Michaelmas Term
[2018] UKPC 27
Privy Council Appeal Nos 0068 of 2017

JUDGMENT

Bannerman Town, Millars and John Millars Eleuthera Association (Appellant) *v* Eleuthera Properties Ltd (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Sumption
Lord Briggs
Sir Rupert Jackson
Lord Menzies (Scotland)
Sir Ben Stephens (NI)

JUDGMENT GIVEN ON

15 October 2018

Heard on 17, 18 and 19 July 2018

Bannerman
Stephen Jourdan QC
Oliver Radley-Gardner
Timothy A Eneas
Richard H R Lightbourn
(Instructed by Sheridans)

Eleuthera
Thomas Roe QC
Sharon R Wilson
Sharlyn R Smith

(Instructed by Axiom Stone)

LORD BRIGGS:

Introduction

1. This is the latest of a number of appeals to the Board raising questions of title to land in the Bahamas, arising under the Quieting Titles Act 1959. This statutory jurisdiction to resolve, after judicial enquiry, uncertainties as to title to unregistered land by the issue of certificates of title is of particular utility in the Bahamas, although similar jurisdictions exist in some other common law countries. This is because many of the outlying islands in the Bahamas are sparsely populated and only sporadically cultivated, as explained by Lord Walker, giving the advice of the Board in *Armbrister v Lightbourn* [2012] UKPC 40; [2013] 1 P & CR 17, at paras 7 and 8.

2. The land in issue in these proceedings ("the Property") is a tract comprising some 2,086.24 acres, lying on the Atlantic (that is eastern) side of the island of Eleuthera towards its southern end. The competitors for a certificate of title in respect of the Property are, now, the petitioner in the proceedings, Eleuthera Properties Ltd ("EPL") and the surviving adverse claimant in those proceedings, namely the Bannerman Town, Millars and John Millars Eleuthera Association ("the Association"), which is a non-profit company limited by guarantee formed to further the interests, including land ownership, of residents and their descendants of the three named settlements, situated on southern Eleuthera near the Property. Other persons claiming title to the Property during the proceedings fell by the wayside, or joined forces with the Association, assigning their claims to the Association for that purpose. The trial lasted more than 40 days including at least 35 days of witness testimony and several thousand pages of documentary evidence. The competing claims of EPL and the Association were to the whole of the Property. They made no alternative claims to parts of it, although other adverse claimants did.

3. In bare outline, the trial judge, Hepburn J, decided (in May 2014) that EPL had proved good documentary title to the Property, and she rejected all the competing claims to possessory title. In particular she rejected the Association's claim, mainly upon the basis that she did not find the evidence, to the effect that numerous witnesses had occupied the Property on a joint basis, credible. She found that evidence as to the basis of their alleged occupation to have been a recent invention.

4. The Court of Appeal (Allen P, Isaacs JA and Adderley JA) decided in April 2016, unanimously, that the judge had been wrong about EPL's documentary title. By a majority, they upheld her rejection of the Association's competing claim. By the same majority they found that EPL had established good possessory title to the Property by

its conduct in relation to it since 1988. Adderley JA, dissenting, held both that EPL had also failed to establish possessory title and that the Association had done so. The result in both courts was the award of a certificate of title to EPL.

5. Before the Board the Association sought to affirm the Court of Appeal's rejection of the EPL's documentary title, to have overturned its majority decision, and to establish its own possessory title, substantially in accordance with the dissenting judgment of Adderley JA. For its part EPL sought, primarily, to uphold the Court of Appeal's decision that it had proved possessory title and, in the alternative, sought to support the judge's decision that it had, in any event, good documentary title to the Property.

The Facts

6. Eleuthera is a long, narrow, low-lying island on the eastern side of the Bahamas. It is over 100 kilometres long, running approximately North by West to South by East. At its southern end, where the Property is situated, it is about two kilometres wide, with the Atlantic on its eastern side and the shallow waters of the Bahamas archipelago to the west. The Property is situated a few kilometres north of the southern tip of Eleuthera, near a small settlement named Bannerman Town. For the most part the Property is bounded on the east by the Atlantic Ocean and (now) on the west by a road constructed by the government of the Bahamas in 1956, running north south down the middle of the island. At its northern end, the Property extends across the road to reach the sea on the western side. It is shown edged pink on the plan attached to this opinion.

7. In the early 19th century the Property formed part of an estate owned by one Robert Millar. In 1830 he is recorded as owning 130 slaves, 93 of whom worked on his Eleuthera estate. Slavery was abolished throughout the British Empire (including the Bahamas) in 1834, but most of Mr Millar's former slaves probably continued to work for him thereafter as his employees. On Robert Millar's death, his Eleuthera estate, including the Property, passed to his sister Ann. Thereafter, her brother's former slaves and servants continued to work for her, until her death in about 1871.

8. By her will dated 12 January 1869, Ann Millar made three relevant gifts of parts of her Eleuthera estate, as follows:

> "(1) The tract of land on the Island of Eleuthera known as 'Millars Settlement' containing about 1,000 acres, a part of which however I have already disposed of I, give and devise the residue thereof 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.

(2) The land adjoining 'Millars Settlement' aforesaid (excepting 250 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 Millar to be held and enjoyed by them in common and by their Descendants forever.

(3) The 250 acres aforesaid part of the tract granted to William A Bowles I give and devise as follows:

(a) to Lewis B Thompson, Planter of Eleuthera I devise 100 acres thereof situated on the Western part of the said land and to his heirs and assigns forever;

(b) to Frederick Millar and his Descendants in common forever I devise the other 100 acres adjoining the last mentioned portion; and

(c) to James McKay and his Descendants forever in common I devise the remaining 50 acres."

9. Most of the Property, namely the 1,700 acres lying between the Atlantic Ocean and the road, shown hatched orange on the annexed plan, formed part of the land described in gift (2). It will be referred to as "the 1,700 Acres". The remaining part of the property shown hatched green on the plan and described in the proceedings as "the Northern Bowles Tract" formed part of gift (3). It is now common ground (although this was not appreciated until recently) that the devise of the Property by Ann Millar's will was void for perpetuity, with the result that, upon her death, title to the Property passed to her residuary legatee.

10. Meanwhile, from then until the present day, use was made of the Property, in various ways and at different levels of intensity, by a substantial number of persons falling within the class constituted by her servants, former slaves and their descendants (collectively "the Descendants"). While the precise state of mind of those of the Descendants who used the Property from time to time has been a matter of dispute at

all stages in these proceedings, it may generally be said that they did so in the belief that Ann Millar's will gave them the right to do so although, in law, it did not.

11. The nature of that use of the Property is less contentious and may be summarised as follows. First, there was no significant residential use. The Descendants who made use of the Property appear to have lived in nearby settlements including Bannerman Town. Their use of the Property consisted of various kinds of subsistence or money-crop farming, including the growing of pigeon peas, beans and corn for sale to a local cannery and packers, the growing for their own food of those and other crops including tomatoes, bananas, peanuts and some fruit, the cutting of silver tops for basket making, foraging for crabs, the keeping of goats and the stripping and preparation of Cascarilla bark ("barking") for sale to the alcoholic liquor industry.

12. At no relevant time was the Property, or any large part of it, used or operated as a single organised farm. Rather, individual Descendants, or family units within the class of Descendants, would clear small plots (typically no larger than one acre) by stripping and burning the bushes and undergrowth, would grow crops on the cleared plot for a year or two, until the relatively infertile soil was exhausted, and then move on to another plot, leaving the previous plot to return to its ordinary state of unoccupied, wild scrub.

13. During the 30 years or so which ended with the closure of the cannery and packing firms at the end of the 1960s, this form of agricultural farming use was relatively vigorous and intensive, involving a large number of the Descendants for the time being. Thereafter, the relative collapse in demand led to a steady reduction in this type of use, or any other use, of the Property. A survey conducted in 2009 for EPL revealed persons (described on the accompanying plan as squatters) using some nine parts of the Property amounting, in all, to less than 1% of its total acreage.

14. Meanwhile, beginning in 1952, an enterprising resident of Miami, Arthur Vining Davis, set about seeking to acquire sole and exclusive title to the Property (and neighbouring property). Undaunted by the virtual impossibility of tracking down all of them, he obtained no less than 404 conveyances from Descendants, usually at a price of £75 or less. 133 of them recited that the vendor was in occupation of the land conveyed. The other 271 merely recited that the vendor claimed descent from Ann Millar's former slaves and servants. All of them purported to convey such right title or interest as they had in land sufficiently described as either (or both) of the 1,700 Acres and the Northern Bowles Tract.

15. In 1959 Mr Davis sought to cash in on his endeavours to date. By a conveyance dated 23 November 1959 ("the 1959 Conveyance") he sold and conveyed the Property, together with other neighbouring land, to Avon Bay Limited ("Avon Bay") for an aggregate sum in excess of £230,000. It is not possible to attribute any particular part

of that sum as the agreed value of the Property. By recital (B) to the 1959 conveyance Arthur Davis recited that he was seised in “unencumbered fee simple” of the land described in the second Schedule thereto, which included the Property. But it is notable that, in contrast with some other parts of the land thereby conveyed, Arthur Davis gave no covenants for title in relation to the Property.

16. For its part, Avon Bay continued the process of obtaining conveyances from Descendants of interests in the 1,700 Acres. A further 65 additional conveyances were secured. In 1964 Avon Bay presented a petition under the Quieting Titles Act seeking a certificate of its title to the Property. Objections were lodged, but those proceedings never reached a conclusion. By a conveyance dated 26 October 1988 (“the 1988 Conveyance”) Avon Bay conveyed the Property to EPL for a sum stated in the conveyance to have been B$300.000, again without giving covenants for title. There is doubt whether that sum, or any substantial sum, was paid by EPL.

17. Neither Mr Davis nor Avon Bay appeared to have done anything on the ground, as it were, by way of use or occupation of the Property. On the contrary, a diminishing number of the Descendants continued to farm diminishing parts of it as they had always done, but on a reducing scale due to the collapse of demand for the produce of the land, together with opportunities for more attractive or remunerative work elsewhere. It may safely be inferred that neither Arthur Davis nor Avon Bay had any present use for the Property, and that their interest in it related more to its possible future development potential.

18. The same was largely true for EPL between 1988 and 2010, when it presented the Petition in these proceedings. EPL has neither occupied (in any practical sense) nor used the Property at any time, but it did take the following steps which led to its success in the Court of Appeal, and which are now relied upon as a sufficient taking of possession of the Property. First, EPL instructed a Mr Coakley to survey the Property in January 1988. For that purpose he cleared vegetation away from around the northern and southern boundaries and restored some boundary markers. He cut down some of the underbrush on an overgrown track road leading from the government north south road to the Atlantic coast, to save time walking around the boundary. This survey was completed before the 1988 Conveyance was executed. Secondly, Mr Cranston Patram, an employee of EPL between 1994 and 2004, supervised a reopening and clearing of the boundary lines at the Property twice a year and the occasional replacement of “private property” signs until 1997, although they were frequently removed. His activities do not appear to have involved him in any significant entry to the Property within its boundaries. Thirdly, Mr Ricardo Fernander was employed by EPL to monitor the Property and to clear vegetation from boundary lines in and after 2006. There was inconclusive evidence about conversations between him and persons he found farming parts of the Property, but it is clear that he did not ask them to leave, or try to charge them rent. He was responsible for the 2009 survey and plan depicting the small parts of the Property where he found activity by persons described as squatters. Fourthly, there

was evidence of occasional overflying of the property for the purposes of conducting photographic surveys. But that evidence was deployed more to assist the Court on issues as to the presence or absence of farming activities on the Property, rather than as evidence of the taking of possession. Finally, Mr Franklyn Wilson, the Chairman and a director of EPL, visited the property not more than six times between 1988 and 2013. He found a recent clearing of about four acres in March 2009 on part of the Northern Bowles Tract by a Mr Benjamin Mackey and, in August 2009, EPL issued possession proceedings against him. These proceedings were successful, in the sense that Mr Mackey vacated the Property, but it is not clear whether it had been necessary to obtain a court order for that purpose.

Proceedings under the Quieting Titles Act

19. Reference has already been made to the 1964 Petition by Avon Bay. Little is known about it, save that it never proceeded to trial. Of more importance is the petition issued in 1995 ("the 1995 Petition") issued by Tom and Millar Corporation Ltd ("TMCL"). This sought a certificate of title to land comprising about 3,638 acres, representing the whole of the subject matter of gift (2) in the Will, and therefore including the 1,700 Acres, but not the Northern Bowles Tract. TMCL (which had been formed for that purpose) claimed possessory title to the gift (2) land by virtue of the alleged joint possession thereof by 31 named individuals, for a time sufficient to bar any earlier possessory or documentary title. Alternatively, TMCL relied upon a claim to the whole of the gift (2) land by the family of one Thomas McKinney.

20. The 1995 Petition was opposed by adverse claims from EPL, the Ann Millar Association, and by Warren Young and Benjamin Mackey. Each of them claimed to be owners of parts of the gift (2) land. The 1995 Petition was not further pursued by TMCL and, in September 2013 (during the trial of the present proceedings) TMCL assigned such interest as it had in the gift (2) land to the Association.

The Present Proceedings

21. EPL presented the present Petition in March 2010 seeking a certificate of title pursuant to the Act, relying first upon documentary title conferred upon it by the 1988 Conveyance as a good root of title and, in the alternative, by virtue of its alleged possession of the Property from October 1988 onwards. The Petition noted that Mr Mackey had claimed an interest in the Property, but he took no active steps to pursue an adverse claim.

22. There were originally six adverse claimants in the present proceedings, namely:

i) The Association;

ii) TMCL;

iii) Emily Hall;

iv) Dora Adrella Whylly-Boston and Bristo Walton Whylly (together);

v) Thomas Whylly Jnr;

vi) Gary Young.

23. The Association had been formed in April 2011 and claimed as successor by conveyance to the Descendants' possessory title. The claim was that the use and occupation of parts of the Property over many years by numerous Descendants amounted to joint possession of the whole of the Property, not only for those Descendants using and occupying parts of it at any time, but for all the Descendants. This, it was said, was the shared common intention and understanding of all those Descendants who occupied and used the Property from time to time. The conveyances from numerous persons claiming to be Descendants upon which the Association relied were made in April 2011, April and September 2013.

24. Also in September 2013 TMCL joined forces with the Association and conveyed its alleged interest in the Property to the Association. By this time, the trial had reached closing submissions. The Boston-Whyllys had by then formed common cause with each other.

25. As in traditional conveyancing of unregistered land between vendor and purchaser, the process of proof of title by a petitioner or adverse claimant in proceedings under the Quieting Titles Act generally requires the preparation of an abstract of title. The abstract prepared for EPL was an astonishingly detailed document running to 502 pages. The index alone ran to 33 pages and identified 514 deeds or documents. Although EPL sought to rely upon the 1959 Conveyance as its root of title, it abstracted the entire conveyancing history of the Property, beginning with Crown grants to members of the Millar family in the 18th century, Ann Millar's will, all the conveyances to Arthur Davis, and the additional conveyances obtained by Avon Bay after 1959.

26. The judge made two important case management decisions before and during the trial. First, she declined to consolidate the 2010 Petition with the 1995 Petition. Secondly, she ruled that the parties were entitled to deploy and rely upon evidence about

title prior to the 1959 Conveyance, including Ann Millar's will and the numerous conveyances by Descendants to Arthur Davis.

27. The judge delivered her reserved judgment on 30 May 2014, in which she made the following relevant findings:

i) The 1959 Conveyance was a good root of title.

ii) EPL had thereby, and by the 1988 Conveyance, established good documentary title, which could only be displaced if a competing claimant could prove that EPL's title had been barred by adverse possession.

iii) The Association's claim failed because she rejected the evidence that Descendants had occupied the property with an intention to do so jointly on behalf of all Descendants, as lacking credibility and as being of recent vintage.

iv) None of the other adverse claimants had demonstrated possession of the Property or of any part of it for sufficient time to bar EPL's documentary title.

v) Accordingly, EPL was entitled to a certificate of title.

28. The judge made two other relevant findings, although they do not appear to have been necessary to her decision. The first was that the gifts in Ann Millar's will were, to the extent that they concerned the Property, void for perpetuity. The second was that she broadly accepted EPL's evidence about its activities in relation to the Property in and after 1988. She did so, not as part of any analysis about whether EPL had proved possessory title, since it had decided by the time of closing submissions to rely purely on its documentary title. Rather, she relied upon that evidence as sufficient to prove that none of the adverse claimants had acquired title as against EPL by adverse possession.

29. The Association, Emily Hall and the Boston-Whyllys all appealed. In a judgment handed down on 21 April 2016 the court (Allan P, Adderley JA and Isaacs JA) held as follows:

i) Unanimously, that the judge had been wrong to find that EPL had established documentary title to the Property.

ii) By a majority, that the judge's rejection of the evidence about joint possession central to the Association's claim could not be faulted, so that she had correctly found that the Association's claim failed.

iii) By a majority, that the judge's findings of fact about the conduct of EPL in relation to the Property in and after 1988 was sufficient to prove a possessory title in favour of EPL.

iv) Unanimously, that the judge had been right to reject all the other adverse claims.

30. In a dissenting judgment, Adderley JA would have reversed the judge's decision in relation to the Association's claim, on the basis that it had proved possessory title, and would have declined to find that EPL's conduct in relation to the Property in and after 1988 amounted to possession of it for the purpose of proving possessory title. In the result, EPL held on to its certificate of title, albeit for very different reasons than those of the judge.

31. The Association appealed to the Board, seeking in substance to support the dissenting judgment of Adderley JA. EPL resisted the appeal, seeking to uphold the Court of Appeal's majority decision in its favour on the issue of possession and contending also that the judge had been right to find that it had proved documentary title. The Boston-Whylly family sought permission to appeal out of time, but that application was struck out shortly prior to the hearing before the Board for want of prosecution. There was no appeal by any other adverse claimant.

32. The Board's opinion may be summarised as follows:

i) The Court of Appeal was correct to conclude that EPL had not proved documentary title.

ii) The Association's claim to possessory title fails because there is no basis upon which the Board can depart from the concurrent findings of fact by the judge and by the Court of Appeal, which are fatal to the Association's claim.

iii) The dissenting judgment of Adderley JA in relation to the question whether EPL had proved possessory title is to be preferred to that of the majority of the Court of Appeal.

iv) Therefore no party should be granted a certificate of title.

The Quieting Titles Jurisdiction

33. The jurisdiction under the Quieting Titles Act in the Bahamas is, (as elsewhere, for example in parts of Canada), a statutory graft upon a body of law about the ownership of unregistered land, the main purpose of which is to remedy perceived defects in that law (compared for example with systems of land registration) which harm the public interest by adversely affecting the marketability, and therefore beneficial use and development, of land. The Act necessarily takes for granted and adopts parts of the procedure for the deduction and proof of title under that system of law, which is itself partly common law and partly statutory. For present purposes the relevant statutory elements are to be found in the Conveyancing and Law of Property Act 1909 (Bahamas) as amended, and the Limitation Act 1995 (Bahamas) replacing earlier statutes of limitation and reducing the relevant limitation period for present purposes from 20 to 12 years.

34. Although the Bahamian Conveyancing Act followed an English lead, the comprehensive English 1925 property legislation was not replicated in the Bahamas. One relevant result is that a legal estate may still be owned by co-owners as tenants in common, each of whom may transfer their undivided shares to anyone, *inter vivos* or upon death, without the concurrence of the other co-owners.

35. Section 3 of the Quieting Titles Act gives the court a general power to investigate and declare in a certificate the title of any person who claims to have any estate of interest in land. More specifically section 16 provides that:

> "Without limiting the generality of the provisions of section 3 of this Act, the court shall have power to declare by a certificate of title in the form prescribed by section 18 of this Act that the petitioner is the legal and beneficial owner in fee simple of the land mentioned in the petition in any of the following circumstances -
>
> > (a) where the petitioner has proved a good title in fee simple to a share in land and has proved such possession as, under the Limitation Act, would extinguish the claim of any other person in or to such land;
> >
> > (b) where the petitioner has proved such possession of land as, under the Limitation Act, would extinguish the claim of any other person in or to such land;

> (c) where the petitioner has proved that he is the equitable owner in fee simple of land and is entitled at the date of the petition to have the legal estate conveyed to him."

36. The Quieting Titles Act expressly takes for granted certain common law and statutory provisions and practices about the deduction and proof of title as between contracting vendors and purchasers of land. Thus, section 8(2) of the Act provides as follows:

> "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."

Section 3(4) of the Conveyancing Act (as amended in 1957 and 1960) provides that:

> "A purchaser of land shall not be entitled to require a title to be deduced for a period of more than 30 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."

37. Section 3(4) of the Conveyancing Act recognises and implements the common law principle and practice that a vendor may deduce and prove documentary title by reference to a good root of title of sufficient antiquity, prescribing 30 years as the generally applicable period for that purpose. Section 8(2) of the Quieting Titles Act imports the concept of the proving of title by reference to a good root of title into the process of proof which is designed, if successful, to lead to the grant of a certificate of title. Thus section 4 of the Quieting Titles Act partly replicates that process by requiring that a petition under the Act be supported by title deeds, certified copies of documents not in the possession of the petitioner, and by an abstract of title.

38. Nonetheless, the statutory process for obtaining a certificate of title under the Act has both constraints and opportunities which set it apart from the deduction and proof of title as between vendor and purchaser. The main constraint is that, whereas the vendor and purchaser process affects no one other than themselves, even if a dispute is resolved by the court on a vendor and purchaser summons (for which see section 4 of

the Conveyancing Act), the process of quieting titles is designed to lead to a certificate which, save in cases of fraud, is good against the whole world, in favour of the person or persons (petitioner or adverse claimants) who succeed in proving their title: see sections 19 and 27 of the Quieting Titles Act. Thus, although title to unregistered land is normally thought of in purely relative terms, the issue in any proceedings being who has the better title, a certificate of title confers something more like absolute title, of the quality conferred by registered title under a system of land registration. For this reason, the court needs to be cautious before certifying title under the Act, as the Board warned in the *Armbrister* case.

39. There are tell-tale indications in the Act itself to the same effect. Thus, for example, section 5 requires that the affidavit in support of a petition under the Act must state to the best of the deponent's knowledge, information and belief, that the affidavit and the other papers produced therewith "fully and fairly disclose all facts material to the title claimed by the petitioner, and all contracts and dealings which affect the title or any part thereof or give any rights as against him". In sharp contrast with the vendor and purchaser summons procedure, the court is required by section 7(1) of the Act to notify by appropriate means any persons, known or unknown, who may have an adverse claim in respect of the whole or any part of the land mentioned in the petition. By sections 9 and 10 the court may, if not satisfied with the petitioner's evidence, adjourn the application so as to give time for further evidence to be produced. Further, by section 13, the petitioner needs the leave of the court to withdraw his application.

40. Nonetheless the court hearing a petition under the Quieting Titles Act enjoys one major advantage over the court hearing a vendor and purchaser summons. Its power to direct notification and advertisement to potential adverse claimants is coupled by provision in section 7(2) of the Act that any person's failure to file and serve a statement of an adverse claim within the time specified by the court shall operate as a bar to such a claim. This means that the court may exercise case management powers to ensure that, by the time of trial, all persons with a claim can have their claims investigated by the court, or alternatively be barred from pursuing a claim. The result is that the court need not be deterred from issuing a certificate of title to the claimant who, among those before the court, appears to have the best title, by any apprehension of a real risk that there may be one or more others, unknown to the court, whose rights in relation to the land would thereby be unjustly infringed. The result is that the court may with confidence grant a certificate of title to a claimant who, in a vendor and purchaser summons, might have failed to prove good marketable title sufficient to justify an order for specific performance, precisely on the basis that there were unacceptable risks of adverse claims.

41. But none of this means that the court has the duty, or even the power, to create title by use of the machinery conferred by the Act, where in truth no title at all is proved. Section 17 of the Act gives the court a discretion whether to dismiss the application entirely, to dismiss it and grant a certificate of title to an adverse claimant, to grant a

certificate of title to the petitioner, or to grant separate certificates of title to different parts of the land to the petitioner and to one or more adverse claimants. In *Nova Scotia (Attorney General) v Brill* [2010] NSCA 69, para 37, Fichaud J said this, speaking of the Quieting Titles Act 1989 in the Nova Scotia Court of Appeal:

> "The QTA does not enable a court to create title. Rather it authorises a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the QTA."

The Board considers that the same principles apply to the Bahamian Act.

42. To give a practical example, a petitioner (or adverse claimant) in relation to the freehold of a parcel of land which has become divided over time among a large number of legal tenants in common may be unable to buy in all those shares, or even to ascertain who all the tenants in common are, or track them down. Nonetheless he may (rather like Arthur Davis thought he was doing) buy as many of those shares as he can find, and invite the court to advertise for further claims. In such circumstances the court will be able to certify his title, on the basis that (if it be the case) no further adverse claimants to a share as tenants in common came forward, so that they were all barred. Thus, a claimant who could never have forced his potentially incomplete title on a purchaser could, by recourse to the machinery of the Act, perfect his title.

EPL's Documentary Title

43. The central issue under this heading, about which the judge and the Court of Appeal disagreed, is whether the 1959 Conveyance was a good root of title. The judge relied upon the following definition of a good root of title in Megarry and Wade's Law of Real Property (4th ed) at p 580:

> "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 …"

To substantially the same effect is the definition in Williams on Vendor and Purchaser (4th ed, 1936) at p 124. It is a time-honoured and practical definition, which is not challenged in these proceedings.

44. At first sight, the 1959 Conveyance appears to satisfy those requirements. It is common ground that it describes the Property sufficiently to identify it and purports to be a disposition of the whole legal and equitable interest in it. Furthermore, its recitals include a statement that Arthur Davis was seised in unencumbered fee simple in relation to the whole of the property. No mention is made of Ann Millar's will, or of the pre-1959 conveyances of interests in the Property to him by Descendants. Furthermore, the prohibition on pre-root requisitions or calls by a purchaser for production of documents in section 3(4) and (5) of the Conveyancing Act is confirmed by section 8(2) of the Quieting Titles Act, subject to the power of the court to direct otherwise.

45. This may have been the basis upon which the judge held that the 1959 Conveyance was a good root of title, although she does not spell out that analysis in terms. In the Board's view, the judge's analysis was wrong for the reasons which follow, which are broadly coincident with those given by the Court of Appeal. First, there was something in the 1959 Conveyance which cast an element of doubt on Arthur Davis's title. This was his failure to give covenants for title in relation to the Property. The absence of covenants for title in a conveyance is by no means invariably sufficient on its own to disqualify it as a good root of title. Trustees and mortgagees do not ordinarily give covenants for title. Such covenants are, by their nature, personal obligations of the vendor to the purchaser. They are not of themselves part of the title conferred. In the present case however Arthur Davis was neither a trustee nor a mortgagee, but a vendor for substantial consideration under a contract of sale, who might ordinarily be expected to have given covenants for title. More significantly, he was careful in the 1959 Conveyance to choose which parts of the land conveyed in respect of which he gave such covenants, and which parts (including the Property) in respect of which he did not, suggesting that he harboured doubts about his title to the Property, by comparison with his title to other parts of the subject matter of the sale.

46. Secondly, although a purchaser in 2010 might not have been able to requisition or compel production of conveyancing documents prior to 1959, on a sale by EPL to a purchaser at the time of the presentation of the petition, EPL did under its disclosure duty imposed by section 5 of the Quieting Titles Act both abstract and produce the whole of the documentary history of title in relation to the Property prior to 1959, including Anne Millar's will and the numerous pre-1959 conveyances which Arthur Davis had received from Descendants. Furthermore, the judge directed, as she was entitled to do under the concluding words of section 8(2) of the Act, that the pre-1959 documentation was to be admissible in the proceedings, and she referred to some of it in her judgment.

47. Thirdly, that material comprehensively demonstrated that Arthur Davis did not have documentary title to any part of the Property, let alone good documentary title free from significant doubt. This is mainly because all those Descendants conveying to Arthur Davis, without exception, claimed that their title to convey derived from Ann Millar's will. But the relevant gifts of the Property in the will were void for perpetuity,

as the judge herself held, and as is now no longer in dispute. Ann Millar's undoubted title to the Property passed not to the Descendants, but to her residuary beneficiary, although he made no adverse claim in the proceedings.

48. It is true that 133 of those Descendants conveying to Arthur Davis recited (in standard form) that he or she "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 [ ] years continuously", but none of them explained to which part of the Property that assertion referred, nor did any of them assert that their occupation and use of that portion of the Property was being undertaken by them jointly on behalf of themselves and all other Descendants with a like right to do so. This is not surprising, because it had not at that stage been appreciated that none of the Descendants could derive title to the Property from the will. Equally unsurprisingly, EPL did not at trial seek to rely on the pre-1959 conveyances in seeking to prove its documentary title. Rather, it sought unsuccessfully to have them ruled inadmissible.

49. The result was, as the Court of Appeal held, not merely that Arthur Davis did not have good documentary title to pass on to Avon Bay, and thence to EPL, but that he had no documentary title at all. Since there is no evidence that he occupied or otherwise took possession of the Property, he could not convey possessory title either. Accordingly, the 1959 Conveyance (which was the only one relied upon by EPL as having been made more than 30 years before the presentation of the Petition) conferred no title of any kind. As the Court of Appeal held, this left the dispute to be resolved as between claimants basing themselves on possessory title, that is, title derived from an original possession of the Property by themselves or their predecessors as trespassers. In this respect there remained before the Board only two rival candidates for possessory title, namely EPL and the Association.

The Association's Possessory Claim

50. While occupation or use of land is a familiar non-technical concept, possession of land is a legal term of art. Possession, for however short a time, may be sufficient to found a cause of action in trespass against someone thereafter coming upon the land. But possession sufficient to bar a prior title (whether itself documentary or possessory) must be proved for the whole of the time prescribed by the relevant Limitation Act: see *Perry v Clissold* [1907] AC 73, per Lord Macnaghten at p 79:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period

> prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

51. Possession of land is generally described as having two elements, factual possession and the intention to possess: see *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. In the present case there is no difficulty about a general intention to possess by the various Descendants who gave evidence, since they believed that they were co-owners of the land pursuant to Ann Millar's will. Such a belief, even if mistaken, is sufficient for the purposes of intention to possess: see *Roberts v Swangrove Estates Ltd* [2008] Ch 439. All that is common ground.

52. Possession of land may be exercised jointly, and vicariously. Where a number of persons are proved to have occupation and use of land together, and the question arises whether they had joint possession of the whole of the land, this will usually turn upon the agreement, arrangement or shared common intention (if any) between them: see eg *Bigden v London Borough of Lambeth* (2001) 33 HLR 43; *Brown v Faulkner* [2003] NICA 5(2); *Churcher v Martin* (1889) 42 ChD 312 and (in Canada) *Afton Band of Indians v Attorney General of Nova Scotia* (1978) 85 DLR (3d) 454.

53. There is an element of uncertainty in those authorities whether the requisite mutual meeting of minds must amount to an agreement or to an arrangement, or to a common intention shared between them. It is not necessary that there should be a formal contract. But the mere aggregate of the separate intention of each occupier, which is neither communicated to nor shared with any of the others, will be insufficient. The requirement is for a shared common understanding, sufficient to render multiple occupants of land joint possessors of it. It is quite separate from the general requirement of an intention to possess. Rather, it forms part of the analysis of possession in fact.

54. Possession may be vicarious in the sense that A may occupy land on behalf of B, such that B rather than A is in possession of it: see eg *Bligh v Martin* [1968] 1 WLR 804. Vicarious possession may arise where, for example, A is the licensee, agent or agricultural contractor of B. Again, this will depend upon the existence of some agreement or arrangement between them.

55. In the present case the Association failed to prove that any individual Descendant, or succession of individuals, had taken possession of the whole of the Property, before conveying it to the Association, but it made no claim for a certificate of title in relation to anything other than the whole. Rather, the Association relied upon a combination of joint and vicarious possession, by seeking to prove that those Descendants farming parts of the Property from time to time, over many years, did so with the common intention to possess the whole of the Property jointly, that is together

with all others doing the same, and vicariously, that is for all other Descendants, even if not in occupation of any part of the Property. The judge extracted the following quotation from the Association's written closing submissions:

> "8.5. ... it has acquired its title from descendants whose possessory Interest comprised the Interest acquired by them through their own occupation of the Property and the Interest acquired on their behalf by other descendants who occupied the entirety of the Property for themselves and for and on behalf of the other descendants with a like right. As a consequence of the joint nature of the occupation, each descendant acquired a possessory title which mirrored the possessory title of any descendant who occupied the Property. For this reason even those descendants who were not in actual occupation acquired an interest in the Property as a consequence of the possession of those descendants who were in occupation on their behalf. As noted above the belief by the descendants that the land was generation property confirms that the occupation of every person on the land was for the benefit of every descendant who had a like right."

56. Mr Stephen Jourdan QC for the Association described the common intention of the occupying Descendants as being similar to that of the Indian community in the *Afton Band* case, and akin to the concept of "generation property" recognised in academic writings about land ownership in the Bahamas, whereby the descendants of a common ancestor regard themselves as owning land in succession to that ancestor without there having been any formal transmission of title *inter vivos* or upon death. It is not a concept known to the common law, nor recognised by statute, although it is one of the objects of the Association to promote it. But Mr Jourdan submitted that the existence of such a concept, even if not yet hardened into a custom, assisted the court in finding that the requisite common intention existed.

57. As already noted, the judge rejected the evidence deployed in support of this alleged common intention on the part of occupying Descendants as both lacking in credibility and of recent invention. The majority of the Court of Appeal concluded that this aspect of the judge's fact-finding could not be faulted.

58. Before the Board the Association challenges that outcome on the following grounds. First it is said that those conclusions were based upon a misdirection in law, both by the judge and by the majority in the Court of Appeal, to the effect that joint possession could only be proved by an agreement to that effect, rather than merely by a common intention. Secondly, they said that the evidence supportive of the alleged common intention was largely unchallenged. Thirdly they said that the judge failed to have regard to documentary evidence supportive of the Association's case in that

regard. Finally, it was submitted that the judge and the Court of Appeal relied upon irrelevant evidence in support of their adverse conclusion about intention. EPL responded to all those submissions, but its main case, from start to finish, was that the Board was faced with concurrent findings of fact with which it could not, on settled principles, properly interfere.

59. Taking the Association's submissions in turn, there is, firstly, some substance in the point that the judge and, more particularly, Allen P giving the leading judgment in the Court of Appeal did appear to describe the requisite intention to possess jointly as something which needed to amount to an agreement, albeit not a contract in the legal sense. As noted above, the Board's view (although it is unnecessary to decide the point) is that the requisite subjective requirement is more in the nature of an arrangement or a shared common intention than an agreement although, of course, an agreement would suffice. But this supposed misdirection does not in the Board's view impeach the fact-finding exercise conducted on this point by the judge and by the Court of Appeal. As will shortly appear, the evidential matters upon which both courts relied were equally destructive of a finding of agreement, arrangement or shared common intention. It was not that the judge found the evidence probative of common intention but not probative of an agreement about joint possession. Rather, she simply rejected the evidence as lacking in credibility, and of recent invention.

60. As for the Association's second submission, there is, again, some substance in the complaint that the evidence about common intention from witnesses called by the Association was not generally subjected to focused cross-examination. Nonetheless a judge is not required to accept at face value everything said by a witness which has not been specifically cross-examined, if there is evidence to the contrary which has to be weighed in the balance, as indeed there was in this case.

61. As to the third point, there was indeed documentary evidence both in the recitals to the pre 1959 conveyances to Arthur Davis and in the government's publication of its plans to build the north south road, published in the Official Gazette in 1956, to the effect that land including the Property was generally understood to be held by descendants of the servants and former slaves of Ann Millar as tenants in common. But the omission to make specific mention of particular evidence deployed during a 30-day hearing does not of itself mean that the judge disregarded it. And she clearly had regard to the pre-1959 conveyances. In any event, an understanding on the part of an individual Descendant that his or her right to make use of land was that of a tenant in common comes nowhere near to proof that, in making that use, the Descendant did so on behalf of all other Descendants, under an arrangement between them, or upon the basis of a shared common intention to that effect.

62. The contrary evidence, of which it is submitted that the judge and the Court of Appeal took inappropriate account, consisted of the mainly earlier claims (supported by

evidence) of numerous Descendants that they were in possession of the Property or parts of it, on their own account, rather than for all Descendants jointly. Some of these claimants later altered their positions so as to support the joint claim made by the Association. The Board does not consider it necessary to undertake a detailed analysis of this evidence in this opinion. It is sufficient that, in the Board's view, this evidence did constitute material upon which the judge could find both that the evidence of an intention to possess jointly lacked credibility, and that it was of recent invention. More generally, none of the Association's submissions on this question came near to persuading the Board that it could properly depart from the concurrent factual finding by both the judge and the majority of the Court of Appeal, that the necessary common intention to possess jointly, on behalf of all Descendants, had not been proved. There was also evidence which, had it been accepted, would have entitled the judge and the Court of Appeal (including Adderley JA, who dissented on this specific point) to find that the requisite intention to possess jointly had been proved. But this would not entitle the Board to substitute a different view of its own for that of the courts below, unless that view was invalidated by a significant and operative misdirection, or by some other serious departure from a fair and just fact-finding process.

63. EPL did, in addition, mount a series of attacks upon the validity of the transfer by various Descendants of their possessory claims to the Association, including perpetuity and the assertion that the transfer to the Association was an invalid attempt to create a non-charitable purpose trust. The Board was not, in the event, persuaded by any of those objections but, since the rejection of the essential plank in the Association's case, namely that the occupying Descendants' possession was intended to be joint, is fatal to the Association's claim for possessory title, this part of the Association's appeal cannot prevail.

Claim for Possessory Title by EPL

64. The Board has already described the evidential basis upon which this claim succeeded, by a majority, in the Court of Appeal. The Association challenged this conclusion before the Board upon the following grounds. First, EPL had not merely not pursued, but positively abandoned and disclaimed any attempt to rely on possessory title, both before the judge and before the Court of Appeal. Secondly, time did not run in favour of EPL for this purpose after the presentation of the 1995 Petition. Thirdly, the requisite limitation period was 20 years rather than 12 years. Finally, the conduct of and on behalf of EPL which the judge had found to be proved did not in any event amount to possession of the Property. The Board will address each of those points in turn.

65. First, it certainly does appear that, by the time of closing submissions before the judge, EPL were no longer relying upon possessory title as a separate basis for its claim to a certificate. In the Court of Appeal EPL disclaimed title based on its own possession

for the limitation period, both in written and oral submissions. The Board is however reluctant to determine the case upon this procedural ground. As already noted EPL did rely, in the alternative, upon a possessory claim in its petition, and it does not appear to have abandoned that alternative prior to the conclusion of the evidential stage of the trial. There is accordingly no basis for a conclusion that EPL's abandonment of its possessory claim led to there being no proper opportunity for the Association to challenge EPL's evidence about its conduct in relation to the Property in and after 1988.

66. As to the second point, although of course time stops running in favour of a claimant relying upon adverse possession upon the presentation of a petition under the Quieting Titles Act, the Board is not persuaded that time ceases to run upon the presentation of some earlier petition which is then not pursued to a conclusion, merely because there are some common parties to both petitions. To the extent that the running of time matters at all, a point to which the Board returns later in this opinion, it must be taken to have stopped running when the present Petition was presented, in March 2010.

67. The question whether 12 or 20 years was the relevant limitation period by March 2010 turns upon a narrow point of construction of the Limitation Act 1995 (Bahamas). Section 16(1) provides for the limitation period for an action to recover land by the Crown of 30 years, replacing a previous longer period. Subsection (2) provides for an exception in relation to the recovery of foreshore. Subsection (3) provides for a 12-year limitation period for actions for the recovery of land. The following two provisos appear between section 16(1) and (2):

> "Provided that the time for bringing an action to which the provisions of this section apply in respect of a cause of action which has accrued before the commencement of this Act, shall, if it has not then already expired, expire at the time when it would have expired apart from those provisions:
>
> > Provided further that the time when the cause of action would have expired as aforesaid shall not exceed 30 years from the date of commencement of this Act."

68. At first sight, both those provisos appear, from the position where they are set out, from the link between the two and from the fact that subsection (3) is followed by its own separate proviso, to be applicable only to section 16(1) rather than to section 16 as a whole, including section 16(3). Certainly, the second of those two provisos is plainly applicable only to section 16(1).

69. Mr Jourdan pointed out however that the first of those provisos is related to the time for bringing an action to which the provisions of "this section", rather than

subsection, applies. In other words, he submitted that it was by its express terms applicable to the whole of section 16, so as to require a 20-year limitation period in respect of any cause of action accruing before the commencement of the Act. Mr Thomas Roe QC for EPL submitted that the reference to "section" rather than "subsection" in the first proviso was simply an obvious drafting mistake.

70. If this point had mattered, the Board would have preferred to construe that first proviso as applying only to section 16(1), treating the reference to "section" rather than subsection as a clear drafting error. The alternative construction involves assuming that the drafter has placed the first proviso in the wrong place, before one of the operative provisions which it is intended to qualify. The two provisos work together, and make much better sense if limited to subsection (1). The court can correct clear drafting errors when construing a statute; see *Inco Europe Ltd v First Choice Distribution (A Firm)* [2000] 1 WLR 586, 592-593. But EPL's possessory claim does not have to qualify as a claim for adverse possession, sufficient to bar any prior title, at least within the framework of these proceedings. This is because, for the reasons already given, no party has established any title prior to 1988, documentary or possessory, which needs to be barred. All that EPL need to do is to show that its conduct in relation to the Property was, for some period, however limited, sufficient to amount to possession in law.

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

72. Taking the various aspects of EPL's conduct in relation to the Property in turn, the 1988 survey can hardly qualify, since it was undertaken prior to the execution of the 1988 Conveyance. The subsequent clearing of boundary lines by Mr Patram between 1994 and 2004 does not in the Board's view qualify as taking possession. The two long boundaries to the Property on its east and west sides were, respectively, the high tide line abutting the Atlantic Ocean and the line of the government's public highway. Both were entirely accessible to the world at large and the clearing of undergrowth (if that is what clearing the boundary lines means) did nothing to enclose the Property nor inhibit its use by others in any way. The evidence as to what constituted, on the ground, the

northern and southern boundaries is less clear, but again, merely removing undergrowth obstructing the boundary lines does not amount to the taking of possession.

73. Nor does the occasional placing and replacement of signs saying Private Property. In *Simpson v Fergus* (1999) 79 P & CR 398, the question was whether the plaintiffs had established sufficient possession (to support an action in trespass) over a private service road at the rear of their property to which they had no documentary title, but which they had marked out with parking spaces together with a notice saying "Private Land No Unauthorised Parking". The English Court of Appeal held that this amounted not to possession, but merely to a declaration of intent to possess, insufficient to support an action in trespass against neighbours parking their vehicles on the private road. Having acknowledged that what may amount to possession will depend upon the characteristics of the land in question, Robert Walker LJ said this, at pp 402-403:

> "Possession is a legal concept which depends on the performance of overt acts, and not on intention (although intention is no doubt a necessary ingredient in the concept of adverse possession). It may or may not be sufficient in international law to annex an uninhabited and uninhabitable rock by planting a flag on it. … but to establish exclusive possession under English law requires much more than a declaration of intention, however plain that declaration is. Actual occupation and enclosure by fencing is the clearest, and perhaps the most classic, way of establishing exclusive possession (though even enclosure is not invariably enough): … it may well not have been feasible for Mrs Simpson (or for Mr Humphries before her) to have fenced off the parking spaces, although conceivably it might have been possible to do so with some form of moveable barrier, moveable posts, chain or whatever. Had either Mr Humphries or Mrs Simpson attempted to do that, matters might have come to a head much sooner. But to my mind, it is not correct, and would indeed be a serious heresy, to say that because it is difficult or even impossible actually to take physical possession of part of a reasonably busy service road, that simply for that reason some lower test should be imposed in deciding the issue of exclusive possession."

74. Those observations are appropriately adaptable to the very different characteristics of the Property in this case. It may well have been practically impossible (having regard to its purposes and long term intentions) for EPL to have undertaken any very active use of the Property, which was largely wild scrubland, with a few very small areas of low level farming and crabbing activity, but it would not have been impracticable for EPL to have enclosed it by some form of fencing or, at least, obstructions to vehicular access. More generally, there is no reason why Robert Walker LJ's principled approach should not be applicable in the Bahamas, or to land of this

nature. In the Board's view, merely keeping boundaries clear and from time to time placing or replacing "private property" signs came nowhere near taking possession of the Property. *A fortiori* overflying the Property and taking photographs of it cannot possibly have amounted to taking possession. Finally, the isolated occasion upon which EPL initiated possession proceedings against the occupier of a particular small part of the Property in 2009, thereby securing his departure, cannot in the Board's view have amounted to taking possession of the whole of the Property. This is so whether or not any court order had to be obtained, as to which the evidence is not clear. Like the Association, EPL made no separate claim for title to any part of the Property as opposed to the whole.

75. For those reasons the Board considers that EPL did not by its conduct in relation to the Property in and after 1988 take possession of it.

The Outcome

76. The Board has, not without considerable regret, been driven to the conclusion that neither of the surviving competitors in these proceedings has established such title to the Property as ought to be reflected in a certificate granted under the Quieting Titles Act. This is notwithstanding the efforts of Arthur Davis, Avon Bay and EPL on the one hand, and those of TMCL, the Association and the many individuals who have supported them, together with the exceptional effort of the parties in assembling documents and deploying evidence in support of the investigation conducted by the court under the Act. The Board is dismayed that this lengthy and no doubt extremely expensive process has not quieted this title at all.

77. This is not a case in which it has been possible to choose which is the better, or even the least worst, of competing titles, even though the process of advertisement of claims and barring of potential claimants reduced the number of applicants to five, and the number of survivors before the Board to two. The sad reality is that neither of the surviving claimants have proved any title at all.

78. The Board ventilated with counsel during the hearing what might be the outcome of a negative conclusion in relation to the surviving applicants' claims coupled with the barring of other claims under section 7(2) of the Quieting Titles Act. One possible conclusion appeared to be that the outcome might leave the Property free of any title, so that anyone with the energy now to travel to southern Eleuthera and enclose the Property by appropriate fencing might establish possession which would be proof against all comers.

79. The Board has however been assisted by counsel's responses towards a conclusion that section 7(2) only bars other titles to all or part of the Property for the

duration of proceedings under the Act, so as to enable the court to grant, in effect, absolute title by means of a certificate, if that is the appropriate conclusion for it to reach at the end of the proceedings. Thereafter the Board's view is that the barring of others' title (if any) ceases to have effect. It may well be that there are persons at present making sufficient use of (probably) very small parts of the Property for them to be in possession of those parts, sufficient to enable them to resist eviction. It may be that there are parts of the Property in relation to which the original documentary title of Ann Millar which passed on her death to her residuary beneficiary can be asserted, free from any successful claim to have extinguished it by adverse possession, but the Board's conclusion that neither surviving applicant has proved title to the whole of the Property does not, of itself, resolve that question either way.

80. All that can be said is that, however successful the machinery of the Act has been, and may yet be, in quieting title to other parts of the Bahamas, it has not proved to be an effective vehicle for that purpose in relation to the Property. This may well have adverse consequences for any development potential for the Property and it will certainly impede the achievement by the Association of its main ambition, namely to secure for all the Descendants sufficient title to the Property to enable them to continue to enjoy it, as and when they may choose to do so, now and in the future. If either of those consequences are regarded as sufficiently antipathetic to the public interest then, in the Board's view, they can only be resolved by legislation.

81. The Board will therefore humbly advise Her Majesty that the Association's appeal should be allowed in part and that the Petition should itself be dismissed without the grant of any certificate of title. The Board will entertain written submissions from the parties as to costs.

<u>**Appendix: Plan of relevant land**</u>