

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01171

BETWEEN

HUGHDON BOWE
ADRIAN BOWE
SHON BOWE
HUGHDON BOWE JR.

Plaintiffs

AND

SHANIQUE ROLLE

First Defendant

AND

RUDY TAYLOR
ELOISE McKENZIE
RUTH ROLLE
BERNICE ROLLE
MELISSA HART
SOPHIA HART-ROLLE

(in the capacity as the ROLLEVILLE COMMONAGE COMMITTEE)

Second Defendants

AND

SHAVAGO McPHEE
QUINTON WRIGHT
MARVIN McKENZIE
SHAWN GIBSON
CAREY McKENZIE JR.

(in the capacity as the ROLLEVILLE COMMONAGE LAND COMMITTEE)

Third Defendants

Before Hon. Chief Justice Sir Ian Winder

Appearances: Krystian Butler for the Plaintiffs
Michelle Y. Campbell for the First Defendant
V. Alfred Gray for the Second and Third Defendants

4 July 2022, Submissions: 23 September 2022 and 27 June 2023

JUDGMENT

WINDER, CJ

In this action, the Plaintiffs claim that they are registered commoners of the Rolleville Commonage ("Rolleville") who were granted certain land by the Rolleville Commonage Committee (the "Commonage Committee") and the Rolleville Commonage Land Committee (the "Land Committee") (collectively, the "Committees"), upon a portion of which the First Defendant ("Shanique") has trespassed by building a home. Shanique counterclaims on the basis that she is lawfully on the land.

Background

[1.] The Plaintiffs are a father and three sons who claim to be registered commoners of Rolleville. Whether the Plaintiffs are in fact registered commoners is disputed. However, it is clear that the Plaintiffs have had their status as commoners acknowledged by Rolleville's internal administration.

[2.] Shanique is a resident of Nassau who claims to be a registered commoner of Rolleville. It was not disputed by any party in their pleadings that Shanique is a registered commoner. The Plaintiffs' Statement of Claim expressly pleads that:

"2. The First Defendant is and was at all material times a registered commoner under the Rolleville Commonage."

[3.] The Second Defendants were the serving members of the Commonage Committee at the time that these proceedings were commenced but were not members of the Commonage Committee at the material times when the Plaintiffs allege that land was granted to them by the Committees.

[4.] The Third Defendants were the serving members of the Land Committee at the time that these proceedings were commenced but were not members of the Land Committee at the material times when the Plaintiffs allege that land was granted to them by the Committees.

[5.] It is common ground between the parties that these proceedings concern commonage land within the ambit of the provisions of the **Commonage Act** (the "Act"). On this premise, the Island Administrator for Exuma (the "Administrator") is concerned in Rolleville's affairs. The Administrator has not, however, been made a party to these proceedings.

[6.] No material has been placed before the Court which details the history of Rolleville, the boundaries of the lands comprising Rolleville or the rights of commoners in Rolleville. For necessary context, I am compelled to take judicial notice of the following, as "notorious facts", pursuant to section 80(1)(j) of the **Evidence Act**.

- i) Denys Rolle of Devon, a British loyalist, was granted lands in Exuma from the British government after the Treaty of Versailles in 1783 and migrated his plantation operations from Florida to Exuma.
- ii) Denys Rolle established the settlements of Rolleville, Rolletown/Rolle Town, Steventon, Ramsey and Mount Thompson in Exuma.
- iii) Denys Rolle's lands in Exuma were inherited by his son, Lord John Rolle, 1st Baron Rolle, upon his death.
- iv) former slaves of the Rolle family occupied Rolleville, Rolletown/Rolle Town, Steventon, Ramsey and Mount Thompson notwithstanding that they could not produce any formal deed of conveyance of the relevant land from Lord John Rolle or his heirs.
- v) persons claiming to be descendants of Rolle's slaves continue to inhabit Rolleville, Rolletown/Rolle Town, Steventon, Ramsey and Mount Thompson to the present day.

[7.] Similarly, no material has been placed before the Court which elaborates upon the basis for the Committees' activities within Rolleville. However, it appears from the parties' filings that:

- i) the Commonage Committee is involved in issuing, receiving and processing applications for land by commoners, collecting fees associated with the registration of commoners, collecting annual dues, collecting payments for land grants, facilitating general meetings of commoners and recommending and spearheading initiatives that may be beneficial to Rolleville.
- ii) the Land Committee is involved in receiving and processing applications for land by commoners and identifying and allocating parcels of land in Rolleville to commoners.

[8.] The Plaintiffs claim that, pursuant to a letter dated 26 November 2014, the first-named Plaintiff was granted a parcel of land in Rolleville by the Committees (the "First Parcel"). The Plaintiffs' Statement of Claim alleges in pertinent part that:

"5. By a letter dated the 26th November, 2014 from the Rolleville Commonage signed by former President Dwight C. Hart, and former Chairman of the Rolleville Commonage Land Committee, Elvis Rolle, they agreed to grant the First-named Plaintiff the following parcel of land:

'A parcel of land that is 300 feet along the beach front from East to West and 100 feet from the beach North to South towards the access roads. This parcel of land

is at the Eastern most end of what is known as Rolleville along the border with what is now the Thompson Family property.'

6. *Pursuant to the offer letter the First-named Plaintiff was required to pay a fee of \$1,200 to the Rolleville Commonage Committee to complete the transaction and commence a structure within 5 years of the date of the agreement. The First-named Plaintiff accepted the offer and duly paid the consideration."*

[9.] The relevant letter of 26 November 2014 (the "26Nov14 Letter"), printed on the letterhead of the Commonage Committee, stated:

"November 26th, 2014

RE: HUGHDON BOWE SR.

Dear Mr. Bowe,

After consideration of your application and consultation with Mr. Elvis Rolle, Rolleville Commonage Land Committee Chairman, it has been decided that the Rolleville Commonage will grant to you a parcel of land that is 300' along the beach front East to West and 100' feet from the beach North to South towards the access road.

This parcel of land is at the Eastern most end of what is known as Rolleville, along the border with what is now the Thompson Family property.

You will be required to pay a fee of \$1,200.00 to the Rolleville Commonage Committee, to complete this transaction.

As per the current restrictions, you will be required to commence some kind of structure on this property within 5-years of today's date otherwise the Commonage may seek to reclaim the parcel and re-issue it to someone else.

Sincerely

[Signature]

*Dwight C. Hart
President 2014 –
Rolleville Commonage Committee*

[Signature]

*Elvis Rolle
Chairman Lands Committee*

Cc: Rolleville Community"

[10.] The Plaintiffs further claim that, pursuant to a letter dated 15 November 2015, they were granted another parcel of land in Rolleville by the Committees (the "Second Parcel"). The Statement of Claim alleges in pertinent part that:

"7. By a subsequent letter dated the 15th November, 2015 from the aforesaid President and Chairman, at the request of the First-named Plaintiff, they granted to the Second, Third and Fourth-named Plaintiffs, 'the property directly behind your 300 feet beach front, North to South to the access road (Herman Taylor Drive) in consideration of fees already paid.'"

[11.] The relevant letter of 15 November 2015 (the "15Nov15 Letter"), printed on the letterhead of the Commonage Committee, stated:

"November, 15th 2015

RE: HUGHDON BOWE SR.

Dear Mr. Bowe,

After consideration of your application and consultation with Mr. Elvis Rolle, Rolleville Commonage Land Committee Chairman, it has been decided that the Rolleville Commonage will grant you the property directly behind your 300 feet beachfront, North to South to the access road (Herman Taylor Drive); in addition to your grant of November, 2014; in consideration for your fees already paid.

Sincerely

[Signature]

*Dwight C. Hart
President 2014-2015
Rolleville Commonage Committee*

*[Signature]
Elvis Rolle
Chairman Lands Committee*

Cc: Rolleville Commonage"

[12.] The Plaintiffs have not had the exact boundaries of the land which they say was granted to them defined by the Land Committee. The Plaintiffs complain at paragraph 8 of their Statement of Claim that:

"8. On several occasions, the Plaintiffs requested that the Third Defendant layout the exact boundaries of the land granted to them, but they have failed and/or refused to do so."

[13.] The Plaintiffs claim that the Defendants have trespassed on their land. In their Statement of Claim, the Plaintiffs allege:

"9. That on a date unknown to the Plaintiffs, the First Defendant trespassed on their property and commenced construction on a portion of the land.

10. That also at a date unknown to the Plaintiffs, servants and/or agents of the Commonage and Land Committee and other unknown persons pushed a road through two parcels of land and cut from Line Wall along the beach.

11. Despite demands from the Plaintiffs to the Defendants to desist their respective trespass, they have persisted in their trespass upon the said property as aforesaid.

12. The Defendants threaten and intends unless, restrained by this Honourable Court, to repeat and continue the acts complained of.

13. By reason of the matters set out herein, the Plaintiffs have been deprived of the use and enjoyment of the said property and have thereby suffered loss and damage."

[14.] The Plaintiffs do not particularize which of the First Parcel or the Second Parcel Shanique has allegedly trespassed upon in their pleadings. However, it is clarified in the Plaintiffs' evidence that it is the Second Parcel that is at issue. It is the Plaintiffs' case that the Committees erroneously granted Shanique land which they had already granted to the Plaintiffs.

[15.] Relying on the foregoing matters, the Plaintiffs pray for the following relief:

"1. A Declaration that the land described in the letters to the First-named Plaintiff from the Rolleville Commonage Committee dated respectively, the 26th November, 2014 and 15th November, 2015 have been validly granted to the Plaintiffs by the Second Defendant.

2. A Declaration that the Plaintiffs are entitled to have the Third Defendant layout the exact boundaries for the land granted.

3. A Declaration that the First Defendant is trespassing on land granted to the Plaintiffs.

4. An Order in the nature of a mandatory injunction compelling the Third Defendant to lay out the boundaries of the land granted to the Plaintiffs.

5. *An Order in the nature of a prohibitory injunction preventing the First Defendant further trespassing on the land granted to the Plaintiffs.*

6. *An Order that the Defendants pay the Plaintiffs costs of this action.*

7. *Such further or other relief as this Honourable Court deems just and fit.”*

[16.] Shanique claims that she is entitled to build her home because she was granted the relevant land by the Committees and was given permission to build her home by the Chairman of the Commonage Committee. The Defence and Counterclaim of Shanique provides that:

“6. The First Defendant is on the property granted to her with the leave and licence of the Second and Third Defendants which has not been revoked.

7. In October A.D. 2015 the First Defendant was shown a 100 feet by 100 feet parcel of land by Elvis Rolle the then Chairman of the Third Defendants running East to West along a road called and known as 'Herman Taylor Drive' starting at the eastern dead end of that road and running 100 feet west thereon on the opposite side of that road from the property granted to Tishura Bain and in March A.D. 2016 the First Defendant was approved and granted the said parcel of land by the Second and Third Defendants (the approval receipt to be relied on at trial) subject to the First Defendant paying a land payment fee of \$300.00 and commencing building a home on the property within three (3) years.

8. On the 26th day of March A.D. 2016 the First Defendant paid the land payment fee of \$300.00 to the Second Defendants (the receipt in respect thereof to be relied on at trial), was given permission by a letter from Rudy Taylor the Chairman of the Second Defendants dated the 21st day of August A.D. 2016 to construct a home on the said property (the said letter to be relied on at trial) and thereafter the First Defendant obtained approved building plans (the approved building plans to be relied on at trial) and in 2017 commenced building a home on the said property.

9. Paragraph 10 of the Plaintiffs' Statement of Claim is not admitted.

10. Paragraphs 11 and 12 of the Plaintiffs' Statement of Claim are denied. The First Defendant had no knowledge of the Plaintiffs' alleged claim to the parcel of land granted to her or any part thereof until some time when she was served with a Writ of Summons filed herein on the 11th day of October A.D. 2018 at which time the First Defendant had already completed 70% to 80% of the construction on her home on the said property.

11. No admission is made as to the alleged or any loss or damage.

12. In the circumstances the Plaintiffs are not entitled to the relief claimed or any relief at all."

[17.] Shanique seeks an injunction and "*further or other relief*" against the Plaintiffs on the basis that they have trespassed upon her property on dates unknown to her. The Defence and Counterclaim of Shanique provides:

"1. The First Defendant repeats Paragraphs 5 to 10 of her Defence by way of Counterclaim.

2. On dates unknown to the First Defendant the Plaintiffs have trespassed on the property granted to the First Defendant.

3. Unless restrained from doing so the First Defendant fears that the Plaintiffs will continue to trespass on the property granted to her.

4. By reason of the matters aforesaid the First Defendant has suffered loss and damage.

AND the First Defendant counterclaims:

1. An Injunction restraining the Plaintiffs from interfering with the First Defendant or trespassing on the property granted to the First Defendant by the Second and Third Defendants.

2. An Order that the Plaintiffs pay the First Defendant's costs of this action.

3. Such further or other relief as this Honourable Court deems just."

[18.] The Plaintiffs did not file a defence to Shanique's counterclaim.

[19.] The Second and Third Defendants defend against the Plaintiffs' claim on various grounds elaborated in their "Defence to Amended Statement of Claim", the chief one being that the Plaintiffs are not registered commoners "*on the register of the Rolleville Book of Commoners*" and, therefore, any land in Rolleville which was granted to them by the Committees was wrongfully granted to them. (I have disregarded the Second and Third Defendants' irregular "Defence" filed in response to the Plaintiffs' generally endorsed Writ of Summons.)

Evidence

[20.] At trial, Hughdon Bowe Sr. ("Hughdon") gave evidence for the Plaintiffs, Shanique gave evidence in support of her own case, and Sophia Hart-Rolle ("Sophia") and Shavago McPhee ("Shavago") gave evidence on behalf of the Committees.

[21.] While I have considered the entirety of the evidence, I address the evidence only briefly in this judgment because the issues that I have identified as being material do not

require that the evidence be outlined more fully. Where I do not mention something, this should not be taken as an indication that I have overlooked it.

Hughdon's evidence

[22.] The witness statement of Hughdon filed on 2 December 2021 was admitted as his evidence-in-chief. He was subject to cross-examination and subsequently re-examined by his counsel.

[23.] Hughdon said in his witness statement *inter alia* that:

- i) he is a registered commoner and has been since 2001/2002 when he registered under Kermit Rolle, a past Chairman of the Commonage Committee.
- ii) since he became a registered commoner, he has paid the requisite dues and attended Rolleville meetings, which ought to be reflected in the minutes book of the commonage.
- iii) the First Parcel and the Second Parcel were granted by the 26Nov14 Letter and the 15Nov15 Letter and were subject to land registration fees, land fees and property payment fees which were all paid by him.
- iv) cheque no. 1423 (dated 29 November 2016) and cheque no. 1424 (dated 29 November 2016) paid by him were signed by Rudy Taylor, former Vice Chairman, and now Chairman, of the Commonage Committee, and were the final consideration for the properties; however, by the time of the payments, the Second Parcel had already been granted to Shanique.

[24.] In cross-examination, Hughdon said or accepted *inter alia* that:

- i) he was born in Rolleville and is a registered commoner under Kermit Rolle's tenure as Chairman.
- ii) he was properly registered as a commoner because the way he registered in 2001/2002 is the way all Exumians registered at the time.
- iii) he had never gone to the Administrator's office to register his name and had not seen a register maintained by the Administrator.
- iv) he was unaware of and was never told that the Administrator held a register on which commoners' names had to be recorded.
- v) he would be surprised to learn his name appeared nowhere at the Administrator's office on any register as he should be "*a part of the commonage in*

the register". He referred to a missing "book" which he was aware of in his capacity as a former part of the "committee" but he did not usefully elaborate.

vi) the other Plaintiffs are registered commoners of Rolleville.

vii) the Land Committee never marked out the boundaries of the properties granted to the Plaintiffs; however, he knew the land that he was granted as he went and physically examined the land.

[25.] In re-examination, Hughdon addressed the time permitted for the payment of the \$1,200 required by the 26Nov14 Letter, the reasons why he believed his sons had been included in the purported grant of the Second Parcel despite not being named in the 15Nov15 Letter, the sequencing of the delineation of the boundaries of land granted by the Lands Committee and the grant of that land and the Land Committee's failure to map out the boundaries of the Plaintiffs' claimed land.

Shanique's evidence

[26.] Shanique's witness statement filed on 29 November 2021 was admitted as her evidence-in-chief. She was subject to cross-examination but was not re-examined by her counsel.

[27.] Shanique stated in her witness statement *inter alia* that:

i) she is a registered commoner and applied to the Commonage Committee to construct on a parcel of land in September 2015.

ii) in October 2015, she was shown a 100' x 100' parcel of land at the end of Jack Rolle Drive/Herman Taylor Drive by Elvis Rolle, the then Chairman of the Commonage Committee, and she indicated she wished to be given the property to build a home on it.

iii) in March 2016, the property was given to her subject to her making a land payment of \$300.00 and her agreeing to commence construction of her home within 3 years.

iv) on 26 March 2016, she paid the land payment fee to the Commonage Committee and on 21 August 2016 she was given permission to start construction of a home on her property.

v) she was unaware of the Plaintiffs' claim to the property until she was served with their writ, at which point her home was already 70% to 80% completed.

[28.] In cross-examination, and here I make no distinction by whom for brevity, Shanique said or accepted *inter alia* that:

- i) she is registered as a commoner at the Administrator's office.
- ii) she was shown the property she was granted by the Chairman of the Land Committee in 2015 and she built her home on the property that she was shown.
- iii) her home was 90% to 95% complete at the time of trial. She continued to build after service of the Plaintiffs' writ because she believed that the relevant land had been granted to her.
- iv) after she received the Plaintiffs' writ, she went to certain members of the Committees to inquire about the situation and they said the land had been granted to her and there was no reason she should not continue to build.

Sophia's evidence

[29.] Sophia's witness statement filed on 18 March 2022 was admitted as her evidence-in-chief. She was subject to cross-examination and was very briefly re-examined by her counsel.

[30.] Sophia stated in her witness statement *inter alia* that:

- i) she had been a member of the Commonage Committee for the past 5 years. She considers the Commonage Committee to be an organized group that keeps proper records.
- ii) from the records of the Administrator's office (referring to a letter from the Administrator dated 17 June 2021) the Plaintiffs had not applied to be registered as commoners and were not commoners. (This was an inaccurate description of the substance of the letter. By the relevant letter, the Administrator was requesting documents before a determination could be made by the Administrator as to whether the Plaintiffs were or were not registered.)
- iii) the Commonage Committee checked with the Administrator and none of the Plaintiffs are registered with the Administrator's office as commoners as none of their names appear on the register of commoners.
- iv) it is not the responsibility of the Commonage Committee to register commoners with the Administrator.

[31.] Under cross-examination by Counsel for the Plaintiffs, Sophia said or accepted *inter alia* that:

- i) the Administrator's office has a register of commoners as prescribed by the Act. The Administrator could not locate that register at the time of the 17 June 2021 letter. She recently, and in the past, reviewed the register. The register has the

names of registered commoners, the persons that they are connected to that entitle them to be registered as a commoner (i.e. their ancestors) and their address. She could not say who could access the register, because it is at the Administrator's office, but could say that the Chairman or Deputy Chairman of the Commonage Committee could go and inspect it and she believed that a person applying to be registered could check to confirm if their name appears in the book. The last time she looked at the register was in April 2022.

ii) in order for a commoner to apply for land, they must be a registered commoner at the Administrator's office, with their name on the register. Once that requirement is satisfied, and the registration fee is paid, the commoner makes an application to the Land Committee for the land they are interested in. The Commonage Committee is responsible for ensuring these requirements are completed. The previous Commonage Committee made some mistakes as far as not ensuring that individuals were registered at the Administrator's office before issuing letters to them granting them property.

iii) when a commoner is granted land, under current practice, they usually do not receive a "grant letter" as such. There are fields on the application form for land where the approval is indicated, as is so in the case of Shanique's application form. Letters like a particular letter issued to Shanique which resemble grant letters are not grant letters but are intended to be taken to utility companies or the Town Planning Committee.

[32.] Under cross-examination by Counsel for Shanique, Sophia said that: according to the register of commoners and the records of the Commonage Committee, there is no application to the Commonage Committee by the Plaintiffs for registration nor are their names in the official register, which "*dates back some years*"; Shanique is a validly registered commoner; and, as far as she was aware, Shanique was validly granted the land on which she has built her home, as there is an application on file that Shanique completed and an approval granted, and her name is on the official register of commoners.

[33.] In response to questions posed by the Court, Sophia said that the Chairman, Secretary and Treasurer of the Commonage Committee have carriage of Rolleville's records; those records are supposed to be handed over from Chairman to Chairman; she could not say whether those records extended to the past 20 years or to 2008, as she had not had reason to look back that far, but she had seen some documents from 2014; and she was familiar with Elvis Rolle and Dwight Hart – they were the Chairman of the Land Committee and the President of the Commonage Committee, respectively, at the time when Hughdon claims to have applied for Rolleville land.

Shavago's evidence

[34.] Shavago's witness statement filed on 18 March 2022 was admitted as his evidence-in-chief. He was subject to cross-examination but was not re-examined by his counsel.

[35.] Shavago stated in his witness statement *inter alia* that:

- i) he had been a member of the Land Committee for the past 5 years.
- ii) the Land Committee is responsible for receiving and processing all applications for land in Rolleville and identifying and allocating parcels of land to eligible registered commoners.
- iii) he was aware that a check was made at the Administrator's office and there is no record of the Plaintiffs on the Administrator's register.
- iv) it is the obligation of applicants applying for land to be interviewed by and be deemed a commoner by the Administrator for Exuma and therefore to be placed on the register of commoners by the Administrator.
- v) the Land Committee is prepared to grant Hughdon a piece of land once he registers with the Administrator as a registered commoner, pays the associated fee to the Commonage Committee and applies to the Land Committee for an available piece of land.

[36.] Under cross-examination by Counsel for the Plaintiffs, Shavago said or accepted *inter alia* that:

- i) the Land Committee is the body that grants commoners land. Part of the Land Committee's responsibility is to make sure that applications for land are "*in standing order*", i.e. that commoners names are "*actually in the book at the Commissioner's office*".
- ii) he did not believe Hughdon was granted land by the 26Nov14 Letter or the 15Nov15 Letter, though it appeared Hughdon had applied for land. If he had been granted land, he would know its exact position, and it was not clear where the Land Committee had shown him his land.
- iii) when it is determined that a commoner will be given land, the boundaries of that land are determined after the grant of property. It is the Land Chairman and the Land Committee's role to map out the boundaries of land. The boundaries could not have been delineated after Hughdon was granted land for several reasons, including that Hughdon said he was given a piece of land 300 feet alongside the beach but the distance from the beach to Shanique's property is at

least 500 feet and “*by law*” the Land Committee only grants parcels that are 100’ by 100’.

iv) he met with Hughdon and his wife at Shanique’s property in 2017 or 2018 and, at that time, Hughdon told him that he believed he had been granted the property.

v) there are some records in Rolleville that reflect whether a person is a registered commoner and the properties that were granted. He had only seen records dating from 2018 as there was never a reason for him to go further back in time.

vi) he had not personally seen the Administrator’s register of commoners (“the book”).

vii) there have been issues in the past where two people in Rolleville have been granted the same land.

viii) the previous Committees must have been satisfied that the persons named in the report dated 3 December 2015 prepared by Elvis Rolle as persons having been granted land were commoners.

Issues

[37.] While I have been assisted by the lists of issues identified by the parties, in my view, the issues arising may be distilled to the following:

i) whether the Plaintiffs or Shanique or both the Plaintiffs and Shanique are registered commoners of Rolleville? (the “Standing Issue”)

ii) whether the Plaintiffs or Shanique or both the Plaintiffs and Shanique were validly granted the subject property? (the “Validity Issue”)

iii) whether the Plaintiffs or Shanique are trespassers in the circumstances? (the “Trespass Issue”)

iv) what relief should be granted in view of the determinations made in relation to the Standing Issue, the Validity Issue and the Trespass Issue? (the “Remedy Issue”)

Submissions

[38.] At the conclusion of the evidence, the parties were directed to submit written closing submissions by 23 September 2022. The Defendants complied with this direction. Counsel for the Plaintiffs lodged written closing submissions dated 27 May 2023 which

were not received by the Court until 27 June 2023 without any explanation for the failure to comply. While I have read and considered the parties' submissions irrespective of when they were received, unexplained non-compliance with the Court's directions is to be deplored. Counsel must not assume that such non-compliance will be tolerated as a matter of course.

Discussion and analysis

Preliminary – the Commonage Act

[39.] The Act applies to "*lands held in common*" which are lands which "*have been granted to twenty or more people and not partitioned*". Malone Sr. J in ***Pinder Estate v. Pinder [1985] BHS J. No. 54*** found, on an application for an interlocutory injunction, that Rolle Town did not satisfy this statutory definition. Here, I am unable to examine whether Rolleville satisfies the statutory definition because of the lack of relevant material before me. However, that exercise is not necessary because I am able to treat it as common ground that the lands in Rolleville are "*lands held in common*" for the purposes of the Act.

[40.] In ***Bannerman Town, Millars and John Millars Eleuthera Association and others v Eleuthera Properties Limited [2016] 2 BHS J No 62***, a quieting action, Adderley JA briefly discussed the Act when discussing the concept of "generation property" in The Bahamas. He said:

"180 Generation property bears a similarity to commonage land which was made statutory about 25 years after the Will, by the passage of the Commonage Act Chapter 152 Statute Laws of the Bahamas on 30 April 1896. That Act mandates that where land has been granted to twenty or more persons and not partitioned a Register of Commoners shall be formed and kept. It provides for an elected body to manage the property. When a commoner reaches the age of 18 he can apply to the body to be added to the Register of Commoners. Their rights include the right to the allocation of land for farming or other purposes. Trespassers may be ejected from the land.

181 I mention commonage land and the Commonage Act because it appears that the concept of generation property may have been a precursor to that Act. The settlements of Rock Sound and Savannah Town, in the Island where the Property is located have commonages which have been statutorily established."

[41.] The Act was passed in 1896 to "*provide for the more beneficial use of lands held in common*" according to its preamble. Section 7 of the Act enables commoners to hold meetings to decide issues and for those issues to be decided by a majority of the commoners present at the meeting, provided there are at least 10 of them so present. Section 8 of the Act requires commoners to hold an annual meeting on the first Monday

in December, at which a chairman and other office-bearers on a committee of commoners are elected for the ensuing year. Pursuant to section 9 of the Act, the Family Island Administrator, the Chairman, or five or more commoners may summon a meeting of commoners.

[42.] Section 11 of the Act authorizes commoners to make rules for, *inter alia*, securing the fair use of commonage lands by the commoners amongst themselves and for securing the full and beneficial use of such lands for the commoners. Rules passed by commoners have no effect unless they have been approved by the Minister responsible for Commonages and have been published in the Gazette. If so published, they have the same effect as if expressed in the Act, and a small monetary penalty is prescribed by the Act for non-compliance with them. Gazetted rules dealing with various matters exist for commoners in Rock Sound, Harbour Island and Spanish Wells, Mount Thompson, Ramsey, Savannah Sound and Tarpum Bay, but no such rules appear to exist for Rolleville. According to Shavago's *viva voce* evidence, there are only unofficial bylaws.

[43.] Among the innovations introduced by the Act was a system of registration for commoners. Under the Act, the Family Island Administrator for the island where the relevant commonage land is situate must maintain a register of commoners and consider applications for registration from persons claiming to be entitled to be registered as a commoner and, if satisfied as to their entitlement, enter their names onto the register. Sections 3, 4, 5 and 6 of the Act provides:

"3. A register of commoners shall be formed and kept in each town or settlement in which any land is held in common. Such register shall be formed in the first instance by the commissioner in accordance with such rules as may be made and issued to him on the subject by the Minister, which rules the Minister is hereby empowered to make and issue. Every person residing at the settlement adjacent to any lands held in common who is in actual occupation of any portion of the land so held in common at the time when this Act comes into operation shall be entitled to be registered as a commoner in such land.

4. The register formed under section 3 of this Act shall be deemed the register of commoners of the land in such settlement for the purposes of this Act.

5. At any time after the formation of such register every person, whether male or female above the age of eighteen years, who may claim to have the right to be registered as a commoner in such register, may, subject to the provision of this Act, apply to the commissioner to be registered in such register as a commoner.

6. (1) Where any person applies to the commissioner to be registered as a commoner, the commissioner shall consider the application and may take evidence thereon. Any commoner may oppose any such application. If the commissioner is satisfied that the applicant has the right to be registered as a

commoner in such lands, he shall cause the name of the applicant to be registered as such, and if not so satisfied he shall reject such application. ...”

[44.] Failure to register as a commoner once a register has been formed for the commonage has significant consequences. “*Commoner*” is a statutory concept and it is, by definition, “*any person who is registered as a commoner in or over any lands under this Act*”. Persons who are not commoners are deemed by section 10 of the Act to have no interest in the commonage lands and, if in actual occupation of any part of the commonage lands, are deemed to be wilful trespassers and may be ejected by the Family Island Administrator. Sections 10 and 15 of the Act provides:

“10. No person who is not registered as a commoner shall be deemed to have any interest in the lands which are held in common.

...

15. Any person occupying any of the lands held in common who is not registered as a commoner shall be deemed to be a wilful trespasser, and may on the application of any commoner be ejected by order of the commissioner, who is hereby authorised and empowered to issue his warrant of ejection, and cause such person to be forthwith ejected.”

Standing issue

[45.] Turning to the Standing Issue, an unusual feature of this case is that whether the Plaintiffs or Shanique or both the Plaintiffs and Shanique are registered commoners turns on whether a register of commoners for Rolleville has ever been maintained at the Administrator’s office and, if so, whether the Plaintiffs’ or Shanique’s names have ever been entered on that register. Yet, no party to these proceedings has provided a certified copy of the register or called the current Administrator, upon whom rests the statutory duty to maintain the register, or a former Administrator, to give evidence. I am therefore significantly disadvantaged in determining whether a register of commoners exist and, if so, whose names are on it.

[46.] The only witness evidence at trial given by a person that purportedly personally inspected the register was the evidence of Sophia, whose credibility and reliability the Plaintiffs have impugned. Sophia’s evidence about the existence and contents of the register was not objected to by the Plaintiffs on the ground that it was inadmissible, but, for completeness, that evidence was admissible. The register of commoners under section 3 of the Act is not a “*public document*” within section 112 of the ***Evidence Act***, the list of the types of document which qualify as “*public documents*” there being exhaustive, and, therefore, as a result, admissible secondary evidence is not limited to certified copies.

[47.] Having considered her witness evidence as a whole, including her answers to the challenges put to her by Counsel for the Plaintiffs, and having assessed her evidence

against the other evidence in this matter, I reject the criticisms made of Sophia's evidence in the Plaintiffs' written closing submissions. On balance, I accept Sophia's evidence that there is a register of commoners maintained at the Administrator's office which she has personally inspected and on which Shanique's name is present and from which the Plaintiffs' names are absent. Accordingly, I am satisfied that the Plaintiffs are not registered commoners whereas Shanique is.

[48.] I have seen nothing in the documentary record before the Court that is more persuasive than Sophia's testimony. The letter dated "11/06/2008" from Gary Munnings describing Hughdon as a commoner is in the form a template letter which does not specifically speak to registration with the Administrator. Furthermore, Munnings was not called as a witness to explain the letter. It is therefore of limited probative value. Similarly, the report dated 3 December 2015 prepared by Elvis Rolle, which refers to lands being granted to the second-named through fourth-named Plaintiffs, is also of limited probative value because Elvis Rolle was not called as a witness to explain the report. Land may have been granted to the second-named through fourth-named Plaintiffs by the Land Committee without an enquiry into the position on the Administrator's register. It does not follow from the mere fact that land may only properly be granted to registered commoners, that the fact the second through fourth-named Plaintiffs were purportedly granted land means that they *are* registered commoners.

[49.] The Plaintiffs advance the criticism that the Second and Third Defendants should have been able to produce the register of commoners to the Court but have likewise failed to do so. Their criticism presumes that they had no access to the register of commoners up to trial, but I cannot safely conclude this on the evidence. Furthermore, it (and the Plaintiffs' other, more general criticism that the Defendants "...*ha[ve] not provided any evidence that the Plaintiffs are not registered commoners*") places the burden of proof on its head. Pursuant to section 82 of the **Evidence Act**, it was for the Plaintiffs to establish that, on the balance of probabilities, their names appear on the register of commoners. As a practical matter, it was incumbent on them to adduce the best evidence available in the circumstances in support of their case on the contents of the register, which would naturally be either a copy of the register, evidence from the Administrator, evidence from a former Administrator or, failing that, evidence from someone that personally inspected the register. This the Plaintiffs failed to do.

[50.] While I have accepted Sophia's evidence on the existence and contents of the register of commoners, even if I were wrong to do so, I ultimately would have reached the same conclusions that I have reached on the Standing Issue without taking that evidence into account. This is because:

i) there appears to be no real dispute between the parties about the existence of a register of commoners. The parties have all made submissions addressing who is or is not a registered commoner while relying on the provisions of the Act.

ii) I am not satisfied that the Plaintiffs have discharged the burden of proving the positive case that they are registered commoners to the civil standard. The Plaintiffs are therefore *not* registered commoners for the purposes of these proceedings. As HHJ Paul Matthews explained in **Ball v Ball [2017] EWHC 1750 (Ch)** at paragraph 17:

“The significance of who bears the burden of proof in civil litigation is this. If the persons who bear the burden of proof of a particular matter (here the claimants) satisfy the court, after considering the material that has been placed before the court, that on the balance of probabilities that something happened, then, for the purposes of deciding the case, it did happen. But if those persons do not so satisfy the court, then (for these purposes) it did not happen. Our system of fact-finding is binary. ...”

iii) the parties have not joined issue on Shanique’s status as a registered commoner.

[51.] In the premises, the Plaintiffs have failed and the Defendants have succeeded on the Standing Issue. I have found that the Plaintiffs are not registered commoners while Shanique is a registered commoner.

The Validity Issue

[52.] Proceeding to the Validity Issue, no material has been placed before the Court which addresses the rights of the Rolleville commoners generally or the authority of the Committees to “grant” commonage land to commoners. Additionally, as mentioned above, there appears to be no gazetted rules made concerning Rolleville which might purport to empower the Committees to regulate the use of commonage land by commoners. In **Pinder Estate v. Pinder, Malone Sr. J** found that the Rolle Town Committee had no authority to confer, by way of licence or otherwise, any right affecting Rolle Town land. **Malone Sr. J** said:

“3 I am told that over the land on which the house is situated, ‘jurisdiction’ is exercised by a body called the Rolle Town Committee and that it was by that body that permission was granted to the late Percy C. Pinder to build the house. It is submitted that the Committee is a corporation by prescription and as it has exercised its jurisdiction over the lands in excess of sixty years, it has by virtue of section 1 of the Prescription Act, (Chapter 147), an absolute and indefeasible title to the land. It is also submitted that through custom, the Committee has acquired the right to allocate portions of the land for building onto inhabitants or the

descendants of inhabitants of Rolle Town. The late Percy C. Pinder is said to have been the descendant of an inhabitant.

4 The Rolle Town Committee appears to be a body with a fluctuating membership. It has not been actually incorporated and its members are not registered under the Commonage Act, Chapter 123. Nor are the lands over which it is said to exercise jurisdiction, 'lands held in common' as defined in section 2 of that Act. Can it then be a presumed corporation? That is the presumption I have been invited to make. To my mind, the presumption cannot be made if only because it is known that the Committee came into being to administer lands to which it was thought the descendants of former slaves of Lord Rolle could lay claim. It is not then a body originating from time immemorial, and the preamble to the Prescription Act, Chapter 147 cannot be prayed in aid to incorporate it as that Act does not relate to the incorporation of bodies by custom or prescription. Consequently, the Rolle Town Committee, to my mind, had no authority to confer by way of licence or otherwise, any right affecting the land upon Percy C. Pinder."

[53.] The parties have not addressed the Court on the issue of the Committees' authority to make grants of commonage land. The parties have proceeded on the basis that the Committees have the ability to validly grant commonage land to a commoner and that a grant of commonage land by the Committees to one registered commoner is sufficient against other registered commoners to justify the grantee using the land in priority to other registered commoners. I do not have sufficient information before me to determine whether this view of the matter is correct, though *Malone Sr. J's* finding in *Pinder Estate v. Pinder* casts doubt upon its correctness.

[54.] Nevertheless, I accept Shanique's submission that, as a result of the Plaintiffs not being registered commoners, any purported grant of property in Rolleville to them by the Committees must be null and void. This follows from section 10 of the Act, insofar as it provides that no person who is not registered as a commoner shall be deemed to have any interest in the lands which are held in common. In my view, given the apparent object of section 10 of the Act, the provision must be interpreted and applied broadly.

[55.] I also accept the Second and Third Defendants' submission that no Committee member can deem anyone to be a "commoner" under the Act if they are not in fact registered in accordance with the Act. This follows from the definition of "commoner" in the Act as "[a] person registered as a commoner in or over any lands under [the] Act". The duty and function of registering persons claiming to be entitled to be registered as a commoner lies with the Administrator under section 6 of the Act, and not any committee of commoners.

[56.] In the premises, the Plaintiffs have failed on the Validity Issue. The Plaintiffs could not have been validly granted the lands purportedly granted to them by the Committees because they were not registered commoners at the time of the grants. Shanique

succeeds on the Validity Issue because the authority of the Committees to grant land in Rolleville to registered commoners has not been disputed.

The Trespass Issue

[57.] In light of my conclusions on the Standing Issue, the Plaintiffs are incapable of succeeding on the Trespass Issue. The Plaintiffs did not enter into possession of the land on which Shanique has constructed her home before she did. And, as I have found that the Plaintiffs are not registered commoners, they are deemed by section 10 of the Act to not have any interest in the relevant land. There is therefore no basis for them to claim in trespass.

[58.] As regards Shanique's counterclaim in trespass, the Plaintiffs failed to file a reply and defence to Shanique's defence and counterclaim. **Order 18, rules 3(1), 3(2), 13(1) and 14(3) of the Rules of the Supreme Court, 1978** are applicable. The effect of a failure by a plaintiff to file a reply and defence to counterclaim in response to a defence and counterclaim was considered by Charles Sr. J in **Glendon E. Rolle v Scotiabank (Bahamas) Limited [2022] 1 BHS J. No. 30**, where she said:

"36. In my judgment, the Plaintiff is precluded from seeking to mount an affirmative case in answer to the Bank's Defence and has merely impliedly joined issue thereon. And, in failing to file a Defence to Counterclaim, the Plaintiff is deemed to have admitted every allegation of fact within the Bank's Counterclaim. I therefore agree with the submissions advanced by Mr. Farquharson that the Bank is entitled to have final judgment entered in its favour in the terms prayed for in the Counterclaim. I shall make this Order. In the event that I am wrong, I shall carry on."

[Emphasis added]

[59.] In my judgment, by their failure to file a reply and defence to counterclaim, every allegation of fact contained in Shanique's counterclaim is deemed to be admitted by the Plaintiffs. Consequently, the Plaintiffs have admitted that Shanique is on the land that she has built her house on with the leave and licence of the Committees and that the Plaintiffs, on dates unknown to her, have trespassed on that land. Shanique therefore succeeds on the Trespass Issue. Irrespective of the Committees' authority to grant land, as observed by *Malone Sr. J* in **Pinder Estate v. Pinder**, at paragraph 6, "*the mere de facto and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves*".

The Remedy Issue

[60.] In her written closing submissions, Shanique invites the Court to grant:

- i) a declaration that she is a registered commoner and was validly granted the land that she built her home on and is not a trespasser on that land; and
- ii) an injunction against the Plaintiffs preventing them or their servants or agents from interfering with her or trespassing on the land granted to her.

[61.] Only the injunction sought by Shanique features specifically in the prayer for relief in her counterclaim. However, in my view, Shanique is entitled to seek the declaratory relief she has sought under the general prayer in her counterclaim for “*further or other relief*”.

[62.] Considering the circumstances of this case, I will grant Shanique the injunction she seeks. It has not been suggested that section 15 of the Act supplies an exclusive remedy in cases of trespass and the Act is insufficiently clear so as to limit the jurisdiction of the Court. The Plaintiffs, in failing to file a defence to the counterclaim, have admitted to trespass, and have not responded to Shanique’s stated belief that, unless restrained, they will continue to trespass. Shanique is a registered commoner that entered into occupation of the subject property in good faith and has substantially completed her house. Against this background, an injunction is appropriate to secure Shanique’s occupation.

[63.] I will also grant a declaration that Shanique is a registered commoner. However, adopting a cautious approach, I decline to grant the balance of the declaratory relief sought by Shanique. Recently, in ***RBC Royal Bank (Bahamas) Limited v Victor Perron Symonette and another 2014/CLE/gen/01770 and Judith Julia Symonette v RBC Royal Bank (Bahamas) Limited 2020/CLE/GEN/000205***, I had occasion to consider the jurisdiction of the Court to grant declaratory relief. At paragraph 28, I said:

*“[28.] The declaratory relief, as is being sought by Judith, is pursued under the discretionary power of the Court. In the case of **Messier-Dowty Ltd v Sabena (No 2) 1 All ER 275**, Lord Woolf MR stated that when deciding whether declaratory relief should be granted the Court must consider whether it is appropriate to do so bearing in mind: (i) the justice of it to both plaintiff and defendant in a matter, (ii) whether the declaration would serve a useful purpose (iii) any special reasons for or against the declaration(s) per Neuberger J in **Financial Services Authority Rourke (t/a- J E Rourke & Co) [2001] EWHC 704 (Ch), [2001] All ER (D) 266 (Oct)**.”*

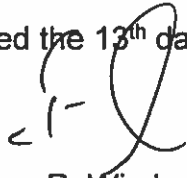
Among other things, it is a rule of practice that a declaration usually ought not to be granted without a full investigation of the merits, hence a declaration will not be granted in default or by consent or concession: see, e.g., ***Pacific Hill Pictures, Inc v. Saltzman [1997] BHS J. No. 106*** at paragraph 28 and ***Bahamas Hotel Catering & Allied Workers Union v. Attorney General of the Commonwealth of the Bahamas [1998] BHS J. No. 134*** at paragraph 9 per Sawyer CJ. Because of the positions taken by the parties,

underlying issues engaged by the questions of whether Shanique was validly granted the land she has built her home on and whether she is a trespasser have not been fully ventilated in these proceedings. It would therefore not be appropriate for me to grant declarations as to those matters.

Conclusion

[64.] For the foregoing reasons, the Plaintiffs' claim is dismissed and Shanique's counterclaim is allowed to the extent I have identified above. Counsel are to settle a suitable draft order giving effect to this decision. I will deal with the issue of costs on written submissions, which are not to exceed 5 pages and are to be lodged with the Court within 14 days.

Dated the 13th day of July, 2023

A handwritten signature in black ink, appearing to be 'I. Winder', written over the date line.

Sir Ian R. Winder
Chief Justice