[2009] UKPC Case Ref 47
Privy Council Appeal No 0012 of 2009

JUDGMENT

Kenneth McKinney Higgs, Senior
v
(1) Leshel Maryas Investment Company Limited
(2) Annamae Woodside

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Hope
Lord Scott
Lady Hale
Lord Brown
Lord Mance

JUDGMENT DELIVERED BY
LORD SCOTT
ON

26 November 2009

Heard on 12 and 13 May 2009

Appellant
James Dingemans QC
(Instructed by Lee
Bolton Monier-Williams)

Respondent
Jonathan Small QC
Nicola McKinney
(Instructed by K A
Arnold & Co)

LORD SCOTT

Background

1. This appeal, which relates to the ownership of land in New Providence Island, has a long litigious history and it is impossible to explain the issues that the Board has now to address without first describing, at least in outline, that history. It is convenient, however, to say at once that the main issue is whether the appellant, Mr Kenneth Higgs, has obtained, whether for himself or on behalf of the estate of his late mother, Clotilda Higgs, of which estate he and a brother of his are the executors, a good possessory title to the land in New Providence Island later described to the exclusion of the other tenants-in-common of the land, and, in particular, the respondent, Leshelmaryas Investment Co. Ltd. ("Leshel").

2. Mr Higgs is, via his mother, a member of the Adderley family, a family which is, and has been for well over a century, a prominent Bahamian family, prominent in the ownership of extensive tracts of New Providence Island and prominent also in Bahamian public affairs. The land to which this appeal relates is a parcel of land comprising 92.33 acres and is situated on the south-western side of the New Harold Road Reservation, Western District, New Providence. The Board will, for convenience, refer to this land as "Tract A". Tract A belonged, together with a great deal of other land in New Providence, to Alliday Adderley who died on 27 September 1885 and, as a result of various transactions that it is not necessary to detail, Tract A became after his death vested in his four children as tenants-in-common. His children were Joseph Richmond Adderley ("Joseph"), William Campbell Adderly ("William"), Sarah Bain ("Sarah") and Daniel D Adderley ("Daniel"). Each, therefore, became entitled to an undivided 1/4 share, a freehold estate, in Tract A.

3. It is convenient at this point to notice that the real property law reforms introduced in 1924 and 1925 in England and Wales have never been adopted by The Bahamas, whose real property law remains, so far as relevant to this case, the law as it stood in England prior to the 1924 and 1925 legislative reforms. Accordingly, individual shares in Bahamian land can continue to exist as freehold estates, requiring neither unity of title, interest or time, but only unity of the right to possession (see Halsbury's Laws of England 4th Ed. Reissue (1998) Vol 39(2) para.207).

The devolution of the undivided ¼ shares

4. William's affairs plainly did not prosper. He became insolvent and his undivided 1/4 share in Tract A was sold by the Provost Marshall on 25 May 1892. The share was, on 6 January 1964, acquired by a Bahamian company, Nassauvian Ltd, sold by Nassauvian Ltd to Group Three Ltd on 28 June 1990 and by Group Three Ltd to Leshel on 14 January 2002. Leshel are the plaintiffs in the proceedings that have led to this appeal.

5. Daniel died on 28 March 1934. He devised his undivided 1/4 share in Tract A to his four children, Richard, Clotilda, Mary Ellen and Roger, as tenants-in-common (subject to a life interest given to another son who died in 1945). Each of Richard, Clotilda, Mary Ellen and Roger therefore became entitled to an undivided 1/16 share in Tract A.

6. Richard died in 1956 having devised his 1/16 share to his siblings, Clotilda, Mary Ellen and Roger, in equal shares, i.e. an undivided 1/48 to each. The Tract A entitlement of each, therefore, became 1/16 plus 1/48 i.e. a 1/12 share.

7. Mary Ellen died intestate in 1967 and a grant of Letters of Administration to her estate was issued to Roger, her heir-at-law. It is so pleaded in paragraph 6 of the Defence of the 3rd defendant, Annamae Woodside, and the Board will assume that the pleading is correct. If that is so, Roger became entitled to Mary Ellen's 1/12 share and, in all, to a 1/6 share in Tract A.

8. Roger died in 1975 having, according to paragraph 7 of the 3rd defendant's defence, devised to one, Elrenia Moxey, 1/3 "of the three-fourth (3/4) share … of Roger … in all that one-fourth (1/4) interest ..." of Daniel in Tract A. The Board is unable to understand why it was thought that Roger had a 3/4 share in Daniel's 1/4 share. Daniel's 1/4 share had been divided between his four children. So Roger started with a 1/16 share. He then acquired from Richard a further 1/48 share, bringing his share up to 1/12. He then acquired Mary Ellen's 1/12 share, resulting in a 1/6 share in all, not a 3/4 of 1/4 share, which would produce a 3/16 share.

9. On the footing that Roger's share in Tract A was, when he died, a 1/6 share, not a 3/16 share, the demise to Ms Moxey was a demise of 1/3 of a 1/6 share i.e. a 1/18 share. The 3rd defendant claims to be entitled to the 1/18 share on the pleaded footing that she was the only lawful child of Ms Moxey who died in 1998 "partially intestate as it relates to her interest under …" Roger's Will. If that is so, it appears to the Board that the 3rd defendant is entitled to an undivided 1/18 share of Tract A, subject, of course, to the appellant's possessory title claim.

10. Clotilda, who had become Mrs Higgs, died in 1974. She left, apparently, a number of children (see para.4 of the Defence of the 8th defendant), one of whom, the appellant Mr Higgs, became the 1st defendant to Leshel's action. It is not clear from the papers before the Board quite how Clotilda's 1/12 share in Tract A devolved on her death but it appears from the Defence filed on behalf of the estate of Monica Delores Knowles (said to be a daughter of Clotilda) that Clotilda devised 1/7 of her real estate to Monica. Monica died in 2004 and, if the details pleaded in the Defence are correct, Monica's estate is entitled to a 1/84 share in Tract A. The devolution of the other 6/7 of Clotilda's 1/12 share is not disclosed by the papers before the Board but it is a fair certainty that Mr Kenneth Higgs has a share. It is relevant to notice that the possessory title claim to Tract A advanced by Mr Higgs in this action and before the Board is advanced on behalf of the estate of his mother, Clotilda. If, and to the

extent that, that claim is well-founded, the shares in Tract A of all those who claim through Clotilda will be enhanced accordingly.

11. The papers before the Board do not disclose how the respective 1/4 shares in Tract A of Joseph or of Sarah devolved. Joseph appears from the family tree, exhibited to the affidavit of Leslie Miller sworn on 12 July 2002, to have been survived by a number of children and grandchildren and it seems very likely that his 1/4 share became divided into many smaller shares (see also para 23 of Mr Miller's affidavit). Sarah, it seems, married, but no other information about her is available. The shares in Tract A claimable by those claiming under Joseph or Sarah must depend, also, on the viability of the possessory title claim made by Mr Higgs on behalf of his mother's estate.

The past litigation in respect of Tract A

12. Litigation in respect of Tract A that has relevance to the present proceedings commenced in 1967. Nassauvian Ltd, the then owners of the 1/4 share in Tract A that is now vested in Leshel, brought proceedings under the Quieting Titles Act 1959 to obtain confirmation of its title to the 1/4 share in Tract A to which the Board have already referred and also its title to a parcel of land comprising 12.52 acres ("Tract B") adjacent to Tract A on Tract A's eastern boundary. Adverse possessory title claims in respect both of Tract A and Tract B were filed by Clotilda and Roger. They contended also that Nassauvian's documentary title was invalid. They lost at first instance and Smith J issued a Certificate of Title dated 23 February 1970 certifying that Nassauvian was the legal and beneficial owner in possession of Tract B and of an undivided 1/4 part of Tract A. Clotilda and Roger both appealed on the possessory title issue but Roger withdrew his appeal and the Court of Appeal dismissed Clotilda's appeal. Clotilda obtained leave to appeal to the Privy Council but she then died and the appeal was prosecuted by her executors, one of whom was Mr Higgs.

13. The appeal to the Privy Council failed. The opinion of the Judicial Committee, reported in [1975] AC 464, was delivered by Sir Harry Gibbs on 16 October 1974. The case for the appellants, as described by Sir Harry Gibbs (at 470) was that

> "… the adverse claimants and their predecessors in title had been in exclusive possession of the land for more than 20 years before the present proceedings were commenced in 1967, and that the title of the respondent [was] barred by the Real Property Limitation Acts 1833 and 1874 (UK) which were declared in force in the Bahama Islands by Acts 9 Vic.c 9 and 40 Vic.c 2 of that colony (as it then was)."

14. The evidence of the acts of possession relied on was described by Sir Harry Gibbs at 471:

> "The land in question – the total area comprising both tracts – was for the most part arable although some of it consisted of pine barren. It was not fenced or otherwise enclosed. There was evidence that at various dates between 1920 and the date of the trial, the land was farmed by

> [Daniel] and his descendants and their tenants. The farms produced small crops of various kinds, particularly vegetables. The practice of most farmers was to cultivate a small area, to reap the harvest, and then to move on to another area leaving the first to become overgrown. There was some evidence that fruit trees were planted but it was not made at all clear where or how extensive the orchards were or how long they survived. There was also evidence that lime burning or coal burning was carried out on the land."

The evidence was that the farming activities had been carried out in part by members of Clotilda's or Roger's families and in part by tenants of one or other of them. However, as Sir Harry Gibb put it at 473,

> "… the body of evidence presented by the adverse claimants was imprecise and lacking in detail: it was not completely consistent within itself and it was in material respects contradicted by other evidence. The trial judge was not bound to accept it: on the contrary it was open to him to take the view – which indeed has much to commend it – that the evidence was vague, nebulous and unreliable and insufficient to discharge the burden of proof resting on the adverse claimants."

15. It does not appear that Nassauvian had, before or after the grant of the Certificate on 23 February 1970, made any actual use of Tract A. Sir Harry Gibbs stressed, however, that "time does not run against an owner of land simply because he is out of possession" (471). What is essential is that the claimant to a possessory title can show that he and, if necessary, his predecessors have been in possession of the land for the requisite period. The adverse claimants had failed to do so. It follows from the grant of the Certificate and the dismissal of the appeals that, for the purposes of any subsequent possessory title claim, acts of possession preceding the grant of the Certificate would be irrelevant.

16. It does not appear that in the period between 1970 and 1987 any attempt was made by Nassauvian to go into actual possession of, or to exercise acts of possession over, Tract A. It does appear, however, that acts of possession continued to be exercised over Tract A by Mr Higgs and members of his family. It appears that peripatetic quarrying operations on Tract A had replaced the former peripatetic farming to which Sir Harry Gibbs had referred. Indeed it seems that this change had pre-dated 1970. Sir Harry Gibbs, at 472, recorded that

> "At the time of the trial, as Smith J who inspected the lands saw, quarrying had taken the place of the former farming, all traces of which had been completely obliterated."

Smith J, in the judgment he gave on 29 January 1970, had referred to his visit to the land and said -

> "Industry has taken the place of any farming that was done. The land has been stripped to rock bottom and rock crushing on a vast scale has

taken place. But this has only been done within the last three or four years by the Higgs family."

17. In 1987 events of some considerable significance took place. On 10 September 1987 attorneys acting for Nassauvian wrote to James M Thompson, attorney for Clotilda's executors, informing him that -

> "Our clients propose surveying the boundary of the 92.33 acre parcel within the next few weeks for the purpose of endeavouring to agree a division of the property with the joint owners or alternatively applying to the Court for an order to this effect."

What was in contemplation, clearly enough, was a consensual division or, alternatively, an application to the Court under the Partition Act c.153. No answer to, or acknowledgement of receipt of, this letter was forthcoming.

18. Nassauvian accordingly, presumably in preparation for a partition application, instructed surveyors to survey Tract A. The surveyors attempted to do so but their attempts were frustrated by opposition from Mr Higgs. This opposition resulted in a considerable disturbance on or near Tract A taking place. Police were summoned. A tractor, brought on to the site by the surveyors in order to clear the Tract A boundaries of scrub vegetation, was allegedly overturned by bulldozers and then surrounded by or buried beneath (descriptions differ) mounds of earth. The surveying operation could not continue, if it had been ever really able to begin, and there is an unresolved issue of fact as to where exactly the tractor was positioned at the time it was overturned and whether it had ever managed to enter Tract A. It is to be borne in mind that the boundaries were unfenced.

19. Not surprisingly Nassauvian commenced an action against Mr Higgs and his brother and co-executor, Eric Alliday Higgs, described in the title to the action as "executors and trustees of Clotilda Eugenie Higgs deceased." The Writ, specially endorsed with a Statement of Claim, was issued on 19 October 1987. It claimed, *inter alia*, an injunction to restrain the defendants from entering Tract B and, in relation to Tract A,

> "an injunction to restrain the Defendants whether by themselves or by their servants or agents or otherwise from interfering with the Plaintiff or its agents in clearing the boundaries of and surveying [Tract A]."

It is not necessary to refer to the parts of the Statement of Claim relating to Tract B but it is important to notice the basis on which the Tract A injunction was sought. Paragraph 3 pleaded the 1970 Certificate of Title that had established Nassauvian's title to an undivided 1/4 share of Tract A, paragraph 4 pleaded the 1974 judgment of the Privy Council and paragraph 8 pleaded the 16 September 1987 attack on the tractor "while in the process of clearing the boundary of Tract A."

20. On 9 November 1987 Nassauvian applied for and on 25 January 1988 were granted by Gonsalves-Sabola J "until the hearing of the action" interlocutory

injunctions in terms of the injunctions sought by the Writ. On 10 May 1988 Nassauvian made an application for final judgment in the action. This application led to an order on 23 June 1988 made by Gonsalves-Sabola J which, after reciting that counsel for both parties had been heard and that affidavits of Mr Brown for Nassauvian and Mr Higgs for the defendants had been read, granted the injunctions as sought, both in respect of Tract A and Tract B, with costs to Nassauvian. There was no appeal. This order constituted in the Board's opinion a clear re-affirmation by the court, binding on the defendants to that action, of Nassauvian's title to its undivided 1/4 share in Tract A. There was no other basis on which Nassauvian could have succeeded in obtaining the Tract A injunction.

The present proceedings

21. The Board can now come to the litigation that has led to this appeal. Nassauvian had, by their solicitors' letter of 10 September 1987, threatened a partition application. However, on 28 June 1990 Nassauvian had sold Tract B and its 1/4 share in Tract A to Group Three Ltd who, in turn, had on 14 July 2002 sold to Leshel and it was Leshel who, by an Originating Summons issued on 19 July 2002 but amended on 13 January 2003, made the application, pursuant to the Partition Act, for the partition of Tract A. On 12 May 2004 it was ordered that the proceedings continue as if begun by Writ and a Statement of Claim served on 1 June 2004, sought the following substantive relief :

> "1. An order for partition of [Tract A] among the parties interested therein.
>
> 2. An order granting the Plaintiff 28.85 acres i.e. one-fourth interest in [Tract A]
>
> 3. Alternatively, an order for sale of [Tract A] in lieu of partition pursuant to the Partition Act, Chapter 153, and the distribution of the proceeds of sale."

22. Eight defendants are named in the title to the Statement of Claim. The first named defendant is Mr Higgs, the second is described as "Personal Representative of the estate of Clotilda Higgs, deceased." Whether Mr Higgs' joinder was in a personal capacity or simply as an executor of Clotilda's estate is not clear. Whatever the intention behind the joinder, he and his co-executor represent Clotilda's estate and, at least, its 1/12 share in Tract A. The third defendant is Annamae Woodside. She, as it appears to the Board, has a documentary title to a 1/18 share in Tract A (see para.9 above). The fourth defendant is named as "Personal Representative of Julia Leslie, deceased", the sixth defendant as "Personal Representative of George Nottage, deceased." Nothing in the Board's papers discloses what share can be claimed by these parties or the reason for their joinder. The eighth defendant, named as "Personal Representative of Monica Delores Higgs deceased", may, it appears to the Board, be able to show a documentary title to a 1/84 share in Tract A (see para.10 above).

23. The defendant not yet mentioned, the fifth defendant, is a company, Manufacturer's Agents Ltd. The fifth defendant, alone among the defendants, was not

joined as the inheritor of a share in Tract A. Its claim to an interest in Tract A is as the purchaser of specific parts of Tract A. The company filed a defence to the partition action on 10 June 2004. In paragraph 4 it pleaded that by a Conveyance of 18 December 1969 Clotilda and Roger had sold to it a 3 acre plot, part of Tract A, and that by a Conveyance of 17 October 1972 Clotilda had sold to it a 6 acre plot, also part of Tract A. Each Conveyance has a Schedule in which a specific part of Tract A, identifiable by specified location and dimensions, is identified as the land sold. These Conveyances did not convey an undivided share. They purported to convey specific parcels of land. In paragraph 6 of its defence the fifth defendant pleads that it "remained in open, continuous and undisturbed possession [of the two plots] until the year 1995." It is to be noted that the fifth defendant's defence was signed by James M Thompson, the president of the fifth defendant and the attorney who had appeared for Mr Higgs and his co-executor in the 1987 action commenced by Nassauvian.

24. The first and second defendants, i.e. Mr Higgs and Clotilda's estate, filed an amended defence and counterclaim on 12 August 2004. They denied Leshel's title to any interest in Tract A, and asserted a possessory title over the whole of Tract A on the ground that they had

> "… for upwards of 25 years prior to the commencement of these proceedings had the undisturbed possession of [Tract A] to the exclusion of the Plaintiff, the Plaintiff's predecessors, and exercised acts of ownership over the same …" (para.7)

They claimed a declaration that Tract A belonged to Clotilda's estate.

25. The third defendant, Annamae Woodside, filed a defence asserting her documentary title to "one-third (1/3) of the three-fourth (3/4) share, estate and interest of [Roger] in all that one-fourth (1/4) part of [Tract A]." The Board have already commented on this claim (para.9 above). She supported Leshel's application for a partition of Tract A. The eighth defendant, the executor of the estate of Monica Delores Knowles, deceased, filed a defence on 27 July 2004. He claimed the 1/84 share in Tract A referred to in paragraph 10 above and supported Leshel's partition application. No defences were filed on behalf of the fourth, sixth or seventh defendants.

26. Leshel filed a reply and defence to the first and second defendants' counterclaim. This pleading simply joined issue with the possessory title assertion. Very surprisingly, as the Board think, there was no pleaded reliance by Leshel on the 1987 action in which Nassauvian, Leshel's predecessor in title, had obtained final judgment against Mr Higgs and his co-executor on 25 January 1988 (see para 20 above). It is noteworthy, also, that neither the third defendant nor the eighth defendant filed any pleadings opposing or dealing with the first and second defendants' possessory title claim.

The issues

27. The main issue disclosed by the pleadings was whether the first and second defendants, Mr Higgs and his co-executor of Clotilda's estate, had established a possessory title to Tract A so as to extinguish the documentary title of Leshel to an undivided 1/4 share in Tract A and, of course, the documentary titles of all other tenants-in-common of Tract A. A secondary issue was whether the two Conveyances to the fifth defendant could have had any effect and, if they could not, whether the fifth defendant could establish a good possessory title to the plots purportedly conveyed in 1969 and 1972. It is not in dispute that, under the Real Property Limitation Acts 1833 and 1874, which apply to the Bahamas, a 20 year period of uninterrupted adverse possession is necessary in order to bar an otherwise good documentary title. So both the first and second defendants and the fifth defendant had to show a period of 20 years uninterrupted possession preceding July 2002, when Leshel's Originating Summons seeking a partition order was issued.

28. Subject to these adverse claims, there was no doubt that Leshel was entitled to an order under the Partition Act. It was necessary, however, for the court to consider whether a division of Tract A into parcels for the respective tenants-in-common should be ordered or whether a sale of Tract A should be directed, with the proceeds of sale divided among the tenants-in-common in accordance with their respective entitlements. Sections 3, 4, 5 and 6 of the Partition Act needed to be kept in mind.

> "3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them the court may if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them direct a sale of the property accordingly, and may give all necessary or proper consequential directions.
>
> 4. In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.
>
> 5. In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the

> property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions; and in case of such undertaking being given the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.
>
> 6. On any sale under this Act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters as to the court seem reasonable."

29. And, if any award either of land or of a part of any proceeds of sale were to be made in favour of any of the tenants-in-common of Tract A, the court would have to be satisfied that the award did not exceed the share to which that tenant-in-common could establish an entitlement. There is, however, a further issue the potential relevance of which was always present but which was not addressed by counsel in the courts below or before the Board. The issue is whether the acts of possession on which the first and second defendants rely for their possessory title claim may be insufficient to defeat the documentary title of Leshel but nonetheless sufficient to defeat the documentary titles claimed by any other tenants-in-common and, in particular, those claimed by the third and eighth defendants. The Certificate of Title obtained by Nassauvian in 1970 confirmed Nassauvian's documentary title to a 1/4 undivided share. The 1987 proceedings and the 1988 Order likewise confirmed that documentary title. None of the other tenants-in-common have any such support. If the acts of possession on which the first and second defendants rely would, but for the 1970 Certificate and the 1988 Order, have sufficed to establish a possessory title, the question arises whether, or on what basis, the other tenants-in-common can resist the first and second defendants' counterclaim. The Board will return to this issue after reviewing the proceedings in the courts below.

The judgment of Thompson J

30. The evidence given at the trial, which, having opened on 28 June 2004, closed on 21 June 2005 on the footing that the respective attorneys for Leshel and for the first and second defendants would present their closing submissions in writing, was almost entirely directed to the acts of possession on which the first and second defendants relied for their possessory title case. The evidence of Mr Higgs was that he and members of his family and persons authorised by him or them had been in effective possession of the whole of Tract A at all times since the grant of the 1970 Certificate to Nassauvian. The main acts of possession relied on were the peripatetic quarrying operations which Mr Higgs said had been carried on indiscriminately as to location

over the whole of Tract A. Evidence was given also by Mr James M Thompson, attorney for the fifth defendant. He supported the evidence of acts of possession that Mr Higgs had given. As to the fifth defendant's interest under its two Conveyances, Mr Thompson made clear that his main concern was the interest in Tract A claimed by the Higgs family. He said

> "Manufacturer's has a very small interest. My interest in the land is that I was an attorney for them for close to 25 years."

By "them" Mr Thompson meant, it is clear, Clotilda and her family. As to the pleaded claim by the fifth defendant that since the dates of the two Conveyances it had been in possession of the land conveyed, Mr Thompson gave a revealing answer under cross-examination by counsel for Leshel :

> "Q. The Higgs are saying that they have been in possession of all the land, including yours?
>
> A. Yes.
>
> Q. During the period?
>
> A. Yes. They were protecting it for me."

There was no other relevant evidence that, post 1972, possession of the 9 acres had been enjoyed by the fifth defendant.

31. The evidence given on behalf of Leshel about the Higgs' quarrying activities was that those activities had been more or less confined to the western and north western parts of Tract A and that Leshel's predecessors in title had themselves carried on quarrying operations on other parts of Tract A.

32. Considerable evidence was directed to the 16 September 1987 incident when an attempt at clearing the boundary, which the Board think must have been the western boundary, of Tract A was frustrated by opposition from the Higgs family.

This incident assumed some importance because it was represented by Leshel as constituting an interruption to any possession that the Higgs family might previously have had. The period 1970 (when the Certificate was granted) to 1987 fell short of the requisite 20 years and so did the period from 1987 to the commencement of the partition proceedings in 2002. If the incident did constitute an interruption to the possession claimed by Mr Higgs, it would have put an end to the viability of the possessory title claim, at least as against Nassauvian and its successors-in-title.

33. The written closing submissions provided to the judge by the respective attorneys for Leshel and for the first and second defendants contained careful reviews of the evidence that had been adduced as well as submissions of law on the requirements for a possessory title claim, and, in the case of the submissions on behalf of Leshel, the requirements for a partition order. Section 3 of the Partition Act was cited.

34. There are notable omissions, however, from the closing submissions made on behalf of Leshel. First, there was no mention of any particular piece of land that it was contended should be awarded to Leshel in satisfaction of its undivided 1/4 share in Tract A. Second, although reference was made to the events of 16 September 1987, there was no mention of, and therefore no reliance placed on, the 1987 action and the final judgment of the court in favour of Leshel's predecessor in title and against Clotilda's executors. And in the closing submissions on behalf of the first and second defendants nothing was said about the position as between the first and second defendants and the other tenants-in-common if Leshel's documentary title to its 1/4 share were to be confirmed.

35. Thompson J gave judgment on 24 April 2006. She gave a brief summary of evidence of acts of possession on Tract A in the 1990s by representatives of Leshel's predecessors-in-title, of the evidence of acts of possession given by Mr Higgs and of the 16 September 1987 incident, which she described as having led to a "forceful confrontation" (para.11).

36. The judge noted the third defendant's estimate of her share in Tract A as entitling her to 15.38 acres. The Board note that 15.38 acres represents marginally less than a 1/6 share of the 92.33 acres but are unable to follow how the third defendant could claim more than a 1/18 share in Tract A (see para.9 above). In paragraph 14 of her judgment the judge referred to the documents of title relied on by the third defendant. This appears to be a reference to the "Amended Abstract of Title" to be found at p.158 of Bundle B of the Record. But the Abstract substantiates a claim by the third defendant to a share in Tract A consisting of 1/3 of (i) a 1/16 share (derived by Roger from Daniel) and (ii) a 1/48 share (derived by Roger from Richard) but does not mention the 1/12 share (derived by Roger from Mary Ellen). It appears to the Board that the most the third defendant can claim is a 1/18 share but in paragraph 25 of her judgment Thompson J expressed her satisfaction with the third defendant's claim and directed that she be awarded the 15.38 acres. The Board respectfully demur.

37. In paragraph 26 of her judgment the judge held the first and second defendants to be entitled to a parcel of land of 7.70 acres. That acreage does fairly approximate to a 1/12 share of Tract A.

38. In paragraphs 27 and 28 the judge dealt with the claim made by the fifth defendant to the 9 acres of land that the 1969 and 1972 Conveyances had purported to convey. She held that the Conveyances "had no valid effect" on the ground that, since Clotilda and Roger had been merely tenants-in-common holding undivided shares in Tract A, they had lacked the power to convey specific areas of land. That conclusion must, the Board think, be correct. The judge did not mention, and therefore did not deal with, the fifth defendant's pleaded claim to have been in undisturbed possession of the plots of land conveyed from the date of the respective Conveyances. But since no evidence in support of that pleaded claim seems to have been given, the omission is not surprising.

39. In paragraph 18 the judge referred to the evidence that had been given on behalf of the first and second defendants regarding the use made by them, or by persons on their behalf, of Tract A in the period since the grant of the Certificate in 1970 but made no finding as to whether it would, but for the 1987 events, have sufficed to establish a possessory title and, in particular, did not indicate what parts of that evidence she accepted and what parts, if any, she did not. She dismissed the claim to a possessory title but did so not on the basis that the acts of possession relied upon were inadequate for that purpose but on the basis of the 16 September 1987 events. She dealt with these in paragraph 20 of her judgment

> "In any event, I accept the evidence of Mr Brown that he entered upon the property in 1987 to survey the same for an exercise similar to the one on which we are presently embarked. As stated previously his evidence is corroborated by Mr Kenneth Higgs Sr. Mr Higgs also corroborates the evidence of Mr Leslie Miller that there were confrontations on the land between them commencing in the early 1990s. In these circumstances the contention that the title of the Plaintiff has been ousted by the open continuous and undisturbed possession of the 92.33 acres for the 20 year period cannot be supported."

40. The problem with paragraph 20, pointed out by Mr Dingemans QC, counsel for the first and second defendants, is that although Mr Higgs had corroborated some of the evidence about the 16 September incident that Mr Brown had given, he did not corroborate, but on the contrary positively disputed, Mr Brown's evidence as to where the overturned tractor had been standing when it was intercepted and overturned by the Higgs bulldozers. Mr Brown had said that the tractor had been clearing scrub from the line of the boundary of Tract A. Mr Higgs insisted that the tractor was not on the boundary and had not entered Tract A. The relevance of the position of the tractor is that its work on the site (to use a neutral expression) was relied on as constituting a re-entry on to Tract A by Nasssauvian, the then owners of the 1/4 share, whose documentary title as a tenant-in-common entitled it to possession of Tract A together with any other tenants-in-common – all enjoying unity of possession. This re-entry, it was submitted, would have interrupted the adverse claimant's sole possession. But if Mr Higgs' evidence about the position of the tractor were correct, and the judge did not say it was not, it would be difficult to treat the presence of the tractor as a re-entry by Nassauvian on to Tract A and thus as an interruption of the Higgs family's possession.

41. The reason, the Board are disposed to think, why the judge did not find it necessary to resolve the dispute as to whether on 16 September 1987 the tractor had made an entry on to Tract A was that she regarded the law as requiring that possession of property should, for possessory title purposes, be possession taken and retained peacefully and not by force. Submissions to that effect had been made in paragraph 11 of the closing submissions in writing provided to the judge by counsel for Leshel. The paragraph referred to

> "… substantial evidence of persistent violent behaviour by the First Defendant and persons acting on his behalf, engaging in violent and dangerous acts against the plaintiff and its predecessors-in-title …"

and to

> "The attacks on Mr Geoffrey Brown and others in September 1987 by the First Defendant and/or his agents …"

42. The judge made an order on 24 April 2006 ordering, *inter alia*, that Tract A be partitioned and

> (i) that a parcel of 22.55 acres situated immediately to the west of Tract B be transferred to Leshel;
>
> (ii) that a parcel of 15.38 acres be demarcated out of Tract A "if practicable adjacent to the Plaintiff's parcel" and transferred to the third defendant; and
>
> (iii) that a parcel of 7.70 acres situated at the extreme western boundary of Tract A be demarcated and transferred to the first and second defendants.

The order declared, also, that the two Conveyances under which the fifth defendant claimed had "no valid and binding effect".

43. Mr Higgs appealed to the Court of Appeal against Thompson J's order. He was the only appellant and a question has subsequently arisen as to whether he was appealing in his personal capacity or as an executor of Clotilda's estate, or in both capacities. The Board think it plain that he regarded himself as appealing on behalf of Clotilda's estate for the benefit of which he had asserted the possessory title and he has, by his counsel, confirmed that to be so. The procedural uncertainties have been resolved before the Board by the formal addition of his co-executor as an appellant. Nothing now turns on the point.

44. The grounds of appeal, as formulated in Mr Higgs' Notice of Appeal dated 1 June 2006, were, *inter alia*, that

> (i) the judge had not made any findings of fact regarding the acts of possession on which the first and second defendants relied and evidence of which had been given;
>
> (ii) the judge had erred in awarding 15.38 acres to the third defendant;
>
> (iii) the judge had made a partition order in respect of a part only of Tract A and had failed to deal with the entirety; and
>
> (iv) the award of the specific parcel to Leshel was unfair in that its value exceeded 1/4 of the value of Tract A as a whole and was therefore disproportionate.

45. The appeal came on for hearing before Sawyer P and Ganpatsingh and Osadebay JJA but the papers before the Board do not disclose the date, or dates, on which the appeal was heard. Subsequently, on 4 September 2007, Sawyer P gave orally the judgment of the Court. A written note of the judgment is in these terms :

> "The appeals are allowed. The decision of the learned judge is set aside. We remit the matter to the Supreme Court with our opinion that the judge hearing this matter should comply with the provisions of the Partition Act (Ch.153). The entire Act must be followed as they do not appear to have been followed in the instant case. In particular, if there is any difficulty with regard to notification of interested or anticipated interested parties, sections 6,7,8,9,10.11,12 and 13 are to be borne in mind by the judge hearing the matter, and the statute, having set out its own process, must be followed faithfully. Each party is to bear his/its own costs of the appeal. The costs in the court below will be costs in the cause."

The terms of this Note raise questions as to the intentions of the Court of Appeal. Thus

1. The Order of Thompson J was set aside. Does that revive the claim of the fifth defendant to a possessory title over the 9 acres comprised in the two Conveyances? Bearing in mind that the fifth defendant did not appeal the Board think that the answer to this question is 'No' and that the judge's dismissal of the fifth defendant's claim should stand.

2. Mr Higgs' appeal was "allowed", but does that revive the first and second defendants' possessory title claim? The directions and guidance given by the judgment note as to the way in which the judge hearing the remitted action should deal with the partitioning of Tract A suggest that the Court of Appeal was not intending to revive the pleaded possessory title claim which, if well-founded, would prevent the partitioning.

3. But if the answer to question 2 is "No", the first ground of appeal referred to in paragraph 44 above would not have been dealt with.

4. And, in any event, the opinion of the Court of Appeal as to the quality of the acts of possession relied on by the first and second defendants or as to the effect of the 16 September 1987 incident on the possessory title claim cannot be discerned from the note.

46. When special leave to appeal to the Privy Council was given by the Judicial Committee on 2 December 2008 a direction was given that written reasons be provided by the Court of Appeal for its 4 September 2007 ruling. The Board regret to say that there has been no response by the Court of Appeal to that direction. The Board have, however, been supplied with a copy of a Note of the oral judgment taken by Ms Francis-Butler, counsel for the appellant, while the judgment was being delivered. The Board are grateful to the parties and to Ms Francis-Butler for that assistance but the Note does not answer any of the questions posed above. The Board regret that they find it necessary to repeat that it is the duty of every court, and particularly every appellate court, to give reasons for their decisions unless relieved by

the parties from that obligation. To leave parties in doubt as to why their contentions have not been accepted is a failure of the judicial process. Mr Higgs was entitled to be told whether his evidence about possessory acts in relation to Tract A from 1970 to 2002 was accepted and, if it was, why his possessory title claim was rejected. Paragraph 20 of Thompson J's judgment based the reason for her rejection of Mr Higgs' possessory title claim on the 16 September 1987 incident and "confrontations on the land" between Mr Higgs and Mr Miller in the early 1990s. The early 1990s confrontations, however, would have taken place after the expiration of 20 years from February 1970 when the Certificate was granted and there was an unresolved issue of fact as to whether in September 1987 there had been any entry by Nassauvian, or its agents, on to Tract A. The question whether, if the acts of possession on which Mr Higgs relied were otherwise sufficient to sustain an possessory title claim, the 16 September 1987 incident could constitute a sufficient re-entry or resumption of rights of possession by the documentary title owner was not explored. The judge had simply said, in paragraph 21, that "Given the evidence of Messrs Miller, Brown and Higgs, the occupation by the Higgs family was not peaceful." Mr Higgs' first ground of appeal against Thompson J's judgment, as expressed in his Notice of Appeal of 1 June 2006, was that the judge had made "no findings of fact as to [the] possession of the first and second Defendants." The Court of Appeal simply did not deal with this. It may reasonably be thought that the Court of Appeal, by remitting the case to the Supreme Court for Leshel's partition application to be re-examined, impliedly dismissed Mr Higgs' appeal on the possessory title issue. After all, if that part of the appeal were allowed, there would be nothing to remit. But parties are entitled to have their appeals dealt with in express terms and, if dismissed, to know the reasons for that dismissal. The Court of Appeal's treatment of the appeal has left Mr Higgs justifiably aggrieved.

The appeal to the Privy Council

47. Mr Higgs has appealed to the Privy Council against the Court of Appeal's implied dismissal of his appeal on the possessory title issue. His main points are that no reasons for that dismissal have been given by the Court of Appeal and that no sufficient findings of fact were made by Thompson J. The Board are of opinion that both these complaints have substance. However, the first and second defendants' case for asserting a possessory title to the exclusion of Leshel and its documentary title to a 1/4 share is, in the Board's opinion, bound to fail. The reason for this is the 1987 action brought by Nassauvian and the final order made in that action. The 1967 litigation that culminated in the grant of the 1970 Certificate to Nassauvian prevents the first and second defendants from relying as against Leshel, Nassauvian's successor-in-title to the 1/4 share, on acts of exclusive adverse possession predating 1970. The 1987 proceedings and the final order made in 1988 prevents, in the Board's opinion, reliance by the first and second defendants on acts of adverse possession predating 1987. For a good possessory title a period of at least twenty years uninterrupted adverse possession is required. The commencement by a documentary title holder of judicial proceedings against a person in adverse possession, the success of which proceedings requires the recognition of the

documentary title, constitutes, if the proceedings are successful, an interruption of the period of adverse possession. If the adverse possessor remains in possession the requisite 20 year period must start afresh. By 1987 the 20 year period from 1970 had not expired. Between 1987 and the commencement of the partition action in 2002 a fresh 20 year period had not expired. The 1987 action, like the partition action, required for its success a judicial recognition of the plaintiff's documentary title to a 1/4 undivided share in Tract A. It follows that the first and second defendants' claim to have overridden Leshel's documentary title by a 20 year period of adverse possession must fail. That is so whatever view be taken of the quality of the possessory acts relied on or of the question whether the incident on 16 September 1987 constituted a re-entry and therefore an interruption of the adverse possession on which the first and second defendants relied.

48. However that conclusion does not necessarily, in the Board's opinion, put an end to the issues raised by the first and second defendants' possessory title claim. There is also the point earlier referred to regarding the position as between the first and second defendants on the one hand and the documentary tenants-in-common ~~title~~ other than Leshel on the other. Let it be assumed that the acts of possession on which the first and second defendants relied and of which evidence was given before Thompson J, were of a quality and a frequency sufficient to constitute exclusive adverse possession by the Higgs family of the whole of Tract A for the requisite 20 year period prior to 2002 and subject only to the interruption constituted by the 1987 litigation. That interruption preserved for Nassauvian and its successors-in-title the undivided 1/4 share in Tract A now vested in Leshel. But does it follow that the benefit of that interruption can be claimed also by the other tenants-in-common? The interruption did not consist of an actual re-entry into possession by Nassauvian. It consisted of a specific legal act recognised by the law as, in effect, a notional re-entry. Suppose, for example, the adverse possessors, before they had had 20 years adverse possession, had acknowledged in writing Nassauvian's documentary title to an undivided 1/4 share of Tract A (see s.14 of the 1833 Act). On what basis could the benefit of that acknowledgement be claimed by the tenants-in-common whose documentary titles had not been similarly acknowledged? This is not a point that was raised or addressed at the hearing by the Board of the appeal and the Board cannot therefore express any conclusions about it but it is a point that the first and second defendants may wish to pursue at the remitted hearing.

The remitted hearing

49. At the remitted hearing of Leshel's partition action the judge will have to try to ascertain the respective shares in Tract A to which the respective claimants to an undivided share are entitled. The only certainties, as it seems to the Board at present, are that Leshel is entitled to an undivided 1/4 share and the executors of Clotilda are entitled to at least a 1/12 share (see para.6 above). It is at this point that Clotilda's executors may wish to claim that their acts of possession have barred the documentary titles of the other tenants-in-common and the Board think it might be helpful if they made a few comments about the ability of a co-owner under the relevant property

legislation that applies in the Bahamas to claim by adverse possession to have barred the documentary titles of other co-owners and to do so in reliance on a peripatetic exploitation of the land in question.

50. The Board think there is little doubt that, pre the enactment of the Real Property Limitation Act 1833, the acts of possession relating to peripatetic farming, quarrying and rock and stone removal relied on by Mr Higgs would have been inadequate to bar the title of a co-owner no matter how long those acts had continued. Under common law tenants-in-common of land enjoyed unity of possession. This continues to be the law in the Bahamas – and in other Caribbean jurisdictions. The result of the common law unity of possession of co-owners was that the sole possession by one co-owner of the co-owned land was, *prima facie*, not adverse to the title of any other co-owners. The co-owner in possession would be accountable to the others for rents and profits received but, although the lapse of time might bar the right to an account (see *In re Landi, deceased* [1939] Ch 828), it would not, without something more than mere possession, bar a co-owner's title.

51. This state of affairs was changed by section 12 of the 1833 Act

> "When any one or more of several persons entitled to any land or rent as … tenants in common shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or rent shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

This section makes the actual possession by a tenant in common of co-owned land separate from the entitlement to possession of his co-owners who are out of possession (see Carson's Real Property Statutes 2nd Ed (1910) at 149). The proposition is illustrated by *Culley v Doe* (1840) 11 Ad & ECl.1008 (see Denman CJ at 1017) and *In re Hobbs* (1887) 36 Ch.D 553 in which it was held that a co-owner father, who had for the requisite period received the rents of a property of which his adult son, too, was a co-owner, had thereby barred the title of the son. There was no evidence, it was held, that the father had received the rents as agent or trustee for the adult son. It seems well arguable, if this principle is applied to the present case, that exclusive possession by Clotilda's executors of Tract A, or their exclusive receipt of the rents and profits derived from Tract A, for at least 20 years would have barred the respective titles of those inactive co-owners who, unlike Nassauvian and Leshel, had taken no steps to protect their titles.

52. In the present case the boundaries, or at least part of the boundaries, of Tract A were neither fenced nor demarcated on the ground. There was, therefore, no obvious act of exclusion, such as the locking of gates, by means of which Clotilda's executors, the presumptive adverse possessors, could bar the entry to the land of the other co-owners or demonstrate the requisite *animus possidendi* in relation to the whole of

Tract A. In *Jones v Williams* (1837) 2 M&W 326, however, it was held that acts done on part of the land could constitute evidence of possession of the whole : per Parke B at 331 -

> "Ownership may be proved by proof of possession … evidence may be given of acts done on other parts, provided there is a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did …"

and at 332

> "… if you prove the cutting of timber in one part [of a wood], I take that to be evidence to go to a jury to prove a right in the whole wood."

In *Lord Advocate v Blantyre* (1879) 4 App.Cases 770 Lord Blackburn said at 791-792:

> "And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what kind of possession was proved … I apprehend that this is as much the law in a Scotch as in an English Court."

53. Whether this approach would succeed in a case where title was being claimed by one co-owner against another would depend very much on the facts of the case. Assuming it were to apply, it would be no answer that there may be some co-owners whose title the adverse possessor has acknowledged or for some other reason cannot bar – see the reference in section 12 to "possession or receipt of the entirety *or more than his or their undivided share or shares* of such land."

54. The most important acts of possession relied on by Mr Higgs are those relating to the removal of rock and stone. These operations appear to have been akin to an opencast mining operation with excavators moving across Tract A at will. There is no evidence that this use of Tract A was ever protested by the other tenants in common. Certainly none sought an account of the rents and profits derived from that use and it is well arguable the use of the land of which evidence was given, evidence that was not really challenged before Thompson J, requires the tests suggested in *Jones v Williams* and *Lord Advocate v Blantyre* to be applied.

55. It appears to be common ground that the third defendant, Annamae Woodside, who claims to have succeeded, via Roger, to a share in Tract A (see para.9 above) never, over the period between 1975 when Roger died to the commencement of this litigation in 2002, made or attempted any entry on to Tract A or made any claim to a share in the rents and profits being obtained from Tract A by Clotilda's executors. If the acts of possession relied on by them are of a character and degree sufficient for possessory title purposes, her documentary title must be statute barred unless she can

claim the benefit of the notional interruption brought about in 1987 by Nassauvian's action.

56. As to any other claimants to a tenancy in common over Tract A, i.e. other than Leshel and the third defendant who were the only two whose documentary titles were recognised by Thompson J, none gave evidence of any entry on to the land over the period during which Clotilda's executors were engaging in their acts of possession, there was no evidence of any claim by any of them to an account of the rents and profits obtained from Tract A by Clotilda's executors, and if the third defendant's documentary title is barred, so too must theirs be barred. Much turns, therefore, on the question whether they can claim the benefit of the notional interruption to the first and second defendants' possession constituted by the 1987 action brought by Nassauvian.

57. The Board think it desirable that they say a word or two also about the proposition, advanced to the Board by counsel for Leshel, that a demand made by a documentary title holder to be allowed into possession is a sufficient interference with the possession of an adverse possessor so as to interrupt the possessory period. There is no warrant for that proposition. Nor is there any warrant for the proposition that a refusal by the person in possession to allow the demanded re-entry stops time running. The requirement that for prescriptive purposes enjoyment of a right be *nec vi, nec clam, nec precario*, a requirement that Thompson J thought disqualified the first and second defendants from claiming a possessory title, is certainly a requirement applicable to prescription of easements but the *nec vi* element is not, in the Board's opinion, applicable to the possession of land for possessory title purposes. The decision of the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 established, or perhaps re-established, that for possessory title purposes it is the intentions of the adverse possessor, not those of the documentary title holder, that are important. 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.

58. The documentary title-holders in the present case have had, as co-owners, the right to possession of Tract A and to a share in the rents and profits derived by Clotilda's executors from Tact A but, other than Leshel and its predecessors in title, have never exercised or sought to exercise those rights since, at latest, 1975 and, unlike Leshel and its predecessors in title, have taken no step to protect those rights.

The partition

59. Unless the tenants in common entitled to shares in Tract A can agree upon a partition of the land, it seems to the Board, as at present advised, that a sale of Tract A

and a division of the proceeds of sale is likely to be inevitable. If Clotilda's executors can succeed in satisfying the judge before whom the remitted action is heard that they have acquired by their possessory acts over Tract A the rights of their co-tenants in common other than Leshel, their individual share will have increased from 1/12 to 3/4. It would be reasonable to expect that they and Leshel could agree upon a division of the land. If they cannot agree, it appears to the Board – although this does not of course bind the judge – the sensible course would be to direct a sale by auction with both parties at liberty to bid.

60. If, on the other hand, Clotilda's executors fail to establish a possessory claim to Tract A that bars their co-tenants in common other than Leshel, there can surely be no alternative but a sale. If the documentary titles of all the co-tenants in common remain good, the shares of some of them will be 1/84 or even less (see paras 6 to 11 above). An actual division of the land into parcels the respective values of which equate to the entitlement of each tenant in common would seem an impossibility. Moreover each parcel would have to have access to a public highway. So, it seems to the Board, a sale would be inevitable, with the net proceeds of sale divided between the tenants in common in accordance with their respective entitlements. These opinions are expressed in the hope that they may assist the judge and do not, of course, bind him or her.

Summary and disposal

61. The Board conclude that

(1) Mr Higgs and his co-executor's appeal against their failure in the Court of Appeal to establish a possessory title that overrides Leshel's documentary title to a 1/4 share in Tract A must be dismissed;

(2) the Court of Appeal's order setting aside the award of specific parcels of Tract A to Leshel, to the third defendant and to Clotilda's estate was correct and should be upheld;

(3) the remission of the partition action to the Supreme Court for a re-hearing was correct and should be confirmed;

(4) it remains open to Clotilda's executors to contend at the remitted hearing that by their acts of possession over Tract A they have acquired a possessory title to the undivided shares of their co-tenants in common other than Leshel – it will be a case management decision for the judge whether or to what extent fresh evidence, additional to that given at the hearing before Thompson J, will be permitted;

(5) the fifth defendant's claim to an interest in Tract A was correctly dismissed by Thompson J and should not be treated as revived by the Court of Appeal's order;

(6) save as mentioned above, the Court of Appeal was correct in setting aside the order of Thompson J.

Costs

62. The Court of Appeal ordered that each party, i.e. Leshel and Mr Higgs, should bear its/his own costs of the appeal and that the costs below should be costs in the cause. The problem with this order is that (i) Leshel has succeeded before the Board on a point not pleaded and not taken in either of the courts below; (ii) Clotilda's executors have failed in their possessory title claim as against Leshel but may yet succeed in establishing that claim against the other tenants in common; (iii) the "cause" for the purposes of the costs of the hearing before Thompson J is therefore uncertain.

In these circumstances the Board is minded to say that each party should bear its own costs of the hearing before Thompson J, before the Court of Appeal and before the Board. The parties may make submissions within 21 days for some other order as to costs to be made.