COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 5 of 2023

BETWEEN

CARLA ANITA CECILIA BRAYNEN TURNQUEST

Appellant

AND

WATER AND SEWERAGE CORPORATION

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mrs. Krystal D. Rolle KC with Ms. Kendrea Demeritte, Counsel for the Appellant**
Mr. Dywan A. G. R. Rodgers, Counsel for the Respondent

HEARING DATES: 12 September 2023, 5 December 2023

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Documentary Title to Land - Paper Owner - Possessory Title - Adverse Possession - Factual Possession - Intention to Possess - Animus Possidendi - Conveyancing and Law of Property Act - Section 3(4) of the Conveyancing and Law of Property Act

In 2009, Carla Anita Cecilia Braynen Turnquest ("the appellant") inherited a piece of land ("the Property"), as devised in her deceased father's will. She was able to trace a documentary title to the property dating back to a 1963 Conveyance. In 2009, the appellant hired a land surveyor to survey the Property. The surveyor advised the appellant that Water and Sewerage Corporation ("the respondent") had water supply equipment on a portion of the Property.

In 2012, the appellant wrote to the respondent, advising that she is the fee simple owner of the Property and demanded compensation for the respondent's trespass. The appellant also offered to lease or sell a portion of the Property to the respondent; the respondent replied that it would need time to investigate title and did not claim to be the owner of the Property. In 2013, the appellant again wrote, seeking a follow up on the 2012 letter.

In 2016, the appellant wrote the respondent again, inquiring whether it had investigated the title to the Property. The respondent replied and asked the appellant to provide proof of ownership and a proposal to purchase or lease the property; the respondent reiterated this request in a follow-up letter.

In 2017, the appellant again wrote the respondent and offered to lease the occupied portion of the Property and requested mesne profits for the past unauthorized occupancy. There was no reply.

In 2018, the respondent issued a cheque for $20,000.00 to the appellant which was expressed to be for "*the initial payment for use of private land*".

In 2019, the respondent indicated to the appellant that an investigation found that there is no documentary evidence that proves the appellant lawfully owned the Property. The respondent also requested that the $20,000.00 cheque be returned.

The appellant sued the respondent. The trial judge found that the appellant is not the owner of the Property by documentary title and that the respondent has a possessory title. The judge also ordered that the appellant return the $20,000.00 to the respondent. The appellant appealed those findings.

Held: Appeal allowed. The Respondent must pay to the appellant a) mesne profits, for each year of the respondent's unlawful occupation of the Property as well as interest on mesne profits, b) damages in lieu of an injunction to remove the water supply equipment, and c) interest on the sums awarded pursuant to Section 3 of the Civil Procedure (Award of Interest) Act 1992. The assessment of damages relative to mesne profits, interest on mesne profits, and damages in lieu of an injunction are remitted to the Registrar of the Supreme Court. Costs in the Supreme Court below and in this Appeal are certified fit for two Counsel, to be taxed if not agreed.

There is no such concept as an "absolute" title to land. 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. Compared to a trespasser, a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred by the Limitation Act.

In order to succeed on her claim, the appellant needed to demonstrate that her title was superior to the respondent's title. As the respondent alleges that it has a possessory title, the documentary title put forth by the appellant (even with defects) was a better title than the respondent's title.

Although the Conveyancing and Law of Property Act requires that the appellant prove a good and marketable documentary title to the Property, the learned judge erred in law by holding the appellant to too high a standard. There is no such requirement on an appellant relative to a claim in trespass, since a documentary title is superior to an alleged possessory title.

The respondent acknowledged that the only documentary root of title which exists to the Property is the appellant's title. Since there was no other documentary title before the Court, the learned judge erred in finding that the 1963 Conveyance was not a good root of title because it did not identify the property conveyed or contain a recognizable description of the Property.

The 1963 Conveyance contained a recognizable description, including, the size, location and the description of the land. As the learned judge found "that the survey was properly and is proof of the property surveyed therein", she erred by nonetheless concluding that it did not prove that the Plaintiff owned the Property.

The learned judge also erred by requiring the appellant to deduce title prior to the 1963 Conveyance. Having found that there was no other documentary root of title other than that of the appellant and finding that the respondent's water supply equipment was on the Property, which was properly surveyed, the judge ought to have accepted the 1963 Conveyance as the documentary root of title to the Property and proceed to investigate whether the respondent had adversely possessed the Property.

Title to land only needs to be deduced for a period of thirty years. As such, the learned judge was not entitled to require the appellant to deduce a title beyond her 1963 Conveyance.

A person's title to land including the person who has the documentary title is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that a person who is in possession as a trespasser/squatter without the permission of the paper owner can obtain a good title if the paper owner fails to assert his superior title within the requisite limitation period. After the limitation period has expired, the paper owner's rights will be extinguished.

In order for a party without documentary title, to establish legal possession to land, there must be custody or physical control of the land (factual possession) and an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess).

Although there was a 1983 Memorandum evidencing the water supply equipment on the Property, this only demonstrates physical possession but not an intention by the respondent to possess the Property to the exclusion of all others. The respondent's posture of wanting to purchase or lease the Property and the payment of the $20,000.00 demonstrates that the respondent lacked the intention to possess the Property in its own name. The respondent's request for confirmation of title or ownership was an acknowledgment that it was not the owner and had no interest.

A right of action to recover land can only accrue where some other person is wrongfully in possession of it. If the person in possession of the land acknowledges the title of the person entitled

to recover it, then the right of action for recovery of the land is treated as having accrued on the date of the acknowledgement and not at any earlier time. The acknowledgment by the respondent in 2018 was in writing. Since the 2018 written acknowledgement of the respondent took place after the expiration of the period for adverse possession, it resets the clock on the adverse possession claim. The respondent will need to start the statutory period over again from the date of the acknowledgement.

The most recent date for the accrual of the appellant's cause of action is around 2018 and therefore, the respondent cannot claim adverse possession of the Property until 2030.

Bannerman Town, Millars and John Millars Eleuthera Association and others v. Eleuthera Properties Limited SCCivApp No. 175 of 2014; applied
Bahamasair Holdings Ltd. v Messier Dowty Inc. [2018] UKPC 25; considered
Bodie and Others v Bahamas Land and Finance Co Ltd [1979-80]1 LRB 251; mentioned
Bolton v London School Board [1878] 7 Ch 766; mentioned
Browne v Perry [1991] 1 WLR 1297; mentioned
Collie v. The Prime Minister [2012] 1 BHS J. No. 18; applied
In the matter of the Petition of Desmond Dean and Sharmaine Dean 2020/CLE/gen/FP/000131
In the matter of the Petition of Rushel Rowena Mcklewhite 2011/CLE/qui/00661; mentioned
IN THE MATTER OF the Quieting Titles Act, 1959 AND IN THE MATTER OF the Petition of Eleuthera Land Company Limited, a company incorporated and existing under the laws of the Commonwealth of The Bahamas AND IN THE MATTER OF a tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera 2012/CLE/qui/00579; mentioned
James Wallace and another v Addington Nairn Jr. [2017] 2 BHS J. No. 27; applied
J A Pye (Oxford) Ltd and another v Graham and another [2002] UKHL 30; applied
Keith Rolle & Anor. V Raymond Meadows SCCivApp. No. 128 of 2020; mentioned
Ocean Estates Ltd v Norman Pinder [1969] 2 A.C. 19; applied
Powell v McFarlane (1977) 38 P & CR 452; mentioned

JUDGMENT

Judgment delivered by the Honourable Madam Justice Charles, JA:

1. This appeal, arising from the decision of Stewart J ("the learned judge") in the Supreme Court, concerns a claim in trespass. In a written judgment issued on 2 December 2022, the learned judge dismissed Mrs. Braynen-Turnquest ("the appellant")'s claim in trespass in respect of land situate in Mangrove Cay on the Island of Andros, The Bahamas ("the

Property"). The learned judge also ordered that the appellant shall return to Water and Sewerage Corporation ("the respondent") the sum of $20,000.00 which the respondent had paid to her for the use of the Property.

Factual background

2. The relevant factual background can be shortly summarized. The appellant is the daughter of the late Carl A. Braynen ("Carl") who had acquired the Property by an Indenture of Conveyance dated 7 January 1963 ("the 1963 Conveyance") from Lauretta Braynen ("Lauretta") as the Administratrix of the Estate of Albert Braynen ("Albert"). Carl died testate on 8 October 2007, leaving a Will devising the Property to the appellant. By Deed of Assent dated 14 October 2009 ("the Deed of Assent"), the appellant, as Executrix of Carl's Will, assented to this devise to her of the Property thus granting and conveying to herself the Property in question.

3. Lauretta was the appellant's paternal grandmother and Albert was Carl's grandfather. In her capacity as Administratrix, Lauretta sold 660 acres of land situate in Mangrove Cay to Carl for £1,000.00. This is evidenced by the 1963 Conveyance. The appellant's father (Carl) had informed her that he had owned the said acreage which he wanted to develop. Before they could visit the land, Carl died.

4. After her father's death, the appellant, through her company Mangrove Properties Ltd., hired a land surveyor, Mr. Emile Ledee ("Mr. Ledee") and his company Bahama Geomatics Ltd. between the years 2009 to 2011 to conduct a survey of the Property. Mr. Ledee prepared a survey plan and registered the plan with the Department of Lands & Surveys as Plan 600 AN ("Plan 600 AN"). Its accuracy was confirmed by the learned judge. Mr. Ledee advised the appellant that during his surveying of the Property he discovered the presence of the respondent's water holding tanks, pipes, fencing and related apparatus which occupied 15,192 square feet of the Property. The respondent had also created an access road known as "Wellfield Road" on the Property for the purpose of ingress and egress to and from the tanks.

5. The appellant surmised that the respondent's water holding tanks were erected in or about 2007. She became the legal and beneficial owner of the Property in 2009 and it was around this time that she objected to the respondent's unauthorized use and presence on the Property.

6. Based on the information which she received from Mr. Ledee, the appellant obtained legal representation. This led to periodic communications between the parties which continued for over a six-year period.

7. On 6 November 2012, the appellant's Counsel wrote to the respondent's General Manager, Mr. Glen Laville, advising that the appellant is the fee simple owner of the Property on which

the respondent had constructed, without her knowledge and consent, a water tank. The appellant demanded that she be compensated quickly for the respondent's trespass and unauthorized use of her Property. The appellant also offered to lease or sell a portion of the Property to the respondent so that their operations may continue uninterrupted.

8. By letter dated 12 November 2012, Mr. Laville responded that they would need some time to investigate title before giving her an answer. The respondent did not claim to be the owner of the Property.

9. On 17 January 2013, the appellant's Counsel again wrote to the respondent seeking a follow up on the 12 November 2012 letter and an expeditious resolution of the matter without resorting to legal action. There was a long hiatus.

10. On 7 January 2016, the appellant's counsel wrote yet again to the respondent stating that it has been more than three years since the date of the respondent's last letter with respect to requiring time to investigate the title deed to the Property. The appellant sought an answer from the respondent as to their position regarding settlement of the matter within five working days.

11. By letter dated 22 April 2016, Mr. Laville responded to the appellant's letter acknowledging "*occupying approximately 15,200 square feet or just over one third of an acre under Crown Grant F-25 to Joseph Evans*." Omitting immaterial parts, the letter continued:

> **"WSC would be grateful if <u>you could provide proof of ownership by your client, and also a proposal from your client for WSC's outright purchase or extended lease of the occupied property</u>, for our consideration."** [Emphasis added]

12. On 27 May 2016, the appellant's Counsel wrote once again. The gravamen of the letter was that if the appellant did not hear from the respondent within fourteen (14) days with a definitive and substantial proposal for the resolution of the matter, she would be constrained to institute legal proceedings against the respondent.

13. On 30 May 2016, Mr. Laville responded in writing to the appellant "*reiterating its request as contained in his 22 April 2016 letter to the then Counsel for the appellant for proof of ownership and a proposal for an outright purchase or extended lease of the occupied property*."

14. After receiving offers from the respondent and having the Property appraised at $44,000.00, the appellant offered by letter dated 15 November 2017 to lease the occupied portion of the

Property to the respondent for $4,000.00 per month and to accept mesne profits for the past unauthorized occupancy and usage at $4,000.00 monthly by a lump sum payment.

15. Several months passed and the appellant did not hear from the respondent. The appellant's Counsel once again threatened legal action.

16. On 25 May 2018, the appellant confirmed in writing to the respondent her agreement to accept from it (the respondent) a partial settlement of her claim for compensation for the use of the Property. The invoice submitted was entitled: 'Confirmation of Partial Settlement of Claim'. The description on the invoice stated:

> "**regarding the submitted and pending Trespass claim of Carla Braynen-Turnquest against the Water & Sewerage Corporation <u>in respect of her property situated at Mangrove Cay, Andros Bahamas</u> and pending the final amicable settlement and resolution of the same Carla Braynen-Turnquest accepts from Water & Sewerage Corporation the sum of Twenty Thousand Dollars ($20,000.00) as a Good Faith Partial Settlement of the said claim**." [Emphasis added]

17. The respondent issued a cheque dated 25 May 2018 for $20,000.00 which was expressed to be "*the initial payment <u>for use of private land by the Corporation in Mangrove Cay, Andros</u>*". [Emphasis added]

18. On 11 February 2019, Mr. Dywan Rodgers of Meridian Law Chambers, attorneys for the respondent, wrote to the attorney for the appellant, Mrs. Krystal Rolle KC of Rolle & Rolle, stating that an attorney at his law firm conducted an investigation into the appellant's title and found that there is no documentary evidence that proves the appellant lawfully owned the Property. He seeks a return of the cheque of $20,000.00 and a withdrawal of the summary judgment application which was filed by the appellant.

19. Unable to resolve their dispute amicably, the appellant commenced an action in the Court below by a Generally Indorsed Writ of Summons filed on 17 October 2018 seeking principally a declaration that the respondent has no title, interest or right to use and/or occupy the Property, mesne profits for each year of the respondent's unlawful use and occupation of the Property, damages for trespass and a mandatory injunction that the respondent remove forthwith the water holding tank and storage apparatus as well as any other of its chattels and/or possessions from the Property. In her Statement of Claim filed on 8 November 2018, the appellant claimed that she is the documentary title owner of the Property and that the respondent has wrongfully trespassed upon her Property whereby she has suffered loss and damage.

20. By its Defence, the respondent relied upon a possessory title. The respondent claimed that it has had undisturbed visible and physical possession of the Property since 1978, considerably more than the 12 years as required by section 16(2) of the Limitation Act and is still in possession, control and using the Property.

21. In her Reply, filed on 6 November 2019, the appellant put the respondent to strict proof of its assertion that it ever had or has acquired a possessory title to the Property. The appellant also relied on Section 38 of the Limitation Act which, in its marginal note states "*fresh accrual of action on acknowledgment or part payment.*"

22. At the trial, the learned judge found that the appellant is not the owner of the Property by documentary title and that the respondent has a possessory title (factual and physical possession) of the Property as well as the intention to possess for more than the requisite period as set out in the Limitation Act.

The Court's approach to determining trespass claims

23. A convenient starting point in determining claims for trespass is the Privy Council case of **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19. At pages 24-25 of the Judgment, Lord Diplock giving the advice of the Board stated:

> **"At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."** [Emphasis added]

24. This principle was adopted and restated in **James Wallace and another v Addington Nairn Jr.** [2017] 2 BHS J. No. 27. Isaacs JA, in delivering the Judgment of this Court, differently constituted, applying Lord Diplock's dicta, stated at paragraphs 32 and 33:

> **"32. Pursuant to Lord Diplock's dicta, if the appellants were able to show that they had the necessary title to the property, they were entitled to recover it. However, this was subject to the respondent being able to demonstrate that he had continuous and exclusive**

possession for the requisite period under the Limitation Act, i.e. twelve years.

33. Lord Diplock continued:

> **"Put at its highest against the plaintiffs it is clear law that the slightest act by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired."**

25. In short, a plaintiff who makes a claim for trespass against a defendant only needs to show that he/she has a better title than the defendant regardless of what the title is. Shortly put, it is a simple matter of "*the relative strengths of the titles proved by the rival claimants.*"

26. Essentially, for the purpose of the appellant's claim for trespass, all she needed to demonstrate in order to succeed on her claim was that her title was superior to that of the respondent. That said, an action in trespass can be defeated by a claim that the plaintiff's rights as documentary title owner to possession has been defeated by a defendant's adverse possession for more than 12 years: see **Keith Rolle & Anor. V Raymond Meadows** SCCivApp. No. 128 of 2020 at paragraphs 27 to 51.

Judgment in the court below

27. In her written judgment, the learned judge identified the main issue to be determined, namely whether the respondent trespassed on the Property and, if so, what is the appropriate quantum of damages to be awarded to the appellant?

28. After setting out each party's evidence and upon hearing submissions of Counsel, the learned judge stated at paragraph 124 of the Judgment that:

> **"The Plaintiff claims that she is the legal and beneficial owner of the Property located in Mangrove Cay, Andros by way of documentary and possessory title. In support of her claim she relies on the survey plan prepared by Mr. Ledee filed as 600AN to determine the location of the Property. As a result of this ownership, she alleges that the Defendant trespassed on the Property. Trespass is the "unjustifiable intrusion by one person upon land possessed by another."**

29. From paragraphs 125 to 127, the learned judge summarized the law relating to the tort of trespass and possession. From paragraphs 128 to 145, she analyzed the evidence and, in paragraph 146, she found that there was no proper description of the Property in the 1963 Conveyance. In paragraph 148, the learned judge stated:

> **"148. There is no document produced by the Plaintiff which meet (sic) this definition. The fact that the conveyance to Carl Braynen is over thirty years is not dispositive of the issue. When the title is being disputed, more is required to establish a good root of title. Accordingly, I do not find that the Plaintiff is the owner of the Property by documentary title and the 1963 Conveyance provides no proof of ownership of the property in dispute as it is not a good root of title."** [Emphasis added]

30. Having found that the appellant is not the owner of the Property by documentary title and that she had not produced any document which provided a description or identified the land to which her title related, the learned judge went on to find, in paragraph 152 of the Judgment, that "**[***T]he property claimed by the Plaintiff is that on which the water holding tanks and storage are situate".*

31. In paragraph 153, she accepted that the survey was properly registered with the Department of Lands & Surveys and is "*proof of property surveyed therein*". She continued: "*however, it does not prove that the Plaintiff owned the Property*."

32. In paragraph 155 of the Judgment, the learned judge seemed to suggest that the respondent had a possessory title to the Property when she said:

> **"155. The 1983 Memorandum dated 14th April 1983, from the Assistant Registrar of the Ministry of Works & Utilities to its Permanent Secretary, reflects the presence of a wellfield and water distribution system owned by the Defendant in Mangrove Cay. This was a document contained in the parties' Agreed Bundle of Documents. Although the maker of the 1983 Memo was not a witness in the trial to speak to the contents of the document, it is evidence of possession of the Property by the Defendant, in support of its latter correspondences questioning title and not defence against the Plaintiff.** [Emphasis added]

33. Then, in paragraph 165 of the Judgment, the learned judge appeared to have confirmed that the respondent had a possessory title since 1983.

34. In paragraph 161, the learned judge found that the payment of the $20,000.00 by the respondent to the appellant in May 2018 suggested that the respondent did not intend to possess the Property to the exclusion of the appellant. This is what she said:

> **"The Property being claimed by the Plaintiff is a large tract of land. There is no evidence of the Surveyor placing new markers or fencing on the land or any overt act of ownership. <u>The payment by the Defendant to the Plaintiff reflects that, in May 2018, the Defendant did not have the intention to possess the Property to the exclusion of the Plaintiff.</u> This was short lived however, as the 16th November 2018 letter from the Defendant's attorney questioned the Plaintiff's ownership of the Property. Thereafter, by letter dated 11th February 2019 the payment of the twenty-thousand dollars was requested to be returned to the Defendant. However, possession is not determined to be undisturbed until legal action is commenced to address such claims and a finding is made with respect to the same."** [Emphasis added]

35. In paragraph 162, she observed that the respondent never acknowledged that the appellant was the legal and beneficial owner of the Property.

36. In paragraph 166, the learned judge encapsulated her decision in this manner:

> **"After considering all of the evidence and the submissions of the parties, I find therefore that the Plaintiff did not have factual and physical possession nor the intention to exclusively possess the Property in question in order to oust the possession of the Defendant which the Plaintiff claimed to have owned by virtue of the 2009 Deed of Assent. I am also not satisfied that her predecessor in title held good title in order to devise the same to her. <u>I also find that the Defendant had factual and physical possession of the Property as well as the intention to possess for more than the requisite period as set out in the Limitation Act</u>. I am satisfied that the survey which was duly registered with the Department of Lands and Survey only set out the boundaries to the Property but did not determine who owned it."** [Emphasis added]

Grounds of appeal

37. In her Notice of Appeal Motion filed on 13 January 2023, the appellant seeks an order to set aside the following findings:

(i) The appellant is not the owner of the Property by documentary title since she did not produce any document which provides a description or identifies the Property to which her title relates: paragraph 148 of the Judgment.

(ii) There is no proper identification of the Property in the Conveyance dated 7 January 1963 from Lauretta Braynen, Administrator of the Estate of Albert Braynen to Carl Braynen ("the 1963 Conveyance"): paragraph 146 of the Judgment;

(iii) The 1963 Conveyance is not a good root of title and is not proof of ownership: paragraph 148 of the Judgment; and

(iv) The respondent has a possessory title (in so far as such a finding was in fact made): seemingly at paragraphs 155 and 165 of the Judgment.

38. Further, the appellant entreats for the following findings to remain undisturbed namely:

(i) The respondent's Water Holding Tank and Storage Apparatus is on the Property: paragraph 152 of the Judgment;

(ii) The payment of the $20,000.00 by the respondent to the appellant in May 2018 reflects that the respondent did not intend to possess the Property to the exclusion of the appellant: paragraph 161 of the Judgment and;

(iii) The survey of the Property and Plan 600AN were properly registered with the Department of Lands & Surveys and is proof of the Property surveyed therein: paragraph 153 of the Judgment.

39. Since the respondent has not cross-appealed, those findings supportive of the appellant's claim are now final findings.

40. Twenty-eight grounds of appeal were filed. It is unnecessary for us to recite those grounds but we accept the appellant's categorization of the grounds which fall under three broad heads, namely:

i. **<u>Grounds 1-8:</u>**
The learned judge's errors in determining the appellant's trespass claim.

ii. **<u>Grounds 9-14:</u>**
The learned judge's erroneous rejection of the appellant's documentary title.

iii. **<u>Grounds 15-27:</u>**
The learned judge's erroneous finding that the respondent had a possessory title.

Discussion

Grounds 1- 8: The learned judge's errors in determining the appellant's trespass claim

41. On behalf of the appellant, Mrs. Rolle KC submits that the learned judge, having correctly identified the key issue in the case as being *"whether the defendant trespassed on the Property"*, she thereafter committed a grave error in law by failing to consider or give proper consideration to the established legal principle that, in a claim for trespass against a defendant, a claimant only needs to demonstrate that he/she has a better title than the defendant regardless of what that title is. Mrs. Rolle equates this point to the fact that while a tenant cannot bring a claim for trespass against his landlord, he certainly can bring a claim for trespass against a squatter. In our view, this is a correct exposition of the law.

42. In dealing with the issue of trespass, the learned judge stated in paragraph 128 of the Judgment that:

> **"The Defendant claims that the Plaintiff does not have good title to the Property because of the defects in her title documents. In the wake of this claim, the documentary title of the Plaintiff must be examined in order to determine if the Plaintiff's title to the Property is good."**

43. Then, in paragraph 143 of the Judgment, she continued:

> **"Given the aforementioned inaccuracies cited in my investigation of her title, inclusive of the lack of the description of the Property in the 1963 Conveyance and the lack of a plan, <u>I am not satisfied that the Plaintiff can prove a good and marketable documentary title to the Property as is required to be shown by section 3(4) of the CLPA.</u>"** [Emphasis added]

44. Mrs. Rolle contends that the learned judge erred, firstly by accepting the respondent's assertions about so-called "*defects*" in the appellant's title documents and then by allowing such so-called "*defects*" to form the basis for rejecting the appellant's trespass claim.

45. Secondly, says Mrs. Rolle, the learned judge erroneously held the appellant to a standard of having to "*prove a good and marketable documentary title to the Property as is required to be shown by section 3(4) of the CLPA"* in circumstances where there is no such requirement on a claimant in the context of a trespass claim where any documentary title is superior to a possessory one.

46. Thirdly, and most importantly, as a matter of law, the respondent's title (whatever it purported to be) could not be superior to that of the appellant's in circumstances where the case clearly was one of comparative "*titles proved by the rival claimants*" and where, as clearly demonstrated above the respondent (i) described the matter as between itself and the appellant as "*not contentious*", (ii) had repeatedly offered to purchase or lease the Property

from the appellant and (iii) had in fact made a payment of $20,000.00 in partial settlement of the appellant's trespass claim and for the use of the Property.

47. Fourthly, Mrs. Rolle helpfully pointed out that one of the learned judge's findings which is supportive of the appellant's claim is at paragraph 161 of the Judgment where the learned judge said, "*the Defendant did not have the intention to possess the Property to the exclusion of the Plaintiff*."

48. According to Mrs. Rolle, given that this matter was one concerning the relevant strengths of the titles proved by the appellant and the respondent, a finding by the learned judge that the respondent "*did not have the intention to possess the Property to the exclusion of the appellant*" must necessarily mean that the respondent's possession of the Property was not adverse to the appellant's title and that, resultantly, the appellant's title was superior to that of the respondent.

49. On behalf of the respondent, Mr. Rodgers submits that the learned judge's findings that there were defects in title were based on sound legal principles since the appellant could not and has not established through her evidence that Albert had any title or right to the Property that was conveyed in the 1963 Conveyance. Mr. Rodgers concentrates on the purported documentary title of the appellant and contends that since none of the appellant's predecessors in title had any documentary title to the Property, she likewise has no documentary title and is not in possession of the Property. Relative to the learned judge's findings that the appellant has to prove a good and marketable title to the Property as is required to be shown by section 3(4) of the Conveyancing and Law of Property Act ("the CLPA"), Mr. Rodgers submits that it was the duty of the learned judge to investigate the documentary title especially such title which has the potential to displace someone who is physically possessed of the Property.

50. In the present appeal, it is clear that the appellant, having brought the action alleging that the respondent is a trespasser, is required to prove her title to the Property. She has put forward the 1963 Conveyance and her Deed of Assent. All that she needed to demonstrate in order to succeed on her claim was that her title was superior to that of the respondent. The respondent does not allege that it possesses a documentary title to the Property or is claiming through a documentary title holder. What the respondent alleges is that it has a possessory title having been on the Property since 1978 and has occupied it undisturbed, visibly and openly.

51. In our judgment and based on sound legal principles, any documentary title put forth by the appellant (even with defects) was a better title than the respondent's title.

52. In paragraph 143, the learned judge held that the appellant has to "*prove a good and marketable documentary title to the Property as is required to be shown by section 3(4) of the CLPA.*"

53. In our opinion, the learned judge erred in law by holding the appellant to too high a standard under section 3(4) of the CLPA in circumstances where there is no such requirement on an appellant relative to a claim in trespass since her documentary title is superior to the respondent's alleged possessory title.

54. Mr. Rodger's submission that, in order to bring an action for trespass on the basis that as the documentary title holder, you have to satisfy the requirements of section 3 of the CLPA which calls for an investigation of your documentary title is simply wrong. There is no such requirement on a claimant when bringing a trespass claim where any documentary title is superior to a possessory one. The appellant's 1963 Conveyance and her Deed of Assent were sufficient to give her the locus standi to bring her action in trespass.

55. Thereafter, the issue before the learned judge was simply to determine whether the respondent had dispossessed the paper owner (the appellant) by going into ordinary possession of the land for the requisite period of 12 years without the consent of the owner.

56. It is accepted that, as an appellate court, we should not intervene in upsetting a trial judge's conclusions of primary facts unless we are satisfied that the judge was "plainly wrong": **Bahamasair Holdings Ltd. v Messier Dowty Inc.** [2018] UKPC 25. At paragraph 36, the Board reiterated the basic principles in this area which was summarized thus:

> **"36. …**
>
> **1. "… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, para 5.**
>
> **36.2. …..**
>
> **36.3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against**

the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of *Central Bank of Ecuador*."

57. At paragraph 161 of the Judgment, the learned judge said "*the Defendant did not have the intention to possess the Property to the exclusion of the Plaintiff"*, a finding which is supportive of the appellant's claim and on which there is no cross-appeal.

58. In our view, the learned judge's rejection of the appellant's trespass claim was wholly inconsistent with this finding, both in fact and in law. Mr. Rodgers' reliance on cases under the Quieting Titles Act, 1959, has to be looked at differently since the principles relative to trespass were those which required consideration.

59. In this appeal, the appellant only needed to demonstrate that her documentary title was superior to the respondent's possessory title. It matters not that her documentary title may not have been perfect as there is no such thing as a perfect title. Shortly put, it is a simple matter of "*the relative strengths of the titles proved by the rival claimants.*"

60. For all of the reasons stated above, we are satisfied that the learned judge erred, both in law and in fact. Grounds 1 to 8 are allowed.

Grounds 9-14: The learned judge's erroneous rejection of the appellant's documentary title

61. The appellant contends that the learned judge erred in law by failing to consider, or give proper consideration to, the evidence which included confirmation from the respondent's witness, Attorney Gilbert Thompson that he conducted a title search in relation to the property which revealed no other documentary root of title for the Property other than the appellant's documentary title.

62. The appellant further contends that the learned judge having found, in paragraph 148, that the 1963 Conveyance provided "*no proof of ownership"* of the Property and that it is *"not a good root of title",* made findings without properly considering the detailed explanatory expert evidence of Mr. Ledee which confirmed that:

(i) the land depicted on Plan 600 AN was the land described in the 1963 Conveyance;

(ii) such land as described in the 1963 Conveyance and as shown on Plan 600 AN was in fact a portion of the land referred to in the Crown Grant to Joseph Evans;

(iii) such land as described in the 1963 Conveyance and as shown on Plan 600 AN was also referenced in the 1875 Will of William Henry Sweeting and;

(iv) such land as described in the 1963 Conveyance and as shown as Plan 600 AN being a part of the Crown Grant and referenced in the Will of William Henry Sweeting was the Property upon which the respondent's water holding tank and storage apparatus had been installed.

63. The appellant argues that the learned judge gravely erred since Mr. Ledee's expert evidence (i) had not been materially undermined or discredited by the respondent's experts, Mr. Stafford Coakley or Mr. Alvin Young; (ii) had not been materially undermined on cross examination; and (iii) was not rejected by the learned judge as lacking in credibility or rejected at all.

64. The appellant further argues that the learned judge erred in law and in fact when, in considering the case of **IN THE MATTER OF the Quieting Titles Act, 1959 AND IN THE MATTER OF the Petition of Eleuthera Land Company Limited, a company incorporated and existing under the laws of the Commonwealth of The Bahamas AND IN THE MATTER OF a tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera** 2012/CLE/qui/00579 found that the 1963 Conveyance was not a good root of title because the conveyance did not identify the property conveyed and/or did not contain a recognizable description of the Property.

65. The appellant submits that it is manifestly clear that the 1963 Conveyance contained a recognizable description. It includes, among other things, the size and location of the land conveyed and the description of the land by reference to the original Crown Grant to Joseph Evans and the subsequent 1875 Will of William Henry Sweeting along with its recording reference.

66. According to the appellant, the learned judge conflated the issue of description of the land in the conveyance with the surveying question of locating the land on the ground by reference to such description; the evidence of Mr. Ledee being the latter and not the former.

67. The appellant also attacks the learned judge's finding on another prong. She submits that the learned judge, being the judge investigating title to land, erred in law by requiring her (the appellant) to deduce title prior to the 1963 Conveyance in circumstances where the respondent has not asserted that the 1963 Conveyance was invalid and/or where its validity

was in no way questioned or challenged and where the documentary title pleaded by the appellant in her Statement of Claim commenced with the 1963 Conveyance and culminated with her Deed of Assent to herself.

68. Further, says the appellant, in rejecting the appellant's documentary title, the learned judge erred in law by failing to give any proper consideration to Section 3(4) of the CLPA and to the cases of **Bannerman Town, Millars and John Millars Eleuthera Association and others v. Eleuthera Properties Limited** SCCivApp No. 175 of 2014 and kindred cases which authoritatively affirm that in the absence of any challenge to the validity of the 1963 Conveyance, the learned judge was not entitled to go behind the 1963 Conveyance and was not entitled to require the appellant to deduce a title beyond her 57-year-old conveyance.

69. Additionally, the appellant submits that the learned judge having found in paragraph 153 "*that the survey was properly registered with the Department of Lands & Surveys and is proof of the property surveyed therein"* erred thereafter by stating *"however it does not prove that the Plaintiff owned the Property"* since the property surveyed by Plan 600 AN was the property described in the 1963 Conveyance and the 1963 Conveyance, being a valid conveyance whose validity or efficacy was not called into question effectively conveyed the property which the appellant inherited and ultimately conveyed onto herself by the Deed of Assent.

70. In paragraphs 22 to 48 of their written submissions, the respondent supported the learned judge's findings on her rejection of the appellant's documentary title for the following reasons:

(i) There is no document in existence or discovered during the search conducted by their Attorney Gilbert Thompson which reflected how Albert came to be in possession of the Property;

(ii) There is no connection between the property surveyed by Mr. Ledee and the documents prepared by the appellant's father, Carl;

(iii) The learned judge did not make a finding or ruling as to whether Plan 600 AN is accurate as there was no need for her to make such a finding given the evidence before her;

(iv) The 1963 Conveyance was woefully deficient and contains many contradictions with respect to the description of the property. Specifically, it does not identify which grant it refers to. It simply states "*land granted to Joseph Evans."*

(v) Crown Grant F-28 was introduced into evidence because the 1963 Conveyance said *"tract of land granted to Joseph Evans*" but an assumption was being made because no map or plan was attached to the 1963 Conveyance and no specific reference was made with respect to Crown Grant F-28 which refers to 1,500 acres, and not 860 acres or 660 acres;

(vi) In examining the Will of William Henry Sweeting, no boundaries or dimensions are given in connection with any 660-acre tract of land. There is no plan or map attached;

(vii) Although the respondent did not expressly state that the 1963 Conveyance was a fraudulent or invalid document in its Defence, the respondent maintained that it has always been their case that the appellant did not have good and marketable title to the Property and could not prove a good root of documentary title. In essence, the respondent challenges the 1963 Conveyance;

(viii) There was no express reference of the Property in Carl's Will dated 13 September 2007 wherein he gave, devise and bequeath to the appellant "*all of his real of personal property whatsoever and wheresoever situate*" and;

(ix) There is no finding by the learned judge (and no supporting evidence) that the property surveyed by Plan 600AN was the property described in the 1963 Conveyance.

71. During cross examination of Attorney Gilbert Thompson, he stated (see Transcript of 24 January 2020 – page 72, lines 18-25, page 73 lines 1-25 and page 74 lines 1-9):

"Mrs. Rolle:	**Am I correct in saying that as it relates to this property that is being claimed by the plaintiff, that your Computitle search results did not reveal any other document recorded in relation to this acreage?**
Mr. Thompson:	**No, not between Joseph Evans and Albert Brennen (sic).**
Mrs. Rolle:	**So, if we were using the period 1910 to 1955, there were no other recorded documents other than the documents that you would have used for the purpose of initiating your search?**
Mr. Thompson:	**Yes.**
The Court:	**Let me ask the question: Did it show any other person owning the property?**
Mr. Thompson:	**No.**
Mrs. Rolle:	**That was my next question, my Lady."** [Emphasis added]

72. Despite the forceful arguments advanced by Mr. Rodgers that there is no document before the Court, or discovered during the search, that shows how Albert came into possession of the Property, we find as a fact that the respondent's witness, Attorney Gilbert Thompson acknowledged during cross examination that the only documentary root of title which exists to the Property is the appellant's title. Put differently, there is no other documentary root of title to the Property except the appellant's.

73. Since there was no other documentary title before the Court, it seems to us that the learned judge erred in law and in fact in finding that the 1963 Conveyance was not a good root of title because it did not identify the property conveyed and/or did not contain a recognizable description of the Property.

74. It is a fact that the 1963 Conveyance does contain a recognizable description. It provides:

> **"…the Bahama Islands hereby grants and conveys to the Purchaser all that piece parcel or lot of land containing Six hundred and Sixty (660) acres more or less being a portion of a 860 acres out of tract of land granted to Joseph Evans and situated at the Settlement of Mangrove Cay Andros one of the Bahama Islands between Middle and Southern Bight more particularly described in the Will of William Henry Sweeting late of Mangrove Cay Andros which the Will is recorded in Book R. 8 at pages 418 to 424."**

75. It is clear that the description includes, among other things, the size and location of the land conveyed and the description of the land by reference to the original Crown Grant to Joseph Evans and the subsequent 1875 Will of William Henry Sweeting along with its recording reference.

76. We therefore find that the learned judge conflated the issue of the description of the land in the conveyance with the surveying question of locating the land on the ground by reference to such description.

77. We also find that the learned judge erred in law by requiring the appellant to deduce title prior to the 1963 Conveyance. Contrary to Mr. Rodger's submission, the respondent's Defence in no way impugned or challenged the validity of the 1963 Conveyance. Having found that there was no other documentary root of title other than that of the appellant and finding that the respondent's water holding tank and storage apparatus were on the Property which was properly surveyed by Mr. Ledee (which survey of the Property and Plan 600 AN were properly registered in the Department of Lands & Surveys), the judge ought to have accepted the 1963 Conveyance as the documentary root of title to the Property and proceed to investigate whether the respondent had adversely possessed the Property.

78. In rejecting the appellant's documentary root of title, we find that the learned judge ought to have given proper consideration to Section 3(4) of the CLPA which provides that:

> **"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."** [Emphasis added]

79. The effect of Section 3(4) of the CLPA has been definitively determined by the Court of Appeal in **Bannerman Town** (supra) where Allen P stated thus:

> **"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."** [Emphasis added]

80. Also, in **Collie v. The Prime Minister** [2012] 1 BHS J. No. 18, a case referred to by the appellant, Adderley J followed the Court of Appeal's decision in **Bodie and Others v Bahamas Land and Finance Co Ltd** [1979-80]1 LRB 251 who followed the case of **Bolton v London School Board** [1878] 7 Ch 766, where the Court stated as follows:

> **"… 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".**

81. Applying Section 3(4) of the CLPA and the reasoning in the aforementioned cases as well as the lack of challenge to the validity of the 1963 Conveyance, the learned judge was not entitled to require the appellant to deduce a title beyond her 1963 Conveyance. Accordingly, she erred in law.

82. We also agree with the appellant that the learned judge having found "*that the survey was properly registered with the Department of Lands & Surveys and is proof of the property surveyed therein"* erred after stating *"however it does not prove that the Plaintiff owned the Property"* since the property surveyed by Plan 600 AN was the property described in the 1963 Conveyance and the 1963 Conveyance, being a valid conveyance whose validity or efficacy was not called into question, effectively conveyed the property which the appellant inherited and ultimately conveyed onto herself by the Deed of Assent.

83. In the circumstances, we are satisfied that the learned judge's rejection of the appellant's documentary title was wrong. Grounds 9 to 14 are allowed.

Grounds 15-27: The learned judge's erroneous finding that the respondent had a possessory title

84. Mrs. Rolle submits that while the learned judge made a finding rejecting the appellant's documentary title and seemingly accepted the respondent's legal submission that it had acquired a possessory title, she did not actually make an express finding in the Judgment that the respondent had acquired a possessory title. Similarly, she did not condescend to explain in the Judgment as to when and how such possessory title arose, who the documentary title holder of the Property was (given that she rejected the appellant's documentary title), who the respondent dispossessed to acquire such title and when such possessory title was acquired by the respondent. Mrs. Rolle submits that the failure of the learned judge to make such findings was an error of law.

85. Mrs. Rolle further submits that since there was no other documentary root of title other than the appellant's, the respondent could only acquire a possessory title by virtue of having dispossessed her or her predecessor in title and, the conduct of the respondent in a) offering to purchase or lease the land and b) actually making an initial payment to the appellant for its use, meant that there could be no such adverse possession against the appellant. In addition, in its Defence, the respondent did not allege that it had dispossessed the appellant. Significantly, there is not an iota of evidence that the respondent had the intention to dispossess the appellant.

86. Mr. Rodgers relies on the 1983 Memorandum dated 14 April 1983 as evidence to support his submission that the respondent was in possession of the Property since, at the very least, 1983. Mr. Rodgers argues that (i) the appellant is not the paper title owner and she has done nothing except to present a flawed purported documentary title and; (ii) the respondent had every intention to possess the Property to the exclusion of all others since it constructed a water facility at substantial costs with the intention to remain on the Property indefinitely.

87. We start off with the 1983 Memorandum. In our opinion, the learned judge erred in relying on the 1983 Memorandum as the basis for possessory title which, taken at its highest, would only demonstrate physical possession but did not evince an intention to possess or the *animus possidendi* of the respondent to possess the Property to the exclusion of all others.

88. Thereafter, in paragraph 165 of the Judgment, the learned judge appeared to confirm that the respondent had physical possession of the Property since 1983. This is what she had to say:

> **"165. Accordingly, even if I am mistaken in finding with respect to the Plaintiff's title, the Defendant occupied the Property undisturbed and were utilizing the water tanks and water storage facility units from at least 1983 when the 1983 Memo was issued confirming their presence thereon. The Plaintiff herself acknowledged that she became the owner of the Property in 2009 which is when she became aware of the Defendants' occupation of the Property; some twenty six years later which exceeds the statutory time set for possession. The hiring of Mr. Ledee to survey the Property would not have been a sufficient act to constitute actual possession.** [Emphasis added]

89. In our view, both of these findings by the learned judge seem to relate solely to physical or factual possession of the Property by the respondent.

90. The appellant maintains that the critical component of "*the intention to possess*" is lacking to ground an adverse possession claim.

Adverse possession

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

92. In order to establish legal possession to land, two ingredients must be satisfied namely: (i) sufficient degree of custody or physical control of the land (factual possession) and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess or the *animus possidendi*). This basic proposition was re-stated by Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd and another v Graham and another**

[2002] UKHL 30 quoting Slade J. in **Powell v McFarlane** (1977) 38 P & CR 452, 470, stated at paragraph 40:

> **"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*")."**

93. In the quieting action of **In the matter of the Petition of Rushel Rowena Mcklewhite** 2011/CLE/qui/00661, a Supreme Court case referred to by both parties, the Court described the mandatory "*animus possidendi*" or "intention to possess" as defined by Slade J in **Powell** as:

> **(63) The *animus possidendi,* which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case, the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."** [Emphasis added]

94. Thus, on the basis of well settled principles, a party without documentary title, i.e. a party wishing to establish adverse possession, needs to demonstrate not only physical possession of the property but *"the intention"* to exclude all others from the land especially the documentary title owner: see also **Wallace v Nairn** [supra].

95. It seems to us that the learned judge erred in law when she placed reliance upon the respondent's 1983 Memorandum as the basis for its possessory title where, as the appellant alleges, assuming that the 1983 Memorandum related to the same Property, taken at its highest, it would only demonstrate factual possession but not the requisite intention to possess the Property to the exclusion of all others. We also observe that, during the hearing of this appeal, Mr. Rodgers was at pains to identify any evidence and/or finding of the learned

judge as it relates to the requisite intention by the respondent to possess the Property to the exclusion of all others.

96. Further, even though the learned judge made a finding rejecting the appellant's documentary title and seemingly accepted the respondent's legal submission that it had acquired a possessory title, as the appellant correctly submits, the learned judge did not condescend in the Judgment as to when and how such possessory title arose, who the documentary title holder of the Property was (given that she rejected the appellant's documentary title), who the respondent dispossessed to acquire such title and, when such possessory title was acquired by the respondent. Ultimately, the failure to do was an error in law.

97. Further, we agree with the submission advanced by the appellant that the respondent's posture of wanting to purchase or lease the Property when approached by the appellant and by the payment of the $20,000.00 for *"use of private land by the Corporation"* clearly demonstrates an intention to possess the land with the consent and approval of the owner, even if such consent and approval came at a cost. The respondent's constant offers to purchase or lease the Property (pending verification of the true owner) and the payment of the $20,000.00 could never be indicative of an intention by the Respondent to exclude the true owner and the world from the Property.

98. In paragraph 162 of the Judgment, the learned judge found that the respondent *"never accepted that the Plaintiff was the legal beneficial owner of the land."* We agree with the appellant that this shows a failure by the learned judge to properly consider the import and effect of the respondent's conduct because the respondent's request for confirmation of the appellant's title only serves to fortify the position that the respondent was not intending to exclude the owner and the world from the Property. The respondent was attempting to confirm who the owner of the Property was so that it could rightfully pay the owner for its use and was not asserting ownership or title to the Property.

99. We also agree with the submission advanced by the appellant that the respondent's request for confirmation of title or ownership was in fact an acknowledgment by the respondent that it was not the owner and had no interest.

100. As we see it, the respondent lacked the necessary intention to possess the Property in its own name and on its own behalf to exclude the world at large, including the owner with the paper title. Thus, the finding by the learned judge that the respondent had a possessory title (if she so found) is plainly wrong.

101. In our judgment, we find that the errors made by the learned judge both in law and in fact are sufficient for us to set aside the learned judge's determination of the appellant's trespass claim on the findings which are adverse to the appellant and to grant the relief claimed in the

appellant's Writ of Summons. However, for the sake of completeness, we shall address the issue of acknowledgement which was canvassed by the appellant.

Acknowledgement

102. On behalf of the appellant, it is submitted that the respondent's conduct of offering to purchase or lease the Property from her and paying her $20,000.00 as an initial payment for its use, is dispositive of any competing claims as between the parties and is also dispositive of the appellant's claim for trespass as against the respondent. Further, the respondent's conduct of offering to purchase or lease the appellant's Property from her and paying her $20,000.00 as an initial payment for its use invalidates any possible notion (a) that the respondent dispossessed the appellant or her predecessor in title (though not pleaded or alleged by the respondent; (b) that the respondent's possession of the Property was adverse to the appellant's title and (c) that the respondent had a possessory title to the Property.

103. The appellant relies on section 38 of the Limitation Act ("the Act") which provides:

> **"(1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and-**
>
> **(a) The person in possession of the land or personal property, acknowledges the title of the person to whom the right of action has accrued;**
>
> **(b) ….**
>
> **The right shall be deemed to have accrued on and not before the date of the acknowledgement or payment.**
>
> **(2) Subsection (1) shall apply to a right of action to recover land accrued to a person entitled to an estate or interest against whom time is running under section 24, and on the making of the acknowledgement that section shall cease to apply to the land."**

104. It is an established legal principle that a right of action to recover the land can only accrue where some other person is wrongfully in possession of it. If the person in possession of the land acknowledges the title of the person entitled to recover it, then the right of action for recovery of the land is treated as having accrued on the date of the acknowledgement and not at any earlier time: Section 38(1) (a).

105. Simply put, the appellant forcefully asserts that the most recent date for the accrual of her cause of action was June 2018. She relies on the quieting case of **IN THE MATTER of the Petition of Desmond Dean and Sharmaine Dean** 2020/CLE/gen/FP/000131 where the issue of acknowledgement arose. In dealing with the issue, Hanna-Adderley J cited **Browne v Perry** [1991] 1 WLR 1297, PC, an appeal to the Privy Council from the Eastern Caribbean

Court of Appeal of Antigua and Barbuda. The brief facts are that the appellant, Mrs. Browne and the respondent, Mr. Perry owned adjoining parcels of land. Mrs. Browne, by mistake, built a house on Mr. Perry's land in 1972. In 1983, she discovered her mistake and orally acknowledged Mr. Perry's title to the land. She nevertheless succeeded in her adverse possession defence to Mr. Perry's action for possession. The Court held that the acknowledgement had to be in writing if it was to start time running again for the purposes of a limitation defence.

106. In the present case, the acknowledgment by the respondent in 2018 was in writing. Since the acknowledgement of the respondent took place after the expiration of the period for adverse possession, it has the effect of resetting the clock on the adverse possession claim. In other words, the respondent will need to start the statutory period over again from the date of the acknowledgement.

107. We accept that the most recent date for the accrual of the appellant's cause of action is around 2018 and therefore, the respondent cannot claim adverse possession to the Property until 2030.

Conclusion

108. We agree with the appellant that her claim in trespass against the respondent ought to have succeeded for the following reasons:

(i) The only documentary root of title which exists to the Property is that of the appellant;

(ii) The validity of the 1963 Conveyance was not impugned or challenged by the respondent in its Defence;

(iii) The respondent, by its repeated offers to purchase or lease the Property and, by its payment to the appellant of $20,000.00 for the use of the Property, is evidence that it did not have possession of the Property which was adverse to the appellant and;

(iv) The respondent did not have the requisite intention to possess the Property to the exclusion of all others so as to acquire a possessory title.

109. Consequently, we allow the appeal, set aside the learned judge's findings which are adverse to the appellant's claim and grant, with amendments, the relief sought in the appellant's Generally Indorsed Writ of Summons namely:

(1) A Declaration that the respondent has no right, title or interest or right of occupancy and/or possession to the appellant's Property;

(2) Mesne profits for each year of the respondent's unlawful use and occupation of the appellant's Property as well as interest on mesne profits;

(3) Damages in lieu of a mandatory injunction to forthwith remove the water holding tank & related apparatus upon the Property. This is because we recognise that the respondent has been on the Property for many years and is also providing an essential service (water) to Mangrove Cay;

(4) Interest on all such sums awarded at the statutory rate of interest pursuant to Section 3 of the Civil Procedure (Award of Interest) Act 1992 and;

(5) Costs of and occasioned by the proceedings in the Court below and by this Appeal certified fit for two Counsel. Costs are to be taxed, if not agreed.

110. We would remit the assessment of damages relative to mesne profits, interest on mesne profits, and damages in lieu of an injunction to the Registrar of the Supreme Court.

The Honourable Madam Justice Charles, JA

111. I agree with the disposition of this appeal.

The Honourable Sir Michael Barnett, P

112. I also agree with the disposition of this appeal.

The Honourable Mr. Justice Turner, JA