the testator's death took place before the Real Estate Devolution Act came into force on 22 June 1914 in The Bahamas, and prior to that date there was no need for a deed of assent because the property automatically vested in the testator's devisee or heir-at-law (see **Selkirk v Romar Investments Ltd. [1963] 1 WLR 1415 PC** per Viscount Radcliffe at p 1419).

## The Law

120. In as much as the judge's decision is based on section 8(2) of the Act and subsections 3, 4 and 5 of section 3 of the Conveyancing and Law of Property Act, central to a review of the learned Judge's decision are the answers to the following questions:

A. was the learned judge right to conclude (1) that the gifts in the will were void for perpetuity, and (2) that the 1959 conveyance was a good root of title?

B. was the judge entitled to look behind the 1959 conveyance ?

C. having done so was the appellant entitled to rely on it notwithstanding that the 1959 conveyance was more than 30 years old by the date the appellant joined the action in 2010?

It is therefore necessary to review the applicable law.

**Root of Title**

121. Root of title is not defined by statute. However In **Collie v. The Prime Minister [2012] 1 BHS J. No. 18**, the court accepted the definition from Williams on Vendor and Purchaser at paragraph 23*:*

> **"23. *Williams on Vendor and Purchaser* 4th Edition provides a good definition of what constitutes a good root of title. The authors state at page 24: "must be an instrument of disposition dealing with or proving on the face of it without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title"**

122. This is essentially the same definition accepted by the parties in this action taken from Megarry and Wade: The Law of Real Property 4th ed at page 580 which describes it as :

> **"….a document which describes the land sufficient to identify it, which shows the disposition of the whole legal and**

**equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title"**

**Section 8(2) of the Act**

123. On the question of title, section 8(2) of the Act incorporates by reference Sections 3(4) and 3(5) of the Conveyancing and Law of Property Act and the judge is mandated to carry out an enquiry under the Act and the purpose of section 8(2) is twofold. The first part gives statutory guidance to the judge conducting the enquiry. It sets out what is sufficient for him/her to grant a certificate under the Act. It reads:

**"(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 …"**

124. By so doing the section necessarily sets a minimum requirement which a petitioner must meet. Subsection (4) of section 3 limits the period of commencement of a good title which a purchaser of land is entitled to require from a vendor to thirty years or back to a Crown Grant or Crown Lease or a Certificate of Title under the Act whichever is later. A good title means a title without defects or encumbrances which commences with a good root of title as defined above.

125. This court has considered subsection (4) of section 3 within the context of section 8(2) of the Act. In **Sturrup and another v. Gibson and others [2011] 3 BHS J. No. 22** delivering the judgment for the Court (Conteh; Blackman, and Newman, JJA), Conteh J A explained it at paragraph 36 and folllowing:

“ 36… on the evidential issues in proceedings under the Act [the Quieting Titles Act] in relation to which the court may proceed or act upon, S.8 of the Act provides as follows:

> "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 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 of form satisfactory to the

court."

126. Continuing, Conteh, JA said:

> " 37. Sub-section (2) of S.8 does not itself, expressly state the length of time for which a petitioner or an adverse claimant must prove to have been in possession, in order to establish title to the land. But when this sub-section is read along with ss (4) of S.3 of the Conveyancing and Law of Property Act Ch.393 of The Statute Laws of The Bahamas, it would readily show that for purposes of proceedings under the Act, a claimant under the Quieting Titles Act, need not have his claim of title to the land "to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown… whichever period shall be shorter".

127. Sub-Section (4) of section 3 of The Conveyancing and Law of Property Act provides as follows:

> "(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a

> **certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter"**

128. The second part of section 8(2) of the Act is for the benefit of the applicant. Although not expressly stated, it is referring to subsection 5 of section 3 of the Conveyancing and Law of Property Act which absolves the vendor from answering questions, and prevents the purchaser from making any requisitions relating to a period prior to a thirty year root of title. The second part of section 8(2) of the Act provides:

> **" …or [it] shall not be necessary] 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."**

129. In summary, subsection 5 of section 3 prohibits a purchaser from requiring the production of documents dated or made before the 30 year period, or to require any information or make requisitions about such documents, or the title prior to that time notwithstanding that any such deed, will or other document, or that prior title is recited, or covenanted to be produced, or noticed, and shall assume unless the contrary appears that the recitals are correct and the documents duly executed and perfected. This, of course, will apply if and only if the 30-year document satisfies the requirements of a good root of title, and there is no contrary intention expressed in the contract of sale.

130. Subsection 5 of section 3 is similar to section 45(1) of the Law of Property

Act 1925 of England absent the three statutory exceptions contained in section 45 (1) b (i), (ii), and (iii). For example, in England a purchaser is entitled by section 45 (1) b (i) to require the production of a pre-root power of attorney under which any abstracted document is executed. By contrast section 3(5) of the Conveyancing and Law of Property Act does not appear to make that exception as it states that a purchaser shall not require the production or extract or copy of any deed or document dated or made before the time prescribed by law (30 years) even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser.

131. It would appear therefore that the opinion provided In Megarry and Wade's The Law of Real Property 4th Edition namely, that a purchaser cannot look behind the root of title, is true in the Bahamas on an open contract as well. The learned authors state it this way at page 581 (e):

> "*Defects anterior to the root of title.* The purchaser may not make any enquiry or objection about matters anterior to the root of title.[ re *Scott and Alvarez' Contract (No. 1)* (1895) 1 Ch.596].There are certain exceptions to this rule, one being any contrary provision in the contract. But in general the purchaser must be content with a title starting with a good root in accordance with the contract. If he discovers(for example, from accidental disclosure of older documents that the earlier title is technically defective, so that it is questionable whether the vendor is really owner at all, he must nevertheless take the property with the title as it

> **stands. [ Re *Scott and Alvarez' Contract (No. 1)* (1895) 1 Ch. 596]. But if he can prove that the title is patently indefensible… then he may rescind. Similarly he may object to an incumbrance which although created before the date of the root of title still affects the existing title."**

132. Lord Walker in **Ambrister et al v Lightbourn [2012] UKPC 40** at paragraph 8 described the procedure under the Act as **"*comparable to that which applies on the investigation of title on an ordinary sale, out of court, under an open contract.*"**

133. An open contract is a contract which does not contain an express provision that a good title should be made, but there is an implied term in such a contract that a good title shall be furnished. (see Lord Cozens –Hardy, M.R. dicta in **Alderdale Estate Company v McGrory [1917] a Ch 414** at page 417) .

134. However, there is an extra element which features in quieting titles actions which does not come into play in an open contract. The provisions of section 8(2) apply "unless the court orders otherwise". So although section 8(2) of the Act lays down a thirty-year title as a sufficient condition for the court to grant a certificate under the Act, it does not prohibit the court from inspecting title documents more than 30 years old to properly carry out its investigation.

135. This view is clearly supported by the Privy Council in **Ambrister (above)** where by the time the adverse claimants joined the action, the 1944 conveyance and the 1931 mortgage which contained a recital of seisin of possession on which the petitioner relied were 38 and 51 years old respectively. Under the Act the court clearly has a wide ranging power to receive and act upon, any

evidence which it considers probative. As set out in section 8(1):

> **"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."**

136. The above analysis is relevant to whether the Judge had jurisdiction to look behind a root of title, and it appears that she did have such jurisdiction.

**Section 3(3) Conveyancing and Law of Property Act**

137. Subsection 3 of section 3 of the Conveyancing and Law of Property Act provides as follows:

> **" (3) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and description."**

138. In **Collie (above)** reference is made to this Court's consideration of section 3(3): It stated at paragraph 10:

> **"10. …In The Bahamas Court of Appeal in *Bodie and Others v Bahamas Land and Finance Co Ltd* [1979 -80] 1LR B, Blair-Kerr, P considered section 3(3) of the Property Act [the Conveyancing and Law of Property Act] and said this at 25: (words in square brackets added)**
>
> **"This section is in the same terms as is section 2 of the English Vendor and Purchaser Act 1874…In *Bolton v London School Board* 1878] Ch 766 it was held that section 2 of the 1874 Act meant that a recital in a conveyance more than twenty (20) years old that the vendor was seized in fee simple is sufficient evidence of that fact and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate."**

139. In other words following ***Bodie*** even though the conveyance may not be 30 years old it can still ground a good title if it is at least 20 years old and contains the necessary recital which has not been rebutted. This Court cited with approval the speech of Malin V C which at page 770 explained the application of the section as follows:

> **" It is provided by the contract that the money being deposited it shall be received by the vendor on making a good title. What doubt is there about the**

title? I cannot see the slightest doubt in the world. The abstract has been delivered commencing in 1853. Mr. Higgins says they are now entitled to a forty years' title, and this only shews twenty-four; but this abstract begins with a deed which was a purchase deed, and every man's experience leads him to believe that in almost every case the purchaser investigates the title when he purchases, and he, therefore, being satisfied that his vendor is seised in fee, the title is then deduced from that time. Therefore, the Legislature has, in my opinion, most wisely provided, that although by the first section, under special circumstances, you must have a title for forty years, yet that any recitals, statements, and descriptions, facts, matters, and parties, contained in a deed or Act of Parliament, which is twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts. What does this abstract which has been delivered contain? It begins the 25th of November, 1853, with a purchase deed by which Samuel Walker conveys to the testator in the cause, and it contained this recital, that Walker, that is, the vendor, was seised in fee simple in possession of the said several pieces of ground. Mr. Higgins says that is not a statement of fact, but a proposition of law. I beg to

> **express my opinion that it is a statement of fact that he was not only in possession, but he was in possession in fee simple of the pieces of land which were conveyed. Therefore that relieves the Plaintiffs from the necessity of shewing a forty years' title, because they have a deed twenty years old, which recites that the then vendor was seized in fee simple. This, in my opinion, was a perfectly good commencement of title."**

140. The presumptions in subsection 3 of section 3 of the Conveyancing and Law of Real Property Act, that the recitals are true only apply "**unless and except so far as they shall be proved to be inaccurate"**. Lord Walker in **Armbrister et al v Lightbourn et al [2012] UKPC** recognized the importance of this qualification at paragraph 9 when he said: *".*

> **"..The qualification in subsection (3) is important. There may be evidence which casts doubt on the correctness of the recital. A striking example of this is provided in the conveyance dated 15 January 1944 ("the 1944 conveyance") which is crucial to the petitioner's claim. It recites that Charles Walter Brownrigg ("Mr Brownrigg") was at his death in 1933 " seised and possessed in fee simple of the hereditaments hereinafter described " and goes on to give particulars of four areas of land totaling 911 acres which had been sold for 240 pounds."...the fact that the land changed**

> **hands at a rate of almost four acres to the pound tends to raise the question of whether the agreed purchase price reflected a discount for the vendor's doubtful title to part at least of what was sold. Under the mortgage of 13 July 1931 ( " the 1931 mortgage " ) Mr Mckinney, through whom the petitioners seek to establish title, had accepted 100 acres in the village Estate as security for advances of up to 200 pounds to be made to Mr Brownrigg. It contained a recital of the possessory nature of the title which Brownrigg claimed"**

141. In **Armbrister** the contest was between who owned two parcels, Freeman Hall South and 15 acres in Cat Island. This Court, differently constituted, had dismissed the adverse claimants appeal in respect of Freeman Hall South based on the petitioner's paper title. The action had been brought by the petitioner on 15 March 1982. The adverse claimants joined the action on 5 July 1982. Notably the petitioner had a paper title to Freeman Hall South by way of the 1944 conveyance and the 1931 mortgage, all of which were over 30 years old, but the adverse claimants had no paper title.

142. Nevertheless in paragraphs 74 through 80 the Board reviewed the evidence in support of the recital found in the 1944 conveyance which indicated that Mr. Brownrigg was seised in possession in fee simple and on which the petitioner relied. The Board also reviewed the evidence of the adverse claimants. It concluded, on the evidence, in favor of the possession of the adverse claimant's that the truth of the recitals that Mr. Brownrigg was in possession had been shown to be inaccurate even though their alleged roots of title were over 30 years old.

143. The reality is that a recital that a vendor is seised in fee simple is not made irrebutable by virtue of the passage of time only. The evidence which could prove that the recital was inaccurate when it was first made 20 years earlier may be sufficient to rebut it in a current sale 20 years later, unless during the intervening period there had been a change in the surrounding circumstances to make the recital accurate. Such an example would be if the vendor had taken up exclusive physical possession of the property for the requisite period independent of the colourable paper title in which the recital was first made, or had performed acts of ownership which raised a presumption of ownership in accordance with the statement of principle by Lord Diplock in **Ocean Estates Ltd v Pinder [1969] 2 AC 19** at paragraph 25 that:

> **"… where a person has dealt in land by conveying an interest in it to another person there is a presumption, until the contrary is proved, that he was entitled to the estate in the land which he purported to convey."**

144. As in this case, **Ambrister** was not about the adverse claimant dispossessing the paper title holder; it was a case of the adverse claimant having a better title, though not documentary. The evidence showed that the adverse claimant was in possession at the time that the recital was made and continued, with the consequence that the recital was untrue when made even though contained in documents over 30 years old.

**The Will**

145. The learned Judge found that the will of Anne Millar was void for breach of the rule against perpetuity. The Will read as follows:

> **" The tract of land on the Island of Eleuthera known as "Millars Settlement"**

containing about one thousand acres, part of which however I have already disposed of, I give to my old servants and former slaves Old Scopio and his wife Grace and her children, Sailor George and his wife Sarah and her children, Dinah Miller and her children to be held and enjoyed by them in common and by their decendants forever.

The land adjoining "Millars Settlement" aforesaid (excepting two hundred and fifty acres thereof) part of a tract originally granted to William A Bowles I give and devise unto my old servants and former slaves now residing or who may be residing at the time of my death on Millars Settlement aforesaid including also the last mentioned parties and Old Jack, his wife Chloe and her children, my servants Pender and her children, and Allan Miller to be held and enjoyed by them in common and by their descendants forever.

And as to all the rest, residue and remainder of my estate both real and personal and wheresoever situated I give, devise and bequeath the same and every part thereof unto my friend Daniel S. Farrington his heirs and assigns forever...."

146. The learned Judge found that the members of the class of beneficiaries under the Will could not be ascertained within the perpetuity period, which at the time in the Bahamas was the common law period of a life or lives in being plus 21 years. A reason for her decision was expressed in paragraph 27 as follows :

> **"27. Counsel for the Petitioner submitted that (i) it is impossible then and now to ascertain the number or existence of members of the class of descendants covered by the Will of Anne Millar, and (i) it is certain that all of the members of this class cannot come into existence within the perpetuity [sic]."**

I accept that submission.

147. I agree with the conclusion and that the statement of the law at paragraph 21 of her judgment is correct:

> **"21. The use of the word "forever" in a will conveys [sic] has the effect of passing the fee simple estate. ( see ' The Law of Real Property' by R.E Megarry, Q.C. and H.W. Wade a page 53; Timewell v Perkins 26 E.R. 464; (1740) 2 ATK 102 per Fortescue J.)"**

148. Ann Millar was herself a life in being at the time she made the will. The bequests were to vest in interest, if at all, upon her death. It was certainly possible at her death that no one would satisfy both the requirement of being a former slave or servant and residing in the Millar's settlement. Upon the gift failing, the property vested in the residuary legatee, Daniel S. Farrington.

However no one claiming to represent him or his estate was before the Court.

## The 1959 Conveyance

149. In my view the learned judge was in error to find that the 1959 conveyance was a good root of title. My reasons are set out below.

150. Between May 1952 and November 1959 persons who claimed to be descendants of persons named in the Will purported to convey his/her individual interest in approximately 1700 acres of the Property to AVD. It is understood that he was seeking to purchase all of the property in that area for an economic development. From the samples seen the conveyances appeared to be uniform in reciting that Ann Millar was in possession of the 1700 acres *inter alia,* that she devised her property to her descendants to be occupied by them in common, and that the vendor was a descendant of a beneficiary under the Will. Each vendor purported to convey all his right title and interest in the 1700 acre tract to AVD.

151. Of the 459 conveyances 133, according to the Judge, recited that the vendor was in occupation. In a small number of those 133 conveyances seen by the court the conformed recitals stated that the vendor ***" claims also to have been in occupation of a portion of the said hereditaments and to have used and enjoyed the same for the past*** **[number stated]** ***years continuously,"*** In each case the number of years was over twenty, but the size and location of the portion of the 1700 acres was unspecified. The consideration in each conveyance was 50 to 75 pounds sterling.

152. Since the class gift in the Will was not valid and failed, the vendors entered the land as trespassers. They had obtained no interest under Will. To claim title to the land they had to show an adverse possession for at least a twenty year period against the true owner, namely the heirs of Daniel S. Farrington, the residuary legatee. Exclusive possession was a necessary ingredient to gain a possessory title. None of the vendors recited that they had exclusive

occupation.

153. The appellant contended that in light the interest of the vendors being undivided the conveyance of the hereditaments in the 1700 acres by the vendor was ineffectual because it amounted to an attempt by the vendor to partition the 3600 acres without the consent of the other co-owners. The appellant relied on the dictum of Lord Scott in **Higgs v Leshell Maeyas Investment Company Ltd. et al [2009] UKPC** where he said para 38:

> **" 38…….She [the judge] held that the conveyances "had no valid effect" on the ground that, since Clotilda and Roger had been merely tenants-in-common holding undivided shares in Tract A, they had lacked the power to convey specific areas of land. That conclusion must, the Board think, be correct."**

In light of the fact that the gift was ineffectual, argued the appellant, AVD did not obtain any interest by the conveyances.

154. This would mean, contended the appellant, that AVD received no part of a possessory title at all from the vendors, and had no such interest to pass to ABL in the 1959 conveyance which in turn would have had no title to pass on to Eleuthera Properties Limited ( " EPL " ) in the 1988 conveyance. The respondent therefore could not claim possession by virtue of the paper title obtained by way of the 1959 conveyance because it had no paper title at all. In the case of the 1988 conveyance, not enough time had elapsed for the respondent to establish a possessory title by the time it filed as adverse claimant in the 1995 action, and time ceased to run by virtue of its joining that action, contends the appellant.

155. Furthermore argued the appellant, the 1959 conveyance on its face raised a question of the nature and extent of the estate owned by the vendor in the hereditaments described in Part Three of the Second Schedule. This is evident, they say, by a review of the conveyance set out below.

156. Recital (A) recites that the vendor (AVD) is seized in unencumbered fee simple of the hereditaments described in the First Schedule, and recital (B) recites that the vendor is seized in unencumbered fee simple of the hereditaments described in the Second Schedule.

157. Recital (C) states the consideration as 238,791 pounds, four shillings and eleven pence sterling for all of the hereditaments. For the consideration the vendor granted and conveyed as beneficial owner all of the hereditaments in Part One of the Second Schedule and granted and conveyed all of the hereditaments in Part Two of the Second Schedule.

158. However, in relation to the hereditaments in Part Three of the Second Schedule, which refers to 1700 acres in paragraph 14 of the schedule, although it earlier recited that it was the owner in fee simple, it does not convey "as beneficial owner". Under section 7(1)(a) of the Conveyancing and Law of Property Act conveying "as beneficial owner" implies a right to convey. T. Cyprian Williams author of A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real (second edition, Volume 1, at page 96 correctly posited that the main rule of proof of title is "…**what the vendor has to show is that he has the right to convey what he sold**".

159. Within the context of the other dispositions in the 1959 conveyance the omission to convey "as beneficial owner" must be seen as deliberate and begs an explanation. Mrs. Wilson's explanation was section 51(1) of the Conveyancing and Law of Property Act. That states:

> **"Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveyancing parties respectively have, in, to or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on the same."**

160. This explanation does not answer the question which is critical to establishing a root of title, namely: does it prove on its face without the aid of extrinsic evidence, the **ownership** of the whole legal and equitable estate in the property sold? In my judgment the conveyance on its face raises sufficient doubt concerning the vendor's title to this portion of the Property to disqualify it as a root of title. The test of a good title is whether a Court would order specific performance on the available evidence. In my judgment, this is not a case in which a court would have ordered specific performance for several reasons: (1) the vendors' right to convey is in question (2) the interest, if anything, which ABL purportedly obtained is unknown.

161. Furthermore, the judge herself at paragraph 30 of her judgment went behind the 1959 conveyance by referring to the 133 conveyances. Even though such extrinsic evidence may be ordinarily inadmissible in an open contract case, she was perfectly entitled to do so as part of her investigatory power under Section 8(2) of the Act. Ostensibly she did so to determine if they would support the recital in the 1959 conveyance that a good possessory title had been conveyed to AVD. In these circumstances the appellant was certainly entitled to rely on that fact.

162. To this must be added the aliunde evidence which shows that after the 1959

conveyance ABL, the purchaser from AVD, for whatever reason secured 65 additional conveyances from persons who purported to have an interest in the property. With that must be considered the evidence of Mr Hubert Williams, the photogramist called by the respondent, and that of the adverse claimants, that the vendors were farming the Property even after AVD had completed his acquisitions around 1956 up until the early 1970s, with no evidence of AVD's permission.

163. On the evidence it is certainly not possible, having regard to the surrounding circumstances and the aliunde evidence, to say that the 1959 conveyance met the requirements of a good root of title. It is not a title which a court, in the circumstances, would force on an unwilling purchaser.

164. It is for all the above reasons that in my judgment the judge fell into error in finding that the 1959 conveyance constituted a good root of title 30 years old.

## The 1988 Conveyance

165. The learned Judge did not make any findings in respect of the 1988 conveyance. However, as it was mentioned extensively in the judgment and before us, I shall comment on it.

166. The inadequacy of the 1988 conveyance to convey the Property was confirmed by aliunde evidence surrounding the sale of the Property from SEP to EPL. It started with a memorandum dated January 25 1985 from H. A. Jordon Executive Vice President of SEP addressed to the Executive Committee of SEP. In reporting on their current real estate matters, he stated that Robert Chappell (buyer of the Rock Sound Club) had expressed interest in approximately 4400 acres of agricultural land, 2000 acres with unclear title south of C.B.C [Cotton Bay Club] (square brackets added). The purchase did not proceed on the 2000 acres because of 'title problems'.

167. This is confirmed by the outcome of an agreement for sale made between South Eleuthera Properties Ltd. ("SEP") and its sister companies ("the SEP Group") and EPL dated 12 September 1986. By that agreement the SEP Group for a consideration of Three Million Six hundred Thousand Dollars (B$ 3,600,000.00) agreed to sell a basket of real and personal properties including land owned by ABL.

168. Closing took place effective 25 January 1987. In his report to "All United States Shareholders" dated 9 March 1987 Langhorne B, Smith, Treasurer of SEP, listed the assets and Liabilities of the company. Under the name of "Deposit of land by Robert Chappell (Note 18) 50,000 (Note 18)". Note 18 read as follows:

> **" This represents SEP's liability for a deposit received under a contract to sell approximately 2,000 acres of property. The buyer, Robert Chappell, has requested a return of the deposit due to problems with the title to some 1,700 acres of the land. The land will revert to EPL at no cost if not purchased by Mr Chappell.**

169. The sale to Mr Chappell did not take place. According to the Report the Property was then conveyed to EPL at no cost. Notably in the 1988 conveyance ABL did not convey the Property "as beneficial owner" which term would have signified the statutory warranty of a right to convey.

170. It was common ground at the hearing before us that the consideration of B$300,000.00 placed in the 1988 conveyance was an estimate of value derived by EPL for the sole purpose of placing a value in the conveyance for the payment of real property tax. It was confirmed by the company's Chairman, Mr Franklyn Wilson that the land was sold for $1:00 and associated expenses because of the peculiar provisions in the overall contract for sale.

171. So notwithstanding that the 1988 conveyance was twenty years old at the time of the action, in my judgment the above evidence was sufficient to rebut the recital therein that ABL was seised in fee simple of the Property.

**The claim of Generation Property**

172. The learned judge helpfully summarized the appellant's case at paragraph 43 of the judgment, as follows:

> **"43. The claim of the Association is summarized quite succinctly at paragraphs 3.1 and 3.2 of the Association's Closing Submission thusly:**
>
> **The Association contends that pursuant to the provisions of the Quieting Titles Act, 1959 it is entitled to a certificate of Title to the Property to the exclusion of all other parties to the proceedings on the ground that it acquired the fee simple title to the entirety of the Property from the descendants who jointly occupied the Property for each other and that the interest acquired by the Association comprises the collective and joint possessory titles of the descendants.**
>
> **Alternatively, the Association claims to have acquired the Customary Rights of the descendants and is entitled to a Certificate of Title in terms reflecting its interest In the Property"**

173. The Association is before the court as an adverse claimant on behalf of the persons who claimed continuous occupation for varying periods in excess of the statutory period of 20 years. It says that each person's occupation was of the **whole** property, the 1995 Land, not just a portion, and the occupation was jointly with other 'descendants' who had a like right to occupy an undivided part of the whole property under the concept called "Generation property".

174. The Association states that the occupation was continuous not interrupted, and lasted for as much as 60 years before 1995 (i.e 1935) up to as late as the 1970s and was exclusive to descendants as against the rest of the world. Having acquired the title it was never dispossessed by the respondent who was relying, not on actual possession, but on a deemed possession by virtue of its purported paper title. In the case of the 1988 conveyance as it relates to adverse possession time ceased to run in favour of the respondent after 8 years when it joined the 1995 action as an adverse claimant on 29 March 1996. (***Mather v The Grand Bahama Port Authority Ltd*** **(1965-70) 1LRB 103** per Sinclair ,P ).

175. This is consistent with the evidence. On the evidence persons who could loosely trace their ancestry to the named beneficiaries in the Will of Anne Miller expressed the view that they considered themselves to be entitled to take up occupation of the Property, farm on it and enjoy the property to the exclusion of all the world except those who were likewise descendants and therefore had a like right. These persons are referred to in this decision as 'descendants'. They acted upon that belief and entered upon the land with that understanding with which they were all agreed. Their actual possession was accompanied by the *animus possidendi* brought about by the belief (although mistaken) that they were beneficiaries under the Will and had a right to occupy the land under the concept of what is called and known in The Bahamas as 'generation property'.

176. Because the gift in the Will failed, the descendants in fact entered on to the Property as trespassers without the consent of the true owner, the residuary legatee Daniel S. Farrington.

177. Because of their belief, though erroneous, that they were occupying the Property as of right, they had the necessary animus *nec vi nec clam nec precario*. They also saw themselves as occupying the Property jointly in accordance with the terms of the Will which they believed was valid, and by their conduct demonstrated their agreement with this state of affairs. On the evidence they used the land for its expected use, farming, and exercised the customary rights of crabbing and barking, and did so without anyone's permission, openly and continuously and exclusively vis a vis non descendants for many years, sufficient to establish a possessory title jointly with the other descendants.

178. Generation property is not a concept unknown to The Bahamas, especially in the Family Islands. In 2010 the government of The Bahamas recognized the existence of the concept of generation property and proposed the Land Adjudication Bill. The then Minister of Lands and Local Government, Hon Byron Woodside, gave what he considered to be a good definition as follows: ***"a form of common property where several claimants hold undivided interest in the property. They derive their interest from claims of inheritance from a single ancestor, without following the legally prescribed procedures for administering the estates of deceased ancestors."***

179. There was universal belief that the land belonged to the Millar's descendants. Indeed, in 1956 a strip from the 1995 Land was acquired by the Government to build a 50 foot wide public highway approximately splitting the 1995 land in half. In its Notice of Intended Acquisition published in the Official Gazette dated 7 April 1956 under the Acquisition of Land Act Chapter 52, the land over which the proposed roadway was to run was described as ***"running through … lands presently held in common by the Millers heirs…"*** . Unfortunately there

was no evidence adduced of who received the proceeds of the acquisition, but the land was notorious as belonging to the Millar's heirs.

180. Generation property bears a similarity to commonage land which was made statutory about 25 years after the Will, by the passage of the Commonage Act Chapter 152 Statute Laws of the Bahamas on 30 April 1896. That Act mandates that where land has been granted to twenty or more persons and not partitioned a Register of Commoners shall be formed and kept. It provides for an elected body to manage the property. When a commoner reaches the age of 18 he can apply to the body to be added to the Register of Commoners. Their rights include the right to the allocation of land for farming or other purposes. Trespassers may be ejected from the land.

181. I mention commonage land and the Commonage Act because it appears that the concept of generation property may have been a precursor to that Act. The settlements of Rock Sound and Savannah Town, in the Island where the Property is located have commonages which have been statutorily established.

182. Thompson J found that land in Farmers Cay, Exuma, constituted an "informal" commonage. This was a case where land was occupied by descendants of Joseph Nixon and of Adam Brown who under a lost conveyance occupied the land where each family had a one half undivided interest as tenants in common. This was property on which buildings had been erected and the evidence was that as a group they agreed about certain matters including the paving of the road, and where the school and the airstrip should be situated. Each descendant had an entitlement to occupy the property, and they excluded trespassers. There had been no severance or partitioning of the property. (see *In the Matter of the Petition of Shero Company Ltd*. **[2007] 2 BHS J. No. 19.**

**The Appellant Association**

183. The Association was formed as a company limited by guarantee on 11 February 2010. The objects for which it was formed were inter alia **"to obtain Government approval for the transfer of land listed as "Generation property" to the Association to be used as Commonage Land … for the residents and descendants of the Settlements…"**[Bannerman Town, Millars and John Millars Settlements] and in clause 3.14 **"to extend the membership of the Association to persons residing in the Settlements for 50 years or more prior to the execution of this memorandum and their offspring. "** A Memorandum of Association and Articles of Association is an agreement between the subscribers and the members of a company *inter se*.

184. By Conveyance dated 5 April 2013 between "the descendants" of the one part and the Association of the other part over 100 persons claiming by the recitals to be entitled to an interest pursuant to the Will, and in addition to having acquired a possessory title to property by virtue of their and their predecessors occupation thereof executed a conveyance **as beneficial owners** of all their share and interest in the property in favor of the appellant. The consideration for each person conveying was the issue of one share in the Association. The property was defined as including 2,086.24 acres in the 5 April conveyance, but by a confirmatory conveyance dated 30 September 2013 the property was redefined as the 1995 Land which includes the Property which was sometimes stated to be 1700 acres but by modern survey is the Property.

185. By a conveyance dated 25 September 2013 made between Errol Mcphee and Michael Rolle, Michael Rolle conveyed the interest of the Tom and Millers Corporation Ltd, an adverse claimant in the action, to the Association. A confirmatory Conveyance dated 25 September 2013 clarified the description of the property to mean the 1995 Land.

186. On the above argument the Association claimed it is the only party to these proceedings that has acquired the undivided possessory interest through

several of the descendants. All other interests not having made their claim in this action, have been barred from making such claims by virtue of section 7(2) of Act. That reads:

> **"7(2) any person having dower or a right of dower or an adverse claim not recognized in the petition shall before the expiration of the times fixed respectively in the notices referred to sub subsection (1) of section 6 of this act or subsection (10 of this section for the filing of adverse claims, file and serve on the petitioner, or his attorney, a statement of his claim in Form 3 of the Schedule, verified by an affidavit to be filed therewith. The failure of any such person to file and serve a statement of his claim within the time fixed by the respective notices aforesaid shall operate as a bar to so [sic] such claim."**

**The review of the evidence by the Judge**

187. The judge at paragraph 41 made reference to the evidence given on behalf of the appellant including Mr. Errol Mcphee, a 58 year old of the Settlement of Millars in the Island of Eleuthera and President of the appellant. She noted that he stated his address as formerly of the Settlement of Millars where he was born but now residing in Yamacraw Beach Estates in the Eastern district of New Providence. He swore that he maintained a very close connection with his place of birth and visited at least 3 to 6 times per year.

188. At paragraph 42 the judge noted that the other witnesses were Deneria Butler, Michael Rolle, Princess Pratt-Miller, Eleanor Rolle, Benjamin Martin, George Bullard, Mildred Young and Charles Rolle who gave evidence as to their connection to the persons referred to in the Will. They all deposed that they occupied the 1995 land as descendants of the servants and former slaves of Ann Miller. Based on stories handed down by their ancestors they all had constructed family trees leading back to the slaves and former slaves.

189. The judge apparently dismissed this evidence because as she stated in paragraph 42 of her judgment:

> **"Their evidence as to their connection to the slaves and former slaves of Anne Miller was stories they had been told by their ancestors, and based on that information they constructed their respective family trees."**

190. The judge at paragraph 54 expressed her reservation about the evidence in support of their contention that their occupation and possession of the land was joint for themselves and for the benefit of other descendants of devisees under the Will as being of recent vintage and not credible because as she explained in paragraphs 54 to 59, both in this action and in the 1995 action some of the individuals had sought to quiet the land for themselves to the exclusion of all others.

191. She also noted in paragraph 61 that with the exception of Charles Rolle they now lived permanently in Nassau and had not done any farming on the land since they left in the late 1960's and early 1970's, and after that time there was some barking to the 1980's.

192. The learned judge in paragraphs 34 and 35 accepted the submission of Mr Smith QC that the fact that Tom and Millar Corporation and Dora Andrella Whylly sought certificates in their own names was contradictory to their claim of common ownership. This is not the law. Despite the common law doctrine of unity of possession, actual possession by a tenant in common of co-owned land is now separate from the entitlement to possession of his co-owners who are out of possession.

193. As Lord Scott stated in **Higgs v Leshel [2009] UKPC 47** at paragraphs 50 and 51, this was brought about by section 12 of the Real Property Limitation Act 1833. So it is possible, as was attempted by Tom and Miller Corporation Ltd in the 1995 Action, for a descendant in possession who claimed an undivided interest in common in the property to seek to claim all or part of the land for himself to the exclusion of another tenant or tenants in common. This is provided for by section 19 of the Limitation Act 1995 Chapter 183 which addresses joint ownership as well. The action was therefore not inconsistent with their claim of a joint possessory interest in the land although admittedly it is inconsistent with the current claim.

194. The learned judge also took into account that no one actually lived on the land and they walked to the land from neighboring settlements and that she, the judge, visited the locus during the trial in 2014 and did not see any evidence of any significant farming. I would say here right away that such a visit being made near the end of the case could have little if any weight.

**Who was in possession?**

195. According to the Record the position taken by the respondent throughout the trial was that it was not claiming a possessory title except insofar as it relied on the deemed possession by virtue of the paper title of the 1959 conveyance.

196. It was stated in written submissions before this Court, and Mrs. Wilson

confirmed the position in oral argument where she stated:

> **" There are several references, my Lords, to the fact that the respondents relied on possessory title. The respondent has never said that and I trust that would be clear in our submissions … " See Transcript dated 11 May 2015 p.110**

197. This led the Court to clearly state the position later.

> **"ADDERLEY, JA: I think we understand that the respondents have stated clearly that their title is not based on possession, except insofar as possession accrues to a paper titleholder " . See Transcript dated 12 May 2015 p 20 at lines 9-12.**

There was no correction or intervention by any of the counsel on behalf of the respondent to this assertion by the Court.

198. It was therefore not entirely correct how the judge characterized the respondent's evidence in paragraph 67:

> **" 67. The Petitioner has relied on the evidence of Hubert Williams, Stafford Coakley, Cranston Petram and Ricardo**

**Fernander to support its claim of continuous, undisturbed possession of the land…"**

Their evidence was relied upon to attempt to negative the claim of actual possession by the appellant, and to support the deemed possession by the respondent as paper title holder, not its actual possession which it never claimed.

199. Once the 1959 conveyance was ineffectual to convey the fee simple, as in this case, the whole substratum of the respondent's claim of deemed exclusive possession failed. On that basis alone the certificate should be set aside and the appeal allowed. A further analysis of the evidence is also consistent with this result.

200. Starting from first principles, I am reminded that in order to have possession it is not necessary to physically live on land, although that is the best evidence of occupying the land openly. A person may exercise physical control over the land by clearing it, or cultivating it, or harvesting assets from it, or otherwise exercising dominion over the land in the way that the true owner would do. The well-known principle is set out by Slade J in **Powell v McFarlane (1977) 38 P&CR 452.**

**" (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 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 user 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 generalize with any precision as to what acts will or will not suffice to evidence factual possession..... 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."**

201. Since no-one claiming to be the heirs of the residuary legatee Daniel S. Farrington, is before the Court their claims have been barred by section 7(2) of the Act. It leaves a contest between which of the trespassers, the appellant or the respondent, has the better claim to the Property.

202. In order to reach a conclusion it must be determined when time began to run for their occupation, the nature of their occupation, the period of continuous exclusive occupation, and if the occupation ripened into a possessory title for either the appellant or the respondent when did that occur. If the occupation ripened into a possessory title and there is no evidence, as in this case, that the true owner interrupted the occupation, then that person is entitled to the Property. He is also entitled to the property if his occupation is superior to that of his rival claimant even though it is not itself a good title per se.

203. So applying these principles a review of the evidence before the learned Judge is required.

**The evidence on behalf of the respondent**

204. For the respondent the learned judge relied on the evidence given by persons who were hired by it, namely Hubert Williams, a photogramist, Stafford Coakley, and surveyors, Cranston Petram and Ricardo Fernander. She stated that the evidence was especially helpful in their seeking to establish whether there were any other persons occupying the land since 1988 which is the year that the respondent bought the Property.

205. Mr Coakley, was employed by the respondent in 1988. His evidence in chief

was that he reopened the boundary lines at that time, and upon doing so only saw two overgrown areas on which there could have previously been farming. He also said that he arranged a fly over of the Property in 2000 and upon examining the photographs taken saw no signs of farming.

206. Mr Williams stated that a review of the aerial photographs taken by him confirmed that there was extensive farming on the land during the years 1942 and 1958 but in surveys conducted in 1970 and 1974 there were clearings but they were not consistent with farming. He also saw some tract roads running through the Property. On cross examination he conceded that he had omitted to mention some cleared areas in his Report but maintained that those areas that he omitted to mention were also not consistent with farming.

207. Mr Petram who was employed from 1994 to 2004 said his job was to open the boundary lines to the property twice per year. He also placed ' Private Property' signs on property called the 'Chappelle tract'. The judge omitted to mention that in cross examination it was admitted that when the signs were put up they were taken down by persons unknown and despite a complaint to the police no one was ever questioned or prosecuted in connection with it. She also did not mention that on at least one occasion Mr Patram was asked to leave the Property by Mr Michael Rolle one of the occupants who claimed to be a descendant. (Volume 7 Tab 205 at page 3447 at lines 10 to 32) and did so without objection.

208. Mr Fernander was employed from 2005 to 2014 including up to the time of trial. He said his duties included clearing the boundary lines and doing a physical inspection of the property at least once per year. He claimed that he found Mr H. Forbes, Mr B [Benjamin] Martin and Mr James Wilson farming on the Property and told them the land belonged to the respondent and they made no objection.

209. Not mentioned by the learned judge was that with respect to this evidence given by Mr Fernander, Mr Benjamin Martin said that he saw Mr Fernander who was known to him as "Bucket" near his farm on the Property on one occasion. During their brief conversation, Mr. Benjamin claimed that Bucket made no mention that he was employed by EPL and at no time suggested that he was trespassing. He added, that had Bucket done so there is no way that he would have acknowledged that the property was owned by EPL because he was sure that the was entitled to be on the land. This assertion was not challenged by Mr Smith during his extensive cross examination of Mr Martin.

210. Mr Fernander also gave evidence that one Manassah Mackey used a tractor on the land but he was later evicted by way of court action taken by the respondent. No decision was made in that case. There is nothing on the Record to show that it was disposed off, and obviously if a decision was made in the respondent's favour the respondent would have brought it to the Court's attention.

211. As such, it has no more evidential weight than the countervailing quieting action commenced by certain decendants in the 1995 action which involved all the property and which is still extant, and also the countervailing claims made by the appellants as adverse claimants in this case. Furthermore there is clear countervailing evidence of actual possession by the appellant (as set out in this judgment) which trumps the 'deemed' possession of the respondent once the respondent's documentary title falls away, as it now has.

212. Mr Fernander further testified that while carrying out his duties he saw Mr Errol Mcphee putting up markers along the Western Boundary of the Property. This was evidently between 2004 and 2005.

213. The evidence adduced by the respondent was ostensibly to prove that the

appellant had not exclusively occupied the Property for the required 12 year time period required under the 1995 Limitation Act. However it can no longer serve that purpose because based on my analysis the respondent was not the owner of the paper title. The evidence must now be viewed from the perspective of whether or not it proved a superior title to that of the appellant, through the members it represents, who had actual occupation for varying periods of time. While exercising powers of dominion over property by going to the land for the purpose of inspecting it and surveying it for future development and other acts are capable of being acts of possession ,they must be assessed having regard to all the circumstances.

**The evidence on behalf of the Appellant**

214. The learned judge identified the following witnesses that gave evidence on behalf of the appellant: Errol McPhee, Denria Butler, Michael Rolle, Princess Pratt-Miller, Eleanor Rolle, Benjamin, Martin, George Bullard, Mildred Young and Charles Rolle on behalf of Bannerman Town. Barry Ricardo McKinney, and Tom Mckinney gave evidence on behalf of Tom and Miller Corp, Gary Young gave evidence on behalf of Thomas Whylly, and Edmond Hall Jr. on behalf Emily Hall.

215. Mr Benjamin Martin stated that each descendant had the right to occupy any part of the land under what was called “the man’s height rule” which meant that if a farmer deserted his farm then as soon as the bush grew up to a man’s height it would be assumed that the person had abandoned his farm and another person was then free to farm the same property. It was with this rule in mind that he decided to reopen a road on the Property to farm an area along the road in the vicinity of 2 large dilly trees which had previously been farmed by his Uncle Charlie (Thompson) up to the early 60’s. He put in an irrigation system and had been farming the traditional crops since 2006 and also planted some fruit trees.

216. Each of the witnesses in turn gave evidence of their open occupation of parts of the property and of their intention to occupy the whole of the Property,

along with other descendants, in accordance with what they perceived to be their rights and without permission of AVD , ABL of EPL or interruption by any of them.

**Further Evidence**

217. There were other facts on behalf of the appellant admitted in evidence by the judge but not mentioned in her analysis and appears not to have been considered by her. In the affidavit of Augustus Young, aged 87 years, dated 7 February 1994 filed 10 May 1996 in the 1995 action he swore to being well acquainted with the 1995 Land which he described as 3600 acres. He swore that the 31 persons listed in the schedule to his affidavit had been in full free continuous and undisturbed possession of the 1995 Land by farming thereon either by themselves or their servants or agents in common with each other over the number of years set opposite their names as follows:

> **" Lavinia Stewart, 50 years; George McKinney, 60years; Charles Mckinney 64 years; Robert Hallan McPhee 64 years; Wilfred Mc Phee, 60 years; Obediah McKinney 68 years; Virginia McKinney 45 years: Margaret Rolle 60 years; Cecil Williams 40 years; George Williams 40 years; William Thompson 60 years Kenneth Kemp 25 years; Annie Fox 60 years; Alsada curry 40 years; Jerome McKinney 30 years; Wifred mackey 64 years; Priscilla Carey 45 years; Gladwin Grey 60 years; Joseph Sands 60 years; Clifford Miller 60 years; Mary Ellen Knowles 60 years; nenceva mackey 60 years; Maud Whyms 64 years; Zerlene Mackey 50 years; Mitchel McPhee 60 years; Edward Miller 25 years; Milton Whylly 60 years; Charles**

**Rolle 30 years; Ethel Miller 50 years; Charles Mackey 40 years; and William Miller 40 years."**

A similar supportive affidavit was sworn 9 February 1994 by Roselyn Davis, aged 77 and admitted in evidence by the judge.

218. The accuracy of the Young and Davis affidavits ("the 1994 affidavits") were in some cases corroborated by the recitals in the conveyances made to AVD. In the sample of 133 conveyances to AVD in the record the number of years of occupation recited in the actual conveyances in 1954 were consistent with the number set out in the 1994 affidavits forty years later in so far as they satisfied the 20year period of occupation necessary to establish a possessory title in 1954. For example, Mitchell McPhee's conveyance to AVD in 1954 recited that he was in occupation for 35 years; the Young and Davis affidavits in 1994 stated that he was in occupation for 60 years. This would mean that by 1954 he was in occupation for at least 20 years. Likewise, for Milton Whylly who in the 1954 conveyance recited 35 years, and Gladton Gray 26 years, all of whom are stated as occupying for 60 years in the 1994 affidavits.

219. Of the 31 persons named in the 1994 affidavits, who qualified for possessory titles, using the judge's criterion of occupation as proof of possessory title, there is evidence that 18 persons conveyed to AVD. There were no conveyances to AVD by 13 persons ( " the non-conveying descendants " ). Among the 13 persons whose occupation was sufficient, based on the criteria used by the judge, to found a possessory title were Robert Hallan McPhee(64 years), Wilfred Mc Phee (60 yrs), Joseph Sands (60 years) Mary Ellen Knowles (60) years and Maud Whyms (64 years).

220. *Prima facie* they had exercised that possession against the residuary legatee

under the Will, Daniel S Farrington, and if it could be viewed as exclusive to the class of 'descendants', left them with a good possessory title superior to anyone else. This they could pass on. As correctly quoted by Mr Eneas from Elements of Land Law, 4th ed. At p 375:

> **" On the expiration of the statutory limitation period a dispossessed owner's title to his unregistered estate in land is extinguished immediately. With his title also perishes any claim to recover rent and mense profits in respect of the squatters preceding occupation of the land. The combined impact of the barring of all rights of recovery and the extinction of all prior titles leaves the successful adverse possessor with a relatively better title than anyone else. The common law freehold which the squatter has held from the inception of his possession is now rendered unchallengeable. In unregistered land the adverse possessor simply emerges with an unimpeachable legal title in fee simple, although he inevitably holds this title subject to all valid pre-existing legal and equitable rights over the land…"**

221. Among those who did not convey to AVD was Charles Rolle who the learned Judge accepted was living in Whyms' Bight from his birth including the date of trial. He gave evidence that "the land was farmed all over from Guinea Grass Road down to the tamarind tree and Sally Field Rd and the Pond" including by himself, and persons who he named together with the crops that they raised. The description encompassed the Property.

222. And so, unless there is evidence to the contrary the property is still also subject to those possessory interests held jointly in common with the non-conveyancing descendants unless there is evidence that they or their successors in title conveyed it out. The learned judge apparently did not investigate and make any findings of fact on this aspect of the evidence.

223. As regards the 1988 Conveyance, it recited that by the 1959 conveyance Avon Bay Ltd was seised in unencumbered fee simple in possession of the Property, and then went on to convey "[a]ll right title interest property claim and demand both present and future vested and contingent at law and in equity of the vendor in and to the Property." I discussed this above under the rubric "Section 3(3) Conveyancing and Law of Property Act' applying what I understand to be a similar analysis used by the Privy Council in **Armbrister**.

224. The learned Judge interpreted the recitals of occupation in the 133 conveyances as evidence that each of the vendors conveyed a possessory title to AVD who in turn conveyed to EPL. However, not one of the vendors recited in their conveyances that their occupation was exclusive.

225. What the vendors purported to have was a non-exclusive right to occupy the property. Every single 'descendant', even those who had claimed in separate actions to have occupied exclusively on their own behalf in accordance with the principles in **Leshell** , conceded that they had a right to occupy the land jointly with other 'descendants' to the exclusion of 'non-descendants'. They also gave evidence of how this right was exercised over the years in using the property for farming and other appropriate uses. There appears to have been an agreement between them demonstrated by conduct that the property should be used in that way. As mentioned, the land was recognized by the government as belonging to the Millar's descendants as well.

226. This concept was supported by every witness who gave evidence on the matter who said that they actually occupied the land jointly with other ‘descendants’.

## Conclusion

227. I accept the submissions of the Association that the land was occupied jointly with other ‘descendants’ with the intention to exclude all non- descendants. It was pursuant to an agreement between the ‘ descendants’ and that agreement was by their conduct.

228. Following the precept *nemo dat quod non habet,* at best, all that the vendors in the 133 conveyances could convey to AVD and AVD to EPL was a non-exclusive right to occupy the Property alongside the other ‘descendants’. The recitals did not express any intention to convey an exclusive right to possession to AVD, and the judge was in error to so find.

229. Furthermore, in order for a conveyance of a possessory right in a portion of the Property in which the vendor has an undivided interest to be effectual, the agreement of all the descendants in joint possession was required, in the same manner as it would be required to partition the land itself. The uncontroverted evidence that some persons in possession did not convey to AVD, nor did they join in any conveyances to him, is evidence that the consent of all was not obtained.

230. I therefore accept the submission of the appellant that the 133 conveyances were ineffectual under the principle enunciated in **Higgs v Lashell (above)**. This gives legal support to the commonly held laymen’s view that generation property cannot be sold. What that really means is that it cannot be sold without the consent of all the co-owners.

231. Alternatively, if the conveyances were effectual they conveyed to the respondent a non -exclusive right vis a vis the descendants to occupy the land. In such case the co-existing right of occupation by the descendants together with their physical occupation amounted to a superior title to that of the respondent who on their own case had no physical occupation.

232. Focusing, as she was, on the wrong question, namely whether the Association had dispossessed the respondent's deemed possession by virtue of their purported paper title, the judge apparently failed to properly consider the countervailing evidence given by the witnesses for the Association against the acts of dominion by the respondent, and failed to see them as acts of possession by the Association or acts for the requisite period of time.

233. If the evidence had been properly considered, the judge ought to have concluded that there was considerable evidence that persons represented in this action by the Association were in actual occupation of the Property over the years, exercising what they considered to be their rights over it in accordance with what they believed were rights accrued as descendants on generation property to the exclusion of non-descendant's, and that these acts negated the alleged acts of dominion by the respondent.

234. I am well aware that my conclusion does not fit neatly into a slot of cases determined heretofore in relationship to the ownership of Bahamian land, but as atypical as it may be, the evidence in this case lends itself to the above conclusions, and a proper analysis of all the evidence could not, to my mind, have reasonably yielded a different result.

235. The Memorandum and Articles of Association of a company is a contract between the members and the company and the members *inter se*. The Association has agreed to deal with the Property in a way that is set out in its

Memorandum and Articles of Association. The persons acknowledged by the Association to be entitled to the Property are all before the Court as members of the Association. It is open to the court to accept the agreement between the Association and its members as to how they wish the land to be dealt with among them. Based on the evidence on the Record I accept that agreement. The court can therefore grant a Certificate of Title to the Association to be dealt with on behalf of the members in accordance with the Memorandum and Articles of Association of the Association.

236. I switch now to Dora Andrell Boston-Whylly et al. Counsel sought to trace their title through the Will, but conceded that if the gift in the Will was void their claim would fall with it. Since I and my colleagues have agreed with the Judge, that the gift was void for perpetuity, I will not repeat her very comprehensive arguments, and simply agree with the judge, and dismiss the claim. Counsel did, however, submit that even if their claim as presented did not succeed, they had a right to joint possession in common with the other descendants, thereby adopting the arguments of the appellant.

237. I also agree for the reasons given by the judge in paragraph 56 that the appeal of Emily Hall should be dismissed on the first two grounds raised. First she claimed all of the 1995 Land. She abandoned that and then claimed 1100 acres which on cross examination was demonstrably an arbitrary figure. The final claim was one adopting the arguments of the appellant. I agree with the judge's dismissal of the first two claims. The Hall estate is entitled only to the extent that her claim is included in that of the Association. I have considered the other issue raised by Mr Kemp on behalf of Mrs Hall that the trial was unfair because 5 persons who appeared as adverse claimants in the 1995 action did not appear during this trial. I dismiss that appeal point as well because it was open to those claimants to join in this action.

238. For all the above reasons I would allow the appeal of the appellant, Bannerman Town et al, and quash the certificate granted to the respondent

and order that a Certificate of Title be issued to the Association under section 15 of the Act with the usual qualifications.

239. I would order costs to follow the event.

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The Honorable Mr. Justice Adderley, JA