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

2022/CLE/gen/00498

IN THE MATTER OF the Partition Act (Chapter 153) of the Statute Laws of the Commonwealth of the Bahamas

IN THE MATTER OF the Inheritance Act (Chapter 116) of the Statute Laws of the Commonwealth of the Bahamas

BETWEEN

PHILIP A. MITCHELL JR.

1st Plaintiff

AND

MICOLETTE MITCHELL JR.

2nd Plaintiff

VS

TANIA (AKA TANYA) MITCHELL CASH

1st Defendant

AND

TAWANNA MITCHELL DELANCY

2nd Defendant

AND

CHRISTINA MITCHELL GILBERT

3rd Defendant

AND

ZHONETTE MITCHELL EMMANUEL

4th Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Philip A. Mitchell Jr. and Micolette Mitchell Pro Se

Cyd Ferguson for the Defendants

Date of Hearing: 29th November, 2022

DECISION

1. The Plaintiffs and Defendants are all the children of the late Philip Mitchell Sr., who was the inheritor of a property Lot 57 East Street North, Nassau, Bahamas, and who died intestate on 9th January 2022. The estate of Mitchell Sr. has not yet been probated.

2. By Originating Summons filed 31st March 2022, the Plaintiffs seek the following:

1. (1) A Partition of ALL THAT piece parcel or lot of land situated on the eastern side of the East Street, in the Grants Town Community. The property is bounded on the North by land now or formerly that property of Albert E. Johnson and running thereon (100.00) feet, on the West by East Street and running thereon more or less (50.00) feet, on the South by land now or formerly the property of George Monday Dean and running thereon (100.00) feet, and on the East also by land now or formerly the property of Monday Dean and running thereon (50.00) feet in the said community hereinafter called "the property". The property is appraised and valued at $133,000.00.

(2) An Order that the property be sold and the net proceeds thereof be distributed equally between the Plaintiffs and Defendants, AFTER the deductions of the below mentioned accounting.

2. As per the terms of the verbal agreements both in A.D, 2001 between the 1st Plaintiff and the 2nd Defendant, AND pursuant to the terms of the verbal agreement between the father of the parties herein and the 1st Plaintiff, the Plaintiff also seeks and is entitled to an accounting and deductions from the sale of the property to be paid to him in the amount of $80,725.00 which represents:

(1) The amount of $30,000.00 ($30k) principal and $12,000.00 interest at 8% (accumulative) interest per year for a period of five (5) years, totaling approximately $42,000.00 which principal sum was paid by him to the 2nd Defendant for the repayment of the sums paid on the property in order to prevent vacant possession of the property by Royal Bank of Canada.

(2) The amount of $38,400.00 in interest of 8% per annum for 16 years based on the said $30k, to be deducted from the sale of the said property, and running at a rate of 8% interest per annum until Judgment.

(3) The amount of $325.00 ($390.00 less his $65.00 portion) be paid to him which represents the cost which he paid relative to the Appraisal Report dated March 10th AD 2022.

3. Such other relief and directions in the circumstances as the Court may deem just.

4. That the costs of this application be provided for, to be taxed if not agreed.

3. The Defendants on the other hand filed a summons on 11th May 2022 seeking the following relief:

1. An Order pursuant to Order 18 Rule 19 (1)(a)(b) and (d) of the Rules of the Supreme Court 1978 (RSC) and under the Court's inherent jurisdiction that Originating Summons filed herein on the 31st day of March A.D., 2022 be struck out in its entirety, on the following grounds, namely:-

(i) The Defendants have been improperly or unnecessarily made a party to this action pursuant to Order 15 Rule 6 of the Rules of the Supreme Court, 1978;

(ii) The action was improperly brought pursuant to Order 68 of the Rules of the Supreme Court, 1978 and;-

(iii) The alleged verbal agreement made in 2001, is statute-barred pursuant to Section 5 of the Limitation Act, 1995.

2. Further or other relief as the Court deems just.

3. The Plaintiffs pay to the Defendants the costs of and occasioned by this application, such costs to be set off from the interest of the Plaintiffs' when taxed, if not agreed.

THE PLAINTIFF'S EVIDENCE

4. The Plaintiff has filed two affidavits in this matter. In his first affidavit Mitchell Jr. states that he is the son of Philip Mitchell Sr, and the remaining Plaintiff and Defendants are his siblings. Their great grandmother, Mary Mitchell, was the owner of a property which she bequeathed to Mitchell Sr. Mary named her son Samuel Mitchell as executor, and her will was probated on 19th December 1978. No Deed of Assent is attached to the affidavit. Mitchell Sr.'s wife, Mavis, died intestate on 17th May 1997, while Mitchell Sr. died intestate on 9th January 2022.

5. On 30th January 1981, Mitchell Sr. was granted a mortgage by RBC, secured by the inherited property. Sometime in or around 2001 the Plaintiff was informed by his father that the mortgage was in arrears and that the Bank (RBC) was about to take the property. The amount of the arrears was $30,000.00, which Tawanna agreed to pay by salary deduction on the condition that Mitchell Jr. repay her monthly, as it was expected that he would inherit the property.

6. Mitchell Jr. further states that he spoke with his father, who agreed that after the debt was repaid in full he would bequeath the property to his son. However Mitchell Jr. states that he advised his father not to do this, as he had five other children, all of whom should inherit. His father then advised that once the property was paid off, Mitchell Jr. was to retrieve the original documents from the bank, which should not be used to secure any further borrowing, and that after the father died the 1st Plaintiff could do with the property as he saw fit, while, if possible, ensuring that the 2nd Plaintiff had a roof over her head. The 1st Plaintiff further states that he told his father that once

the father had passed, the 1st Plaintiff would sell the property to recover the money he had invested in the property with interest.

7. The 1st Plaintiff states that he consulted with his wife, who agreed, and that he thereafter paid the sum of $500.00 per month to his sister Tawanna for five years until the debt was repaid, after which he obtained a satisfaction of the mortgage from Royal Bank of Canada. The Plaintiff has exhibited to his affidavit a number of receipts evidencing some of the monthly payments.

8. Following the death of Mitchell Sr., the 1st Plaintiff states that Tawanna now dishonestly stated that she is unaware of the 1st Plaintiff repaying any money, and later said while some money had been repaid, it was not $30,000.00. She also disputes an appraisal report obtained by the 1st Plaintiff, which values the property at $133,000.00, and claims instead that the property is worth only $40,000.00, and wants to purchase it herself for that amount.

9. The 1st Plaintiff states that during a ZOOM meeting with all of his sisters in March 2022, he objected to selling the property to his sister Tawanna for $40,000.00, as it was far less than the appraised value. He stated further that Tawanna then ordered him out of her home, where he had been residing with his family after having lost his own home. The four defendants, according to the 1st Plaintiff, now refuse to sell the home under any conditions. They also refuse to agree that he be appointed administrator of his father's estate.

10. The 1st Plaintiff goes on to describe the unsafe and unsanitary condition of the home, which he alleges is filled with mold and could not survive another serious storm. Further, the 1st Plaintiff alleges that there is a danger of serious harm as Zhonette and the 2nd Plaintiff, who both live in the home, are constantly fighting, necessitating police involvement at times.

11. The 1st Plaintiff also seeks an accounting, and at paragraph 20 of his first affidavit states the following:

> "20. 1 am advised and do verily believe that as per the terms of the verbal agreements both made in A.D 2001 between myself and my sister Tawanna. the 2nd Defendant herein, AND pursuant to the terms of the verbal agreement between our father and I, I also seek and am entitled to an accounting, deduction and repayment since I have invested $30k in the property and now seek the return plus interest as agreed, in the amount of $80,723.00 which represents:
>
> (1) The amount of $30k principal which I repaid to the 2nd Defendant to save the property from foreclosure by Royal Bank of Canada and $12,000.00 interest at 8% (accumulative) per year for a period of five (5) years, totaling approximately $42,000.00.
>
> (2) The amount of $38,400.00 in interest of 8% per annum for 16 years based on the said $30k, to be deducted from the sale of the said property, and running at a rate of 8% interest per annum until Judgment.
>
> (3) The amount of $325.00 ($390.00 less my $65.00 portion) which I paid, for the relative Appraisal Report dated March 10th A.D 2022.

12. The 1st Plaintiff filed a second affidavit after the commencement of these proceedings. Most of that affidavit contains submissions, including attacks on counsel for the defendants and the defendants themselves. With respect to what is admissible and relevant as evidence, the 1st Plaintiff exhibits more receipts alleged to be evidence of payments to his sister Tawanna for the repayment of the $30,000.00.

13. The 1st Plaintiff also avers that he has been trusted in the past to handle the affairs of his father and some of his siblings. The 1st Plaintiff exhibited a Power of Attorney authorizing him to deal with certain insurance matters, and speaks to the payment of funeral expenses. The 1st Plaintiff insists that his father was debt-free at the time of his death, owing money to only him.

14. He, therefore, prays that the property be sold, and the amount claimed by him be deducted, with the remainder to be distributed between the remaining siblings.

15. The 2nd Plaintiff has also sworn an affidavit in this matter. It is indicated that she resides at the subject property, and confirms that while she and the 1st Plaintiff wish the property to be sold at what they claim is the appraised value, the four defendants have objected, wishing instead for the property to be purchased by Tawanna to keep the property in the family. She also speaks to a contentious relationship with Zhonette, who also resides in the home with her four sons, which has included violence and the involvement of law enforcement. She, therefore, supports the application for the sale of the property at the appraised value.

16. The Plaintiffs also rely on an affidavit from Brenda Mitchell, the wife of the 1st Plaintiff, in which she indicates that she was told of the agreement for the 1st Plaintiff to repay the sum of $30,000.00 to Tawanna, and that he had informed his father that upon the father's death the property would be sold to recover the 1st Plaintiff's investment plus interest. She also speaks to the refusal of the defendants to sell the property at the appraised value.

THE DEFENDANTS' EVIDENCE

17. The Defendants filed the affidavit of Candace Fraser, a Legal Assistant in the firm of Sharon Wilson & Co., counsel for the Defendants. In that affidavit, which is in support of the Summons to Strike Out, as opposed to the substantive partition action, Ms. Fraser really speaks to facts that are generally not in dispute, namely the date of the filing of the action, the fact that the four Defendants are sisters and that the action was brought in respect of the property of their deceased father. Ms. Fraser also suggests that the property is not owned by either the Plaintiffs or the Defendants. The remainder of the affidavit contains not facts but submissions.

THE PLAINTIFFS' CASE

18. The Plaintiffs appeared pro se, and submissions were presented by the 1st Plaintiff and endorsed and adopted by the 2nd Plaintiff. The Plaintiffs commenced by attacking the documents filed by the Defendants, including the Notice and Memorandum of Appearance, and the Summons to Strike Out, on the basis that the names of the 2nd Plaintiff and 4th Defendant were incorrectly spelled. They claim that the Defendants are therefore not properly before the court, and object to any amendments, while suggesting that there would be costs implications of any amendments.

19. The 1st Plaintiff also contends that he was not properly served, as documents were sent to him via email, when no application had been made for substituted service. He, therefore, submits that the Summons to strike out should be dismissed on this basis.

20. The Plaintiffs submit that the affidavit filed on behalf of the Defendants should be struck out, as the affiant is a legal assistant and not an attorney at all, but speaks to legal matters, and does not identify or disclose the sources of her information. They also accuse the affiant of swearing to false information as to the limitation of the contract, which they say is egregious conduct, on the basis that the cause of action on the breach of contract claim did not arise in 2001 as claimed. The Plaintiffs also note that the Defendants assert that they do not own the subject property, and are therefore improper parties to the action, and suggest that this means that they have formally divested all their beneficial interest in the property.

21. The Plaintiffs further submit that even if the court were to grant the Defendants the relief sought in removing them as parties to the action, the partition action would still survive. The Plaintiff submits that the Partition application should be dismissed on the basis of the Defendants being improperly added as the power granted to the court pursuant to Order 15 rule 6 (2) of the RSC is merely to order that a person who was improperly joined would cease to be a party. The Plaintiff further submits that the court had no power under that rule to go further and strike out the matter. It is also suggested that the Defendants cannot on the one hand claim to not be proper parties, but on the other hand seek to strike out, as, if they claim that they are not proper parties, they would not have standing to ground any further participation in the matter.

22. With respect to the question of whether the claim is statute barred, the Plaintiffs rely on Section 5 (1) of the Limitation Act, which provides as follows;

> "The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say — (a) actions founded on simple contract (including quasi contract) or on tort."

23. The Plaintiffs submit that it is clear that time does not begin to run from the date that the contract or verbal agreement is entered into, as submitted by the Defendants, but that time only begins to run from the date the cause of action accrued. In this case, the Plaintiffs submit that the cause of action did not accrue until Mitchell Sr. passed away on January 9th A.D. 2022, as they suggest that the agreement was that after the death of Mitchell Sr., the 1st Plaintiff would sell the property to recover the principal of $30,000.00 expended by the 1st Plaintiff in repaying the outstanding sums, and interest on that sum.

24. With respect to the application for sale pursuant to the Partition Act, the Plaintiffs begin by citing the provisions of Section 4(1)(b)(ii) of The Inheritance Act 2002, which provides that;

> 'The residuary estate of an intestate shall be distributed in the manner mentioned in this section, namely — (b) if the intestate -
>
> (ii) leaves children but no husband or wife, the residuary estate shall be distributed equally among the children and where there is only one child that child shall take the whole residuary estate.'

25. They therefore submit that the siblings are interested and proper parties, and suggest that rather than being required to pursue a probate action, Parliament has legislated an alternative means by which the parties can approach the courts to have the property of an intestate sold and the proceeds divided to those entitled to those proceeds.

26. The Plaintiffs cite the provisions of sections 3 and 4 of the Partition Act, and submit that having regard to the evidence before the court of the rancorous nature of the relationship between the parties, a sale would clearly be more beneficial to the parties. They further submit that the provisions of Order 68 of the Rules of the Supreme Court relating to probate actions have no applicability, as Parliament could not have intended those provisions to apply to this alternate means of approaching the court by persons interested in the partition of property.

27. The Plaintiffs also cite the provisions of section 50 of the Probate and Administration of Estates Act 2011 which provides as follows:

> "(1) Where a person dies intestate, his real and personal estate, until administration is granted, shall vest in a Justice of the Supreme Court.

28. The Plaintiffs rely on dictionary.law.com, where "vest" is defined as;

> "Adj. referring to having an absolute right or title, when previously the holder of the right or title only had an expectation...".

They also cite wikipedia.org, where vesting is defined as;

> "In law, vesting is the point in time when the rights and interests arising from legal ownership of a property is acquired by some person. Vesting creates an immediately secured right of present or future deployment. One has a vested right to an asset that cannot be taken away by any third party, even though one may not yet possess the asset. When the right, interest, or title to the present or future possession of a legal estate can be transferred to any other party, it is termed a vested interest."

29. They therefore submit that the Supreme Court has ownership of the property as Mitchell Sr. died intestate, and can therefore order the sale of the property and the distribution of the proceeds.

THE DEFENDANTS' CASE

30. The Defendants rely on Order 18 Rule 19(1) of the Rules of Supreme Court, 1978 ("RSC") which provides, as follows:

> "The Court may at any stage of Proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action;

(d) it is otherwise an abuse of the process of the court..."

31. The Defendants cite the case of **Drummond-Jackson v British Medical Association (1970) 1 WLR 688**, in which Smith, L.J. said the following:

"...It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies... "

32. The Defendants cite the following provisions of Order 68 of the RSC:

"(1)(2) In these Rules "probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business."

Order 68 Rule (2) II) :

"(2)(1) A probate action must be begun by writ, and the writ must be issued out of the Registry."

33. The crux of the Defendants' argument is that probate actions must be begun by writ, which has not been done in this case, and as a result of the failure to probate the estate, the Defendants are not owners of the property, and are therefore not proper parties to the action. They submit that the Plaintiffs are attempting to disregard the entire probate process. They also rely on **West Island Properties v. Sabre Investments Ltd. [2012] 3 BHS J. No. 57** in which Allen J cited with approval the English Court of Appeal case of **the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch. 274**, in which a similar rule related to the striking out of pleadings was considered. At page 277 of **Duchy of Lancaster** the court said:

"It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious or obviously unsustainable"

34. With respect to the claim for a breach of contract, the Defendants suggest that the Plaintiff is seeking to claim as a result of an agreement which was allegedly arrived at in 2001. They cite section 5 of the Limitation Act which provides as follows:

5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on simple contract (including quasi contract) or on tort;

35. The Defendants cite the cases of **Ronex Properties Ltd. v. John Laing Construct Ltd et al (1983] 1 QB 398**, and **Girten v Andreu (I998J BHS I No. 164**. In the latter case, Sawyer C.J.,

as she then was, in relation to applications to strike out based on a limitation defence, said the following:

> "...I think it is now trite law that where it is clear from the statement of claim that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation defence and there is nothing before the court to suggest that the plaintiff could escape from that defence the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court - see e.g., Riches v Director of Public Prosecutions [1973] 1 WLR 1019; [1973] 2 All E.R. 935 as explained in Ronex Properties Ltd. v John Laing Construction Ltd. [1983] Q.B. 398; [1982] 3 All E.R. 961."

36. The Defendants, therefore, submit that the impugned verbal agreement clearly occurred more than six years ago, and the matter should therefore be struck out as frivolous, vexatious and an abuse of the process of the court.

LAW & ANALYSIS

37. The Plaintiffs have raised a number of preliminary objections which, in my view, can be dealt with quite briefly. There is an objection to the spelling of names in the Notice of Appearance and Memorandum of Appearance, and subsequent documents filed by the Defendants. In my view this is a matter of form over substance, which the court is permitted pursuant to Order 2 Rule 1 of the Rules of the Supreme Court to treat as an irregularity which does not nullify the steps taken by the defence. I therefore decline to find that the Defendants have not properly entered an appearance in this matter, or that the Summons filed by the Defendants is a nullity.

38. There is also a complaint about a lack of proper service, as documents were sent by email, while no application had been made for substituted service. While the documents were eventually properly served in any event. I note also that on the Originating Summons the 1st Plaintiff gives his address as "Formerly No. 31 Tropical Avenue, Twynam Heights, Nassau Bahamas", and provided an email address for electronic service. The street address given is obviously not a proper one for physical service. I find no merit is this complaint.

39. Objection has also been taken to the filing of an affidavit by a legal assistant, on the basis that she speaks as though she is an attorney, and has not provided disclosure of any documents used to support the averments in the affidavit. The affiant clearly states that she is a legal assistant, and that the information in the affidavit is from her personal knowledge or from files reviewed in her capacity as a legal assistant. In my view, the question of documentary evidence to support the contents of the affidavit is one of the weight to be given to the evidence, as opposed to the admissibility of that affidavit. I therefore find no merit in this ground.

40. The Plaintiffs also complain of delay in this matter. No mention is made of how that delay may have prejudiced the fair hearing of the matter, other than to say that it amounts to a denial of justice. For the sake of clarity, I note that this matter was initially reviewed by the duty judge, who determined that, despite a Certificate of Urgency, the matter was not urgent. It was then assigned to this court by the Listing Office in the usual way. A date was assigned by this court without reference to counsel, who then indicated a scheduling conflict, as a result of which the date was

changed. The matter was called on the new date, and proceeded thereafter. In my view, there is no substance to any complaints about delay in this matter, as any delays have not been so excessive as to amount to a constitutional breach.

41. The Plaintiffs place great reliance on the proposition that by the enactment of the Partition Act, Parliament intended to provide an alternative means by which persons who inherit land are able to monetize their inheritance, without the need for probate. No authority has been provided for this novel proposition.

42. Sections 3, 4, and 5 of the Partition Act Chapter 153 read as follows:

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

43. It is clear from a reading of the sections that the question of what is meant by "parties interested" is of paramount importance. No definition is provided. In considering the meaning, it is my view that regard must be had to the intention behind such legislation. That intention was addressed by the Privy Council in **Ceylon Theatres Limited v Cinemas Limited and Others [1968] 2 WLR 1114**. At page 2 of that decision, Lord Wilberforce said as follows:

"Both by the common law, and under the successive pieces of legislation which have been passed in Ceylon concerning partition, partition may be effected by agreement or by decree of a competent court. Partition, when effected by judicial decree, appears, according to the prevailing opinion, to be in the nature of an alienation by purchase, the alienees deriving their title from the decree of the court. The position under the Partition Ordinance (Cap. 56) of 1863, the legislation which preceded the Act of 1951, has been described as follows:

"When common ownership becomes burdensome the Partition Ordinance enables it to be determined at the instance of a co-owner by the conversion of undivided shares into shares in severalty by partition, or when that is not possible by the sale of the land. Upon the issue of a certificate of sale to the purchaser under decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser, and the lands cease to be held in common by the original owners." Fernando v Cadiravelu, per Garvin J.1

Thus, the conception underlying judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owners' shares.""

44. Inherent in that passage is that partition is available where there are co-owners. It is therefore my view that the interest required for an application pursuant to the Partition Act is an ownership interest. The question then is, are the Plaintiffs and Defendants co-owners of the property? In my view, the answer is clearly no, as, until the estate is administered, the property is vested in a Justice of the Supreme Court for the estate of the deceased. The Plaintiffs also cite the provisions of section 50 of the Probate & Administration of Estates Act 2011, as noted above, as well as definitions of vesting, and submit that as title to the property vests in the Supreme Court, the court is empowered to sell the property and apportion the proceeds as requested by the Plaintiffs.

45. The nature of such a vesting of title in the court has been considered **in In re Deans, Dec'd. ; Westminster Bank Ltd. V Official Solicitor [1954] 1 WLR 332.** In that case, which related to a similar provision, the court said the following at page 3:

"In my view, the senior judge of the Probate Division cannot be said, by virtue of the language of section 9 of the Administration of Estates Act, 1925, to be a trustee within the meaning of that word for any of the purposes of the Trustee Act, 1925. He has no duties whatsoever to perform. No obligations fall upon him. It is a mere matter of necessary convenience and protection which has led to the introduction of section 9 in the Administration of Estates Act; and, although reference is made to the ordinary, the position of the senior judge of the Probate Division appears to me to be different from the position of the ordinary, in that, whereas the ordinary had, at any rate in later times, thrown upon him the obligation to discharge debts before holding the balance to pious uses, no such obligation is thrown on the senior judge of the Probate Division. The whole operation of that section is that where the condition is fulfilled of a person dying intestate, his estate, real and personal, vests in the senior judge of the Probate Division, and that property remains vested in him until the second condition is fulfilled, namely, that administration is granted in respect of that property. That appears to me to be plain language and to provide

the only method by which the senior judge of the Probate Division can be divested of the property which vests in him under the section."

46. A similar provision was also considered in the case of **Manning v Administrator-General (1962) 5 WIR 269**, a decision of the Court of Appeal of Trinidad and Tobago, where the court said as follows:

"We have been referred more especially to the provisions of s 10 (4) and of Part III of the Administration of Estates Ordinance. Section 10 (4) enacts that on the death of any person all his estate real and personal whatever in Trinidad and Tobago shall vest in law in the Administrator-General until the same is divested by the grant of probate or of letters of administration to some other person or persons, provided however that pending such grant he shall not take possession of or interfere in the administration of any estate except as otherwise authorised by statute. Part III empowers the Administrator-General, in the several circumstances therein prescribed, to apply for letters of administration to the estate of a deceased person dying testate or intestate or, in respect of "small estates" not exceeding in value the sum of $960 to administer the same without applying for a grant in that behalf. From all this it was contended that the Ordinance must have intended the Administrator-General to be a legal persona with various powers and authorities, duties and obligations. I do not agree. These provisions hark back, I think, to the jurisdiction formerly exercised by the Ordinary in England. An account thereof is to be found in Blackstone's Commentaries, Vol III, at pp 494 et seq, and in the judgment of the Privy Council in Dyke v Walford ((1848), 5 Moo PCC 434, 6 State Tr NS 699, 6 Notes of Cases 309, 12 Jur 839, 13 ER 537, PC, 3 Digest (Repl) 428, 237). Briefly stated, it is this. The clergy never had, by law, any beneficial interest in the property of intestates, but rather the right and duty of administration and the right of possession for the latter purpose. Previous to the reign of Edward I, however, the Church seems to have acquired the right of jurisdiction in cases both of testaments and intestacies, and this right became vested in and was exercised by the Bishop of the diocese where the goods of the deceased person were situate. In exercising this jurisdiction, the Bishop was styled the Ordinary. In course of time, it was found very difficult, if not impossible, to compel any satisfactory account of his administration from the Bishop in any court, spiritual or temporal, and in the result gross abuses prevailed and the property of deceased persons was often misappropriated. In an attempt to correct this, Archbishop Stratford published in 1341 his Constitution De Testamentis prohibiting interference in any manner 268 with the goods of testators of which, it stipulated, executors should be permitted freely to dispose, and providing further that in the case of intestacies the goods remaining over after payment of debts should be employed to pious uses, to the relations and servants and friends of the deceased person, or others, for the benefit of his soul, retaining nothing except reasonable compensation for the labour of the Ordinary. But the Constitution proved insufficient to prevent malpractices from continuing, and so by a statute of Edward III the Ordinary was deprived of all or any right of administration, which right was thereby required to be granted to those who were most interested in the property, namely, the nearest relatives of the deceased. As this statutory provision was founded on the principle that administration ought to be granted to

those who were beneficially interested in the property of a deceased person but nothing was expressly provided by the statute in regard to the grant of administration where a deceased left no next-of-kin, the ecclesiastical courts thought it right to make the grant in such a case to the nominee of the Crown. Thus it came about that the ecclesiastical courts held that the right to administration followed the right to the goods of a deceased. The goods, nevertheless, formally vested in the Ordinary until administration was granted.

The Ordinary's association with such matters finally ended on the enactment of the Court of Probate Act, 1858 [UK], s 19 of which vested in "the judge of the Court of Probate for the time being" the personal estate and effects of a person dying intestate, from the date of the death until the grant of letters of administration, "in the same manner and to the same extent" as theretofore they had vested in the Ordinary. This provision was later replaced by s 9 of the Administration of Estates Act, 1925 [UK], which provides that "where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same manner and to the same extent as formerly in the case of personal estate if vested in the Ordinary". The vesting under the 1925 Act is not expressed to be in the probate judge for the time being but, since the designation "the Probate Judge" is defined by s 55 to mean the President of the Probate, Divorce and Admiralty Division of the High Court and, therefore, the vesting is in him by virtue of his office, the result is, in my judgment, the same as if it had been so expressed. Also, since the statute of Edward III had in effect stripped the Ordinary of all of his rights of administration, the vesting of a deceased's real and personal estate in the President of the Probate, Divorce and Admiralty Division was a bare vesting of the legal estate, carrying with it no right or power to take possession or interfere in the administration thereof."

47. I am therefore unable to conclude that the vesting of the property in the Supreme Court empowers the court to act as the Plaintiffs wish. In my view, administration of the estate is still required to properly pass title to any potential purchaser. That requires an application by writ pursuant to Order 68 of the Rules of the Supreme Court.

48. The importance of a proper administration of the estate of the deceased is magnified in this case due to the nature of the relationship between the parties, and what may amount to an anomaly. I have earlier indicated that in the exhibits to his affidavit, the 1st Plaintiff has attached the will of his great-grandmother bequeathing the property to Philip Sr., and the Probate of that will, and I have noted that no Deed of Assent is attached. This may be important, as the Deed of Assent is necessary to give effect to the devises under the will. As was said by the learned Evans J in **Powell and others v Farquharson (2013) 1 BHS J No 104 at paragraph 49** :

"49 An assent in relation to real estate operates to vest in any person entitled thereto the estate or interest to which the assent relates and relates back to the deceased's death. See section 25 of the Administration of Estates Act, chapter 108, Statute Laws of The Bahamas. See also Halsbury Laws of England, 3rd edn. Volume 16, page 342 where the learned authors state:

"The title to a legacy vests immediately upon the assent to the legatee so as to enable him to bring an action in law against the executor or any person in possession of the bequest. An assent in relation to real estate relates back to the deceased's death unless a contrary intention appears, and the legatee of the specific legacy has the right to recover the intermediate profits of the thing bequeathed. Where executors who are also trustees under the will have assented they cease to hold the property as executors and thenceforth hold it as trustees.""

49. There may therefore be a question as to whether the title to the subject property was ever properly vested in Mitchell Sr., notwithstanding the mortgage granted to him by RBC, which would have to be resolved in order to properly administer this estate.

50. The Defendants submit that any action relating to the purported verbal contract between the 1st Plaintiff and the deceased would be statute barred. Having regard to what has been said above, it is my view that the disposition of this matter does not require resolution of this issue. Although I do note that any purported contract would have been with the deceased, with the result that any action for breach of contract would have to be taken against the estate of the deceased, as opposed to the Defendants, who were not parties to that contract. It is my view that the references to the repayment of money to Tawanna do not support the existence of any contract involving her, as, if that evidence is accepted, she was merely being reimbursed monies that she had expended, and could not authorize the sale of the property.

51. The Defendants have by summons invoked the jurisdiction of the court to strike out pursuant to Order 18 Rule 19(1)(a)(b) and (d) of the Rules of the Supreme Court. Charles J. in **B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J No. 28** explains the power to strike out as follows:

"7. As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

8. In Walsh v Misseldine [2000] CPR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

52. In **Hunter v. Chief Constable of West Midlands (1982) A.C. 529 at page 536** Lord Diplock said the following:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

53. In my view, as neither the Plaintiffs nor the Defendants are at present the owners of the property, none are proper parties to this action at this time, as the action is premature. The Originating Summons is therefore in my view incurably bad. I am also of the view that the present application is a misuse of the procedure of the court, as the Plaintiffs deliberately chose to take this route, as opposed to applying for letters of administration. The Plaintiffs have also suggested in rebuttal submissions that the court could treat this application as a request for Letters of Administration. To do so would ignore the very specific rules relating to such actions contained in Order 68 of the Rules of the Supreme Court, and the fact that this matter has not been treated as such an application, with the opportunity to hear from all parties on such an application, and with the safeguards inherent in the process which applies to such an application to ensure that the interests of all relevant parties are considered, and that the estate of the deceased is properly administered.

54. In consequence of the duty of the court to prevent abuses of the process of the court, and having regard to my view that this application is premature, as the estate has not been probated, I therefore order that this action be struck out.

55. On the question of costs, the Defendants submit that they should have their costs as the matter has been stuck out. The Plaintiffs submit that costs should not be awarded due to misconduct by the attorney for the Defendants, and delays on the part of the court. Earlier in this decision, I have addressed these issues. In the circumstances, I see no reason to depart from the usual rule that costs should follow the event. I therefore award costs to the Defendants to be taxed if not agreed.

Dated this 18th day of May A.D., 2023

Neil Brathwaite
Justice