

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2021/CLE/gen/00849

B E T W E E N

PROVIDENTIAL MARKETING & INVESTMENT CONSULTANTS LIMITED

First Claimant

G. ALMANDO GIBSON
(Trading as Pro Se United)

Second Claimant

AND

PISWELL DON STRACHAN

(As Administrator of the Estate of the late Prince A. Strachan)

First Defendant

AND

PISWELL DON STRACHAN
(Trading as PDS Farming)

Second Defendant

AND

JUSTIN CURTIS

Third Defendant

AND

VIRGINIE CURTIS

Fourth Defendant

AND

DALLAS MICHAEL STRACHAN

Fifth Defendant

Before: **The Honorable Madam Justice Carla Card-Stubbs**

Appearances: Mr. J. Michael Saunders of Counsel for the Claimants
Mr. Craig Butler of Counsel for the 1st & 2nd Defendant
Mr. Dallas M. Strachan Pro se

Civil Procedure and Practice- Competing applications for summary judgment – Part 15 Supreme Court Civil Procedure Rules 2022, as amended (CPR)- Whether Claimants can show that the Defendants have no real prospect of successfully defending the claim – Reliance on affidavit evidence by Claimants and Defendants- Maker of affidavit to comply with Rule 30.3 CPR – Contents of an affidavit

Whether the Defendants can rely on unpleaded factual allegations to show that the Claimants have no real prospect of succeeding on the claim– Duty to set out case and requirement to plead factual allegations in Defence – Consequence of failure to set out factual allegations - Part 10 Supreme Court Civil Procedure Rules 2022, as amended (CPR)

RULING

Introduction

[1.] Before this court are competing summary judgment applications.

[2.] The Claimants' application is for summary judgment and to strike out the Defence of the First and Second Defendants. For the reasons that follow, that application is refused.

[3.] The First and Second Defendants' application is for Summary Judgment. For the reasons that follow, that application is refused.

Background

[4.] On the 23rd day of July 2021 the Claimants brought an action against the five named Defendants alleging trespass of land. By Statement of Claim, the Claimants alleged that the First Plaintiff (‘Providential Marketing’) is the Fee Simple owner of #80 Bacardi Road (formally Miller Road). The Second Plaintiff (Mr. Gibson) is described as the party contracted by Providential Marketing to manage the property. The Defendants were sued, in various capacities. The Claimants sought various remedies including vacant possession, damages, and a declaration that a vesting deed held by the Defendants was void.

[5.] Judgment in Default of Defence was entered against the Third and Fourth Defendants on November 1, 2021.

[6.] Judgment in Default of Defence was entered against the Fifth Defendant on May 27, 2022.

[7.] The First and Second Defendants filed a Memorandum of Appearance and a Notice of Appearance on the 25th day of August 2021 and a Defence was filed on the 6th day of October 2021. On June 12, 2023, the Claimants filed an application for summary judgment against the First and Second Defendants.

[8.] The First and Second Defendants filed an application on September 13, 2023 seeking leave to set aside a judgment in default and for extension of time within which to file a Defence, the Defence having been filed out of time. There was no judgment in default entered against the First and Second Defendants. The application also seeks leave for the First and Second Defendants to amend the Defence. There was no draft amended Defence or explanation of the amendment articulated in the application. The application also sought summary judgment to be entered for the First and Second Defendants.

[9.] This ruling addresses the competing applications for summary judgment.

THE APPLICATIONS

[10.] The Claimants' Amended Summons filed on the 12th day of June 2023 was made pursuant to Order 15 Rule 2 of the Rules of the Supreme Court and the Court's inherent jurisdiction and sought Summary Judgement against the First and Second Defendants for vacant possession and the damages claimed in the Statement of Claim with interest.

[11.] The Claimants' case, in short, is that there is no answer in law to their documentary title. Their case is that their ownership is by conveyance from the Vendor (a bank) which exercised its power of sale over the subject property which was previously held by the father of the Defendants. Their case is that at the time of his death, the father of the Defendants held no interest in the land that could be passed to the Defendants. Their case is that therefore any vesting deed purporting to confer ownership on the Defendants is a nullity.

[12.] The Defendants' application filed on the 13th day of September 2023 is made pursuant to Part 13.3, Part 43.12, Part 10.8, Part 15.2(a) and Part 20.2 of the CPR, -2022 and the Court's inherent jurisdiction. As it relates to summary judgment, the First and Second Defendants make an application for summary judgement be entered on behalf of the First and Second Defendants.

[13.] The Defendants' case is that First Claimant cannot "demonstrate that it has locus standi" because it was struck off the register of companies. The Defendants' case is that the First Claimant cannot maintain this claim against the Defendants.

CLAIMANT'S APPLICATION

[14.] By action filed, the Claimants purport to be owners of 80 Baccardi Road (the subject property). The claim of ownership is the basis of their cause of action in trespass. By paragraphs 1, 11 and 16 of the Statement of Claim, the Claimants allege:

1. The First Plaintiff is the Fee Simple owner of #80 Bacardi Road (formally Miller Road), situate in the western District of the Island of New Providence.

...

10. The Defendants have taken steps together to wrongfully trespass occupy and claim ownership of the First Plaintiff's property. The Defendants have no ownership interest in the First Plaintiff's property.

11. On or around November 24th 2020 The Second Defendant after probating his father's estate and obtaining a Grant of Certificate of Letters of Administration wrongfully executed and recorded a Vesting Deed indicating that the First Plaintiff's property had been transferred to the Second and Fifth Defendants. The said Vesting Deed was made February 26th 2020 and recorded November 24th 2020 in the Public Registry of the Bahamas by the Defendants at Volume 13497 page 592.

....

17. The Defendants have no right to enter and/or trespass on the Plaintiffs' property or to sell, rent or occupy the same.

[15.] By their application for summary judgment, the Claimants allege that the Defendants have no real prospect of successfully defending the claim. I therefore now consider the Defendants' response on the pleadings. To the Claimants' assertion of ownership, the Defendants responded in their Defence filed October 6, 2021:

1. The First and Second Defendants deny Paragraph 1 of the Plaintiffs' Statement of Claim.

...

10. The First and Second Defendants deny Paragraph 10 of the Plaintiffs Statement of Claim.

11. The First and Second Defendants deny Paragraph 11 of the Plaintiffs Statement of Claim and state that the Vesting Deed refers to a portion of land which is adjacent to the Plaintiffs' property.

...

17. The First and Second Defendants deny Paragraph 17 of the Plaintiffs' Statement of Claim and state that the First Defendant owns the property by virtue of Vesting Deed dated 26th February, 2020 and recorded in book 13497 at pages 592 to 596.

[16.] The Defence reads largely as a bare denial save what appears to be conflicting assertions as to ownership of the subject property.

[17.] Evident on the face of the pleadings is an issue drawn as to ownership of the subject property. The Claimants in their statement of case indicates that the Defendants have produced and relied on a vesting deed (out of the administration of their deceased father's estate) as the source of their ownership. The Claimants assert that this Vesting Deed was "wrongfully executed and recorded". The Claimants point out that the Defendants' Defence is contradictory because it claims in one paragraph that the Vesting Deed refers to adjoining property (paragraph 11) and in another paragraph that the Vesting Deed refers to the subject property (paragraph 17).

[18.] By affidavit the Claimants seek to show that whatever interest the deceased father had, had been passed to the vendor (the bank) from whom the Claimants purchased the subject property. The argument of the Claimant is that there can be no answer to the Claimants' conveyance and that the Vesting Deed serves no purpose in law.

[19.] The Claimants rely on the affidavit of G. Almando Gibson filed on November 21, 2022 and the Affidavit of Jiann Kelly filed on the 12th day of June 2023.

[20.] I note that the evidence of Jiann Kelly serves to corroborate the evidence of Gibson and to answer the allegations made in the application of the Defendants. I also note that nowhere in the affidavit of Jiann Kelly does she give the nature of her capacity for the purpose of swearing the affidavit nor does she indicate that she is authorized to make the averments on behalf of the Claimants. The affidavit of Gibson filed November 10, 2025 purports to confirm that Jiann Kelly is authorized to make the affidavit on behalf of the Claimants. What is still missing is Jiann Kelly's "capacity". What is not evident is how Jiann Kelly would have come by any of the information contained in the affidavit.

[21.] **Part 30 CPR** deals with Affidavits. Rule 30.3 makes provisions for the contents of an affidavit and Rule 30.3(2)(b) specifically addresses those affidavits made "for use in an application for summary judgment under Part 15 or any procedural or interlocutory application." If the maker of the affidavit wishes to rely "on statements of information and belief", the maker must comply with the requirements therein set out i.e. the maker must

indicate: (1) which statements are made from the maker's own knowledge (2) and which statements are made as a result of information or belief and (3) the source of any matters of information and belief must be identified and set out in the affidavit.

[22.] Rule 30.3 CPR provides:

30.3 Contents of affidavits.

(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) An affidavit may contain statements of information and belief —

(a) if any of these Rules so allows; and

(b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates —

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source of any matters of information and belief.

[23.] The Kelly affidavit fails to comply with Rule 30.3(2)(b) and it is not evident how she would have come by any of the information contained in the affidavit. For these reasons, this Court will not attach any weight to the contents of the Kelly affidavit.

[24.] I now turn to the evidence of Mr. Gibson. He seeks, inter alia, to set out ownership of the disputed land by the Claimant, acts of trespass by various Defendants, and the evidence of payment of registration fees by Providential Marketing. In that regard, G. Almando Gibson, Second Claimant, avers:

3. The First Plaintiff acquired the property located on #80 Bacardi Road, formerly Miller Road, the subject of this action by way of a Conveyance dated 21st January 1983, between the Bank of Nova Scotia of the one part and the First Plaintiff of the other part and recorded in the Registry of Records in Volume 3830 at pages 320 to 325 (hereinafter referred to as "the said Conveyance"). There is now produced and shown to me a copy of the said conveyance and marked "GG-1".

4. At paragraph A of the said conveyance it notes that the said property was mortgaged to the Vendor by the late Prince A Strachan. The Defendants do not want to accept the reality of the situation and refuse to stop their unlawful activities trying to steal the property from the Plaintiffs.

5. The said conveyance refers to events that occurred which empowered the Vendor to sell the said property by virtue of the terms of the Mortgage and the Conveyancing and Law of Property Act Chapter 184.

....

13. The Second and Fifth Defendants probated knowing that their father had no interest in the Plaintiffs property at his death The estate under the direction of the Defendants have wrongfully executed and recorded documents indicating that the Plaintiff's property was transferred to the second and fifth Defendants by virtue of a certificate of letters of Administration. There is now produced and shown to me a copy of a Vesting Deed recorded in book 13497 page 592 and marked "GG-3".

14. The said Vesting Deed was wrongly made and recorded, the same has caused harm damage and loss to the Plaintiffs, who are seeking an Order setting aside the said Deed.

[25.] The Claimants seek summary judgment on the grounds that the Defendants have no legal entitlement to the property and that the Vesting Deed has no effect in law. The submissions emphasize that the test for summary judgment is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial." The Claimants argue that they have clearly proven their case, the Defendants have no viable defence, and that the Claimants are entitled to the declarations, orders, and damages claimed.

[26.] The Claimants base their ownership on a documentary title. However such documentary title is not pleaded in the Statement of Claim. The Claimants rely on affidavit evidence as proof of ownership. Without affidavit evidence, there is no indication of the particulars as to the basis of the ownership claim of the Claimant. The Defendants themselves rely on affidavit evidence to set out the basis of the ownership by vesting deed. The Defendants, on the other hand, seek to show that they have a claim in adverse possession which is the foundation of the Vesting Deed and if true, could displace the Claimants' ownership.

LAW AND ANALYSIS

SUMMARY JUDGMENT

[27.] Part 15 of The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') govern the applicable procedure and practice.

PART 15 – SUMMARY JUDGMENT

15.1 Scope of this Part.

This Part sets out a procedure by which the Court may decide a claim or a particular issue without a trial.

15.2 Grounds for summary judgment.

The Court may give summary judgment on the claim or on a particular issue if it considers that the —

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue.

15.3 Types of proceedings for which summary judgment is not available.

The Court may give summary judgment in any type of proceedings except —

- (a) admiralty proceedings in rem;
- (b) probate proceedings;
- (c) proceedings by way of a fixed date claim;
- (d) proceedings for —
 - (i) claims against the Crown;
 - (ii) defamation;
 - (iii) false imprisonment;
 - (iv) malicious imprisonment; and
 - (v) redress under the Constitution.

15.4 Procedure.

(1) Notice of an application for summary judgment must be served not less than fourteen days before the date fixed for hearing the application.

(2) The notice under paragraph (1) must identify the issues which it is proposed that the Court should deal with at the hearing.

(3) The Court may exercise its powers without such notice at any case management conference.⁴³

15.5 Evidence for the purpose of summary judgment hearing.

(1) The applicant must —

- (a) file affidavit evidence in support with the application; and
- (b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought, at less than fourteen days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must —

- (a) file affidavit evidence; and
- (b) serve copies on the applicant and any other respondent to the application;

at least seven days before the summary judgment hearing.

15.6 Powers of Court on application for summary judgment.

(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

(2) Where the proceedings are not brought to an end the Court must also treat the hearing as a case management conference.

[28.] The guidance notes to Part 15, Rule 15.2 as appear in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024 are helpful in this regard. The practice note reads in part:

Notes:

15.2 Grounds For Summary Judgment The rules in this Part provide a procedure by which the court may carry out part of its duty of active case management, the summary disposal of issues that do not need full investigation and trial. The issues disposed of may arise in claims, counterclaims, third-party proceedings or similar proceedings.

The rules in this Part permit summary disposal in three types of cases which under the previous Rules of the Supreme Court rules were dealt with by separate provisions; summary judgment, summary disposal of a case on a point of law (RSC 0.14), and striking out pleadings (RSC 0.18 r.19)

Part 15 also permits the court to summarily dispose of cases and issues in three additional types of cases: (1) allowing summary judgment against a claimant where, on all the facts, the claim has no reasonable prospect of success; (2) allowing summary disposal of preliminary issues where the court is satisfied that those issues do not need full investigation and trial; and (3) allowing the court to fix summary judgment hearings of its own initiative.

There is a substantial overlap between Part 15 and Part 26.3. As with Pt 15, the court's powers under Part 26.3 may be exercised on the application of a party or on the court's own initiative. Part 26.3 cover the strike out of claims or defences which are unreasonably vague, incoherent, vexatious, scurrilous, or obviously ill-founded and other cases that do not amount to a legally recognisable claim or defence

Part 15.2 provides that: (1) not only a claimant may apply for summary judgment against a defendant, but a defendant may apply for a summary judgment against the claimant for the claim or any issue in the claim against him to be dismissed on the basis of the evidence as opposed to striking out on technical grounds under the court's case management powers under Part 26. (2) where the application is made by the claimant the test to be applied is whether the defendant has 'no real prospect of successfully defending the claim or issue'; (3) where the application is made by the defendant the test is whether the claimant has 'no real prospect of succeeding on the claim or issue'.

In an appropriate case, an application- for summary judgment may be combined with an application to strike out under Part 26. Conversely, the court may treat a defendant's application to strike out as if it were an application for summary judgment: **Taylor v Midland Bank Trust Co Ltd** 21 July 1999, BLD 230799916, [1999] All ER (D) 831.

Similarly, where the defence merely contains bare denials, the court may equally make an order for summary judgment under Part 15 on the basis that the defence stands no real prospect of success: **Ed Jacob v Millennium Development Corporation Ltd** (IT: CV 2007-1668) (3 April 2008).

[29.] Some of the summarized cases referred to in the Practice Guide are:

Swain v Hillman [2001] 1 All ER 91, CA-The court should interpret 'real' as the opposite of fanciful and should not conduct a mini-trial in order to establish whether a summary disposal was appropriate:

Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550, [2001] BLR 297-The test under Part 15 is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial - or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to a trial (namely, the balance of probabilities).

Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16, [2001] 2 All ER 513 (Lord Hope at paras 95 and 158)-The rule '... is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.'

[30.] In the applications before me, for the Claimants to be successful on their application, they must show that the Defendants have no real prospect of successfully defending the claim. For the Defendants to be successful on their application, they must show that the Claimants have no real prospect of succeeding on the claim or the issue. (Rule 15.2)

[31.] Counsel for the Claimants cited, *inter alia*, the cases of **Gathina Intl Ltd. v. Replay Destinations Bahamas Ltd. 592 of 2020, Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray [1984]** and **National Westminster Bank plc v Daniel [1993] 1 WLR 1453**.

[32.] **Gathina Intl Ltd. v. Replay Destinations Bahamas Ltd. 592 of 2020** concerned a dispute over an agreement for sale of property. The Claimant made an application under the then Order 14, rule 1(1) RSC 1978 for summary judgment. Justice Winder, in coming to his decision, considered the principles of law applicable in the court's exercise of its discretion to grant summary judgment. In that case, Justice Winder reiterated that a court ought to act with caution, finding that there were substantial questions of fact to be determined at trial. The learned judge refused the application for summary judgment, finding that the defence was "more than fanciful or imaginary and better than merely arguable". The learned judge considered the principles of law in this area as settled in the jurisdiction. At paragraphs 23 to 25, Justice Winder opined :

23. The Supreme Court Practice (2016) at paragraphs 24.2.5 provides an instructive discussion of the considerations to be taken into account when a court considers a summary judgment

If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required is not high. It suffices mainly to rebut the applicant's statement of belief. The language of ... ("no real prospect...") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without analysis everything said by a party in his statements before the court (ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472. In evaluating the prospects of success of the claim or defence judges are not required to abandon their critical faculties (Calland v Financial Conduct Authority (2015) EWCA Civ 192 at [29])....Therefore, the Court hearing a [summary judgment] application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is a function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it (Fashion Gossip Ltd v Esprit Telecoms UK Ltd July 27, 2000, unrep., CA; cf. Day v RAC Motoring Services Ltd (1999) 1 ALL E.R. 1007, PER Ward L.J. at 1013 propounding the adoption of a negative test on applications to set aside default judgments). When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (Royal Brompton Hospital NHS Trust v Hammond (No. 5), [2001] EWCA Civ 550, CA).

24. In the Court of Appeal case of **Mark Oscar Gibson Sr. v The Bank of The Bahamas Ltd SCCiv App No. 43 of 2020**, Evans JA, writing for the Court, stated the

following relative to summary judgment applications in this jurisdiction:

13. The test which is applicable is well known and was most recently applied by Charles J in the case of *Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts* 2017/CLE/gen/00801 (unreported) where she observed as follows:

[26] Under O. 14 r 5, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.

[27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."

14. In *AerCap Ireland Ltd and others v Hainan Airlines Holding Co. Ltd* [2020] EWHC 2025 (Comm) Cockerill J observed that:

"13. The law governing applications for summary judgment is not contentious. In summary:

a) The test for summary judgment is that (i) the party against whom the application is made has no real prospect of success on the claim or issue in question, and (ii) there is no other compelling reason why the claim or issue should be disposed of at trial: CPR 24.2.

b) A real prospect of success means a 'realistic' as opposed to a 'fanciful' prospect of success": *Swain v Hillman* [1999] EWCA Civ 3053.

c) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable".

25. In the English Court of Appeal case of *Home and Overseas Insurance Co. Ltd v Mentor Insurance Co. (U.K) Ltd (In Liquidation)* [1990] 1 WLR 153, 158 Parker LJ stated that "the purpose of summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim."

[33.] Having regard to the above, the relevant principles, as I understand them, may be summarized as follows:

1. Summary judgment may be granted if the party has no real prospect of success. Real prospect of success does not mean probable prospect of success. "Real prospect of success" means more than merely arguable and more than "fanciful"; it must be realistic and carry some degree of conviction.

2. The burden is on the applicant to show that the respondent has no real prospect of success.
3. The court must not conduct a "mini-trial" or make detailed findings of fact. However, a court may scrutinize the evidence presented in support of the application and is not bound to accept everything said by either party at face value.
4. If the case involves complex factual issues or issues of law, summary judgment is not appropriate.
5. Summary judgment is not appropriate where the case involves complex or uncertain issues of law or fact.

[34.] Summary judgment bars a party from advancing its case at trial. The exercise of the court's discretion to grant summary judgment must be in keeping with the overriding objective (Part 1 CPR). A party ought to be afforded its "day in court" if it can advance a viable case - one that is not merely fanciful and which is better than merely arguable. However, summary judgment is appropriate where, from a summary perusal of the issues joined, it is apparent that a party has no reasonable prospect of success should the matter proceed to trial. In such a case it is in keeping with the overriding objective to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases.

[35.] In this case, the Claimants seek, inter alia, vacant possession and an order setting aside the vesting deed by way of summary judgment. I consider that the pleaded Defence is, on the face of it, contradictory. The pleaded Defence avers on the one hand that the vesting deed refers to the subject property and, and on the other hand, that the said vesting deed refers to another property which is an adjacent property. This is obviously contradictory but, to my mind, is resolved by reference to the Vesting Deed exhibited by the Claimant and which appears to be a reference to the subject property. Indeed, the pleaded case of the Defendants is ownership by the vesting deed. There seems to be no real doubt that both parties allege that the Defendants rely on the vesting deed to support any admitted activities on the subject property.

[36.] On the pleaded case, the issue of ownership is drawn. Significantly, the Claimants do not plead a documentary title. The Claimants instead refer to the document on which the Defendant relies, viz, a Vesting Deed. This court will have to accept the affidavit evidence of the Claimants to give them the relief sought i.e. to declare the vesting deed a nullity and grant vacant possession and damages as claimed in the statement of claim. The Claimants insist that the vesting deed is ineffective because it purports to flow from the estate of a deceased whose interest had been acquired by a bank which sold the property to them. Again, the allegation that the interest of the Deceased was acquired by the Vendor of the conveyance to Providential Marketing is absent from the Claimants' statement of case. The only allegation made in the Statement of Claim is that Providential Marketing is "the fee simple owner".

[37.] The affidavit evidence of Mr. Gibson, on behalf of the Claimants, is that the 2020 vesting Deed purports to pass the property in a 1983 conveyance between The Bank of Nova Scotia and the First Claimant and that "therefore it is impossible in Law for the Defendants to transfer title that did not exist." Counsel for the Claimants submit that "It is clear that the property in question was conveyed by the Bank of Nova Scotia under its power of sale to the plaintiffs in 1983, and therefore would not be subject to the said vesting deed."

[38.] It may be that the determination of titles in such a case could normally be resolved as a question of law but I do not have that argument before me. Nevertheless, it appears in this instance, that the resolution of ownership will not be resolved merely as a question of law.

[39.] In considering the affidavit evidence on which the Claimants rely to make their claim, also consider the affidavit evidence of the Defendants.

[40.] Curiously, by affidavit of the Defendants and the Claimants, both parties purport to rely on acts of possession although there is no explicit pleading of much of the factual allegations of possession made on behalf of the parties by their several affidavits.

[41.] The affidavit evidence of Mr. Gibson filed on January 22, 2024 is that pursuant to his business' agreement with Providential Marketing, he "took possession" of the subject property "about October 22, 2016." His evidence is also that :

5. From October 2016 until 2021 no one lived on the property, however the First and Second Defendant was operating a business secretly from the property, the First Defendant must account to the Claimants as to their activities on the property.

...

8. The statements, pleadings petitions and Affidavits made by the Defendants claiming "under oath" that they have been in possession and living on the property at any time between 2016 and 2020, is simply not true.

19. The Claimants' property is being occupied by the Fifth Defendant who has refused to vacate the property and has refused to obey the Default Judgement served on him that required him to stay off the property.

21. The Second Claimant at all times before the unlawful trespass by the Defendants enjoyed peaceful and lawful enjoyment and possession of the subject matter property.

[42.] By affidavit sworn on behalf of the First and Second Defendant, the Defendants swears that the deceased father of the First Defendant had been in possession of the property in such a manner that he acquired "possessory title rights". In effect, the First and Second Defendant raise the issue of adverse possession on the part of the Deceased. The evidence of the Defendants is that there is a quieting action filed. The Affidavit of Piswell Strachan filed June 20, 2023, reads in part:

23. That the power of sale was executed in 1983 and at no time thereafter did the first plaintiff make any overtures to take possession of the property.

24. That my father remained in occupation of the property in an open undisturbed continuous manner for a period in excess of twelve years thus acquiring possessory title rights.

25. I am advised by my counsel that the third and fourth defendants are not proper parties to the action.

26. The third and fourth defendants are acquaintances of mine who were experiencing hard financial times especially during the pandemic accordingly resided at my residence for a few months.

27. They were never tenants they did not acquire any rights and had no authority to make any decisions.
28. In relation to the fifth defendant, he is my brother and the son of my late father prince Strachan.
29. That my late father died intestate, and letters of administration were applied for and received which entitled him to a twenty five percent interest in the estate.
30. A quieting petition was filed in action CLE/qui/2023/00222 with respect to the same land as the subject of the plaintiff's action.
31. Said petition was filed on 20th day of March A.D., 2023 and herein marked and exhibited as PDS-1 are a copy of the petition, the abstract, affidavit of Piswell Strachan, the plan.
32. The said petition I am advised on was filed to invoke the investigatory powers of the Court to determine the true ownership of the property.
33. In my petition I claim to be the owner of the said parcel via documentary and possessory title.
34. That I am advised that by remaining in open undisturbed occupation of the land in question any rights that the plaintiff may have acquired have been extinguished.
35. My family has been in continuous open undisturbed occupation of the same for a period in excess of twelve years.

[43.] The answer therefore, of the Defendants, is that the Defendants have a real prospect of successfully defending the claim because the ownership of the Defendants by way of the Vesting Deed is on the basis that the Deceased had more than twelve years continuous open undisturbed possession of the subject property. Their evidence is that a quieting action has been filed to determine ownership of the said property.

[44.] To the claim of adverse possession on the subject property, the Claimants submit that :

1. In the Affidavit filed June 20th 2023, the First Defendant exhibits a petition with supporting Affidavits made by the Defendant claiming to be in possession of the subject property for more than 30 years but we now know that's not true as the First and Second Defendants are not in possession of the land at all.
2. The First Defendant should withdraw his petition claiming to be in possession of the property without the need for the Claimants to seek an Order for the Petition to be struck out. The Court on its own motion can also make an Order striking out the Petition.

3. The First and Second Defendants claimed to be in possession of the Claimants property. However, it was this false assertion that caused the Claimants to sue the Defendants for possession of the property.
4. It has been admitted to the Court by the Attorney for First and Second Defendants at the hearing on January 30th 2024, that the First and Second Defendants were not in possession of the subject property, and in fact had no access to the property.

[45.] In other words, the submission of the Claimants is that the Defendants have falsely claimed to be in possession. Yet the Claimants' pleaded case is premised on alleged acts of trespass by the named Defendants and the continued occupation by the Fifth Defendant. The Claimants' case is that the Defendants removed the fence and caused excavation operations on the subject property. The pleadings have not been amended. The Claimants by statement of case and by affidavit evidence allege acts of trespass of all Defendants, including the First and Second Defendant.

[46.] It is also the Claimants' submissions that the court ought to rely on a previous representation by counsel for the Defendants that the Defendants have no access to the property. It seems to me that whether the Defendants are in possession of the property or have committed acts of possession ought to be determined by an investigation into the facts and cannot be resolved by resort to Defendant counsel's representation especially if that representation does not accord with the evidence advanced by said counsel on behalf of the parties.

[47.] Whether the Petition for the quieting of title is a farce, as the Claimants contend, is not an issue for determination in this matter. If the Defendants rely on purported acts of possession in support of the vesting deed, then those are allegations of facts to be explored by the examination of the evidence, including the cross-examination of witnesses. The nature of a quieting action is an investigation into title. There is no basis on which this court can strike out the quieting petition *suo moto*. I also bear in mind that this Court ought not to engage in a mini trial on an application for summary judgment.

[48.] Counsel for the Claimants relied on the dicta of Ackner LJ in **Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray [1984] 1 Lloyd's Rep. 21, 23**: "The mere assertion in an affidavit of a given situation which is to be the basis of a defence does not,

ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the Defendant has satisfied the court that there is a fair or reasonable probability of the Defendants having a real or bona fide defence.”

[49.] This is an action in trespass and the title to land is disputed on the pleadings. In this matter, the parties have each claimed ownership of the subject property. The Claimant has not particularized or pleaded its documentary title. It is my determination that this court cannot resolve the application in favour of the Claimants based on the bare allegations in both pleadings. In looking at the “whole situation”, I therefore considered the state of the unexamined evidence by affidavit. The Claimants invite the Court to look at the Conveyance of the fee simple to them, the Vesting Deed of the Defendants and the Will of the Deceased. In addition, by affidavit evidence the parties have each sought to rely on acts of possession. The very nature of the Claimants’ pleading is acts of trespass by the First and Second Defendants. The Claimants rely on affidavit evidence to particularize the nature of their pleaded fee simple ownership and to answer the Defendants’ claim of acts of possession. The Defendants’ pleaded response is the vesting deed as a basis of ownership. The Defendants rely on affidavit evidence to establish by possession as the foundation of the vesting deed.

[50.] In this matter, the pleaded cases of the parties provide insufficient particulars for a court to grant the relief that the Claimants seek. A court may consider evidence by way of affidavit. Such evidence must be in support of the pleaded case. The Claimants relies on a 1983 Conveyance. That appears unchallenged. The burden is on the Claimants to show that the Defendants’ case is merely fanciful. The Defendants have filed a Quieting Petition to determine the ownership of the property. That appears unchallenged. If by virtue of that action, it is determined that the requirements for adverse possession are met and that the statutory period of uninterrupted possession has been satisfied, then such a finding would have consequences. One such consequence would be to extinguish the rights of a documentary title holder. It is my opinion that the mere filing of such a petition subsequent to this action does not *ipso facto* render the Defendants’ assertions unreliable.

[51.] In this case, the Claimants' pleaded case of fee simple ownership is said to be based on a Conveyance set out by affidavit evidence. In this case, the Defendants' pleaded case of a Vesting Deed is said to be based on the adverse possession of the Deceased. I find that the Defendants' case is not merely fanciful or arguable and that the pleaded defence, which raises a recorded document as the basis of title in answer to the Claimants' pleaded case of fee simple ownership, has a real prospect of success. It is my determination that the dispute before me ought to be disposed of on a full hearing to resolve factual and legal issues regarding title.

DEFENDANT'S APPLICATION

[52.] I will now address that part of the Defendants' application which is an application for summary judgment on the ground that Providential Marketing, First Claimant, is not a party recognized in law. The Defendants purport to raise the objection "in limine" and in support of an application for summary judgment. For the Defendants to be successful on their application, they must show that the Claimants have no real prospect of succeeding on the claim or the issue.

[53.] In this case, the application of the Defendant is not based in their answer to the claim of trespass. They raise what they term the "locus standi" of the Claimant to bring the Claim.

[54.] The Application is supported by the Affidavit of Piswell Don Strachan filed 24th March 2023 and a Supplemental Affidavit of Piswell Don Strachan filed June 20, 2023. The deponent in his separate affidavits purports to produce evidence that the First Claimant, Providential Marketing, has been struck off the register of Companies and has never been restored to same.

[55.] The Claimants challenge the authenticity and admissibility of the Defendants' proof that the First Claimant company was struck off the register, noting the lack of any registry

stamp/certification. The Claimants sought to rebut the evidence of the Defendants by producing what are said to be recent registry fee payments in the affidavit of Jiann Kelly. However, for the reasons given above, I will attach no weight to the evidence of Jiann Kelly.

[56.] The Claimants also argue that if the Defendants wished to rely on the allegations that they ought to have pleaded same in the Defence.

[57.] **Part 10 CPR** makes provisions concerning a Defence. Rule 10.5 CPR sets out the Defendant's duty to set out case. It provides:

10.5 Defendant's duty to set out case.

(1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) The statement of facts referred to in paragraph (1) must be as short as practicable.

(3) In the defence the defendant must say which, if any, allegations in the claim form or statement of claim —

(a) are admitted;

(b) are denied; and

(c) are neither admitted nor denied, because the defendant does not know whether they are true;

(d) the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim —

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not —

(a) admit it; or

(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document known to the defendant which is considered to be necessary to the defence.

(7) A defendant who defends in a representative capacity, must say —

(a) what that capacity is; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.8.

[58.] Rule 10.7 CPR provides for the consequences of not setting out a defence and provides:

10.7 Consequences of not setting out defence.
The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the Court gives permission or the parties agree.

[59.] It is evident from a perusal of the Defence that there is no defence pleaded which raises the issue of the “locus standii” or that the First Claimant, Providential Marketing, has been struck from the Companies’ register. I accept the submissions of the Claimants that this objection ought to be raised by way of a pleaded defence. The Defendants are not entitled to rely on what is said to be an allegation of fact which is not pleaded in the Defence. It ought to be pleaded so that the Claimants are not taken by surprise and can respond to it. In any event, I accept the Claimants’ submissions as to the nature of the evidence laid and find that there is no admissible evidence before the court that the First Claimant has been struck off the Register.

[60.] The application of the Defendants based on whether Providential Marketing had been struck off the register of companies is dismissed.

CONCLUSION

[61.] In the premises, The Claimants’ Application for summary judgment is dismissed.

[62.] The Defendants’ Application for summary judgment is dismissed.

COSTS

[63.] Exercising my discretion under Part 71, CPR, I order that the parties will bear their own costs.

FURTHER DIRECTIONS

[64.] I will set this matter down for further case management and for the hearing of any outstanding application.

ORDER

[65.] The ORDER and directions of this Court are as follows.

1. The Claimants' Application for summary judgment is dismissed.
2. The Defendants' Application for summary judgment is dismissed.
3. Each party will bear their own costs.

Dated this 20th day of November 2025

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

Carla D. Card-Stubbs, J

Justice