

**IN THE COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2023/CLE/gen/No.00213**

**BETWEEN:**

**LESLIE MCKENZIE  
FREEMAN MCKENZIE  
MARVIN MCKENZIE  
JOHN OLSON MCKENZIE  
BESSIE CURTIS  
JENNIFER MCKENZIE  
PATRECE MCKENZIE DARLING**

**Claimants**

**AND**

**DWAYNE GARDINER**

**First Defendant**

**AND**

**GARCO INVESTMENTS LIMITED**

**Second Defendant**

**Before: Her Ladyship The Honourable Madam Justice Carla Card-Stubbs**

**Appearances: Ms. Nichollette Burrows as Counsel for the Claimants  
Mr. Charles Mackay as Counsel for the Defendants**

*Application for Interim Injunction - Parts 17.1, and 17.2 of the Supreme Court Civil Procedure Rules, 2022, as amended, ('CPR') —Factors to consider when granting an interim injunction- American Cyanamid Co v Ethicon Ltd. principles – Claim in Trespass – possessory claim versus documentary title*

*The Claimants sued the Defendants in trespass and sought an interlocutory injunction to restrain the activities of the Defendants. The Claimants allege over 70 years of possession of the subject property. The Defendants claim to be documentary title holders by virtue of a conveyance which had its root in a conveyance from the Second-named Claimant. The Claimants deny that the Second-named Claimant executed a conveyance. The evidence before the court was that the Defendants entered into possession of the subject property and conducted several businesses thereon.*

*Held: Application for injunction dismissed. The suit concerns the ownership of the land and the entitlement to possess the land. There was a serious issue to be tried but damages would be an adequate remedy for the Claimants. The Claimants did not provide evidence of subsisting businesses at the time they allege they were dispossessed nor particulars of the types of losses said to be suffered. In the circumstances, the Court refused to exercise its discretion in favour of the Claimants.*

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## **RULING**

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**CARD-STUBBS J.**

### **INTRODUCTION**

[1.] This is the Claimants' application for an interim injunction. For the following reasons, the application is dismissed.

### **BACKGROUND**

#### **The Action**

[2.] The Claimants commenced their action by Fixed Date Claim filed March 14, 2023. The claim is in trespass. The dispute is about land described as situate 3/10 miles West of the Public Dock in the Settlement of Barraterre in the Island of Exuma, The Bahamas, and is herein referred to as "the subject property."

[3.] The Claimants allege that they have been in occupation of the subject property "since on or about" 1973. Their claim to the land is based on possession as a family unit.

[4.] The First Defendant is the relative of the Claimants. He is the son of the deceased sister of the Claimants.

[5.] The Claimants allege that "on or before April 30, 2022, the Defendant [sic] together or separately by his servants and agents wrongfully entered the said land without the consent of the Claimants and took possession and remains in possession of the said land".

#### **The Application**

[6.] By application filed May 18, 2023, the Claimant petitioned the court for an interim injunction, requesting the Court to make the following Order:

"For an Order that the Defendants be restrained whether by themselves or by their servants or agents or otherwise by injunction until judgement in this action or further order from doing the following acts that is to say taking possession of the Claimants land situate in Barraterre, Exuma in the pleadings mentioned by wrongfully entering into possession of the

said Property and forcibly evicting the Claimants and other authorized occupants thereof AND to forthwith return the personal possessions, including furnishings, appliances and other fittings out of the Restaurant on the property of the Claimants land AND that provision be made for the cost of this application.

[7.]The Application is supported by the Affidavit of John Olson McKenzie, Fourth-named Claimant, filed July 13, 2023.

[8.] The Application was resisted by the Defendants. On June 21, 2023, the Defendants filed the Affidavit of Dwayne Gardiner in response to the Claimants' application.

Allegations of the Claimants

[9.]By affidavit of John Olson McKenzie, the Claimants assert that the land has been in the family's possession since 1973 and that in 1978 the family completed construction of the building known as "Sailor's Cove". He avers that in 1980, Freeman McKenzie, brother of the affiant and uncle to the First Defendant, received the first business licence for operation of "the family business known as "Sailor's Cove" and "Barratterre Bone Fishing Lodge" which included a restaurant, gift shop and guest houses." His evidence is that other business licenses "to operate the business from the subject land" were granted to his siblings including the mother of the first Defendant and later the Defendant, which he avers was "with permission from the Claimants."

[10.] The Claimants' Affiant further avers:

7. The McKenzie family have never vacated the land and or given up possession. They have always been in full possession up to the First Defendant's wrongful disruption. We have always had peaceful enjoyment and possession of the said land.
8. The First Defendant is familiar with the land which is the subject matter of this injunction. In fact, we agreed to allow the First Defendant to operate and assist us with the day-to-day operations of the restaurant and renting the guest houses as he complained of not having employment and in need of financial assistance.
9. The First Defendant was allowed to operate Exuma Sport Rental between the periods from 2016 to 2022 with our permission as our nephew in need of assistance and not a possessor of the land.
10. The First Defendant never had and or was given possession to the subject land and simply ran the day-to-day operations with our consent.
11. Sometime in April, 2022 The First Defendant contacted my family regarding developing the land which is in my family's possession. We all agreed to hear the First Defendant regarding the same and collectively made a decision regarding his desire to develop the land which we are in possession of with our approval.
12. On the 17th day of April 2022, the McKenzie family presented a letter to the First Defendant advising him that he had no authority to develop the land nor

were we open to entering into any agreement as he initially suggested in developing the said land. Attached hereto and now shown is a copy of the letter marked "**Exhibit F**".

13. A few days later the First Defendant presented a Conveyance from my brothers, Freeman McKenzie Jr. and Laverne McKenzie (now deceased) indicating that they had conveyed the land to our sister Marjorie McKenzie Gardiner, the First Defendant's mother which was subsequently conveyed from Marjorie Gardiner to Garco Investments Ltd. Attached hereto and now shown is a copy of the purported Conveyance marked "**Exhibit G**" and "**Exhibit H**".
14. Our brother Freeman has no knowledge of entering into an agreement with our deceased sister regarding a sale of the subject property. He has never received any form of compensation for the same.
15. ...
16. ...
17. On the 29th day of April, 2022, we received a letter from Counsel representing the First Defendant regarding the Estate of Marjorie Gardiner indicating that the First Defendant and his sister were the beneficial owners of the property which my family is in possession of. Attached hereto and now shown is a copy of the letter marked "**Exhibit J**".
18. At that time, my family and I continued to operate our business from the premises as we have done for over 40 years. We engaged our attorneys who sent a formal letter to his counsel regarding our family's' position. Attached hereto and now shown is a copy of the letter marked "**Exhibit K**".
19. The First Defendant subsequently served me and a few of my siblings with a summons to be bound over to keep the peace in the Magistrate's Court in New Providence. An Order was granted which cautioned me and my family to keep the peace and that we were not to interfere with the First Defendant, and we could no longer enter the property which we possessed for over 40 years. Attached hereto and now shown is a copy of the Order marked "**Exhibit L**".
20. Not having an understanding and appreciation of the Order, my family continued operating their business and I continued to operate my boat tours from the manor. This continued until my brother and I were arrested and placed in jail in Exuma and we were flown to New Providence and brought before the Magistrate Court regarding the breach of the order. As a result of the same, my brother and I were ousted from the property which my family possessed for over **70 years** and told that if we were to enter the premises again, we would be placed in jail and ordered to pay costs.
21. Shortly thereafter, the First Defendant along with his agents came in and began to demolish the property, erect unauthorized structures, sold our equipment which we had in the restaurant and destroyed our personal belongings. Additionally, the First Defendant entered into a lease agreement with Rubis Gas Company, which has a gas pump on the land we possessed as mentioned above. Attached hereto and now shown are photos of the damage and destruction to the property and photos of unauthorized structures marked "**Exhibit M and N**".
22. To date we have no access to the land due to the bound over in place in addition to our family being deprived of their right to continue occupying the land which we are in possession of.

[11.] The Claimants' claim is one of possession for over 70 years.

Allegations of the Defendants

[12.] By Affidavit of Dwayne Gardiner, the Defendants allege that the Second Defendant holds a conveyance in respect of the subject property and refutes that the Claimants, save Freeman Mckenzie, had an interest in the property.

[13.] Dwayne Gardiner avers that Freeman Mckenzie, Second-named Claimant, was in possession of the property but failed to develop it because of a lack of finance. He avers that in 1983, Freeman's brother Lavern injected capital into the project but failed to complete it due to inadequate financing. His evidence is that his mother Marjorie (Mckenzie) Gardiner stepped in to assist in 1985 and that Freeman McKenzie "left Exuma thereby abandoning the property" in 1990. He alleges that Lavern Mckenzie was resident in Nassau and "never moved to Exuma".

[14.] Dwayne Gardiner alleges that his mother bought the interests of Freeman Mckenzie and Lavern McKenzie in the subject property and that she subsequently conveyed the subject property to the Second Defendant.

[15.] The Defendants' Affiant further avers:

7. In 1997 my mother, Marjorie Mckenzie Gardner, became employed in Exuma and proceeded to renovate the building on the property in dispute but in speaking with Mr. Elliott Lockhart who was her legal advisor, he informed her that she should purchase the interest of Freeman and Laverne Mckenzie who are her brothers before she invested any more monies in the property in dispute.
8. Following on the advice given to her by Mr. Lockhart she then obtained a conveyance of the property shown on the plan attached thereto from Freeman McKenzie and Laverne McKenzie both of whom claimed the land and residing in New Providence. They sold all of their shares an interest in the property described in the schedule to the conveyance which is the property now in dispute. None of the other claimants ever had any interest in the property as each of them own property in the same area.
9. When the said Marjorie Gardiner acquired the land in question she proceeded to renovate the building thereon and open the same for business as a bonefish lodge in 2003. She obtained all of the necessary permits and licenses from the government.
10. ...
11. While in possession she transferred title to the property in the name of the Second Defendant and she remained in possession of the same.
12. When she died in 2015 her Insurance paid off a part of the loan obtained from the Bahamas Development Bank.
13. My father put me in charge to run the business until he died in 2018 and thereafter the shares in the company was left to my sister and myself with two thirds to me and one third to her.

14. In 2022 I received a letter requesting me to vacate the property. At that time my family's combined occupation of the property amounted to 25 years plus the property was vested in the Second Defendant.
15. ...
16. I consulted with Mr. Lockhart, my mother's attorney, with respect to the actions of the claimants and he presented me with a copy of the conveyance and I obtained an order from the Magistrates Court in Exuma against all the Claimants on 13<sup>th</sup> June last year to prevent them from interfering with my business on the property. The claimant, John McKenzie, breached the court order on two occasions and he was fined by the magistrate accordingly.
17. I have copies of the following documents in my possession showing that I have been carrying on business on the property in dispute. ...

[16.] The Defendants' claim is to documentary title and possession for over 25 years.

## **ISSUE**

[17.] The issue before the Court is whether it ought to exercise its jurisdiction and grant the injunctive relief sought by the Claimants.

## **LAW AND ANALYSIS**

[18.] The Court has the power to grant an interim injunction pursuant to Part 17.1(1)(b) of the **CPR**, which provides:

“1) The Court may grant interim remedies including —  
(b) an interim injunction;”

[19.] The January 2024 Practice Guide to the CPR provides helpful guidance. The notes to Rule 17.1.1(b) provide in part:

### **CPR 17.1(1)(b) – interim injunctions:**

The purpose of an interim injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. National Commercial Bank Jamaica Limited v Olint Corporation Limited (Practice Note) [2009] UKPC 16 <http://www.bailii.org/uk/cases/UKPC/2009/16.html>

The approach to be adopted by the court in hearing applications for interim injunctions and the principles to be applied are derived from American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 (H.L.): Tara Estates Ltd v Arthurs (Milton).pdf ([courtsofappeal.gov.jm](http://courtsofappeal.gov.jm)) [2019] JMCA Civ 10; JIPFA Investments Ltd v The Ministry of Physical Planning et al - Eastern Caribbean Supreme Court ([eccourts.org](http://eccourts.org)).

Examples of cases involving a consideration of whether an interim injunction should be granted include the following:

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*Tyson Strachan v Anthony Simon et al* 2021/CLE/gen/00863 (11 October 2023) The claimant claimed to be the true owner of land in respect of which the first defendant had a conveyance dated 16 March 2020 from the second defendant. The third defendant, First Caribbean International Bank (Bahamas) Limited entered into a mortgage over the first defendant's property. The claimant brought an action alleging negligence in the unlawful/wrongful transfer of the property as well as nuisance. The claimant applied for interim reliefs mirroring the substantive reliefs sought in his writ of summons. The Court held that the Court's powers to grant interim orders are outlined under Part 17 of the CPR.

In relation to the application for an interim injunction, the Court held that CPR 17.1(1)(b) empowers the Court to grant an interim injunction. The principles emanating from *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1 remain the benchmark in determining whether or not an interim injunction ought to be granted. The factors to be considered are (i) whether there is a real issue to be tried? (ii) whether damages would be an adequate remedy? (iii) whether the claimant is willing to provide an undertaking in damages if it is determined that the injunction ought not to be granted? (iv) whether the balance of convenience lays in favour of the applicant? (v) whether there are any special factors to consider? On the facts, an interim injunction was granted subject to the claimant providing an undertaking in damages.

(However, the American Cyanamid criteria do not apply in certain exceptional cases, e.g., in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial: *Bonnard v Perryman* [1891] 2 Ch. 269).

[20.] In determining whether an interim injunction should be granted, a court takes into account those considerations enumerated in the *locus classicus*, **American Cyanamid Co v Ethicon Ltd** [1975] AC 396. Lord Diplock opined at pages 407 – 408 of that judgement:

“The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the

balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the



hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

[21.] Therefore, the considerations for this court on this application are:

1. Whether there is a serious question to be tried.
2. Whether damages would provide an adequate remedy for the Claimant if the application for interim injunction were to be refused and they were to succeed in their claim at trial. If not, whether damages would provide an adequate remedy for the Defendant if their actions were to be curtailed by the interim injunction and they were to be found at trial as having a right to carry out the actions complained of by the Claimant.
3. If there is doubt as to the adequacy of the respective remedies in damages, where does the balance of convenience lie?
4. If other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

#### Claimants' Submissions

[22.] The Claimants contend that there exists a substantial issue to be determined at trial, as the First Defendant unlawfully entered and took possession of land previously under their control, located in Barratterre, Exuma, The Bahamas. They assert that such actions by the First Defendant amount to trespass.

[23.] The Claimants maintain that, should they succeed at trial, damages would not constitute an adequate remedy due to the ongoing nature of the alleged trespass by the First Defendant. In support, they rely on ***Canary Wharf Investment Ltd. & Ord v Brewer [2018] EWHC 1760***.

[24.] The Claimants further argue that the livelihood of the Second and Fourth Claimants has been severely impacted by the First Defendant's conduct, as the business in question was their sole source of income. They allege that the First Defendant has inflicted significant and irreparable harm to the subject property and to the Claimants' reputations.

[25.] The Claimants further submitted that the First Defendant has been operating the business exclusively for a year (to the date of the action), to the exclusion of the Claimants, who had managed the business enterprise since 1980. They contend that an injunction is warranted to halt the First Defendant's business operations and arrest the losses suffered by the Claimants.

[26.] The Claimants challenge the validity of the conveyances upon which the First Defendant relies to assert documentary title to the subject property. One of those

conveyances is purported to have been signed by one of the Claimant and that is refuted. They allege that the documents are fraudulent and that no legitimate title exists in the Defendants in respect of the subject property and that therefore their possessory title is stronger than the Defendants' purported documentary title.

[27.] The Claimants argue that the balance of convenience favors the granting of the injunction. They assert that, in addition to the damage already suffered, the Defendants' actions violate their rights to the land. They argue that an injunction would enable the Claimants to re-enter the property without interference, prevent further damage, and prohibit the First Defendant from continuing to trespass or obstruct the Claimants' peaceful enjoyment and operation of the land and business established since 1980.

#### Defendants' Submissions

[28.] The Defendants submit that there is no serious issue to be tried. The Defendants submit that an action for trespass must be brought by the party in possession, citing Clerk & Lindsell on Torts, Twentieth Edition, Sweet & Maxwell (publishers) and the case of **Ocean Estate v Pinder [1969] 2 A.C. 19** as authority. The Defendants argue that the Claimants lack an interest in the subject property and that the Defendants hold both the documentary title and possession of the land in question. The Defendants also argue that it is a landowner whose title is not in issue that is entitled to an injunction per **Patel v WH (Exiot) Ltd [1987] 2 All ER 569**.

[29.] The Defendants further contend that the Claimants assert possession through inheritance from their parents but that no evidence has been provided to support that claim.

[30.] With regard to the fraud allegations, the Defendants maintain that the Claimants' originating document does not contain any allegation or foundation for a pleading of fraud, and as such, issues of fraud should not be entertained in this application for injunctive relief. The Defendants also submit that the signature of the Second-named Defendant which appears on the Conveyance is identical to one is on a Demand Letter issued by the Claimants.

[31.] Further, the Defendants lay their own allegation of fraud and assert that the survey plan submitted by the Claimants in support of their claim of possession has been altered and does not reflect the original property plan.

[32.] The Defendants submit that the Claimants are not entitled to an injunction and "have no right in law to bring an action for trespass as they are not in possession of the land or physically in possession of title documents."

#### Discussion and Determination

##### ***(i.) Whether there is a real issue to be tried***

[33.] In assessing whether there is a serious issue to be tried, the Court must consider whether the applicant for the interim injunction has made out a case of a continuing or threatened breach of a legal right. To do so, a court must assess the evidence presented by affidavit. Where there is a conflict of evidence, it is not for the court to resolve that conflict

on an application of this nature. However the court must consider the nature of each party's case in making a determination as to whether there is a serious issue to be tried.

[34.] The Claimants assert that the subject property has been in their family's possession for approximately 70 years. That assertion is said to be supported by a survey plan "surveyed at the instance of the Mckenzie Family" and dated August 2022. It is difficult to see how a 2022 plan, without more, supports the Claimants' contention of possession since 1973. The Defendants submit that that document is "a false document" and is an alteration of a plan originally made at the instance of the First Defendant's mother, Marjorie Mckenzie Gardiner in 1997.

[35.] Besides a bald assertion, there is no explanation or description of how "the McKenzie family" came to possess the land since 1973. The Claimants also rely on a business licence granted to Freeman McKenzie in 1980 as evidence of the "siblings" running a business on the subject property. The evidence of the Defendants is that Freeman Mckenzie was in possession of the property "between 1978 and 1980".

[36.] The Claimants rely on business licences to Marjorie (Mckenzie) Gardiner in 2003 and 2006 as evidence of further possession by the Mckenzie family. Marjorie Gardiner was the mother of the First Defendant. The First Defendant alleges that the property was conveyed by Freeman Mckenzie Jr and Lavern Mckenzie to his mother in 1997 and therefore his mother, Marjorie Gardiner, acquired the entire interest in the property and received business licences in her name. The imputation is that at the time Marjorie Gardiner acquired the business licences, she did so in her own right and not as part of a family which had an interest in the property.

[37.] Marjorie Gardiner is said to have later conveyed the property to the Second Defendant, Garco Investments Ltd., in March 2010. The First Defendant avers that he is a part owner of the Second Defendant. The First Defendant has also exhibited approvals related of the use of the land in his name.

[38.] I find that the assertion of the Claimants to possession as a family since 1973 have not been substantiated on this application based on the affidavit before me. However the parties are *ad idem* that Freeman McKenzie did possess the property from 1978 and attempted to run a business thereon for which he obtained a business licence in 1980. The parties are *ad idem* that two of the siblings, now deceased, also committed acts of possession on the property. The Defendants' evidence is that Lavern Mckenzie joined Freeman Mckenzie in 1983 and that Marjorie Mckenzie Gardiner "stepped in to assist" in 1985.

[39.] The Claimants, including Freeman Mckenzie, dispute that Freeman Mckenzie executed the 1997 conveyance to Marjorie Gardiner. The Defendants argue that fraud has not been pleaded in the initiating action as is required by the rules. While that may be so, it appears that the cause of action of the Claimants is premised on their purported possession. The Claimants in their current Application before this court have introduced

the 1997 conveyance and made the allegation by affidavit which has gone unanswered by the affidavit of the Defendants.

[40.] The Claimants have also alleged that the First Defendant was given occupation of the land by them and was given permission to conduct business on the land until they withdrew their permission in 2022. The Claimants contend that between 2016 and 2022, the First Defendant was granted permission by them to assist with, and conduct daily business operations on, the subject property.

[41.] The Defendants' evidence is that the Claimants served notice to vacate the property in 2022. It is subsequent to that, that the First Defendant avers that he consulted "with Mr. Lockhart, my mother's attorney, with respect to the actions of the claimants and he presented me with a copy of the conveyance....". Notably, the documentary title relied upon by the First Defendant surfaced subsequent to the notice to vacate.

[42.] The Defendants submit that only a person in possession can sue for trespass, relying on **Ocean Estates v Pinder**. The Defendant also relies on **Patel v WH (Exiot) Ltd** which is authority for the point that a landowner whose title is not in dispute was prima facie entitled to an injunction to restrain trespass on his land, even if the trespass did not harm him. In **Patel v WH (Exiot) Ltd**, an adjoining landowner whose title to the land was not disputed, was granted an injunction to restrain the Defendants from parking on his property where the Defendants had no right at law to do so and had no answer in defence to the landowner's title.

[43.] In **Ocean Estates v Pinder**, the Appellant relied on documentary and possession to bring a suit of trespass against the Respondent. The Court considered the submission that the documentary title by itself was not sufficient to bring a suit in trespass. Lord Diplock, in delivering the judgment of the Court, determined that such a contention was not well-founded. At pages 26 to 29, Lord Diplock opined:

It has, however, been contended on his behalf that notwithstanding that the plaintiffs showed a sufficient documentary title to the land the particular form of action which they selected, viz., one of trespass to land, was not available to them because they failed to show that at the time that the action was brought they had sufficient possession of the land to maintain an action for trespass.

This contention is based upon a relic of the ancient law of seisin under which actual entry upon land was required to perfect title and to enable the owner to bring a personal action founded on possession such as ejectment or trespass. In *Bristow v. Cormican* (1878) 3 App.Cas. 641 Lord Black-burn, at p. 661, explains how in the development of the action of ejectment the entry ceased to be actual and became a mere legal fiction. It is in their Lordships' view unnecessary to consider to what extent at the present day, more than a century after the abolition of forms of action, actual entry by the person having title to the land is necessary to found a cause of action in trespass as distinct from ejectment or recovery of possession. **Put at its highest against the plaintiffs it is clear law that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless**

**there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired:** see *Bristow v. Cormican* (1878) 3 App.Cas. 641, Lord Hatherley at p. 657, and *Wuta-Ofei v. Danquah* [1961] 1 W.L.R. 1238.

[Emphasis supplied]

[44.] The Defendants say that they are in possession of the land and that the Claimants cannot bring a trespass action on the basis that they are not in possession. For the reasons set out in **Ocean Estates v Pinder**, those submissions are ill-founded. Further, the very basis of the Claimants' assertion is that they were in possession until they were wrongly dispossessed by the First Defendant. Trespass is based on a claim of entitlement to possession. It seems to me that it would run afoul of the applicable legal principles to say that a party could not plead a case of trespass because they were in possession of property but dispossessed by the very person they allege is a trespasser. The Claimants' action is in trespass. The relief sought is repossession of the land. For the Claimants to succeed they must demonstrate a legal right to possession of the property. It is my opinion that the Claimants are not disentitled from bringing a suit in trespass where their case is that the First Defendant has dispossessed them.

[45.] The Defendants have sought to establish that they have been in possession of the property for a sufficient period that would give them title by possession. They rely on evidence of the acts of business carried out on the subject property by the Defendants. The Claimants allege that the First Defendant was allowed to carry out acts on the subject property with their permission "and not as a possessor of the land." On the Defendants' evidence, the acts of possession relied upon by the Defendants were undertaken prior to the production of the disputed conveyances. One question before the court will be whether the First Defendant's acts of possession (prior to April 2022) were pursuant to permission granted as alleged by the Claimants or to a belief in a legal right by virtue of the conveyances presented by the Defendants.

[46.] I bear in mind that it is the Defendants' case that the Claimants have no interest in the property and that the Defendants have documentary title with its root in a title said to be executed by one of the Claimants. This is refuted by the Claimants.

[47.] Without resolving the factual or procedural issues that the parties will face, I find that the parties are joined on the issue of the ownership of the land and the right to possession. The Defendants assert that the fact that they have a documentary title and are in possession of the land should be dispositive of the matter. In circumstances where the Claimants, including one of the persons who is purported to have made the conveyance, have denied that any such conveyance was made and in the face of the contention that the First Defendant enjoyed occupation of the premises by permission of the Claimants, it seems to me that there is a serious issue to be tried.

**(ii.) Whether damages would be an adequate remedy**

[48.] The court must consider whether damages would be an adequate remedy for the Claimants if the Claimants were to succeed at trial and were to continue to sustain losses until then if an interim injunction were not made in their favour. The Claimants argue that

the injunction is necessary to prevent any ongoing or future harm resulting from the Defendants' unlawful use of the Property, including the destruction of personal items.

[49.] In his Affidavit, the Fourth-named Claimant, John Olson McKenzie, alleges that the First Defendant demolished the property, constructed unauthorized structures, sold restaurant equipment, and destroyed personal belongings. He also asserts that the First Defendant entered into an agreement with RUBIS Gas Company, leading to the installation of a gas pump on the subject property. He avers:

21. Shortly thereafter, the First Defendant along with his agents came in and began to demolish the property, erect unauthorized structures, sold our equipment which we had in the restaurant and destroyed our personal belongings. Additionally, the First Defendant entered into a lease agreement with Rubis Gas Company, which has a gas pump on the land we possessed as mentioned above. Attached hereto and now shown are photos of the damage and destruction to the property and photos of unauthorized structures marked "**Exhibit M and N**".

22. To date we have no access to the land due to the bound over in place in addition to our family being deprived of their right to continue occupying the land which we are in possession of.

[50.] The Fourth Claimant's evidence on these matters was not challenged by the Defendants. However, the Claimants did not condescend to details on the loss incurred. The nature of the losses, including continuing losses, as alleged by the Claimants, are quantifiable losses which may be adequately compensated by money.

[51.] Counsel for the Claimants submitted that there was also reputational harm caused by the actions of the First Defendant. The evidence is that the First Defendant sought and obtained a "binding over" order from the Magistrate and that two of the Claimants were arrested. However, there is no evidence of any reputational damage suffered.

[52.] I find that damages would be an adequate remedy for the Claimants in this matter.

[53.] I have also considered the implications of an injunction to the Defendants if it were granted in favour of the Claimant. The Defendants, on the evidence provided, have subsisting businesses on the subject property. I am mindful that the Claimants have alleged financial challenges (paragraph 24, John Olson McKenzie affidavit) and it seems to me that it would be imprudent to ask the Claimants to enter into an undertaking in damages in the event of the Defendants succeeding at trial.

[54.] It is my determination that the Claimants could be adequately compensated in damages were they to succeed at trial.

***(iii.) Balance of Convenience***

[55.] Given the foregoing, there is no need to determine where the balance of convenience lies. However, in this case, it is not difficult to find that the balance of

convenience favors the Defendants, as the First Defendant is actively utilizing the subject property, having carried on various businesses for several years. This much is acknowledged by the parties despite the variance in position as to how the First Defendant comes to be in possession of the property.

***(iv.) Status quo***

[56.] I am satisfied that the court ought not to exercise its discretion in favour of the Claimants at this juncture for the foregoing reasons and that the parties ought to maintain the status quo.

**CONCLUSION**

[57.] In the circumstances, the Claimants' application for an interim injunction is dismissed.

**COSTS**

[58.] Costs in the cause.

**ORDER**

[59.] For the foregoing reasons, the order and directions of this Court are as follows:

**IT IS HEREBY ORDERED THAT:**

1. The Claimants' application for an interim injunction is dismissed.
2. Costs in the cause.

**Dated this 17th day of July 2025**

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs', with a stylized flourish at the end.

Carla D. Card-Stubbs  
**Justice**