In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 246

BETWEEN:

SAMUEL ANDREW BANKS

Plaintiff

v

SIMON STOREY

and

DEIRDRE STOREY

Defendants

JUDGMENT

Boundary Dispute, Horticulture, Construction, Drones, Underground Utility Cables Issues and Remedies for the Torts of Trespass, Nuisance, Conversion, Development and Planning Act 1974, Zoning Orders, Limitation Act 1984, Laches, Doctrine of Lost Modern Grant, Prescriptive Easement, Right of Way, Mandatory Injunction, Prohibitory Injunction, Quia Timet Injunction, Damages, Aggravated Damages

Date of Hearing: **9-13 December 2024, 20-24, 27 January 2025, 26 February 2025**
Date of Judgment: **21 April 2026**

Appearances at Trial: **Jeffrey Elkinson, Britt Smith, Conyers Dill & Pearman Limited for Plaintiff**

Keith Robinson, Oliver Mackay, Carey Olsen Bermuda Limited, for Defendant

Counsel at Judgment: **Jeffrey Elkinson; and Britt Smith, Harneys Bermuda Limited, for Plaintiff**

Contents

Introduction 3

Background and Pleadings 4

The Trial - Evidence 10

The Issues 15

Satellite Images ("SI") 16

Findings of Fact – Knowledge of Mr. Storey of the Boundary between the Properties 22

Issue 1 – The Woodland Reserve Torts 26

Issue 2 – The Excavated Western Access Roadway 54

Issue 3 – The Construction Trespass 71

Issue 4 – Damages in respect of the Woodland Reserve – Indemnity for the costs of the Conservation Management Plan (CMP) 77

Issue 5 – Mr. Banks' Use of the Asphalted Roadway 96

Issue 6 – The Grass Verge 114

Issue 7 – The Utility Cables 126

Issue 8 - The Plaintiff's Gateway Encroachments on Long House 141

Issue 9 – The Plaintiff's Drones 151

Issue 10 - The Plaintiff's Boundary Incursions on Long House 156

Issue 11 - The Plaintiff's Nuisances 163

Issue 12 - Claims for Aggravated Damages by both Parties 168

Conclusion 173

Costs - the Parties to be heard on Costs 177

Postscript 177

JUDGMENT of Mussenden CJ

Introduction

1. The Plaintiff is Samuel Andrew Banks ("**Mr. Banks**"). His wife is Dame Pamela Gordon Banks ("**Dame Pamela**"). Mr. Banks is the owner, since 2001, of Gatewood at 17 Inglewood Lane, Paget ("**Gatewood**"[1]).

2. The Defendants are Simon Storey ("**Mr. Storey**") and his wife Deirdre Storey ("**Mrs. Storey**"). Mrs. Storey has played no part in the proceedings; she has not filed any affidavit evidence, witness statements or appeared in person to give evidence. They purchased the property Long House at 13 Inglewood Lane, Paget Parish, ("**Long House**"[2]) in December 2012 and they moved into the house in January 2013 and have been living there since. Long House adjoins Gatewood sharing a long boundary. The Defendants also own Agapanthus at 11 Inglewood Lane ("**Agapanthus**").

3. This case revolves around various alleged encroachments, over time, mainly over the boundary (the "**Boundary**") between Gatewood and Long House (together the "**Properties**").

4. A main issue in the case involves an area of Woodland Reserve that straddles the Boundary of the Properties (the "**Woodland Reserve**"), with part of it on Gatewood ("**GW Woodland Reserve**") and part of it on Long House ("**LH Woodland Reserve**").

5. In the Inglewood Estate, there are house numbers for the properties which are different from lot numbers in the estate. The Zoning Order (defined below) makes reference to a plan, 123/A/10 drawn on 10 December 1958 and uses "lot numbers". Relevant numbering is as follows:
    a. Agapanthus, 11 Inglewood Lane, comprises Lot 15;
    b. Long House, 13 Inglewood Lane comprises Lot 14; and

[1] Reference to "Gatewood" means the property at 17 Inglewood Lane. On occasion, reference is made to specific areas of the property, e.g. to the Woodland Reserve.
[2] References to "Long House" means the property at 13 Inglewood Lane. On occasion, reference is made to a specific area of the property, e.g., to the house/home on the property, the Upper Lot, the Lower Lot.

c. Gatewood, 17 Inglewood Lane comprises Lots 12 and 13 joined together.

Background and Pleadings

Specially Endorsed Writ of Summons (the "**Writ**") and the Statement of Claim (the "**SOC**")

6. By a Specially Endorsed Writ issued on 23 August 2021, Mr. Banks commenced the present action. He set out that in the month of June 2021 he became aware that the Defendants had come onto Gatewood and removed numerous mature trees and other vegetation, excavated a roadway over a portion of Gatewood (the "**Excavated Western Access Roadway**"), deposited an extensive mulch berm significantly altering the topography, installed ornamental plantings, and carried out other encroaching developments. Mr. Banks claimed that the Defendants did not have his permission to come onto his land or to remove any trees and/or vegetation nor to encroach on his land by way of the establishment of a roadway or to place any other construction there.

7. Mr. Banks set out that the Defendants had trespassed on his property and did a number of things: (i) obscuring boundary markers; (ii) removing mature trees and other vegetation in the GW Woodland Reserve with consequential destruction of the natural habitat for birds and other wildlife. (iii) placed new ornamental plantings for the purpose of obscuring the tortious acts and then dumping deadwood and other vegetative debris creating an artificial embankment; and (iv) excavating a roadway to allow for vehicular traffic originating on Long House to go over and make use of Gatewood.

8. The SOC also set out that: (i) The Defendants created a nuisance by providing for a roadway over which vehicles and the Defendants, their servants or agents or guests could pass and repass: (ii) the Defendants converted the Plaintiff's trees and vegetation for their own use; (iii) the Defendants committed the acts in circumstances where they would have known that the area on the Plaintiff's property where they cut down trees and removed vegetation is zoned Coastal and Woodland Reserve Conservation Area pursuant to the Bermuda Plan 2018; (iv) the Defendants by their wrongful actions have created a liability for the Plaintiff to present a Conservation Management Plan ("**CMP**"), and in relation to

the costs of such a plan, the Plaintiff seeks an indemnity from the Defendants; (v) the Defendants did the acts knowing at all material times that it was the Plaintiff's property. Alternatively, they did so recklessly and then made use of the Excavated Western Access Roadway which they excavated on the Plaintiff's property for their own purpose and advantage, including to enlarge and improve their own property.

Relief Sought

9. Thus, Mr. Banks sought the following:
    a. A permanent injunction restraining the Defendants, their servants or agents or guests from trespassing or creating a nuisance on Gatewood;
    b. A mandatory injunction requiring the Defendants to restore Gatewood to its original state as existed prior to the Defendant's wrongful acts;
    c. An order for demolition of any construction wrongfully erected or placed on Gatewood;
    d. Damages for the trespass, nuisance and conversion and further an indemnity as regards the costs of any CMP or equivalent which Mr. Banks has any liability for; and
    e. Aggravated damages.

The Defence and Counter Claim

10. The Defendants' defence is as follows:
    a. They denied the claims about the encroachments except that they admitted that as a result of lack of knowledge of the precise legal boundary between Gatewood and Long House that certain woodland planting had been carried out in an area ("**Admitted Planting**") and a retaining wall had been constructed on the area ("**Admitted Construction**").
    b. They asserted that the Admitted Planting took place commencing in 2015 following damage caused by Hurricanes Faye and Gonzalo in 2014 (together the "**Hurricanes**"). The work consisted of remediation of storm damage and were completed by August 2017. The Admitted Construction was constructed in or about

May 2019. Thus, the Defendants denied that Mr. Banks became aware of the Admitted Planting and Admitted Construction in June 2021.

c. They admitted that no permission was given by Mr. Banks in respect of the Admitted Planting and the Admitted Construction.

d. They denied that they had obscured or obliterated boundary markers between the two properties.

e. They stated that the remediation works that they conducted did not result in the destruction of any natural bird or wildlife habitats, rather it greatly improved the said habitats with the planting of native Bermuda and other complimentary species.

f. They denied that any of their acts had the purpose of obscuring any of their acts and they denied that they dumped deadwood or other vegetative debris to create an 'artificial embankment' or otherwise.

g. They denied that they created the Excavated Western Access Roadway whether to allow vehicular traffic or otherwise, rather they and their servants or agents, cleared and used an existing pathway (the "**Pathway**") over which they enjoyed a right of way (the "**Long House Claimed Pathway RoW**").

h. They denied that the Draft Bermuda Plan 2018 is of any relevance to the matters pleaded, but if it did, they denied that it imposed a positive obligation for Mr. Banks to present a Conservation Management Plan or any other liability whatsoever and they denied any liability for the costs of any such Conservation Management Plan.

i. They denied that they knew that the Admitted Planting and Admitted Construction were on Gatewood until receipt of the Survey Report or that they acted recklessly.

j. They denied that Mr. Banks is entitled to the claimed or to any relief and that there has been any diminution in value of Gatewood by either the Admitted Planting or Admitted Construction.

k. They took the position that to the extent the claims are in tort and the alleged cause of action arose more than 6 years before the issue of the Writ, then those claims are time-barred by virtue of the Limitation Act 1984 (the "**1984 LA**").

11. The Defendants' counterclaimed as follows:

    a. Gatewood enjoys a legal easement in respect of Long House which is a right of way 14 feet wide and running along the northern boundary of Long House (the "**Gatewood RoW (D)**[3]"). In or about 2006, Mr. Banks constructed an asphalt access roadway ("**Asphalted Roadway**") which passes over Long House. The construction and use of the Asphalted Roadway constitute a continuing trespass in that it passes approximately 5.5 to 6 feet south of the Gatewood RoW (D) for approximately 63 yards.

    b. In or about 2006, Mr. Banks caused or permitted Bermuda Telephone Company Limited and Digicel (and possibly other utility companies) to lay cables through Long House parallel to the said Asphalted Roadway without any easement being granted, such cables constituting a continuing trespass.

    c. Mr. Banks has trespassed and continues to trespass on Long House by the construction in or about 2006, and use of ornamental pillars, a trench drain, gate switch and mailbox post and decorative lighting together with ornamental planting on either side of the entrance gateway (together the "**Gateway Items**").

Relief Sought

12. Thus, the Defendants sought the following:

    a. A declaration that Mr. Banks has no right, title, estate of interest in the land at Long House other than the Gatewood RoW (D), that is a right of way 14 feet wide running along the northern boundary of Long House.

    b. An injunction to restrain Mr. Banks from using the said land otherwise than in lawful exercise of the said Gatewood RoW (D).

    c. An order that Mr. Banks shall remove the cables and the Gateway Items.

    d. A declaration that Long House enjoys a right of way along the Pathway, the Long House Claimed Pathway RoW.

    e. Damages for diminution of value of property from the Boundary Fence.

    f. Damages and interest for trespass.

[3] Gatewood Right of Way (per the Defendant)

The Reply and Defence to the Counter Claim

13. The Reply set out the following:
    a. The Defendants at all material times were fully aware of the legal ownership of Gatewood and the Boundary between it and Long House, and if they were not fully aware, then such ignorance of where the boundary existed was willful.
    b. Mr. Banks denied that the Admitted Planting and Admitted Construction took place following damage caused by Hurricanes Fay and Gonzalo as alleged.
    c. Mr. Banks denied that the Admitted Planting and Admitted Construction was remediation work and that it improved the habitats of the birds or wildlife which lived there.
    d. Mr. Banks denied that the Defendants have a right of way as alleged, that is, the Long House Claimed Pathway RoW.

14. The Defence to the Counter claim is as follows:
    a. Mr. Banks stated that for upwards of 50 years there has been use of the Asphalted Roadway. The Asphalted Roadway had been statutorily in existence since 26 January 1959 running the length of Inglewood Lane from South Road to the entrance of Gatewood. The Asphalted Roadway ranges in width from 20 feet at the northern end and narrows to 14 feet wide in the vicinity of the Parties' properties. It was established by a zoning order made under the Building and Land Development (Control) Rules 1948 referred to as Inglewood Property, Paget, Zoning Order 1959 (the "**Zoning Order**"). Mr Banks stated that he has an absolute legal right to the use of the Asphalted Roadway. I shall refer to the right of way over Long House as claimed by Mr. Banks as the "**Gatewood RoW (P)**[4]". For clarity, I note here that there is a dispute as to whether the proper right of way for Gatewood over the Asphalted Roadway on Long House is the Gatewood RoW (P) or the Gatewood RoW (D). As will be set out below, the two positions overlap each other in a parallel fashion as they traverse the Asphalted Road.

[4] Gatewood Right of Way (per the Plaintiff)

b. Mr. Banks denied that he caused the construction of the Asphalted Roadway which passes over Long House as is alleged (that is, in the location of the Gatewood RoW (P) or at all. Mr. Banks stated that in 2011 he paid for resurfacing of the Asphalted Roadway which had been in place for over 60 years. He not only paid for that portion of resurfacing but for the resurfacing of the whole of the Asphalted Roadway from the entrance to Gatewood to South Road, at the request of the other residents of Inglewood Lane. In or about 2016 the Defendants caused trenching on the Asphalted Roadway all the way to South Road for the purpose of getting services provided to Long House and despite promises to resurface the Asphalted Roadway, they have never carried out such repairs.

c. Mr. Banks stated that if he has committed the alleged or any acts of trespass, he and/or his predecessors in title have for a period of over 60 years before the commencement of this action openly enjoyed as of right and without interruption, the right to pass and repass over the Asphalted Roadway.

d. Mr. Banks denied that he is trespassing and denied causing or permitting utility companies to lay cables without an easement being granted by the Defendants. Mr. Banks stated that such utilities are required under Section 5(4) of the Zoning Order to be placed underground. If he was not entitled to place the utilities underground, then any such claim is time-barred by the 1984 LA.

e. Mr. Banks stated that all material times the construction and use of the Gateway Items in and about 2006 was at all material times acquiesced to by the Defendants and/or their predecessors in title, and in any event is *de minimis*. Further, no cause of action as regard such allegations would arise at the suit of the Defendants.

f. Mr. Banks stated that if there was any trespass as alleged by the Defendants, they have acquiesced and the doctrine of laches applies as against the Defendants.

g. Mr. Banks stated that he maintains the grassed strip of land (the "**Grass Verge**") which adjoins the Asphalted Roadway to the north of it and has acquired ownership of that by long usage and by enjoyment of it, *nec vi, nec clam, nec precario*.

h. Mr. Banks denied that the Defendants are entitled to the relief sought or claimed in the counterclaim.

The Trial - Evidence

15. The trial took place with evidence given by witnesses of fact and experts for the parties. There was also extensive documentary evidence. I will deal with the evidence of the witnesses of fact and the experts when I address the various issues as set out below.

16. For Mr. Banks' case, he gave evidence along with the following people, and in the case of experts, they were accepted by the Court in their respective areas of expertise:
    a. Dame Pamela Gordon Banks – wife of Mr. Banks;
    b. Dr. Kevin Mayall - expert in geospatial information and geographical information systems
    c. Michelle Pitcher – expert in meteorology;
    d. Sharon Trimingham – long-time resident of 4 Inglewood Lane;
    e. John Manderson – drone operator;
    f. Dave Ramrattan – expert in engineering;
    g. Paula Maguire – former tenant of Long House;
    h. Myles Darrell – expert in horticulture;
    i. David Cox – expert in landscape architecture; and
    j. Susan Lusher – real estate agent.

17. For the Defendants' case, Mr. Storey gave evidence along with the following people, and in the case of experts, they were accepted by the Court in their respective areas of expertise:
    a. Ciaran Keaveny – landscape architect;
    b. Kent Brazier – expert in horticulture;
    c. James Redrobe – expert in property evaluation; and
    d. Kelly Harris – expert in civil engineering.

Evidence not in dispute

18. The Court invited counsel to submit a Statement of Agreed Facts in order to assist the Court, but attempts by counsel to do so were unsuccessful. Carey Olsen in a letter dated 7

April 2025 filed their "Proposed Agreed Facts" which had not been agreed by Conyers. Conyers in their letter dated 9 April 2025 confirmed that the "Proposed Agreed Facts" were not agreed. In any event, there was some evidence that generally was not in dispute and I have used Carey Olsen's Proposed Agreed Facts as a basis to set them out below, although in the main there is considerable evidence that is disputed.

19. Mr. Banks is the legal owner of Gatewood.

20. The Defendants have a life interest in Long House and the reversionary interest is held on trust.

21. Gatewood was built in 2009. Mr. Banks occupied it following receipt of the Certificate of Use and Occupancy Permit dated 27 November 2009.

22. In October 2014, the Hurricanes, Faye and Gonzalo, made landfall in Bermuda and caused extensive damage to trees across the island.

23. There were boundary markers at the 4 corners of Long House. During cross-examination, Mr. Storey explained to the Court his knowledge of the location of the boundary markers[5]. He pointed them out and marked them on the page at HB/27 which was the Satellite Image dated 16 March 2013. Three of the boundary markers were steel pins with red caps. Looking at the picture from the ocean, those three markers were the northwest, northeast and southeast markers. He described the marker at the southwest corner as being three cuts in the rocks.

24. At least one of Mr. Banks' entrance gate pillars encroaches onto Long House.

25. Mr. Banks' Gateway Items encroach onto the Long House side of the boundary.

[5] Transcript, 22 January pages 140 – 143,

26. Mr. Banks has a deeded right of way over the upper lot of Long House. It is on the Asphalted Road either in the location of the Gatewood RoW (P) or the Gatewood RoW (D).

27. The Parties commissioned surveys of the Properties in 2021. Both Parties' surveyors agreed that the Defendants had encroached on Gatewood and Mr. Banks had encroached on Long House.

28. Mr. Banks caused the installation of new utility cables in a trench from South Road along Inglewood Lane to Gatewood in and around 2006. There is an issue as to whether an existing trench was used; or as the Defendants argue, Mr. Banks caused a new trench to be dug from South Road to Gatewood in which his new utility lines were run.

29. Mr. Banks planted a hibiscus hedge along the Grass Verge which runs along Inglewood Lane in June 2008. The Defendants cut down the hibiscus hedge on the Grass Verge in 2023.

30. The Defendants carried out the Admitted Planting and admitted to it in their Defence. The Admitted Planting contains different species to those that made up the original forest.

31. The Defendants carried out the Admitted Construction which encroached on Gatewood.

32. Mr. Banks' proposed CMP has not been approved by the Department of Planning. The CMP intends to plant trees which are not the same species as the original forest.

33. Mr. Banks caused the installation of a green wire fence (the "**Boundary Fence**") along the Boundary in May 2022. Mr. Banks caused a pile of concrete blocks (the "**Blocks**") to be stacked near the Boundary on Long House in April 2022. I note here that it is disputed whether Mr. Banks, his servants or agents trespassed on Long House to do these two tasks.

<u>Surveys and Plans</u>

34. There are extensive Orders, Surveys and Plans in this case as follows:
    a. Inglewood Estate

i. The Inglewood Property, Paget, Zoning Order [20], 1959 made pursuant to The Building and Land Development (Control) Rules 1948 defining at paragraph (b) the "Inglewood Property, Paget" as meaning "That lot of land situated in Paget Parish described in the first schedule hereto and delineated on the plan No. 123/A/10 which accompanied the Governor's message to the House of Assembly No. 53 of the present session (already defined as the Zoning Order)

ii. Plan of Land Paget Parish East Bermuda – Clarke & Doidge Engineers & Surveyors – Job No. 6369. February 1958 ("**Original Clarke Plan 1958**")

iii. Plan of Land Paget Parish East Bermuda – Director of Public Works – Clarke & Doidge. 10 December 1958 ("**DoPW Clarke Plan 123/A/10 1958**")

iv. Revised Plan 'Inglewood Development' by Robert H. Clarke Engineer & Surveyor. No. 6369. April 1975 ("**Revised Clarke Plan 1975**")

b. Long House – 13 Inglewood Lane

i. Plan of subdivision of No. 13 Inglewood Lane from Bermuda-Caribbean Engineering Consultants Ltd. ("**BCEC**") S3607. 25 February 1999

ii. Letter from Shawn McKee of BCEC to Neil Halliday, Fiduciary Trust regarding 13 Inglewood Lane. 11 December 2012 ("**BCEC McKee Letter 2012**")

iii. Survey produced by BCEC. 19 August 2021

iv. Letter from Shawn McKee of BCEC to Mr. Storey dated 23 August 2021 with pictures and survey plans. ("**BCEC Mckee Letter 2021**")

v. Letter from BCEC to Simon Storey regarding 13 Inglewood with Plan of Survey from BCEC - SV15969/2/12 dated 10 August 2021. 23 August 2021

vi. BCEC Plan of Survey for 13 Inglewood Lane, Paget Parish, Bermuda. 27 November 2023

vii. Survey produced by BCEC. April 2024.

c. Gatewood - 17 Inglewood Lane

i. Plan of Inglewood Estate by Surveying Services Limited ("**SSL**") - Ref. 1614. July 2000

ii. Topographical Plan of 17 Inglewood by JW Bermuda Realty – No. LS6983. June 2003 ("**JWBR Plan 2003**")

iii. Plan of 17 Inglewood Eastern Boundary by CHB Crisson Ltd. ("**CCL**") – No. CS/ 1464. September 2021 ("**CCL 2021 Plan**")

iv. Survey report from Mr. Noon of CCL to Mr. Banks Re 17 Inglewood Lane with: Annex A - Extract from plan CS/1464; Annex B - Extract from plan CS/1464. 1 September 2021 ("**Noon 2021 Survey Report**")

v. Revised Survey report from Mr. Noon of CCL to Mr. Banks Re 17 Inglewood Lane with: Annex A - Extract from plan CS/1464 dated 1 September 2021, Revised Annex B dated 14 April 2022. ("**Revised Noon 2022 Survey Report**")

vi. Images with boundary overlay by Dr Kevin Mayall. 16 March 2013 to 6 November 2015

d. Agapanthus and Lot 10

i. Survey of 'Agapanthus' by Q-Ship Ltd. ("**QSL**") - Drawing number 0313034. March 2013 ("**QSL Agapanthus 2013 Plan**")

ii. Survey of Lot 10 by QSL - Drawing number 0919100. September 2019

e. The Bermuda Plan Extracts

i. 2008 Bermuda Plan - Map 40. 2008

ii. 2018 Bermuda Plan - Mapping Viewer - 13 Inglewood Lane, Paget. 2018

<u>Evidence in dispute and Credibility of Witnesses</u>

35. There were various main areas of evidence that were in dispute as set out below which I will deal with as I address the issues.

36. Upon my observations of Mr. Banks giving evidence, I found that he was generally a credible witness who gave his evidence in a forthright and honest manner. He was passionate about his property Gatewood. His evidence about the issues had sound reasoning and a resounding ring of truth to it. I found him to be generally straightforward

in his evidence about the material matters even though I accepted some parts of his evidence and rejected other parts.

37. Upon my observations of Dame Pamela Gordon Banks giving evidence, I also found that she was generally a credible witness who gave her evidence in a forthright and honest manner. She was passionate about Bermuda, the Inglewood Estate and Gatewood. I took the view that her evidence was straightforward, clear, accompanied with reason and passion and had a resounding ring of truth to it about material matters.

38. I have considered the evidence of Simon Storey and my observations of him are that he was from a starting point, a credible witness who was passionate about his properties and horticulture. However, in my view, he was at times defensive if not evasive, and on occasion he was unhelpful in some of his explanations. I found that Mr. Storey's sometimes evasive approach was such that it clouded his evidence on various issues.

The Issues

39. There are several main issues in this case as set out below which I will deal with in turn:
    a. Plaintiff's Case
        i. The Woodland Reserve Trespasses
        ii. The Excavated Western Access Roadway Trespass
        iii. The Admitted Construction Trespasses
        iv. Remedies
            1. Reinstatement Damages: Woodland Reserve and Excavated Western Access Roadway Trespasses
            2. Mandatory Injunction: Construction Trespass
            3. Prohibitory Injunction
    b. Defendant's Counterclaim
        i. The Right of Way/Asphalted Roadway Claim
        ii. Prescriptive Easement in the Alternative
        iii. The Grass Verge
        iv. The Utility Cables

v. The Drones
vi. The Boundary Incursions
vii. The Nuisances

40. For each of the issues, I have carefully considered the evidence in the case, that is the witness statements, the expert evidence, the oral evidence which was mainly cross-examination, the maps, photographs, images and the extensive documentary evidence. I have also considered the written opening and closing submissions, as well as the oral closing submissions along with the legislation and numerous case authorities. The matters set out below are a summary of the evidence and the arguments. Any failure to expressly reference a matter relied on in analysis and argument does not mean that I have not considered it.

Satellite Images ("SI")

Dr. Mayall – Plaintiff's Geospatial Consultant

41. I have considered the evidence of expert Dr. Mayall in respect of the satellite images. He is a geospatial professional dedicated to the field of location data, analytics, and geographical information systems ("**GIS**"). He has a PhD in Planning specializing in GIS with over 30 years' experience in the field across academic, public and private sectors and a wide variety of industries. His *curriculum vitae* shows that he has developed core geospatial databases and data infrastructure for the Government of Bermuda, provided strategic leadership to the Government of Bermuda and Corporation of Hamilton on adopting geographic information systems as critical data infrastructure for asset management.

42. Dr. Mayall stated that the purpose of his evidence was to explain his utilization of satellite and aerial imagery to examine the area and vicinity of the Boundary and building and landscaping works at Long House that may have affected the Woodland Reserve. Upon his instructions from Mr. Banks in December 2021, he went on to obtain a number of satellite images from GeoOrbis, the Caribbean distributor of Maxar, a leading global provider of satellite imagery. The images he obtained were from the period 16 March 2012 to

November 2015. He then used a survey drawing from John Noon of C.H.B Crisson Limited to overlay Mr. Noon's line work on the various satellite images. He also georeferenced satellite images that he had downloaded from Google Earth from 2016 to 2019 and he used the December 2019 high resolution aerial imagery from the UK Hydrographic Office/Bermuda Department of Marine & Ports. The georeferencing process is used to adjust geographic coordinates of images to be more correct. He formatted the various images to fit identical page templates for easy comparison. He used ArcGis Pro software which is an advanced software toolkit for creation, analysis and management of geospatial data, and is the most widely used GIS software globally.

43. Dr. Mayall provided the following images[6] as overlayed by him as described above, along with his description of some of the details:

    a. SI May 2012 – This image represented the site before any works took place.
    b. SI 16 March 2013 – This image represents the site before any works took place. The area along the Boundary line appears densely wooded.
    c. SI 11 March 2014 – This image shows the area along the Boundary to be densely wooded.

       Hurricanes - 12 & 18 October 2014 – Hurricanes Fay and Gonzalo passed over Bermuda.
    d. SI 19 October 2014 – This image showed the Properties immediately following the passage of the hurricanes. Many of the trees appear to have some brown colour presumably from storm damage. To the south of Long House, between the house and the shoreline, some of the trees from March 2014 no longer existed. There was no observable diminution in the number of trees in the wooded area on the eastern side of Gatewood.
    e. SI 27 October 2014 – The browning of the trees appear to be more extensive.
    f. SI 4 March 2015 – The image shows a dirt access road has appeared along the eastern side of Long House, providing vehicular access to the southern part of the property (the "**Eastern Access Road**"). There is clearing of trees to the south of

[6] Satellite Images are labelled as "SI Date" e.g. SI May 2012

the house and to the southwest past the surveyed property Boundary. Two sand features appear to the northern side of Long House.

g. SI 2 April 2015 – The two sand features in the north have expanded to between seven and ten. Part of the cleared area to the east has been topped with fresh soil. There is more exposed soil in the northwest region of Long House. Along and through the Boundary, an access has been cut and passes into woodland of Gatewood (ie the Excavated Western Access Roadway). It has a light colour indicating that it is either exposed sand in the ground or has been topped with sand. Its width is similar to other vehicular access ways in the image. It continues along the Boundary, then crosses over the Boundary onto Gatewood and into the GW Woodland Reserve, around the house on Long House, over the Boundary back onto Long House and to the southern area of Long House. A circular built structure is visible at the southwestern corner of Long House.

h. SI 13 May 2015 – This image shows further work has taken place on the northern part of Long House. The Eastern Access Road appears to have been abandoned having had fresh topsoil in April and a row of new plants planted across the former road. The Excavated Western Access Roadway appears to have had some mixing of sand and soil, possibly from use.

i. SI 30 June 2015 – The image shows extensive landscaping at the north and south ends of Long House. The north end has been topped with soil and joins up with the Excavated Western Access Roadway which appears to have been used as it is more pronounced, wider, and leads to a larger area of dark soil deposits at the southern end of Long House. The soil deposits extend across the Boundary and placed in the GW Woodland Reserve. The Excavated Western Access Roadway appears to have three or four palm trees planted on the eastern edge. Four small trees also appear to have been planted at regular intervals along the western edge of the GW Woodland Reserve, immediately west of the house on Long House. A short curved, ancillary path has been cut on the western side of the southern end of the Excavated Western Access Roadway, extending further into the GW Woodland Reserve.

j. SI 15 July 2015 – There is not much change.

k. SI 7 August 2015 – There is not much change.

l. SI 6 November 2015 – The north formal garden on Long House has been grassed over. The Excavated Western Access Roadway is still present.

m. SI 8 July 2016 – The colour of the Excavated Western Access Roadway is not as light but it is still visible. The southern area of the Long House does not appear to be as exposed as it once was.

n. SI 18 September 2017 – Long House is looking greener overall, especially in the southern part where grass has grown in. The Excavated Western Access Roadway is still evident.

o. SI 15 October 2018 – Trees and hedges throughout Long House appear to have grown. The Excavated Western Access Roadway is still evident.

p. SI 12 February 2019 – Vegetation on Gatewood appears to be growing back closer to the Excavated Western Access Roadway, with vegetation canopy overgrowing the road.

q. SI 5 May 2019 – There is some pruning to trees/vegetation as there is no longer overhang over the Excavated Western Access Roadway. The Excavated Western Access Roadway is still visible with a light colour and still extends to the southern end of mainly Gatewood and to Long House.

r. SI 5 July 2019 – Vegetation is growing in and the Excavated Western Access Roadway is still visible. The Excavated Western Access Roadway may be truncated at the southern end or a vegetation canopy overhangs it.

s. SI 6 August 2019 – The Excavated Western Access Roadway is still evident.

t. AC[7] December 2019 – This is a high-resolution aerial photo captured by aircraft rather than satellite. There is growth over the Excavated Western Access Roadway which can still be seen over the boundary into the Woodland Reserve of Gatewood and to the south. Dual tracks can be seen on it indicating that it has been used for vehicular access. An open bed truck is visible where the Excavated Western Access Roadway meets the paved road in the north on Long House.

[7] Aircraft Photo

44. Dr. Mayall provided some images which were zoomed in from high resolution images. He superimposed on them line work from the August 2021 Crisson land survey, using white lines to show features such as walls, steps, the Excavated Western Access Roadway, foliage etc.
    a. HR[8] May 2012 – shows the state of the western end of the house on Long House before construction of the planter walls. A footpath and steps are evident. To that point, I should add that upon my review of this photo, I note a footpath and steps on Long House, not on Gatewood. There are no planter walls and no Excavated Western Access Roadway. To that point, I note that there is not a path in the location on Gatewood where the Excavated Western Access Roadway is marked out in white lines.
    b. HR December 2019 – Shows the planter walls constructed and the Excavated Western Access Roadway.
    c. DR[9] 7 March 2022 – This is a drone image. The patio brickwork on Long House is visible, the planters are filled with vegetation, and some of the surrounding trees have filled in. The Excavated Western Access Road has had some grass growth but is still visible.

45. Dr. Mayall summarised his findings as follows: (i) the landscaping works did not appear in the images from 2013 and 2014; (ii) in the March 2015 image, landscaping works became evident including the Eastern Access Road along the eastern side of Long House; (iii) by April 2015, the Excavated Western Access Roadway had been established across Long House to its western boundary where it cut into the GW Woodland Reserve and provided vehicular access to the southern part of the property; (iv) The Excavated Western Access Roadway remains visible in satellite images of 2015 to 2019 and the high resolution aerial images of December 2019 and March 2022.

46. Dr. Mayall was cross-examined extensively. He stated that he was not qualified as an engineer, surveyor, architect or horticulturist. In relation to the accuracy of the red lines

[8] High Resolution
[9] Drone

representing boundary lines on the various images, he stated that there are differences in the georeferencing between different satellite images which was common because satellites do not take the same picture from the same place every time they go around the earth, and certainly not over many years. Therefore, he uses a georeferencing process to reduce distortion in the images as best as he possibly can. He also stated that he had given his subjective view of what is in the images based on his professional opinion and examining such images for many years, if not decades.

47. I have accepted the evidence of Dr. Mayall and his description of the content of the images as well as how he has placed the boundary lines from the Crisson Survey onto the images. I have also reviewed the images myself and I am satisfied that my observations of the images align with the descriptions provided by Dr. Mayall.

48. On 22 January 2025 Mr. Storey gave evidence. In addition to his first two witness statements, he made reference to his third witness statement dated 21 January 2025 and accompanying exhibit. In that statement he described his concern about the quality of some of the enlarged image boards used in the courtroom of the Satellite Images provided by Dr. Mayall, in particular those dated 4 March 2015, 2 April 2015 and 13 May 2015. He caused his counsel to communicate with the satellite companies that produced Dr. Mayall's images and they produced images in JPEG and TIF file formats. He included the JPEG version in his printed exhibit and the TIF version in electronic form which I have reviewed as necessary. Mr. Storey stated that his counsel also obtained higher resolution HD images of the images already obtained. Upon his review of those HD images, his concerns were not alleviated as it appeared to him that the colour and contrast of the images did not align with the images he had viewed on the enlarged boards in the courtroom. His counsel invited counsel for Mr. Banks to disclose the original digital images obtained by Dr. Mayall. Mr. Storey stated that he wished for the Court to have the images which he had obtained.

Findings of Fact – Knowledge of Mr. Storey of the Boundary between the Properties

49. Significant aspects of this case rely on whether Mr. Storey had knowledge about where the Boundary was located between Gatewood and Long House. I have considered the evidence as set out below.

50. Mr. Storey's position is that at the time when the Admitted Planting and Admitted Construction took place, he did not know the full boundary of his property, in particular where it runs with Gatewood. He stated that at the time of purchasing Long House, there were no boundary markers, fences or other indication of where the Boundary was between the Properties, except for the four corners of Long House which had steel pins *in situ* in the north-west, north-east and south-east corners and three cuts in the rock on the foreshore boundary with Gatewood. He stated that: (i) he did not know where the rest of the Boundary tracked from the private access road down to the foreshore; (ii) it is one thing being able to see where the boundary is between two properties on a map, survey or drawing or aerial photograph; and (iii) but without any boundary markers, he did not appreciate where the Boundary was in each area between the Properties, particularly in the LH Woodland Reserve in the Lower Lot.

51. Mr. Storey stated that when he moved into Long House, the house had already been extended by a prior owner, such that the westernmost part of the house is an extension with a patio around it and a small wall – and is the closest part of the house to the western Boundary, which is six feet away. He stated that he did not appreciate how close to the Boundary the previous owners of Long House had built the extension and wall. Thus, it was surprising to discover in these proceedings that Long House had been given Planning permission to extend the house to within the typical setback of 25ft from the Boundary. However, he had become aware that as both Properties were owned by the same family, a concession had been granted allowing the construction of the extension within the setback. He stated that the plans for the extension were drawn in the 1960s and it was built between 1965 to 1973. He made reference to the Pathway that ran around the western side of the

house on Long House, connecting the Upper Lot to the Lower Lot, on which no trees were planted, and on which it was possible to walk and appeared to have been used to do so.

52. Mr. Storey stated that now that the precise location of the Boundary has been located and agreed with Mr. Banks, it is easy to determine where it is. But prior to these proceedings, he assumed that the Pathway was on Long House and that some of it actually is. He stated that the Boundary area between the Properties is elevated with Long House being cut into the rock at a lower level than the woodland. He noted that some of the Pathway cuts across the Boundary between the Properties which was evident at the time of making his statement. He stated that as he was at ground level when he used the Pathway, it was difficult to appreciate where he was in relation to Gatewood. Thus, he wrongly assumed that the entire Pathway was on Long House.

53. On cross-examination, Mr. Storey maintained that he did not know where the Boundary was located. Before purchasing Long House, he walked around it with Sue Lusher, although he later said it was not her, but a man who he walked around with. He decided to purchase it, then instructed Woodbourne and Associates to do a report and Trott & Duncan to handle the conveyancing. He stated that he signed the conveyance for the purchase of Long House without reading it, instead relying on his lawyers to do their part. He said that he did not see the plan of the sub-division on Long House although he had been told there was a sub-division, but he was not interested in it, despite paying several million dollars to purchase Long House. He stated that he did not recall seeing the plan with the conveyance. I should add here that the conveyance dated 17 December 2012 is 3 ½ pages of writing and signatures followed by a plan of Long House with the boundary on all sides marked out in red followed by a title page. My observation is that it is a long rectangle with three straight sides and the fourth side being a ragged edge on the shoreline. All three sides of the rectangle and the ragged shoreline are marked in red/orange colour.

54. Mr. Storey also maintained that at the time of the purchase: (i) he did not know of the Zoning Order, despite documentation mentioning the same from Planning to his lawyers or that Long House had areas of Woodland Reserve and Coastal Reserve; (ii) he did not

recall walking onto the patio near the Boundary although he had been on other parts of the patio; (iii) he did not ask about a wall at the edge of the patio as it was insignificant then and he did not see it as serving any functional purpose; (iv) he was walked to the four corners of Long House but not along the boundaries nor was he told where the boundaries were; (v) he was not aware of the BCEC McKee Letter 2012 addressed to Fiduciary Trust setting out the various encroachments, some described as minor; (vi) that he had seen the BCEC McKee Letter 2021 addressed to him which in turn referred to the BCEC McKee Letter 2012 – which he had not seen; that in his affidavit sworn 10 February 2022, when he stated that he had been provided with a boundary survey report, he meant the 1998 survey report, not the BCEC McKee Letter 2012; (vii) that he now knows the boundary lines are straight but did not know such at the time of the purchase of Long House; (vii) when he hired Almeida's Landscaping to clear away debris, he made no attempt to ascertain where the Boundary was before the clearing up started; (viii) that he now understands the wall six feet from the house was the boundary; (ix) that when he swore his affidavit in April 2022, he knew that the boundary survey had been provided at the time of the conveyance in 2012; (x) that he could not recall that, as a result of having the conveyance plan and the boundary survey, he had seen that boundaries were straight and that the western Boundary was close to the end of the house; (xi) that he could not confirm nor deny the shape of Long House prior to 2021; (xii) that he believed the Boundary was 25 feet away from the edge of the house like on the other side of the house.

Analysis

55. I have considered the documentary evidence in relation to the boundaries of Long House as well as to the evidence of Mr. Storey. I do find that Mr. Storey was evasive about this issue of knowledge of the boundaries and answers were such that I got the impression that he was trying to distance himself from any such knowledge. After careful consideration of the evidence, I do not believe Mr. Storey's explanations such that I find that Mr. Storey did have knowledge of the full boundaries of Long House.

56. First, Mr. Storey does concede that before he purchased Long House he was walked by a man unknown to the four corners of it when he was shown the corner markers. I do not

believe his denial that at that time he was not shown the actual boundaries running between the markers. Those corner markers are some distance apart from each other. The question begs as to what would the reason be for showing him the corner markers without some kind of explanation or demonstration as to where the actual boundaries ran between those markers. More likely than not, they were walking along some of the boundaries between the corner markers.

57. Second, Mr. Storey and his wife signed the conveyance which had a plan of Long House attached to it. However, Mr. Storey does not recall reading the document or seeing the plan. It was a six page document and, in my view, the plan was a key document that would have been very difficult to miss. The full boundaries were marked in red/orange and showed three boundaries with straight lines and the ragged shoreline. Thus, it is incredible that of all the pages, Mr. Storey did not review the plan which explains the purchase by the single picture. Thus, I do not accept Mr. Storey's version that he did not review the plans.

58. Third, Mr. Storey says that Sue Lusher had shown him and his wife a lot of properties, more than 10, as they searched for a first home in Bermuda. His wife loved Long House and encouraged him to purchase it. They had to arrange some financing for it and eventually paid over several million dollars for it. In my view, it is totally unbelievable that, after such a long search for a home, Mr. Storey did not take time to review the documents including the plan. It seems to me that some of the first things a homeowner wants to know about any property they visit is the layout of the property, the size of the lot and where the boundaries are. That becomes even more focused when a person makes a choice of which property to purchase. To that point, Mr. Storey was the co-head of risk and analytics at a hedge fund – thus it beggars belief that he would not be careful with several million dollars of his own money by checking through documents and plans to ensure that he was getting what he was paying for.

59. Fourth, I am satisfied that the evidence shows that Mr. Storey was in possession of the BCEC McKee Letter 2012 that had a plan attached to it. The Sale and Purchase Agreement signed by the Defendants had a clause committing the vendor to provide a boundary survey,

which in my view is the BCEC McKee Letter 2012. Although Mr. Storey's explanation was that it was addressed to Fiduciary Trust, in my view, that explanation misses the mark completely, because the Sales and Purchase Agreement's clause was for the parties to have the boundary survey. Fiduciary Trust may have ordered it, but it was for the benefit of the parties to the agreement.

60. Fifth, Mr. Storey swore an affidavit as part of these proceedings where he gave answers to interrogatories. He stated therein that he did have a boundary survey at the time of acquisition. To that point, I do not believe his evidence that he was not referring to the BCEC McKee Letter 2012 but to a report a few years earlier than his first involvement with Long House.

61. Sixth, I do not believe Mr. Storey's explanation that he had never seen a map showing the shape of Long House before the proceedings commenced. In an email dated 8 May 2021 sent by Mr. Storey in relation to the installation of an electric gate at Long House, he mentions asking Shawn Mckee about updating the 'topo" as in essence it was done previously and would assist with planning the project, adding a reference to his review of the last drawing that he had on file. The cross-examination on this point showed that there was a Q-Ship Ltd survey of Lot 10, the farm, which showed the top part of Long House with straight boundary lines and an insert in the top left hand corner of the Inglewood Estate which showed the straight line boundaries of Long House.

62. In light of the reasons set out above, I am satisfied to find that Mr. Storey had knowledge of the full boundaries of Long House when he purchased it, in particular the Boundary between Long House and Gatewood.

Issue 1 – The Woodland Reserve Torts

63. Mr. Banks claims that the Defendants converted his trees and vegetation in the GW Woodland Reserve when they trespassed there.

The Law on Trespass, Nuisance and Conversion

64. *Clerk & Lindsell on Torts 24th Edition*, Main Volume, Chapter 18-01 defines trespass to land as follows:

> *"18-01 … as any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it" An actual or intending intruder may be prohibited by injunction from entering another's land.*
>
> *18-02 "… Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from one day to the next for as long as the trespass continues. So one who built on the claimant's land some buttresses to support a road and paid damages in an action for trespass was held liable in damages in a second action for not removing the buttresses after notice: Holmes v Wilson (1839) 10 A. & E. 503; Konskier v Goodman Ltd [1928] 1 K.B. 421."*
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> *18-06 "It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. Thus there will be liability where the boundary between the claimant's and the defendant's land is ill-defined and the defendant, in mowing his own grass by mistake mows some of the claimant's, and when a master of hounds' pack enters prohibited ground where, knowing of the risk of entry, the master negligently failed to prevent an entry. In short, as Aikenhead J. has made clear, "a negligent incursion on to, and damage of, a claimant's land or property can in law be a trespass": Network Rail Infrastructure Ltd v Conarken Group Ltd [2010] EWHC 1852 (TCC); [2010] B.L.R. 601 at [67] (affirmed in relation to the negligence issue also raised: [2011] EWCA Civ 644; [2011] B.L.R. 462)."*
>
> *18-11 "Trespass is actionable at the suit of the person in possession of land... Such a person may claim damages or an injunction, or both. e.g. John Trenberth v National Westminster Bank (1980) 39 P. & C. R. 104. However, the award of an injunction is subject to judicial discretion. Cf. Charrington v Simons and Co Ltd [1971] 1 WLR 598 at 603, per Russell L.J.; Patel v WH Smith (Eziot) Ltd [1987] 1 WLR 853. An injunction is prima facie available even if there is no damage. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion. Similarly, a person in possession can sue although he is neither the owner nor derives title from the owner, and indeed may be in possession adverse to the owner."*

65. *Clerk & Lindsell on Torts 24th Edition* defines nuisance as follows:

> "*Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of … his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance"*

66. *Clerk & Lindsell on Torts 24th Edition*, Main Volume, Chapter 16-07 defines conversion as follows:

> *"Forms of conversion - ... conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it. As will appear, the defendant need not intend to question or deny the claimant's rights; it is enough that his conduct is inconsistent with those rights."*

Plaintiff's Submissions

67. Mr. Elkinson made a number of submissions in support of the Plaintiff's case including that:
    a. The Defendants or their agents came onto Mr. Banks' land, in an area zoned Woodland Reserve, and removed mature vegetation and placed a "Resort Planting" in their place (collectively the "**Woodland Reserve Trespass**"), an area according to surveyor Mr. Noon of 6000-7000 square feet.
    b. Meteorologist Michelle Pitcher and horticultural expert Myles Darrell rejected the Defendants' claim that the trees had fallen over during Hurricanes Fay or Gonzalo, with Mr. Darrell stating that the removal of the trees and vegetation would have been carried out by "a combination of machine and manpower".
    c. The Defendants created the Excavated Western Access Roadway on Gatewood.
    d. The images of Dr. Mayall support this.
    e. The Defendants did not seek planning permission.

Defendants' Submissions

68. Mr. Robinson made a number of submissions in support of the Defendants' case including that:
    a. The Defendants have admitted the Admitted Planting, but the trees are not a continuing trespass as the trees are on the Plaintiff's property.
    b. Mr. Banks has not properly pleaded the damage he suffered from the planted trees such that he can maintain a claim in nuisance.

c. The Defendants did not destroy any trees or plants. There is no positive evidence of any destruction or any motive for the Defendants to destroy trees.
d. The Defendants were planting trees in order to remediate damage and improve the security and aesthetics of their property.
e. Mr. Banks caused trees to be cut down after the Defendants gave an undertaking not to cross the boundary, after the grant of an interim injunction and before the experts' site visits. Thus, any damage to trees was caused by Mr. Banks.
f. There was evidence of unknown third-party trespassers trespassing on both properties. Thus, the damage could have been at the hands of such third parties.
g. Even if the damage was caused by the Defendants, then the bulk of the actions arising from such acts would be time-barred, as the Defendants started their remediation project in 2014 and did not engage in any concealment of such project.
h. The Plaintiff has suffered no damage and the woodland has been restored already. Thus, the relief by way of injunction is not available to Mr. Banks with respect to the pathway.

Expert Evidence

Michelle Pitcher – Plaintiff's Meteorologist Expert

69. I have considered the evidence of expert Michelle Pitcher who was accepted as an expert in meteorology. She holds a Masters of Science Degree in Marine-Estuarine Environmental Sciences. She was hired in January 2008 at the Bermuda Weather Service as a Meteorological Technician and since then, rising to the position of Director. Throughout her career, she has maintained her certification as both Meteorological Technician and Meteorologist. She reviewed various documents, including the pleadings, the Defendants' Defence and Counterclaim, photographs, satellite images, Doppler radar videos, obtained other relevant documents and conducted a site visit to the Woodland Reserve on 30 November 2023. On cross-examination she agreed that she was not an expert in horticulture, but stated that she was qualified to answer on damage to trees caused by hurricanes. I accept that her expertise extends to such qualifications.

70. Ms. Pitcher stated that Hurricane Faye made landfall on 12 October 2014 as a Category 1 hurricane and Hurricane Gonzalo made landfall on 18 October 2024 as a Category 2 hurricane. In her evidence-in-chief she stated that "*The conclusion reached from the data available is that each property would have experienced very similar, if not the same, conditions during each event and therefore would exhibit similar damage.*" Ms. Pitcher made reference to the available data and to the Saffir-Simpson Scale which describes damage due to Atlantic hurricane categorizations and what can be expected in those categories. In summary, a Category 1 hurricane can snap large branches of trees and shallowly rooted trees may be toppled. A Category 2 hurricane will snap many shallowly rooted trees or uproot them. On cross-examination, she accepted that there were other relevant factors such as type, age, condition and location of a tree. Also on cross-examination, she accepted various excerpts from two National Hurricane Center Tropical Cyclone Reports. The one for Hurricane Fay stated that "*Faye's winds toppled utility poles, downed trees and street signs throughout Bermuda with the damage likely exacerbated by saturated soils after nearly 14 inches of rain on the island in August and above normal rains in September.*" The one for Hurricane Gonzalo stated "*Strong winds downed numerous trees and utility poles, and also caused some structural damage including the loss of roofs and collapsed walls.*"

71. However, on cross-examination about Mr. Storey's case that the trees were damaged by the hurricanes, Ms. Pitcher's evidence was that "*The damage referred to was very specific to a small area with regards to the rest of the island … Neither hurricane was going to be very granular in particular damage as they affected all of the areas equally."* To that point, the evidence of Ms. Pitcher on re-examination, which I wholeheartedly accept, is that in her "*experience with Fay and Gonzalo shows that wide areas which are in similar situations experience similar types of damage*." She went on to explain that she wouldn't "*usually see isolated or small areas damaged very differently than immediate surrounding areas*", and thus it was her "… *professional opinion that it was highly unlikely that the small area of woodland reserve was damaged in such a way by Fay and Gonzalo that prevented the rest of the woodland reserve to experience the same type of damage.*" Thus, to my mind, it is overwhelmingly clear that the force of the wind of such hurricanes would

not be so precise and that if the trees fell because of the winds, similar trees and vegetation in the surrounding area would also have fallen. Thus, I am satisfied by her evidence that "*According to the Saffir-Simpson Scale, both Fay and Gonzalo could in theory have caused the damage on Mr. Banks' property however it is highly unlikely that they did and there is nothing in the data which would indicate that this damage could have occurred the way it is said to have.*"

Myles Darrell – Plaintiff's Horticulture Expert

72. I have considered the evidence of expert Myles Darrell who was accepted as an expert in horticulture. He has a Bachelor of Science Degree majoring in Biological Sciences and a Graduate Diploma in teaching science and biology. He has worked for a horticulture firm in Bermuda and was the superintendent in the Bermuda Government Parks Department for several years. He has taught at the Whitney Middle School and more recently to date has served as the head of Natural Heritage for the Bermuda National Trust. His role involved leading the management, long and short term strategic planning, budgeting and care of all of the Trust's open spaces, arable land, nature reserves, community gardens, offshore islands, cemeteries as well as developing and facilitating integrated contextualized environmental education. He currently serves on the Parks Commission and on the Executive Board for the United Kingdom Overseas Territory Conservation Forum.

73. Mr. Darrell's expert report set out facts and his opinions in the areas as set out below. Further he exhibited Planning's Guidance Note 107 on CMPs; a document entitled "Woodland Edge Enhancement" by the Indiana Division of Fish & Wildlife – Habitat Management Fact Sheet; and Planning's "The Bermuda Plan 2018".
    a. The purpose of woodland reserve and the importance of and requirements regarding its protection generally;
    b. The type and ages of mature trees and vegetation in the GW Woodland Reserve at the time of the deforestation/removal that had been removed/destroyed, including Bay Grape trees;
    c. How such trees and vegetation were likely removed;
    d. The importance of replacing such mature trees and vegetation;

e. The type and species of wildlife in the GW Woodland Reserve that would have been impacted by the destruction and how;
f. The type and age of trees that make up the Defendants' Admitted Planting;
g. The likely purpose of the Defendants' Admitted Planting, whether the Defendants' Admitted Planting would constitute "remediation" of the GW Woodland Reserve and whether such planting is appropriate;
h. The effects of the Defendants' Admitted Planting on the GW Woodland Reserve and Mr. Banks' property;
i. The impact and appropriateness of dumping of mulch berm in woodland reserve, including the horticultural function of mulch berm;
j. The impact of dumping of deadwood and other vegetative debris creating an artificial embankment in the GW Woodland Reserve;
k. The dates on which the Defendants' Admitted Planting and dumping of mulch berm and deadwood likely took place;
l. The relevance of the draft Bermuda Plan 2018 and the circumstances in which liabilities of landowners arise in respect of CMP's or otherwise; and
m. Typical timescales for remediation of such damage.

74. Mr. Darrell's evidence-in-chief in respect of how the trees were removed was that the removal would have been carried out by a combination of machine and manpower as it was clear to him that a road had been constructed at the site. He stated that the road development would have required removal of flora and compaction of the ground to allow for passage which is detrimental to the environment of a woodland reserve.

75. On cross-examination, Mr. Darrell explained that although he had been to Gatewood before being instructed as an expert, he had not examined the Woodland Reserve and that he was not residing in Bermuda when the hurricanes struck Bermuda. He accepted that woodland reserve conservation areas are susceptible to damage from the effect of naturally occurring events such as hurricanes and flooding. This was his opinion as well as it was stated in the Government's CMP Guidance Note. He accepted that there was no way he could tell what happened to the trees in terms of storm damage.

76. On re-examination he stated that Mr. Storey had told him various things including: (i) that he had carried out various landscaping activities that involved making soil, utilizing mulch and various other organic materials that he brought to the site; (ii) he had gone about replanting the site with the species that were present on his inspection; and (iii) that machinery had been used to carry out the work at the site.

Kent Brazier – Defence Horticultural Expert

77. I have considered the evidence of Mr. Brazier. He was accepted by the Court as an expert in horticulture.

78. Mr. Brazier holds a National Certificate in Horticulture from the Myerscough College of Agriculture & Horticulture and he is a certified associate in LEED (Leadership in Energy and Environmental Design) for Green Building. He has over thirty years experience in horticulture and in Bermuda has been employed with Sousa's Landscape Management, and then as a horticultural operations manager for Mangrove Holding Ltd and Horti-tec Holding Company Ltd. He currently works in Belize where he is an operations manager for a laboratory.

79. Mr. Brazier set out a number of views and conclusions in his detailed witness statement accompanied by a number of pictures of soil and vegetation in the Woodland Reserve. He categorised his observations and drew conclusions as follows:
    a. Allegations that the Defendants removed trees and plants from the GW Woodland Reserve that were undamaged from the Hurricanes in 2014:
        i. Nine years had passed since the Hurricanes, and thus it was hard to see that any trees or plants had been removed, furthermore, if they were alive, dead or damaged if and when they were removed.
        ii. Tree stumps in the GW Woodland Reserve, which were mainly Allspice trees which are classed as invasive species. Other tree stumps were Chinese Fan Palm and Bay Grape, but he could not confirm a date time stamp on when they were cut. He could not confirm whether they were dead or alive

when they were cut because there were a lot of dead trees of the same diameter in the GW Woodland Reserve.

iii. There were dead White Cedars which looked like they may have been broken in a storm – they had not been cut.

iv. His opinion was that site conditions present at Gatewood impacted and resulted in the death of the trees in the Woodland Reserve. The rocky ground at Gatewood played a significant role in the growth of trees as plants he saw were not planted in the ground. Seeds will have dropped onto the ground and the plants grown without being planted underground – there were root structures running along the top of the ground rather than planted below. Soil erosion of the root structure is present, thus heavy rainstorms wash away the soil around the roots, causing poor stability and insufficient anchoring of the tree into the ground.

v. Damage from tropical to hurricane storms can also cause trees to die – which happens when other trees fall on each other, or when treetops break off and land on them. Trees can be damaged by each other in a storm.

b. The Defendants planted trees and plants on Gatewood outside of the Admitted Planting:

i. He followed the boundary lines of the CCL 2021 Plan and found no other planting outside the area of the Admitted Planting

c. The allegation that Bay Grape trees were pulled down and removed after 12 July 2021:

i. He was shown a Bay Grape tree by Mr. Banks. It was not pulled down and there were no attempts to pull it out. Also, it was not burnt with kerosene fuel. Another Bay Grape tree was suffering from die-back, which is the gradual deterioration of tree health, which sometimes leads to a tree's death, caused by a combination of factors such as diseases and pathogens, insect attacks and/or stressful climate conditions. Die-back is frequently seen in trees which have grown in rocky areas with unsupported roots and is not uncommon in Bermuda. In his opinion the tree was located in a rocky area with a weak root structure and thus had fallen over.

d. The allegation that the Admitted Planting was to "obscure or obliterate … boundary markers" and to obscure "tortious acts":

    i. He was shown two boundary markers, one alongside Inglewood Lane and the other at the coastline. They were not obscured or obliterated.

e. The allegations that the Admitted Planting was purely ornamental, whereas the Defendants say that they were a mixture of native, endemic, and ornamental planting:

    i. All shrubs, palms and trees are considered ornamental plants in the commercial horticultural business because they do not produce edible fruit

    ii. In Bermuda there are endemic and native species like Bermuda Cedar (Juniperus Bermudiana and the Bermuda Palm (Sabaal Bermudiana) found only in Bermuda.

    iii. There are native species which would have arrived in Bermuda naturally, which includes Bay Grape, but which exists also in North America, the Caribbean and Central America.

    iv. The Bermuda Government Department of Environment and Natural Resources ("**DENR**") has issued guidelines[10] for plants that can be used in different areas of Bermuda and they are also applied in conservation management plans. The Admitted Planting has been made up of plants from the endemic and native list from the DENR guidelines. There have been some ornamental plants planted to fill some areas.

    v. Mr. Brazier made some general comments on the Admitted Planting, to the effect that a lot of consideration had been put into the Admitted Planting based on a coastal landscape design which was not uncommon in Bermuda and intended to produce a beautiful sustainable landscape.

f. The Allegation that the Defendants destroyed wildlife habitat, woodland reserve and caused damage to the Plaintiff:

    i. His opinion was that the planting has not damaged the Woodland Reserve, rather, careful consideration had been given to the planting, which has

[10] Bermuda Government DENR extract pages 8 and 9 on Woodland Habitats, Coastal Woodland, and Coastal Woodland Plants

enriched the area and resulted in a sustainable environment for plants and wildlife.

g. The Defendants altered the topography of Mr. Banks' property by depositing an extensive mulch berm:

   i. He distinguished between a mulch (which he referred to as compost layers) being deposited in the Woodland Reserve, a “mulch berm” (which he described as an artificial embankment made of mulch) and a horticultural term “swales” which are designed to channel water flow that is coming from the top of a property and directing it to the ocean without taking any soil or compost, used to prevent erosion.

   ii. It appeared to him that Mr. Banks did not say where the “mulch berm” was located.

   iii. He took soil samples along the areas along the Admitted Planting areas and concluded that the depth of the mulch or the compost layers were no more than 2 inches in some areas, further concluding that the mulch was distributed in the Woodland Reserve in 2015 to 2016.

   iv. His opinion was that, as the root structure can be seen of mature trees that were left after the hurricanes, no significant amount of mulch was dumped in the area.

   v. He described mulch as being any material that is used to cover the soil for beneficial purposes, with natural mulch being a layer of fallen leaves, flowers, fruits and branches. He stated that mulch improves the quality of the soil in the root zone by improving soil structure, especially by increasing porosity.

   vi. In his opinion, when the storm debris was cleared after the hurricanes, the natural mulch layer was removed also leaving the Woodland Reserve bare. The mulch and chipped trees from the Woodland Reserve were likely mixed with the local soil and peat to make the compost mix for planting the new trees and plants, and then after planting, a layer of mulch was added as the top layer, this process improving the Woodland Reserve. He referred to piles of chipped trees and mulch from the Marsh Folly Composting Facility.

vii. Mulch Swales in the access walkway – He saw that mulch swales had been used in the walkway area to prevent water runoff from the surrounding land from eroding the Woodland Reserve soil area. He noted that the depth of the berm is high. He noted that berm/swales on each side of the walkway were to prevent silt-loam from going into the Woodland Reserve and to avoid the new compost in the Woodland Reserve being washed away.

viii. He concluded that he did not see an extensive mulch berm or changes to the topography.

ix. He had to walk through Gatewood to reach the Woodland Reserve. He noted Zoysia grass in and outside of the Woodland Reserve, and a well maintained lawn which showed no stress or damage from the planting area, meaning there was no transfer of pests, diseases or viruses from the Woodland Reserve to cause any stress or extra lawn care. In his opinion, the mulch/compost layer in the Woodland Reserve would have leached to the lawn and helped it to grow and strengthen.

h. The likely effects of hurricane damage from 2014 on the plants and trees in the relevant parts of Gatewood and Long House. Whether, and if so when and how, any trees that may have been damaged by the hurricane were removed:

i. He stated that due to the length of time that had passed since the hurricanes, it was not clear what trees were removed or whether they were alive or dead when they were removed.

ii. He referred to the National Hurricane Centre Tropical Cyclone reports which pictures show that the hurricanes ran along the South Shore.

iii. He said he could still see damage in the Woodland Reserve and other areas of Long House. When there is such damage it is normal to clear the damaged trees to assess what is left, after which a woodland reserve management review would be conducted to see what trees with value are left and what invasive species are there. The invasive species would have to be removed and they would take over the area.

iv. Based on his observations, Bay Grapes would have been at the front running along the coastal area; and then there would be Chinese Fan Palms,

Fiddlewood trees, many White Cedars, Mexican Peppers, Allspice and Oleander.

v. The trees in the Woodland Reserve on Gatewood could have been damaged by the Hurricanes, particularly due to the poor root structures he observed.

i. Allegations of trespass:

i. He denied that he trespassed on Gatewood in August 2021, noting that he left Bermuda on 28 October 2020 and returned in November 2023 to conduct his site inspection.

80. Mr. Brazier was cross-examined extensively. He had conducted consultancy work on the site previously as well as checking on fruit trees that he had earlier supplied to Mr. Storey. He did not attend the site after the Hurricanes. He accepted that he was not a meteorologist or a landscape architect. He noted that he had carried out his inspection for this case in 2023. He explained that mulch was the top layer put on after planting, used to suppress weeds and retain moisture for the plants. He explained that mulch was the same as compost, which was plant material that used to be alive but has now been allowed to compost down. So locally, the terms mean the same. He maintained that the deepest mulch/compost that he had found was not deep, being about two inches. When challenged that other people had found mulch to be as deep as 18 inches to 3 feet, he countered that deeper than the top level of mulch was soil. He explained that he used a tool to extract a core sample that showed a few inches of mulch and then beyond that it showed soil. He expressed disdain over how other people examined for mulch, which was sticking a rod into the ground and concluding that it was mulch, without any photographs, measurements or other data.

81. He was cross-examined about the presence of any debris in the Woodland Reserve, noting that using 2015 as a base year, there was no debris present. He described debris as being anything left from the plant that had fallen to the ground. He noted that he could walk around the area without having to use a machete. He maintained that the new plantings did not make a difference to the topography as it was still the same slope of land. He conceded that he had never submitted a conservation management plan.

82. On re-examination, Mr. Brazier went into some detail about how he took the samples, in general 20 feet into the Woodland Reserve from many of the fence posts. With reference to the pictures in the annex to his report, he used his tool to extract a core sample, took photographs against a tape measure, and examined the same. He stated that generally, the mulch was the first few inches from the surface and deeper in was soil, first a mix of material and then pure soil.

Analysis

83. I am satisfied that the Defendants are liable for the Woodland Reserve Trespass on Gatewood and the conversion of the property of Mr. Banks for several reasons.

84. First, I accept the evidence of the Plaintiff's expert Michelle Pitcher as set out above. As a starting point, I accept, as Ms. Pitcher stated, she need not be a horticulturist to give the evidence that she did. She was clear in her evidence that the damage to the Woodland Reserve was not caused by the Hurricanes because "*The damage referred to was very specific to a small area with regards to the rest of the island. … Neither hurricane was going to be very granular in particular damage as they affected all of the areas equally.*" I have already stated above that I was satisfied by Ms. Pitcher's evidence that it was highly unlikely that the Hurricanes caused the damage on Mr. Banks' property. I should point out here that Ms. Pitcher had considered the evidence of the Saffir-Simpson Scale and the categorizations of hurricanes. She had also accepted various excerpts from the two National Hurricane Center Tropical Cyclone Reports both which had stated that the Hurricanes' winds had downed trees and utility poles. In my view, it was overwhelmingly clear that Ms. Pitcher's evidence was that whilst damage to and downing of trees could be caused generally, in the circumstances of the Woodland Reserve area, it would not be as precise as it was.

85. Second, I accept the evidence of the Plaintiff's horticultural expert Mr. Darrell that a combination of machine and manpower was used to remove the trees. This fact was supported by Mr. Darrell when he stated that Mr. Storey had told him that he had used

machinery to carry out the work at the site. I am satisfied that such removal amounts to conversion by the Defendants of Mr. Banks' property.

86. Third, I have considered the evidence of the Defence horticulture expert Mr. Brazier as set out above. I am not satisfied of his evidence where he rejects the allegations that Mr. Storey removed the trees and plants from Gatewood. The thrust of his evidence on the point was that it was not possible to see that any trees or plants were removed and if they were alive, dead or damaged if and when they were removed. In my view, I reject that opinion as well as his opinion that: (i) the site conditions present at Gatewood impacted and resulted in the death of the trees in the Woodland Reserve; and (ii) in respect of the Woodland Reserve, that trees can damage other trees when they fall. To these points, the Satellite Images paint a vastly different story. Satellite Image of 19 October 2014 showed the properties immediately following the passage of the Hurricanes. I accept that many of the trees appear to have some brown colour, but significantly there is no observable diminution in the number of trees in the Woodland Reserve. I also accept the following: (i) Satellite Image of 27 October 2014 shows more browning of the trees in the Woodland Reserve but not a diminution of them; (ii) Satellite Images from 2 April 2015 to 6 November 2015 show the Excavated Western Access Roadway has cut into the Woodland Reserve where trees have been cleared away. Thus, in my view, it is clear that the Hurricanes did not cause the trees to be downed, rather, they were caused to be felled by Mr. Storey.

87. Fourth, I have considered the Plaintiff's witnesses of fact in relation to this issue. Dame Pamela's evidence was that in May 2021 she noticed a building permit sign at the entrance to Long House. Thus, she checked the Department of Planning website, made enquiries with Planning and then, along with her husband did some research using Google Earth, when they were shocked to see the deforestation of the Woodland Reserve and that a roadway had been carved into Gatewood. On 17 June 2021 she and Mr. Banks walked into the Woodland Reserve where they saw the large cleared area in the Woodland Reserve. They saw that mature foliage had been cut down and removed and ornamental plantings had been planted and a massive mulch berm deposited. Mr. Banks' evidence supported her evidence. Paula Maguire's evidence was that when she lived at Long House, the Woodland

Reserve was covered with dense vegetation woodland made up of trees, bushes and thick undergrowth making it difficult to pass through on foot. Further, there was no Pathway as described by the Defendants in their Defence and Counterclaim, and although there was a narrow walkway along the western side of Long House, there was no deviation from it onto Gatewood. On cross-examination, Mr. Banks' evidence in essence was that he and Dame Pamela had not walked in the Woodland Reserve area for some years before the Hurricanes, heeding some advice from the Department of the Environment. In my view, their evidence as outlined above does not support how the trees were cut down or fell down.

88. Fifth, I have considered Mr. Storey's evidence on this issue. He described the area of his property from Inglewood Lane down to his house as the Upper Lot and the area between the house and the foreshore as the Lower Lot. The Woodland Reserve is adjacent to the Lower Lot of Long House.

89. He describes the damage that occurred to Long House as the result of the Hurricanes. He was not on island for Hurricane Fay but had returned mid-week and was on island for Hurricane Gonzalo. As a result of damage and fallen trees from Hurricane Fay, he engaged Almeida's Landscaping & Estate Maintenance Ltd. ("**Almeida's**") to clear away debris from the Upper Lot. The Storey family did not stay at Long House for Hurricane Gonzalo but they returned there two days afterwards when Mr. Storey observed additional damage and more trees that had fallen down. He stated that as a result of the Hurricanes, there were large trees, including large white cedars and casurinas that had fallen down and there was windfall debris all over the property. There was one large palm tree snapped in half on the driveway to Long House and a cedar tree leaning against the side of the house on Long House. He exhibited several pictures of such damage. He engaged Almeida's again to clear up the debris. Mr. Storey stated that there was damage to other properties that the residents' association paid to have cleaned up and there was damage to trees and plants on the property 11 Inglewood Lane.

90. Mr. Storey stated that as a result of the damage from the Hurricanes, and concerned for the safety of his family, he began to carry out extensive maintenance work, including

replanting of trees that surrounded his property. He had determined that if he was able to re-establish the woodland, with a mix of native, endemic and ornamental species of trees, and restore the damage caused by the Hurricanes, this would make it safer.

91. In respect of the GW Woodland Reserve, Mr. Storey denied that he pulled down, cut down or set fire to the trees on Gatewood, stating that he had no motive or malice to do so. He stated that he had mistakenly thought that a larger area of the GW Woodland Reserve was on the Long House side of the Boundary. He planted a variety of mature plants including Bermuda Palmettos and other varieties of trees including mature Bay Grapes and Bermuda Cedars. He stated that the only vegetation that could possibly have been removed from GW Woodland Reserve were trees that were damaged in the Hurricanes. Thus, he denied converting Mr. Banks' trees or vegetation for his own use. He was unable to say which trees were felled by the Hurricanes as the work was carried out in 2014 and 2015. He could not say which type of trees had been felled and were cleared away, the number, or which side of the Boundary they would have originally stood on. He maintained that he or his contractors would not have pulled down any tree, particularly a native or endemic tree. He denied pulling down two Bay Grape trees as alleged after giving an undertaking not to go onto Gatewood. In essence, he says his intention was to plant trees, not pull them down. He stated that he sourced scores of trees from suppliers, many of which were planted in GW Woodland Reserve. He asserted that in May and November 2022, Mr. Banks had cut down trees in the GW Woodland Reserve during the course of the proceedings, for which he provided video footage.

92. On cross-examination, Mr. Storey maintained that the trees in the GW Woodland Reserve were damaged by the Hurricanes. He disagreed with Meteorologist, Ms. Pitcher, about her evidence that hurricane damage would have been to all the trees and not just the area he cleared and the Excavated Western Access Roadway, stating that Ms. Pitcher was not asked about Long House or other neighboring properties and the damage they sustained. He disagreed with Ms. Pitcher's evidence that the damage would have been uniform throughout the area rather than specific damage in a specific area noting that she was focused only on the area of encroachment. To these points, and as stated above, I prefer

Ms. Pitcher's evidence over Mr. Storey's. In my view, I accept that there was some damage to the trees as a result of the Hurricanes, but I do not accept that the damage in the GW Woodland Reserve was caused by the Hurricanes alone. Here, I also accept the evidence of Mr. Darrell as set out above.

93. When Mr. Storey was asked about SI 19 October 2014 and SI 27 October 2014 (both immediately after the Hurricanes) and that the trees were still standing along the superimposed red boundary line and the density had not changed from previous images, he disagreed stating that the pictures do not tell what was actually going on on the road and he had pictures showing that trees were blown over by the storm and lying on the ground.

94. When asked about SI 4 March 2015 as to an area which appeared cleared in the southeast corner along the boundary, Mr. Storey replied that in that area on his property, several incredibly large White Cedars had fallen over, some removed already, and the area dressed with topsoil. When asked about the SI 2 April 2015 which shows a 'white strip' (the Excavated Western Access Roadway) running along south to north and that it showed no vegetation, Mr. Storey replied that there were photographs that showed debris on the ground adjacent to the white strip area (Excavated Western Access Roadway) and that it, the white strip area, had not been cleared. When asked about SI 13 May 2015, SI 30 June 2015 and SI 15 July 2015, and that the white strip (Excavated Western Access Roadway) was even more stark and even more into the GW Woodland Reserve, Mr. Storey replied that the replanting was already happening. When pressed about replanting, Mr. Storey explained that they had removed anything that had debris or had been blown over. He explained that for the trees that were too big to be moved, they would have been cut into movable pieces and then moved to the Upper Lot, where they chipped what they could and then returned it to the area.

95. When asked about the work to the south of Long House in SI 7 August 2015, Mr. Storey explained that they would use both the Excavated Western Access Roadway and the Eastern Access Road to get a bobcat and a small excavator to the area. When asked about invoices from October 2014, November 2014, February 2015, June 2015 and October 2015

which showed men from landscaping companies (Almeida's, Dynamic Excavation and Landscaping and Precision) excavators, unloaders, and chippers on site for hours each day, Mr. Storey, agreed with the contents of the invoices, and explained that the workmen were clearing debris and chipping it to return it to the land. When asked if they were working on the GW Woodland Reserve, Mr. Storey replied that he could not confirm or deny that. He explained that he gave instructions to at least one person from each company.

96. When asked why people from the landscaping companies were not called to give corroborating evidence, he explained that he did not know the people in any personal capacity, that the invoices did not break the work down to a particular section and the work was part of the Admitted Planting. When challenged that he had no corroborating witness he explained that his father-in-law would have been a witness but he had passed away. When asked about his wife being a witness, he replied that he was relying on photos of some of the felled trees. In my view, I find the absence of any of these people, save for Mr. Storey's father-in-law, to give evidence to corroborate his version as a significant weakness in Mr. Storey's case. These potential witnesses could have been crucial witnesses, and there appears no reasonable explanation, save for the father-in-law, as to why they were not presented at trial.

97. When asked about why he would do work in 2015 in the GW Woodland Reserve and considering that there must be boundaries somewhere, Mr. Storey explained that in 2014 his primary concern was immediate damage on the property and clearing it away so the property was free of debris and fallen trees, all which took time. In 2015 he moved to a more definitive plan to deal with the extent of the damage and began the replanting. In respect of the boundaries, Mr. Storey stated that in his 2022 affidavit, he stated that when he purchased Long House in December 2012, it included the boundary survey of 2012. However, when the work was taking place in 2015, he had not seen the boundary survey and did not know where the boundary was between the properties in the Woodland Reserve.

98. On re-examination on the issue of damage, Mr. Storey maintained his evidence that there was significant damage to the trees, in the Upper Lot (including White Cedars, Palm trees) and the Lower Lot (including Cedar trees) by reference to various pictures with his witness statement. He maintained that he worked on clearing debris, using machinery and as well as the Eastern Access Road and the Excavated Western Access Roadway, noting that the Excavated Western Access Roadway had a sharp decline which meant that vehicles could go down but could not always make it back up the path.

99. I have fully considered all the evidence of Mr. Storey. In general, I do not accept Mr. Storey's evidence on this issue. As stated above where I considered Mr. Brazier's evidence, the SIs tell a vastly different story, namely that the immediate aftermath of the hurricanes do not show the damage as described by Mr. Storey, but rather a sustained removal and clearance of trees in the GW Woodland Reserve, so much so that the Excavated Western Access Roadway developed with unmistakable clarity on the SIs. Also, I find that the landscaping invoices support the position that extensive work was carried out over time by men and machine after the passage of the Hurricanes, including to remove the trees in the GW Woodland Reserve. I also find that it is incredible to believe that Mr. Storey had invested significant money and effort in the project, in particular setting out an ornamental planting structure, none of which required him to remove trees in the GW Woodland Reserve. In other words, it seems apparent to me, that in order for Mr. Storey to accomplish his task of the Admitted Planting, despite saying he never removed any trees, it seemed that is was necessary to do so. In my view, Mr. Storey planted the ornamental plants because that is what he desired the Woodland Reserve to consist of, to be to his own tastes, it being so near to Long House and an area that he would have to look at on a daily basis. In light of the reasons set out above, I am satisfied that Mr. Storey removed, or caused to be removed, a wide range of trees in the GW Woodland Reserve, thus committing the torts of trespass, nuisance and conversion. I find that Mr. Banks should be awarded damages for such trespass, nuisance and conversion.

Limitation Period

The Law

100. Section 33 of the Limitation Act 1984 provides as follows:

Fraud; concealment; mistake

33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

101. Section 33(2) provides as follows:

33(2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

102. In the English Court of Appeal case of *Giles v Rhind* [2009] Ch. 191, Arden LJ, in the context of the UK Limitations Act, considered the meaning of breach of duty as to whether a narrow or wider meaning was the correct approach. The headnote of the case provides as follows:

"Held, dismissing the appeal, that the meaning of "breach of duty" in section 32(2) of the Limitation Act 1980 was not confined to breach of duty in a tortuous or contractual sense or in the sense of an equitable or fiduciary duty but included any legal wrongdoing of a kind which could properly be raised in an action to which section 32 applied; …"

Defendants' Submissions

103. In respect of the issue of liability for removing the trees in the GW Woodland Reserve, the Defendants raise the defence of limitation. The argument is that Mr. Storey began his remediation project in 2014, and Mr. Banks' pleaded case is that the clearing/excavation occurred before 23 August 2015, the date on which Mr. Banks' cause of action became time-barred. Further, the Defendants' position is that there was no intentional concealment as they were constructing a significant project that was obvious to Mr. Banks, who by reasonable enquiry, for example, by walking into the GW Woodland Reserve, could have discovered the Admitted Planting and the use of the Excavated Western Access Roadway. Also, the Defendants could not have been intentionally concealing anything as they did not know the exact location of the Boundary when remediating the damage from the Hurricanes.

Plaintiff's Submissions

104. Mr. Banks' position is that the limitation defence is not available to the Defendants, on the basis that even if they felled the trees outside of the six-year limitation period, - which they do not concede – the circumstances are such to engage section 33(1)(b) of the Limitation Act 1984 which provides for the postponement of a limitation period where the defendant has deliberately concealed a fact relevant to the Plaintiff's right of action.

105. Mr. Elkinson submitted that section 33(2) applied such that the breach of duty was not limited to a breach in the tortious or contractual sense. He relied on *Giles v Rhind* [2009] Ch. 191 where the English Court of Appeal, in interpreting the similar UK Limitations Act held that any actionable legal wrongdoing may constitute the requisite breach of duty. He argues that the trespasses complained of here are in a broad sense, breaches of a duty not to do civil wrongs and that they were deliberate acts carried out in a secluded and densely forested section of Mr. Banks' large property.

Analysis

106. In my view, Mr. Banks is entitled to rely upon section 33(1)(b) of the Limitations Act 1984. I have already found that Mr. Storey was aware of the Boundary between the

Properties when he purchased Long House. Thus, when he was in the process of felling trees and performing the Admitted Planting in the GW Woodland Reserve, he knew that he was doing so on Gatewood. I have considered the evidence on this point. I accept Mr. Banks' evidence that he did not walk through the GW Woodland Reserve other than when Hurricane Fabian had passed over, as he had been encouraged not to go into the area by people from the Department of the Environment, that being around the time when he was building his tennis courts. I also accept that the topography of the land is such that Mr. Banks and Dame Pamela could not see the boundary between the Properties from their home on Gatewood. This leads me to consider the conduct of Mr. Storey in that I find that he was working in the GW Woodland Reserve which was a dense woodland which could not be seen from Gatewood but could be seen from Long House. Although Mr. Storey was conducting work on his own property Long House, I am satisfied that he was in fact concealing his work in the GW Woodland Reserve when he was clearing it and carrying out the Admitted Planting. In respect of section 33(1)(b) of the Limitation Act 1984, I find that the said concealment causes the limitation period to not run until such concealment was discovered by Mr. Banks. I have also considered whether Mr. Banks could with reasonable diligence have discovered the cleared area and the Admitted Planting sometime before he did. I am not satisfied that he could based on several factors including that he had not walked through the GW Woodland Reserve for many years, he was not able to see the GW Woodland Reserve due to the topography of the land and the area was densely forested in any event. Thus, I find that Mr. Banks could not have discovered the trespass with reasonable diligence.

107. In respect of the evidence by Dame Pamela on this point, she was emphatic that as a Bermudian and as a former government minister with responsibility for planning, if she had seen something then she would have said something. Thus, I accept her evidence that on 17 June 2021, when she and Mr. Banks walked through the GW Woodland Reserve, it was then that they discovered the large cleared area, a mulched berm and the Admitted Planting.

108. I have also considered the cross-examination evidence of Dame Pamela where she agreed that she had made several complaints with follow-up to Planning against Mr. Storey, in a spell of about three months in April – June 2019. The complaints were about various works that Mr. Storey was doing on his properties. Dame Pamela maintained that she would report a breach. She was also cross-examined in detail about an incident where it was asserted that she was on Long House property and her explanation of looking for a dog. The focus was on what part of Long House she was on and she maintained that she was on the Upper Lot, having explained the route she took to follow a dog that she had not seen before. Additionally, she denied that she was seen by Mr. Storey on the Excavated Western Access Roadway on Long House in the company of her son or any other male. The thrust of the cross-examination was that Dame Pamela would have been in the GW Woodland Reserve and would have seen the cleared area and the Admitted Planting. In my view, I accept Dame Pamela's evidence that she had not been in the GW Woodland Reserve or on the Excavated Western Access Roadway in the Lower Lot. This position aligns with her evidence that she would have reported any breaches if she had seen any. Thus, the question begs, if Dame Pamela had seen the Excavated Western Access Roadway or the cleared area or the admitted planting, then why would she not report it to Planning, having already reported other possible breaches.

109. In respect of the case law, I rely on *Giles v Rhind* to find that the breach of duty includes the trespass present in this case, on the basis that a wide view is preferred and that "breach of duty" is not limited to a tortious or contractual sense. Thus, in light of the reasons set out above, I find that the breaches were discovered on 17 June 2021 when Mr. Banks and Dame Pamela walked through the GW Woodland Reserve. To that point, I find that the action was brought in time, on the basis that the limitation period did not start to run until such concealment was discovered.

110. Mr. Elkinson submitted that the limitation analysis is more straightforward as it relates to the Admitted Planting as it remains on Mr. Banks' property to the present day, thus it is a continuing trespass, for which a new cause of action accrues each moment they remain. On the contrary, Mr. Storey's position is that the Admitted Planting is not a

continuing trespass because they now form part of Mr. Banks' property. For the purpose of limitation, it is not necessary to deal with this issue here as I have already found that the limitation period ran from the date of discovery of the Admitted Planting.

Ownership of the Trees in the GW Woodland Reserve

Continuing Trespass

111. As stated above, Mr. Elkinson submitted that as the Admitted Planting is still on Gatewood it is a continuing trespass.

112. In *Halsbury's Laws of England*, *Tort* (Volume 97A (2021)) at [167]:

> *"Torts to Land, Trespass to Land, What Constitutes Trespass to Land*
> *It may be necessary to distinguish between continuing trespass and the continuing effects of a trespass. Continuing trespass occurs when a person who is or has become a trespasser remains on the land as a trespasser or when objects placed on or intruding into land by way of trespass remain unremoved. In these circumstances, a new trespass is committed from day to day, successive actions may be brought and the trespasser can be required to remove any trespassing material. The occupier may be entitled to damages even for damage resulting from trespassory intrusion before he went into occupation.*
> *Where there are continuing effects of trespass there is one act of intrusion or contact causing persisting damage but no continuing trespassory contact or intrusion. Damages must be assessed in a single action and the trespasser cannot be required to make good the harm.*
> *The distinction between a continuing tort and the continuing effects of the tort may affect limitation."*

113. The Court of Appeal case of *Blake v Highways Departments* [2000] 10 WLUK 176 involved an agreement between the parties in respect of trespass by tipping soil and an issue arose as to whether it was a continuing trespass. The Court stated as follows:

> *Aldous LJ*
> *"10. The Recorder held that there was a continuing trespass. He relied upon the Sale of Goods Act to conclude that the property in the soil which had been dumped by the County Council remained the property of the County Council. …*
> *20. The Recorder did not base his judgment upon a conclusion that there was trespass ab initio. His view was that there was a continuing trespass. He said it was the intention of the parties that the soil should become part of the land and that only occurred when it was leveled and put back into the agreed form.*

21. In my view, that decision of the Recorder was wrong. Here we are considering land, not sale of goods. Once the soil was dumped on Mr. Blake's land and levelled so as to make it part of the land owned by Mr. Blake, he became the owner. Thus the Recorder's conclusion that there was a continuing trespass cannot be upheld. The failure to re-seed and restore was an act of omission. It was, if right, a breach of contract and not one for which an action for trespass could lie. One can look at it in this way. Assume that Mr. Blake wished to sell his land in 1981 or 1982 and executed a transfer to a third party. Would the property in the soil which had been roughly levelled have passed to the transferee? The answer must be "yes". In those circumstances, it cannot be said there was a continuing trespass.

Sedley LJ

25. I agree. It is clear from his judgment that the learned Recorder accepted the exposition by counsel for the local authority of the law of trespass ab initio; in particular that it required an act of positive misfeasance to render an authorized entry retrospectively unlawful. Mr. Jenkala relies on a passage following that read by my Lord in Clerk & Lindsell:

> *"A person only becomes a trespasser ab initio if he commits an act of positive misfeasance. Mere non-feasance, such as omitting to pay his score at an inn or refusing to deliver up a distress upon tender of the sum due, is not enough."*

26. But no doubt partly out of sympathy for Mr. Blake, the Recorder devised an ingenious analogy - the passing of property under the Sale of Goods Act. The dumped soil, he reasoned, remained the local authority's until they had carried out their contractual obligation to level it fully and to seed it. Hence, the local authority were in his judgment guilty of a continuing trespass.

27. The fallacy in this, although it is nowhere identified in the local authority's notice of appeal or skeleton argument, is that soil once placed on the surface of land ordinarily accrues to the land. It becomes part of the realty, not movable property. It would follow, for example, that once the soil has been dumped, the local authority could not change its mind, enter or Mr. Blake's land and take it away again."

114. The Defendants submitted that as the trees are on Gatewood, they have acceded to Mr. Banks and thus are not a continuing trespass. They rely on *Halbury's Laws of England, Boundaries* (Volume 4 (2020)) at [344], (citing *Masters v Pollie* (1620) 2 Roll Rep 141) which states as follows:

> *"Ownership of boundary trees*
> *The ownership of a tree on a boundary is a question of fact in each case but such a tree will prima facie belong to the owner of the land on which it was planted*[11]*. Where*

[11] *Masters v Pollie (1620) 2 Roll Rep 141* (plaintiff had cut down a tree and had sawn it into boards, and in an action of trespass for breaking into the plaintiff's close and taking away his boards the defendant contended that, as the roots

ownership is disputed, the topping and lopping of a tree is evidence of acts of ownership. It has been held that a tree planted right on a boundary which then extends its trunk and roots over the boundary was owned in common by the two landowners; but the better view is that such a tree remains in the ownership of the land on which it was planted even when the trunk, roots and branches extend into the adjoining property."

115. The doctrine of accession stems from the Roman law rule "*quicquid plantatur solo, solo cedit*", which means "*whatever is planted in the soil yields to the soil*". It provides that an object affixed to the land becomes part of that land, such that ownership of the object passes from the original owner to the owner of the land. Thus, the Defendants argued that the maxim *quicquid plantatur solo, solo cedit* applies to trees. In the case of *Re Ainslie* (1885) 30 Ch D 485 where the Court of Appeal was required to determine ownership of various trees which had been either fully or partially uprooted by extraordinary gales, Lord Halsbury found that if the trees formed part of soil, then they were realty, in accordance with the said maxim:

*"The broad proposition is this - and it presents itself in this case in the most naked form - that if the trees in question are attached to and form part of the soil, they are realty; if they are severed from the soil they are personalty. I for my own part am unable to frame words which will express this proposition more clearly than the familiar maxim, "quicquid plantatur solo, solo cedit." The degree and extent to which a tree may form part of the soil by reason of the attachment of its roots, is in every case a question of fact; and in what I am about to say I am not in the least endeavouring to lay down a principle. But as an illustration I may say that if a tree is so fixed to the ground that it would be necessary to apply some new force in order to remove it from the ground, then it would be attached to the soil. If the roots were broken in the soil, so that the tree and its roots were in truth and in fact severed from each other, then, although some of the broken parts of the tree might still remain covered with earth, I should say that it would be in truth and in fact severed, although to the casual observer it would seem to have some of the roots in the ground." [*emphasis added*]*

116. The general test for accession requires a contextual analysis of two factors: (i) the degree of annexation; and (ii) the purpose of annexation. In the English Court of Common Pleas case of *Holland v Hodgson* (1871-72) LR 7 CP 328 Blackburn J stated [at 334]:

"There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with

extended into his soil and had been nourished by it, he was entitled to a share of the tree; but it was held that, as the body of the tree was in the plaintiff's land, the whole of the tree belonged to the plaintiff though it was admitted that, had the plaintiff planted the tree in the soil of the defendant, it would have been otherwise).

precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see Wiltshear v Cottrell 1E. & B. 674; 22 L. J. (Q. B.) 177, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land:

...

Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

117. In the House of Lords case of *Elitestone Limited v Morris* [1997] 1 W.L.R. 687, the issue was whether a bungalow became part of the land, or whether it had remained as a chattel ever since it was first constructed. Lord Lloyd adopted the three-fold classification set out in Woodfall, Landlord and Tenant (looseleaf ed.), vol. 1, para. 13.131: "*An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.*" Lord Lloyd went on to state:

"So the question in the present appeal is whether, when the bungalow was built, it became part and parcel of the land itself. The materials out of which the bungalow was constructed, that is to say, the timber frame walls, the feather boarding, the suspended timber floors, the chip board ceilings, and so on, were all, of course, chattels when they were brought onto the site. Did they cease to be chattels when they were built into the composite structure? The answer to the question, as Blackburn J. pointed out in Holland v Hodgson (1872) L.R. 7 C.P. 328, depends on the circumstances of each case, but mainly on two factors, the degree of annexation to the land, and the object of the annexation.

Degree of Annexation – The importance of the degree of annexation will vary from object to object. In the case of a large object, such as a house, the question does not often arise. Annexation goes without saying.

...

Purpose of annexation - Many different tests have been suggested, such as whether the object which has been fixed to the property has been so fixed for the better enjoyment of the object as a chattel, or whether it has been fixed with a view to effecting a permanent improvement of the freehold. This and similar tests are useful when one is

considering an object such as a tapestry, which may or may not be fixed to a house so as to become part of the freehold. These tests are less useful when one is considering the house itself. In the case of the house the answer is as much a matter of common sense as precise analysis. A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty.

...

I do not doubt that when Mr. Morris's bungalow was built, and as each of the timber frame walls were placed in position, they all became part of the structure, which was itself part and parcel of the land. The object of bringing the individual bits of wood onto the site seems to be so clear that the absence of any attachment to the soil (saved by gravity) becomes an irrelevance."

118. I have given careful consideration to these arguments and the line of cases as set out above. The evidence shows that in respect of the degree of the annexation, the trees were planted in the soil of Gatewood. For clarity, those acts of entry and planting constituted the trespass. In respect of the purpose of the annexation, the evidence shows that Mr. Storey was planting them to become a part of the land, an area which he stated he thought was his own land, albeit I have found that he had knowledge of where the Boundary was located. In all the circumstances, in applying the maxim *quicquid plantatur solo, solo cedit*, meaning "*whatever is planted in the soil yields to the soil*", I am satisfied that the trees in the Admitted Planting acceded to Mr. Banks when they were planted. Thus, it follows, and I find that, the presence of the trees since planting were not a continuing trespass. Thus, as already stated, Mr. Banks is entitled to damages for the torts on Gatewood and the Admitted Planting.

Issue 2 – The Excavated Western Access Roadway

119. Mr. Banks claims that the Defendants committed a nuisance when they created the Excavated Western Access Roadway over which they, their servants and agents could pass and repass.

The Law on Nuisance

120. I set out the *Clerk & Lindsell on Torts 24th Edition* commentary on trespass and nuisance above in an earlier section.

Plaintiff's Submissions

121. Mr. Elkinson made a number of submissions in support of the Plaintiff's case including the following:

a. It was in or around 2015 that the Defendants or persons working on their behalf excavated the Excavated Western Access Roadway, that is a roadway that starts at the top of Long House, crosses over onto Gatewood before rejoining Long House on the southern end of the lot.
b. That there was never a Pathway there contrary to Mr. Storey's evidence that there was always one there. The expert evidence and the Drone and Satellite Images do not show a Pathway.
c. There is no corroborating evidence to support that a Pathway existed there before. It was not shown on surveys and Paula Maguire, who lived at Long House for seven years immediately before Mr. Storey was clear that no such Pathway existed.
d. The Defendants were responsible for the excavation of the Excavated Western Access Roadway.

Defendants' Submissions

122. Mr. Robinson made a number of submissions in support of the Defendants' case including the following:

a. There was a Pathway where the Excavated Western Access Roadway was located. Mr. Storey only cleared debris off the Pathway.
b. Mr. Banks' expert evidence and Satellite Images are not reliable to make a finding that excavation took place.
c. The Defendants' expert Mr. Harris's evidence and Mr. Storey's evidence should be accepted.
d. Mr. Storey made use of the Eastern Access Road and the Excavated Western Access Roadway to access the lower part of Long House.

e. If the Court found that the Defendants excavated the Excavated Western Access Roadway, then the excavation had to be during 4 March 2015 and 2 April 2015, thus it was time-barred. Further, there is no continuing trespass as the Excavated Western Access Roadway no longer exists, as it has been grown over with soil and vegetation for a number of years.

f. There is no basis for a permanent injunction to restrain trespass or nuisance. In respect of nuisance, any such interference was minimal.

g. There is no basis for a mandatory injunction requiring the Defendants to restore Mr. Banks' property to its original state.

Analysis

Existence of the Pathway

123. I have considered the expert evidence on this issue. In the Noon 2021 Survey Report/Plan, in relation to the Excavated Western Access Roadway on Gatewood, it states that property has been excavated for a road, which is unfinished and the area of excavation is 96.87 square metres or 1042.7 square feet in size. In the BCEC Mckee Letter 2021, Mr. McKee refers to the Excavated Western Access Roadway on Gatewood as a temporary road access with an area of 953 square feet. However, in the JWBR Plan 2003 I accept that no Pathway is shown on that topographical plan. So too in BCEC McKee Letter 2012, in a report which McKee states that he has completed a survey of Long House, there is no mention of a Pathway that runs from north to south cutting over to Gatewood and returning to Long House. In that letter, Mr. McKee makes mention of a number of encroachments, (pillars, direction lights, mailbox and post, water catchment drain, green chain link fence which 'wanders slightly south onto Lot 1 by 3 ½"), which he describes as minor infringements by Mr. Banks onto Long House. In my view, Mr. Mckee has paid significant attention to the infringements. Thus, to my mind, if a Pathway existed in the location of the Excavated Western Access Roadway that ran from Long House over onto Gatewood and then returned to Long House, it is likely that Mr. McKee would have reported it, especially since it was by no means a 'minor infringement'. Thus, I am satisfied that based on this evidence, there was no Pathway that existed before the Excavated Western Access Roadway was excavated.

124. I have considered the expert evidence of Dr. Mayall and the Satellite Images as set out above. He first mentions the Excavated Western Access Roadway in SI 2 April 2015 when he states that an access has been cut and passes into the GW Woodland Reserve. He describes it as having a light colour indicating that it is either exposed sand in the ground or has been topped with sand and that its width is similar to other vehicular access ways in the image. He further describes the state of the Excavated Western Access Roadway in SI 13 May 2015. Significantly he states that the Eastern Access Road appears to have been abandoned having had fresh topsoil in April and a row of new plants planted across the former road. In my view, this leads me to conclude that the Excavated Western Access Roadway was being used from that point in time to move vehicles down to the Lower Lot. Dr. Mayall further describes the Excavated Western Access Roadway in images SI 30 June 2015 through to SI 6 August 2019. He also mentions it in HR May 2012 which is overlaid with a red boundary line and white lines for other features including the Excavated Western Access Roadway. As stated earlier, Dr. Mayall makes mention of a footpath and steps which I found earlier were on Long House. Dr. Mayall made no mention of a Pathway leading from Long House into the GW Woodland Reserve and then headed back onto Long House. Thus, as found in the previous paragraph, I am satisfied that based on this evidence, there was no Pathway that existed before the Excavated Western Access Roadway was excavated.

125. Taking into account, the factors assessed above, I am satisfied that there is no expert evidence that supports a finding that there was a Pathway existing where the Excavated Western Access Roadway is located.

126. I now turn to the witnesses of fact on whether a Pathway existed previously. Mrs. Maguire was called by Mr. Banks. Her evidence was that she had lived at Long House with her husband and three children from January 2006 to January 2013, after which the Defendants moved into the Long House. She recalled clearly the layout of the interior of Long House as well as the grounds of Long House, noting that the area south from the house on Long House was so thick they could not see the ocean from the house. She stated

that she was very familiar with the house and its surrounds, and so were her children who spent countless hours playing and doing various activities in the garden and at the beach. Upon seeing SI 7 August 2015, she was shocked as the property looked completely different to when she lived there, noting that a road had been carved out and that large swathes of vegetation and trees had been cleared. She recalled the property had looked like a 2012 image that she was shown. Strikingly, she stated that there was never any Pathway as described by the Defendants in their Defence and Counterclaim. She countered that the area in question was on the western side of Long House was covered with dense vegetation and woodland made up of trees, bushes and thick undergrowth making it extremely difficult to pass through on foot. Also strikingly, Mrs. Maguire explained that along and adjacent to the western side of the house on Long House, there was a narrow walkway with 2-foot pavers on the grass running next to and parallel to her daughter's bedroom leading to the back of the house and coming to a dead end in a small walled garden. She confirmed the walkway from the image that she was shown and that it did not deviate from Long House onto Gatewood. She explained that from the southern French doors of the house, the ground sloped away quite steeply and that there was no Pathway or trail of any kind whatsoever visible beyond the enclosed area through the vegetation or woodland on Gatewood. She also stated that the driveway led from Inglewood Lane to the front of the house on Long House but that there was no vehicular access to the side or back of the house to the ocean side. She added that her son and her daughter, who did not give evidence, had confirmed to her that there was no Pathway or trail through the woodland.

127. On cross-examination, Ms. Maguire stated that there was no Pathway or trail visible from the small walled courtyard. She agreed that she had not gone a few feet into the woodland to know whether a Pathway was there, but she maintained that her son would have found such a Pathway. I should add that at this point, Mr. Elkinson took a point that Mr. Mackay had not put to the witness a photograph from Mr. Storey's witness statement on what the Pathway looked like. Mr. Mackay's position was that Mr. Storey's photograph was from a time when Mr. Storey lived at Long House, not when Mrs. Maguire lived there, and thus he need not put such a picture to Mrs. Maguire. In my view, showing the picture to Mrs. Maguire would have allowed her to comment on the picture, the point being

whether the Pathway existed for quite some time, which is as I understand it the Defendants' very case.

128. Dame Pamela's evidence on this point, on cross-examination was that, by reference to the Greenlight Energy photographs, she recalls when she visited Mrs. Maguire at Long House, the boundary area was lush with trees and foliage.

129. Mr. Storey's evidence on this point was that when they purchased the Long House, there was a clearly defined Pathway that ran through the trees between the Upper Lot and Lower Lot. It was a gap between the trees where no trees or plants were planted, on which it was possible to walk and had seemed to have been in use before they lived at Long House, used most likely to access the Lower Lot from the Upper Lot, for maintenance of the grounds or to access the beach. He referred to a photograph of his son using the Pathway in July 2014, noting that nothing was growing on the Pathway as it appeared to have been travelled by human footfall over time. Mr. Storey stated that there was vegetative debris and deadwood on and near the Pathway with a pile of logs stacked nearby, possibly for firewood. He referred to an aerial photograph from the Department of Planning from 2012 which he said showed a clearing traversing the boundary in the Lower Lot and adjacent to the boundary.

130. On extensive cross-examination about the Pathway, Mr. Storey stated that the Pathway may not have been on surveys because surveyors would not have ventured into the GW Woodland Reserve; that although Mrs. Maguire may not have traversed the Pathway, that someone had, perhaps a groundskeeper; that the previous owners, all family had probably used the Pathway, although he conceded most likely with permission; that the area was cleared in 2006 and Google images support such clearings; that he did not know the previous owners or their contractors in order to get them to give evidence; and he had not asked his own contractors to give evidence as Mr. Banks would not take kindly to them, thus he did not want to adversely affect their small businesses by embroiling them in the litigation. Mr. Storey explained that, for the pictures from the 2012 Planning website, he had superimposed a green dotted line on the picture to show the approximate location

of the pathway, running from the Upper Lot to the Lower Lot, crossing the boundary onto Gatewood. He added that there were multiple paths and canopies that had come and gone over time.

131. In respect of the existence of a Pathway, there was extensive cross-examination and re-examination, on a series of Google images and other images from 1962, 1973, 1981, 2003, 2005, 2007, 2008, 2014, 2016, 2018, 2020 and 2021. Mr. Storey maintained that those images showed the existence of a number of paths on which he believed that people were traversing from one area to another. He did concede that it was possible that it could have been family, guests, gardeners or landscapers albeit with permission.

132. In my view, I prefer the evidence of the Plaintiff's witnesses of fact. Mrs. Maguire had no interest in this matter and she gave overwhelming evidence that neither she nor her family members had seen or come across a Pathway during the seven years that they lived at Long House, which significantly, was immediately prior to the Defendants' owning Long House. Although Mr. Storey maintained that Mrs. Maguire had not ventured into the GW Woodland Reserve to see the Pathway, the evidence of Mr. Storey is that the Pathway existed on Long House then went onto Gatewood before returning to Long House. I note that Mrs. Maguire has no recollection of such a Pathway. I also accept Dame Pamela's evidence that when she visited Mrs. Maguire the area towards the boundary was lush with trees and foliage. On the contrary, I am not satisfied by the evidence of Mr. Storey on this point. First, there is no corroborating evidence from his wife, any workers or contractors who had attended upon Long House, although Mr. Storey seemed to rely on his father-in-law, who sadly has passed away by the time of the trial. However, to my mind there were other witnesses that he could have called on this point. In respect of the Google images, whilst they show some clearing in the 2005 and the 2008 images, I am not satisfied that they show that there is Pathway as asserted by Mr. Storey. Further, there are no witnesses of fact to speak to the existence of the Pathway before Mr. Storey lived there.

133. In light of both the expert witnesses and the witnesses of fact, I find that the Pathway as asserted by Mr. Storey did not exist before Mr. Storey created the Excavated

Western Access Roadway. Thus, it follows, and I so find, that the Defendants have trespassed on and created a nuisance on Gatewood where the Excavated Western Access Roadway crosses onto Gatewood.

The Defendants' Claim to a Right of Way over the Pathway on Gatewood

134. In the Defendants' Counterclaim, they seek a declaration that Long House enjoys a right of way along the Pathway on Gatewood, that is the Long House Claimed Pathway RoW. As set out above, I found that there was no Pathway in existence before the Excavated Western Access Roadway was excavated by the Defendants. It follows that if there was no such Pathway, then there could be no use of such a Pathway over a period of time that established the Long House Claimed Pathway RoW. On that basis, I dismiss the relief claimed for a declaration for the Long House Claimed Pathway RoW.

The construction of the Excavated Western Access Roadway

135. I have considered the expert evidence of Mr. Dave Ramrattan and Mr. Kelly Harris on the issue of the construction of the Excavated Western Access Roadway.

136. Mr. Ramrattan filed a written report supported by an attachment of over 800 pages including building legislation, codes, publications and the Bermuda Plan 2018. He also had access to relevant material in this case. He has a Bachelor of Science degree, a diploma in Science and Technology, a Master of Science degree and is a Registered Structural Engineer in Trinidad and Tobago and a Registered Professional Engineer in Bermuda. He has considerable diverse experience in structural engineering and project management. He has worked on a number of noteworthy projects in Bermuda over the last twenty years.

137. In relation to the Excavated Western Access Roadway, Mr. Ramrattan was asked if he was able to determine the age of the roadway and whether there is an underlying foundation which is older. He did a site visit to the Properties on 3 November 2023. His opinion was that due to the overground ground cover and the soft landscaping over the Excavated Western Access Roadway, he was not able to gather any suitable information for estimating the age of the roadway or its underlying foundation, or as a "temporary road

encroachment". He stated that to estimate the age of the roadway and its underlying foundation, he would have to defer to the specific expertise of a registered geotechnical engineer rather than relying on the generalized knowledge base and experience of a civil engineer. That would involve a few test-pits and/or borings for extraction of soil samples, from the underlying layers for testing in a suitable soils laboratory.

138. On cross-examination Mr. Ramrattan stated that the standard practice in Bermuda to gain access to a work site was to carry out excavation, which in his view was to remove the material on the land to get to bedrock, whether it was rock excavation or soil excavation. Thus, when he first visited the site, it was in his mind that the Excavated Western Access Roadway had been excavated. He stated that he disagreed with Mr. Harris's view that the road had not been excavated, and maintained that the Excavated Western Access Roadway had indeed been excavated.

139. On re-examination, Mr. Ramrattan explained the reason for excavating the surface was to expose the bare rock and then make that rock surface usable by levelling, using equipment to shave it off and create a level surface. He was concerned about and disagreed with Mr. Harris's findings that (i) no signs of excavation were observed along the path – but it was clear to him that there was vegetative cover over the bare rock; and (ii) and that the path followed the natural grade of the land, meaning that there were no signs or indications that the ground levels were changed by human means, such as excavation – but his view was that if you covered over the land then you would not be able to see the ground surface unless you remove it. Thus, to address these concerns, on 7 December 2024, he visited the site to conduct further examination on the Excavated Western Access Roadway. After some discussion in Court that the additional visit and findings were not disclosed to the Defendants, the Court granted leave for Mr. Harris to revisit the Properties to conduct further tests and then for both experts to be cross-examined again. Mr. Ramrattan stated that on his subsequent visit, his examination, which involved driving a steel rod into the ground until refusal, at 11 locations on the Excavated Western Access Roadway, led him to the conclusion that between 6 to 12 inches of fill material was on the rock base, and

about 3 feet that looked like a mulch fill material, which suggested that the excavated ground had been backfilled between 2021 and 2023.

140. Mr. Ramrattan was cross-examined again on the issues related to the Excavated Western Access Roadway when the trial resumed in January 2025. He had prepared a Supplementary Expert Report dated 20 January 2025. He stated that a geotechnical engineer would be needed to ascertain the age of the road. He stated that the only time he tested the content of the Excavated Western Access Roadway was in 2024, conceding that he had not tested it in 2015 or otherwise. However, in essence, Mr. Ramrattan maintained that the Excavated Western Access Roadway was excavated of material down to the bedrock for several reasons: (i) he had taken into account the aerial photos in 2015; (ii) he had relied on the Noon 2021 Survey Report/Plan, but did not need to rely on it to form his conclusion; (iii) the foundation of the road is bedrock which would be the age of Bermuda; (iv) by reviewing the images, knowing how groundcover and soil relate to bedrock, something had clearly had happened between March 2015 and April 2015 in that the bedrock was exposed in April 2015; (v) that he could say without doubt that the topsoil was removed and the bedrock exposed; (vi) that SI 4 March 2015 shows vegetative coverage and SI 2 April 2025 has no vegetative coverage because it was removed; and (vii) in civil engineering, they know what geology and soil mechanics are, and based on that, he can say that without doubt there was soil there, which was excavated to the bedrock – which he had seen, not just relying on the satellite images.

141. Mr. Harris was the expert witness for the Defendants. He is a licensed professional engineer with 28 years of civil/structural engineering experience. He is licensed to practice civil engineering in Bermuda and Alberta, Canada. He holds a Bachelor of Science degree and a Bachelor of Civil Engineering degree awarded from Acadia University and Dalhousie University, Canada, respectively. In his first report dated 1 November 2024, his evidence in respect of the path, was that he visited the Properties on 3 November 2023 and walked the path (Excavated Western Access Roadway) as well as he examined photographs taken in 2015/2016. He stated that paths or roadways are typically excavated to create a level and stable travelling surface which involves the removal of material like

soil or rock, normally by use of mechanical means like an excavator, bobcat and less frequently with hand tools. He did not find any immediate signs of excavation along the path such as exposed rock or significant removal of material. His opinion was that the path followed the natural grade of land and that there were no significant signs of excavation along the path such as exposed rock or significant removal of material, concluding that the path had not been excavated.

142. Mr. Harris filed a second report, dated 17 January 2025, which was after he had heard the oral evidence of Mr. Ramrattan and the Court had learned of the subsequent visit of Mr. Ramrattan to Gatewood. He visited Long House again, with Mr. Ramrattan and Mr. Cox, and conducted some tests along the path – and one in the wooded area between Gatewood and Long House – at locations indicated by Mr. Banks' expert. The tests at eleven locations required the use of a ½ inch diameter steel reinforcing rod that was approximately 42 inches long which at certain points were driven by use of a hammer into the ground until refusal or the rod could not be driven further. The rod was extracted and the depth of penetration measured. The results showed depths ranging from 3.5 inches to 19.5 inches. Following the completion of the test, Mr. Harris's expert opinion did not change from his first report. His view was that: (i) the tests provided an indication of the depth of the existing grade to the level of rock below, but they did not confirm whether material was added or removed or whether the area was excavated; (ii) He explained that the tests provided did not confirm whether material was added or removed or whether the area was excavated. Mr. Harris did not disagree with Mr. Ramrattan's conclusion in his oral evidence that it was possible that based on aerial photographs, the area was excavated and then backfilled to the current grade, but added that the probe tests would provide a depth of material that could have been added to the rock. He stated that an alternative type of construction would be for material to be placed on top of the existing grade once vegetation was removed, although such a process was less common for located constructed access roads or pathways. He stated that an investigation by a geotechnical engineer would be required to determine the type and layers of material that are below the surface. I note there has been no geotechnical engineer report. Mr. Harris also opined that, having inspected the aerial photographs that Mr. Ramrattan had referred to, the resolution was too

low to determine with certainty that there is exposed rock versus sand or screenings deposited on top of the previously existing grades in the area.

143. On cross-examination, Mr. Harris agreed that for big machinery to gain access to a construction site, the soil would be scraped off, but depending on the contractor, it could be done by use of a small bobcat, but not an excavator which use would be to reach a certain depth. In respect of the Excavated Western Access Roadway shown in the printed SI 2 April 2015, even with zooming in closely with the same image on the computer screen, he maintained that the image did not show enough detail to say exactly what had happened, noting that the surface of the Excavated Western Access Roadway could be rock or some other material put on top of it. He maintained that one or two things had occurred on the Excavated Western Access Roadway, either there has been soil removed to expose the rock or there has been material added on top, such materials probably screenings. He agreed that the rock formation in this area was of the same formation as the rock in Black Watch Pass in Pembroke.

144. On re-examination, Mr. Harris, upon review of two pictures of the area of the Excavated Western Access Roadway near the boundary, for the purposes of seeing whether there had been any changes to the surrounding land and whether material had been removed from the location, maintained that the land was still following the same slope of the land around it without any real change.

145. Mr. Storey's evidence on this point was that he did not excavate or create a road, instead he cleared vegetative debris, deadwood, felled trees and plant matter from the pre-existing Pathway on the higher ground that runs along the western part of Long House. As he had plans to carry out significant planting in the Lower Lot it made sense to him to clear and utilize the Pathway to get to the Lower Lot. He stated that no trees were felled, and he did not install a mulch berm on the Pathway altering the topography.

146. On cross-examination Mr. Storey agreed that there were invoices from landscapers that showed there was considerable work going on at Long House in March 2015 that

involved use of an excavator, chipping work and dumping at Marsh Folly. He stated that he and his contractors placed screenings on the path, explaining that screenings were debris used primarily to mix concrete, 3/8ths inch or less in diameter, gravel, sand and dust. Such screenings were placed on the top of whatever was there, either vegetation, soil or bedrock. Thus, any use of the path was on the screenings, denying that it was on an excavated roadway as explained by Mr. Ramrattan was the normal practice in Bermuda. He conceded that his machinery used the Excavated Western Access Roadway to access the Lower Lot of clearing and planting. Mr. Storey did state that he used the Excavated Western Access Roadway and the Eastern Access Road to access the Lower Lot. I accept these concessions and admissions.

147. In my view, I find that Mr. Storey created the Excavated Western Access Roadway by excavating the land, in particular as it crossed onto Gatewood. I prefer the evidence of Mr. Ramrattan and I prefer it over the evidence of Mr. Harris. I accept that Mr. Ramrattan did not visit the site in March and April 2015 but it is clear to me that his opinion is based on his expertise of the creation of access roads to work sites in Bermuda as well as the interconnection of soil, vegetation and bedrock. Mr. Ramrattan, in essence, was clear that there was soil in the location of the Excavated Western Access Roadway and it had been excavated to the bedrock. I am persuaded that his consideration of the Satellite Images in conjunction with his knowledge and experience leads properly to his conclusions. Significantly, his findings are supported by the invoices from Mr. Storey's landscapers which show that he was being billed for the use of machinery including an excavator during March 2015. That period aligns with Mr. Ramrattans' opinion that there was a significant change in the area as shown by SI 4 March 2015 and SI 2 April 2015, namely the removal of the topsoil and the exposure of bedrock. I have reviewed the Satellite Images myself and I am satisfied that the images accord with Mr. Ramrattan's evidence, such that I am satisfied of his conclusions.

148. In respect of Mr. Harris's evidence, I find support that the area was excavated as Mr. Harris did not disagree with Mr. Ramrattan's conclusion in his oral evidence that it was possible that based on aerial photographs, the area was excavated and then backfilled

to the current grade. Also, I find that Mr. Harris did explain that the normal practice in Bermuda to gain access to a site would be to use a bobcat to clear off vegetation and that a less common practice would be to put material on existing surfaces. The question begs then whether the local landscaper companies would use the normal practice or a less common practice. Although the landscapers were not called to give evidence, I am satisfied to find that their invoices show that by use of the excavator in March 2015, they were using the normal practice of excavating the soil down to the bedrock. Thus, I am not satisfied with the evidence of Mr. Storey that he used screenings to create the Excavated Western Access Roadway and I reject his evidence, albeit I do accept that he cleared the Excavated Western Access Roadway of fallen material.

149. In light of the above reasons, I am satisfied that the Defendants trespassed on Gatewood and created a nuisance in the form of the Excavated Western Access Roadway.

150. There was much evidence and submissions on what was the state of the Excavated Western Access Roadway before March 2015, what it had become in April 2015, what was its condition when the experts visited it in 2024/25 and at trial. For clarity, in my view, I find that there was topsoil and vegetation on the Excavated Western Access Roadway up to March 2015, that topsoil and vegetation was removed by excavation by the Defendants by April 2015, and since then, in the period between 2021 and 2023 it has been covered over with fill in order to allow vegetation to grow on it for a number of years to its present state.

The Defence of Limitation

151. The Defendants have raised a defence of limitation in respect of the trespass and nuisance in respect of the Excavated Western Access Roadway on the basis that if the Excavated Western Access Roadway was constructed between 4 March and 2 April 2015 it was time-barred. I reject that defence, as I take the view as I did in the section on the Woodland Reserve, that the Excavated Western Access Roadway was only discovered by Mr. Banks when he discovered the trespass in the Woodland Reserve on 17 June 2021. Thus, the claim is not defeated by the defence of limitation.

The Relief Claimed – Injunction

152. In *Clerk & Lindsell* at 27-06 it states:

"Prohibitory Injunctions
The mere proof of a legal wrong done in the past is insufficient to entitle the claimant to an injunction. The court must be satisfied that the interference with the claimant's right is continuing, as in many cases of nuisance and some of trespass; or that it is likely to be repeated unless restrained. Furthermore, even if this is done, the decision whether to grant an injunction remains essentially discretionary. In the case of substantial interference with the claimant's rights, there should be a presumption in favor of injunctive relief, with the defendant having to advance a case why it should not be available. If, however, the claimant seeks an injunction after the defendant has acknowledged service, but before he or she has had the chance to plead a full defence, a court will nonetheless be entitled to assess the available evidence and refuse an injunction where, on the basis of that evidence, it appears that the defendant would have a real prospect of defending the claim for an injunction. It is no longer the case, if it ever was, that an injunction can be had save in exceptional circumstances. Indeed, the matter cannot be reduced to any simple rules. As Millett LJ put it in Jaggard v Sawyer [1995] 1 W.L.R. 269 at 288 (approved by Lord Neuberger in Coventry v Lawrence [2014] UKSC 13; [2014] A.C. 822 at [120]

> *"Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."*

153. In *Bean on Injunctions* at [2-09] it states:

"Adequacy of Damages

> *"The very first principle of injunction law is that prima facia you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy" (per Lindley LJ in London & Blackwall Railway Co v Cross (1886) 31 Ch. D. 354 at [369]).*

If the claimant can be fully compensated by an award of damages, no injunction will normally be granted. In particular, where the wrongdoing has ceased and there is no likelihood of it recurring, an injunction would generally be refused (Proctor v Bayley (1889) 42 Ch. D. 390); a permanent injunction requires the prospect of continuing or recurring injury to the claimant. However, where the defendant's conduct was high-handed an injunction could be granted even for a minor infringement which could be addressed by damages (Ottercraft Ltd v Scandia Care [2016] EWCA Civ 867). In that case the defendant builds a fire escape staircase in flagrant breach of an undertaking to the court; so it was not oppressive to make an order

It is comparatively unusual for the defendant to be able to say that damages are the only available remedy in the case and that the court does not even have a discretion to grant an injunction. The more common defence is that although the claimant has made out a prima facie case for an injunction, nevertheless the court, weighing all the circumstances in the balance, should exercise its discretion against granting one. In Novartis AG v Teva UK Ltd [2022] EWHC 959 (Ch); [2022] Bus. L.R. 888, Roth J held that the claimant pharmaceutical company had not shown that a downward price spiral was likely or that future sales would be affected and was unconvinced that it would suffer reputational damage. On that basis he held that damages would be an adequate remedy for the claimant while the damage to the defendants would be hard to quantify and refused an injunction.
…"

154. Mr. Banks seeks a permanent injunction against the Defendants to restrain the trespass and nuisance on the Excavated Western Access Roadway on Gatewood. The Defendants resist such a permanent injunction on the basis that the trespass is not continuing and thus there is no likelihood of it recurring unless restrained.

155. The evidence is that Mr. Banks caused the Boundary Fence to be erected on the Boundary. Presently, that Boundary Fence cuts across the Admitted Construction on Gatewood and runs fairly close to the house on Long House. The evidence is also that Mr. Storey has given an undertaken not to trespass on Gatewood and there is no evidence that he has done so since such undertaking. I take note of the relief sought by Mr. Banks that the Admitted Construction be removed. I determine that issue below that it should be so removed. I also have determined below that the CMP should be implemented, subject to some limitations, so that it restores the GW Woodland Reserve to the condition it was prior to the actions of Mr. Storey. I also note that Mr. Banks has a plan to build a wall along the Boundary. In my view, following *Clerk & Lindsell* and *Bean on Injunctions* as set out above in this section, an injunction is not appropriate where damages would be an adequate remedy in the circumstances. However, in this case, the evidence shows that the Defendants now know where the Boundary is between the Properties and they know the rule as it applies to woodland reserves. In my view, I do not think that, going forward, there is a risk that the Defendants will trespass onto Gatewood and will not undertake the kinds of activities that they did that led to this litigation. If they do, then in my view, damages are adequate for the type of damage that could be done. Thus, I am not satisfied that a

permanent injunction should be granted restraining the Defendants from trespassing on Gatewood.

The Relief Claimed - Damages

156. Halsbury's Laws of England [167] was set out above in an earlier section *"Torts to Land, Trespass to Land, What Constitutes Trespass to Land,* which distinguished between continuing trespass and the continuing effects of a trespass.

157. In *Clegg v Dearden* 116 ER 986 the Court stated as follows:

> *"There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass: but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation: such an admission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty."*

158. Mr. Robinson submitted that there is no continuing trespass because there is no longer any Excavated Western Access Roadway there as soil and vegetation has grown back over the area for a number of years. I found above that in the period between 2021 and 2023 the Excavated Western Access Roadway had been covered over with fill in order to allow vegetation to grow on it for a number of years to its present state. In my view, applying *Halsbury's Law of England* and *Clegg v Dearden* in this section above, damages should arise for the excavation and use of the Excavated Western Access Roadway for the period March 2014 until a date between 2021 and 2023 when it was backfilled. Taking a broad approach to the date range, I find that the end date should be the last date in 2023, that is, 31 December 2023.

159. The claim for damages does not end there as Mr. Banks' position as I understand it, is that the Excavated Western Access Roadway, in its current state, that is, with vegetation on it, is a continuing trespass as it is not in the condition that it was before the Excavated Western Access Roadway on Gatewood was excavated. I approach this issue firstly that Mr. Storey has trespassed by depositing the backfill in order to allow the

vegetation to grow. Thus, again relying on *Halsbury's Laws of England* and *Clegg v Dearden* in this section above, I find that Mr. Storey should be liable for damages for such depositing of materials on the Excavated Western Access Roadway on Gatewood. A further point arises in that, in relying on the law of ownership of items that accede to an owner once planted or deposited, I do not consider the backfill or vegetation on the road as a continuing trespass, as the material has become part of Mr. Banks' land. However, Mr. Banks seeks a remedy to restore the Excavated Western Access Roadway on Gatewood pursuant to the CMP. In respect of that relief, I shall deal with it in the section below entitled damages in respect of the Woodland Reserve - the Conservation Management Plan.

Issue 3 – The Construction Trespass

160. There is an issue as to the Admitted Construction as to whether the Court should order damages and for it to be removed.

Plaintiff's submissions

161. Mr. Banks has claimed for the Construction Trespass wherein the Defendants have admitted to the construction of a brick patio and an adjoining concrete wall which encroach onto Gatewood. Mr. Elkinson made a number of submissions as follows:

a. The Admitted Construction is not minor. If it was as minor as the Defendants state that it is, then they should remove it.
b. Mr. Ramrattan had given evidence that the retaining wall was not necessary due to the underlying rock.
c. Mr. Storey in his evidence has stated that if the Admitted Construction needs to be removed to find peace then it will be removed, as he did not want to be at war with his neighbor.
d. The evidence of Mr. Storey that he built the Admitted Construction himself at a cost of $1,450 should be rejected, as the expert evidence of Mr. Ramrattan showed that such construction required a highly skilled person along with at least two other people to assist.
e. Mr. Storey's evidence that he possessed the qualification, skill and experience to build the wall by himself cannot be believed.

f. Mr. Banks seeks a mandatory injunction limited to requiring the Defendants to remove in accordance with all applicable planning and building regulations the patio and wall to the extent that they encroach on Gatewood.

Defendants' Submissions

162. Mr. Robinson made a number of submissions in respect of the Admitted Construction as follows:

a. The encroachment has been admitted. An order for demolition would be unnecessary and disproportionate as the vast majority of the structure is on the Defendants' property and this would create a risk of a nuisance being caused by runoff from Mr. Banks' more elevated property.

b. The minor encroachment of the corner of the retaining wall has caused no damage or diminution of value to Gatewood and no damage should be awarded.

c. It is impossible for the Defendants to remove them in light of the Boundary Fence that has been erected on the Boundary by Mr. Banks and the interim injunction that was obtained by him.

d. Mr. Banks has not adduced any evidence of damage or diminution of value to his property and Mr. Redrobe opined that there was no diminution. The Defendants should be permitted by Mr. Banks to remove the encroaching material without a further claim for trespass arising.

The Law

163. *Bean on Injunctions* at [2-21] it states as follows:

> *"Mandatory injunctions*
> *A mandatory injunction is an order which requires a person to do a specified act. This is normally an act which will end a wrongful omission (such as an order requiring delivery up of property which should have been returned) or which reverses the consequences of a wrongful act (such as removing some wrongful alteration to land). Special considerations apply to mandatory injunctions, which the courts are traditionally more reluctant to grant. The rules as to the discretionary nature of the remedy, and the relevance of the claimant's conduct, still apply, but there are also more important distinctions."*

164. In the case of *Wilkinson v Dill* (1972 No 38) Seaton J stated [at 4]:

> *"The question now arises as to whether they are entitled to any further damage for trespass. These might arise if there were damage to the plaintiffs' land in addition to the conversion. The only evidence of other damage is the erection of wire fences, chicken coops, goat runs and the dumping of trucks or other equipment. I believe the proper remedy, for such wrongs is for the defendant to remove all that he is illegally placed on the plaintiff's land within one month from today failing which they may be removed by the plaintiffs at the expense of the defendant."*

165. In *Goodson v Richardson* (1873-74) L.R. 9 Ch. App 221, which was about water pipes being laid on land without the consent of the owner of the land, Lord Selbourne LC stated [at 224-225]

> *"I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction."*

166. In the Supreme Court of Canada case of *Gross v Wright* [1923] S.C.R. 214, which was about the construction of a wall where the upper portion rested entirely on the plaintiff's property, Brodeur J stated [at 233]:

> *"But the evidence of Wright's architect shows that he was instructed to construct the wall as he did in order that he (Wright) would have more room on the inside. Damages could be substituted for a mandatory injunction; but where, as Kerr on Injunctions, 5th ed. p. 44 says, "the defendant has been guilty of sharp practice or unfair conduct or has shown a desire to steal a march upon the plaintiff," then the remedy should be by injunction. The courts are not instituted for legalizing wilful wrongful acts; and, as it is stated in Shelfer v City of London [1895] 1 Ch. 287 "the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is willing and able to pay for the injury he may inflict."*

Analysis

167. In my view I should grant the mandatory injunction for the removal of the Admitted Construction where it encroaches on Gatewood for several reasons. First, as a result of the admission of the Admitted Construction, Mr. Banks is granted damages for the trespass and nuisance for the Admitted Construction.

168. Second, by way of background, in respect of the Admitted Construction, I have considered the evidence of Mr. Story as well as the experts. Mr. Storey stated that he built the wall in 2017 but did not build it with the intention of encroaching onto Gatewood. He built it because there was a problem at the western end of the house on Long House during heavy rainfall and the patio area would flood and lots of runoff would be deposited in the area, creating blockage of the drains at the western end of the house, because the house is at a far lower level than the ground above it. He stated that when he purchased Long House, there was already a stone wall and patio in the same location and he did not appreciate how close to the wall the boundary was. He denied that it was an extension to Long House, rather it was a replacement, noting that only about 90 feet of the Admitted Construction encroaches onto Gatewood. He maintained that if the encroaching part is removed then the adjacent hillside and planting will collapse onto Long House.

169. On cross-examination, Mr. Storey maintained that he worked by himself and differently than the process as described by Mr. Ramrattan. The costs he incurred were for the block, the cement and the bar and no costs for labour. In general, his process was to lay out everything that he needed in order to do the work. He said he used a concrete mixer, dumped the cement or concrete into a bucket of a bobcat and drove it to where he needed it. He used formwork, mixtures to plasticize and retard the concrete, making it last longer, he compacted the concrete without a vibrator which was not necessary. To move the blocks to where he needed them, they were loaded onto pallets using the forks on the bobcat and driven to where they were needed. He stated that the walls were built and reinforced by filing every cell of the block with concrete. He considered the works to be minor works and the wall to be a garden wall rather than a retaining wall, maintaining that the project was probably over engineered, which is something that engineers do when not constrained by budget.

170. On re-examination, Mr. Storey stated that he had learned to do work around Long House from the time he was employed with British Rail when he and others were responsible for many utility huts, for signalling and for power along the length of the rail. He had installed ducting, rebar and concrete. He maintained that he did not hire anyone to

do the construction work because he enjoyed doing it, working with his hands and getting great pleasure from such work.

171. I am not satisfied by Mr. Storey's evidence that his education qualifications, and his experience working for British Rail enabled him to build the Admitted Construction on his own and as he described. Mr. Storey gave evidence and exhibited documentation of his very impressive qualifications: (i) a 1994 First Class Bachelor of Engineering with Honours in Electronic Engineering Degree from the University of Central England in Birmingham with a 1994 Avery-Berkel Shield award for the Best Overall Performance on the course, along with the relevant transcript of subject grades; (ii) a 1993 Certificate of Training from the Loadpin Conference Centre, Kingswinford, England for the safe operation of cranes, lifting equipment and tackle, when he worked at British Rail Intercity West Coast; (iii) a 1994 certificate from British Rail Projects for project safety strategy; (iv) a 1994 certificate for City and Guilds of London Institute for Wiring Regulations; and (v) a 1994 certificate in Construction Design & Management (CDM) Regulations.

172. With the greatest respect to Mr. Storey for his qualifications and to his evidence that he built the wall by himself, I am not satisfied that he is a highly skilled person in building walls, such skills which take years of accumulated experience. I accept Mr. Ramrattan's evidence that electronic engineering was not the same as civil engineering. Although Mr. Storey said that he can bend bar and mix cement, in my view those skills are different than the skills of a highly skilled mason. Thus, I prefer the evidence of Mr. Ramrattan who stated that from the construction industry's standpoint, it is not conceivable for the Admitted Construction to be carried out in a meaningful way by even one highly skilled person. He noted that the thought of placing concrete without the assistance of other personnel would be considered impractical to achieve the construction industry's standard of workmanship for basic quality assurance. There was much evidence on cross-examination of the processes and people needed to build the patio and the wall, pointing out that the mason is the highly skilled person doing the building with the other workers 'feeding' him the materials because there is a time limit for placing the concrete. Although Mr. Storey described his method of building using the bobcat and being organized, his

procedure was never put to Mr. Ramrattan on cross-examination. Thus, it was clear to me that the mason was not going to be building the wall and at the same time, mixing the concrete, carrying buckets of it to the specific location and then fetching blocks. Thus, I accept that a team was required to build the Admitted Construction. This insistence by Mr. Storey that he built the Admitted Construction himself undermines his credibility, such that I also accept the evidence of Mr. Ramrattan that the wall costs about $22,000 to build, thus rejecting Mr. Storey's evidence that he built it for $1,450.

173. Third, I have considered the evidence of the quality of the rock in the location of the Admitted Construction. This is important in respect of whether to grant the application for an injunction to remove the Admitted Construction where it encroaches on Gatewood. I am satisfied by Mr. Ramrattan's evidence that the photographs show good quality bedrock which would be expected as referenced in the Bermuda Geological Map. Thus, he stated that the Admitted Construction can be removed without risk to life or damage to adjoining property, provided that it is performed by a contractor experienced in carrying out demolition works in accordance with section 5.13 of the Bermuda Residential Building Coed 2014. Mr. Kelly agreed on cross-examination that the rock formation was of the same good quality as rock in Blackwatch Pass, Pembroke Parish. In light of these reasons I am satisfied that it is safe to remove the Admitted Construction where it encroaches onto Gatewood.

174. Fourth, I have considered that the Defendants' position is that there has been no diminution in value of Gatewood as a result of the encroachment, thus I should not grant the injunction to remove it. However, the thrust of the issue is that the Defendants have committed a wrong by placing the Admitted Construction on Mr. Banks' land. In applying the principles set out in *Bean on Injunctions* and in the cases set out above in this section, I am satisfied that I should grant the application for a mandatory injunction to remove the Admitted Construction where it encroaches onto Gatewood. The terms of the mandatory injunction should allow for the Defendants to enter onto Gatewood for the purposes of removing the encroachment without giving rise to new claims for trespass.

Issue 4 – Damages in respect of the Woodland Reserve – Indemnity for the costs of the Conservation Management Plan (CMP)

175. Mr. Banks seeks an order for damages for trespass which aims to restore Mr. Banks to the position he occupied before the commission of the wrong, namely by way of indemnity as regards the costs of the implementation of any CMP or equivalent which Mr. Banks has any liability for. Thus, there is an issue as to the correct measure of damages.

176. The Defendants oppose any such damages, in particular the grant of indemnity as regards the costs of the implementation of the CMP.

Guidance Note 107 Conservation Management Plans

177. Mr. Darrell exhibited Planning's Conservation Management Plans – Guidance Note 107. Relevant parts of the Guidance Note 107 are set out below. [emphasis added]

> ***1. What are Conservation Management Plans?***[12]
> *Conservation Management Plans (CMPs) are plans that give details for managing conservation areas to provide for improved biodiversity of endemic and native animal and plant life, reduce invasive species of trees and other vegetation and encourage the appropriate planting of endemic, native and noninvasive ornamental species.*
>
> ***2. Why are Conservation Management Plans necessary?***[13]
> *Appropriate vegetation protects the Island's ecology, habitat and other natural features; and, enhances the visual amenity and aesthetics of the Bermuda Image. We depend on our natural environment to sustain our quality of life. The Development and Planning Act 1974 (the Act) makes specific provision for the designation of 'Areas of Special Environmental Value' in the Fourth Schedule (Section 28). These 'designated area protections' are encompassed in the Bermuda Plan 2008, for the protection of areas that are considered to possess natural features with environmental value, including woodlands, agricultural land, beaches, caves, and other habitats and natural features.*
>
> *CMPs are required in order to ensure that Bermuda's most sensitive physical environments are protected and enhanced. CMPs recognize the fact that environmental areas are limited and declining; and, if compromised, will result in the degradation of the environment as it relates to fauna, flora and the aesthetics of Bermuda's visual quality. Ensuring conservation gain, or at least an equitable*

[12] Page 3 of 20
[13] Page 3 of 30

conservation equation, is critical in ensuring development is sustainable for future generations.

Improving natural areas in Bermuda through CMPs contributes to the Bermuda Image and the importance of doing so cannot be understated. The Bermuda Image is defined as "the appearance of Bermuda resulting from a harmonious mix of natural features and man-made elements which produce a visual quality and character of development which are distinctively Bermudian." Elements that contribute to the Bermuda Image are: lush, dense and colourful vegetation, natural coves, bays, beaches, rocky coastline and islands.

3. When are Conservation Management Plans required?[14]

When a Conservation Base Zone or a Conservation Area is protected by the Bermuda Plan 2008, a CMP may be required for any proposed development within or adjacent to these areas. The public is encouraged to submit a CMP for any land which is located within a Conservation Base Zone or a Conservation Area when maintenance or management is required. For easier implementation and to distribute the costs; the proposed works can be phased. If you know your property has conservation zoning and your development proposal may impact that area, you are required to submit a CMP with your planning application.

5. What details are included in a Conservation Management Plan?

5.2 Helpful planting information[15]

As a general rule of thumb planting within Conservation Zones and Areas should be considered in the following ratio: 40% endemic /30% native /20% ornamental /10% variance.

7. Appendix

7.2.1 Woodland Reserve[16]

The Woodland Reserve Conservation Area is designated specifically for the protection of woodlands. They include extensive belts of mature trees and other blocks of dense vegetation, which are considered to be important features of the landscape Bermuda's environment and visual appeal. Woodland Reserves may also include smaller areas of trees and shrubs in prominent locations. These areas create natural habitats for wildlife and also serve as windbreaks for protection for agricultural land.

Woodland areas contain a variety of plant and tree species which change over time and the underlying objective is the protection of these areas, whether they contain protected, endemic, native, introduced or invasive species, to ensure that the land resource and vegetation may be preserved over the course of time. Although Woodland Reserve areas may contain open space areas with dispersed vegetation, cliffs, rocky formations, ditches, ponds and other natural or man made features, these all play an

[14] Page 4 of 20
[15] Page 8 of 20
[16] Page 18 of 20

integral role in terms of the overall value and therefore, need to be protected as part of the wider scheme. CMPs are required for any development or management work within a Woodland Reserve Conservation Area. Woodland Reserve Conservation Areas are susceptible to damage from the effects of naturally occurring events such as hurricanes and flooding. They may also be impacted by fire, vehicle damage, insects, carelessness, non conforming land uses and materials storage. In such circumstances, every effort should be made to re-establish these areas. Property owners are encouraged to submit a CMP detailing the restoration works. A minimum setback of 15 feet is suggested for development abutting a Woodland Reserve Conservation Area.

The Plaintiff's Submissions

178. Mr. Elkinson made a number of submissions as follows:

a. Mr. Banks seeks damages in the amount it will cost him to implement the CMP devised by his landscaping architect and CMP expert in these proceedings, David Cox, that is the sum of $1,228,892. This is the sum reasonably required to reinstate Mr. Banks' land as near as possible to its state before the Defendants committed their acts in respect of the GW Woodland Reserve and the Excavated Western Access Roadway.

b. The "Resort Planting" installed by the Defendants had created a liability for Mr. Banks of $2,000 to $3,000 per month to manage over 40 or 50 years. Mr. Banks should not be burdened with the cost of maintaining the Resort Planting.

c. The objective of the CMP was to get it back to a zero-maintenance area. Once it is restored it will cost nothing to manage.

d. To obtain Planning permission, a CMP is needed.

The Defendants' Submissions

179. Mr. Robinson made a number of submissions as follows:

a. Mr. Banks is under no legal liability to produce a CMP under the Director of Planning's enforcement powers or to carry out the works included in it.

b. If Mr. Banks has any such legal liability, it was not caused by any action (including the admitted actions) of the Defendants.

c. If the Defendants' actions caused a legal liability to accrue to Mr. Banks, any such liability was not reasonably foreseeable and was thus too remote.

The Evidence

Plaintiff's evidence

Mr. Banks

180. I have considered the evidence of Mr. Banks on this issue who wants his property restored. He is of the view that it is the right thing to do being aware of the thoughts of luminaries such as Dr. Wingate and Myles Darrell that woodland reserve areas need to be preserved for the benefit of Bermuda's wildlife and Bermuda's environment and visual appeal. He stated that what the Defendants destroyed in a woodland reserve area on his land must be restored and what they constructed should be removed. He noted that the Defendants spent $628,000 on ornamental plantings which they preferred to the natural habitat.

181. Mr. Banks also asserts that he has a legal liability to restore the property. He refers to the 2018 Plan which states "*In the event that a woodland reserve area is damaged or cleared by natural causes or otherwise, every effort should be made to re-establish it, and the property owner shall be encouraged to submit a CMP detailing such restoration works."*

Mr. Cox

182. I have considered the evidence of Mr. Cox. He is a Chartered Landscape Architect. He holds an Honours Bachelor of Landscape Architecture from the University of Guelph, Canada and a Certificate of Merit for Excellence 1996 from the American Society of Landscape Architects. He is affiliated by charter or full membership to landscaping bodies in England and America. He is a member of the Bermuda National Parks Commission (a past Chair), is chair of the Bermuda Environmental Coalition and has involvement on committees with the Bermuda National Trust, the Corporation of Hamilton and others. He has worked as a full-time landscape architect for over 26 years in England and Bermuda. He has experience in design and Bermuda Planning Requirements as well as managing, coordinating and producing large design development and construction packages, master planning and preparation of reports.

183. Mr. Cox prepared his expert report having visited Gatewood and he also relied on documents provided to him. He prepared a 3-page CMP. He obtained a quote from Brown & Co. Ltd, who he opined was capable of performing the work to professional standards. The costs which he opined were reasonable for implementation of the CMP are as follows:

a. $304,610 - Mobilisation, excavation, stripping, planting, watering and aftercare;
b. $460,300 - Providing 20 year maintenance plan;
c. $130,000 - Construction of 4ft Boundary Wall and 4ft chain link fencing;
d. $178,982 - Contingency of 20%;
e. $155,000 -Allowance for water and electricity over 20 year period.
f. The quote included assumptions for access, storage and provision of water over Long House.

184. Mr. Cox's report included the following statements generally:

a. It was obvious that the pre-existing forest had been cut back for more recent planting of Oleander hedges and a number of palms and exotic plants species;
b. The Excavated Western Access Roadway is located within the Woodland Reserve and Coastal Reserve itself, and within the Woodland Reserve, Coastal Reserve and Boundary set-backs. The planter wall and brick walkway are also located within the Woodland Reserve and Boundary set-backs.
c. To re-create the pre-existing woodland, his approach would include: (i) re-establishing pre-existing grades; (ii) prepare the area for re-planting; (iii) plant/install new plant species in keeping with the adjacent woodland species; and (iv) committing to a long-term maintenance regime to ensure proper establishment. A fifth and important consideration would be time - it would take potentially up to 20 years for any new plantings to grow in and become a mature/established woodland.
d. In formulating a proposed plan list to 'reinstate' the original woodland, instead of using the Class II invasive White Cedar, he would use Bermuda Cedar and Bermuda Olivewood, plus Bay Grapes, Green Buttonwood and various native and endemic shrubs/understorey species. His opinion was that the proposed woodland would blend into the adjacent woodland areas, and become an unassuming and

natural woodland once again, albeit with differences influenced by current best practices methods used for woodland management in Bermuda.

e. He included the Planning Guidance Note GN 107 and the Planning Bermuda Plan 2018.

185. On cross-examination, Mr. Cox's evidence included that:

a. He gave an umbrella view to his evidence when he stated that "*when you cut a cedar tree that is 200 years old, it takes 200 years for it to grow back.*"

Mr. Darrell

186. I have considered the evidence of expert horticulturist Mr. Darrell which I summarised previously in above sections. I will address other parts of his evidence relevant to the CMP. In this section, I rely on the following sections of his expert report:

a. The purpose of Woodland Reserve and the importance of and requirements regarding its protection generally;
b. The importance of replacing such mature trees and vegetation;
c. The relevance of the draft Bermuda Plan 2018 and the circumstances in which liabilities of landowners arise in respect of CMP's or otherwise.; and
d. Typical timescales for remediation of such damage.

187. In respect of the purpose of woodland reserve and the importance of and requirements regarding its protection generally, I was satisfied to accept as significant the opinion of Mr. Darell that "*Bermuda's Woodland Reserves are very importance to Bermuda.*" He stated that the Gidance Note 107 on CMPS provided a clear answer to the question which he firmly agreed with. He referenced paragraph 7.2.1 which is set out above in this section.

188. In respect of the importance of replacing mature trees and vegetation, I was satisfied to accept as significant the evidence of Mr. Darrell that "*Replacing mature vegetation takes time but it is crucial to re-establishing habitat that provides ecosystem services that at the very least consider: invertebrates, birds, lizards and soil biome. Mature trees and*

vegetation provide oxygen and sequester carbon, and are an important part of the solution to offsetting carbon emissions. Mature trees are less susceptible to the impact of climate change. Mature trees preserve and enhance soil."

189. In respect of the typical timescale for remediation of such damage, I was satisfied to accept as significant Mr. Darrell's opinion that "*Restoration of conservation areas to damage of this nature takes at least 20 years of concerted management and 50-80 years before the area reflects a mature woodland similar to the woodland reserve which was damaged.*"

190. In respect of the relevance of the Bermuda Plan 2018 Mr. Darrell referred to Chapter 5 Planning Application Considerations (APC) and Chapter 20 Woodland Reserves (WDR) as follows:

a. Policy APC.19 - Any development proposed in a zone which is adjacent to a Woodland Reserve or Agricultural Reserve Conservation Area shall have a minimum setback of 15 feet from the boundary of the Woodland Reserve or Agriculture Reserve Conservation Area.
b. Policy WDR.2 –
    i. <u>To determine the management works that can be undertaken in a Woodland Reserve Conservation Area, a Conservation Management Plan shall be required in accordance with policies ENV.6 and ENV.8.</u>
    ii. <u>The Board may require the submission of a Conservation Management Plan for any development proposal which may impact a Woodland Reserve Conservation Area.</u>
c. <u>Policy WDR.3 - All forms of development shall be prohibited in areas of Woodland Reserve, subject to the provisions of Heads of Protection A, E and F in the Fourth Schedule of the Act unless specifically permitted by the policies in this Statement.</u>
d. Policy WDR.5 - An application for a vehicular or pedestrian access through a Woodland Reserve may only be approved if the Board is satisfied that: (a) it is necessary for gaining access to a development area, the water or is necessary for the enjoyment of the Woodland Reserve; (b) there is not a suitable alternative

alignment located beyond the boundaries of the Woodland Reserve; (c) the width of the access is kept to a practical minimum and the alignment protects specimen trees and natural features, and minimizes site excavation; and (d) the grounds in support of the proposal as submitted by the applicant justify the exercise of the Board's discretion.

e. Policy WDR.7 - Any development proposed in a zone which is adjacent to a Woodland Reserve shall have a minimum setback of 15 feet from the boundary of the Woodland Reserve in accordance with policy APC.19.

The Defendants

191. I have considered the evidence of Mr. Brazier which I summarised previously. I will address other parts of his evidence relevant to the CMP.

Mr. Redrobe

192. I have considered the evidence of Mr. Redrobe. He is a Chartered Valuation Surveyor in Bermuda since 1983 and became a Fellow of the Royal Institution of Chartered Surveyors in 1991 while managing the real estate department of a local bank. He is registered as a Professional Surveyor and as a Registered Valuer. The firm Fulcrum Property Consultants Limited to which he is associated is on the approved panel of Chartered Valuation Surveyors for the local banks.

193. He visited the Properties for inspection on 12 December 2023. As a result of his inspection, he formed the following opinions:

a. The Admitted Planting has no impact to the market value of Gatewood.
b. The Admitted Construction has no impact to the market value of Gatewood.
c. In respect of whether destruction of natural habitats for birds and other wildlife has any effect on the market value of Gatewood, he was not aware of this having any effect on the market value of property in Bermuda and he did not consider that any valuer would do so, and this ought not to be seen as a valuation question for that reason. He added that the value is subjective, it depends on an individual's needs and wishes for their land.

d. The Pathway has no effect on the market value of Gatewood. There is no market evidence in Bermuda for the establishment of licence/encroachment fees.
e. In respect of the Admitted Construction, using 90 and 91 square feet from a Noon BCEC Report:
    i. If the wall is located within Residential 2 zoning: (i) 90 sq ft would be valued at $2,700; and (ii) 91 sq ft would be valued at $2,730;
    ii. If the wall is located within Woodland Reserve: (i) 90 sq ft would be valued at $207; and (ii) 91 sq ft would be valued at $209.30.

Ciaran Keaveny

194. I have considered the evidence of Ciaran Keaveny. He is a consultant to Mr. Storey. He has 20 years' experience in landscape architecture, horticulture, and project management currently working for a local company. He frequently deals with Planning and the Department of Environment and Natural Resources ("**DENR**").

195. Mr Keaveny's evidence included the following:
a. In 2021 he prepared a CMP for Mr. Storey for Long House (the "**Storey CMP**"). On cross-examination he explained that Planning had asked for it as some parts of Long House had Woodland Reserve on it.
b. He is familiar with Long House having worked there previously in 2016 during the installation of four spindle palms in the north orchard. He has been to Long House over fifty times in the 3 years.
c. He assisted Mr. Storey with his retroactive applications to Planning which included for (i) a patio and stairs; (ii) the Storey CMP; and (iii) a Shipping Container.
d. On cross-examination he stated that: (i) he was not in Bermuda when the Hurricanes struck; and (ii) a person cannot get Planning permission or access across a neighbor's land without their direct consent.

The Law

196. The Development and Planning Act 1974 makes provision for the preparation of the Bermuda Plan 2018. Section 28 provides as follows:

Designated areas

28 (1) A development plan may designate by reference to this section areas of Bermuda (being areas considered to possess natural features of special environmental value) as areas (to be called "designated areas") to which one or more of the following heads of protection shall extend by virtue of this section—

(a) woodlands protection;
(b) agricultural land protection;
(c) beach protection;
(d) cave protection;
(e) habitat protection;
(f) other natural features protection

197. The Fourth Schedule provides as follows:

FOURTH SCHEDULE (Section 28)
DESIGNATED AREAS OF SPECIAL ENVIRONMENTAL VALUE
"(1) Subject to paragraphs 2 and 3 of this Schedule, the extent of the protection afforded by the several heads of protection listed in section 28(1) is respectively as follows—
A: WOODLANDS PROTECTION
(1) Subject to paragraphs 2 and 3, the following acts, if done wilfully, are forbidden—
(a) cutting down, topping, lopping, destroying, removing or otherwise altering a tree;
(b) destroying or removing any shrub, ground cover or other form of vegetation;
(c) disturbing or destroying any soil, rock or other ground material.
(2) …
(3) The Board may grant planning permission for any act forbidden in paragraph 1—
(a) to the extent allowed by the development plan in the circumstances specified in that plan; and
(b) if of the opinion that the doing of the act will not cause material damage to the woodland.

198. The Bermuda Plan 2018 sets out some relevant statements as follows:

Chapter 1 – The Bermuda Plan 2018 provides for the land use and development requirements of the Island in a way that makes the most effective use of its resources, protects its natural and built environment, and provides a good quality of life for the Island's residents. As such, the Plan helps to encourage suitable development on appropriate sites and helps the Development Applications Board make decisions on planning applications.

Chapter 6 – Environmental Analysis (ENV)
Conservation Management Plans
To determine the nature of management work that can be undertaken in relation to any coastal, woodland, agricultural land or natural habitat designated as a Conservation Zone or Conservation Area and protected in compliance with the Fourth Schedule of the Act, a Conservation Management Plan will be required. The Board may also require the submission of a Conservation Management Plan for any development proposal to ensure the proper maintenance and management of important flora and fauna, woodland, natural habitats, soil and substrata and amenity areas.

A Conservation Management Plan should include the appropriate plans, information and data in accordance with the policies of this chapter as well as the Department of Planning's Conservation Management Plan Guidance Note, including measures for maintaining and managing conservation areas to provide for greater biodiversity, to reduce invasive species, and to plant endemic and native species.

Conservation Management Plan
ENV.6 To determine the nature of management work that can be undertaken as permitted by the Fourth Schedule of the Act in relation to any woodland, agricultural land or natural habitat designated as a Conservation Base Zone or Conservation Area and protected in compliance with the Fourth Schedule of the Act (and any subsequent revisions), a Conservation Management Plan will be required.

ENV.7 To ensure the proper maintenance and management of important flora and fauna, woodland, natural habitats, soil and substrata, and amenity areas, the Board may require the submission of a Conservation Management Plan for any proposal that it determines one is necessary.

ENV.8 A Conservation Management Plan shall comprise a plan or plans at an appropriate scale and drawn, coloured and annotated in sufficient detail to accurately show the following information as relevant:

(a) the contours and zoning boundaries of the site taken from a current and accurate topographical survey and zoning map;
(b) existing vegetation noting species, height, spread, condition, and whether the vegetation is to be retained, relocated or removed;
(c) other physical features such as rock cuts, walls, fence lines, existing and proposed buildings, utilities, trails and roads;
(d) the extent of the proposed development including areas of hard surfacing;
(e) proposals for reducing invasive species and planting endemic and native species;
(f) the location and number of all proposed planting, noting species and size;
(g) proposals for improving wildlife and wetland habitats;
(h) the location of other conservation enhancements including artificial longtail nesting sites;
(i) proposals for reducing soil and coastal erosion;
(j) the location of any proposed protective fencing; and
(k) any other information detailed in the Department of Planning's Conservation Management Plan Guidance Note.

199. In the Court of Appeal case of *Vaucrosson v Lightbourne* Civil Appeal No 2 of 1974, Inness JA and Hogan JA accepted that the costs of reinstatement is a proper measure of damages in trespass cases except where reinstatement would be unreasonable. Hogan JA stated as follows:

"Turning to the question whether reinstatement or diminution in value was the proper criteria on which to rely, whilst subscribing to Lord Loreburn's observation in Lodge Holes Colliery Co. Ltd. v Wednesbury Corporation (1908) A.C. 323 that a court of justice should be slow to countenance any attempt by a wrong-doer to make captious objections to the methods by which those whom he had injured have sought to repair

the injury. I would, like the learned judge in the court below, adopt the view that the injured party's desire to reinstate the property should be measured against the necessity or reasonableness of so doing. If reinstatement is not necessary and the cost is out of proportion to the advantage derived from reinstatement then diminution in value appears to be the proper test. On balance that appears to me to be the proper construction of the authorities, many of which are summarized in Mayne and McGregor on Damages (13th Edition para. 1061 et al). Applying that test to the present case, I think the respondent's damages should be measured by the diminution in value and I would adopt the figures reached by Inness J and his order as to costs." [emphasis added]

200. The Supreme Court case of *Sukdeo v Ming* 1982 Civ No 242 involved an assessment of damages for trespass caused by the defendant's contractor for excavating a portion of the plaintiff's land as a result of a misreading of survey marks. Collett J stated [at 232] as follows:

"It is, however, observed in McGregor on Damages, 14th Ed. at page 761 that Jones v Goday is the only case where the cost of replacement has been refused to an injured plaintiff with a full freehold interest in possession and it can be distinguished upon the ground that reinstatement is inappropriate only where its cost would be unreasonably out of proportion to the value of the land before the wrongful act took place. That was the basis of the House of Lords decision in Lodge Holes Colliery v Wednesbury (1908) A.C. 332. In the English Court of Appeal decision in Harbutt's Ltd. v Wayne Tank Co. (1970) 1 Q. B. 447, the cost of a new replacement of a factory negligently burnt down was allowed and not merely the diminution in its value before the fire. Lord Denning M. R. at page 468 said:-

> *"The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed the owner only gets its value, because he can go into the market and get another to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed the company had no choice. They were bound to replace it as soon as they could, not only to keep their business going but also to mitigate their loss of profit - for which they would be able to charge the defendants".*

Although the facts here are different, I regard that passage as declaring the true principle of law and therefore decline to follow the early authorities. Applied to the facts here, I hold that a plaintiff whose building lot has been damaged by wrongful excavations in such a way that it is no longer possible or convenient for him to build upon it according to his approved plans is entitled to put in hand at the defendant's expense reasonable works of reinstatement with a view to restoring its ability to support and accommodate the building planned for it and thus also to mitigate any loss of rental which he might have expected to derive from it when complete. The plaintiff in this case is therefore in my judgment entitled to claim from the defendant

the reasonable cost to her of having the retaining wall built and the backfield installed in the excavated cavity on this lot."

201. The English Court of Appeal case of *Scutt v Lomax* [2000] 1 WLUK 530 was heard before Evans LJ and Clarke LJ, both formerly of the Bermuda Court of Appeal and involved the issue of trespass to land when the defendant had cleared the claimant's property of some mature and substantial trees. The Court stated as follows:

<u>*Clarke LJ*</u>

"40. The principles
41. The relevant principles are discussed between paragraphs 1474 and 1481 of the 16th edition of McGregor on Damages. As I see it, the position may be summarised in this way. Where trespass by the defendant has caused damage to the claimant's land, the claimant may be entitled to the diminution in value of the land or the reasonable cost of reasonable reinstatement, or in some cases a figure in between. All will depend upon the circumstances of the particular case, but the authorities seem to me to establish the following general propositions.
42.

1. The claimant will ordinarily be entitled to the diminution in value of the property unless the reasonable claimant would have reinstated the land at less cost.
2. The claimant who has in fact reinstated the property will ordinarily be entitled to recover the reasonable cost of doing so, even if the cost is greater than the diminution in value, unless he has acted unreasonably in reinstating the property.
3. Where the claimant has not in fact yet reinstated the property, (subject to 4 and 5 below) he will ordinarily be entitled to recover the reasonable cost of reasonable reinstatement, even if it is greater than the diminution in value.
4. In assessing what is the reasonable cost of reasonable reinstatement, the court will consider whether the amount awarded is objectively fair; that is fair to both parties. In particular, the court will not award a sum which is out of proportion to the benefit conferred on the claimant.
5. In assessing what steps it is reasonable to take by way of reinstatement, the court will take account of the cost of the reinstatement. Thus it may not be reasonable fully to reinstate the property because the cost of doing so may not be justified. All will depend on the circumstances of the particular case.

48. It is propositions 4 and 5 with which the appeal is principally concerned. They derive, in part at least, from the following. In paragraph 1480 McGregor says this:

"The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant and

having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land."

50. In assessing what is reasonable, the correct approach is an objective one. Thus in Farmer Giles Ltd v Wessex Water Authority, Russell LJ said at page 179 C-D:

"In reality, therefore, in making that award, I take the view that the judge has done no more than reflect in the damages the true diminution in value of this site and the circumstances of this case caused by the destruction of the building. The award, particularly when contrasted with cost of full reinstatement, in my judgment, also passes the test of reasonableness. I add that test of reasonableness because the authorities to which we have been referred indicate that reasonableness always has to be taken into account. The judge must stand back, when he has done his arithmetic, and ask himself whether the figure achieved by his findings is fair both to the plaintiff and the defendants.""

Evans LJ

"For the reasons given by Lord Justice Clark, I agree with him that the damages awarded to the claimant should be limited to the reasonable cost of what was a reasonable degree of reinstatement in the present case, taking account of all relevant factors. The evidence given before the District Judge was not directed towards this particular issue, but I agree with the learned judge that the court should draw the best inferences it can from the evidence that was given. The conclusion I have reached, like Lord Justice Clark, is that it is not unreasonable for the claimants to recover the cost of planting grown but not fully mature trees, and that the best estimate we can make of the cost of doing this is the figure of 8000 which he has described."

202. In McGregor on Damages (22 Ed) [at 40-003] the commentary set out that the determination of the measures of damages is highly fact sensitive. It states as follows:

"The principal issue is whether damages should be measured by diminution of the value of land or by the cost of reinstatement. The discussion which follows illustrates that this question is "highly fact sensitive". (See Lea Valley Development Ltd v Derbyshire [2017] EWHC 1353 (TCC); [2017] 4 W.L.R. 120 at [37]) However, the historical treatment by the courts of the distinction between the two measures reveals the relevant factors and guidelines which form the appropriate measure. The overarching principle is one of reasonableness."

Analysis

203. In my view, I grant the application for damages in the form of an indemnity in the amount it will cost to implement Mr. Banks' CMP, subject to some limitations as set out below, for several reasons.

204. First, in following the cases set out above in this section, I am satisfied that reinstatement is the proper form of damages in this case. In my view, the value of the destruction of the Woodland Reserve may not be possible to quantify in the form of a monetary value. It could be viewed as being priceless. In following the cases in *Vaucrosson* and *Sukdeo* citing *Lodge Holes Colliery* and *Scutt v Lomax* I am obliged objectively to measure Mr. Banks' desire to reinstate the GW Woodland Reserve against the necessity or reasonableness of doing so. Thus, in applying the objective approach as to what is reasonable, consideration must also be given to the fairness to the Parties. In my view, based on the expert reports of Mr. Darrell and Mr Cox, including that Mr. Banks is incurring ongoing monthly costs to manage the current state of the GW Woodland Reserve for no fault of his own, but that of the Defendants, I take the view that a reasonable person would find that it is necessary and reasonable to have reinstatement in all the circumstances particularly when the aim is make the GW Woodland Reserve eventually maintain itself at no costs to anyone.

205. Second, in my view, I am satisfied that Mr. Darrell's expert report sets out the importance of replacing such mature trees and vegetation in all the circumstances that he set out in his report. Gatewood is the property of Mr. Banks and he has been advised that there has been damage and consequential to the GW Woodland Reserve and he has been further advised by experts in the relevant fields of the need to restore the GW Woodland Reserve to the position it was before the actions of the Defendants. I am satisfied that Mr. Banks is entitled to rely on their expertise. Thus, the GW Woodland Reserve should have plants in it that amount to the kind that were in it or in other adjacent areas of the Woodland Reserve as observed by Mr. Darrell – not ornamental plants as selected by Mr. Storey. To that point, I am not satisfied that the Defendants' position and evidence, based on Mr. Redrobe's valuation evidence, that there has been no diminution in value undermines the reasonableness of reinstatement of the GW Woodland Reserve.

206. Third, I have considered the Defendants' submissions on the costs of various items included in the claim for reinstatement as set out in the CMP. I grant the indemnity for the

costs of the CMP and for the costs of the works set out in the CMP which I say below are reasonable, but subject to the following findings in respect of some specific costs issues:

a. Area A restoration should remain in the CMP.
b. Area B restoration should remain in the CMP as it is necessary to integrate the restoration with the existing vegetation in the Woodland Reserve. To that point, the Defendants argue that they did no work in Area B, however, to my mind, based on the CMP, work is required in that area to achieve a reasonably successful restoration in Area A.
c. Area C Boundary Wall - In my view, the building of a wall and fence are not properly a part of reinstatement of the GW Woodland Reserve. I reject any indemnity for the costs associated with the building of a wall or fence as set out in Area C of the CMP.
d. I accept that the Defendants did not plant invasive species in the GW Woodland Reserve. I reject any indemnity for costs associated with the removal of invasive species unless it can be determined that invasive species grew as a result of any actions by the Defendants.
e. I am satisfied with Mr. Darrell's opinion that the typical timescale for remediation such damage in the GW Woodland Reserve is at least 20 years of concerted management. Thus, the order for indemnity takes into account the 20-year plan as set out by Mr. Cox despite any earlier reference to a plan by Mr. Cox or Brown & Co for a shorter period

207. Fourth, I am of the view that the costs, subject to my findings in the preceding paragraph, are not out of proportion to the advantage derived from reinstatement. The Defendants argue about the difficulty or impossibility of making an accurate assessment of the costs because Mr. Banks cannot place a cost on what is a reasonable remediation of the GW Woodland Reserve and to its condition before the Admitted Planting and the Admitted Construction. They submit that this is because: (i) Mr. Banks had not been there for nine years; (ii) he has no idea what trees or conditions were there before or after 2014; (iii) Mr. Cox gave evidence that it had not been maintained for 30 to 50 years; and (iv) the woodland has grown and changed significantly since 2014. I reject those submissions as I am satisfied

that Mr. Darrell in his expert report in the various sections and in his oral evidence, set out a method to determine these matters, namely he did a comparative study of surrounding areas to see what was present, noting all the species which he listed in his report. His report was relied on by Mr. Cox and then Brown & Co to determine the costs, which I find are reasonable.

208. Fifth, in what is a fact sensitive approach per *McGregor on Damages*, in essence, Gatewood is a high value property in a high value estate. The Defendants expended approximately $600,000 to conduct the works on the Woodland Reserve along with other costs associated with the Admitted Construction and the Excavated Western Access Roadway. Thus, cost of restoration in the amount of $1.2 million (less the cost of some items set out above) is not out of proportion to the advantage of restoring the Woodland Reserve to its generally untouched natural state of decades or centuries. Thus, I decline to take the approach of diminution in value and the associated evidence. In my view, I consider the costs of reasonable reinstatement to be fair to the Parties in all the circumstances. In light of removing some costs items, the Court will hear from the Parties on any reduced costs for an amended CMP.

209. Sixth, in my judgment, reinstatement arises as set out above and I need not go further to establish the same. However, the thrust of the resistance by the Defence is that there is no legal liability placed on Mr. Banks to either restore the GW Woodland Reserve or to have a CMP. Here, I am guided by *Vaucrosson* which cites *Lodge Holes Colliery* where Lord Loreburn stated that the Court should be slow to countenance any attempt by a wrong-doer to make captious objections to the methods by which those whom he had injured have sought to repair the injury. I take that to mean I should attach little weight to the Defendants' position on reinstatement. However, I will seek to address the Defendants' position in the following paragraphs.

210. Seventh, I have read in some exacting detail the Development and Planning Act 1974, section 28 and the Fourth Schedule of the Act, the Bermuda Plan 2018 the Guidance Note 107. In my view, generally, when read together they set out the importance, the

principles, the strategy and the process for the protection and development of land in Bermuda including Woodland Reserves. In my view, it is clear that certain activities are prohibited in Woodland Reserves and certain activities require permission to be undertaken in Woodland Reserves.

211. Eighth, in order for Mr. Banks to restore the GW Woodland Reserve as advised, he is required when reading the Planning Documents to submit a CMP, which he has done, for Planning permission to carry out the restoration works. I am satisfied that the several provisions which make it mandatory to submit a CMP apply in these circumstances. In particular, generally, the acts of the Defendants in the GW Woodland Reserve were prohibited. Thus, the Bermuda Plan Chapter 20 Introduction states "*In the event that a Woodland Reserve is damaged or cleared by natural causes or otherwise, every effort should be made to re-establish it, and the property owner shall be encouraged to submit a CMP detailing such restoration works.*" Further, in that chapter, WDR.2 and WDR.3 support the mandatory nature for a CMP to be submitted. In my view, the work Mr. Banks wishes to do is prohibited unless it is specifically permitted.

212. Ninth, I have considered the Defendants' argument that the Director of Planning has enforcement power under the Development and Planning Act 1974 including the power to issue notices and civil penalties, noting that no such notices or civil penalties have been issued to Mr. Storey. The argument made the point that the Development Applications Board can require an applicant to submit a CMP in support of an application for planning permission. Further, the argument is that Mr. Banks has no legal liability for acts taken in the Woodland Reserve, which could only occur by Planning's enforcement powers, noting that the time limit for enforcement action has expired. I reject this argument because Mr. Banks should not have to wait upon any enforcement actions by Planning in order to address the tortious wrongs committed to his land by the Defendants. In my view, the powers of the Director of Planning do not remove the Court's powers to address the wrongs by way of damages, and in this case by way of a CMP to effect restoration.

213. Tenth, I have considered the arguments of the Defendants that, if Mr. Banks has any legal liability, they did not cause it as the Admitted Planting was an attempt to reestablish the Woodland Reserve after the hurricane damage. I have dealt with the issue of damage from the Hurricanes and the Admitted Planting in some detail. I have found that the damage was not caused by the Hurricanes and that the Admitted Planting is a trespass. In my view, the acts of the Defendants have caused the damage to Mr. Banks' property. To that point, the Defendants argue that they have not caused a legal liability to have a CMP. In my view, if that were the case, it still misses the point that Mr. Banks is entitled to damages, and in this case by way of a CMP to effect restoration.

214. Eleventh, I reject the Defendants' arguments that any such liabilities were not reasonably foreseeable and was thus too remote. To my mind, it was overwhelmingly clear that liability would attach in the circumstances of trespass and causing damage to the GW Woodland Reserve. Thus, it follows that it was not too remote.

215. Twelfth, I have considered the claim for a prohibitory injunction to allow Mr. Banks access to the GW Woodland Reserve by way of Long House and the Excavated Western Access Roadway in order to effect reinstatement of Area A and Area B by way of the CMP. I do note that after some objection from Planning about Mr. Banks using Long House to access the GW Woodland Reserve, he has submitted that he has amended his CMP application to remove the need for access over Long House. In alignment with that position, I am not satisfied that I should make an order to allow Mr. Banks to cross over Long House to access the GW Woodland Reserve to implement the CMP, or for Mr. Banks to use Long House for water supply and storage of equipment – for what could be 20 years of maintenance. I consider this to be excessive and prolongs the interaction of the Parties who seem to prefer to want to be fully separated in respect of any issues with the Properties. However, if there are any exceptional reasons that Long House should be used minimally for a limited time period to effect any specific part of the CMP, then the Court will hear such an application with submissions from the Parties, taking into account a principal ground of avoiding any destruction to other undamaged areas of the GW Woodland Reserve.

Issue 5 – Mr. Banks' Use of the Asphalted Roadway

216. There is an issue as to the location of Mr. Banks' right of way across Long House, namely is the Asphalted Roadway in the location where Mr. Storey says it should be, namely the Gatewood RoW (D) or is it in the location where Mr. Banks says it presently is and should be, namely Gatewood RoW (P). As I stated previously, the two positions of the right of way overlap each other as they traverse the Asphalted Road in a parallel fashion. In order to resolve this issue, a deep dive of the conveyances and various plans was necessary.

The Law

217. In *Steede v Lewis and Lewis* [2017] SC Bda 60 Civ at [35] Hellman J stated:

> *"As Lord Denning explained in the latter case at 595 E – F, the grant must be construed as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant. The other side of the coin is that no-one entitled to use the right of way may use it to an extent which is beyond anything contemplated at the time of the grant. The time of the grant is the date of the relevant instrument, which need not be the date on which the grant takes effect. See Roe v Siddons (1888) 22 QBD 224 EWCA per Lord Esher MR at 233 and Lopes LJ at 237."*

218. In *Fearn v Board of Trustees of the Tate Gallery* [2023] WLR 339, Lord Leggatt of the UK Supreme Court stated as follows:

> *"F. THE PUBLIC INTEREST*
> *114. I have pointed out where I believe the judge and the Court of Appeal respectively were mistaken in their analyses of the claim. How did those courts come to make different errors of law which nevertheless led them both to dismiss the claim? I think there is a common explanation. It is that both courts were influenced by what they perceived to be the public interest in the use made of the Tate's viewing gallery. To be clear, I do not suggest that it is wrong to take account of the public interest. What is wrong is to treat it as relevant to the question of liability for nuisance rather than only, where liability is established, to the question of what remedy to grant.*
> *...*
> *119. The Court of Appeal's discussion was directed at "overlooking". But the difficulties that concerned the Court of Appeal about reconciling the different public and private interests in a use of land which materially interferes with the ordinary use of neighbouring land can occur in relation to almost any form of nuisance. In Lawrence, for example, the interference consisted of noise from motor sports carried on at the defendant's stadium and adjoining track. The question whether to restrict those activities potentially affected the interests of many people who derived enjoyment*

or economic benefit from taking part in or watching the various motor sports. Industrial activities which cause atmospheric pollution to neighbouring land may have substantial economic importance including for those employed in the undertaking. These are classic cases falling within the scope of the law of nuisance. The difficulties of reconciling the different public and private interests involved in such cases have not been treated as a reason for the courts to abstain from granting any remedy for violations of private rights in respect of land use, and instead to leave such matters to the planning system or the legislature. And rightly so. The result of such abstinence would in practice simply be to leave the rights of individuals without any effective protection. That was what the Court of Appeal did here.

120. The correct approach - for which the leading authority is now this court's decision in Lawrence - where significant considerations of public interest are raised is for the court to take this factor into account, not in determining liability, but, where liability is established, in deciding whether to grant an injunction or to award damages.

(2) Why the public interest is not relevant to liability

121. I said I would come back to the principle that a defendant cannot avoid liability for nuisance by arguing that its activity is of public benefit. The reason is simply that private nuisance is a violation of real property rights (see paras 10-11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose - say, as a short-cut or as a place for taking exercise - is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference. In Sturges v Bridgman, for example, no one thought it relevant to examine the public utility of Mr Bridgman's use of his land for making confectionery or to seek to compare this with the public utility of Dr Sturges' use of his consulting room. (Although the economist Ronald Coase was understood by some to have proposed such an approach in a famous essay, it is entirely inconsistent with the common law: see RH Coase, "The Problem of Social Cost" (1960) 3 JL & Econ 1; and David Campbell & Matthias Klaes, "What Did Ronald Coase Know about the Law of Tort?" (2016) 39 Melb U L Rev 793.) The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party's use has infringed the other's rights, the public utility of the conflicting uses is not relevant.

122. Property rights are not absolute. There are circumstances in which they may be subordinated to the general good of the community - a classic example being the expropriation of land needed for a major infrastructure project. But it is fundamental to the integrity of any system of property rights that, in any such case, the individuals whose rights are infringed or overridden receive compensation for the violation of their rights. In other words, the public interest may sometimes justify awarding

damages rather than granting an injunction to restrain the defendant's harmful activity, but it cannot justify denying the victim any remedy at all." [emphasis added]

Defendants' Submissions

219. The Defendants accept that Mr. Banks enjoys a right of way over part of Long House by use of the Gatewood RoW (D). Thus, their claim is that the Asphalted Roadway as laid by Mr. Banks does not conform to the Gatewood RoW (D) granted to Mr. Banks, and therefore all use of the roadway outside of the Gatewood RoW (D) is trespass. Mr. Robinson made a number of submissions as follows:

a. The relevant instrument granting the right of way is the Indenture of Conveyance dated 19 February 1958 (the "**Indenture**").
b. A right of way cannot be varied or released unilaterally but only by express agreement between the parties.
c. Mr. Banks says the original surveys produced for the parties are all wrong.
d. All descriptions of the right of way referenced by Mr. Banks use the word "… *leading from the Northeastern corner*", which is a clear indication the right of way is and was always intended to be against the boundary. Mr. Banks accepted this in oral testimony.
e. Mr. Banks is confusing a road with a right of way. The current use of the land does not prove anything as regards the location of the right of way.
f. Zoning Order 20 cannot affect contractual rights between tenements.
g. The Court should make a declaration that the right of way is 14 feet wide and runs along the northern boundary of Long House.

Plaintiff's Submissions

220. Mr. Elkinson made a number of submissions as follows:

a. Mr. Banks did not construct a roadway, he only ever paid for the resurfacing of the roadway that runs from South Road through the estate to his home. This position is supported by Zoning Order 20, maps from the deed plans of surrounding properties and by Mrs. Sharon Trimingham.

b. The Asphalted Roadway coincides exactly with the Gatewood RoW (P) and there has always been a 6 foot verge between the Gatewood RoW (P) and the northern boundary of Long House.

Witnesses of fact

221. I have considered the evidence of Mr. Storey on this issue. He asserts that Mr. Banks caused the Asphalted Road to be laid in the wrong location across the top of the Upper Lot, such that it does not conform with the Gatewood RoW (D). Further, he asserted that from Google Earth images it appears the work took place between 2008 and 2011. He referred to Historical Image dated 13 May 2008 and Historical Image dated 30 March 2011. Mr. Storey also stated that there is a strip of land north of the Asphalted Roadway, along the northern boundary of the Upper Lot, (the "**Grass Verge**") which does form part of the Gatewood RoW (D) but remains part of the property of Long House. He claims that Mr. Banks, his servants or agents, have trespassed on that Grass Verge, and converted it to their use by removing trees, and vegetation and replanted it with a lawn and hedge. They have repeatedly trespassed in order to tend to it, including cutting the grass, trimming hedges, weeding and painting fences despite his numerous requests to desist. He stated that he tends to that part of land as it is a part of Long House.

222. On cross-examination, Mr. Storey stated that the 1958/59 plan shows the position of the road being in the northwest corner of the property for a 14 feet width, which coincide with his deeds. When challenged that his surveyor Mr. McKee says that the road is in the same position for the last 50 years, Mr. Storey maintained that the drawings do not match the deeds. He disagreed with Mrs. Trimingham's evidence that the road had not been moved since she first went there in 1969.

223. I have considered the evidence of Mrs. Sharon Trimingham who stated that she first visited Tom Trimingham in Inglewood Estate in 1969, later marrying him in 1981 and building their home in Inglewood Estate in 1983. She had dated Tom for 10 years before marriage and since then, she and Tom often walked along the Asphalted Roadway with her daughter and dogs, there being no part of the road that she did not use up to Andrew

Trimingham's house, now Gatewood. She still uses the full extent of the roadway with her grandchildren and dogs. She stated that the roadway from the main road through the estate remains in the exact same location as it had been since when she first went there in 1969. Mrs. Trimingham stated that she observed the resurfacing work which was only that, resurfacing. She maintained that the roadway was never moved from the original position which it had been in over the 40 years in which she lived on Inglewood Estate and over 50 years since she first visited there. On cross-examination, she stated that Mr. Banks had stated that, due to the damage done to the road as a result of his construction, he would get it repaved. She was not cross-examined on whether the location of the road had changed.

224. I have considered the evidence of Mrs. Paula Maguire. As stated above, she lived at Long House for the period January 2006 until January 2013. She stated that when Mr. Banks finished the construction of Gatewood, he resurfaced Inglewood Lane from South Shore Road to Gatewood, noting that the Asphalted Roadway did not change position when it was asphalted and that it was always in the same position. Mrs. Maguire was not cross-examined on this evidence.

Documentary Evidence – deeds, plans, surveys, Zoning Order 20

225. I now turn to the documentary evidence on the issue, namely deeds, plans and surveys as referred to by the witnesses.

226. Mr. Banks' evidence was that his property consisted of two lots, Lot 14 and Lot 15, which the previous owner Andrew Trimingham had had united in 1979. The title deeds for Gatewood show the two lots and the two 1958 Voluntary Conveyances dated 19 February 1958 have the same February 1958 plan attached to them, as created by Clarke & Doidge, Engineers and Surveyors, marked "Job No. 6369" (I refer to the plan as the Original Clarke Plan 1958). That plan was the plan used for describing the Inglewood Property attached to Zoning Order 20, which was made under the Building and Land Development Control Rules 1948, which defined the Inglewood Property.

227. Mr. Banks was cross-examined on the first Voluntary Conveyance for the western lot of the two, measuring 174 feet along the roadway and 2.8 acres, agreeing as follows:

a. that the Indenture (at page 6) described the land at Gatewood – which did not have a right of way over it.

b. that the Indenture (starting at page 6 going over to page 7) described Gatewood's right of way over the next eastern property, Long House and the next eastern property (Agapanthus) as being fourteen feet wide up to a 'turnaround' and then as being twenty feet to South Shore Road thereafter as follows:

"AND ESPECIALLY TOGTHER with full free and unrestricted right and liberty of way and passage for the said Harold Gilbert Lutyens Trimingham his heirs and assigns owners for the time being of the parcel of land above described or any part thereof and his and their tenants and servants and all other lawfully authorized persons with or without animals and vehicles of all descriptions OVER AND ALONG the roadway fourteen feet wide coloured yellow on the said plan leading from the northeastern corner of the parcel of land above described in an Easterly and thence in a North-easterly direction to a turnaround AND ALSO OVER AND ALONG the said turnaround shown on the said plan and thereon colored yellow AND ALSO OVER AND ALONG the roadway twenty feet wide also coloured yellow on the said plan leading from the said turnaround in a Northerly direction to the South Shore public Road. [emphasis added]

c. that the Indenture states that the right of way starts in the northeastern corner of Gatewood and proceeds easterly.

d. that the Indenture did not describe a six-foot verge or privacy buffer.

e. that the map attached to the Indenture showed the words 'roadway 14ft wide' with a little arrow pointing to the roadway.

f. that there was no mention of any right or easement to run any cables over any land – noting that that subject was in the Zoning Order.

228. Mr. Banks was cross-examined on the second Voluntary Conveyance for the eastern lot of the two, measuring 188 feet along the roadway and 2.875 acres agreeing as follows:

a. that the Indenture states that right of way starts in the northeastern corner of the parcel of land and proceeds easterly.
b. that the Indenture did not describe a six-foot verge or privacy buffer.
c. that the map attached to the Indenture showed the words 'roadway 14ft wide' with a little arrow pointing to the roadway.
d. that there is a line indicating 188 feet as being the width of the lot.
e. that there was no mention of any right or easement to run any cables over any land – noting that that subject was in the Zoning Order which obliges the landowners to put all utilities underground as stated in plain English.

229. I should here refer to the Defendants' title deeds which refer to the Right of Way in the following terms:

> *"... BUT SUBJECT NEVERTHELESS to full and unrestricted right and liberty of way and passage for the owners and occupiers for the time being of the parcels of land lying to the West of the parcel of land ... OVER AND ALONG that portion of the parcel of land above described colored Green on Plan 2 being Fourteen feet (14') wide and running along the Northern boundary thereof"* [emphasis added]

230. I have considered the surveys that address this point. The Noon 2021 Survey Report dated 1 September 2021 was commissioned by Mr. Banks. At paragraph 3(c) Mr. Noon stated "*The long standing location of existing asphalt surface providing vehicle access to the " GateWood" property, over 13 Inglewood Lane, does not conform to the position of the legal Roadway 4.27 metres wide which is colored yellow on plan CS/ 1464.*" He included an Annex B plan of the same date with yellow shading to show the location of the legal roadway. Also, he laid out the location of the Asphalted Roadway. On cross-examination, Mr. Banks agreed that the yellow strip was running from the northeastern corner of Gatewood. To my mind, the two areas overlap such that they look like a 3-lane roadway, with the legal roadway (2 lanes) in yellow running along the boundary, the asphalted road (2 lanes) running approximately 5 ½ – 6 feet from the boundary, and the middle lane belonging to both the legal roadway and the asphalted road.

231. The BCEC McKee Letter 2021, including the BCEC Plan dated 19 August 2021, was commissioned by Mr. Storey. It showed the legal roadway marked in yellow running from the northeastern corner of Gatewood. That yellow shaded area is running along the boundary. It also showed the existing Asphalted Roadway running several feet from the boundary. Mr. McKee described the Asphalted Roadway as being approximately 5 ½ - 6 feet further south of the legal right of way. To my mind, I ascribe the same description from the previous paragraph of an area of 3 lanes with the middle lane overlapping.

232. The Revised Noon 2022 Survey Report dated 14 April 2022 was commissioned by Mr. Banks. Paragraph 3(a) and (b) had the same wording as the original report. However, Mr. Noon included a new paragraph 4 as follows [emphasis added]:

"4. The Roadway (4.27 metres wide) - see Revised Annex B dated 14 March 2022.

An anomaly exists, with the title deed and survey information for the "GateWood" and "Long House" properties, relating to the location of the Roadway (4.27 metres wide) which provides legal access to the " GateWood" property across the land of the "Long House" property - please find details below.

"Gate Wood" Title Deed documents.

a) The Roadway (4.27 metres wide) coloured yellow on Revised Annex B represents the location of this right of way as shown on the title deed plan for the "GateWood" property.

b) The title deed plan is a plan prepared by Surveying Services Limited (SSL) with Reference No. 1614 dated July 2000 - please find attached. The SSL plan shows a note on the plan stating that the plan has been prepared from an existing plan and is not the result of a recent survey.

c) The Roadway (4.27 metres wide) colored yellow is shown as being offset, to the south, by a distance of 1.83 metres from the northern boundary of the "Long House" property.

"Long House" Title Deed documents.

a) The Roadway (4.27 metres wide) hatched green on Revised Annex B represents the location of this right of way as shown on the title deed plan for the "Long House" property.

b) The title deed plan is a plan prepared by Bermuda Caribbean Engineering Consultants Limited (BCEC) with Drawing No. SV11129/2/12 - please find the attached title deed documents.

c) The Roadway (4.27 metres wide) hatched green is shown abutting the northern boundary of the "Long House" property."

233. On the Revised Plan Annex B Mr. Noon referred to both 'roadways' as the "Legal Roadway". On cross-examination, Mr. Banks stated that Mr. Noon was relying on the following for support: (i) for Gatewood, the SSL plan with Ref. No 1614 dated July 2000; and for Long House, the BCEC Drawing No. SV11129/2/1; rather than the 1958 voluntary conveyances. Mr. Banks denied that he or Dame Pamela had given instructions to Mr. Noon to change his report, or that they threatened to sue him, describing Mr. Noon as a good Scotsman who he did not believe would take instructions from a client. He stated that they wanted him to look at all the plans in the deed pack, which he did eventually, after which he had a different understanding.

234. In the Conveyance dated 17 December 2012, in respect of the sale of Long House, in essence from Claudette Trimingham to the Defendants (both involving trusts and respective trustees), reference was made to the Original Clarke Plan 1958 describing the right of way as being fourteen feet wide and running along the northern boundary.

235. I have considered the Zoning Order which created the Inglewood Property. As a starting point, I bear in mind the principles as set out in the case of *Minister of the Environment v Barber and Scarborough Property Holdings Limited* [1994] Civ Appeals No. 23 and No. 26. Huggins JA gave the Judgment while daCosta JA and Astwood P provided their separate reasons. daCosta JA considered the nature of planning legislation stating "*The Act is a public code for the planning, development and use of land in Bermuda, and it must be construed in that context.*" He cited Lord Guest in *Simpson v. The Corporation of the City of Edinburgh SC* (1960) S.C. 313, 316 who stated: "*From the preamble to the Act of 1947 it is apparent that it is a public code for planning and development and use of land in Scotland. It is not intended primarily for the protection or benefit of individual proprietors."* and at 317 *"Where an Act regulates the development of*

land, the interests of the public may be expected to be the primary concern of the Legislature. If from this regulation another class of persons derive advantage, this does not spring from the primary purpose and intention of the Act …. The overriding purpose of the town planning legislation is the benefit of the community." Thus, I take the approach that the Zoning Order is for the benefit of the Inglewood Estate 'community', not primarily to affect contractual rights between owners of land there. However, I am of the view that the Zoning Order can be used as evidence to assist in determining issues between parties.

236. I have also considered the evidence of Dame Pamela. It is necessary at this stage to set out relevant parts of her evidence in depth to get a useful handle on the chronological development of the various plans. Dame Pamela gave evidence of the Zoning Order as she had conducted research when seeking planning permission for Gatewood. The Zoning Order was enacted into legislation in 1959 and is still in force today. She stated that the historical documents show that the Defendants' and Trustees' predecessors in title voluntarily obtained the Zoning Order along with other members of the Trimingham family and other Inglewood Lane property owners.

237. Dame Pamela stated that the Defendants are wrong in their assertion that the Asphalted Roadway is in the wrong place. In essence, she stated that there were a number of documents and plans that show the scale of the roadway between Gatewood and the turnaround as being 14 feet and the remaining Grass Verge as being 6 feet to make a total of 20 feet which aligned with the width of 20 feet for the roadway from the turnaround to South Shore Road. Those documents are: (i) the Zoning Order plan 123/A/10 dated 10 December 1958; (ii) the February 1958 Deed Pack Plan for #13 and #17 Inglewood Lane; (iii) the transfer notice dated 29 July 2015, the March 2013 survey and the December 1958 Deed Pack Plan for number 11 Inglewood Lane (Agapanthus); and (iv) another iteration of the Clark and Doidge Plan dated December 1958 and described as Job Number 6369. She stated that the same plans also show an arrow pointing to the location of the 14 foot roadway for clarity. To those points, I have reviewed those plans and I have seen the 6 foot Grass Verge, the 14 foot roadway and the arrow pointing to the location of the of the 14 foot roadway as described.

238. Dame Pamela stated that she had conducted extensive research on the ownership of land in Inglewood Estate through her research at Bermuda Archives, Planning Department and Land Title Registration Office, and with various people, including members of the Trimingham family. She referred to the Revised Clarke Plan 1975 which she said was prepared by the same Robert Clarke who had prepared the Original Clarke Plan 1958 and who owned Lot 9 from March 1959 to until 1971. In her view, the purpose of the Revised Plan was to show an update that included a developed Lot 9 with a house and a pool, in place of the empty lot shown on the Original Clarke Plan 1958.

239. Dame Pamela's evidence was that the Revised Clarke Plan 1975 showed the roadway from the turnaround to Gatewood in the correct physical location, measuring 20 feet wide, the same size as the roadway from the turnaround to South Shore Road, but it was wrongly identified as a total of 14 feet wide, with the 6 foot verge line omitted from the plan. Also, the arrow indicating the southerly location of the 14 feet roadway was missing. This contrasted with the Zoning Order Plan, the February 1958 Deed Pack Plans and the Original Clarke Plan 1958. I have reviewed the plans and noted the descriptions.

240. Thus, Dame Pamela's evidence was that the Revised Clarke Plan 1975 was intended for use only for Lot 9 which was sold several times before and after 1975. Her evidence was that the Revised Clarke Plan 1975 appeared erroneously in 3 Deed Packs in Inglewood property sales (Lots 4, 9, 11) since the Zoning Order with plan 123/A/10 passed in 1959. Their use of the Revised Clarke Plan 1975 was unaffected by the error because they all shared the 20 foot roadway from their properties to South Shore Road. However, it was not the statutory plan and was not contained in any of the other properties' Deed Packs. Thus, land surveyors from Bermuda Realty, Crisson Real Estate and BCEC all used the Revised Clarke Plan 1975, appearing to assume that the Revised Clarke Plan 1975 could be used for the entire Inglewood Estate. It was used by CCL and BCEC in their 2021 surveys of Lots 13 and 17 but did not appear in either of the Deed Packs for Lot 13 or Lot 17 and was not the plan on which the Zoning Order was enacted.

241. Dame Pamela referred to the QSL Agapanthus 2013 Plan, obtained from the Land Title Registry Office, which showed the 14 foot roadway and 6 ft verge which supported that position. I have reviewed that plan and noted the description. Also, she referred to a plan obtained from Land Title Registry Office attached to a 1983 conveyance of 13 Inglewood Lane. It showed the roadway in the same 'correct' position as the Zoning Order Plan 123/A/10 and Mr. Banks' Deed Packs, and the QSL Agapanthus 2013 Plan and the Original Clarke Plan 1958. Dame Pamela stated that having reviewed the 2021 Surveys from Noon and BCEC, and knowing them to be incorrect, she contacted Mr. Noon, who after further research, issued his Revised Noon 2022 Survey Report noting an anomaly.

242. The essence of Dame Pamela's evidence was that the proper position for the right of way across Long House is the Gatewood RoW (P) and which is where the Asphalted Roadway is currently located.

Analysis

243. In my view, I reject the Defendants' counterclaim that Mr. Banks has trespassed by use of the Asphalted Road in its current location. Further, I reject the Defendants' application for a declaration that the right of way is 14 feet wide and runs along the northern boundary of Long House. I come to these conclusions based on a number of reasons.

244. First, I am satisfied by the clear evidence of Sharon Trimingham that the Asphalted Roadway has always been in the same location, she having used it over the last 50 years since 1969 to the present day. I also accept her clear evidence that the road was resurfaced in the same position as it had always been and her insistence that it had not been moved from its original position.

245. Second, I accept the similarly clear evidence of Mrs. Maguire that the Asphalted Roadway did not change position when it was resurfaced after the construction of Gatewood. She was living there at that time and observed the process.

246. Third, I accept the evidence of Mr. McKee, in his letter dated 11 December 2012, that the position of the Asphalted Roadway has been in existence since the creation of the estate lots.

247. For the above reasons, I accept that when Mr. Banks resurfaced the roadway, after the completion of the construction of Gatewood, he did not move the Asphalted Roadway from its original location.

248. Fourth, the Defendants' case along with their cross-examination of witnesses for Mr. Banks relies on various sets of wording in the Defendants' deeds about the right of way. They assert that "*running along the Northern boundary thereof*" means that the Right of Way abuts the northern boundary of Long House including the Grass Verge. However, I am not satisfied by that assertion, preferring Mr. Banks' approach that '*running along*' is merely a generic description of the general route of the Right of Way with the 6 foot Grass Verge being along the northern boundary, clearly supported by: (i) the depiction of the Right of Way some feet away from the boundary on the Original Clarke Plan 1958; and (ii) the factual existence of the Asphalted Roadway and the Grass Verge at the time of the grant. In my view, I agree with Mr. Elkinson that, if the draftsman had intended, in light of the clear Grass Verge as set out on the original Clarke Plan 1958, to convey the route of the Right of Way as running directly against the northern boundary then they would have used specific language such as 'abutting", "directly abutting" or "bordering" the northern boundary.

249. Also, the Defendants case is that the Indentures use the words "*leading from the northeastern corner*". Thus, Mr. Robinson submitted that: (i) the conveyance to the Defendant, dated 12 December 2012 (almost 54 years later) has almost identical wording to the 1958 voluntary conveyances; (ii) that the easement was originally granted in the Indenture; (iii) following *Wesleyvale Limited v Harding Homes (East Anglia) Limited*, that where the exact route of a right of way is uncertain, it is for the servient owner , that is the Defendants, to prescribe its exact position. Thus, as all descriptions of the right of way referenced by Mr. Banks use the words "… *leading from the Northeastern corner*", then

that is a clear indication the right of way is and always was intended to be against the boundary; (iv) clear words should take precedence over any plan, which is included only as an indication of the location of the right of way. He noted that there were variations in the plans provided for in the evidence of Dame Pamela and the plans appended to the Indenture and later on to the Conveyance; (v) there was ambiguity in the plans whereas the wording in the 1958 conveyance was clearly intended to define the property when the document is read as a whole and the wording describing the easement should also be taken defining it, particularly in circumstances where the plan is unclear.

250. In *Wesleyvale Limited* Lewison J stated:

"One of the important factors in construing a conveyance is to relate the description in the instrument to the topography of what is conveyed. In Jackson v Bishop [1979] 48 Property and Compensation Reports, page 57, the Court of Appeal held:

"Where there are inconsistencies between a verbal description and a plan, the competing interpretations must be applied to the physical features on the ground to see which of them produces the most sensible result."

As Lord Bridge LJ observed: "It seems to me that the decision is one which must depend on the application of the plan to the physical features on the ground, to see which, out of two possible conclusions, seems to give the more sensible result."

251. In the Bermuda Court of Appeal case *Fisher v Cox* [1988] Bda LR 2, a case about an easement, daCosta JA stated as follows:

"The problem here is one of construction. "In the case of an easement expressly granted or reserved the right of the dominant owner depends on the words of the relevant deed construed in the light of the surrounding circumstances at the time of the grant." (see Gale on Easements 14th Ed p. 139; ...).

The correct approach to the problem was clearly laid down by the Court of Appeal in England:

"It is no doubt true that in order to construe an instrument one looks at the instrument and no doubt one may form a preliminary impression on such

inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction. Of course, one may have words so unambiguous that no surrounding circumstances could affect their construction" (St. Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No. 2) (1975) 1 All ER 772 at 779 per Sir John Pennycuick).

The principles dealing with the interpretation of documents are now well established; and "the object of all interpretation of a written document is to discover the real intention of the author." (see Halsbury's Laws of England, 4th edn Volume 12 sec1459). To the question how is the intention to be ascertained Halsbury states:

"The intention must be gathered from the written instrument in the light of such extrinsic evidence as is admissible for the purpose of construction. The function of the court is to ascertain what the parties meant by the words which they have used to declare the meaning of what is written in the instrument, not of what was intended to have been written, to give effect to the intention as expressed, the expressed meaning being for the purpose of interpretation, equivalent to the intention." (para 1460)

252. In *Network Rail Infrastructure Limited v Freemont Limited* [2013] EWHC 1733 (Ch), Deputy Judge Strauss QC, stated as follows:

"28. The evidence that is admissible for the purpose of construing the parcels clause in the 1990 Lease is thus governed by the second Investors Compensation Scheme principle, [1998] 1 WLR 896 at 912-3, as explained by Lord Hoffman in B.C.C.I. v Ali [2002] 1 A.C. 251 at para. 39. It consists of any relevant background material known or reasonably available to both contracting parties. However, this is subject to the point, explained in Lewison on The Interpretation of Contracts 5th ed. at para, 3.17, 11.04, that

"… in the case of a document like a conveyance which will pass from hand to hand the reasonable reader would only place weight on background facts that are unlikely to change, such as the physical features of the land conveyed".

…

253. Thus, applying the principles in the Bermuda Court of Appeal case of *Fisher v Cox*, I am obliged to consider the words in the instrument construed in the light of surrounding circumstances. I do this by considering both sets of words "*leading from the northeast corner*" and "*running along the northern boundary*". As stated by the Court of Appeal in

England, while those words may cause one to form a preliminary impression that the Right of Way may be on the northern boundary, it is necessary to consider the surrounding circumstances and what the parties meant by the words used. In my judgment, the various plans show the Grass Verge and the 14 foot roadway, that is the Zoning Order Plan, the DoPW Clarke Plan 123/A/10 1958 and the Original Clarke Plan 1958. Thus, it is clear to me that as a starting point, the parties always intended for there to be a 20 foot wide strip of land for access from South Shore Road to the turnaround. Thereafter, for the final few lots of land towards Gatewood, there would be the same 20 foot wide strip of land, as the scaled drawing shows, but the properties would be served by a 14 foot wide roadway with a 6 foot Grass Verge.

254. The intention is further supported by the precise details of the said 1958 plans. I will refer to the Original Clarke Plan 1958. The Defendants assert that there is a note "Roadway 14 ft wide" with an arrow pointing to the roadway as abutting the northern boundary. This version would mean that the line inside the roadway is depicting the length of the respective lots of land, that is, 188 feet, 188 feet and 158 feet but not a distinction between the roadway and the Grass Verge. I reject that assertion because: (i) there is no such line depicting the length of 174 feet on the western most plot, that is Lot 15 at the time; and (ii) there is no such line depicting to where the measurement of 249 feet applies; and (iii) it would be inconsistent with the aerial picture referred to above which shows a road and a Grass Verge

255. I infer further support in respect of the intention of the parties, in that there is a 1962 picture from the Department of Planning's ArcGis database. To that point, I have reviewed that photograph which appears to show the road between Agapanthus, crossing Long House and leading to Gatewood. I have observed that immediately north of the roadway is a verge of land with vegetation on it, which I take to be the Grass Verge which clearly shows the roadway in the exact location where it exists today, along with the Grass Verge, although I note that the picture is dated 4 years after the 1958 documents. To that point I find that the roadway as set out in 1962 aligns with the roadway as depicted on the Original Clarke Plan 1958, that is the Gatewood RoW (P), and that it still accords with the existing

position some 65 years later with the Grass Verge running alongside the northern boundary of the Asphalted Roadway.

256. Fifth, I am satisfied that Dame Pamela's evidence shows how the Revised Clarke Plan 1975 is erroneous in that it depicts the Right of Way as abutting the northern boundary of Long House. Her evidence had the quality of a thorough forensic review of the deeds and plans of the Inglewood Estate properties, although the Defendants submit that Dame Pamela is not an expert on surveys and plans, such that it leads to a clear logical conclusion that Mr. Clarke prepared the Revised Clarke Plan 1975 for purposes in relation to Lot 9. In my view, it was not for any purposes connected with the roadway leading from the turnaround to Gatewood. I find that the Revised Plan did disregard the 6 foot Grass Verge which had been in existence for at least 60 years and which had been shown on the original Clarke Plan 1958. Further, I find that along the roadway from Gatewood to the turnaround, comprising the Grass Verge and the 14 foot roadway for a total of 20 feet, does align with the 20 foot roadway from the turnaround to South Shore Road. Following that line of thought, I also find that some subsequent plans were based on the erroneous Revised Clarke Plan 1975, including the Plan of Sub-Division for Long House dated 25 February 1999. To my mind, it then follows that the 2021 Survey Plans placed the right of way along the northern boundary, such that I am not prepared to rely on them, instead preferring that in the Revised Noon 2022 Survey Report, Mr. Noon set out the legal roadway per the Gatewood deeds as being offset from the northern boundary, having concluded that an anomaly existed between the title deeds for Gatewood and Long House.

257. In my judgment, constructing the Indentures, taken as a whole, I find that the right of way is where the Asphalted Roadway presently exists as per the Gatewood RoW (P).

Prescriptive Easement in the Alternative

258. Mr. Banks states that, even if the right of way does abut the northern boundary, he still enjoys a prescriptive easement over the Asphalted Roadway under the doctrine of modern lost grant. He relied on the case of *Brady v Zuill* [2024] CA (Bda) 27 Civ which was an appeal from a judgment of mine. Smellie JA set out the principle as follows:

"43. In sum, the legal basis of the claim is as Lord Neuberger MR explained on behalf of the English Court of Appeal in Tara Hotel v Kensington Hotel [2012] 2 All ER 554 at [9]:

> *"It is well established that, if the owner of land uses a road as a means of access to, and egress from, his land for more than 20 years 'as of right', then, at least in absence of special circumstances, he will obtain a right of way over the land for the benefit of his land.""*

259. In *Brady v Zuill*, the Court of Appeal referred to my reference to its earlier case, which was the leading authority on the doctrine of lost modern grant in *Gleeson and Gleeson v Bell and King* Civil Appeal 1994: No 2, Judgment dated 12 May 1994. That case highlighted the principle that an enjoyment of right must be *nec vi nec clam nec precario*, that is, it must not be by violence, it must not be secret, and it must not be permissive: The Court stated as follows:

> *"On the issue of lost modern grant the learned judge was bound by authority to conclude that there was no statutory provision in Bermuda for the acquisition of easements by prescription or the applicability of the common law doctrine relating to prescription (see Lathan v Darrell and Hill, Civil Appeal No. 13 of 1985, at p8). Accordingly, the appellants had to persuade the learned judge that this was a case for the application of the doctrine of lost modern grant. The learned judge implicitly rejected that contention holding that the user relied upon was not user as of right. When Lord Davey asserted in Gardner v Hodgson's Kingston Brewery Company (1903) A.C. 229, 238) that an enjoyment as of right must be nec vi, nec clam, nec precario, he was in fact merely accepting what was law from the time of Bracton as cited by Coke: in short, the enjoyment must not be by violence, it must not be secret and it must not be permissive.*
>
> *The prerequisite for the acquisition of an easement under the doctrine of lost modern grant is that the user must have been as of right. Any acknowledgement that the user is permissive will be fatal to the claim. As Cheshire observed 'to ask permission is to acknowledge that no right exists' (Cheshire and Burns' Modern Law of Real Property, 14th Ed p 550.) Accordingly, what a party must show is that he claims the privilege, not as a thing permitted to him from time to time by the servient owner, but as a thing he has a right to do (see Patel v W.H. Smith (Esiot) Ltd 1987 (1) WLR 853".*

260. In my view, the evidence clearly shows that Mr. Banks, having owned Gatewood since 2001, had been using the Asphalted Roadway to access and leave Gatewood for more than 20 years by the time of the commencement of this action. It is also clear that his predecessor in title did likewise dating back to the early 1960s. Thus, in my view, applying the principles set out in *Brady* and in *Gleeson and Gleeson,* their use was of right as there

was no force (*nec vi*), there was no secrecy (*nec clam*) and there is no evidence that they had or needed any permission from the owner of Long House (*nec precario*). Thus, in my judgment, if I am wrong on the true location of the right of way across Long House, then Mr. Banks has a prescriptive easement over the Asphalted Roadway.

Issue 6 – The Grass Verge

261. There is an issue of ownership and use of the Grass Verge which runs along the Right of Way across Long House.

262. During the trial[17], there was an issue as to what is the actual location of the Grass Verge. There was no dispute that the Grass Verge starts at the gates of Gatewood and runs easterly up to the BELCO Hut on the Asphalted Roadway. On cross-examination, Mr. Banks agreed that the green fence he had installed on the Grass Verge ran easterly past the BELCO Hut along with some plantings but he did not know where they stopped. In submissions, Mr. Robinson complained that Mr. Banks did not positively plead adverse possession of the Grass Verge and as a result, it was not clear where the Grass Verge then ends. Mr. Elkinson stated that they had pleaded adverse possession by way of: (i) denying the declaration that the Defendants seek about the Grass Verge; and (ii) in Mr. Banks' Reply to the Defence and Counterclaim where they set out their position in respect of *nec vi, nec clam, nec precario*. Thus, it seemed from Mr. Elkinson that the Grass Verge was the strip of land running from the gates of Gatewood to the BELCO Hut[18]. After further legal arguments, I understood the Grass Verge to be the strip of land from the gates of Gatewood, easterly along the length of the 14 foot Asphalted Roadway, past the Belco Hut ending at the Turnaround[19].

[17] Transcript 10 December 2024, starting at page 36 - 48
[18] Transcript 10 December 2024, page 40 - 41
[19] Transcript 10 December 2024, pages 45, 48-49

Defendants' Submissions

263. Mr. Robinson made a number of submissions:

a. The Defendants seek a declaration that Mr. Banks has no right, title, estate or interest in Long House other than a right of way in line with Gatewood RoW (D).

b. Mr. Banks failed to plead a claim for adverse possession, thus it is defective in accordance with Order 18, rules 8 and 5 of the Rules of the Supreme Court 1985 ("**RSC**").

c. Mr. Banks failed to plead limitation and has therefore failed to comply with Order 18, rule 8, such that Mr. Banks cannot now raise a limitation defence to the Defendants' declaratory relief.

d. Mr. Banks has not provided clear evidence demonstrating sufficient physical control of the Grass Verge.

e. Mr. Banks and his servants and agents have trespassed on Long House on each and every occasion they went on to the Grass Verge, except for passing over the Right of Way.

Plaintiff's Submissions

264. Mr. Elkinson made a number of submissions.

a. Mr. Banks owns the Grass Verge by way of long usage and under the Doctrine of Lost Modern Grant;

The Evidence

265. I have considered the evidence of Mr. Banks who in essence states that since the time of acquiring Gatewood in January 2001, he has fenced, planted vegetation on and maintained the Grass Verge. He stated that Andrew Trimingham, his predecessor in title, told him he had been maintaining the Grass Verge during his years of ownership of the property, and that it was now his responsibility, adding that the Grass Verge was a privacy buffer and that it allowed hedges to be planted. Mr. Banks stated that he did continue to have the Grass Verge maintained, paying Joe Moniz Landscaping in arrears from 2 April 2001 to October 2002, after which there were several landscapers who maintained the Grass Verge for him, the current company being GreenKing Landscaping. On cross-

examination he did acknowledge that he had fenced the Grass Verge only on the northern side.

266. Mr. Banks stated that he was surprised to learn that in the course of these proceedings, the Defendants claimed in their Defence and Counterclaim dated 4 October 2021 that he was trespassing on the Grass Verge. He stated that in 2023 the Defendants, by their agents, did go on the Grass Verge and chopped down the 4 foot hedge which had been there to less than 4 inches. He asserted that in all the 23 years that he has had possession of the property and when Andrew Trimingham owned it, no one had ever sought to make a claim to it or objected to their use of it, except the Defendants in this case. He is advised that the Asphalted Roadway and the Grass Verge are located in accordance with the deeds and the attached plans and have been in their present location since 1957.

267. Mr. Banks stated that in the interests of resolving the dispute and avoid having the Defendants as neighbors, he tried by offering to buy Long House from them at market value. However, he has never received any positive engagement from the Defendants on this offer.

268. I have considered the evidence of Sharon Trimingham who stated that since 2001, Mr. Banks had been maintaining the Grass Verge leading to the house which is what Andrew Trimingham used to do. She maintained that position on cross-examination and re-examination.

269. I have considered the evidence of Mr. Storey who states that the Grass Verge does form part of the Gatewood RoW (D), but remains the property of Long House. He stated that Mr. Banks, his servants or agents, have trespassed on the Grass Verge, and converted it to their use by removing trees, and vegetation and replanted it with a lawn and hedge. They have repeatedly trespassed in order to tend to it, including cutting the grass, trimming hedges, weeding and painting fences despite his numerous requests to desist. He stated that he tends to that part of land as it is a part of Long House. To that specific point, Mr. Banks on cross-examination was adamant that he had never seen the defendants maintaining the

Grass Verge, whereas, he had done so continuously for the previous 23 years. He conceded that although the video cameras that look towards the Grass Verge, he had not provided any video evidence to prove that Mr. Storey was not maintaining the Grass Verge.

270. Mr. Storey stated that he and his wife first met Mr. Banks and Dame Pamela in January 2013 when they were invited to Gatewood for "meet and greet" drinks along with their real estate agent Sue Lusher. It was a friendly occasion to welcome them to the neighborhood. Mr. Storey recalls that Mr. Banks and Dame Pamela asked them if they would be willing to sell the Upper Lot to them. He found this offer strange for a first meeting, noting that they had offered $800,000. In any event, as they were confused and embarrassed by the offer, they quickly brushed it under the carpet, politely declining to sell the Upper Lot, remembering that it significantly lower than the appraised value they had used as the basis for purchasing Long House. I should add here that Mr. Banks and Dame Pamela deny that such a conversation took place at their home at the "meet and greet" or at all.

271. Sue Lusher's evidence was that she was present for the whole meeting and did not recall Mr. Banks or Dame Pamela asking the Defendants if they would be willing to sell any part of their property to them, noting that she would have remembered such a conversation as she had just sold Long House to the Defendants. On cross-examination, Sue Lusher, maintained that she arrived with the Defendants, the conversation was about some pleasantries as new neighbors, and denied that she left the "meet and greet" before the Storeys, noting that it would have been unlikely for her to do so, as it would have been rude to have left them behind when she left. In my view, I prefer the evidence of Mr. Banks and Dame Pamela that the conversation about Mr. Banks offering to buy the Upper Lot never took place at the "meet and greet" as alleged. This is supported by Sue Lusher who would most certainly have remembered such a discussion as she was in the business of selling property and may have been involved in any such sale, as in her cross-examination she stated emphatically that she would sell anything. Also, Mr. Storey's version is not supported by any other evidence.

272. In respect of the issue of the Grass Verge, I have considered the evidence in relation to the Asphalted Road, including about its location, and the various plans. I note the Revised Clarke Plan 1975 makes no reference to the existence of the Grass Verge.

Law on Adverse Possession

273. Part 1 of the First Schedule to the Limitation Act 1984 sets out as follows:

Right of action not to accrue or continue unless there is adverse possession

8 (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.

(3) For the purposes of this paragraph—

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be treated as adverse possession of the rentcharge; and

(b) receipt of rent under a lease by a person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease shall be treated as adverse possession of the land.

(4) In determining whether a person occupying any land is in adverse possession of the land the court shall take in account whether or not the owner of the land had actual knowledge that the person occupying the land was in possession thereof adverse to his interest.

274. In *Wilkinson, Outerbridge and Brewer v Mackie* [1990] Bda LR 7 the Bermuda Court of Appeal addressed the concept of possession, at page 10, as follows:

"In Buckinghamshire County Council v. Moran (1989) 2 All E.K. 225 at p. 240 Nourse L.J. said:

'The whole of this troubled subject [i.e. the concept of possession1 was carefully considered by Slade J. in Powell v. MacFarlane (1977) 38 PLCK 452. In my opinion that Judgment accurately stated the law in all material respects and I speak from my own experience in saying that it has consistently been treated as having done so …'

Accordingly, it will be instructive to turn to the observations of Slade J. (as he then was) in Powell v. MacFarlane (sup). At PP. 470-472 he had this to say:

'it will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants"; West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessor: title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts or an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. On the particular facts or Cadija Umma v. S. Don Manis Appu the taking of a nay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the Red House Farms case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting; per Cairns. Orr and Waiker L.JJ. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley M.K., in Littledale v. Liverpool College (a case involving an

alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the World at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow.

The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. "This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner' as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the Owner.' (emphasis added)

275. In *Simmons v Steede et al* [2009] SC (Bda) 5 Civ Kawaley J (as he then was), at paragraph 42 summarised that the two essential legal requirements for proving adverse possession were as follows:

"1. Factual possession- an appropriate degree of physical control given the circumstances; and
2. Animus possidendi - requisite intention to exclude the world at large."

276. In *Buckinghamshire County Council v Moran* [1989] 3 WLR 152 the English Court of Appeal stated as follows

"*As a number of authorities indicate, enclosure by itself prime facie indicates the requisite animus possidendi. As Cockburn C.J. said in Seddon v Smith (1877) 36 L.T. 168, 169: "Enclosure is the strongest possible evidence of adverse possession." Russell L.J. in George Wimpey & Co. Ltd. v Sohn [1967] Ch. 487, 511A, similarly observed: "Ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner.*"

277. In *SS Global Ltd and another v Sava* [2007] All ER (D) 173, a case which also referred to the judgment of Slade J in *Powell v. MacFarlane* as set out above as follows

> *"63. Normally, the erection of fences will be considered to be an unequivocal act of possession, as will the policing and locking of gates which control the entrance and access to the land.*
>
> *...*
>
> *64. However, in order to be treated as evidence of possession, the erection of fences must be for the purpose of keeping people out of the land and not merely for the purpose of keeping animals in or preventing them from straying.*
>
> *...*
>
> *66. Equally, the mere maintenance of existing boundary features such as a fence or a ditch or a hedge, is not an act which unequivocally asserts exclusive control over land. That is important in that case, such as the present, where the ditches and the hedges that bordered the fields on the disputed land were all features that were present when Mr. Sava moved on to the disputed land."*

Analysis on Adverse Possession

278. I am not satisfied that Mr. Banks has established adverse possession of the Grass Verge for several reasons. First, I am not satisfied that there was factual possession. I refer to paragraph 3 of the extract from *Powell v McFarlane* on factual possession, which was also referred to in *SS Global Ltd and another v Sava* [2007] All ER (D) 173 at paragraph 41. I accept that Mr. Banks fenced, planted vegetation and maintained the Grass Verge but in my view, the Grass Verge is fenced on the northern boundary side only to a point east of the BELCO Hut. Thus, it follows that the other sides are open to the world at large, including the Defendants. In my view there has been no enclosure by Mr. Banks of the Grass Verge. I rely on *Buckinghamshire County Council* as set out above where it stated that enclosure is the most cogent evidence of adverse possession. Further, I rely on *SS Global Ltd* to find that the fence and the hedge clearly were not planted for the purposes of keeping people out of the Grass Verge.

279. Second, Mr. Banks only erected the fence in 2005. The similar position would also apply to any fence that Andrew Trimingham would have erected prior to 2005, which was a time when there were no gates to demarcate the end of the Grass Verge and when the landowners were all family. To that point, there is no evidence, and no such evidence from

Sharon Trimingham, that Andrew Trimingham was asserting adverse possession of the Grass Verge as against the previous owner of Long House, Claudette Trimingham.

280. Third, Mr. Banks planted a hedge in June 2008 which was cut back in 2023. Thus, the hedge does not represent 20 years of factual possession. That hedge was along the northern boundary and was not keeping out or otherwise excluding the Defendants, again relying on *SS Global Ltd.*

281. Fourth, I accept Mr. Banks' evidence was that he has maintained the Grass Verge since he purchased Gatewood, placing into evidence the receipts to the various landscaping companies. I also accept Sharon Trimingham's evidence that Andrew Trimingham used to maintain that area when he owned the property. However, in replying on *SS Global Ltd.* as stated above, the mere maintenance of a hedge is not an act which unequivocally asserts exclusive control over land. Thus, in my view, such maintenance of the Grass Verge does not support factual possession of the land.

282. In *Simmons v Steede* [2009] Sc (Bda) 5 Civ at paragraphs 39 – 40 Kawaley J (as he then was), stated as follows:

> *"39. The law related to the evidence required to prove an adverse possession claim is shaped by the following practical considerations. The whole framework of private property ownership would be thrown into chaos if people with valid legal title to land could be easily displaced by trespassers or squatters. There is obviously a strong public policy interest in protecting persons who have acquired valid legal title to real property from having their property rights being usurped by trespassers bold enough to take advantage of the fact that the true owner is not occupying their property. There is a countervailing legal policy which holds that if the true owner permits a trespasser to use his property for many years, the trespasser's extensive use of the property will (at such point as Parliament may determine to be the limitation period) will extinguish the original owner's title. The original owner is effectively treated as having abandoned his title if he has permitted the trespasser to treat the property as his own for 20 years.*
>
> *40. The tension between these two opposing legal policies has resulted in rules designed to assist both courts and property owners to determine what physical acts in connection with somebody else's property if not interrupted for 20 years will extinguish the owner's title. These rules state certain basis principles the application of which may vary greatly depending on the type and location of property to which the*

adverse possession claim relates. The present case, subject to one exception, raised no controversy as to the content of the applicable legal principles; rather, the real dispute was how the principles ought to be applied to the facts of the present case."

283. Fifth, I am not satisfied that there was ever an intention by Mr. Banks to possess the Grass Verge. I am not satisfied that there has been any evidence that Mr. Banks had the intention to exclude the Defendants or the world at large from the Grass Verge. Simply put, it was an open strip of land bordering the Asphalted Roadway. In my view, having conducted a site visit, I got the impression that the Grass Verge presented as a beautiful buffer of the area leading up to the entrance to Gatewood. Further, there is no evidence that Mr. Storey or the previous owner had knowledge that Mr. Banks was occupying the Grass Verge or was in possession of it, adverse to their interests. I do accept that there was nothing preventing the Defendants from going onto the Grass Verge and cutting back the hedge, thus showing that they too had access, use and possession.

284. Sixth, I accept that Mr. Banks acknowledged the Defendants' title to Long House, which included the Grass Verge, when in an open letter dated 18 June 2024, he offered to purchase Long House. However, as I found above that the conversation about Mr. Banks purchasing the Upper Lot at the "meet and greet' did not take place, that does not provide support for the assertion that Mr. Banks acknowledged title at that point.

285. In light of the above reasons, I find that Mr. Banks has failed to establish adverse possession of the Grass Verge.

Law on prescription of an easement by lost modern grant

286. *Gale on the Law of Easements 22nd Ed*. at [Part II, Chapter 4, Section 3(1) 4-82 to 4-87] states as follows:

"4-82 Presumed grant by owner of servient tenement - As it is essential to the existence of an easement that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement is to be acquired by prescription must be by a person in possession of the dominant tenement. Moreover, as such user is only evidence of a previous grant - and as the right claim is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient

tenement - it follows that by the common law such grant can only have been legally made by a party capable of imposing such a permanent burden upon the property - that is, the owner of a freehold estate.
Further, in order that such user may confer an easement, the owner of the servient tenement must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed. His abstaining from interference will then be construed as an acquiescence.
...
4-85 Claims based on lost grant - Where the claim to an easement is based on the doctrine of lost grant, it would seem to follow from the language used by Lindley LJ in Wheaton v Maple & Co [1893] 3 Ch. 63 at 69 that the same rule should apply, and that an enjoyment as against an owner of the servient tenement who cannot dispose of the fee is not sufficient. In Barker v Richardson (1821) 4 B. & Ald. 579, where the light of a presumably modern house had been enjoyed for more than 20 years over land which during part of that period had been glebe land, no easement was acquired, the ground of the decision being thus stated by Abbott CJ [at 582]:

> *"Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid."*
> *4-86 - In Bradbury v Grinsell 2 Wms. Saund. 1871 edn, pp. 509-512 the rule is stated as follows:*
>
> > *"Though an uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant; yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance: for a tenant for life or years has no power to grant such right for a longer period than during the continuance of his particular estate. If such a tenant permits another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession the reversioner may dispute the right to the easement, and the length of possession will be no answer to his claim." [emphasis added]*

Analysis on prescription of an easement by lost modern grant

287. I am not satisfied that Mr. Banks has established an easement by lost modern grant for several reasons. First, Mr. Banks is required to show 20 years of usage such that the Court can presume the existence of a lost grant of an easement to use the Grass Verge. I am satisfied by Mr. Banks' evidence that he had retained landscaping companies to maintain the Grass Verge between his gates and up to the BELCO Hut and slightly beyond it. Mr. Banks did state on cross-examination that he had caused plantings to be placed on the strip beyond the BELCO Hut, although I note the photograph evidence shows that that

part is not as neatly manicured as the part between the gates of Gatewood and the BELCO Hut. Thus, I do not accept Mr. Storey's point that I should reject such evidence because the gates, hedge and fence came later on once the house on Gatewood had been built and/or Mr. Banks had moved into Gatewood. I also accept the evidence of Sharon Trimingham that both Andrew Trimingham and Mr. Banks had been maintaining the Grass Verge respectively. For the reasons as set out above, I was prepared to presume the existence of a lost grant of an easement to use the Grass Verge.

288. Second, however, in applying the principles set out *in Gale on the Law of Easements* as set out above, in paras 4-82 - 4-87, I am satisfied that it is not possible for me to do so, as the Defendants are life tenants and such cannot acquiesce to a grant of an easement based on lost modern grant because a life tenant has no ability to bind a successor in title without the consent of the holder of the reversionary interest, in this case the trustees of the Vita Bella Trust. I am satisfied that the evidence shows that the Defendants have possession of Long House as life tenants subject to a reversionary interest of a trustee. They purchased that life interest from Claudette Trimingham who had been in possession as a life tenant since 17 December 2003. Thus, I am satisfied that for at least 17 years of the continued use by Mr. Banks of the Grass Verge before the action commences, there was a life tenant in possession, neither who would have been able to have acquiesced in a grant of a right of way.

289. Third, I have considered whether there has been any knowledge of the reversioner trustee and its effect. In *Gale on Easements*, at 4-155 it states as follows:

> *"The cases in which the importance of knowledge on the part of the servient owner has been most frequently discussed are those where the servient tenement has during the enjoyment been in the possession of a tenant for life or years. It seems that in such cases the want of acquiescence of the owner of the freehold of the neighboring tenement may be inferred, either from the circumstances that he is not in possession, or from the nature of the enjoyment of the right being such as to be out of his view and knowledge, though he is in possession. With respect to the former question and important point arises, whether, if the knowledge in fact of the owner of the servient tenement of the hostile enjoyment of an easement be shown, he is bound by it. Cases decided before the Prescription Act certainly laid down that if knowledge in fact of the reversioner be shown, he would be bound;*
>
> *…*

> *Unless, therefore, some positive act, as a notice, intimating his descent, be sufficient to obviate the effect of the user giving a right, he would not be brought into the condition of a person who could interfere with or obstruct the user (a "valens agree"), without which the prescription ought not to run against him.*

290. In my view there has been no positive evidence of knowledge of the reversioner, that is the trustees of the Vita Bella Trust.

Trespass by Mr. Banks and Injunction

291. I have rejected the two grounds on which Mr. Banks has asserted his interest in the Grass Verge. Thus, that leads me to be satisfied that I should grant the declaration that Mr. Banks has no ownership right or right of way granted over the Grass Verge, save for what appears in the Defendants' title deeds and subject to any other determinations made in this case.

292. In all the circumstances in this case, and in particular in respect of the Grass Verge where there have been verbal incidents between the parties, I am satisfied that I should grant an injunction restraining further trespass by Mr. Banks and his servants or agents on the Grass Verge.

Issue 7 – The Utility Cables

293. There is an issue about the utility cables in trenches that run under the Asphalted Roadway across Long House to service Gatewood. The Defendants claim in trespass for Mr. Banks having trenched on Long House and instructed utility companies to lay cables, without any easement.

294. Mr. Banks' position is that he did not permit the utility companies to lay cables without an easement being granted. In the alternative, his defence is that the Zoning Order requires cables to be placed underground. Further, if he was not entitled to place the cables underground then he relies on a limitation defence.

Defendants' Submissions

295. Mr. Robinson made a number of submissions as follows:

a. The cause of action in trespass does not arise by reason of the cables being underground, but from the trenches for those cables, and the cables themselves, trespassing on private property without any easement, as the easement enjoyed by Mr. Banks does not permit trenching or the laying of cables.

Plaintiff's Submissions

296. Mr. Elkinson made a number of submissions as follows:

a. Mr. Banks did not dictate to providers how they were to lay their cables. He did not need to, as the Zoning Order made provision for it.

The Evidence

297. The Zoning Order at paragraph 5(4) states "*All utility lines must be placed underground*".

298. Mr. Story's evidence was that Mr. Banks had caused trenches to be dug across the Upper Lot, in order to lay utility cables without any easement permitting him to do so. He noted that BELCO and Digicel had marked the location of the cables that run across Long House, without servicing it. He exhibited his title deeds which refer to the Right of Way in the following terms:

> *"… BUT SUBJECT NEVERTHELESS to full and unrestricted right and liberty of way and passage for the owners and occupiers for the time being of the parcels of land lying to the West of the parcel of land hereinbefore described and heretofore forming part thereof and their tenants and servants and all other persons lawfully going thereto or therefrom with or without animals and vehicles of all descriptions OVER AND ALONG that portion of the parcel of land above described colored Green on Plan 2 being Fourteen feet (14') wide and running along the Northern boundary thereof"* [emphasis added]

299. By way of a writ of *subpoena duces tecum* dated 25 October 2024, issued by the Defendants, Digicel Bermuda Limited ("**Digicel**") and BELCO produced various documents.

300. BELCO produced a series of correspondence, documents and plans from the time period around 1958 and 1959 which detailed the initial provision of underground utility services and the construction of transformer vaults to the Inglewood Property. We have already referred to one of the transformer huts as the BELCO Hut.

301. BELCO also provided documents, including several pictures, from the period around 2005, 2006 and 2007 including:

a. System Alteration Notice Approved 27/12/06 – for a new transformer at Gatewood.

b. BELCO letter dated 18 October 2005 to Daniel Heaven in respect of a Three Phase Supply for Gatewood which detailed the design and estimate for the work based on his request for the supply of electricity. It set out work to be carried out by the 'customer' and by BELCO:

i. By the customer, including:

1. Installation of a 4" duct in a suitable trench along Inglewood Lane between the new transformer vault and the HV pole GN-5 on South Road to carry the new cable. [emphasis added]
2. Installation of three 4" ducts in a suitable trench between the transformer vault and the proposed electrical room. [emphasis added]
3. Coordination of all other utilities (BTC, Cablevision, etc).

ii. By BELCO, including:

1. Install a transformer on a concrete pad.
2. Install, joint and connect a length of High Voltage ("**HV**") cable in the 4" duct from GN-5 to the new transformer vault.
3. Install, joint and connect Low Voltage ("**LV**") cables (cables in the 4" duct from the new transformer to the switch in the electrical room.

iii. It was General Terms and Conditions of the work that:

1. HV and LV cables trenches need to be dug to the required depth and the bottom then filled with 6 inches of sand or other soft backfill material free from stones or other sharp objects, which could

damage BELCO's cable. HV cables had to be laid at a minimum depth of 2 feet 6 inches and LV cables had to be laid at a minimum depth of 1 feet 6 inches.

2. BELCO required *"... in place any applicable wayleaves and/or easements relating to the vault, cable, equipment or BELCO staff access, for the infrastructure.*"

c. BELCO Offer Acceptance & Deposit Payment for Gatewood signed by Mr. Banks dated 26 October 2005, with a cheque for part payment of the total contribution.

302. Blane Wilson, Outside Plant Engineer of Digicel swore an affidavit, with exhibits including the following:

a. In December 2023 he attended Inglewood Lane to mark out the location of cables.

b. Digicel records showed that their infrastructure had been put in place between the years 1983 – 1985. He noted that Inglewood Lane was part of the legacy copper network, inherited by Digicel from its predecessor, Bermuda Telephone Company ("**BTC**"), for which they did not have any cable installation records. In respect of the records requested in the *subpoena*, other than billing records, Digicel did not have any records.

303. Mr. Banks' evidence was that he did not give instructions to put the utility cables underground, noting that the utility companies would have installed cables and other services as they had previously done and are obliged to do the Zoning Order, such services having been underground prior to the construction of Gatewood and since the inception of Inglewood Property.

304. Mr. Banks was cross-examined on the first Voluntary Conveyance for the western lot of the two, measuring 174 feet along the roadway and 2.8 acres, agreeing that there was no mention of any right or easement to run any cables over any land – noting that that subject was in the Zoning Order.

305. Mr. Banks was cross-examined on the second Voluntary Conveyance for the eastern lot of the two, measuring 188 feet along the roadway and 2.875 acres agreeing that there was no mention of any right or easement to run any cables over any land – noting that that subject was in the Zoning Order which obliges the land owners to put all utilities underground as stated in plain English.

306. Mr. Banks was cross-examined on the installation of the new BELCO line, stating:

a. He had engaged Daniel Heaven of Bermuda Project Management Limited ("**BPML**") to work as electricians on the site. Employees at BPML would have organized and given instructions about the BELCO line.
b. Daniel Heaven was one of the electricians working on his project.
c. He noted the BELCO letter and the reference to the term that the customer had to obtain the proper easements. However, he stated that he was not a party to any dialogue with BELCO.
d. He accepted that he signed the offer acceptance and made the deposit payment towards the total of $54,000.
e. He knew BELCO installed lines, but couldn't recall exactly what year.
f. He accepted that a BELCO map (I note a date of 5 April 2019 at the top of the fold-out map) showed; (i) on the right-hand side of the Asphalted Roadway, a dark blue line, partly dashed and partly solid; and (ii) on the left-hand side a fainter line with some handwritten notes. He also accepted that there was a pencilled line (adjacent to the blue line) running from a 'pad' location on Gatewood to the BELCO Hut that was labelled 'abandoned'.
g. He also accepted that on another BELCO map (I note a red "Note" in the middle of the map): (i) the line on the right-hand side says 'abandoned'; and (ii) the line on the left-hand side had a label in several places "*uncertain of exact route of cable in this area*".
h. When challenged that, in 2005 BELCO put in a new line to Gatewood direct from South Shore Road, Mr. Banks stated that he had no knowledge of how BELCO proceeded to provide services to Gatewood.

i. When challenged that in 2005, the BELCO line was run, not along the abandoned line, but along the Grass Verge, Mr. Banks stated that he could not add to the commentary.

j. When challenged that he had BELCO install the new line which ran along the Grass Verge and not under the existing Asphalted Roadway, he stated that he had no idea how BELCO installed the lines.

307. On re-examination, Mr. Banks evidence was as follows:

a. The utility lines come to the property in conduit buried underground as required by the Zoning Order.

b. In answer to a question from the Court as to whether during construction of Gatewood, he caused a trench to be built from South Shore Road to Gatewood, he recalled that there was a single trench, which when work was completed he caused the roadway to be resurfaced. He did not know if the trench was moved as he did not oversee the work.

308. On cross-examination, Mr. Storey maintained that Mr. Banks had trenched the Grass Verge in order to lay the BELCO cables on it. He disagreed that Mr. Banks had not trenched anything and maintained that the Zoning Order did not give anyone rights to lay cables over or below the ground. He recalled that he had seen Dame Pamela with a Paul Place of BTC on the roadway and he returned later to speak to him.

309. On re-examination, in relation to the utilities trenching, Mr. Storey referred to a photograph[20] in his exhibit, and explained: (i) that prior to the construction of Mr. Banks' home, there was a trench that carried utility lines along the tarmac road (which became the Asphalted Road) which entered into the BELCO Hut, then exited it and continued along the tarmac road to enter Gatewood – he considered this line to be the abandoned service; (ii) the new utility trench comes along the length of the Asphalted Road and then traverses

[20] HB 913

onto the Grass Verge on the right adjacent to the BELCO Hut and then traverses the Grass Verge into Gatewood.

Law

310. Section 33 of the Limitation Act 1984, fraud, concealment and mistake, were set out above.

311. The principles of the following cases were set out above:

a. *Minister of the Environment v Barber and Scarborough Property Holdings Limited* [1995] Bda LR 9

b. *Fearn v Board of Trustees of the Tate Gallery* [2023] 2 WLR 339

312. In the Privy Council case from Jersey of *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd and others* [2011] 1 WLR 2370 at [48 – 51]

> *"48 These instructive judgments are not completely consistent among themselves (especially as to the circumstances in which the court will award an account of profits alias restitutionary damages, which is not an issue in the present appeal). But they establish the following general principles (much more fully developed in the judgments themselves):*
>
> *"(1) Damages (often termed "user damage") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass): Stoke at pp1410-1412; Experience Hendrix at paras 18 and 26.*
>
> *(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character: Stoke at p1412; General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd [1975] 1 WLR 819.*
>
> *(3) Damages under Lord Cairns's Act are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief: Lord Nicholls in Blake at p281. Most of the recent cases are concerned with the invasion of property rights such as excessive user of a right of way (Bracewell v Appleby [1975] Ch 408, Jaggard). The breach of a restrictive covenant is also generally regarded as the invasion of a property right (Peter Gibson LJ in Experience Hendrix at para 56) since a restrictive covenant is akin to a negative easement. (It is therefore a little surprising that Lord Nicholls in Blake, at p283, referred to Wrotham Park as a "solitary beacon" concerned with breach of contract; that case was concerned with the breach of a restrictive covenant to which neither the plaintiff nor the defendant was a party;*

*but the decision of the House of Lords in Blake decisively covers what their Lordships have referred to as a non-proprietary breach of contract.) *

(4) Damages under this head (termed "negotiating damages" by Neuberger LJ in Lunn Poly at para 22) represent "such a sum of money as might be reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]" (Lunn Poly at para 25).

(5) Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted: Millett LJ in Jaggard at p285 (but cf at p291); Lord Nicholls in Blake at p282; Chadwick LJ in World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2008] 1 WLR 445, para 54. This point was not raised in argument in the appeal but is pertinent since there was such a long delay before PFE issued the order of justice commencing these proceedings."

49 Several of the recent cases have explored the nature of the hypothetical negotiation called for in the assessment of Wrotham Park damages It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: Wrotham Park at p815, Jaggard at pp282-283. This point is material in the present case since on the concurrent findings of the courts below Dr Frischmann, the directing mind of PFE, was a very determined (even a recklessly determined) negotiator (see especially the judgment of the Royal Court at paras 110-111 and 411412).

50 Another issue is how far the court is entitled, in its assessment of Wrotham Park damages, to take account of events occurring after the time at which the hypothetical negotiation takes place (and in particular, to take account of how profitable the outcome has been for the contract-breaker). This issue sometimes tends to get confused with the wider issue of whether the court is awarding compensatory or restitutionary damages. Their Lordships consider that the right approach is that of the Court of Appeal in Lunn Poly, in which Neuberger LJ observed, after citing the judgment of Mr Anthony Mann QC in AMEC Developments Ltd v Jury's Hotel Management (UK) Ltd (2001) 82 P & C R 22, paras 11-13:

"27 It is obviously unwise to try to lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events that have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts. Further, the point before us today was not before Brightman J or before Lord Nicholls in the cases referred to by Mr Mann.

28 Accordingly, although I see the force of what Mr Mann said in [13] of his judgment, it should not, in my opinion, be treated as being generally applicable to events after the date of breach where the court decides to award damages in lieu on a negotiating basis as at the date of breach. After all, once the court has decided on a particular valuation date for assessing negotiating damages, consistency, fairness, and principle can be said to suggest that a judge should be careful before agreeing that a factor that existed at that date should be ignored, or that a factor that occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which whey would arrive.

29 In my view, the proper analysis is as follows. Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant. However, given the quasiequitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account."

51 In a case (such as Wrotham Park itself) where there has been nothing like an actual negotiation between the parties it is no doubt reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain. But in this case the parties clearly expected, as is apparent from their negotiations, that the contract with NIOC would be much more profitable than it turned out to be. For that reason, it is unnecessary to give a detailed account of the actual outcome. The Court of Appeal summarised the outcome (para 254 (ii)) by observing that even on PFE's case BVE's eventual profit was between $1m and $1.8m."

313. In *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380 at [118-127], Lord Clarke of the UK Supreme Court stated as follows:

"VI. Damages at common law
118.The appellant's case is that it is entitled to damages on what has sometimes been called the user (or here the wayleave) basis. It is and has throughout been accepted by and on behalf of the appellant that it has suffered no damage or loss as a result of the trespass. As Aikens LJ stressed at para 112, the drilling of three pipelines at depths of 800 to 2,800 feet below the appellant's land would not disturb or detract from its use of the land (to use the judge's phrase) "one iota". However Mr Gaunt submitted on behalf of the appellant that it does not follow from that that it is not entitled to substantial damages because it is now well settled that, where a claimant cannot show loss or damage, he may be entitled to user damages.

119.For my part, I would accept Mr Gaunt's analysis of the position at common law. The courts have held that, in the case of trespass to land, damages may be recovered equal to the value to the defendant of the use he has made of the claimant's land even

though the claimant has suffered no consequential loss and the value of his land has not been diminished. The principle originated in cases not unlike this, where the defendant trespassed by carrying coals along an underground way through the claimant's land. The damages were assessed by determining what the claimant would have received if he had been paid for a wayleave: se eg Stoke on Trent City Council v W&J Wass Limited [1988] 1 WLR 1406 at 1410G to 1411E and the cases there cited.

120 Those principles were then applied to cases of wrongful trespass on the surface of land and wrongful retention of the possession of land in circumstances where the claimant would not otherwise have made use of the land: see Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538 per Rigby LJ at 543.

121 Much more recently Lord Nicholls put the principle thus in AG v Blake [2001] 1 AC 268 at 278:

> *"A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user."*

122 Lord Nicholls restated the principle in Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883 at paras 87 to 90 and in Sempra Metals Limited v IRC [2008] 1 AC 561 at para 116; see also Lord Scott at para 140 and Lord Mance at para 230. The same principle applies where a landowner is awarded mesne profits, whether or not he would have re-let the property during the relevant period: Swordheath Properties Limited v Tabet [1979] 1 WLR 285, which was applied by the Privy Council in Inverugie Investments Limited v Hackett [1995] 1 WLR 713.

123 The same principles have been applied in assessing damages in lieu of an injunction: see eg Bracewell v Appleby [1975] Ch 408 and Jaggard v Sawyer [1995] 1 WLR 269, both of which were cases of obtaining access to a newly built house, and Horsford v Bird [2006] 1 EGLR 75, per Lord Scott at paras 12 and 13. It was in this connection that Lord Nicholls said in AG v Blake at page 281G that the measure of damages is often analysed as a loss of a bargaining opportunity or, which (he said) comes to the same, "the price payable for the compulsory acquisition of a right".

124 Many other examples could be given, including the leading case of Wrotham Park Estate Co Limited v Parkside Homes Limited [1974] 1 WLR 798, where damages were awarded on this basis in respect of an unlawful act which had been committed and it was too late to restrain it by injunction. It was a case where land had been developed in breach of a restrictive covenant and where the existence of the new houses did not diminish the value of the benefited land "by one farthing", which is perhaps not very different from the iota referred to by both the judge and Aikens LJ. Other well known

examples are Experience Hendrix LLC v PPX Enterprises Inc [2003] 1 All ER (Com) 830, WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2008] 1 WLR 445 and Lunn Poly Limited v Liverpool and Lancashire Properties Limited [2006] 2 EGLR 29.

125 Finally, the most recent case in this area is the decision of the Privy Council in Pell Frischmann Engineering Limited v Bow Valley Iran Limited [2009] UKPC 45, [2010] BLR 73, where Lord Walker, giving the judgment of the Board, reviewed the principles in detail at paras 46 to 54. At para 48 he set out five general principles established by the authorities. They included the following (omitting the case references):

> *"1. Damages (often termed 'user damage') are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass).*
>
> *2. ...*
>
> *3. Damages under Lord Cairns's Act are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief. Most of the recent cases are concerned with the invasion of property rights such as excessive user of a right of way. The breach of a restrictive covenant is also generally regarded as the invasion of a property right ... since a restrictive covenant is akin to a negative easement. ... the decision of the House of Lords in Blake decisively covers what their Lordships have referred to as a non-proprietary breach of contract.*
>
> *4. Damages under this head (termed 'negotiating damages' by Neuberger LJ in Lunn Poly at para 22) represent 'such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]' (Lunn Poly at para 25).*
>
> *5. Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted: ..."*

126 Lord Walker added at para 49:

> *"49. Several of the recent cases have explored the nature of the hypothetical negotiation called for in the assessment of Wrotham Park damages. It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: ..."*

127 I recognise that it is common ground that the measure of damages in this case must have regard to the statutory context and thus to the 1934 and 1966 Acts in particular. However, subject to that, the correct measure of damages for the trespass on the facts here would be to award the appellant user or wayleave damages and to

assess them by reference to a hypothetical negotiation of the kind referred to by Lord Walker in para 49 of the judgment of the Board in Pell Frischmann. The question would be what a fair and reasonable figure for Star would be to agree to pay and for the appellant to agree to receive for the use of the part of the appellant's land which was in fact used by Star as described above. That figure would reflect the key value of the wayleave. It is inconceivable that it would be only the £1,000 awarded on the facts here by the Court of Appeal."

Analysis

314. I have considered the evidence in respect of the trenching of the utility cables. I find that there has been a trespass by Mr. Banks for laying a new utility trench in a new location, (different from an abandoned trench) along the Asphalted Road and Grass Verge on Long House for several reasons.

315. First, I have considered the evidence of Sharon Trimingham who did not recall that Mr. Banks put a trench in for utility cables once the estate road was resurfaced. I do not accept her evidence for the reasons as set out below.

316. Second, likewise, I have considered Mr. Banks' evidence that he did not carry out any trenching for the utility cables, or caused it to be done, only resurfacing the Asphalted Roadway. I do not accept his evidence on this issue for the reasons set out below.

317. Third, I have considered that BELCO provided documents, but there was no affidavit, witness statement or oral evidence from anyone from BELCO. Mr. Banks was taken to the BELCO documents in his evidence and Mr. Storey made reference to them. In my view, a careful analysis of the BELCO documents on their own set out what transpired in large part as set out in the following paragraphs.

318. Fourth, Mr. Banks paid to BELCO the sum of $51,104 for new BELCO lines from South Shore Road along a route, mostly on the Asphalted Road, into Gatewood. I have carefully examined the BELCO billing sheets including labour and costs for the project which covers work on the HV Overhead HV lines, the HV cable, the LV cables and the transformers. The summary table for each aspect of that work shows how the figure of

$51,104 was calculated. None of those billing sheets include a charge for trenching. Thus, that leads me to find that BELCO did not do the trenching for the new utility lines. To that point, I must state that I do not recall any other evidence from any source that accounts for trenching work for the new utility lines and associated costs.

319. Fifth, I find that the Terms and Conditions set out that the HV cable (which was the cable that did cross Long House) had to be in a trench and laid at a minimum of 2 feet 6 inches with a bed of 6 inches of sand or other soft backfill material, presumably under the HV cable. I take that to mean a trench depth of 3 feet in total – that's no small trench, for example when compared to a 6 foot tall man. Per the billing sheet, the amount of HV cable provided was 2,034 feet and 2,000 feet of 4" duct, all that going into the trench. Also, there was a labour item of 120 hours for a joinder and a mate, meaning 60 hours each, which mostly like amounts to between one and two weeks of labour on the trench. It is not clear to me how Mr. Banks or Sharon Trimingham could have missed such work.

320. Sixth, it is overwhelmingly clear to me that a new trench was required to provide the new electrical service to Gatewood. Also, this had to be clear to Mr. Banks as he signed the BELCO agreement and he or Dame Pamela paid the contribution of $51,104 in two installments. If it was not clear, then Mr. Banks paid $51,104 for work that did not take place – obviously it did. Or, impossibly, the HV cable is laying on top of the old roadway but under the new asphalt – clearly this was not the case as BELCO would have been in breach of its terms and conditions – and I am satisfied that BELCO did not do so. Thus, I dismiss Mr. Banks' evidence that he only resurfaced the Asphalted Road and carried out no trenching.

321. Seventh, it becomes interesting as to where the trench actually is as it travels under the Asphalted Road, and in particular as it crosses Long House. I find that Mr. Storey's version is credible with support in the 5 April 2019 BELCO map, following the 'pencilled' line, that the trench travels from South Road along Inglewood Lane, then onto Long House and then passing the BELCO Hut, then onto the Grass Verge into Gatewood. Mr. Storey's version is also supported by the blue line on the same map. I did consider whether the new

cables went into the original trench, but rejected that proposition, as I find that the label 'abandoned' applies to the blue utility line after Long House Gatewood because: (i) from South Road to Long House, the blue utility line shows that active electrical service was still being provided to other residences; (ii) it was no longer needed for Gatewood which was then being serviced by the new 'pencilled' line which ran along the Grass Verge to the new red 'pad' near to the house on Gatewood; and (iii) the original blue line went into the BELCO Hut and then came back out to continue its journey to Gatewood – no active electrical line goes into the BELCO Hut now, instead it is bypassed. I note there is a handwritten note, with an arrow pointing to the 'pencilled' line, that states "*cable continues to pad*", and another handwritten note that states "*uncertain of exact route to pad*". In my view, that 'pad' is the pad set out in the BELCO letter dated 18 October 2005 for the proposed LV electrical room on which a transformer was being installed.

322. Eighth, I have considered the Zoning Order. In my view, the Zoning Order does not permit the trenching or the laying of cables on private property. It only provides that cable must be laid underground, as opposed to being overground. The Zoning Order was made under now-repealed legislation, which is planning legislation. Planning legislation is a public code for the planning, development and use of land in Bermuda. Mr. Banks cannot rely on the Zoning Order to claim a right to trench under the Defendants' property. As I stated above, in applying the principles set out in *Barber and Scarborough property Holdings Limited*, I take the approach that the Zoning Order is for the benefit of the Inglewood Estate 'community', not primarily to affect contractual rights between owners of land there. I also rely on *Fearn*, in particular where it stated "*The fact that it would be of general benefit to the community to use your land for a particular purpose - say, as a short-cut or as a place for taking exercise - is not a reason to allow such use without your consent.* Thus the Zoning Order is not capable of overriding or extinguishing the rights of the Defendants to the benefit of Mr. Banks. If that was not the case, Mr. Banks could have chosen any route across Long House as he so desired for the utility trench without regard to the wishes of the Defendants.

323. Ninth, I reject Mr. Banks' submissions that a person subscribes to a utility service and then the company decides on the installation, in the knowledge that the services should be underground. I reject the reliance on the maxim o*mnia praesumuntur rite esse acta,* a Latin legal maxim meaning "*all things are presumed to have been done rightly*" or "*properly*", as in my view, a utility company or an electrical contractor cannot usurp the property rights of an owner of land. I also reject the contention that the trench and cables were historically consented to by the Defendants' predecessors in title at the time of the creation of the Zoning Order because, in effect, I have found that a new trench was created. In my view, historically, based on the BELCO documents, the Inglewood community, most if not all the Trimingham family, used one trench to serve all their utility needs, branching off as necessary to their residences. However, to my judgment, Mr. Banks has created a new trench for the sole use of Gatewood.

324. Tenth, in my view, the Limitation Act 1984 does not provide a time bar for the action in trespass in respect of the trenches and cable because I accept that the Defendants did not become aware of the cables until 2017 at the earliest and the new trench in 2022. Further, the cables were underground in the new trench before the Defendants came into possession of Long House and were concealed by the resurfacing of the Asphalted Road in 2012 and the plantings on the Grass Verge. Thus, I find that the limitation period did not begin to run until that date, per section 33(1)(b) of the Limitation Act 1984.

325. Eleventh, I have considered the Defendants' claim for an order for removal or relocation of the cables and for the land to be reinstated. In my view, in all the circumstances, I am not satisfied that I should grant such an order. Gatewood is a property within Inglewood Property and is a part of the Inglewood community. The maps show that there is no other practical route for the trench and cables within the community in order to get to Gatewood. Even if there were, it would require some level of negotiation with the owners of the land to achieve such a route.

326. Twelfth, in my view, the better approach is in the alternative to grant user damages or negotiating damages. I note that Mr. Redrobe's opinion is that the installation of the

utility cables does not affect the market value of Long House. I rely on *Pell Frischmann Engineering Ltd* and I also rely on *Bocardo SA,* in particular paragraph 127, to state that in this case, the correct measure of damages for the trespass would be to assess them by reference to a hypothetical negotiation, the question being what a fair and reasonable figure would be for granting an easement to run the utility cables underground on Long House. Thus, I will hear the parties on user damages when I anticipate that there will be a one-off payment amount determined, rather than an ongoing monthly or annual payment.

327. In summary, for the reasons set out above, I find that there has been a trespass by Mr. Banks for laying a new utility trench in a new location and that user damages, to be determined, should be paid.

Issue 8 - The Plaintiff's Gateway Encroachments on Long House

328. There is a claim in continuous trespass by the Defendants that Mr. Banks has constructed on Long House the Gateway Items, namely the ornamental pillars, a trench drain, gate switch and mailbox post and decorative lighting together with ornamental planting or either side of the entrance gateway. There is also the chain link fence erected on the Grass Verge. I will refer to Gateway Items and the chain link fence together as the "**Encroachments**".

329. Mr. Banks denies any trespass and, in the alternative, defends the claim on (i) the doctrine of laches; (ii) acquiescence on the part of the Defendants; (iii) any trespass is *de minimis*; and (iv) trespass is not actionable at the suit of the Defendants. Further, Mr. Banks set out at trial that: (v) with respect to the trench drain that he was required to construct it by the Department of Planning; and (vi) with respect to the chain link fence, it had been in existence before his occupation of Gatewood, and he was replacing it.

The evidence

330. I refer to the section above on the evidence that is not in dispute and repeat the relevant parts here as follows:

a. At least one of Mr. Banks' entrance gate pillars encroaches onto Long House.

b. Mr. Banks' Gateway Items entrance trench drain, interlocking bricks, light and mailbox post encroach onto the Long House side of the boundary.

331. Further, I am satisfied that:

a. The surveys of BCEC confirm that all of Mr. Banks' Encroachments, that is, the Gateway Items, are placed on or affixed to Long House; and
b. The surveys of CCL also confirm that the Gateway Items encroach onto Long House.
c. Mr. Banks stated in cross-examination that the Gateway Items were constructed in 2007-2008.
d. Mr. Banks stated in cross-examination that the chain link fence was constructed in 2005.

The Law

332. To prove trespass, the Defendants must demonstrate those Encroachments unjustifiably intrude onto Long House. I refer to the extract from *Clerk & Lindsell on Torts 24th Edition* at 18-01 – 18-11 as set out above. At 18-02 it set out the principles of continuing trespass with reference to *Holmes v Wilson*.

Analysis

333. In my view, I am satisfied that the Encroachments are a continuing trespass. However, I decline to grant an order to remove the Gateway Items although I do grant an order to remove the chain link fence.

334. First, I should restate here that I have already rejected Mr. Banks' claim to ownership of the Grass Verge, thus as a starting point, the Encroachments are a trespass.

335. Second, the Encroachments are still in place. Thus, in my view, they are a continuous trespass, such that a new trespass is committed from day to day. Thus, the six year limitation period for an action in trespass begins to run afresh every day. On that basis,

I find that the Encroachments have not become part of the land of Long House, and thus ownership has not passed to the Defendants.

336. Third, I have considered the application of the Doctrine of Laches. In Halsbury's Laws of England Vol. 47 (2021) at 255 it set out the principles of the nature of laches as follows:

> *"Equitable defences (4) Unconscionable Delay (laches)*
> *In enacting a statute of limitation the legislature specifies fixed periods after which claims are barred; equity does not, however, fix a specific limit, but considers the circumstances of each case.*
> *In determining whether there has been such delay as to amount to laches, the chief points to be considered are:*
> *(1) acquiescence on the claimant's part; and*
> *(2) any change of position that has occurred on the defendant's part.*
>
> *Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.*
>
> *The modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases; a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights."*

337. In *Terceira v Terceira* [2011] SC (Bda) 6 Civ [at 83], Kawaley J stated as follows:

> *"The defence of laches*
> *83. I adopt the law as advanced by the Defendants' counsel at page 46-49 as to the equitable jurisdiction for refusing relief on the grounds of delay. It is incumbent upon them to show that there has been (a) "unreasonable delay in the commencement or prosecution of proceedings", and (b) "in all the circumstances the consequences of delay must render the grant of relief unjust." In traditional legal terms, there is little question that there was unreasonable delay. The claim could first have been brought in 1996 and was not raised until 11 years later. However, in the unique context of the present case, the Plaintiff's decision to defer raising the claim until after his mother's death was in my view understandable, especially since his co-executors were content to defer execution of the Vesting Deed until then as well. Despite this unique factual matrix in which for practical purposes the need to finally adjudicate the beneficiaries'*

respective interests was in any event suspended, there is no legally acceptable reason why the Plaintiff could not have given some notice (e.g. by way of a reservation of rights at the very least) of his claim. Ignorance of his legal rights is not a valid excuse. As a matter of law therefore, I feel bound to find that the unreasonable delay limb of the laches defence was made out on the facts." (emphasis added)

338. In my view, the doctrine of laches is an equitable doctrine which is not available to Mr. Banks as there is an express period of limitation for the tort of trespass. In *Butterfield v Hill et al* [2009] SC (Bda) 35 Civ [at 44], Ground CJ stated as follows:

"44. Given that I find that there is an applicable limitation period, which has not yet expired, I think that it would be inappropriate to enter into the question of equitable laches. I take the law on that from Underhill & Hayton, 'Law Relating to Trusts and Trustees' 17th ed., at paragraph 96.35: "It is clear that if statute specifically provides for an express period of limitation then there is no room for the equitable doctrine of laches…"

Acquiescence

339. Fourth, I have considered any acquiescence by the Defendants, which is another form of laches, which may be invoked even where a statutory limitation period applies. In *Halsbury's Laws of England Vol. 47* (2021) at 253 it set out the principles of the acquiescence as follows:

"The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time; and in that sense acquiescence is an element in unconscionable delay ('laches'). There may, however, be a case of acquiescence which does not depend on delay at all. Subject thereto, a person whose rights have been infringed without any knowledge or assent on his part has vested in him a right of action which, as a general rule, cannot be divested without accord and satisfaction or deed of release.

The term 'acquiescence' is, however, properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act."

340. In *Attorney General and Minister of Legal Affairs v Tito Jermaine Smith* [2018] Bda LR 50 [at 15 – 20], which was in relation to an application for a recovery order, in respect of the issue of delay, Hellman J stated as follows:

"Delay

15. Ms Mulligan submitted that an application for a recovery order was subject to the equitable doctrine of laches. Laches is: "a general equitable defence which bars the grant of equitable relief when the claimant has been guilty of undue delay in asserting his rights". See the judgment of the Court of Appeal of England and Wales, given by Patten LJ, in Lester v Woodgate [2010] EWCA Civ 199; [2010] 2 P & CR 21.

16. In order to establish a defence of laches, the person raising it must show (i) unreasonable delay in the commencement of proceedings, and (ii) that in all the circumstances the consequences of the delay renders the grant of relief unjust. See the judgment of the Court of Appeal, given by Baker JA (as he then was), in Terceira v Terceira [2011] Bda LR 67 at para 35. Where the conduct relied on consists of no more than undue delay, it operates only to bar the grant of equitable relief. See the judgment of Patten LJ in Lester v Woodgate at para 22.

17. As Patten LJ stated in Lester v Woodgate at para 21, the word "laches" is sometimes used in another sense:

> *"To denote the type of passive conduct which can amount to acquiescence and so found an estoppel when it can be shown that the party standing by has induced the would-be defendant to believe that his rights will not be enforced and that other party has, as a consequence, acted in a way which would make the subsequent enforcement of those rights unconscionable."*

18. Although Patten LJ refers to passive conduct, that conduct must amount to doing something rather than nothing. See Snell's Equity, 33rd Edition, at para 18-041:

> *"Acquiescence primarily means conduct from which it can be inferred that a party has waived his rights. Duke of Leeds v Earl of Amherst (1846) 2 Ph 117 at 123. Mere inactivity is insufficient, for 'quiescence is not acquiescence'. Lamare v Dixon (1873) LR 6 HL 414 at 422, per Lord Chelmsford."*

19. The distinction between laches based simply on delay and laches based on acquiescence has two significant practical consequences. Laches based on acquiescence, unlike laches based simply on delay: (1) May be invoked to defeat legal as well as equitable rights. See the judgment of the Court of Appeal of England and Wales, given by Nourse LJ, in Gafford v Graham and Another (1999) 77 P & CR 73 at 80 – 81. (2) May be invoked even where a statutory limitation period applies. See the judgment of the Court of Appeal of England and Wales given by Wilmer LJ in In re Pauling's Settlement Trusts [1964] Ch 303 at 353, affirming on this point the judgment at first instance of Wilberforce J (as he then was), reported in 1962 1 WLR 86, at 115(2) and 115 – 116(3).

20. In summary, laches based simply on delay cannot defeat a claim for a recovery order as the claim is not equitable and is subject to a limitation period. However, laches based on acquiescence can in principle do so where by reason of the applicant's conduct it would be unconscionable for the applicant to seek a recovery order." (Emphasis Added)

341. Mr. Banks' position is that the Defendants were aware of the encroachment of the gate pillars at the time that they purchased Long House but then chose to sit on whatever their legal rights were to call on it to be rectified. He stressed that they never issued even a letter, still less legal proceedings, over the matter, but now wish to raise the matter after living on Long House for over a decade. The asserted knowledge was based on the BCEC McKee Letter 2012, which was a letter to Neil Halliday of Fiduciary Trust regarding Long House. I have already found that Mr. Storey became aware of the Boundary when he purchased Long House. I find that that knowledge should extend to the encroachments.

342. In taking the broader modern approach, to my mind, it appears that Mr. Banks became aware of the Encroachments as a result of the 2021 surveys. Thus, I am not satisfied that the Defendants have conducted themselves in any way that led to Mr. Banks being misled or induced into believing that the Encroachments were assented to. Thus, there was no acquiescence when he purchased Long House. Further, since such knowledge, there has been no unreasonable delay, such that I find it is not unconscionable for the Defendants to assert their rights at this point in time. Thus, the defences of the doctrine of laches and acquiescence fail.

Trench Drain

343. Fifth, I have considered the issues with the trench drain that spans the width of the Asphalted Roadway outside the gates of Gatewood but on Long House. Mr. Banks' evidence was that it was required by the Department of Planning. He exhibited Development Application Board Minutes dated 10 December 2003 (the "**Minutes**") in relation to Gatewood which state "*In order to avoid the discharge of surface water runoff onto a public road and a state road or any other property, provision shall be made for the controlled and disposal of storm water within the curtilage of the application site.*" (emphasis added). On cross-examination, Mr. Banks conceded that the trench drain was to be within the 'curtilage' of Gatewood. An ordinary meaning of 'curtilage' means the land immediately surrounding and closely associated with a building, forming one enclosure with it and used for the building's purposes. Thus, I find that the 'curtilage' referred to in

the Minutes was the curtilage of Gatewood, as Gatewood was the subject of the application, therefore the trench drain should have been constructed on Gatewood.

344. In respect of the same trench drain, Mr. Elkinson submitted that it was situated on the deeded Right of Way and that it was well settled that the grant of an easement carries with it "such ancillary rights as are reasonably necessary for its exercise of enjoyment. He relied on *Jones v Pritchard* [1908] 1 Ch 630 which states [638] as follows:

> *"… Though, in my opinion, Lord Mansfield was in that case referring only to the fact above mentioned, that by the common law the owner of the servient tenement is not under any liability for not repairing the subject of the easement, yet there is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenant for damages due to any want of repair. Thus, if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. Strictly speaking, I do not think that even in this case the dominant owner can be said to be under any duty to repair. I think the true position is that he cannot, under the circumstances mentioned, plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being fairly or properly exercised. I cannot, however, discover any case in which this principle has been applied unless the easement includes the laying on another man's land of some artificial work to be used for the purpose of and belonging to the dominant owner. It would, in my opinion, be quite impossible to apply the principle where, for example, the easement consisted in turning water onto another's land at a definite point, such water being carried away by a surface drain belonging to the servient owner, even though, as a matter of fact, such drains serve no other purpose."*

345. Mr. Elkinson submitted that Mr. Banks had a right to make repairs and improvements to Long House reasonably necessary to the enjoyment of the right of way over that land, in particular preventing runoff and the accumulation of sediment. However, in my view, the right of way was for the purpose of passage over the land as set out in detail above. The right of way did not address water or drainage or anything similar. Thus, I am not satisfied that *Jones v Pritchard* can be relied upon as asserted to give authority to Mr. Banks to install the trench drain on Long House. Thus, I find that the right of way does not allow for the trench drain to be installed on Long House. Further, whilst there was no technical argument on this point, in all the circumstances, it appears that the trench drain would operate the same, two feet over on Gatewood as it did where it was installed on

Long House. To that point, it appears to me that if the pillars and gates were fully installed on Gatewood, it is more than likely that the trench drain would have been installed with them, not left isolated over on Long House.

Chain Link Fence

346. Sixth, I have considered the issue of the chain link fence on the Grass Verge. Mr. Banks' position and Dame Pamela's evidence was that the chain link fence he caused to be erected in 2005 was to replace an existing fence in that location. I am not satisfied that there is any documentary evidence that shows that there was a pre-existing fence. On that basis, I find that the erection of the chain link fence in 2005 was a trespass and remains a continuous trespass.

Whether trespass is actionable at the suit of the Defendants

347. Seventh, I have considered Mr. Banks' position that trespass is not actionable at the suit of the Defendants, presumably as they are life tenants. I rely on *Clerk & Lindsell* at 18-11 set out above which states that *"Trespass is actionable at the suit of the person in possession of land... Such a person may claim damages or an injunction, or both."*. The Defendants have a life estate in Long House, meaning that they have the property for the duration of their lives and have rights of ownership until their deaths, including the exclusive right of occupation. In my view, trespass is actionable at the suit of the Defendants.

Remedy

348. For the reasons set out above, I have found that the Encroachments are trespasses by Mr. Banks.

De Minimis

349. I have considered the submission of Mr. Elkinson that the Encroachments, at 47 square feet are *de minimis* and trifling matters, such that they can warrant no more than nominal damages and that it would be oppressive and inequitable to order the removal of the gate pillar. He relied on *Bean on Injunctions* [at 2-04] where it states:

"In cases where the interference with the claimant's right is trivial, an injunction may be refused (Imperial Gas Light & Coke Co v Broadbent (1859) 74 H.L. Cas. 600). The claimant may also be confined not merely to damages, but to nominal damages (Armstrong v Shepherd & Short Ltd [1959] 2 Q.B. 384). This applies even where the wrong complained of is continuing trespass on the claimant's land; while an injunction will usually be granted in such cases (Patel v WH Smith (Eziot) Ltd [1987] 1 W.L.R. 853), if there is no injury to the land owner, the claimant may obtain nominal damages and no injunction (Behrens v Richards [1905]2 Ch. 614). In this last case, Barclay J described one head of the claimant's claim as a "petty contest" and a "matter for the application of reason, common sense and ordinary forbearing, not for an injunction". These cautionary observations should be kept in mind when applying for relief in relatively minor or trivial cases. In Fielden v Cox (1906) 22 T.L.R. 411, the court refused an injunction against lepidopterists who had committed a technical trespass to land but were desisted on request. In Radford the Campbell (1890) 6 T.L.R. 488 an injunction was refused where its real object would have been to gratify the pride of Nottingham Forest FC by restraining the defendant from playing for Blackburn Rovers FC. The modern approach is likely to be different now that sport is big business (e.g. Araci v Fallon [2011] EWCA Civ 668; [2011] L.L.R. 440 in which the Court of Appeal granted an injunction preventing a jockey from riding a rival owner's horse at the Epsom Derby)."

350. In *Armstrong v Shepherd & Short Ltd [1959] 2 Q.B. 384* Lord Evershed M.R. stated as follows [396-397]:

"First, it is true to say that a proprietor will not be debarred from asserting his legal right, against one who is shown to have to have infringed it, on the ground of acquiescence, unless it is also clear that, at the time he did so acquiesce, the proprietor was aware of his proprietary rights. There is substantial authority for that view, such as the well-known case of Ramsden v Tyson (1866) L.R. 1 H.L. 129 and the judgment of Fry J. in Wilmott v Barber (1880) 15 Ch. D. 96. It is, therefore, in the present case, well said by Mr. Scott that the absence of essential knowledge, as found by the judge, in December 1957, prevents the erection against him of an equity which would bar the plaintiff from asserting for any purpose his legal title.

Second, it is true to say that if a man, having a proprietary right, proves an infringement of that right, prima facie he is entitled to an injunction: but that needs some qualification. It is not a matter of unqualified right; and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on the well-known case of Imperial Gas Light and Coke Co. (Directors) v Broadbent (1859) 7 H.L.C. 600: but I can summarise it by reading from Kerr on Injunctions, 6th ed., p. 30:

> *"After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."*

The judge was here dealing with the claim as I have formulated it; and he came to the conclusion that the circumstances of this case were special, and, as his judgment shows, that the damage was trivial. For the latter statement he was supported by the plaintiff himself, who said in evidence that he had suffered no inconvenience himself whatsoever from what had been done. …"

351. I also bear in mind that in *Clerk & Lindsell on Torts*, it set out that the slightest crossing of a boundary is sufficient and, citing *Ellis v Loftus Iron Co* (1874) L.R. 10 C. & P. 10 at 12 that if a person "*placed part of his foot on the plaintiff's land unlawfully, it is as much a trespass as if he had walked half a mile on it*".

352. In my view, I consider the trespass by way of the Gateway Items as trifling or *de minimis*. I accept that they encroach very minimally on Long House. I also accept that Mr. Redrobe stated, the 47.584 square feet, in a Residential Zone 2, could attract a value of $30 per square foot, such that the value of the Encroachments would be $1,427.52. That amount is an extremely small amount relative to the total value of both Properties. Further, the encroachments are at the end of the right of way, far away from the house on Long House and significantly, an area which the Defendants could not put to any other use. Thus, I see no harm to the Defendants in not granting an injunction to remove the Gateway Items. I am also observant, having heard in detail about the issues of construction in this case, that it would be absolutely out of proportion, for the sake of a few inches and small value, to order the removal of the Gateway Items at what would be significant costs, and presumably further costs to re-erect a few feet away.

353. Therefore, I decline to exercise my discretion to grant an order to remove the Gateway Items. Instead, I am satisfied that I should grant an award or nominal or modest damages for the trespass in relation to the Gateway Items.

354. I take a different view of the chain link fence which I do not consider to be trivial. In my view, I should exercise my discretion to make an order that it be removed, subject to the Defendant's agreement that there will be no further action for trespass for the work required to remove the chain link fence. I am satisfied that I should grant an award or nominal or modest damages for the trespass in relation to the chain link fence.

Issue 9 – The Plaintiff's Drones

355. There is a claim in trespass by the Defendants that Mr. Banks has caused drones to fly over Long House on numerous occasions, including 2 and 5 September 2023. Mr. Banks has denied causing drones to be flown over Long House on those dates.

The Evidence

356. Mr. Banks stated that he owned a drone and tried to fly it once. Dame Pamela expanded on that by stating that they had received the drone as a gift, flew it from the croquet lawn at Gatewood, when it disappeared. Out of concern, they were about to get in their car to search for it, when it came back on its own and landed back at Gatewood. She did not think that they had flown the drone over Long House.

357. John Manderson stated that he is an expert in drone work/piloting, aerial photography, imagery and videography with more than 10 years' experience as a certified drone operator. He was instructed by Mr. Banks to obtain drone footage and images of Gatewood and Long House to be used by Mr. Mayall, which he did on 7 and 9 March 2022 using a DJI Mavic Air 2 aerial drone. He provided the images to Conyers, those images never being disclosed to Mr. Storey, as Mr. Elkinson submitted that they were privileged. Mr. Banks sought to rely on a mosaic picture created by Mr. Mayall from several drone images, but after some argument, the mosaic picture was withdrawn.

358. On cross-examination, Mr. Manderson stated that he flew the drone on both occasions from Gatewood. He and a colleague flew the drone within the Gatewood boundary, then out to sea and back. He stated there was no way he could know if he flew over Long House, but that it was possible but unlikely, that they could have flown the drone over someone else's property.

359. Mr. Storey's evidence is that on 2 and 5 September 2023, a DJI phantom drone was seen flying over Long House. He stated that there were many occasions of drones flying

over Long House and he did not know to whom they belonged or where they came from. He conceded that the dates that Mr. Manderson said he flew his drone was different than the date that he was complaining about. Mr. Storey maintained that if proper disclosure had been made by Mr. Manderson, the drone data would have revealed take-off positions, dates and flight paths, disagreeing with Mr. Manderson that he did not know where he had flown his drone.

The Law

360. The UK Air Navigation (Overseas Territories) Order 2013 (the "**2013 ANOT Order**") is extended to Bermuda. In section 3 it defines:

a. "congested area" in relation to a city, town or settlement, means any area that is substantially used for residential, industrial, commercial or recreational purposes.

b. "small unmanned aircraft" means any unmanned aircraft, other than a balloon or a kite, having a mass of not more than 20kg without its fuel but including any articles or equipment installed in or attached to the aircraft at the commencement of its flight.

361. Section 73 states as follows:

Regulation of small unmanned aircraft

73. (1) A person must not cause or permit any article or animal (whether or not attached to a parachute) to be dropped from a small unmanned aircraft so as to endanger persons or property.

(2) The person in charge of a small unmanned aircraft may only fly the aircraft if reasonably satisfied that the flight can safely be made

(3) The person in charge of a small unmanned aircraft must maintain direct, unaided visual contact with the aircraft sufficient to monitor its flight path in relation to other aircraft, persons, vehicles, vessels and structures for the purpose of avoiding collisions.

(4) The person in charge of a small unmanned aircraft which has a mass of more than 7kg, excluding its fuel but including any articles or equipment installed in or attached to the aircraft at the commencement of its flight, must not fly the aircraft—

(a) in Class A, C, D or E airspace unless the permission of the appropriate air traffic control unit has been obtained;

(b) within an aerodrome traffic zone during the notified hours of watch of the air traffic control unit (if any) at that aerodrome unless the permission of any such air traffic control unit has been obtained; or

(c) at a height of more than 400 feet above the surface unless it is flying in airspace described in sub-paragraph (a) or (b) and in accordance with the requirements for that airspace.

(5) The person in charge of a small unmanned aircraft must not fly the aircraft for the purposes of aerial work except in accordance with a permission granted by the Governor.

(6) The person in charge of a small unmanned surveillance aircraft must not fly the aircraft in any of the circumstances described in paragraph (7) except in accordance with a permission issued by the Governor.

(7) The circumstances referred to in paragraph (6) are-

(a) over or within 150 metres of any congested area;

(b) over or within 150 metres of an organised open-air assembly of more than 1,000 persons;

(c) within 50 metres of any vessel, vehicle or structure which is not under the control of the person in charge of the aircraft; or

(d) subject to paragraphs (8) and (9), within 50 metres of any person.

(8) Subject to paragraph (9), during takeoff or landing, a small unmanned surveillance aircraft must not be flown within 30 meters of any person.

(9) Paragraphs 7(d) and (8) do not apply to a person in charge of the small unmanned surveillance aircraft or a person under the control of the person in charge of the aircraft.

(10) In this article "a small unmanned surveillance aircraft" means a small unmanned aircraft that is equipped to undertake any form of surveillance or data acquisition.

362. Section 126 defines "aerial work" as:

126. (1) Aerial work means any purpose (other than commercial air transport) for which an aircraft is flown if valuable consideration is given or promised in respect of the flight or the purpose of the flight.

(2) If the only such valuable consideration consists of remuneration for the services of the pilot the flight is deemed to be a private flight for the purposes of Part 3.

363. In the UK case of *Bernstein of Leigh (Baron) v Skyviews & General Ltd.* [1978] Q.B. 479, the defendants flew over the plaintiff's land in Kent and took a single aerial photograph of the country house which they then offered to sell to him. The plaintiff claimed damages, alleging that by entering the airspace above his property in order to take aerial photographs, the defendants were guilty of trespass, and or were guilty of an actionable invasion of the plaintiff's right to privacy by taking the photograph without his consent or authorization. Griffiths J stated follows:

"I can find no support in authority for the view that a landowner's rights in the airspace above his property extend to an unlimited height. In Wandsworth Board of

Works v United Telephone Co. Ltd. 13 Q.B.D. 904 Bowen L.J. described the maxim, usque ad coelum[21], as a fanciful phrase, to which I would add that if applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the uncritical and literal application of the maxim: see by way of example only Winfield and Jolowicz on Tort, 10th ed. (1975), p. 305, Salmond on Torts, 16th ed. (1973), p. 44, Shawcross & Beaumont on Air Law, 3rd ed. (1966), p. 536, McNair, The Law of the Air, 3rd ed. (1964), p. 97 and Halsbury's Laws of England, 4th ed., vol 2 (1973), p. 684. I accept their collective approach as correct. The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of airspace. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the airspace above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the airspace than any other members of the public.

Applying this test to the facts of this case I find that the defendants' aircraft did not infringe any rights in the plaintiffs' airspace, and thus no trespass was committed. It was on any view of the evidence flying many hundreds of feet above the ground and it is not suggested that by its mere presence in the airspace it caused any interference with any use to which the plaintiff put or might wish to put his land. The plaintiff's complaint is not that the that the aircraft interfered with the use of its land but that a photograph was taken from it. There is, however, no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's airspace into one that is a trespass."

364. In the UK King's Bench Division, the case of *Anglo International Upholland Ltd v Wainwright and ors* [2023] ALL ER (D) 117 concerned an application for an injunction because Wainwright and others, visited on a regular basis, without permission, an abandoned college seminary building, sometimes using drones, to take pictures for social media. The dilapidated state of the building meant it was unsafe. Judge Bird was satisfied to grant an injunction prohibiting trespass at the building and he further stated as follows:

"I accept that a drone is an aircraft and that section 76 [Civil Aviation Act 1982] applies. It follows (...) that by operation of the statute, the simple act of flying over the college site does not give rise to a claim in trespass. I do not regard section 76 as barring any interim relief in respect of drones on the facts of the present case. The

[21] Bernstein [at 485 C] states "the full Latin phrase is "*cujus est solum ejus est usque ad coelum et ad inferos*" – … a colourful phrase often upon the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century." Translated as "whoever's is the soil, it is theirs all the way to the sky and to the depths"

basis of complaint is not the simple act of flying, but rather what is happening during the flight. Photographs and videos taken by cameras mounted on drones facilitate and encourage further trespass and potentially endanger life. Such footage and photographs can be used to work out new ways to enter the site. The only reason to fly a drone over the site is to facilitate trespass in the way I have described. Alternatively, if the specific use of the drone is not sufficient to warrant interim relief for the reasons set out above, then flying a drone so that footage can be taken means, in my judgment, that its height above ground could not be said to be (in the language of section 76) "reasonable". It would follow that section 76 has no application and so the flight would be a trespass. In my judgment either because of the use to which the drone is put (if section 76 applies) or the trespass (if section 76 does not apply because the height of the drone is not reasonable), it is appropriate and proportionate to make an order preventing drone flights at the site."

Analysis

365. In my view I am not satisfied that there was trespass by Mr. Banks' use of a drone over Long House. First, the evidence does not show that Mr. Banks or his agents were flying a drone from Gatewood or over Long House on the dates complained of, that is 2 and 5 September 2023. Further, I am not satisfied that there is evidence to support any other dates either, in particular the dates when Mr. Manderson says he flew his drone from Gatewood.

366. Second, in applying the principles in *Bernstein*, the Defendants do not enjoy rights in the air space above their property extended to an unlimited height. In applying those principles, in respect of trespass, I would have to be satisfied that the drone was flying at a height where it infringed on the rights of the Defendants to enjoy the ordinary use and enjoyment of his land and the structures upon it. There was no such evidence of the height that the drone was flying and no evidence of what ordinary use and enjoyment the Defendants were experiencing. In my view, those rights could include simply being present on their property, in or outside their home, enjoying peace and tranquility. It would all depend on the facts on a case by case basis.

367. Third, Part 22 of the 2013 ANOT Order sets out the prohibited behaviour, offences and penalties. They are outside the scope of this judgment.

368. In light of the above reasons, I dismiss the Defendants' claim for trespass by drone use of Mr. Banks.

Issue 10 - The Plaintiff's Boundary Incursions on Long House

369. The Defendants claim that Mr. Banks, Dame Pamela, and Mr. Banks' servants or agents, trespassed on Long House in order to install a stack of concrete blocks (the "**Blocks**") and to erect a chain link fence (the "**Border Fence**") in May 2022. The Blocks are intended to be used to build a wall along the boundary between the Properties. The Defendants assert that the stacking of the Blocks is a nuisance. Mr. Banks' Planning Application indicates that Mr. Banks intends to access Long House in order to build the wall. Thus, the Defendants seek a permanent injunctive relief in the form of a *quia timet* injunction to prevent trespass by Mr. Banks, his servants or agents.

370. Mr. Storey also claims that there have been a number of boundary incursions by Mr. Banks, Dame Pamela, or their servants or agents trespassing on Long House on many occasions. He gave a list of such incursions for a period from 30 November 2020 to January 2024. He also claimed that unknown trespassers have come onto Long House from Gatewood, although he did not know if they were also trespassing on Gatewood or had permission to be on Gatewood. Those trespasses ranged from January 2015 to October 2023, including the allegations about the Drone trespass in September 2023.

The Evidence

371. Mr. Storey's evidence about the Blocks is that during the period when a temporary injunction was in place against him, Mr. Banks had engaged Island Construction Services to stack the Blocks in the Woodland Reserve on the Pathway on Gatewood, reaching a height of approximately 6 feet, creating an eyesore, the stack now in danger of tipping over to Long House as they are very close to the Boundary. In order to do this, the workers accessed the area from Gatewood, but only after first trespassing on Long House for a brief period. Mr. Storey maintained that it was unnecessary and aggressive step for Mr. Banks to stack the Blocks there as he (Mr. Storey) had given an undertaking not to trespass on Gatewood and there was no risk of him doing so, nor any evidence that he had done so.

Mr. Storey had photographic and video evidence of the Blocks and the stacking process. He reported the circumstances to Sheldon Fox, a Planning Enforcement Officer.

372. Mr. Storey's evidence about the Boundary Fence is that Mr. Banks caused it to be erected in May 2022, along the Boundary, traversing woodland and coastal reserve, having cleared a significant amount of woodland, including the felling of trees. Mr. Storey maintains that Mr. Banks' workers, including Mr. Noon, trespassed onto Long House in order to erect the Boundary Fence, which is supposed to be four feet in height, but in some places reaches ten feet in height. In the area of the patio on Long House, the Patio Fence Post has been installed, high up but which drops down from Gatewood onto the patio.

373. The evidence in general of Mr. Banks and Dame Pamela is that they have not trespassed on Long House. Dame Pamela denied that she had been on Long House with her son and on the only occasion she had been on Long House was when she was looking for a dog that had wandered onto Gatewood and then off again to Long House. She walked a short distance on the driveway to Long House but left when confronted by Mr. Storey.

374. Mr. Storey relied on videos and pictures to show that workmen instructed by Mr. Banks had erected the Border Fence and or stacked the Blocks by trespassing on Long House. The indication for this was that there was a string present on site which represented the boundary. Workmen on Gatewood were seen stepping over the string, and thus, stepping onto Long House. I should note here that Mr. Banks maintained that he had instructed his workmen to install the fence inside of the boundary between the Properties.

375. In any event, the Defendants are concerned that the CMP states "*Access for machinery, equipment, building materials, soil, plants, etc. shall be via the 'extended' excavated road on the adjacent property, #13 Inglewood Lane. Access shall include all access necessary for the purposes of constructing the boundary wall and reinstating the original adjacent forest and all works associated with this Conservation Management Plan.*"

376. The Defendants' concern is further heightened by the letter from Poppy Brown to David Cox dated 11 July 2024, in relation to the CMP Implementation at Gatewood, in which Mr. Brown makes the following assumptions: (i) his quotes assume access to the area will be via Long House over the existing track with access over Gatewood will not be required; and (ii) water will be provided by water trucks over Long House or from water points on Long House and there would be free access at Long House for storage of equipment and materials for the duration of the works.

The Law

377. In *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 [at 29 – 31] the Patten LJ of the English Court of Appeal stated as follows:

> *"Quia timet relief*
> *29 The court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.*
>
> *30 A much-quoted formulation of this principle is set out in the judgment of Pearson J in Fletcher v. Bealey (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in Salvin v. North Brancepeth Coal Company (1874) LR 9 Ch App 705 and then adds his own comments that:*
>
> > *"…it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down*

that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a quia timet action."

31 More recently in Lloyd v. Symonds [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:

"On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7th January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm – that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" – see Graigola Merthyr Co Ltd v. Swansea Corporation [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see Attorney-General v. Nottingham Corporation [1904] 1 Ch 673 at page 677).

...

In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction quia timet was appropriate in the circumstances of this case."

378. In *Vastint Leeds BV (a company incorporated under the laws of the Netherlands) v Persons Unknown* [2018] EWHC 2456 (Ch) at [31] Smith J of the High Court, referred to the extract above in *Islington London Borough Council*, and then stated as follows:

> *"31 From this, I derive the following propositions:*
>
> *(1) A distinction is drawn between final mandatory and final prohibitory quia timet injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant's rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a quia timet injunction, whether mandatory or prohibitory, is essentially the same.*
>
> *(2) Quia timet injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in Hooper v. Rogers, the cause of action may be substantially complete. In Hooper v. Rogers, an act constituting nuisance or an unlawful interference with the claimant's land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.*
>
> *(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test:*
>
> *(a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?*
>
> *(b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?*
>
> *(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage – the strong possibility that there will be an infringement of the claimant's rights – and without seeking to be comprehensive, the following factors are relevant:*
>
> *(a) If the anticipated infringement of the claimant's rights is entirely anticipatory – as here – it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists.*
>
> *(b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As Spry notes, 15 "[o]ne of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions".*

(c) Of course, where acts that may lead to an infringement have already been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act.
(d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. 16

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material:
(a) The gravity of the anticipated harm. It seems to me that if the some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind.
(b) The distinction between mandatory and prohibitory injunctions."

379. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 EWCA Civ 303 at [63] the Court of Appeal stated as follows:

"63. It will be noted that Cameron did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a quia timet injunction is sought. He did, however, refer (at [15]) with approval to South Cambridgeshire District Council v Gammell[2005] EWCA Civ 1429, [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land."

Analysis

380. In my view I decline to grant the application for a *quia timet* injunction for several reasons. First, I do note that Mr. Banks has placed the Blocks on Gatewood on the Pathway and this is a clear intention that he intends to build a wall along the Boundary between the Properties.

381. Second, I do accept that there is evidence that the workmen, when erecting the Boundary Fence, stepped across the string, which was representing the Boundary, although Mr. Banks did say his instructions were for the Boundary Fence to be installed within Gatewood. The current concern of the Defendants is that when the Boundary Wall is being built, close to or on the Boundary, it is likely that workmen, even under strict instructions, may cross the Boundary onto Long House. I should add here that it seems to me that such a trespass would be in furtherance of their workmanship to build and properly finish a wall, rather than for any nefarious purposes.

382. Third, significantly, I do note that Mr. Banks has submitted in the CMP that he intends to use Long House for access by men and machinery to the Boundary, for works to be carried on the Boundary, to deliver water by use of a route over Long House, to access water points on Long House and for storage of materials on Long House. The CMP was developed without consultation of the Defendants and by way of these proceedings they object to the implementation of the CMP.

383. Fourth, however, I must consider the principles in respect of granting a *quia timet* injunction. The first stage of the two-stage test is to consider whether the threat is imminent. In my view, in applying the principles in the cases cited above in this section, the threat is not imminent. I take that view, because although Blocks have been placed on the Pathway on Long House, for quite some time now, there has been no other action to support the contention that the trespass anticipated from building the Boundary Wall is imminent. To that point, there has been extensive litigation in this case and the CMP, whilst it has been submitted to Planning, is an issue in this case. The implementation of the CMP thus awaits the orders of the Court, although I do note that Mr. Banks, once he obtains Planning approval, can set out implementing the CMP without an order of the Court. Thus, it seems to me, that Mr. Banks is taking a methodical approach to the building of the Boundary Wall, awaiting permission from Planning and orders of this Court in respect of the CMP.

384. Fifth, in respect of the second stage, I must consider, in the absence of a *quia timet* injunction, and if an infringement takes place, how effective an immediate interim

injunction plus damages will be as a remedy for such infringement. In my view, after such extensive litigation as the present, it would be surprising for Mr. Banks to commit a trespass in building the Boundary Wall on his own property or carrying out other aspects of the CMP. But, be that as it may, in my view, if such an infringement takes place, it will be evidenced by the start of the work, and some introductory infringement relative to the entire project of building the Boundary Wall. In other words, the Boundary Wall will not be built in one day, or overnight on the Boundary. Further, parts of the Boundary are very close to the house on Long House such that any activity is likely to be detected early. I point out those circumstances as they lead me to the conclusion that there will not be significant harm that cannot be met by an interim injunction to prevent those activities. Further, in my view, the harm of the infringement can be undone by an *ex post* intervention, namely remediation by damages for any of the trespasses set out in the CMP or otherwise anticipated.

385. In light of these circumstances, I am not satisfied that I should grant the *quia timet* injunction to prevent trespass by Mr. Banks, his servants or agents onto Long House for the purposes of building his Boundary Wall and the activities associated with it.

Issue 11 - The Plaintiff's Nuisances

386. As set out above, the Defendants claim that Mr. Banks has placed the Blocks, stacked over six feet high on the Excavated Western Access Roadway on Gatewood near the boundary between the Properties, which are visible from the house on Long House and which are precarious. Mr. Banks' evidence is that he had them placed there for a future project of building a wall along the boundary, subject to Planning approval. The Blocks have been in place for several years now. Additionally, as set out above the Defendants claim that Mr. Banks erected the Boundary Fence and the Patio Fence Post onto the patio of the house on Long House, in order to mark the boundary between the Properties. Mr. Banks' evidence is that the Boundary Fence is there to mark the boundary. Further, he had planning permission to install the Boundary Fence there. He conceded that the Patio Fence Post is greater than four feet in order to support the Boundary Fence that was running four feet above the undulating surface of the ground.

387. The Defendants claim that Mr. Banks placed the Blocks and installed the Patio Fence Post with the intention of annoying or intimidating the Defendants, thus they interfere with the comfort and convenience of the Defendants' life and enjoyment of their home. They claim that the blocks serve no other purpose as the Boundary Fence cuts across the Excavated Western Access Roadway.

388. Thus, the Defendants claim that the interferences are actionable private nuisances and that the value of Long House has been diminished by the Patio Fence Post and it is actionable. The Defendants seek: (i) removal of the Blocks from Gatewood and removal of the Patio Fence Post, or alternatively an award in damages; (ii) damages for diminution in value of Long House caused by the Boundary Fence which has blighted Long House and reduced its sale value.

389. Mr. Redrobe, in his expert report dated 1 November 2024, stated [at page 5] that:

> *"The erection of the fence along the boundary between the two properties has a negative effect on the market value of 13 Inglewood Lane. It is not possible to establish a market value on the land and building and the negative effect of the encroachment without carrying out a full appraisal of 13 Inglewood Lane. As I advised above, I have not been instructed to value the land and buildings of either 13 or 17 Inglewood Lane."*

The Law

390. In respect of nuisance, I referred earlier to commentary from *Clerk & Lindsell* on the meaning of nuisance. Further, *Clerk & Lindsell on Torts 24th Edition*, Chapter 19-16 and19-28 states as follows:

> *"**19-16 - Acts done with the intention of annoying***
> *Acts done with the intention of annoying a neighbor and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of property[22]. In Hunter v Canary Wharf*

[22] Christie v Davey [1893] 1 Ch. 316; Hollywood Silver Fox Farm v Emmett [1936] 2 K.B. 468 (deliberately firing guns to cause vixens to abort); distinguish in Rattray v Daniels (1959) 17 D.L.R. (2d) 134 (bulldozing close to mink farm in whelping season, no intention to harm, no negligence, no liability); Grandel v Mason [1953] 3 D.L.R. 65 (liable in nuisance and negligence because of knowledge of peculiar sensitivity of mink); distinguishing Nova Mink v Trans-Canada Airlines [1951] 2 D.L.R. 241. A modern example might be the deliberate use of electric equipment to interfere with a neighbor's use of wi-fi.

Ltd [1997] AC 655 it was suggested, obiter, in the House of Lords [per Lord Cooke at 721] that the "malicious erection of a structure for the purpose of interfering with television reception should be actionable in nuisance" in circumstances in which such interference would not be actionable in the absence of malice. Thus although malicious abuse of rights is not in itself an actionable wrong [see para 1-72], malice in this context is an element — often a powerful element — in determining the reasonableness of the user.[see para 1-74]

19-28 Intangible loss

Where an actionable nuisance interferes with the claimant's property and in addition damages his chattels, it seems that the claimant can recover such consequential damages [footnote]. Damages for personal injury, however, do not appear as such [footnote] to be recoverable in private nuisance [footnote]. It has always seemed unlikely that such damages could be recovered, given the focus of the tort upon property and its enjoyment. No reported English case appears to have given such an award, and dicta in the House of Lords now support the view that such recovery is not possible [footnote]. In cases involving interference with amenity and enjoyment of property the court must place a value on an intangible loss which "cannot be assessed mathematically" [footnote]. The Court of Appeal once suggested that such damages could be assessed by analogy with damages for personal injury [footnote], but this was disapproved by the House of Lords in Hunter v Canary Wharf Ltd [footnote]. Since only the owner, or the occupier with the right to exclusive possession, is entitled to sue for interference with the enjoyment each member of a family does not have a separate course of action, and the "quantum of damages does not depend on the number of those enjoying the land in question" [footnote]. (If, however, the defendant is a public authority an individual family member may have a cause of action under the European Convention for the Protection of Human Rights art. 8, for interference with his private and family life [footnote].) If interference with amenity has been so great as to reduce the value of the claimant's property, a substantial award of damages for the reduction in value will normally be taken to include compensation for the loss of amenity itself: the claimant will therefore be unlikely to receive a separate award under that head [footnote]. In Network Rail Infrastructure Ltd v Williams [2018] EWCA Civ 1514; [2019] Q.B. 601, claimants onto whose land Japanese knotweed had spread were awarded substantial sums, based on the reduction in value of their properties, for the loss of enjoyment of their land [footnote]."

391. In the English Court of Appeal case of *Peter James Raymond, Lesley Raymond v Steven Frederick Young, Fiona Young* [2015] EWCA Civ 456 Patten LJ reaffirmed the position that interference with enjoyment can be an actionable nuisance as follows:

"21. Another case which post-dates the decision in Fowler v Jones is Dennis v Ministry of Defence [2003] 2 EGLR 121. This was cited to the Recorder but not referred to in his judgment. It was a claim for damages for nuisance by the owners of a Grade 1 listed country house, Walcot Hall, which is situated less than 2 miles from RAF Wittering. The RAF base was used for training and the operation of Harrier jump

jets and the level of noise was said to have caused a very serious interference with the claimants' enjoyment of their property. Buckley J held that the noise generated by the aircraft did constitute an actionable nuisance and awarded damages of £950,000.

…

In Hunter v Canary Wharf Ltd [1997] AC 655 the House of Lords re-affirmed that the cause of action in private nuisance is a claim for injury to a proprietary or other interest in land even where the nuisance (such as smells, air pollution or noise) causes no physical damage to the claimant's land itself but merely affects its reasonable use and enjoyment."

392. Patten LJ also addressed the approach for assessing damages as follows:

'The decision in Fowler v Jones can therefore be supported on the basis that the Recorder considered he was dealing with a state of affairs that was likely to be limited in point of time. He therefore assessed the damages by reference to the loss of amenity value for the relevant period rather than by assuming that the defendant's conduct would remain a constant blight on the value of the claimant's property. In Dennis, Buckley J accepted that the diminution in the value of Walcott Hall due to aircraft noise assessed as at the date of the trial was £4m but reduced this to £300,000 to take account of the limited future duration of the nuisance and the chances of the property being sold in the meantime. He added a further £50,000 to this for loss of amenity which was itself a reduced figure to take account of the fact that his calculation of loss of value included the £300,000. I have some misgivings about this methodology in the light of Hunter but what is clear is that the judge recognised that the claimants were not entitled to the full amount of the £4m or what they might have achieved on a loss of amenity value calculation had no capital loss been proved."

Analysis

393. In my view, I am not satisfied that I should make orders to remove the Blocks and the Patio Fence Post for several reasons. First, as a result of all these circumstances, Mr. Banks wishes to build a wall along the Boundary between the Properties. I note there is an old proverb that says that "*Good fences make good neighbors*" and thus, with the Boundary Fence in place already, it seems that Mr. Banks seeks to now reinforce that proverb with something more permanent than a fence, namely a wall. In my view, he can desire to build a wall, subject to the requirements and approval of Planning. Thus, I am not inclined to make an order now that the Blocks should be removed. I anticipate that there will be a period of time after Orders are made in this case that a number of actions will have to be taken. The building of the Boundary Wall should take place within a reasonable timeframe in alignment with other actions; however, if the Blocks remain in place or the Boundary

Wall is not built within a reasonable period of time, then relevant applications can be made to the Court to reconsider the position.

394. Second, I am not satisfied that Mr. Banks' intention is to intimidate and harass the Defendants by installing the Boundary Fence or Patio Fence Post. It seems clear to me that the Patio Fence Post is built to support the Boundary Fence which, as it crosses the patio as built on Gatewood, the elevation in land is changing. Thus, to my mind it is a necessity to support the Boundary Fence.

395. Third, the Patio Fence Post is on Gatewood. The only reason why it crosses over the patio is because the Defendants built the patio on Gatewood. It seems rather unfair to me that the Defendants could complain that the Patio Fence Post is a nuisance, when the existence of the patio itself is a trespass by the Defendants onto Gatewood. To that point, once the Defendants remove the Admitted Construction, then the land will have an appearance, with or without a boundary wall, such that the Patio Fence Post will not be crossing the patio, it will be a part of vegetation or replaced by the boundary wall.

396. Fourth, in applying the principles set out in this section from *Clerk & Lindsell* and the case of *Raymond et al*, I find the Blocks and the Patio Fence Post do not amount to an interference in the enjoyment by the Defendants of their home. The actions of the Defendants have been the reason why the Boundary Fence and Patio Fence Post are in place. Despite their existence, the Defendants can enjoy the grounds of Long House to the same extent as they did prior to their existence, namely to move around Long House.

397. In light of the reasons above, I find that the Blocks and the Patio Fence Post are not nuisances as claimed. Based on that finding, I do not need to address the issue of diminution in value and associated damages.

Issue 12 - Claims for Aggravated Damages by both Parties

398. Both parties seek aggravated damages.

399. Mr. Banks seeks damages, aggravated damages and an indemnity for the costs of the CMP. He submitted that he has been put to enormous expense by the Defendants and their actions have caused him to divert time and energy to deal with litigation that was not of his making. He submitted that the greatest expense is the cost of the CMP, for which he submitted he should be indemnified by the Defendants on the basis that the trespass was committed with "*reckless disregard of the interests of the true owner*." I have dealt with the application for an indemnity in respect of the CMP above.

400. The Defendants seek aggravated damages because they submitted that Mr. Banks' actions, which were deliberate, provocative and unrepentant, have caused anxiety, inconvenience and distress and have been carried out with the intention of the other residents of the community having full knowledge of the litigation as reported in the media. They submitted that such deliberate and provocative behaviour includes the erection of the fence with the post on the patio, which act is, in the opinion of the valuation expert, the one that causes a diminution of value in Long House.

The Law

401. In the Court of Appeal case of *McMillan v Singh* (1985) 17 H.L.R 120 Arnold JA stated:

> *"It has also long been clear that exemplary damages may be available, if the conduct of the landlord falls within the criteria for such an award: See Rookes v Barnard [1964] A.C. 1129:*
>
> > *"Where a defendant with a cynical disregard for the plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk .... This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. (per Lord Devlin at p. 1221.)"*

[at page 124] … So that I do not think that the judge approached the case in the right way. But it is pointed out – and that this is a matter which I think this court can deal with - that one does not, on a strict application of the law on the subject - reach the point at which one starts to assess the amount of punitive or exemplary damages until one has exhausted the quantification of other damage, the other damage being, in an appropriate case, not only a compensation for the infliction of damage to property or to the person, but also where such damage is awarded an additional or, as it is called, aggravated damages which are attracted by the circumstance that, in addition to suffering damage to his person or damage to his property the particular plaintiff has suffered damage to his feelings. Lord Justice Lawton, in Drane v Evangelou, explained that that was the proper way and, indeed, the only proper way of approaching the thing, at any rate in the High Court."

402. In the case of English Court of Appeal case of *Scutt v Lomax* Clarke LJ stated as follows:

"87. I turn to aggravated damages. It is conceded that the judge was right to award aggravated damages which, as the judge put it, arise when a tort is committed in such a way as to aggravate the damages suffered by the claimant. Here the claimant's land was devastated. We have seen a photograph of the land in 1981 and a photograph of the devastation after the destruction in 1995. Almost everything was destroyed. It must have been a great shock to the claimant to see the land which he and his wife had tended as memorial to their daughter devastated in that way. The question is whether £500 is manifestly too low as an award aggravated damages.

88. The district judge assessed exemplary damages at £2000 on the basis of what are essentially the same facts as lead to the conclusion that the claimant is entitled to aggravated damages. It seems to me that in all the circumstances an award of £500 is manifestly too low and I would substitute an award of £1,000 by way of aggravated damages."

403. In *Ramzan v Brookwide Ltd* [2010] EWHC Civ 2453 (Ch) the English High Court awarded exemplary damages of £60,000 against a defendant who subsumed part of his neighbor's property into his own property "*with reckless disregard of the interest of the true owner*". The Court stated as follows:

<u>Exemplary Damages</u>
66. The leading case on exemplary damages is Broome v Cassell [1972] AC 1027. In the earlier case of Rookes v Barnard [1964] AC 1129 Lord Devlin said at p.1228 that in a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum. He stressed that awards should be "moderate",

and should not amount to greater punishment than would be likely to be incurred if the conduct were criminal. In Broome v Cassell Lord Hailsham added that a jury should always be warned that they need not award anything, and must not do so unless they are satisfied that a purely compensatory award is inadequate. He went on at p.1060B:

> *"It follows that whatever they do award should only be a sum which has taken into account the award of damages already notionally allowed as compensation, including, where appropriate, the "aggravated" element required by a defendant's bad conduct, and should never exceed the amount by which the required penalty (if that is the right word) exceeds the required compensation".*

67. Lord Hailsham went on to explain at 1073 that the word "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect. The whole process of assessing damages where they are "at large" is essentially a matter of impression and not addition. Lord Hailsham included warnings about double counting by adding a pure fine to what has already been awarded as solatium without regarding the deterrent or punitive effect of the latter, but it is important to bear in mind that he was addressing a context (defamation) in which aggravated damages might be awarded. In the present case I have already ruled that it was inappropriate to award aggravated damages."

404. In the Court of Appeal in the same case, *Ramzan v Brookwide Ltd* [2011] EWCA 985 the Court upheld the award of exemplary damages in principle but reduced it to £20,000, holding that the award did not need to be a substantial sum to make its point, the making of the award was in itself sufficient.

405. In *The Trustees of the Hamilton Parish Temperance Friendly Society v Bean* [2024] SC (Bda) 7 Civ [at 39] Elkinson AJ stated:

> *"38. The actions of the Plaintiff in relation to the Container Issue not only constituted a breach of the covenant for quiet enjoyment but it was submitted that they were also amounted to the torts of trespass and private nuisance. Mr. Rothwell submitted that in such cases aggravated damages can be recovered for injury to proper feelings of dignity and pride and aggravation generally, as can exemplary damages in appropriate cases where there has been intimidation. There is also the inconvenience which the Defendant suffered. However, as regards the tort of intimidation, this can only be actionable if the party intimidated responds to the threat; if he/she does not respond then there is no claim. Further the category of cases where exemplary damages are awarded are very restricted and not applicable in this case.*

39. Here the Plaintiff did not force the Defendant to quit the Property and the Plaintiff did not profit from their own tort. It was a case of a Landlord, in circumstances where they had already commenced an action for what they believed was their right to recover unpaid rent and possession of their property, deliberately choosing to deprive the Defendant of the use of the Property and causing inconvenience the Defendant. This necessitated the Defendant to apply for injunctive relief from the court. The torts of trespass and nuisance were committed by the placing of the containers on the demised property; these were deliberate, provocative and unrepentant actions of the Plaintiff, carried out in full view of the local community given that the containers were visible from the road. It was submitted that this was an affront to the dignity and pride of Pastor Bean and his Ministry, causing anxiety, inconvenience and distress and that such behaviour warrants an award of aggravated damages. I agree. The behaviour of Mr. Lionel Raynor, then one of the Trustees, directly after the first court hearing when the Injunction was ordered, was further relied on to support a claim for aggravated damages. The Chief Justice having determined that the containers were wrongfully there and having ordered their removal, Mr. Raynor said to Pastor Bean that he would not be moving anything and then stated, in front of Pastor Bean's church leaders, "Smile, little boy." These are the uncontested facts relied upon by Mr. Rothwell of behaviour which support an award of aggravated damages."

Analysis

Claim by Mr. Banks

406. In respect of the claim for aggravated damages by Mr. Banks, I am satisfied that there is a basis for such damages that Mr. Storey has caused injury to the dignity and pride of Mr. Banks and Dame Pamela on two grounds.

407. First, similar to the finding of Clarke LJ in *Scutt v Lomax*, Mr. Banks and Dame Pamela gave evidence of their shock as to the devastation of the GW Woodland Reserve, which was once untouched for decades and possibly centuries, but replaced at the desire of Mr. Storey with the Admitted Planting, including ornamental plants. To my mind, this circumstance attracts an appropriate award of aggravated damages reflecting both the seriousness of the destruction and the fact of the replanting. I will hear the parties on the amount of aggravated damages to award.

408. Second, in June 2023, by parking his motorcycle across Inglewood Lane, Mr. Storey blocked Dame Pamela when she was travelling in her car on Inglewood Lane, for which she enjoyed a right of way to pass over it. Further, Mr. Storey called the police to

attend the incident and they did so. I have heard the evidence on this point and I have seen the associated photographs. Mr. Storey may have taken issue with Mr. Banks' landscapers attending to the Grass Verge but in my view, he was not entitled to block Dame Pamela from using the roadway. Further, calling the police to the scene whilst continuing to block her amounts to injury to the dignity and pride of both Mr. Banks and his wife Dame Pamela.

409. This incident was canvassed in the last questions of cross-examination which led to it being put to Dame Pamela that at the incident, she said to Mr. Storey that he and his family did not belong in Inglewood and they lacked the "right caste". Dame Pamela denied that she said that adding "… *we did not use such vernacular*". This was followed up with another question that she did not consider the Storeys to be good enough for Inglewood. I recall Dame Pamela's reply when she emphatically stated "*What you're talking about, a black woman who grew up in a segregated Bermuda until I was a teenager and you're going to say that I am going to tell somebody else that they're not good enough? I don't think so. I'm sorry. … That one I'm not going to let go.*" In my view, that denial and explanation had a resounding ring of truth to it along with an expression of injury to her dignity and pride. To my judgment, in respect of aggravated damages, the conduct and assertion at trial by Mr. Storey caused injury to the dignity and pride of Dame Pamela and by extension to Mr. Banks. I will hear the parties on the amount of aggravated damages to award.

Claim by the Defendants

410. In respect of the claim for aggravated damages by the Defendants, I am not satisfied that there has been some behaviour by Mr. Banks – or Dame Pamela - for injury to the dignity and pride of the Defendants. The fact that this case may have been reported in the media does not rise to the level of attracting aggravated damages in this case. A wide scope of cases are reported in the media on a regular basis. I do not accept that the fact of media reporting was designed to cause a negative impact amongst neighbors against the Defendants.

411. In respect of the erection of the Patio Fence Post, Mr. Banks erected the fence and the Patio Fence on his own property. To my mind, that does not give rise to aggravated damages as he was erecting a fence and a fence post which he had a right to do. Further, I have considered Mr. Banks' and Dame Pamela's complaints to Planning which the Defendants rely on as a basis for aggravated damages. In my view, the complaints have been a backdrop to the real issues in this case and generally have not factored in this judgment, and as such, I am not satisfied that they justify aggravated damages in this case. In respect of the open offer by Mr. Banks to purchase Long House, I do not accept that offer was part of a strategy to extend the litigation in order to financially impair the Defendants such that they had to yield to sell Long House to Mr. Banks in order to resolve matters. I accept that Mr. Banks was trying to put some distance between the Parties.

Conclusion

412. In respect of the Court's analysis, findings, awards and declarations as set out above, I summarise for convenience the same in the following paragraphs. In doing so, I address the areas of relief as set out in the claim and counterclaim by the Parties respectively.

413. Where I have awarded damages, I award interest thereon.

414. Issue 1 – Woodland Reserve Trespasses

a. The Defendants removed, or caused to be removed, a wide range of trees in the GW Woodland Reserve, thus committing the torts of trespass, nuisance and conversion.
b. Mr. Banks is awarded damages for such trespass, nuisance and conversion.
c. The trespasses were discovered on 17 June 2021 when Mr. Banks and Dame Pamela walked through the GW Woodland Reserve. The action was brought in time, on the basis that the limitation period did not start to run until the Defendants' concealment was discovered.
d. The trees in the Admitted Planting acceded to Mr. Banks when they were planted and thus, they are not a continuing trespass.

415. Issue 2 – The Excavated Western Access Roadway

a. The Pathway did not exist before Mr. Storey created the Excavated Western Access Roadway.
b. The Defendant's claim for a declaration for the Long House Claimed Pathway RoW is dismissed.
c. The Defendants have trespassed on and created a nuisance on Gatewood where the Excavated Western Access Roadway crosses onto Gatewood.
d. Mr. Banks' claim for a permanent injunction restraining the Defendants from trespassing on Gatewood is not granted.
e. Mr. Banks is awarded damages for the excavation and use of the Excavated Western Access Roadway for the period March 2014 until a date when it was backfilled, which I find to be 31 December 2023.
f. Mr. Banks is awarded damages for depositing backfill materials on the Excavated Western Access Roadway on Gatewood.

416. Issue 3 – The Construction Trespass

a. Mr. Banks is awarded damages for the trespass of the Admitted Construction.
b. Mr. Banks is granted a mandatory injunction requiring the Defendants to remove the Admitted Construction where it encroaches onto Gatewood. The terms of the mandatory injunction should allow for the Defendants to enter onto Gatewood for the purposes of removing the Admitted Construction without giving rise to new claims for trespass.

417. Issue 4 – Damages in respect of the Woodland Reserve - The Conservation Management Plan (CMP)

a. Mr. Banks is granted damages in the form of an indemnity in the amount it will cost to implement Mr. Banks' CMP in Area A and Area B, subject to some limitations on costs.
b. The Court will hear from the Parties on any reduced costs for an amended CMP, which excludes Area C (the proposed Boundary Wall and Boundary Fence).

c. Mr. Banks is not granted a prohibitory injunction to allow him access to the GW Woodland Reserve by way of Long House and the Excavated Western Access Roadway in order to implement the CMP. However, the Court will hear any application for an injunction, as and when necessary, for any exceptional reasons that Long House should be used minimally for a limited time period to effect any specific part of the CMP.

418. Issue 5 – the Plaintiff's Use of the Asphalted Roadway

a. Mr. Banks' Right of Way over Long House is where the Asphalted Roadway presently exists. If this is not correct, then Mr. Banks has a prescriptive easement over the Asphalted Roadway where it presently exists.

419. Issue 6 – The Grass Verge

a. Mr. Banks has failed to establish adverse possession of the Grass Verge.
b. Mr. Banks has failed to establish an easement by lost modern grant over the Grass Verge.
c. An injunction is granted to the Defendants restraining further trespass by Mr. Banks and his servants or agents on the Grass Verge.
d. A declaration is granted that Mr. Banks has no ownership right or right of way over the Grass Verge, save for what appears in the Defendants' title deeds and subject to any other determinations made in this case.

420. Issue 7 – The Utility Trench and Cables

a. Mr. Banks has trespassed by laying a new utility trench and cables in a new location on the Right of Way.
b. The Defendants are awarded User Damages from Mr. Banks for the new utility trench and cables, to be determined.

421. Issue 8 – The Plaintiff's Gateway Encroachments on Long House

a. Mr. Banks' Gateway Encroachments are a continuing trespass on Long House.

b. The Court declines to grant an order to remove the Gateway Items as the trespass is trifling and/or *de minimis*. An award of nominal or modest damages is granted to the Defendants for the trespass in relation to the Gateway Items.

c. The erection of the chain link fence in 2005 was a trespass and remains a continuous trespass. An order is granted to the Defendants for Mr. Banks to remove the chain link fence from the Grass Verge. An award of nominal or modest damages is granted to the Defendants for the trespass in relation to the chain link fence.

422. Issue 9 – The Plaintiff's Drones

a. The Defendants' claim for trespass by drone use of Mr. Banks over Long House is dismissed.

423. Issue 10 - The Plaintiff's Boundary Incursions on Long House

a. The Defendants' application for a *quia timet* injunction to prevent trespass by Mr. Banks, his servants or agents onto Long House for the purposes of building his Boundary Wall and the activities associated with it is not granted.

424. Issue 11 - The Plaintiff's Nuisances

a. The Blocks and the Patio Fence Post are not nuisances as claimed by the Defendants.

425. Issue 12 - Claims for Aggravated Damages by both Parties

a. Mr. Banks is awarded aggravated damages, to be determined, reflecting both the seriousness of the trespass in the GW Woodland Reserve, the destruction of the vegetation and the Admitted Planting.

b. Mr. Banks is awarded aggravated damages, to be determined, for the conduct of Mr. Storey on the Asphalted Road on 5 June 2023 and the associated assertions at trial by Mr. Storey in relation to the allegations that Dame Pamela said he was not of the 'right caste' and that the Storeys were not good enough for Inglewood Estate.

c. Mr. Storey is not awarded any aggravated damages, including for any media reports on the circumstances of the case, the erection of the Boundary Fence and Patio Fence Post, complaints to Planning by Dame Pamela or Mr. Banks' open letter to purchase Long House.

Costs - the Parties to be heard on Costs

426. I will hear the parties on costs.

Postscript

427. This Judgment is being delivered well beyond the normal timeframe expected for the issuance of judgments and rulings and my own personal timeframe for doing so. I extend my apologies to the Parties and to counsel and thank them for their patience. The reason for the delay is that I have had to turn my attention to a range of other judicial administration duties, anticipated constitutional reform, recruitment and appointment of other judicial officers, other personnel issues and the time consuming process of procurement of an electronic case management system.

Dated 21 April 2026



HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE