BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2008/0142

LUCIEN CALLWOOD
URMAN CALLWOOD
GERTRUDE CALLWOOD-COAKLEY
WENDELL CALLWOOD

Claimants

-AND-

THE REGISTRAR OF LANDS

Defendant

-AND-

SHEILA CALLWOOD SCHULTERBRANDT
JOHN SCHULTERBRANDT

Objectors

Appearances:

Dr. Joseph S. Archibald QC and Ms. Anthea Smith of J.S. Archibald & Co. for the Claimants
Mrs. Joanne Roberts-Williams, Solicitor General for the Defendant
Mrs. Marie-Lou Creque of SCA Creque & Associates for the Objectors

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2010: November 23;
2011: July 18
2012: February 17

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: Lucien Callwood, Urman Callwood, Gertrude Callwood-Coakley and Wendell Callwood (collectively "the Claimants") apply to set aside an Order dated 17 April 2008 made by the Registrar of Lands ("the Registrar") wherein he denied the Claimants' application to be registered as proprietors of certain parcels of land on the basis of prescriptive title.

Background Facts

[2] The subject property of this Appeal consists of twenty-three (23) parcels of land registered as parcels 25 - 29, 31 - 44 and 48 - 51 of Block 1240A on the island of Jost Van Dyke ("the lands").[1] The parcels form a total area of approximately 65 acres and were formerly part of Parcel 2 of Block 1240A ("Parcel 2") as registered during the Cadastral Land Registration exercise in the 1970s.

[3] The original owner of the lands was James Zebedee Callwood. Upon his death in 1951 and, in the absence of a will, the land went to his six lawful children: Zephaniah Callwood, Theophilus Callwood, Keturah Callwood, Florencia Callwood, Christina Callwood and Geraldine Callwood as tenants in common in equal shares. During the Cadastral Survey exercise, and in 1974, Zephaniah Callwood filed ownership of the land for "the Heirs of Zebedee Callwood in care of Zephaniah Callwood". He died in 1977 and was survived by his wife and eleven lawful children, including the four Claimants: Lucien, Urman and Wendell and Gertrude.[2] James' son, Theophilus Callwood died in 1998. He was the father of one of the Objectors, Sheila Callwood-Schulterbrandt ("Mrs. Schulterbrandt").

[4] On 26 April 2001, the Claimants applied to be registered as proprietors of the lands by prescription. The Land Register listed the owners of the lands as:

Sheila Callwood	Parcels 25, 34 & 40
Sheila Callwood Schulterbrandt	Parcel 30
Sheila Schulterbrandt and John Schulterbrandt as Trustees	Parcels 49 & 50
Beatrice Innis Orr	Parcels 26, 35 & 39
Sheradina Callwood alias Geraldine Callwood	Parcels 27, 32 & 38
Doris Kelly	Parcels 28, 36, & 41
Khari Damani Herbert	Parcel 48
Gregory Callwood	Parcel 51

[5] On 18 June 2001, a notice of the application for registration by prescription was placed in a local newspaper. In response, objections were filed by Mrs. Schulterbrandt, John Schulterbrandt, Myrna Herbert on behalf of Khari Herbert, Ivor Stridiron on behalf of Doris

[1] Statement of Question prepared by the Registrar pursuant to Registered Land Act, S.147(2); see Trial Bundle at TAB 7.
[2] Because the parties all share the same last name, they will be referred to individually by their first names.

Kelly and Paul Callwood (collectively "the Objectors"). The Claimants and the Objectors were both represented by Counsel at the hearing before the Registrar.

[6] On 17 April 2008, the Registrar denied the Claimants' application for title based on prescription. By Fixed Date Claim Form filed on 15th May 2008, the Claimants approached this court for an order that:

1. The order of the Registrar, denying the Claimants' application for prescriptive title of the lands, made on 17 April 2008, be set aside;

2. The Claimants have been in exclusive, peaceable, open and uninterrupted possession of the disputed parcels without permission of any person lawfully entitled to such possession for a period of twenty years; and that the Registrar do register the Claimants as the proprietors of the said parcels of land;

3. Costs and further or other relief as the court deems just.

[7] Trial in the High Court began on 23 November 2010. Upon the closing of the Claimants' case, the matter was adjourned on several occasions to enable the Objectors, who were in attendance, to retain Counsel and participate in the proceedings. Trial resumed on 18 July 2011. At the close of the trial, the parties agreed that the court should reserve judgment but permit them a final opportunity at settlement negotiations. Sometime in October 2011, Dr. Archibald QC, who appeared as Counsel for the Claimants, indicated that negotiations had failed and requested delivery of the reserved judgment.

Hearing before the Registrar

[8] The Claimants and two witnesses, their nephew, Edward Freeman and contractor, Melvin Hodge, gave testimony before the Registrar. Their case is that they had been in peaceable, open and uninterrupted possession by actual occupation, fencing, house building, residence, cultivation, animal rearing and road works on the lands, and that they had the intention to possess exclusively; such possession and occupation commencing before the Cadastral Survey took place.

[9] Only two Objectors, Mrs. Schulterbrandt, and Myrna T Herbert, on behalf of her son Khari Damani Herbert, in respect of Parcel 48, testified before the Registrar. Ivor Stridiron, a USVI Attorney, was granted leave to appear on behalf of Beatrice Orr and the estate of Sheradina Chinnery nee Callwood. He participated fully during the hearing before the Registrar. Representation was also made at the hearing on behalf of a registered proprietor, Doris Kelly.

[10] Stripped to its bare essentials, the Objectors' case, based largely on the testimony of Mrs. Schulterbrandt, was that (i) they were inheritors of all of Parcel 2 through James Zebedee Callwood whereby his six children were entitled upon his intestacy to be the equal owners of Parcel 2; and (ii) the Claimants had entered onto the lands with permission but they were aware that it was "family land" to be subdivided. Mrs. Schulterbrandt further testified that at least some of the Claimants participated in family meetings to discuss the subdivision; that they were aware of the survey commissioned by the family and agreed to the subdivision plan chosen by the family. At no time did they make it clear that they were claiming the lands.

The Registrar's Decision

[11] In his decision, the Registrar focused on the testimonies of the Claimants. He stated that "One area of testimony which was relied on was the cutting of the road across the subject properties. The thrust of the various testimonies by the four [Claimants] were (i) who commissioned the cutting of the road (ii) who paid for the cutting of the road and (iii) when and where the road was cut. Testimony was also heard from Mr. Melvin Hodge, the owner of a heavy equipment business who the [Claimants] said they had hired to cut the road through the property. *"The testimony of the [Claimants] and the Witnesses with regards to the cutting of the road seems vague as to the extent of the cutting of the road and as to whether the road cut was leading to a specific location on the land that is, to a house spot*."

[12] The Registrar next referred to the evidence as it related to the surveying of the lands for subdivision and the subsequent transfers noting that "*the [Claimants] deny any knowledge of the meetings that were held to discuss the division of the land among the beneficiaries to the estate and claim that they were not consulted about the subdivision of the land*". He

states that "it is to be noted that the [Claimants'] mother and sister as administrators of their deceased father's estate were authorized to make decisions". He also noted that the Claimants had renounced their rights to administer the estate.

[13] The Registrar seemed to conclude that meetings were held at different times to discuss the way forward in apportioning the family estate amongst the beneficiaries. He expressed disbelief that no person or persons representing the Claimants' father's interest participated in these meetings, noting that testimony from the Objectors stated that either the two administrators or other family members of the Claimants had been present. He also expressed disbelief that none of the Claimants' were aware of the undertaking to survey and to subdivide Parcel 2.

[14] Additionally, the Registrar determined that the Claimants' father, Zephaniah Callwood had shown no intention to prescribe the property in question because at the time of the Cadastral Survey, he filed ownership of the property on the Cadastral Claim Form "for the Heirs of Zebedee Callwood in care of Zephaniah Callwood". Accordingly, the Registrar concluded that the Cadastral Survey and Registration exercise interrupted any prescriptive rights that might have accrued to the Claimants' father and subsequently, onto them. He further concluded that the surveys carried out between 1982 and 1986 to subdivide the estate interrupted the occupation and possession claimed by the Claimants.

[15] The Registrar further stated that "the joint Affidavit of the [Claimants] at Clause 13 states: "*That we have been cultivating portions of Parcels 35 and 36 for more than 35 years. In fact, we are still farming on those two parcels." The combined area of parcels 35 and 36 is approximately 16 acres. The testimonies of the [Claimants] did not provide any evidence as to what portion of parcels 35 and 36 they occupied. Therefore claiming the entire parcel as is implicit in their application is beyond reason. The [Claimants] also made similar claims for parcels indicating that they either cultivated, burned coal or fenced various parcels which encompassed a large acreage of land. Again, no evidence was produced to show that those parcels were occupied [of][sic] possessed in their entirety*."

Grounds of appeal

[16] The Claimants advanced fourteen Grounds of Appeal, many of which overlap. Fundamentally, they raise the following issues namely:

1. Did the Registrar err in failing to conduct a site visit?

2. Did the Registrar err in finding that the Cadastral Survey, the survey commissioned by the family, the subdivision and subsequent transfers constituted interruptions in the period of occupation and possession of the Claimants?

3. Did the Registrar err in his determination that the Claimants had failed to establish occupation and possession of the parcels in dispute?

4. Did the Registrar fail to carry out a proper judicial hearing of the claim?

Failure to Conduct Site Visit

[17] Ground 12 of the Appeal deals with the issue of site visit. The Claimants is aggrieved that the Registrar did not visit the site of the lands. I shall address this issue first as it can be dealt with shortly. In Sylvia Maduro-Dale v Registrar of Lands,[3] Joseph-Olivetti J had to deal with a similar complaint. I can do no better than to gratefully adopt what the learned judge had to say at paragraph 7 of the Judgment:

> "As far as I can determine, on my perusal of the Act and the Registered Land Rules, there is no provision which requires the Registrar to visit the disputed land. The procedure for dealing with an application for prescriptive title is governed by section 137 and it is patently silent on visits to the locus. In addition, as far as the notes of evidence and the submissions before the Registrar disclose, the Claimants did not request a visit. And, finally, the question of whether or not to visit the locus is a matter for the discretion of the Registrar as the sole arbiter. He could properly refrain from doing so if in his view a visit would not assist. Having regard to the issues before him a visit to the land would not have assisted and therefore he did not act improperly by not visiting the site. This ground of appeal therefore fails."

[18] In the instant matter, the Registrar was of the view, that the Claimants' prescriptive rights had been interrupted by the surveys and subdivisions which had taken place. Accordingly, he must have concluded that a site visit would not have assisted him in the resolution of

[3] BVIHCV 2008/0314 (Joseph-Olivetti J), Judgment 10 June 2010.

the issue. In addition, none of the parties requested a visit to the lands and it was properly within the Registrar's discretion not to do so. This ground of appeal fails.

Interruption of Possession

[19] Grounds 3, 4 and 8 complain that the Registrar:

(3) wrongly took into account matters which he considered as interruption of possession which were not in fact or in law interruptive events set out in Section 136(6) of the Registered Land Act, Cap 229 ("the Act");

(4) wrongly concluded that the Cadastral Survey 1974, alleged Surveys of 1982 to 1986, and registrations of title on the basis of those surveys interrupted prescriptive rights and / or defeated the claims of the Claimants, contrary to the Privy Council decision in Graham-Davis v Charles[4] which formed part of the written submissions referred to in Exhibit C and;

(8) wrongly held that alleged surveys of 1982 to 1986 and family meetings defeated the prescriptive claims of each and all of the Claimants when no such surveys or family meetings were put to each of the Claimants in cross-examination.

[20] I shall address Grounds (3) and (4) now. Ground 8 will be dealt with later under the sub-heading: "Family Meetings". Learned Counsel for the Objectors, Mrs. Creque fought hard to justify the Registrar's findings. She argued that the action of Theophilus Callwood in walking the land with Government surveyors during the Cadastral Survey exercise constituted a physical entry upon the land that would have interrupted the Claimants' possession. Furthermore, she argued that the entry also constituted a legal proceeding whereby land was being determined for the legal record under section 36(6)(c) of the Act. Mrs. Creque next argued that the subsequent survey by Julian Skelton, commissioned by the owners, ratified and filed with the relevant authorities, the subsequent partition, issue, execution and transfer of new titles all constituted legal proceedings asserting rights of ownership which would have interrupted the Claimants' possession. She submitted no authorities in support of her assertions.

[21] Section 136(6) of the Act defines acts which can interrupt possession. It states that possession shall be interrupted (a) by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the

[4] (1992) 43 WIR 188 – 200 at 198 g-j

possessor thereby loses possession; or (b) by the institution of legal proceedings by the proprietor of the land to assert his right thereto; or (c) by any acknowledgment made by the person in possession of the land to any person claiming to be the proprietor thereof that such a claim is admitted.[5]

[22] Family meetings are incapable of constituting an interruption within the meaning of 136(6) unless there was some acknowledgement made by the person in possession that the proprietor's claim was admitted. The evidence here yields no such acknowledgment.[6]

[23] If the owner is not in possession of the land, neither the registration of title nor the transfer of registered title affect prescriptive rights which have been acquired or are in the process of being acquired as overriding interests: see section 28 of the Act and Graham-Davis and Another v Charles and Others[7]. The institution of "legal proceedings" refers only to the commencement of litigation by the owner to recover possession of the disputed land. The occurrence of a cadastral survey or other surveys or the transfer of land by one title holder to a new title owner, do not constitute "legal proceedings" to assert his right thereto by an owner who has lost possession of the land. Nor does the entry of the title-holder with surveyors constitute a physical entry capable of interrupting possession within the meaning of section 136(6)(a).

[24] In my opinion, the Registrar erroneously held that the surveys and family meetings are acts capable of interrupting possession. This is a patent misdirection. The Learned Solicitor General conceded that the Registrar misdirected himself. Grounds 3 and 4 of the Appeal are allowed.

Grounds 1, 2 and 9 – failure to determine possession

[25] At page 4 of his decision, the Registrar found that based on the Affidavits and testimonies, the Claimants "have failed to show that they occupied and possessed the entire former parcel 2 or most of it as it is now divided into separate parcels." He referred to the Joint Affidavit of the Claimants wherein they stated that "we have been cultivating

[5] Registered Land Act, s. 136(6).
[6] For more details, see paragraph 51 et seq of judgment.
[77] (1992) 43 WIR 188.

portions of Parcels 35 and 36 for more than 35 years. In fact we are still farming on those two parcels." The Registrar continued:

> "The combined area of parcels 35 and 36 is approximately 16 acres. The testimonies of the [Claimants] did not provide any evidence as to what portion of parcels 35 and 36 they occupied. Therefore, claiming the entire parcel as is implicit in their application is beyond reason. The [Claimants] also made similar claims for parcels indicating that they either cultivated, burned coal or fenced various parcels which encompassed a large acreage of land. Again no evidence was produced to show that those parcels were occupied of possessed in their entirety."

[26] As a result of this finding, the Claimants alleged that (1) the Registrar has not made any findings of fact on their evidence and their witnesses in relation to their possession of the parcels, including un-contradicted evidence of fencing off; (2) he failed to take into account that the evidence of each of the Claimants as to prescriptive occupation, fencing-off, and possession was virtually unchallenged and un-contradicted in cross-examination; and (3) he misconstrued the evidence of the Claimants and their witnesses as it relates to the cutting of roads on the lands which they occupied for prescriptive claim.

The law

[27] Section 135 of the Act stipulates "the ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twenty years." Thus, every element of the section must be satisfied by a person claiming prescriptive title.

[28] Section 136(1) provides that "where it is shown that a person has been in possession of land…at a certain date and is still in possession … thereof, it shall be presumed that he has, from that [certain] date, been in uninterrupted possession of the land…until the contrary be shown."

[29] The application for prescription was made on 26 April 2001. Accordingly, the question which must be answered is whether the Claimants entered into possession of the land on or prior to 26 April 1981.

[30] The word 'possession' in the Act is to be given its ordinary meaning. The applicable principles on what "constitutes 'possession' in the ordinary sense of the word" are those stated by the House of Lords in JA Pye (Oxford) Ltd. v Graham[8] and restated by Slade J in Powell v McFarlane[9] and the Court of Appeal in Buckinghamshire County Council v Moran[10]. See also: Foster J [Ag] in Donovan-Carty and ors v Donovan and ors.[11] at para. 24 and George-Creque J in Carty v Edwards.[12]

[31] As Lord Browne-Wilkinson in Pye put it:

> "There are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession".[13]

[32] Now, the questions which arise for determination are (1) did the Claimants have factual possession of the lands; and (2) did they have the intention to possess?

[33] In Pye, Lord Browne-Wilkinson, citing Slade J. in Powell continued (at page 436):

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed…Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so." [Emphasis added]

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[8] [2002] UKHL 30; [2003] 1 AC 419 (HL), 435C.
[9] 38 P & CR 452.
[10] [1990] Ch 623.
[11] **Olivia Donovan-Carty and Caroline Donovan v Rosalie Donovan and Renardis Donovan** BVIHCV2006/316 (Foster J[Ag]), Judgment 20 April 2009.
[12] **Jeffrey Adolphus Carty and Raphael Edwards** AXAHCV 2003/0045, (George-Creque J), 15 January 2007.
[13] [2003] 1 AC 419, per Lord Browne-Wilkinson at 435 (F-G)

[34] It is admitted by the Claimants that they are claiming the lands in their own rights and not claiming any inheritance from their father.

[35] Learned Queen's Counsel, Dr. Archibald submitted that the Registrar found that the Claimants were in possession of the lands when the Cadastral Survey took place in 1974 and that the survey interrupted their possession. Accordingly, they were in possession of the lands in 1974. Attractive though this argument is, the Claimants, in their Joint Affidavit, stated unequivocally that after their father's death in 1977, they have been exercising all acts of ownership in relation to the said lands. What is clear is that they were not in possession of Parcel 2 during the Cadastral Survey in 1974.

Building and occupation

[36] The Claimants asserted that after their father's death in 1977, they have been exercising all acts of ownership. They claimed to have continued to cultivate a portion of the lands with a wide variety of crops, fenced portions, erected houses and arranged for the cutting of a road without the permission of anyone.

[37] Lucien testified that he was applying because of long possession from 1965.[14] In 1965, he constructed a bar on a concrete foundation. The bar was knocked down by Hurricane Hugo. However, he lives in a house now 10 feet from the former foundation of the bar. The house is located on what is now Parcel 29 and has been there from 1979. Wendell gave evidence that he has had a dwelling house and a business on the lands since 1980 but he had been in occupation since 1977 when his father passed. Gertrude said she has been on Parcel 2 since 1980.[15] She has constructed three buildings, a boutique, a bar, and a restaurant. Urman said he had been on the land for over 30 years and that d'Auvergne J positively found he had been on the land since 1971.[16]

[38] With the exception of Wendell, whose evidence on building was directly challenged, there was no significant challenge to the Claimants' evidence on building and occupation. The

[14] See TAB 8 of Trial Bundle: Registrar's Notes, page 4-5.
[15] Registrar's Notes of Evidence, page 13.
[16] BVIHCV 2000 / 0039 (d'Auvergne J), Judgment 23 August 2004, at para. [48].

principal objector, Mrs. Schulterbrandt testified that Lucien built around the survey period and that Urman had been living at White Bay "a good while."[17] She said that he had a house on Parcel 29. She was not sure when Urman's house was built. Late 60's or early 70's. There is some discrepancy as to the exact date when Gertrude entered but it appeared to be sometime in the early 1980's, prior to the construction of her buildings on Parcel 30. In cross-examination by Dr. Archibald, Mrs. Schulterbrandt stated:

> "I can't remember when I first saw the [Claimants] on the land. Cadastral was in the 70s. I saw Wendell on the land. We went to show the surveyors the land together. I did not see Wendell on the property. Yes, he was with my father during the Cadastral Survey."[18]

[39] It is clear that Wendell also had constructed a building or buildings in the vicinity of what is now either Parcel 26 or 27. The time of such construction was contested. Wendell himself gave inconsistent evidence on his own behalf as to exactly when the buildings were constructed and the use to which they were put. The Registrar did not make a finding as to which of the witnesses' evidence he preferred. However, since Mrs. Schulterbrandt herself testified that Wendell was on the land during the Cadastral survey, I will accept his claim that he was in occupation since 1977 and constructed buildings in the early 1980s; one in 1980 and the other in 1982.

[40] Mrs. Schulterbrandt's own evidence is that no one besides the Claimants was in occupation of Parcel 2 after the 1970s. She further testified that she had been living in White Bay for the past three years. Before that she lived in St. Thomas. As a child, she had frequented Jost Van Dyke with her father. In the 1970's, she lived in White Bay with her father, husband and children in her grandfather's house which was on Parcel 30.

[41] Under cross-examination by Dr. Archibald QC, Mrs. Schulterbrandt testified that Claude Callwood, the Claimants' brother, left the BVI in the 60s and did not return in the 70s or 80s. Their cousin, Ralda Peterson, Aunt Christina Callwood's daughter, lives in the US and she did not remember her living in the BVI in 80s, 90s, or 2000s. She said that Aunt

[17] Registrar's Notes of Evidence, page 22.
[18] Registrar's Notes of Evidence, page 33.

Keturah Callwood lived in the BVI but she couldn't remember the time. She claimed that she had occupied land in JVD but during the time of family meetings for the survey Keturah was not present and "we were rep for them". More than likely Beatrice Orr lived in the US in 70s, 80s and 90s, she still lives there. She claimed that aunt Geraldine Callwood lived partly in the US; partly occupied the land in 70s and 1980s. She died in the States. Doris Kelly never lived in Jost Van Dyke in the 70s, 80s or 90s.

[42] Thus, the uncontroverted evidence before the Registrar was that Urman had been in occupation since 1971; Wendell since 1977, Lucien since 1979 and Gertrude since 1983.

Acts of user

[43] The lands are often referred to in three parts: beachfront (Parcels 25 -30), middle (Parcels 38-43, 47, 50 and 51) and hillside (Parcels 32-36, 47-49). The Claimants' buildings are located along the beachfront. They said that during their youth they used to rear cattle with their father on the parcels now known as Parcels 32, 33, 34, 35, 36 and 49. They used to cultivate portions of Parcels 35 and 36 for more than 35 years and were still farming on those two parcels. They used to plant pigeon peas, bananas, potatoes, okras on Parcels 41 and 42; reared goats on Parcels 38, 39, 40, 50 and 51; burned coal on Parcel 25 and fenced Parcels 36 and 49.

[44] In addition, Lucien erected a house on a portion of Parcel 27 and 28. Urman erected a house on a portion of Parcels 29 and 30, a portion is fenced. Gertrude erected a house on a portion of Parcel 30 in 1980 and Wendell erected a dwelling house on a portion of Parcel 27 during 1980.

[45] Then in 1998, without asking anyone's permission, they gave instructions to Mr. Hodge to cut a road through the land.

[46] The Claimants' evidence on user, in particular, animal rearing and cultivation was largely unchallenged. Despite the fact that this was the thrust of the Claimants' appeal, neither Mrs. Williams-Roberts nor Mrs. Creque sought to challenge the evidence before this court.

[47] Thus, there was sufficient evidence before the Registrar for him to find that the Claimants entered into possession of the lands in or about 1977 and were building, planting, rearing animals, burned coals and fenced-off portions of the lands thereby exercising a sufficient degree of physical custody and control.

Intention to Posses

[48] In addition to factual possession, the Claimants must also demonstrate the intention to possess; that is, requiring an "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." [19]

[49] Referring to Moran case,[20] Lord Browne-Wilkinson accepted as "manifestly correct" the proposition that: "what is required is "not an intention to own or even an intention to acquire ownership but an 'intention to possess.'"

[50] Then, Slade J in Powell stated as follows:

> "The courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.[21]

[51] And Lord Hutton in Pye opined:

> "I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not

[19] per Slade J in Powell and cited in **Pye** [2003] 1 AC 419 at 437C-D.
[20] (1988) 86 LGR 472, 479 and cited in **Pye** at page 436H.
[21] Powell v McFarlane (1978) 38 P&CR 452 Slade J said, at page 472

> have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.[22]

[52] Dr. Archibald QC emphasized that fencing off is the strongest possible evidence of possession. This is correct but in order to be treated as evidence of possession, "the erection of fences must be for the purpose of keeping people out of the land and not merely for the purpose of keeping animals in or preventing them from straying."[23] In the instant case, it is no more than equivocal.

[53] The Claimants' long occupation and user would normally lead to the conclusion that they had the necessary *animus possidendi*. However, the question arises whether the paper-title owner has adduced evidence that points to a contrary conclusion? Were the acts of the Claimants equivocal or open to more than one interpretation? Did their acts in relation to the lands make it clear or 'perfectly plain' that they had the requisite intention to possess – that they were using all of the lands in the way a full owner would and in such a way that the owner was excluded?

Family land to be subdivided

[54] The evidence of the Objector and paper-title holder, Mrs. Schulterbrandt is that the Claimants were aware that it was family land to be subdivided. She testified that there were several family meetings to discuss the subdivision of Parcel 2. Some of these meetings took place at lawyers' offices. The family came to an agreement on subdivision. Surveys were commissioned and the land was subdivided and registered. She testified that the Claimants were aware of the meetings, surveys, subdivision plan and subsequent transfer of title and at no time made objections or made it clear to anyone that they were claiming the land as their own possession.

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[22] Page 447.
[23] Long and others v Sava [2007] EWHC 2087 (Ch), para. 62 – 65.

[55] Mrs. Schulterbrandt further testified that there were discussions in the 1980's about partition. She said that Gertrude and Urman participated in the meeting. They did not protest the lands belong to them or they were in possession.

[56] She stated that "Uncle Zephe told Urman not to build concrete structure as it was family land to be subdivided…I told Urman the land is family land and was being subdivided and not to build concrete structure ."

[57] About Lucien, Mrs. Schulterbrandt said: "Daddy said yes, but he must remember that land was being subdivided."

[58] And about Wendell during the Cadastral Survey, Mrs. Schulterbrandt said:

> "Wendell was there. Urman was there but he disappeared. Wendell did not say anything about ownership of land. This was the family estate. None of the [Claimants] objected to survey of land."

[59] Before the Registrar, neither Lucien nor Wendell were asked about their attendance at family meetings to discuss the subdivision of the family land. Gertrude admitted to attending a meeting at Dancia Penn & Co. but said that she does not recall who else attended nor does she recall any agreement being reached. When asked, Urman said he did not recall attending any family meetings.

[60] In relation to the surveys conducted by Julian Skelton and the subsequent subdivision of the land as agreed by the family, Lucien said he was aware of the survey but he was not in favour of it, nor was he in favour of the subdivision. Wendell said that he did not agree to any subdivision.[24] He said that he was on the land at the time of the survey but was not aware when Mr. Skelton came and what he came to do. He denied any knowledge that his mother had authorized the subdivision of Parcel 2.

[24] Registrar's Notes, page 9.

Court's analysis

[61] It is my firm view that the Registrar misdirected himself when he failed to make a determination in respect of the individual parcels of lands in the application. In particular, the evidence clearly showed that the Claimants have collectively occupied the beachfront parcels where they have constructed their buildings before 26 April 1981 and to the exclusion of all others, including the paper owner.

[62] With respect to the other parcels of land, I am of the view that the evidence of user provided in relation to the size and scale of the land does not clearly demonstrate a sufficient degree of sole user and possession of the middle and hillside sections of Parcel 2.

[63] "Acts of possession done on parts of a tract of land to which a possessory title is sought may be evidence of possession of the whole"[25]: see the Privy Council decision of Higgs and another (substituted for Clotilda Eugenie Higgs (deceased) v Nassuvian Limited.[26] However, the acreage claimed here is 65 acres. In Cobham v Frett, a Privy Council decision from this jurisdiction, the claimant sought to recover possession of a 1.5 acre parcel of land in Josiah's Bay from the defendant. The defendant who owned the adjoining parcel counterclaimed for prescriptive title. The acts of user relied on as indicating possession included the cutting down of trees, the preparation of charcoal, the grazing of cows, the picking and selling of sea grapes, fishing in the pond and from to time taking loads of sand for building purposes. The Privy Council upheld the trial judge's decision that the acts of user failed to demonstrate a sufficient degree of sole user and possession.

[64] Some of the dicta in Cobham v Frett[27] will need to be treated with caution, in light of the principles subsequently elucidated in Pye. In particular Lord Browne-Wilkinson made it clear and it was approved by the Privy Council in Wills v Wills,[28] that there is no need for

[25] Higgs and another
[26] [1974] UKPC 24 (14 October 1974)
[27] [2000] UKPC 49.
[28]

the acts of the squatter to be "inconsistent" with the intentions of the paper owner in order to prove the necessary intention to possess.

> "The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy led directly to the heresy in the Wallis's Cayton Bay line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory reversal but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases." [29]

[65] Despite the inconsistencies of the evidence on subdivision, it appeared to me that all of the Claimants had knowledge that Parcel 2 was family land to be subdivided. In fact, an application for subdivision was made in 1988. In his decision, the Registrar stated that "*I believe that meetings were held amongst the beneficiaries of the estate with regard to the subdivision of the land and finally the transfer to the various beneficiaries*…."

[66] The Claimants' case rests solely on the fact of their sole and exclusive occupation of the lands from the death of their father up until the time of their application for title. But occupation alone is not enough. The law requires possession. With the exception of the parcels where the Claimants constructed their buildings, the acts of user on the rest of the land – cultivation, animal rearing, burning of coal, fencing for cattle etc., rearing of goats - are equivocal at best. They do not evince an intention that would have been manifest to the owner, if he had attended upon the land that a trespasser was in possession and

[29] [2003] 1 AC 419 at 438B-D.

intended to maintain possession against the whole world including the owner. See: Topplan Estates Ltd v Townley[30].

[67] The Registrar made a finding of fact on the evidence of possession. However, he misdirected himself when he failed to make a determination in respect of the individual parcels in issue for determination. The Claimants grounded their claim in their historical occupation of Parcel 2 but it is clear that their application refers to the individual parcels claimed and it should have been considered on that basis. Ground 1 of the appeal is allowed. The Registrar misconstrued the evidence as to the cutting of roads thus Ground 9 of the appeal is allowed.

Failure to conduct a proper judicial hearing

[68] Grounds 2, 5, 6, 7, 10, 13 and 14 are dismissed. I refer again to Sylvia Maduro-Dale v Registrar of Lands.[31] The learned judge said:

> "But, from this simple omission to refer expressly to the submissions, can one imply that the Registrar did not consider them? I think not as it would be to deem the Registrar wholly unprofessional and wanting in his approach which is certainly not borne out when one considers the entire process of adjudication employed by the Registrar as reflected in the notes of evidence and in his written decision. Here one can apply the well known maxim, *omnia praesumptur rite esse acta*."

[69] Ground 8 is also dismissed. The Claimants were not all asked about family meetings but they were all cross-examined about their occupation during the surveys. I also note CPR 60.8 states that the court is not bound to allow an appeal because of (a) a misdirection or (b) the improper admission or rejection of evidence; unless it considers that a substantial wrong or a miscarriage of justice has been caused.

Conclusion / Order

[70] For the fore-going reasons, I find that the Claimants have been in exclusive, peaceable, open and uninterrupted possession of Parcels 25, 26, 27, 28 and 29 of Block 1240A Jost Van Dyke Registration Section for a period of twenty years. They are therefore entitled to

[30] [2004] EWCA Civ 1369.
[31] BVIHCV 2008/0314 (Joseph-Olivetti J), Judgment 10 June 2010, para. 8.

be registered as the proprietors of those parcels of land and I hereby order the Registrar to do so.

[71] With respect to the remaining parcels, 31- 44 and 48- 51 of Block 1240A Jost Van Dyke Registration Section, I am satisfied that, in light of the evidence adduced, the Registrar's findings that he believed that meetings were held amongst the beneficiaries of the estate with regard to the subdivision of the land cannot be faulted.

[72] From that finding, the Claimants were cognizant that the lands were "family land" to be subdivided even when they caused the construction of the road in 1998. In my opinion, the necessary intention to possess the lands in its entirety was wanting. The Claimants' occupation of the beachfront would have been visible to all persons entering the land but at no time did they assert to persons entering the lands to survey that they were in exclusive occupation or possession on the entire Parcel s. As such, the Appeal with respect to those parcels of lands is dismissed.

[73] Given the outcome in that both the Claimants and the Objectors were successful, I will make no Order as to Costs.

Indra Hariprashad-Charles
High Court Judge