EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2012/0008

BETWEEN:

[1] LUCIEN CALLWOOD
[2] URMAN CALLWOOD
[3] GERTRUDE CALLWOOD-COAKLEY
[4] WENDELL CALLWOOD

Appellants

and

[1] THE REGISTRAR OF LANDS
[2] SHEILA CALLWOOD-SCHULTERBRANDT
[3] BEATRICE INNIS ORR
[4] ESTATE OF SHERADINA CALLWOOD ALIAS GERALDINE CALLWOOD (DECEASED)
[5] ESTATE OF DORIS KELLY (DECEASED)
[6] ESTATE OF KETURAH CALLWOOD (DECEASED)
[7] ESTATE OF THEOPHOLOUS CALLWOOD (DECEASED)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario F. Michel — Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer — Justice of Appeal [Ag.]

Appearances:

Mr. Sydney Bennett, QC and with him, Ms. Anthea Smith for the Appellants
Ms. Jo-Ann Williams-Roberts for the Registrar of Lands
Mr. Dave Marshall for Sheila Callwood-Schulterbrandt, the second Respondent

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2016: November 25;
2017: December 12.

Civil appeal – Application for registration as proprietors of land by prescription – Section 135(1) of the Registered Land Act – Whether appellants' occupation and use of the disputed parcels of land satisfy the requirements of prescriptive ownership – Factual

possession – Intention to possess – Role of appellate court in reviewing findings of fact of a lower court – Concurrent findings of fact of lower courts

The appellants are the grandchildren of James Zebedee Callwood ("Zebedee Callwood") who was the owner of a 65-acre parcel of land known as Parcel 2 Block 1240A Jost Van Dyke Registration Section ("Block 1240A"). He died intestate leaving six children who owned the land as tenants in common in equal shares. After registered land ownership was introduced into the British Virgin Islands in 1974, a land survey exercise was carried out. Subsequently, one of Zebedee Callwood's sons, Zephaniah Callwood, applied for Parcel 2 to be registered in the names of the heirs of Zebedee Callwood. As a result, Parcel 2 was registered in the names of the six children of Zebedee Callwood. In 1977, Zephaniah Callwood died and was survived by his wife and eleven children, including the four appellants.

Parcel 2 was subdivided and the appellants applied to the Registrar of Lands ("the Registrar") to be registered as proprietors of parcels 25-44 and 48, 49, 50 and 51 of Block 1240A on the basis of prescriptive title, pursuant to section 135(1) of the **Registered Land Act**, Cap. 229, Revised Laws of the Virgin Islands 1991. The second named respondent, Sheila Callwood-Schulterbrandt is the daughter of Theopholous Callwood, another son of Zebedee Callwood. In the proceedings before the Registrar, she objected to the appellants being registered as proprietors of the relevant parcels on the basis of prescriptive title. The Registrar denied the appellants' application for registration, and found that a cadastral survey and the registration exercise undertaken by the family interrupted any prescriptive rights that might have accrued to Zephaniah Callwood and subsequently, onto the appellants.

The appellants appealed against the Registrar's decision to the High Court. The appellants argued, inter alia, that the Registrar erred in finding that they had failed to establish occupation and possession of the parcels in dispute. The judge allowed their appeal in part, holding that the appellants had been in exclusive, peaceable, open and uninterrupted possession of parcels 25-29 of Block 1240A for a period of twenty years which entitled them to be registered as the proprietors of those parcels of land. However, with respect to the remaining parcels 31-44 and 48-51 of Block 1240A ("the disputed parcels"), the judge affirmed the Registrar's decision and refused registration.

The appellants further appealed to this Court against the decision of the judge refusing registration of the disputed parcels. The appellants argued that: (i) the judge erred in her findings of fact in relation to the appellants' use of the disputed parcels; (ii) the appellants' activities on the disputed parcels should have been considered in a comprehensive manner and not merely separated; and (iii) the totality of the appellants' activities on the disputed parcels satisfy the requirements of prescriptive ownership. The appellants claimed that their occupation and use of the disputed parcels by actual occupation, fencing, animal rearing, and construction of a road demonstrate a sufficient degree of physical custody and control over them. Further, such occupation and use demonstrates the intention to exercise that custody and control for themselves and for their own benefit.

On the other hand, the respondents argued that the appellants' occupation and use of the disputed parcels are equivocal and insufficient to establish an intention to possess the entire 65-acre parcel 2, and consequently does not satisfy the requirements of prescriptive ownership. Further, that there was in any event an intention, if not agreement, expressed at family meetings to subdivide the lands.

Held: dismissing the appeal and ordering that the appellants pay the costs of the respondents, to be assessed in default of agreement, that:

1. The function of an appellate court is not to substitute its own views for those of the court below. In the absence of some other identifiable error, such as a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that the trial judge's decision cannot reasonably be explained or justified. Further, it is the well-established practice of the Privy Council not to interfere with concurrent findings of fact of two lower tribunals. The practice is not cast-iron, but it will be departed from only in cases of a most unusual nature. In the instant case, the Registrar was in effect the trial judge or the adjudicator at first instance, and the judge in the High Court was performing an appellate function. Therefore, the settled principle is no less applicable to the appeal before this Court.

   Sandra Juman v The Attorney General of Trinidad & Tobago and Anor [2017] UKPC 3 applied; **Henderson v Foxworth Investments Ltd** [2014] 1 WLR 2600 applied; **Devi v Roy** [1946] AC 508 applied; **Central Bank of Ecuador v Conticorp SA** [2015] UKPC 11 applied.

2. 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. There are two elements necessary for legal possession: (i) a sufficient degree of physical custody and control ("factual possession"); and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit. Without the requisite intention, in law there can be no possession. To establish factual possession, it must be shown 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.

   Section 135 of the Registered Land Act, Cap.229 of the Revised Laws of the Virgin Islands 1991 applied; **JA Pye (Oxford) Ltd v Graham** [2001] UKHL 30 applied; **Powell v McFarlane** (1977) 38 CP & Cr 452 applied.

3. Although it is possible that the acts of possession of only part of a parcel of land can be evidence of possession of the whole, the evidence in this case falls short of demonstrating factual possession of the whole of parcel 2. None of the evidence demonstrated that the entirety of parcel 2 was entirely or partly used for cultivation

and partly for animal rearing, either intermittently or continuously. The evidence revealed that the extent of the fencing was limited and done for the purpose of keeping the animals in, and not for keeping people out. As it relates to the construction of a road, there is no evidence of the appellants excluding anyone from its use. In any event, the cutting of the road does not advance the appellants' case because doing so did not, and was not shown to, affect adversely the rights of the registered owners. Further, neither the survey nor the family meeting served to stop the period for prescriptive title from running, but weighed against the appellants' case that they were in exclusive, peaceful, open and uninterrupted possession.

Higgs & Anor v Nassauvian Ltd [1974] UKPC 24 considered; **Long v Suva** [2007] EWHC 2087 (Ch) applied.

4. Taken individually and cumulatively, the appellants' acts of user do not conclusively demonstrate the required intention to possess the parcels of land in question. The appellants have not demonstrated that the judge has made a material error in law, or made a critical finding of fact which has no basis in the evidence, or reflects a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, which would allow this court to interfere with the findings of fact made by her. Therefore, the appellants' appeal against the decision of the judge, refusing registration of the disputed parcels, must fail.

JUDGMENT

[1] **STOLLMEYER JA [AG.]**: This appeal concerns a 65-acre parcel of land known as Parcel 2 Block 1240A Jost Van Dyke Registration Section ("Block 1240A"). On 17th April 2008, the Registrar of Lands ("the Registrar") denied the appellants' application to be registered as proprietors by prescription under section 135(1) of the **Registered Land Act**[1] ("**the Act**"), in relation to parcels 25-44 and 48-51 of Block 1240A. They appealed to the High Court under the provisions of section 147 of **the Act** and Part 60 of the **Civil Procedure Rules 2000**.

[2] On 17th February 2012, Hariprashad-Charles J (to whom I refer for convenience as "the judge") ordered that the appellants be registered as proprietors of parcels 25, 26, 27, 28 and 29, but dismissed their appeal in relation to all the other Parcels.

[1] Cap.229, Revised Laws of the Virgin Islands 1991.

The appellants now appeal that part of the order. In other words, they seek to be registered also as proprietors of all the remaining parcels except parcel 30 which has been the subject of other litigation. I refer to these 19 parcels as "the Disputed Parcels". There is no appeal against the decision that the appellants be registered as proprietors of parcels 25-29.

[3] The grounds of appeal are extensive, a total of ten, but Mr. Bennett, QC for the appellants did not pursue two of them and distilled the remaining eight ("in a nutshell", as he expressed it) properly and accurately as follows:

1. The trial judge erred in her findings of fact in relation to the appellants' use of the Disputed Parcels;

2. The appellants' activities on the Disputed Parcels should have been considered in a comprehensive manner and not merely separately; and

3. When those activities are taken together and considered cumulatively, then the totality of the appellants' activities on the Disputed Parcels satisfy the requirements of prescriptive ownership.

[4] The submissions on behalf of the parties can be summarised as follows.

[5] Mr. Bennett, QC submitted that the appellants' occupation and use of the Disputed Parcels demonstrate a sufficient degree of physical custody and control of them, as well as the intention to exercise that custody and control for themselves and their own benefit, satisfying the tests set out in **JA Pye (Oxford) Ltd v Graham**.[2]

[6] Ms. Williams-Roberts submitted on behalf of the Registrar that the appellants' occupation and use of the Disputed Parcels are equivocal and insufficient to

[2] [2003] 1 AC 419 at p.435.

establish an intention to possess the entire 65 acres, and that there was in any event an intention, if not an agreement, within the family to subdivide the lands.

[7] Mr. Marshall submitted on behalf of Sheila Callwood-Schulterbrandt that the occupation and use of the Disputed Parcels in law do not satisfy the requirements of prescriptive ownership. He also submitted that the twenty years of continuous occupation must continue up to the date of making the initial application for registration before the Registrar, but he was unable to provide any authority in support of this argument.

[8] It is clear from the submissions that no issue is taken with the interpretation or application of the relevant law by the judge. The issues are therefore of fact relative to the appellants' use of the Disputed Parcels and it is convenient to summarise them as being:

(1) Cultivation of the lands.

(2) Rearing of animals on the lands.

(3) Fencing of the lands.

(4) Construction of a road on the lands.

(5) Burning of coal on the lands;

(6) Surveys of the lands and meetings of the family with respect to a subdivision.

[9] These issues will be examined in turn individually and also, as Mr. Bennett, QC submitted, cumulatively.

[10] In examining the findings of fact, it is essential to bear in mind that the function of an appellate court is not to substitute its own views for those of the court below. The correct approach to be adopted has been dealt with extensively in other judgments of this Court, but it is sufficient to refer to the judgment of the Privy Council in **Sandra Juman v The Attorney General of Trinidad & Tobago and Anor**[3] where it said:

[3] [2017] UKPC 3.

"14 … The limited role of an appellate court when asked to review the factual findings of a lower court has been expounded and emphasised in authorities too many to mention. Their effect was summarised by Lord Reed in **Henderson v Foxworth Investments Ltd** [2014] 1 WLR 2600, at paragraph 67, as follows:

> "…in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[11] It therefore falls to an appellant to demonstrate that the findings of fact of a trial judge should be interfered with. A further consideration in the present appeal is that the trial judge was in fact hearing an appeal from a decision of the Registrar, and that it was the Registrar who had seen and heard the witnesses when evidence was taken. The trial judge had only the printed evidence before her. In that context, there is, in my view, an even heavier burden on the appellants in the present case and they should be required to show that the concurrent findings of the trial judge and the Registrar should be interfered because this is in some way a case *"… of a most exceptional nature"* as was said in **Sandra Juman** at paragraph 15:

> "15. Further, it is the well-established practice of the Board not to interfere with concurrent findings of fact of two lower tribunals. The practice is not cast-iron, but it will be departed from only in cases of a most unusual nature: Devi v Roy [1946] AC 508, 521, and Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, paras 4 to 8."

[12] In **Devi v Roy**[4] the Privy Council said at page 521:

> "From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice:-
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> (1.) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

[4] [1946] AC 508.

> (2.) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.
> (3.) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.
> (4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.
> (5) ……….. "

[13] In **Central Bank of Ecuador v Conticorp**,[5] the Privy Council said at paragraph 5:

> "Second, quite apart from the settled rule relating to concurrent findings, any 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. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325, para 46."

[14] In the present case, the Registrar was in effect the trial judge or the adjudicator at first instance, and the judge in the High Court was performing an appellate function. Consequently, I am of the view that while the "settled rule" may be only one of practice adopted by the Privy Council, it is no less applicable to the appeal before

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[5] [2015] UKPC 11.

this Court and that since there have been concurrent findings by two courts, it will therefore be all the more difficult for this Court to interfere with the previous findings of fact in relation to the 19 parcels of land in question.

Background

[15] The history of the Disputed Parcels is not in dispute. James Zebedee Callwood ("Zebedee Callwood") owned the 65-acre Parcel 2 of Block 1240A. He died intestate in 1951 leaving six children who then owned the land as tenants in common in equal shares.

[16] After registered land ownership was introduced into the British Virgin Islands in 1974, a land survey exercise was carried out and Zephaniah Callwood, one of Zebedee's children, applied for the 65-acre parcel to be registered in the names of "… the heirs of Zebedee Callwood…". As a result, Parcel 2 was registered in the Land Registry in the names of the six children: Zephaniah, Theophulos, Geraldine, Christina, Florensa and Keturah.

[17] Zephaniah died intestate in 1977, survived by his wife and eleven children, including the four appellants. His widow, Olivia Callwood, and daughter, Esmeralda Fraser, obtained a grant of Letters of Administration to his estate, all of the appellants and the other children having renounced their right to obtain a grant.

[18] Although the Registrar's notice of application dated 18th June 2001 sets out the registered owners differently, it appears accepted that as at April 2001 the following parcels were registered as follows:

1. Parcel 25 Sheila Callwood
2. Parcel 26 Beatris Innis Orr
3. Parcel 27 Sheradina Callwood (also known as Geraldine Callwood)
4. Parcel 28 Doris Kelly
5. Parcel 29
6. Parcel 30 Sheila Callwood Schulterbrandt
7. Parcel 32 Sheradina Callwood (also known as Geraldine Callwood)
8. Parcel 34 Sheila Callwood

9. Parcel 35 Beatris Innis Orr
10. Parcel 36 Doris Kelly
11. Parcel 38 Sheradina Callwood (also known as Geraldine Callwood)
12. Parcel 39 Beatris Innis Orr
13. Parcel 40 Sheila Callwood
14. Parcel 41 Doris Kelly
15. Parcel 42
16. Parcel 43
17. Parcel 47
18. Parcel 48 Khari Damani Herbert
19. Parcel 49 Sheila Callwood Schulterbrandt and John Schulterbrandt as trustees
20. Parcel 50 Sheila Callwood Schulterbrandt and John Schulterbrandt as trustees
21. Parcel 51 Gregory Callwood.

[19] The record does not indicate in whose name(s) parcels 29, 42, 43 and 47 were registered, they being the other parcels to which claim was made. As has been pointed out, the claim to parcel 30 was not pursued. No mention is made of the other parcels (parcels 31, 33, 37, and 44) making up the total of 24 in Parcel 2 claimed in the application for registration.

[20] On 26th April 2001, the appellants applied to be registered as the proprietors by prescription of parcels 25-44 and 48, 49, 50 and 51. The Registrar dismissed the claims. On appeal to the High Court, the appeal was allowed in relation to parcels 25-29 and dismissed in relation to all the other parcels.

[21] In essence, the appellants rely on exclusive, peaceable, open and uninterrupted possession by actual occupation, fencing, cultivation, animal rearing and construction of a road on the Disputed Parcels, and that they had the intention to

possess same exclusively with the occupation and possession beginning from as far back as 1965.

[22] The respondents take the position that they inherited the Disputed Parcels from their grandfather, Zebedee Callwood, and are the owners of same because of his intestacy. Also, that the appellants entered the Disputed parcels with permission, but well knew that it was land owned by the family and was to be subdivided among them.

The Evidence

[23] A great deal of the oral evidence given before the Registrar concerned parcels 25-29 on which buildings had been constructed and in relation to which the appellants were granted prescriptive title on their appeal to the High Court. The evidence as to the other parcels is dealt with in this judgment, but that does not mean that the evidence given concerning parcels 25-29 is to be ignored.

[24] As to the manner in which the Disputed Parcels were used, the appellants asserted in their joint affidavit supporting the application for registration that they are children of Zephaniah Callwood and that their father was in open, peaceful undisturbed and continuous occupation of the Disputed Parcels from 1920, and that he grew up there at a time when it was owned by his father, Zebedee Callwood. After their father died in 1977, they were in full occupation of the entirety, having lived there since their birth, " … exercising all acts of ownership in relation to the said parcels of land. We continued to cultivate a portion of the said land with a wide variety of crops. We have fenced portions of the said land, and erected houses thereon." The houses were erected on parcels 25-29 and businesses carried on there. The judge ordered that they be registered as proprietors of them. There is no appeal against those orders.

[25] They then set out in more detail the various uses of the Disputed Parcels. The relevant parts are as follows:

(1) They used to rear cattle during their youthful days with their father on parcels 32, 33, 34, 35, 36 and 49;
(2) They have also fenced parcels 36 and 49;
(3) They have also cultivated portions of parcels 35 and 36 for more than 35 years;
(4) They used to plant pigeon peas, bananas, potatoes and okras on parcels 41 and 42;
(5) They reared goats on parcels 38, 39, 40, 50 and 51;
(6) They used parcel 25 to burn coal.

[26] The overall impression created in the affidavit is that the appellants have been continuously occupying and using all of the Disputed Parcels since their father's death in 1977, indeed, they say so at paragraph 10 of the affidavit. They say nothing there, however, about the use of parcels 31, 37, 43 or 44. Additionally, the evidence given by and on their behalf before the Registrar points not only to this but to certain inconsistencies, if not contradictions, in their evidence.

[27] Evidence before the Registrar was given by all of the appellants, Lucien, Urman, Gertrude and Wendell, as well on their behalf by Edward Freeman, a nephew of the appellants, and Melvin Hodge, a contractor who gave evidence on the cutting of a road on behalf of the appellants. The cutting of a road was not a matter they spoke to in their affidavit. Sheila Callwood Schulterbrandt, one of the initial objectors, and Myrna Herbert gave evidence on behalf of the respondents. I refer to each of these persons by their first name purely for brevity and convenience, and with no intention of any disrespect.

[28] The evidence is not extensive. Indeed, it can be described as "thin" on occasion and cross-examination for the most part cannot be regarded as robust. Indeed, some of the evidence by and on behalf of the appellants was not challenged.

Area Claimed

[29] The claim is to the entirety of what was known as Parcel 2, that is, some 65 acres. In oral evidence Lucien claims his occupation is since 1965, but this has to be considered in light of the fact that he was at that time there with his father, Zephaniah, who died in 1977 and who was the person who applied for and obtained on 21st May 1974 registration of Parcel 2 in the names of the heirs of Zebedee Callwood.[6] The time for prescription must begin to run, at the latest, from the time of Zephaniah's death in 1977, but this matters little, given that the time required for prescription to be claimed is 21 years. It does, however, bear on Lucien's credibility and the weight of his evidence. Similarly, Urman claims possession for 30 years, while Wendell claims to have been in possession since 1977 and Gertrude for 21 years. There is no evidence to contradict occupation for the statutory 20 year period provided for in section 135 of **the Act** given that the application for prescription was filed on 26th April 2001.

[30] The claim to parcel 51, however, is another matter. Lucien in examination-in-chief[7] acknowledged that Gregory (Gertrude's son) is on this parcel and that "I am leaving him there". Urman said in examination-in-chief that Gregory is on this parcel, has title to it and that he is "not troubling him with that."[8] Gertrude maintains her claim to this parcel "notwithstanding my son's ownership".[9] This evidence makes it difficult to accept the appellants' claim to the whole of Parcel 2.

[31] Additionally, as has been pointed out, they say nothing about the use of parcels 31, 37, 43 or 44. Again, this makes it difficult to accept the claim to the whole of Parcel 2.

Cultivation

[32] In their affidavit at paragraph 13, the appellants aver that they have cultivated portions of parcels 35 and 36 for more than 35 years and still farm them. They also

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[6] See Record of Appeal, Vol. 2, pp 207-209.
[7] See Record of Appeal, Vol. 3, p.174.
[8] See Record of Appeal, Vol. 3, p.185.
[9] See Record of Appeal, Vol. 3, pp.182-183.

aver at paragraph 14 that they planted pigeon peas, bananas, potatoes and okras on parcels 41 and 42.

[33] In examination-in-chief Lucien went on to say that there was also cassava, but immediately after that he said that "I'm not doing farming on 35 and 36".[10] He then said, when referred to paragraph 14 of the affidavit that "We do not plant as stated". In cross-examination he said that he planted up to "… last year on Parcel 2 and they got destroyed by rain. I had coconut…and melon. There is no cultivation there except apple trees. They were planted years ago".[11] The inconsistencies, if not contradictions, as to cultivation on parcels 35 and 36, as well as parcels 41 and 42, do not assist the appellants.

[34] Wendell said little on this issue when giving oral evidence, save that in examination-in-chief he said "We planted pigeon peas as food for the family"[12] which would not indicate any form of extensive cultivation. He went on to say that, "Now you would find bananas, pineapples, sugar apple. We plant them". He did not say when or by whom exactly.

[35] Gertrude's oral evidence was of little assistance because it went to planting potatoes, peas, cabbage, tomatoes on parcel 30, and that on parcel 51 there are orange, tangerine, golden apple, mango, cassava and sugar cane. Parcel 51 is owned and occupied by her son, Gregory.

[36] Urman's oral evidence was that he planted papaya trees. He also said that he planted coconut trees, but this was apparently in the context of his evidence on the use of Parcel 30 where he said he also kept chickens. He said that there used to be apple trees which he and Lucien planted and that banana and coconut trees on

[10]See Record of Appeal, Vol. 3, p.173.
[11]See Record of Appeal, Vol. 3, p.175.
[12]See Record of Appeal, Vol. 3, p.176.

Parcel 51. He also said that there is nothing above Parcel 51 " … except trees. Amarat, torch, loblolly, turpentine."[13]

[37] Sheila said that she had not seen any of the appellants planting on parcels 41 and 42, but admitted that there might have been some kind of planting.

[38] In the event, there is little, if any evidence to support the averment in the affidavit of cultivating all over Parcel 2, i.e. the entire 65 acres, and the evidence of cultivation on parcels 35, 36, 41 and 42 does not support a contention that the entirety of those parcels was under cultivation throughout the 20-year period, nor that there was or is now any cultivation to speak of.

[39] The evidence of cultivation on these four parcels was more for the benefit of the family and was not extensive. It is hardly likely that any substantial area was so used and parcels 35 and 36 are said to total some 16 acres. Additionally, there is no evidence of what particular areas of these parcels were actually cultivated and whether the same areas were cultivated continuously or if cultivation moved from one area to another within any particular parcel or parcels over time.

Animal Rearing – Cattle and Goats

[40] The appellants said at paragraph 11 of their affidavit that in "… their youthful days…" they used to rear cattle on portions of Parcel 2 namely parcels 32-36 and parcel 49 and in examination-in-chief Lucien pointed out most of the area of Parcel 2 as being where this was done. He then went on to say, however, "I am not rearing cattle there now".[14]

[41] Urman said in cross-examination that he reared animals "…all over 33-36"[15] having said in examination-in-chief that "… in the area of 32 and 33 we tied goats"[16] which he kept rearing after his father died. He went on to say further in examination-in-

[13]See Record of Appeal, Vol. 3, pp.185-186.
[14] See Record of Appeal, Vol. 3, p.173.
[15] See Record of Appeal, Vol. 3, p. 186.
[16] See Record of Appeal, Vol. 3, p. 185

chief, however, that "We do not now rear cattle on the land".[17] Interestingly, he also said that "cattle used to be fenced with barb wire". This is relevant to the issue of fencing to which I will come presently.

[42] In examination-in-chief, Wendell pointed out most of Parcel 2 as the area where animals were kept, but he then went on to say in relation to the fencing that it was "… to keep in animals".[18] The evidence on fencing was that it was only along the road side of parcels 35 and 36, so that animal rearing obviously could not have been all over Parcel 2. This is reinforced by his later evidence that, "We used to tend cattle from early morning till around 2 pm".[19]

[43] Gertrude's oral evidence really adds nothing except that she said that all the animals had names which points more to family than commercial use and that, more importantly, the area used to keep them would not have been extensive.[20]

[44] Edward's evidence was that the appellants "… had goats and cows up the hill inside the fence on Parcel 2". Again, this points to a far smaller area used for this purpose than is claimed by the appellants.

[45] Sheila said that she had not seen the appellants rearing cattle, although she recalled Urman having a pig, and she did not recall them rearing goats until "… recently".[21]

[46] At least partly, the evidence can be said to indicate past use of the land. It does not show definitively that the use was continuous during the required period of prescription.

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[17] See Record of Appeal, Vol. 3, p.186
[18] See Record of Appeal, Vol .3, p.176.
[19] See Record of Appeal, Vol. 3, p.178.
[20] See Record of Appeal, Vol. 3, p.182.
[21] See Record of Appeal, Vol. 3, p.191.

Fencing

[47] In their affidavit, the appellants aver at paragraph 17 that parcels 36 and 49 are fenced. Lucien, having said in examination-in-chief that the entire parcel was fenced and that this was probably done in 1970 when his father was alive[22], went on to say that it is the road side of parcels 35 and 36 that is fenced.[23] He also said in cross-examination that "We had the cattle area fenced from the cultivation."[24]

[48] Urman went one step further in cross-examination when he said that "There are no fences on the subdivision boundaries of 33-36, just on the road side"[25] and Wendell said in examination-in-chief, tellingly, that the fences were to keep the animals in.[26]

[49] Gertrude, on the other hand, maintained that the land was fenced all around and Edward said that he helped to maintain the fence and that it was "… outside the land round it." He does not say whether it was the whole of Parcel 2 or the smaller area and was not cross-examined on this.

[50] What is clear from the evidence on this issue is that Parcel 2 was never fenced entirely. At best, no more than the road side of parcels 35 and 36 were fenced and it is clear that the fencing was to keep animals in and not keep the world out. At its highest, the evidence of fencing to support a claim of intention to possess is no better than equivocal. The trial judge cannot be faulted for coming to that conclusion.

Burning of Coal

[51] At paragraph 16 of their affidavit the appellants aver that Parcel 25 was used to burn coal. Lucien in examination-in-chief, however, said that "We do not burn coal there now"[27] and Wendell said in examination-in chief that "We burn coal in the

[22] See Record of Appeal, Vol. 3, p.172.
[23] See Record of Appeal, Vol. 3, p.173.
[24] See Record of Appeal, Vol. 3, p.174.
[25] See Record of Appeal, Vol. 3, p.187.
[26] See Record of Appeal, Vol. 3, p.176.
[27] See Record of Appeal, Vol. 3, p. 173.

area of Parcel 28".[28] Gertrude in examination-in-chief also said that that they used to burn coal on the land without identifying where.[29] "The sand is still black from the charcoal". This was immediately after saying that the "… tamarind tree is still there." The evidence is that coal was burned under the tamarind tree.

[52] Urman said that there were "Big tree (sic) on land such as tamarind where we burn coal. Proof of coal burning – bits of coal and sand dark".[30] Edward said that they used to burn coal under the tamarind tree "I think the tree is still there".

[53] The judge found that the evidence of burning coal was equivocal, but that would have been in relation to the claim to parcels 25-29. Whether coal was burnt on parcel 25 or parcel 28 is of little consequence in this appeal. The fact is that it was not burnt on any of the parcels which are the subject matter of this appeal and is of no assistance to the appellants.

Construction of Road

[54] The appellants made no mention of constructing a road in the supporting affidavit and it was only at the hearing before the Registrar that it was raised as an issue.

[55] The evidence of Melvin Hodge is clear. He was asked to cut the road by Gertrude and this was done, and his bill paid, in 1998. Lucien's evidence that this was done in the 1980s is at odds with this. Also, his evidence that he got the bill from Mr. Hodge is at variance with the evidence of both Mr. Hodge and Gertrude. It is clear that Gertrude got the bill and paid it, using, she said, money collected from her brothers and presumably funds of her own.

[56] There are differences in the evidence as to exactly where the road was cut. Lucien says that it was from parcel 48 up to the eastern point of parcel 36.[31] Gertrude said

[28] See Record of Appeal, Vol. 3, p. 176.
[29] See Record of Appeal, Vol. 3, p. 182.
[30] See Record of Appeal, Vol. 3, p. 186.
[31] See Record of Appeal, Vol. 3, p.172.

it was from the top of parcel 30-48 to 33-35[32] and Mr. Hodge said it was from the bottom of the hill, although in re-examination he said that he did not understand what was meant when he was asked where the road was cut from.

[57] Sheila's evidence is that the road comes "…from Great Harbour Parcel 42 and winds. Gov't road cut from 30-25 at the top and bounds 50-51 and goes up hill to Parcel 55".[33]

[58] The precise route of the road and time when it was cut, however, is not as important as the fact that it was cut. Although this was just eight years before the application was made, it was put forward by the appellants as evidence of their occupation and use of Parcel 2 being inconsistent with the rights of the paper title owners.

[59] A part of this road was subsequently concreted, possibly by the government, but that does not alter the fact that the appellants had it cut initially. In her evidence, Myrna Herbert said "… when gov't was putting public road I received letter for son's consent".[34]

[60] This evidence, however, does not sit well with the documentary evidence before the Registrar.

[61] Exhibits 2 and 3 both appear to indicate either the presence or proposed creation of a public road and/or right of way within Parcel 2 at the time of the sub-division.[35] Exhibit 3 indicates the right of way as allowing access to most, if not all, of the individual parcels within Parcel 2. Additionally, and more important, the existence of a "Public Right of Way as shown on Index" is recorded on the Registration

[32] See Record of Appeal, Vol. 3, p.182.
[33] See Record of Appeal, Vol. 3, pp.191-192.
[34] See Record of Appeal, Vol. 3, p.208.
[35] See Record of Appeal, Vol. 2, pp.124-125.

Certificate issued by the Registrar on 21st May 1974.[36] So it is reasonable to conclude that although the appellants may have arranged for the road to be cut, there already existed a right of way which is contrary to their apparent assertion of having taken some form of action adverse to the interests of the registered owners.

[62] In short, the cutting of the road is not of great or any assistance to the appellants.

Subdivision – Surveys and Family Meetings

[63] Having said in examination-in-chief that "I did not agree for any survey to subdivide", Lucien then said in cross-examination "I was aware of surveying of Parcel 2. I was not in favour of subdivision. I was living on land when subdivided in area now Parcel 30. … I don't know who authorised survey. I was not aware of application to register survey".[37] He obviously knew a survey was being done for the purpose of a subdivision.

[64] Wendell also said in examination-in-chief that he did not agree to any subdivision but then in cross-examination said that he was living at White Bay when "… Skelton came to survey land." He goes on to say that he "… was not aware of what Skelton came to do, "I was not aware that they came to survey land."

[65] Urman said in cross-examination that "I don't know about them coming to survey of land. I was present on the land when survey was done. I did not see J. Skelton surveying in 1982. I heard about it … I didn't do anything as a result of the survey, nor with the cadastral survey."

[66] Gertrude said she did not agree to a subdivision but went on to say in cross-examination that "I was there when the survey was done. I did not object to the survey…. I see them putting down things and assume they were surveyors. I did not stop them. I did not ask them to get off the land. I was on Parcel 30 when I saw them."

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36 See Record of Appeal, Vol. 2, pp.207-209.
37 See Record of Appeal, Vol. 3, p. 175.

[67] It is clear from their evidence that while they did not agree to a subdivision, they knew that a survey was being done and they did nothing to prevent it being carried out. Nor did they raise any objection to the purpose of the survey.

[68] As to meetings of the family, the only appellant to give evidence was Gertrude. She said in cross-examination that "I was present at family meeting at Dancia Penn and Co to discuss survey" but cannot remember who else was there. Gertrude lives next to Lucien[38] and it reasonable to infer that she would have told him, at the very least, about this meeting.

[69] Lucien said in cross-examination that "The older heads were in control so no one brought anything to me … … Not aware mother and sister got LOA [Letters of Administration] to deal with father's land."

[70] Sheila's evidence[39] was that none of the appellants objected to the survey and that Zephaniah had told Urman[40] that the land was to be surveyed. Also, that Lucien had built a shack which her father allowed, but had told him "… he must remember that land was being subdivided".[41]

[71] As to meetings of the family on the question of a subdivision, she said that there had been a family meeting in 1989, and previous to that, possibly in the 1970s.[42] Present at the 1989 meeting were Wendell, Urman, Estelle, Junie, Aunt Olivia, John, her father, Sherman and Myrna Herbert from Mr. Todman's office. The meeting was on the beach at White Bay, Jost van Dyke and that there were notes of the meeting taken by Myrna and Dancia Penn. There was also a meeting at Great Harbour, possibly at Sherman's house, the transcript is not entirely clear on

[38] See Record of Appeal, Vol. 3, p.171.
[39] See Record of Appeal, Vol. 3, p.192.
[40] See Record of Appeal, Vol. 3, p.190.
[41] See Record of Appeal, Vol. 3, p.191.
[42] See Record of Appeal, Vol. 3, p.193.

this. In answer to Mr. Stridiron, she maintained that Gertrude and Urman were present at the meetings in Tortola and on the beach.

[72] She went on to say that the meeting was about who was to get what and where. Aunt Olivia and Esmeralda represented uncle Zephaniah, and Urman, Gertrude were there.[43] Gertrude and Urman spoke during the meeting and did not object to the allocation of the land. As a result of this meeting there was a further meeting with the lawyers, Dancia Penn which the appellants attended, together with Mr Webster who was representing the appellants, but according to Myrna Herbert was the attorney acting for the Estate, presumably of Zephaniah.[44]

[73] Thereafter, an application was made for the subdivision by Dancia Penn on the basis of those at the meeting having agreed on who would get what. Sheila said that the survey was registered and that she got a copy of the application to register the subdivision.

[74] Mr Archibald, for the appellants, at the hearing before the Registrar, objected to subsequent correspondence on this matter between Dancia Penn and the Registrar being admitted into evidence, but it appears that a letter was admitted as Exhibit 9.[45] There is no mention, however, of this issue being raised on the appeal below and it was not raised before this Court.

[75] Sheila then goes on the say that Parcel 2 was subdivided into parcels "25-44 etc " and transferred to various persons. Objection was again taken, but certain transfers dated 1989 and registered in 1991-1992 were admitted into evidence[46] and she was cross-examined on them. In answer to Mr. Stridiron, she said that there was no challenge to these transfers until the 2000s and explained, again in answer to Mr. Stridiron, that the time lapse between signing and registering was

[43] See Record of Appeal, Vol. 3, p.194.
[44] See Record of Appeal, Vol. 3, p.207.
[45] See Record of Appeal, Vol. 3, p.196.
[46] See Record of Appeal, Vol. 3, p.197.

because of the time taken to provide the funds to pay fees due to the surveyor and attorney.[47]

[76] She also said that the subdivision registered in 1992 was done in accordance with a plan or plans dated 1982 and "No. Urman and Gertrude did not disagree with the plans. Yes. Lucien and Wendell were shown the plans".[48]

[77] She also said that she, Geraldine and Beatrice paid certain taxes due on the lands and that as far as she knew the appellants had not paid any.[49] There is no evidence that any of the appellants paid any of these taxes.

[78] Myrna Herbert, who worked for the attorney Mr. Todman said that Olivia brought to him the survey for subdivision of only the beach front and that the middle and hillside survey was done with each of the registered owners or their representatives getting a share from the beach, middle and hillside.[50] "Over the years I think I attended meetings with family and one on Jost van Dyke. I believe in St Thomas in 1989. With consent Skelton produced survey for Parcel 2. I remember family discussed taking the beach front into name of a corporation."

[79] She told of meetings with Esme and her elder brothers and Junie after reviewing survey plans on several occasions. It appears that they agreed "… the plans were fairly drawn and their portion was next to land their father owned personally. [In September 1989] – Labour Day they came to Tortola to sign transfers and Paul Webster came as attorney for the estate and perused document and advised that they sign document." In re-examination by Mrs. Creque she said "Those present were Olivia, Sheila, Wendell, Esme, Pearlette, Junie, Urman and I think Gertrude

[47] See Record of Appeal, Vol. 3, pp.204-205.
[48] See Record of Appeal, Vol. 3, p.201.
[49] See Record of Appeal, Vol. 3, p.205.
[50] See Record of Appeal, Vol. 3, p.203.

was there…. They agreed to the subdivision and distribution of the lands. Yes. Wendell, Urman and Gertrude were present for signing of transfer".[51]

[80] Registration of the subdivision was then applied for." On a couple of occasions since 1989 the office received letters from Archibald's office on request of Urman for the interest of Zephanie Callwood. They were a year apart or longer. … [R]esponse of Ms Penn's office was on settlement of invoice they would receive the document. When I left in [December] 1997 I do not recall the account being settled".

[81] Not only did the appellants know that a survey was being carried out and did not object to it being done, it is reasonable to conclude that they knew its purpose was to effect a subdivision and they raised no objection to this.

The Law

[82] Section 135 of **the Act** provides:

> "(1) 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:"
> ……………

[83] The relevant subsections of section 136 of **the Act** provide:

> "(1) Where it is shown that a person has been in possession of land, or in receipt of the rents or profits thereof, at a certain date and is still in possession or receipt thereof, it shall be presumed that he has, from that date, been in uninterrupted possession of the land or in uninterrupted receipt of the rents or profits until the contrary be shown.
> … …
> (6) 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 possessor thereby loses possession; or
> (b) by the institution of legal proceedings by the proprietor of the land to assert his rights 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 claim is admitted.

[51] See Record of Appeal, Vol. 3, p.211.

… …

[84] It is well accepted that "possession" in **the Act** is to be construed as set out by the House of Lords in **JA Pye (Oxford) Ltd v Graham**[52] and followed in this jurisdiction in **Donovan-Carty and Ors v Donovan and Ors**[53] as well as **Carty v Edwards**.[54] As Lord Browne-Wilkinson expressed it in **Pye** at paragraph 40:

> "… 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."

At Paragraph 37 he had said:

> "[37] It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act"

[85] At paragraph 41 he went on to agree with the statement of law set out by Slade J in **Powell v McFarlane**:[55]

> "In Powell Slade J, at pp 470–471, said this:
> '(3) 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.'"

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[52] [2002] UKHL 30.
[53] BVIHCV2006/0316 (delivered 20th April 2009, unreported) at paragraph 24.
[54] AXAHCV 2003/0045 (delivered 15th January 2007, unreported).
[55] (1977) 38 CP & Cr 452.

[86] At paragraph 43 he agreed with Slade J when the latter said that intention to possess requires an "… intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

[87] Lord Hutton, agreeing with the judgment of Lord Browne-Wilkinson, expanded on this and said at paragraphs 74, 76 and 77 the following:

> "74. I wish … to make some brief observations in relation to the proof of intention to possess which is referred to by Slade J in his classic judgment in Powell v Macfarlane (1977) 38 P & CR 452 , 470:
>
> > "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')."
>
> 76. 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 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.
> 77. The conclusion to be drawn from such acts by an occupier is recognised by Slade J in Powell v Macfarlane , at p 472:
>
> > "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."

And, at page 476:

> "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."

In another passage of his judgment at pp 471–472 Slade J explains what is meant by "an intention on his part to … exclude the true owner":

> "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."

[88] There are therefore two issues which arise and which the appellants are required to satisfy; first, that they exercised a sufficient degree of factual possession of the Disputed Parcels; second, that they had the required intention to possess.

Analysis
Area Claimed

[89] It is clear that the claim to the entirety of Parcel 2 cannot succeed. Quite apart from the appellants (except for Gertrude) acknowledging Gregory's ownership of parcel 51, there is no evidence to support their claim to parcels 31, 37, 43 and 44. Moreover, this leads to a lessening of the appellants' credibility and the weight of their evidence as to the use of the remaining parcels.

[90] Although it is possible that acts of possession of only part of a parcel of land can be evidence of possession of the whole,[56] the evidence in this case falls short of demonstrating factual possession of the whole of Parcel 2 in the

[56] See Higgs & Anor v Nassauvian Ltd [1974] UKPC 24.

present case. Indeed, it falls short of demonstrating factual possession of all of the Disputed Parcels.

[91] Aside from these parcels, the appellants' evidence as to the length of factual possession and use of them is by and large uncontroverted, as the judge correctly concluded.[57] The question, therefore, is whether there existed the necessary intention to possess.

[92] I turn therefore to the evidence relating to the use of the Disputed Parcels and the issue of intention to possess.

Cultivation

[93] The appellants claimed to have cultivated the whole of Parcel 2 but Lucien's evidence was that they "… do not plant as stated." Further, he said that he was not farming on parcels 35 and 36. Wendell said that that pigeon peas were planted as food for the family and that banana, pineapple, sugar apple can be found on these parcels. None of the evidence, however, goes to demonstrating that the entirety of these parcels, some 35 acres as found by the Registrar and which is not disputed, was entirely under cultivation, or used partly for cultivation and partly for rearing of animals, either intermittently or continuously. Indeed, it is unlikely, given that pigeon peas were planted as food for the family and there is no evidence that either animals or crops were reared or cultivated in any form of commercial venture.

[94] As has been noted, it is possible that acts of possession of only part of a parcel of land can be evidence of possession of the whole, but the evidence here was inconsistent and does not support a claim of having cultivated the whole of Parcel 2.[58] Indeed, it does not prove a claim of cultivating the whole of parcels 35 and 36. The Registrar found there was no evidence to

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[57] See paragraphs 46 and 47 of the judgment.
[58] At paragraph 90.

demonstrate what area(s) of parcels 35 and 36 had been used for cultivation and pointed out that together they comprise approximately 16 acres.[59] At paragraph 63 of her judgment, the judge said: "With respect to the other parcels of land (referring to the Disputed Parcels), 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." That, and her further conclusion that the evidence was equivocal at best are both reasonable.[60] The evidence does not support cultivation taking place other than for family use and could not have been if any sizeable extent.

Animal Rearing

[95] The issue of rearing goats can be disposed of with comparative ease. Urman's evidence that they were reared in the area of parcels 33 and 33 is uncontroverted, but he refers to doing this in the past tense after his father died. There is nothing to demonstrate that goats were reared for 20 years on these parcels, nor that they occupied the whole of it. Indeed, the evidence according to Lucien, is that cattle were also reared on parcels 32-36 and 49.

[96] As to the raising of cattle, both Lucien and Urman gave evidence that they do not rear cattle there now, and there is nothing to demonstrate that they did so for a period of 20 years, whether intermittently or continuously. Wendell's evidence is that they used (again, past tense) to tend cattle from early morning until about 2:00 in the afternoon, but this does not necessarily mean that cattle rearing was extensive.

[59] See Record of Appeal, Vol. 3, p.147.
[60] See paragraph 66 of the judgment.

[97] At paragraph 66 of the judge's judgment, she regarded this evidence as equivocal at best and that was a reasonable conclusion at which to arrive. It is difficult to find fault with that conclusion.

Fencing

[98] Fencing is properly to be regarded as the strongest possible evidence of possession, as the judge pointed out correctly. As was said in **Long v Suva**,[61] however, for fencing to weigh in favour of someone claiming adverse possession it must be for the purpose of keeping people out and not just to keep animals in or prevent them from straying.

[99] In the present case, the evidence is that there was fencing only along the road side of parcels 35 and 36, and that no other boundaries were fenced, contrary to the claim made. Further, the area where cattle were reared was fenced from the cultivation, and more important, the fencing was for the purpose of keeping the animals in. Obviously, it was not for keeping people out, including those lawfully entitled to possession.

[100] Clearly, the judge cannot be faulted for concluding that the evidence of fencing was only equivocal at best.[62] It does not in my view indicate an intention to keep people out and is of no assistance to the appellants.

Burning of Coal

[101] The assertion in the supporting affidavit that parcel 25 was used to burn coal is not supported by Lucien's evidence that coal is not now burned there. Wendell, on the other hand says that coal was burned on parcel 28. In addition, there is evidence that sand, presumably on the beach, is still black from the charcoal. Neither parcel 25 nor 28 is the subject of the present appeal. The judge again found this evidence[63] to be equivocal at best, which is reasonable conclusion at

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[61] [2007] EWHC 2087 (Ch) at paragraphs 62-65.
[62] See paragraph 66 of the judgment.
[63] See paragraph 66 of the judgment.

which to arrive, but more to the point is that she so concluded in relation to claims to those to two particular parcels. This evidence is of no assistance to the appellants.

Construction of a Road

[102] It is clear that the appellants had a road cut in 1998 and that this was done without the permission or agreement of those lawfully entitled to possession. It is also clear that this was to facilitate the appellants' use of the Disputed Parcels.

[103] It is difficult to discern the precise route of the road because of the varying evidence, but it also facilitated, and continues to facilitate, at least some, if not all, of the persons who are now registered owners of certain parcels, namely, Gregory who own and occupies parcel 51 and Khari Damani Herbert (Myrna Herbert's son) who owns parcel 48, although he does not occupy it. There is no evidence that any of the other registered owners are unable to use this road.

[104] It is therefore difficult to see how the appellants can assert that cutting the road was an act inconsistent with the rights of those entitled to lawful possession. Indeed, it would be unusual, to say the least, that the subdivision of a 65-acre parcel of land would make no provision for at least a right of way, if not an actual roadway, and the documentary evidence indicates that this was in fact the case. I have grave doubt that the cutting of a road, even without the permission of all concerned, would be an act inconsistent with the rights of the registered owners. This is supported by evidence of a road subsequently constructed or concreted by the Government and of the existence of a public right of way "shown on [the] Index" in 1974 when Parcel 2 was registered in the names of the heirs of Zebedee Callwood.

[105] The Registrar found the evidence on this issue to be "vague" both as to the extent of the cutting and whether it led to any particular destination[64] but the judge held that he had misconstrued the evidence, although she does not appear to have identified the precise route of the road.

Subdivision

[106] The judge concluded at paragraph 65 of her judgment that the appellants knew Parcel 2 was to be subdivided "… despite the inconsistent evidence …". That was a reasonable conclusion at which to arrive. and she pointed out that the Registrar came to a similar/same conclusion[65]. At paragraphs 71 and 72 she agreed with the Registrar's findings that meetings were held among the beneficiaries of Zebedee Callwood's estate with respect to a subdivision and a transfer to various of them and went on to say at paragraph 72 that they were aware of this when they caused the cutting of the road. That was also a reasonable finding to make.

[107] The appellants knew in the 1980s that a survey was being carried out. It could not have been otherwise. Further, the only reason for a survey being carried out would have been for a subdivision of Parcel 2 among the heirs of James Zebedee Callwood in whose names Parcel 2 had been registered.

[108] On the evidence, it was also reasonable for the judge to conclude that an application for subdivision was made in 1988, or perhaps 1989. Certain transfers pursuant to the subdivision were admitted into evidence.

[109] It would also be reasonable to conclude on the evidence that the appellants would know what had been discussed and agreed at meetings of the family, which clearly took place. It is of interest that Lucien said in cross-examination that the "… older heads were in control so no one brought anything to me …" while denying that he was aware his mother and sister had obtained Letters

[64] See Record of Appeal, Vol. 3, p.146.
[65] See Record of Appeal, Vol. 3, p.147-148.

of Administration to his father's estate.[66] That denial simply does not ring true.

[110] The contention of course, is that the appellants did not agree to the manner in which Parcel 2 was to be subdivided and it would appear that this is what has led to the present litigation.

[111] There is no evidence that the appellants brought their disagreement to the attention of the registered owners, but as the judge correctly pointed out, neither the subdivision nor the family meetings had the effect of interrupting possession. As was pointed out by Lord Scott in **Kenneth McKinney Higgs, Senior v Leshel Maryas Investment Company Limited & Anor**[67] at paragraph 57:

> "The remedy of a documentary title holder whose attempts to re-enter into possession are forcibly resisted by a squatter in possession is either to commence legal proceedings for possession, the commencement of which will stop time running, or, if it can be done without breach of the criminal law, to re-enter, re-take possession and throw the squatter out. Simply to accept the barring by the squatter of the desired re-entry and to do nothing to disturb the squatter's possession cannot, in the Board's opinion, stop time running."

[112] In the present case, there is no evidence of any attempt to renter.

Conclusions

[113] It is clear that the appellants claim to the entire 65-acre Parcel 2 cannot succeed. Both the Registrar and the judge came to this conclusion and those conclusions cannot be faulted. The evidence is inconsistent in part and contradictory on occasion and does not prove their claim.

[114] Gregory owns and occupies parcel 51 and of the appellants only his mother, Gertrude, pursues her claim, but fails to show how and why it should

[66]See Record of Appeal, Vol. 3, pp.174-175.
[67] [2009] UKPC 47.

succeed. There is no evidence of occupation or use of parcels 31, 37, 37, 43 or 47.

[115] The Registrar also concluded that since the appellants had failed to satisfy him of this, then their claim must fail completely, but as the judge pointed out correctly, the Registrar fell into error in so holding and he should have considered the use and occupation of individual parcels. The Registrar's error, however, was one of law and his findings of fact on the evidence were reasonable.

[116] Consequently, it is only the appellants' claim relating to the remaining parcels that falls for consideration.

[117] In my view, the judge directed herself properly on the law and applied it correctly. In summary, a person claiming prescriptive title must show a sufficient degree of factual possession of the lands in question for the statutorily prescribed period and, second, must show the required intention to possess, both of which are clearly set out and detailed in **JA Pye (Oxford) Ltd v Graham**. Further, it is possible to establish prescriptive title to a parcel of land even if it has not been occupied in its entirety.[68]

[118] With respect to the cultivation of the lands, the Registrar concluded that the evidence did not support a claim that the entirety of Parcel 2 had been cultivated and that there was no evidence to demonstrate what area had in fact been so utilised in relation to parcels 35 and 36 which together totalled approximately 16 acres. That was reasonable. The Registrar made no finding with respect to the acts of user in relation to individual parcels (cultivation, rearing of animals, burning of coal) except to say that there was no evidence to show that these parcels were occupied or possessed in their entirety.

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[68] See, for example**, H**iggs & Anor v Nassauvian.

[119] The judge at paragraph 62 expressed the view that given the size and scale of the Disputed Parcels the evidence did not clearly demonstrate a sufficient degree of sole user and possession of the middle (parcels 38-43, 47, 50 and 51) and hillside (parcels 32-36, 47-49) sections of Parcel 2. At paragraph 66 of the judgment she expressed the further view that the evidence of user on those lands by way of cultivation, animal rearing, burning of coal and fencing was equivocal at best and did not evince an intention to an owner attending on the lands that they intended to maintain possession against the whole world, citing **Topplan Estates Ltd v Townley.**[69] She was not satisfied that they had surmounted the hurdle of proving intention to possess, as set out in **JA Pye (Oxford) Ltd v Graham**, although they may have satisfied the test of factual occupation. That was also a reasonable conclusion.

[120] The evidence was, again, partly inconsistent and on occasion contradictory. The judge described the evidence as equivocal. She drew a distinction between the evidence in relation to the Disputed Parcels and the evidence in relation to parcels 25-29 where houses had been built and businesses carried on, and in relation to which she was satisfied that the necessary intention to possess had been shown.

[121] The careful construction or formulation of paragraph 66 of the judgment clearly indicates that the judge considered the acts of user cumulatively and not just individually. I have no reason to find that conclusion unreasonable. Taken individually, the acts of user do not conclusively demonstrate the required intention to possess. Considered comprehensively and cumulatively, as Mr. Bennett, QC advocated, those acts still fall short of proving the required intention.

[122] The Registrar found that the evidence with respect to the cutting of the road was vague. The judge expressed the view at paragraph 67 that he had

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[69] [2004] EWCA Civ 1369.

misconstrued the evidence, but did not herself take this "use" into consideration when arriving at her decision, saying at paragraph 66 that the appellants' case rested solely on the fact of their sole and exclusive occupation, but that occupation alone is not enough and that the law also requires them to prove possession. There is no evidence of the appellants excluding anyone from use of the road. It would appear to me that in any event the cutting of the road does not advance the appellants' claim because doing so did not, and was not shown to, affect adversely the rights of the registered owners.

[123] Additionally, both the Registrar[70] and the judge[71] came to the conclusion that there had been meetings of the family and a survey had been carried out for the purpose of a sub-division of Parcel 2, and that the appellants were aware of both the survey and its purpose. Neither the survey nor the family meeting served to stop the period for prescriptive title from running, but they weigh against the appellants' case that they were in exclusive, peaceful, open and uninterrupted possession.

[124] The judge at paragraph 72 of the judgment said that the appellants recognised, and in my view, accepted, that the Disputed Parcels were family lands and that they were to be sub-divided "even when they caused construction of the road in 1998". Again, that finding was reasonable. Nor did they, as the judge correctly pointed out, at paragraph 72 of the judgment assert to anyone coming onto the land to carry out the surveys, or anyone else coming there including some of the registered owners, that they were in exclusive occupation or possession of the lands. There is nothing to demonstrate an intention to exclude the world at large. It is therefore difficult to conclude definitively that the necessary intention to possess the Disputed Parcels existed.

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[70] See Record of Appeal, Vol. 3, pp.146-147.
[71] See paragraph 65 of the judgment.

[125] In the event, the judge came to the conclusion that the appellants had not satisfied her that they had proven the required intention to possess and that the appeal before her and therefore the claim to the parcels of land in question should be dismissed. In so doing, she agreed with certain of the Registrar's findings of fact and I am not persuaded that this is a case of a most exceptional nature as set out in **Devi v Roy** which would require this court to come to different conclusions on those findings of fact.

[126] Moreover, the appellants have not persuaded me that the decision of the judge cannot reasonably be explained or justified. They have not demonstrated that the judge has made a material error in law, or made a critical finding of fact which has no basis in the evidence, or reflects a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, which would allow this court to interfere with the findings of fact made by her.

Disposition

[127] I would therefore dismiss the appeal and order that the appellants pay the costs of the Registrar and the respondents, to be assessed in default of agreement.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario F. Michel
Justice of Appeal

By the Court

Chief Registrar