EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2015/0112

BETWEEN:

(1) GREENBANK ROAD COMPANY LIMITED
(2) EDWARD .F. WEST
(3) ANNA WEST

Claimants

And

(1) DAVID CLASEN
(2) DEBORAH CLASEN

Defendants

Appearances: Mr. Malcolm Arthurs and Mr. Shaun Reardon-John of Martin Kenney & Co., Counsel for the Claimants
The Defendants in person and unrepresented

2016: September 27

JUDGMENT

[1] Ellis J.: In June 2012, a dispute arose between the Defendants and the First Claimant regarding inter alia, the construction of their home and the user of the Greenbank Estate Road. As a result, the Defendants commenced Claim No. 242 in 2013. That matter was eventually referred to mediation and on the 7th November 2013, the Parties arrived at a Mediation Agreement (the Agreement) which disposed of that Claim.

[2] That Agreement was later the subject of a Consent Order dated 27th November 2013. It was made clear that the terms of that Agreement were to be in full and final settlement of that Claim. The Order also prescribed that:

> *"All further proceedings in that Claim were to be stayed upon the terms set out in the Mediation Agreement signed by the Parties herein save for the purpose of carrying such terms into effect and for that purpose the Parties have permission to apply."*

[3] Notwithstanding the terms of that Order, the First Claimant commenced an new action (the Claim herein) in which they sought the following relief:

i. An injunction that the Defendants, their servants or agents or howsoever other be **restrained from crossing over the lands of the Second and Third Claimant's land (being** Parcel 15) without prior approval from the Second and Third Claimants in writing such ability to cross being part of any licence drafted by or on behalf of the Second and Third Claimants.

ii. A declaration that the Defendants have no right, title, estate or interest in the Land of the Second and Third Claimant other than as granted under any licence which may be prepared by or on behalf of the Second and Third Claimants and executed by the parties to the said intended licence.

iii. Should the Second and Third Claimants grant a licence to the Defendants, an order that the Defendants and each of them directly and indirectly shall keep and maintain **the Second and Third Claimant's property as more particularly shaded red on the Court's orders dated 21**st May 2015 clear from all obstructions and shall not park any vehicle or place any object on the said land save and except as expressly contemplated by any grant made by the Second and Third Claimants;

iv. Should the Second and Third Claimants grant a licence to the Defendants, an order that the Defendants by themselves their employees, agents, workmen or otherwise howsoever, may only use the Land belonging to the Second and Third Claimants in compliance with any licence prepared on behalf of the Second and Third Claimants;

v. In the absence of the execution of any agreed licence, a declaration that the Defendants have wrongfully built a driveway over the land of the Second and Third Claimants;

vi. In the absence of any agreed licence, an injunction requiring that the Defendants and each of them shall take all necessary steps to ensure that the land shaded red on the **Court's order dated 21**st May 2015 is returned to its former stated as at May 2015

before the driveway was constructed and when the Defendants were aware (from 1st May 2015) of the Second and Third Claimants' application to Court;

vii. An injunction requiring that (a) any future construction plans be submitted for approval to the Greenbank Road Company Architectural Committee before work is commenced in accordance with the Covenants; (b) once approval in writing is provided (if such approval be provided) no deviation from any approved plans shall be permitted;

viii. In the absence of any agreed licence an injunction requiring the removal of the gate posts installed on the Second and Third Claimants' land without permission forthwith;

ix. An injunction requiring that (a) plans be submitted for the gate posts to the First Claimant's Architectural Committee for approval and that no construction shall commence until approval is provided in writing; and (b) no deviation from the plans submitted will be permitted; damages for the unlawful damage caused to the land of the Second and Third Defendants;

x. An injunction that the Defendants, their servants or agents or howsoever other be restrained from parking on or blocking the Greenbank Road with any vehicle in accordance with Clause 18 of the Court approved mediation Settlement Agreement entered into between the Parties on 7th November 2013;

xi. An injunction restraining the Defendants from parking at the edge of the Greenbank Estate Road thus preventing vehicles passing safely and blocking the road for larger vehicles;

xii. An injunction requiring the Defendants to comply with clauses 6 – 10 and 14 of the Court approved mediation Settlement Agreement entered into between the parties on 7th November 2013 (an approved by the Court on 27th November 2013) and landscape the eastern side of their property as by clauses 6 – 12 and 14 and the Schedule referred to therein with 6 months of the date of any order of the Court and to report monthly on affidavit to the Claimant and the Court regarding their progress;

xiii. Anthony Blake shall be instructed to undertake the landscaping in accordance with the Mediation Settlement Agreement entered into between the Parties on 7th November 2013 (and approved by the Court on 27th November 2013) and shall have the right to apply to this Court for guidance in an application made by the Claimants' counsel, if required;

xiv. An injunction requiring the Defendants to take steps to file and have registered, a copy of the Covenants with the BVI Land Registry with 14 days;

xv. A declaration that the Mediation Agreement dated 7th November 2013 has been fundamentally breached by the Defendants;

xvi. An injunction requiring the Defendants to remove and not to replace the large rocks placed on the edge of the Greenbank Road which prevents larger vehicles (including ambulances and fire trucks) from accessing lower homes in Greenbank;

xvii. Damages for repair costs which GRCL have to pay to repair section of the Greenbank Road due to the construction work undertaken by the Defendants;

xviii. General damages;

xix. Costs;

xx. Such further relief the court may deem fit.

[4] A significant part of this present Claim therefore centers on the Mediation Agreement which resolved the previous Claim 242 of 2013 and which the First Claimant seeks to have enforced. Following the trial of this matter, the Court asked the Parties to address in written closing submissions, the property of launching fresh litigation proceedings involving the same Parties, which alleges a breach a court connected Mediation Agreement and Order and which seeks to enforce its terms.

[5] Counsel for the First Claimant submitted to the Court that although the Mediation Order confirmed that the claim was settled in terms of the Agreement, the said terms did not in effect form part of the Mediation Order but were merely referenced in the Mediation Order. According to Counsel, the

effect of this is that because Agreement was not embodied in the Mediation Order, it is unlikely that contempt proceedings would have been available to the First Claimant as a means of enforcing its terms. He argued that, civil contempt usually arises when a party refuses or **"neglect**s to do an act required by a judgment or order of the court within the time specified in the judgment or order or disobey[s] a judgment or order requiring a person to abstain from doing a specified act**"**[1].

[6] He further submitted that even though the Mediation Order directed that the Defendants' claim is stayed on terms of the Agreement, it does not expressly require the Defendants herein to complete any specific act or refrain from any action. Additionally, he described paragraph 2 of the Mediation Order as more likely of declaratory than directive effect, since it did not require any positive action to be taken by the parties. He submitted that civil contempt does not usually arise when an order is declaratory in nature.[2] As such he argued that any contempt proceedings brought against the Defendants for failure to comply with the Agreement, would have had inherent difficulties.

[7] Counsel further argued that any order which grants permission or liberty to apply for assistance in working out the rights and/or obligations of the parties, "does not enable the Court to deal with matters which do not arise in the course of working out the judgment." On the basis of this, he submitted that, it is unlikely that the Second and Third Claimants would have been given an opportunity to advance their claim within the confines of the Defendants' claim (even if they had applied to be joined as parties) because they were not signatories of the Agreement and were not bound by its terms.

[8] He further argued that reliance on the "liberty to apply" provisions within the confines of the Defendants' claim would not have permitted the Defendants to advance their counterclaim for alleged damage to the wall or the recovery of the damage deposit paid to the First Claimant during the construction of their home.

[9] Counsel for the Claimants therefore concluded that having regard to (i) the urgent injunctive relief sought by the Second and Third Claimants to prevent the Defendants from continued trespass on

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[1] Halsbury's Laws of England Vol 3 para [TAB-3 of the Authorities Bundle]
[2] Webster v. Southwark London Borough Council 2 WLR 1982 page 217 [Tab 4 Authorities Bundle]

their property; (ii) the CPR requirement for claims concerning property to be brought by Fixed Date Claim Form; and (iii) the desire for the Defendants to advance by way of counter-claim, their claim for loss and damage and recovery of a liquidated sum; it was entirely appropriate and cost effective for the Claimants to file the Claim herein to settle all of the issues between the parties. In this view, the **alternative might have resulted in three separate proceedings (the Defendants' claim, the Second and Third Claimants' claim the Defendants' counterclaim) which would have required** consolidation and management by the Court. This would likely have increased costs and made things particularly difficult for the Defendants who were unrepresented after the interlocutory stage.

COURT'S ANALYSIS

[10] Generally, at the end of a successful mediation session, the parties will draw up an agreement that embodies all the main points of what has been agreed. Both parties will sign this agreement bringing the dispute to an end.

[11] Where the agreement results from an out-of-court mediation, it is a standard contract. It then becomes the responsibility of the parties to adhere to the terms of the mediation agreement because it is intended by its very nature to be a binding contract. If either side does not honor the terms of the contract, then the only course open to the other party is to pursue an action in court. When this happens, the innocent party will sue not only for the original disagreement, but also for breach of contract, seeking specific performance relief or damages or both.

[12] However, where the agreement results from a mediation process which is court connected, typically, the Parties would attend before a judge to have the agreement crystallized into an order of the court usually with some terms added in for enforcement purposes. The agreement is filed with the c**ourt as the court's judgment** and is made part of the court**'s** record. An appropriate order would normally dispose of the claim.

[13] In such cases, the agreement is still a legally binding and enforceable contract, but a party who breaches the terms of the agreement could be held in contempt of court, pay some heavy fines, and possibly serve a term of imprisonment. If the agreement is not added to the court record, it is nevertheless still binding like any other agreement made between the parties but in most cases the parties should properly first seek to get a ruling before it can be enforced.

[14] It is clear to this Court that the Parties to Cause 242 of 2013 intended to formalize the terms of the Mediation Agreement and to bring it under the imprimatur of the Court. It follows that the terms of the Agreement became an order of the Court on 27th November 2013 and the Parties were at liberty to apply for the purpose of carrying terms of the Agreement into effect. Such an application would have to be made in the context of that Cause and would not necessitate the initiation of entirely new legal proceedings.

[15] **In the Court's judgment that course would certainly be more consistent with the overriding objective** which calls upon to the Court to deal with cases justly, economically and expeditiously, and which imposes upon parties, a duty assist the Court in furthering that objective. To the extent that this Claim seeks to deal with the terms of that Agreement, this Court is of the view that the appropriate course would have been to solicit a ruling and/or direction from the Court under the banner of that action.[3]

[16] Having said this, the Court accepts that the Second and Third Claimants would be obliged to commence separate legal proceedings in order to claim the relief which is sought as against the Defendants. In the same way, the Defendants would have had to commence separate legal proceedings to pursue their claims for relief. The Court is however not persuaded that this could form a proper basis upon which the First Claimant would seek (as between itself and the Defendants) to have the terms of the Agreement revisited in fresh legal proceedings.

[17] Notwithstanding the conclusions drawn herein the Court will now consider the issues raised in the Claim.

GENERAL

[18] Central to the dispute between the Parties are the terms of the Mediation Agreement and it is common ground between them that these terms are legally binding on the signatories. In introducing the phenomena of agreement, the learned authors of the text Cheshire, Fifoot and **Furmston's Law of Contract** made the following sage observation;[4]

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[3] GDAHCV 2011/0061 Leo Prince v Republic Bank (Grenada) Ltd and Incorporated Trustee Of The Seventh Day Adventist Church

[4] Eleventh Edition at page 27

> *"An Englishman is liable, not because he has made a promise, but because he has made a bargain. Behind all forms of contract, no doubt, lies the basic idea of assent. A contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement, however, is not a mental state, but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done."*

[19] Usually, the failure by a party to perform its obligations under an agreement or contract will amount to a breach which is enforceable. The performance of a party's obligation is primarily dependent on the construction of the agreement or contract. It follows that the starting point for a court in assessing the relative legal positions of the Parties is the Mediation Agreement dated 7th November 2013 between the Clasens (the Party of the First Part) and the Greenbank Road Company Limited (GRCL) (the Party of the other part). That Agreement provides the legal context of the relationship between these Parties and ultimately, the resolution of the Claim as it relates to these Parties will depend on the interpretation and construction of its terms. In the absence of fraud or mistake, the Parties are bound by the terms of the written agreement which they have signed because by signing the document, each party has represented to the other that they have made themselves acquainted with its contents and assented to them.[5]

[20] The agreed terms of the contract therefore evidence the intentions and expectations of the Parties and where a contract is made wholly in writing, evidence is not generally admissible to add to, vary or contradict the written terms[6]. With these general principles in mind the Court will first turn to consider the specific breaches which have been alleged by the First Claimant.

Issue: Whether the Defendants have breached Clause 9 of the Mediation Agreement which required that:

> "The first party will use their best endeavours to complete the ordering, delivering, planting and final landscaping of the Property according to the agreed plans, within 180 days of execution of the Agreement."

[21] The obligation under this Clause required that the Defendants to "*use their best endeavours*" This legal term of art has been judicially interpreted in a way which makes it clear that the purpose is to require a party to "do their best" towards achieving the objective. If the objective is not achieved, that does not of itself mean that the party is in breach of his or her best endeavours obligation. It is

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[5] Harris v Great Western Rly Co. (1896) 1 Q.B.D. 515 at 530, per Lord Blackburn

[6] Jacobs v Batavia and General Plantations Ltd [1924] 1 Ch. 287

only if the objective was not achieved because the person did not use his or her best endeavours that there will be a breach. The object of the endeavours and the range of possible endeavours must therefore be considered together, in order to decide whether there was a justiciable obligation.

[22] In the case of Overseas Buyers v Granadex[7] the court considered the meaning of a promise by one party to use its best endeavours. **Mustill, J. held…**

> *"it was argued that the arbitrators can be seen to have misdirected themselves as to the **law to be applied, for they have found that EIC did 'all that could reasonably be** expected **of them', rather than finding whether EIC used their 'best endeavours' to obtain permission** to export, which is the test laid down by the decided cases. I can frankly see no substance **at all in this argument. Perhaps the words 'best endeavours' in** a statute or contract mean something different from doing all that can reasonably be expected – although I cannot think what the difference might be."*

[23] Likewise in IBM v Rockware Glass[8] the court considered the meaning of a promise by one party to use its best endeavours to obtain a relevant planning permission. The Court held that the obligation included an obligation to appeal from an initial refusal of permission so long as the circumstances were such as to indicate that there was a reasonable chance of success. Buckley LJ opined as follows:

> '*I can feel no doubt that, in the absence of any context indicating the contrary, this should be understood to mean that the purchaser is to do all he reasonably can to ensure that the planning permission is granted. If it were refused by the Local Planning Authority, and if an appeal to the Secretary of State would have a reasonable chance of success, it could not, **in my opinion, be said that he had 'used his best endeavours'…** I find it difficult to see how it could be said that to fail to appeal, if the circumstances were such as to indicate that an appeal from a refusal of planning permission had a reasonable chance of success, could **be said to be using 'best endeavours' to** obtain **the planning permission.'***
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> ***'In my judgment the test must be:** what would an owner of the property with which we are concerned in this case, who was anxious to obtain planning permission, do to achieve that end. The formula which has been suggested and which would commend itself to me is that the plaintiffs as covenantors are bound to take all those steps in their power which are capable of producing the desired results, namely, the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take.*'
> Emphasis mine.

[7] [1980] 2 Lloyd's Rep 608
[8] [1980] FSR 335

[24] The most recent guidance on this question has been offered by Mr. J Flaux QC in Rhodia International Holdings Ltd v Huntsman International LLC.[9] The facts presented reveal that the parties contracted for the sale of a chemical surfactants business. The claimant had contracted to use reasonable endeavours to obtain the consent of a third party for the assignment a contract to supply energy to the business. The defendant said that the commitment to use reasonable endeavours was equivalent to a duty to use best endeavours.

[25] In Rhodia International Holdings, the Court held that as a matter of language, the standards **expected of a promisor to use 'best endeavours' are more onerous than of an obligation to use 'reasonable endeavours', but an obligation to use 'all reasonable endeavours' should be equated with the more onerous obligation to use 'best endeavours'.** The learned Judge observed that "*there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use* ***best endeavours probably requires a party to take all the reasonable courses he can."*** Emphasis mine

[26] **This statement of the law makes it clear that 'reasonable' and 'best' endea**vours placed different levels of obligation upon the concerned party and begs the question - what is the scope of the **obligation to take "all the reasonable courses" of action**?

[27] In the case of Yewbelle v London Green Developments[10] **Justice Lewison said "the obligation to** use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters ag**ain."**

[28] The courts have also made it clear that as part of the exercise of best endeavours, those steps will have to be taken, even if that could on one view, involve **the sacrificing of a party's commercial or** financial interests. In Jet2.com Ltd v Blackpool Airport Limited[11] Longmore L J. said, "the fact that [a party] has agreed to use his best endeavours pre-supposes that he may well be put to some

[9] [2007] 2 Lloyds' Reports 325
[10] [2006] EWHC 3166
[11] [2012] EWCA Civ. 417

financial cost, so financial cost cannot be a trump card to enable him to extricate himself from what would otherwise be his obligation". However, Moore-Bick L J. went on to clarify that "*whether and, if so, to what extent a person who has agreed to use his best endeavours can have regard to his own financial interests will depend very much on the nature and terms of the contract in question*."

[29] The First Claimant contends that under Clause 9, the landscaping was due to be completed on or around 6th May 2014. This included, ordering the plants, having them delivered and planted and then finalizing the landscaping. The Claimant relied extensively on the evidence of Lori Ryder which it contends makes it clear that no reasonable attempt or genuine effort was made to landscape the eastern side of the property within the 180 day time limit set by the Agreement.

[30] In the Court's view, when Clause 9 of the Agreement is combined with the agreed landscaping plans which were annexed in Schedule 1 to the Agreement, the Defendants obligations are quite clear and certain. The Court is also satisfied that the obligation which was prescribed and which must be performed on a best endeavours basis, gave rise to a binding obligation which is enforceable.

[31] During the trial, the Defendants referred the Court to correspondence which they say indicates without a doubt, their efforts and the undue frustration and delays encountered while attempting to work with Ms. Ryder. They contend that when they became concerned about the lack of response from Ms. Ryder, they took it upon themselves to proactively begin the preparation of contingency plan, in the event that Ms. Ryder failed to deliver in a timely manner. They say that they implemented the contingency plan and a new landscaper began a few days later. This contingency plan also resulted in the installation of many larger items than had been originally agreed by the Parties.

[32] Having reviewed the totality of evidence in this case, including the unsuccessfully traversed evidence of Lori Ryder and Anthony Blake, the Court is satisfied that the Defendants have in fact breached Clause 9 of the Agreement. While the Court accepts that Defendant may have experienced some delay and difficulty with Ms. Ryder's services, the Court has no reservations in accepting the uncontroverted evidence of Lori Ryder that the eastern side of the property had not been prepared for the commencement of landscaping works. The construction of the bed area was not completed so that by May 2014, there was no area for the relevant trees to be planted.

The Court also accepts the evidence of Ms. Ryder that the Defendants had solicited that she first complete additional landscaping for other areas of their property which were not the subject of the Agreement. It is also apparent that the Defendants failed to execute a contract for services with Ms. Ryder and failed to properly fund her services in a timely manner. The Court is also satisfied that the Defendants' interaction with Ms. Ryder and Mr. Blake concerning the sourcing and pricing of the plants does not reveal that the Defendants exercised their best endeavours.

[33] Overall in applying the relevant test, the Court has considered what an owner of the property with which we are concerned in this case, who was anxious to comply with their contractual obligations would do to achieve that end. It seems to this Court that a far greater effort ought to have been made to secure the services of a suitably qualified and available landscaper as soon as possible after the Agreement was executed. In circumstances where (as is alleged by the Defendants) there was "undue frustration and delays encountered while attempting to work with the landscaper that was originally agree by the parties" it is inexplicable that the Defendants would not have immediately brought these difficulties to the attention of the Claimant so that a suitable alternative could be agreed and retained. If, as is contended by the Defendant, Ms. Ryder was unavailable, ill or otherwise occupied, then an alternative landscaper should have been secured long before Minnie's was eventually retained in September 2014 well after the prescribed deadline.

[34] This Court therefore finds that the Defendants failed to diligently take all appropriately reasonable steps which would have ensured that they completed the ordering, delivering, planting and final landscaping of the Property according to the agreed plans within the prescribed timeframe. As such their efforts fell well below the standard which would have been expected.

ISSUE: Whether the Defendants have breached the mediation agreement – clause 10 which required that:

> "The house will be almost screened from view from the Estate Road within 4 years of the date of this agreement to comply with the aim of the Second Party.

[35] The Claimant contends that the Defendants' attempts at landscaping were so inadequate that it was clear early on that the house would not be screened in from view 4, years from the date of the Agreement. The Claimant argues that this was readily apparent when one considers how little landscaping had taken place more than 15 months after the Agreement had been executed. Counsel for the Claimant argued that this clause presupposes that a genuine attempt to implement

Ms Ryder's plan had been made. In the absence of these genuine efforts he argued that it would be impossible for the house to be screened from view within 4 years as contemplated by the Parties.

[36] The Claimant relied heavily on the evidence of Anthony Blake, who described the Defendants' lack of landscaping efforts some 16 months after the Mediation Agreement was entered into in the following terms: "*The current landscape has nothing to do with any attempt to screen the house. One must conclude that [it is] either willful or incompetence*." Counsel for the Claimant further argued that it is not clear whether any steps have been or will be taken to achieve the proper vertical coverage which Anthony Blake's report stated indicated would be needed to adequately screen the house.

[37] Counsel for the Claimant further argued that the Claimants have advanced no reasonable explanation for the landscaping delays. When the Claimant examined the totality of the conduct of the Defendants, they say that it illustrates a legitimate concern about the Defendants genuine efforts to landscape their property. The First Claimant reiterates that the Defendants have neglected refused and/or omitted to complete the landscaping in a timely manner or in a way that will ensure that the property will be almost screened from view within 4 years from the date of the Agreement or at all.

[38] The Defendants on the other hand contend that this claim is premature because the relevant time period has not elapsed.

[39] The First Claimant does not appear to contend that there has been an actual breach by the Defendants, because there can be no doubt that Clause 10 of the Agreement contemplates a state of affairs to be achieved 4 years from the date of the Agreement. Instead, the First Claimant's contention is that the Defendants inaction will ensure that the desired state of affairs will not materialize.

[40] Where, in certain circumstances one party to a contract becomes aware of the fact that the other party to the contract has no intention of performing their contractual obligations, even though the time period for performance of the contract is yet to expire and where the requirements of a repudiatory breach of contract are present, the innocent party may be able to treat the contract as

repudiated. It is also clear that an intention not to perform one's obligations under a contract may be demonstrated where there has been an express renunciation by a party indicating an intention to no longer be bound or where there is an impossibility of performing obligations under the contract due to their conduct or action.

[41] It is often difficult to prove that the actions of one party bound by a contract would make it impossible for them to perform the contract.[12] In Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd., the Court of Appeal applied the dicta of Diplock L J. in *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26, and held that previous cases had applied the test – whether the breach had deprived the injured party of "*substantially the whole benefit*" of the contract? This is the same test in the doctrine of frustration, and so the bar was set high. The court also referred to other cases where the issue before the court was whether the breach deprived the "*injured party of a substantial part of the benefit to which he is entitled under the contract*". On the face of it, there is a tension between whether the breach deprives the innocent party of "*substantially the whole benefit*" or "*a substantial part of the benefit*". However, the Court of Appeal referred to the dicta of Lord Wilberforce in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757 where he held that the difference between the two tests does not reflect a divergence of principle, but represents "*applications to different contracts, of the common principle that, to amount to repudiation, a breach must go to the root of the contract*".

[42] The Court of Appeal further held that, regardless of which test one adopts, the starting point is to consider what benefit the injured party was intended to obtain from the performance of the contract. The next step is then to look at the effect of the breach on the injured party, such as: What financial loss it has caused? How much of the intended benefit has already been received by the innocent party? Can the innocent party be adequately compensated? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?

[12] Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd *[2013] EWCA Civ. 577*

[43] When assessing the gravity of the breach, a court will look at the entirety of the commercial agreement between the parties and any steps taken to remedy the breach. Having considered Clause 10 within the context of the evidence before the Court and having reviewed the legal submissions of the Parties, the Court is satisfied that the First Claimant cannot succeed on this ground.

[44] The Court accepts the Defendants' contention that the claim is entirely premature and ought not to have been pursued. Further, the Court is satisfied that by their own agreed terms, the Parties have agreed the appropriate course to be adopted in the event that it became clear that the desired state of affairs would not be achieved. The second half of Clause 10 provides that:

> "If after 3 years it is agreed by both Parties it is clear that this aim will not be achieved, the First Party agrees to work with Ms. Lori Ryder and the Architectural Committee to develop a plan to mitigate the issue."

The prescribed 3 years would have elapsed later this year – and the Defendants together with the Claimant's Architectural Committee must now confer on the appropriate course to remediate the situation in time for the 4 year deadline. In the Court's view, this indicates an intention to work together to amicably arrive at a solution to the screening problem.

[45] Counsel for the Claimant has submitted that given the stark differences between pleaded cases of both Parties that it is unlikely that any such agreement could crystallize because both sides would have to first agree at the 3 year mark that it is clear that the intended aim could not be achieved. In the Court's view this argument provides no legal or equitable basis upon which the Court could properly divert from or ignore the Parties' own agreement on this issue.

[46] When the Court combines the full text of this clause with the factors which this Court must consider, the Court is satisfied that the benefit which the injured party was intended to obtain from the performance of the contract is essentially the compliance with the aesthetic covenants agreed to by the Parties. The Claimant has not alleged that it has suffered any financial loss as a result. It is also clear that the Defendants have taken and in the Court's view must continue to take some steps to achieve the contemplated state of affairs.

[47] Having considered the context of the Agreement and the entirety of the terms, the Court is satisfied that this purported breach would not have entitled the Claimant to terminate the Agreement in an

ordinary contract and could not have underpinned an application for contempt in the event that appropriate enforcement proceedings had been initiated.

[48] This claim is therefore dismissed.

ISSUE: Whether the Defendants were required to submit final plans for the (1) driveway and (2) gate posts.

[49] Clauses 1 and 2 of the Agreement mandates:

(1) That the Defendants were to construct a driveway in accordance with the survey plans prepared by Mike Adamson dated 24/8/2009 – referred to as the "Survey Plans".

(2) Construct a gate to be similar in size and design to the gate which presently forms part of the entryway to Parcel 15.

[50] The Claimant contends that this Clause is to be read in conjunction with the Clause IV of the Recitals to the Agreement which prescribes that:

> "All survey plans and designs are subject to the approval of the Architectural Committee such approval to be contingent upon the execution of the Agreement."

[51] In construing this, the Court is first required to consider the legal import of a recital to an agreement because it is quite clear that Recital IV does not form part of the operative part of the Agreement.

[52] It is now settled law that when the words of the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties and to fix the true meaning of those words.[13] It is also clear that in an appropriate case a court may construe a recital as carrying with it an obligation to carry into effect that which is recited. This legal principle is premised on the basis that any words in a contract which show an agreement to do a thing will amount to an obligation.

[53] The position was perhaps best articulated by Lord Denman in Aspdin v Austin[14] where he stated:

> *"Where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance as if the instruments had contained express covenants to perform them."*

[13] Walsh v Trevanion 1896 A.C. 440 per Patterson J.

[14] (1844) 1 QB 671

[54] It is however clear that a court must be careful in implying an agreement from a recital because it is not an operative part of the agreement. A court must be satisfied that the language does not merely show that the Parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done.[15] This is especially so where the operative parts of the contract already contain obligations relating to the same subject matter.

[55] In the case at bar, clause 1 of the Agreement makes it clear that the driveway is to be constructed in accordance with specifically described plans. These plans were prepared by Mike Adamson and dated 24/8/2009. The Defendants contend that having incorporated these plans into the Agreement, no further approval was required of the Committee before construction could commence. They state further that the gate posts in question in fact comply with the size and design of the sample gate referred to in the Agreement.

[56] The Claimants on the other hand contends that the Agreement does not itself approve the driveway or the gate posts. They submit that there were a number of issues which needed to be resolved before this could occur including but not limited to:

i. The impact on the 2009 Mike Adamson plans of the movement of the house which now sits on the site of the original driveway/parking area.

ii. Whether the dirt driveway (which existed before the concrete driveway was paved) would match the finished construction in width, direction and/or incline.

iii. The location and position of the retaining wall which is not shown on the plans.

iv. The position of the gate posts on the driveway. (The Claimants contend that this is especially important as the relevant area has historically been used as a turning/passing point for the community).

v. The final design of the gate simply states "similar in design to parcel. The Claimants contends that this is a subjective issue. It contends that there were questions about whether the gate could vary from the design of Parcel 15 and/or whether it would be the exact size and colour.

[57] The Court is satisfied that Claimants' cases must be analyzed separately.

[15] James v Cochrane 91852) 7 Exch. 170

[58] As regards the First Claimant, the operative document is the Agreement which is dated 2013 and which makes it clear that the 2009 Mike Adamson plans are the relevant plans which both sides accepted as appropriate for the driveway. Having regard to the principles of contractual interpretation, this Court has no reservation in concluding that as long on the expressly incorporated plans were applied by the Defendants, that Clause IV of the Recitals could not *without more* impose any additional obligation on the Defendants. It follows that no further approval would have been required regarding the driveway as between the Defendants and the First Claimant.

[59] In the Court's judgment the same position would operate in the case of the gate – since it is apparent that both sides would have agreed on the basis of the design of the gate and it must be presumed that the First Claimant's Architectural Committee would have approved the Parcel 15 sample design.

[60] It is now settled law that the where a contract is made wholly in writing, evidence is not admissible to add to, vary or contradict the written terms. It is also settled law that in construing any written agreement, a court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the agreement, including evidence of the genesis and the aim of the transaction. However, this would not entitle a court to look at the evidence of the parties subjective intentions. So that, as per Erskine J. in Shore v Wilson (1842) 9 CL. & Fin. 355 at 512, such implication is "*not for the purpose of giving effect to any intention of the writer not expressed in the deed, but for the purpose of ascertaining what was the intention evidenced by the expressions used; to ascertain what the party has said; not to give effect to any intention that he has failed to express*."

[61] When the Court considered the purported rationale for submission of final plans advanced by the First Claimants, the Court is satisfied that mandating such an obligation would result in the Court giving effect to an intention which the First Claimant failed to express in the Agreement. What is readily apparent is that when the Agreement was executed in 2013, the Parties unequivocally agreed that the applicable plans and sample to be applied would be the 2009 Mike Adamson plans and the sample gate on Parcel 15. In the Court's view, no objective reading of the Agreement could lead to the conclusion that the Parties intended that further approvals First Claimant would be necessary.

[62] As regards the Second and Third Claimants however, the position is somewhat different. It is apparent that the Second and Third Claimants were not party to the civil proceedings which culminated in the Agreement although the Court has no doubt that they were well aware of the details and the outcome. What is clear, is that the said driveway and gate posts were to be constructed on their property (Parcel 15) and that it was contemplated and understood that a licence or easement, would need to be granted to the Defendants to regulate their use of the property.[16]

[63] Counsel submitted quite correctly that separate from their obligations to the First Claimant under the Agreement, the Defendants had separate obligations to the Second and Third Claimants and in that regard, they contend that any driveway or gate post on their property would, notwithstanding the terms of the Agreement, require their prior approval.

[64] The Second and Third Claimants further contend that their express consent and approval would be predicated on the terms of the covenants which exist between themselves and the First Claimant since they too are bound by the GRCL Covenants. They submitted that these covenants cannot be circumvented through the actions of a licensee.

[65] The Second and Third Claimants do not dispute the representations reflected in Clause 1 of the Agreement. However, they reiterate that it is clear that some formal agreement would have been necessary to determine and regulate the proposed user. They further contend that the Defendants would have been well aware when they proceeded to construct the driveway and the gate posts that the terms of their usage of the property needed to be formalized either by the grant of a licence or an easement.

[66] To date no formal licence or easement has been granted. Inspite of this, the Defendants have commenced construction works on **the Second and Third Claimants'** property. In fact, the Second and Third Claimants contend that the Defendants commenced works even after service of the injunction proceedings and at a time when they were expressly aware that they had no permission to do so. Counsel submitted that this demonstrates the Defendants willful disregard of the Second and Third Claimants' proprietary rights.

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[16] Clause 1 of the Mediation Settlement Agreement

[67] It seems to the Court that in circumstances where it is clear that the Second and Third Claimants were not party to Cause 242 of 2013 or the Agreement which settled those proceedings, that the Court must consider what, if any, impact this would have had on rights and liabilities or the Second and Third Claimant who would essentially be third parties.

[68] The doctrine of privity of contract prevents a third party beneficiary from suing on a contract, but it also forbids the contracting parties to enforce obligations against a stranger to an agreement. While there have been exceptions to this general rule developed at common law and under statute, the Defendants have not advanced any persuasive legal or equitable basis upon which the Second and Third Claimants would be bound by the terms of the Agreement or the consent order which memorialized and formalized it. It allows that the Defendants would in those circumstances still be required to ensure that any construction on the Second and Third Claimant's property met with their express approval.

[69] The Second and Third Claimants have indicated that no such approval was given. However, the Defendants have referred the Court to correspondence which they say indicates that significant pressure had been brought to bear on them to commence work on the driveway. The contention is that this would have amounted to a tacit approval or agreement on the part of these Claimants.

[70] Although the Defendants' submissions have done very little to develop this line of argument, the Court accepts as a general principle that tacit approval is consent inferred from the fact that a party kept silence when he had an opportunity to forbid or reject the other party's actions. This approval is manifested by refraining from contradiction or objection and may be inferred from the circumstances. Having reviewed the totality of the evidence advanced by all of the witnesses in the case, the Court finds it impossible to infer that the Second and Third Claimants would have tacitly or otherwise approved of the actions of the Defendants. Rather than silence and acquiescence, the communications revealed that these Claimants unequivocally maintained that the user of their property should be formally regularized. It is also clear to this Court that the Claimant were unequivocal in their objection to the Defendants' unapproved works. Although, it is clear that the Second and Third Claimants were quite prepared to arrive at some agreement, in the Court's judgment it does not follow that they would have been eager to have the Defendants do just anything they wanted to on their property.

[71] In the absence of an agreement with the Second and Third Claimants setting out the terms on which construction of the drive way and gate were to be constructed and in the absence of a clear agreement setting out that the so-called plans had been approved, the Court is satisfied that the Defendants were required to pursue the prudent, responsible and legal course of securing the express permission and consent of the landowners whose land they proposed to use for their purpose. The Court is therefore not satisfied that the Defendants can rely on the terms of Clause 1 and 2 of the Agreement to avoid the claim of the Second and Third Claimants.

ISSUE: Whether the Defendants were obliged to desist from parking on the Estate road **–** whether they have breached Clause 18 and 29 (a) of the Agreement.

[72] Clause 18 of the Agreement provides that no parking will be allowed along the portion of the property adjacent to its eastern boundary, which portion is presently circumscribed by the house, the landscaping wall and the Estate Road. In addition, Clause 29 (a) of the Agreement provides that the Parties agreed to incorporate two additional clauses into the Covenants, one of which **prescribes that there would be "no parking within 20 feet of the side of the Estate Road along the** east side of the house on Parcel 26.

[73] **The Defendants'** house is a four storey building and the original design had a driveway and a parking area close to the upper floors/main living area. The Claimants contend that Clauses 18 and 29 became necessary because in building their home over the original driveway area, the Defendants are forced to walk up several flights of stairs in order to access their living area when parked off the road. This led to the Defendants blocking the road when loading and unloading their vehicle from the Estate Road in order to avoid walking up the flight of stairs. According to the Claimants, the problem with blocking the E**state Road is that the Defendants'** house is positioned near a sharp turn in the road which when wet, causes difficulties for some vehicles. They contend that there is also a safety concern (in the case of emergency) if the road is blocked for a prolonged period because there would be no way to maneuver around a vehicle at that point in the road.

[74] The Claimants conclude that the Defendants were well aware that they were required to desist from parking on the Estate Road along the eastern side of their property and that no exception is made for loading or unloading their vehicle.

[75] In support of this Claim, the Claimants rely on paragraphs 57 – 59 of the Witness Statement of Andrew Mudie which annexes an emailed complaint directed to the Defendants dated 1st September 2015 in which he reports that he had received complaints from Martin Kenny and others that the Defendants had been parking in such a manner as to impede access to his lower driveway and restrict negotiation of the double bend in a normal manner. Mr. Mudie makes it clear that the Defendants engaged in this activity even after the Agreement and the amended covenants and he indicates his fear that they would continue to do so unless restrained by the Court.

[76] When he was cross examined by the Defendants, Mr. Mudie told the Court that he personally witnessed the Defendant's car parked in that zone. He testified that the car was parked and the First Defendant was not in it. When he was further questioned, he testified that he could not hear if the car was running but at some point the First Defendant got into the car and drove off. He averred that the car was parked on the Estate Road outside of the Defendants' house.

[77] The Defendants dispute that they have breached the Agreement's obligations. They state that the Claimants' pleaded case misrepresents the terms of the Agreement and they submit that there is a distinct difference between parking on the Estate Road (which is the Claimants' case) and parking on Parcel 26 (which is specifically prohibited by the Agreement). They contend that the wording of paragraph 21 of the Claim is materially different from Clauses 18 and 29 (a) of the Agreement and is a deliberate attempt to mislead the Court. The contention appears to be that parking along the Estate Road would not have been proscribed.

[78] Although the Court has no reservations in accepting the largely untraversed evidence of Mr. Mudie that the Defendants were seen to have parked on the road on at least one occasion, in the Court's judgment, Clauses 18 and 29 (a) of the Agreement do not convey a clear prohibition against parking on the Estate Road. The Court accepts the Defendants' contention that these clauses were inserted during mediation proceedings specifically to address concerns related to parking in this area, due to the fact that in 2012, the Defendants had requested approval for parking in the area located between the residence and the Estate Road.

[79] The Court therefore finds that this claim has not been made out by the Claimants.

ISSUE: What is the legal basis of the use which the Defendants currently exercise over of **the Second and Third Claimants' Property?**

ISSUE: Do the Second and Third Claimants have the right to revoke the permission; licence, given to the Defendants?

[80] Although identified separately, these two issues can be dealt with together.

[81] The relevant paragraph of the Agreement is Clause 1 provides that:

> "Upon the representation of the Second Party that Ted and Anna West… have agreed to grant the First Party by licence or easement the right to construct a driveway and a gate over the portions of land owned by the West's… Parcel 15 and to access the Property thereby…'

[82] The Agreement makes no further reference to the legal basis of the user. It follows that the answer to this issue is not to be found in the Agreement but in the communications and the conduct of the Parties involved.

[83] It is not disputed that the lands over which the Defendants wish to access their property is Parcel 15 which belongs to the Second and Third Claimants. There can also be no doubt that if the Defendants wish to traverse this property they must have the express permission to do so. In the absence of such permission, the Court is satisfied that the Defendants would be trespassers.[17]

[84] The Defendants have not advanced and the Court accepts that the First Claimant could not have legally given the Defendants permission to traverse or use the Second and Third Claimants' property. Moreover, having reviewed the pleadings and the evidence, it is clear to the Court that it is common ground between the Parties that the Defendants would require the permission of the Second and Third Claimants to use their property. It is also not in dispute that during the construction of the Defendants' residence, the Second and Third Claimants permitted the Defendants to access their residence over their land. And further, it is also not in dispute that this permission was never formalized.

[85] The Second and Third Claimants contend that they have always made it clear that the Defendants right to travserse their land was subject to formal terms being agreed. In particular, they rely on

[17] Robson v Hallett [1967]2 QB 939 at 950-951 per Lord Parker C.J.

emailed correspondence to the Defendants dated 23rd February 2012, in which they indicated that **they will require an agreement to a formal lien (or right of way…) fair compensation for the lien** (plus and legal costs to document and file with the land authorities); and agreement on the design and maintenance of the access area. The emailed message then went on to state:

> "…it is fine to continue with the project in the meantime, but we should probably sort these **things out in the next couple of months."**

[86] A review of the entirety of the documentary evidence relative to this claim demonstrates the Second and Third Claimants lacked legal experience and knowledge because the proposed arrangements regarding the user of their Property vacillates from an easement, to a licence, to a lien. However, what is clear, is that the Second and Third Claimants granted access to the Defendants subject to a mutually agreeable written contract. In the absence of such formal contract, this Court must therefore consider the nature of the Defendants' existing user.

[87] The Second and Third Claimants contend that the present arrangements gave the Defendants no interest in their Property and amounted to no more than a bare licence. The Defendants on the other hand, contend that their use of Parcel 15 followed their written and oral permission that began in 2010 which predated excavation of Parcel 15 by nearly two years. They say that this was the sole method of access which was requested and documented by the Claimants. The Defendants also provided a summary of the significant modifications to Parcel 15 which they contend were paid for at the request of the Claimants. This included excavating and grading the property in such a way as to effect a 529 square foot vehicular right of way in early 2012, and installing electrical and communication cables underground and casting concrete on to that portion **of the land which would finish the "lower driveway."**

[88] On this basis, and relying on the judicial authorities of Ramsden v Dyson,[18] Armstrong v Sheppard[19] and Plimmer v Mayor, Councillors and Citizens of the City of Wellington,[20] the Defendants submitted that this licence was irrevocable. The Defendants submitted that the Second and Third Claimants made certain representations to them upon which they reasonably relied to commence works on the land. They further submitted that they would suffer unconscionable disadvantage or detriment if the Second and Third Claimants were to go back on

[18] [1866] LR 1 HL 129
[19] [1959] 2 QB 384 per Evershed MR at page 399
[20] (1884) 9 AC 699

their assurances. In framing this argument, the Defendants have also relied on judicial authorities on proprietary estoppel, including Thorner v Major.[21]

[89] A bare licence is the simplest form of licence which can be created expressly, or impliedly. It arises where there is a personal permission or consent, granted without consideration, to enter, traverse over or be present upon the land of another and it prevents liability for trespass to land. Such a licence may be revoked at any time and ultimately, it will be a question of fact as to whether a bare licence was excluded or revoked. An irrevocable licence on the other hand, arises where the owner of the land grants a licence to another to go upon the land and occupy it for a specific period or a prescribed purpose, and on the faith of that authority, the licensee enters into occupation and does work, or in some other way alters his position to his detriment. In these circumstances, the owner of the land cannot revoke the licence so as to defeat the period or purpose for which it was granted.

[90] The seminal authority of National Provincial Bank Ltd v Hastings Car Mart Ltd is instructive in this regard.[22] In that case, title **to the matrimonial home was in the husband's name.** He deserted his wife and children. He then transferred title to the property to a company he controlled which granted a mortgage to the bank. The company fell into arrears with the bank and the bank sought possession. The Court of Appeal pointed to a long line of authority to the effect that a wife (in the absence of any other interest in the home) had a contractual licence to occupy it which the husband could not revoke. The land in question was registered land and so the Court had to consider whether the licence amounted to an interest in land. If so, it would be protected as an **overriding interest because of the wife's occupation (Land Registration Act 1925** Section 70(1) (g)). The majority of the English Court of Appeal thought that since equity would grant an injunction to prevent the husband from revoking it, the licence was an equitable interest.

[91] At pages 686-687, the English Court of Appeal noted;

> If you look through the books you will find many analogous cases of a "licence coupled with an equity." If the owner of land grants a licence to another to go upon land and occupy it for a specific period or a prescribed purpose, and on the faith of that authority the licensee enters into occupation and does work, or in some other way alters his position to

[21] [2009] UKHL 18 , per Lord Walker at paragraph 29
[22] (1964) Ch. 665 at 686

his detriment, then the owner cannot revoke the licence at his will. He cannot revoke the licence so as to defeat the period or purpose for which it was granted. A court of equity will restrain him from so doing. Not only will it restrain him, but it will restrain any successor who takes the land with knowledge or notice of the arrangement that has been made. I will give three illustrations:

First, at common law.

The common law courts have, of course, for centuries protected a licence coupled with an interest. It has been always held that a licensor, who has granted an interest, cannot derogate from his grant so as to destroy the interest granted; nor can his successor in title. Some difficulty has been felt in deciding what is an "interest" within this rule. But it seems that a contractual licence to occupy, followed up by actual occupation, was regarded as an interest, or rather as a "sort of interest," within the rule. The first case on this point was *Webb v. Paternoster*, when an owner of land granted a man a licence to put a stack of hay on his land until he (the licensee) could conveniently sell it. It was a typical contractual licence but no tenancy. It was held that the licence, coupled as it was with actual occupation of the land on which the stack stood, was binding, not only on the licensor, but also on his successors. Montague C.J., with the concurrence f Haughton J., said: "This is an interest which chargeth the land into *whosoever's hands it comes*." The reasoning of the case on this point was discussed in *Wallis v. Harrison*, where Lord Abinger C.B. said: "the grant of the licence to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied," and Parke B. said: "the licence was executed, by putting the stack of hay on the land; the plaintiffs there had *a sort of interest, against the licensor and his assigns*." That "sort of interest" is now recognised to be, not a legal interest but an equity: see *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*15

Second, in equity.

There are many cases where the owner of land has granted another a licence to occupy land and to execute works upon it, so that the licensee can use them for his own purposes. It has invariably been held that, once the works are executed, the licensee has an "equity" which is binding on the licensor and his successors: see *Duke of Beaufort v. Patrick*; *Dillwyn v. Llewelyn*. There may be no binding contract to grant any particular interest to the licensee, but nevertheless the court will look at the circumstances in each case to decide in what way the "equity" can be satisfied: see *Plimmer v. Wellington Corpn*. Quite recently there was a similar case, but the court reached the same result by invoking the doctrine of estoppel: see *Hopgood v. Brown*. But whether it be called an "equity" or an "estoppel," the fact remains that the successor was bound just as the original licensor.

Third, *Errington v. Errington and Woods.*

Finally, there was a case where the owner of land granted a licence to a young couple to occupy a house as their home so long as they paid the instalments to the building society.

They went into occupation on this footing. It was held binding, not only on the licensor but also on his devisee: see *Errington v. Errington and Woods*." Emphasis mine

[92] Counsel for the Claimants submitted to the Court that the several cases referred to by the Defendants do not assist them. He argued that the Second and Third Claimants never gave formal permission to the Defendants to cross their land. Instead, the Defendants did so on a bare licence which was at all times subject to the joint understanding that the Claimants' specific requirements would be formally preserved. He posited that the permission as evidenced by the relevant documents, demonstrates that there was no permission given for the Defendants to build over Parcel 15. Indeed, they contend that they specifically asked the Defendants not to do so when they became aware of the activity.

[93] Counsel submitted that the Defendants began construction of their garage and driveway with the **full knowledge that they merely had a bare licence to cross the Claimant's land**. The Defendants therefore continued to carry out works at their own risk (since the bare licence was revocable as it is possible that no formal agreement would be reached). Moreover, he submitted that in the case of the driveway and the gate posts, these were constructed after the Second and Third Claimants had requested that they refrain from doing so.

[94] The Second and Third Claimants contend that this latter construction is wholly distinct from permission to pass and repass over land and represented a concerted attempt by the Defendants to engineer circumstances to their advantage. The Second and Third Claimants reiterate that no authority to build over their land was ever given and that the Defendants ignored their request to desist from carrying out such works. They submitted that the Defendants are liable in trespass and that equity should not intervene to assist them.

[95] With regard to the claim of proprietary estoppel, the Counsel for the Claimants submitted that this is not an appropriate remedy on the facts of this case. Having reviewed the constituent elements which must be proven before a court can consider such relief, Counsel then submitted that there was not sufficient certainty of intention and subject matter for the claim to be maintained. Again, he submitted that the case law relied on by the Defendants does little to assist them.

[96] In Thorner v Major the two issues which the court had to consider are set out at page 968 of the judgment:

> **“[72]** David's contention that he is entitled to the freehold of Steart Farm is, and was at first instance and in the Court of Appeal, founded squarely on proprietary estoppel, whose main elements are often summarised as being, in brief, assurance, reliance and detriment, as Lord Walker more fully explains. The issues in the present case really focus on the quality or nature of the assurance required before a proprietary estoppel can be established.
>
> [73] The respondents advanced two reasons why this appeal should fail, both of which involved contending that the estoppel found by the deputy judge could not be made good. First, that the appellant (David) could not establish that he had reasonably relied on any assurance made to him by Peter Thorner (Peter). This was on the basis that any statement made by Peter was insufficiently clear to found an estoppel—effectively the ground relied on by the Court of Appeal. Secondly, that, even if reasonable reliance could be established, the nature of the property referred to in any assurance relied on was too imprecise to found a proprietary e**stoppel. I shall consider these two arguments in turn.”**

[97] After quoting extensively from that Judgment (paragraphs 84 – 102), Counsel concluded that the Defendants' case is defectively pleaded because they do not allege that the Second and Third Claimants assured them that that they were entitled to anything prior to formalization taking place. Indeed, Counsel submitted that there is clearly a lack of certainty as to what the Defendants claim they were assured. He noted that the Defendants own documents refer interchangeably to a licence and an easement, when it is clear that the proprietary characteristics which they claim (i.e. unfettered exclusive use and possession) are inconsistent with relevant case law. Their claim for exclusive and permanent use fails to set out when that assurance was given, the exact nature of such assurance, what the agreed terms of that assurance were, when such assurance was to take effect, why it would take effect in the absence of formalization, when this was clearly contemplated by both sides, and why the Agreement would not apply. They further submit that the Defendants did not in fact rely on any assurance to their detriment.

[98] Counsel for the Claimants quite rightly argued that by executing on the Mediation Agreement, the Defendants indicated that there were prepared to accept a licence or an easement to the Second and Third Claimants' land and yet they now claim a proprietary interest in the Claimants' property. He submitted that the Defendants are asking for more than they agreed to accept under the Agreement and therefore equity should refuse to intervene.

[99] They further submitted that the Defendants have failed to establish how their reliance could have led them to act to their detriment because it is clear that at all times they acted with the full knowledge that the right to cross over the Second and Third Claimants' land was, until properly formalized, not intended to be binding. They contend that since the Defendants took no steps to cooperate to formalize any permission and so any detriment which they may have suffered is due to their own arrogance.

[100] They submitted that the Defendants have failed to show that there was any representation made prior to commencing works on the driveway in April 2015 upon which they were entitled to rely. In fact, they say that all of the correspondence speaks to the contrary.

[101] Further, the Second and Third Claimants contend that until the right to cross their lands was formalized in writing, the Defendants would have had no permission to commence construction. Indeed, they state that they have not accepted any plans, neither have they given the Defendant's any permission to implement them at any stage. In commencing and continuing construction in the face of their objections, the Claimants allege that the Defendants have not approached the Court of Equity with clean hands because they have essentially committed acts of trespass.

[102] Alternatively, the Claimants contend that if proprietary estoppel does avail, then equity would demand only that the minimum be done to achieve an equitable result. This would involve only the grant of a mere licence to the Defendants to pass and re-pass over the Claimants' property.

[103] Finally, Counsel for the Claimants submitted to the Court that his clients have not refused or revoked any promised right because they are still quite willing to offer a licence to the Defendants on terms to be mutually agreed. He submitted that the Second and Third Claimants have always taken the imitative to progress this matter and he referred the Court to the emailed correspondence of 26th March 2015 and 8th April 2015 which confirmed their intention to grant an easement or licence so as to construct a driveway and gate structures to access their property and which indicated that counsel would be retained to advance this process.

[104] The Court has no reservations in finding that the Second and Third Claimants granted the Defendants permission to use their property (Parcel 15) as a means to access their lands during the construction of the residence. The Defendants have submitted that the evidence of their

witness, Mr. Potter and that of Mr. West, confirms that the use of Parcel 15 is the result of written and oral permission that began in 2010, predating the excavation works which they carried out two years later. However, this is simply not made out on the limited evidence before the Court. Instead, the correspondence before this Court indicates that in 2010, there was communication between the Defendants and the Architectural Committee of the First Claimant regarding alternative proposals of access to their property.

[105] While it may well be that the Committee would have approved (at least in principle) a site plan which would have involved access over the Second and Third Claimant's property, the first direct evidence of the Second and Third Claimant's agreement is set out in their email to the Defendants on 23rd February 2012. The content of this correspondence is critical to determining these issues because it assists the Court in ascertaining the state of mind of the Parties at the material times. The emailed message of 23rd February 2012 states as follows:

> "We are willing to work with you to set up a permanent access to your property at the double bend in the road if that is the optimal plan.
>
> This will require our agreement to a formal lien (or right of way as we have given on the downhill property line from Canefield) fair compensation for the lien (plus legal costs to document and file with the land authorities); agreement on the design and maintenance of the access area ….
>
> Let me know how you would like to proceed on the above. It is fine to continue with the project in the meantime but we should probably sort these things out in the next couple of months."

[106] The Court has also reviewed the plethora of correspondence which followed in the wake of this email. They do not reflect any divergence from this position and repeatedly assert that some form of written agreement would have to be arrived at to regulate the use and access over their land on mutually acceptable terms. Moreover at this stage, the correspondence reflects that the Second and Third Claimants granted permission to pass and re pass over their lands to facilitate the Defendants completion of their residence.

[107] By April 2012, a survey plan is prepared by Mr. Adamson which reflects the proposed the driveway, its dimensions and location. Again, it is clear that the Defendants sought to have the Second and Third Claimants approve the plans. By December 2012 these plans are still being reviewed, commented on and finalized. The emailed message of 1st December 2012 from the

Claimants to the Defendants makes it clear that those plans are subject to the approval of the First Claimant's Architectural Committee. The message concludes with the following:

> "We know it is a bit premature to finalise many of these details but we wanted you to have our thinking as you plan. Once you do have final plans for the front, the driveway and the gate let us know and we can work out the access right of way."

[108] This sentiment is repeated in the emailed message which follows on 7th December 2012. Thereafter, contentious litigation (Clause 242 of 2013) ensued between the First Claimant and the Defendants which resulted in the settlement at mediation. It appears that during this period the Defendants continued to access their property over a temporary dirt track which had been permitted while their house was under construction. Although the Defendants submit that the Second and Third Claimants expressly or tacitly agreed to the construction of the driveway this is not made out on the evidence available to the Court.

[109] In his witness statement, the Second Claimant, Mr. West makes it clear that the Defendants have unilaterally and without permission from them, concreted their land after it was made clear to them that they had no permission to do so. He says that they were simply ignored. He reiterates that since 2012, he has solicited detailed plans for the driveway and gate posts and landscaping so that the right to cross could be formalized but that the only document which they received did not address their concerns. This document certainly does not show the electrical box which was constructed on their Property or the buried power and communication lines which are located on their land. Indeed, the Second Claimant asserts that this concrete box was built without their permission and is yet another example of the advantage taken by the Defendants to "build now and get approval later". He goes on to state that the Defendants have never taken any steps to formalize their use of Parcel 15. Instead, they have conducted themselves as if they own or have some form of a proprietary interest. So that by the time that they indicated to the Defendants that they would not grant them an easement or licence unless they fully complied with the terms of the Mediation Agreement, the Defendants deliberately proceeded at full speed with the construction of the driveway garage and gate posts without permission.

[110] This evidence was not successfully disgorged on cross examination by the Defendants. Moreover, they have themselves put forward no evidence which traverses these assertions. Instead they rely on the evidence of Mr. Louis Potter who simply makes it clear that excavation of the Defendant's

residence and driveway took place in 2012, with the initial support of the Second and Third Claimants. Interestingly, he then points out that had he been aware of this possibility, he would have advised his clients to obtain a "certificate of non-objection" from the Second and Third Claimants.

[111] The Defendants have also sought to rely on an apparent conversation which took place between them and the Third Claimant in which she urged them to hurry up and complete the driveway as she was "*tired of looking at a muddy mess*". This apparent evidence is set out in legal submissions advanced to the Court and not in the form of written or oral testimony. As such, the Court can give no weight to it.

[112] In fact, this evidential gap is symptomatic of the grave error which permeates the Defendants' case. This is particularly crucial in an adversarial system which imposes an obligation upon each party to "come to trial with cards upon the table". A trial is not intended to be an ambush. There is a duty of disclosure that requires each party to articulate its case clearly and precisely and to provide access to the evidence and materials in its possession that are relevant to the case.

[113] For some inexplicable reason, the Defendants have chosen not to give sworn evidence before this Court. Failing to provide written evidence in support of their contentions means that these contentions could not be tested in cross-examination which put the Claimants at a distinct disadvantage.

[114] This paucity of evidence proved to be a great difficulty for this Court. It reflects a poor identification of the proper evidentiary issues which would have arisen on the pleadings and which would have occupied the Court. In the Court's judgment, given the rather technical defences raised, the Defendants were obliged to advance sufficiently cogent evidence which could clothe the constituent elements.

[115] The Court is therefore persuaded on the submissions of the Counsel for the Second and Third Claimants that the Defendants have failed to support their claim for an irrevocable licence or legal or equitable interest based on proprietary estoppel. There is a decided lack of certainty all around.

[116] On the basis of the limited evidence available, this Court finds that the Second and Third Claimant granted access to the Defendants over Parcel 15 on an unequivocally conditional basis. These conditions were well known to the Defendants. It would in the Court's view be impossible for them to have formed a reliance on representations which made it clear a formal written agreement would have to be agreed evidencing the grant of a licence or easement. While the excavation may have also been permitted, it is clear that it was in furtherance of a licence to access their property during the construction phase of their home. Once this phase was completed, such excavation may have been the precursor to the preparation and approval of a survey plan and design plans which would have eventually informed the agreement.

[117] The Court also finds that the Second and Third Claimants gave no permission to concrete the driveway or to install a concrete electrical meter box or to route powers and data cables underground.

[118] It follows that the Defendants have failed to prove that they had anything other than the bare licence which the Second and Third Claimants contend is the extent of the permission or access granted to date. Fortunately during the course of the trial, it was made clear to the Court that the Second and Third Claimant are still prepared to move forward with the process of granting a licence or easement over Parcel 15. This is indeed a laudable position given the intractable conduct of the Defendants.

ISSUE: Is the First Claimant liable for the damage to the Defendant's Wall?

[119] Turning now to the claims advanced by the Defendants. First, the Defendants contend that their wall and hardscaping was damaged when the First Claimant hired and allowed unsupervised concrete trucks to pass over the narrow single lane tracks of the Greenbank Estate road. The Defendants contend that these trucks failed to take reasonable care to ensure that damage was not done to their property. They submitted that all four elements of negligence were present and they relied heavily on the seminal case of Donoghue v Stevenson. They submitted that the Greenbank Estate Road consists of a single lane comprised of two narrow tracks so that it was reasonable to foresee that harm could be done to neighbouring properties when large concrete trucks traverse near the Defendants' residence. There was work being carried out near that Defendants' property and they conclude that it would have been within the Claimants'

contemplation that consequential damages could result. They stated that it is fair, just and reasonable to impose liability for the damages sustained.

[120] Moreover, the Defendants submitted that the First Claimant's Chairman admitted liability in writing. However, when the opportunity presented itself to cross examine Andrew Mudie, the Defendants failed to consolidate this contention. No questions were asked of this critical witness who made it clear in his witness statement that "*all of the representatives of GRCL consider the claim for damages to the Defendants wall as vexatious*." Instead, in written submissions lodged after the trial, the Defendants sought to rely on the less than helpful evidence of Mr. West. They submitted that Mr. West's evidence confirms that the First Claimant was doing work and that damages had occurred to the Defendants' landscape wall and hardscaping.

[121] In opposing this claim, the First Claimant relied on the evidence of Andrew Mudie whose untraversed witness statement indicates that he is aware that the First Claimant offered to repair the wall without any admission of liability on the basis that it considered the wall only need some cracks being covered. However, the Defendants claimed that the wall was fundamentally damaged and covered with an expensive treatment. The First Claimant therefore put the Defendants to strict proof of the damage which is alleged and it contends that the Defendant has woefully failed to discharge this burden.

[122] After referring to the images relied on by the Defendants, Counsel for the First Claimant also submitted that the images of the rocks on the top of the wall suggests that for this to occur there would have had to have been significant force applied. He submitted that this claim is deficient because there is no independent professional and expert evidence supporting this claim for damages. Indeed, Counsel for the First Claimant submitted that there was in fact no evidence underpinning this claim because neither of the Defendants have filed written evidence or given oral testimony and so they have deprived the First Claimant of the opportunity to test these allegations under oath.

[123] In addition, the First Claimant submitted that the Defendant have failed to put forward any objective evidence that the Claimants were responsible for the alleged damage to their wall. Counsel submitted that the Claimant have failed to establish who caused the damage. Instead, they tried to

link the damage to construction work that would have been taking place at the time. They assert instead that the damage could have been caused by any third party utility or service provider. The First Claimant has also submitted that the rocks referred to by the Defendants could not have caused the structural damage which is alleged. And critically, the First Claimant submitted that the Defendants have provided no actual proof of the alleged structural damage.

[124] The First Claimant is offer to repair notwithstanding, the Court is forced to agree with Counsel for the First Claimants' submission that in the absence of evidence to support this counterclaim, the Defendants have failed to prove this claim for relief on a balance of probabilities.

ISSUE: Is the First Claimant liable for the return of the Defendants' damage deposit

[125] The Defendants contend that they submitted a road damage deposit to the First Claimant on 3rd January 2012 when Parcel 15 was excavated. They submitted that all of their construction activities were supervised either personally or by their contractor in order to ensure that harm did not occur. As no damages resulted or were claimed by the First Claimant, the Defendants submitted that the deposit must be returned to them.

[126] **The First Claimant on the other hand contends that sum paid was not a damage "deposit" but a** non-refundable sum for the inevitable damage which the construction of an entire home would cause to the Greenbank Estate Road. In the untraversed witness statement filed by Andrew Mudie, he stated that the 2011 Greenbank AGM minutes refer to this payment as the damage fee **and notes that this is "unrealistic" due to the cost of the repair to the road. He stated that the** damage fee has been completely depleted because during the construction of their house, the Defendants used large concrete trucks to deliver concrete which would inevitably cause damage to the structure of the road. Mr. Mudie also referred to correspondence which he wrote to the Defendants in 2014 in which he complained of their repeated failure to ensure that their contractors complied with the agreed use of heavy machinery on the Estate Road while they were off Island. He noted that there were track marks gouged into the concrete road and the edges of some areas were ground off. Although, he described this damage as extensive, the First Claimant did not prove on the balance of probabilities that the cost of repair exceeded the so called damage deposit which was paid.

[127] Moreover, it is clear to the Court that this claim was pursued with very little enthusiasm by the Defendants. They advanced no direct evidence in support of the claim; moreover they failed to **persuasively disgorge the First Claimant's contention t**hat this sum was a non-refundable damage fee and not a refundable deposit. Further, the Court is not satisfied on a balance of probabilities that the conduct of the Parties intimated as much.

[128] This claim for relief is therefore dismissed.

CONCLUSION

[129] In considering the question of costs, the Court has had to consider that the several claims for relief raised in this Claim should properly have been the subject of enforcement proceedings under Cause 242 of 2013. Further, having reviewed the several witness statements and after listening to the oral testimony and observing the demeanour of the witnesses in Court, the Court was on a balance of probabilities satisfied that only some of the contentions advanced by the Claimants had been made out.

[130] Accordingly, and bearing in mind that there has been some success on the part of each party, the Court will exercise the discretion accorded to it under Part 64.6 of the Civil Procedure Rules 2000.

[131] **The Court's Order is therefore as follows:**

1. This Court declares that the Defendants have no right title, estate or interest in the Parcel 15 which is owned by the Second and Third Claimants other than a bare licence to access their own property.

2. The Second and Third Claimants and the Defendants are at liberty to negotiate and execute a formal agreement granting a licence or easement on Parcel 15.

3. Should the Second and Third Claimants grant a licence to the Defendants, the Defendants by themselves their employees, agents, workmen or otherwise howsoever, may only use the Land belonging to the Second and Third Claimants in compliance with any licence prepared on behalf of the Second and Third Claimants.

4. In the absence of any agreed licence, the Defendants and each of them shall take all necessary steps to ensure that the **land shaded red on the Court's order dated 21**st May 2015 is returned to its former state as at May 2015 before the driveway was constructed and when the Defendants were aware (from 1st May 2015) of the Second **and Third Claimants'** application to Court.

5. In the absence of any agreed licence the Defendants shall remove the gate posts **installed on the Second and Third Claimants' land without permission forthwith.**

6. This Court declares that the Defendants have failed to use their best endeavours to complete the ordering delivery, planting and final landscaping of their property within 180 days of execution of the Mediation Agreement.

7. The Defendants are ordered to take all necessary steps to finalise the landscaping of this Property in accordance with the Mediation Agreement within six (6) months **of today's date.**

8. The Defendants will provide monthly progress reports to the First Claimant.

9. The First Claimant will have 75% of its costs calculated on a prescribed basis. The Second and Third Claimants will have their costs on a prescribed basis.

Vicki Ann Ellis
High Court Judge