COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00765

BETWEEN

(1) ALAN R. CRAWFORD
(2) SHARON M. CRAWFORD

Plaintiffs

AND

(1) CHRISTOPHER STUBBS

(2) SHANNA'S COVE ESTATE COMPANY LIMITED

(3) DONNA DORSETT MAJOR

(Trading as Dorsett Major & Co., a firm)

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Roy Sweeting and Mr. Glen Curry of Glinton Sweeting O'Brien for the Plaintiffs
Mr. Anthony Newbold for the Defendants

Hearing Dates: 16, 17, 18 January, 22 February, 1 May 2019

Land – Sale of land – Right in, to or on property conveyed - Access road - Oral Agreement - Plan annexed to Conveyance with 15-foot access road

Injunction - Perpetual quia timet injunction –Nuisance – Need to show strong case of probability of apprehended mischief - Whether Plaintiffs established that an injury would ensue to them

Nuisance – Action by private adjoining property owner – Obstruction of access road to plaintiffs' property - Septic tank built on defendants' land close to ocean in front of plaintiffs' property – Need to prove particular, direct and substantial damage – Question of degree

Negligence – Professional negligence by attorney – Implied retainer – Standard of care of a reasonably competent attorney - Declarations and Orders

In the summer of 2010, the First Defendant agreed to sell to the Plaintiffs, property in Cat Island owned by the Second Defendant (that being the company of the First Defendant and owner of the subject land). On 30 August 2010, the parties attended the office of the Third Defendant to have the formal agreement for sale prepared and executed. The draft Conveyance was presented to the parties for their review and approval. The Plaintiffs reviewed the draft Conveyance and made several handwritten amendments which the First Defendant subsequently agreed to, provided that the Plaintiffs pay for resurveying the property. The property was resurveyed, but when the final version of the Conveyance was prepared, the written description of the property did not match the plan which was attached to the Conveyance.

Subsequently, a dispute arose between the parties principally with respect to a 15-foot access road between the Plaintiffs' property and the First and Second Defendants' property. It escalated when the First Defendant commenced construction of a building allegedly encroaching on the access road. The Plaintiffs contended that there was an oral agreement between the parties that the access road between the parties' respective properties would remain unobstructed.

Despite requests by the Plaintiffs that the First Defendant ceases construction on the access road, he refused to do so. This was despite numerous letters from the Plaintiffs' attorney as well as the Cat Island District Planning Board which issued a Cease and Desist Notice to the First Defendant to cease building without a valid building permit. The First and Second Defendants also constructed a septic tank on their property but very close to the ocean and directly in front of the Plaintiffs' property without inspection access covers and in contravention of the rules and regulations governing the placement of a septic tank.

The Plaintiffs commenced an action against the First and Second Defendants seeking, among other things, a declaration that neither the First nor the Second Defendants nor their successors in title are entitled to build on the access road or obstruct with the Plaintiffs' passing and re-passing, a permanent quia timet injunction, damages for breach of contract and damages for nuisance. The Plaintiffs joined their attorney as the Third Defendant claiming that she acted negligently when she failed to properly advise them in the execution of a conveyance that did not accurately reflect their negotiations with the First Defendant.

Held: Accepting the evidence of the Plaintiffs and finding that (i) the parties did agree to the handwritten amendments to the plan which was attached to the 30 August 2010 Conveyance recorded in Volume 11418 Page 099 and (ii) the Third Defendant was professionally negligent.

1. The First and Second Defendants must execute a Confirmatory Conveyance to cure the misdescription in the executed Conveyance to accurately reflect that which the parties agreed to.

2. The Plaintiffs and the First Defendant agreed that the 15-foot access road which runs along the southeastern boundary of the land that the Plaintiffs were purchasing and marked "access road" would remain unobstructed and would never be built upon. Since the First Defendant has built on the access road, he is ordered to remove the obstruction and to return the access road to its original state of 15 feet not later than 31 July 2020.

3. In order to establish an entitlement to a perpetual quia timet injunction, a plaintiff must show a strong case of probability that the "apprehended" mischief will arise: **Attorney General and Others v Manchester Corpn** [1891-94] All ER Rep. 1196. The Plaintiffs having satisfied the requirement, is entitled to an injunction barring the First and Second

Defendants from constructing anything on the access road and/or interfering with the Plaintiffs' passing and re-passing over the access road.

4. The construction of a septic tank on the First and Second Defendants' property directly in front of the Plaintiffs' property and so very close to the ocean is a nuisance under the rule in **Rylands v Fletcher**. In effect, the rule provides that if a person brings, or accumulates on his land anything, which, if it should escape, may cause damage to his neighbour, he does so at his peril. The First and Second Defendants must remove the septic tank on or before 31 July 2020.

5. The Third Defendant was the only attorney involved in the transaction. Although there was no express retainer, one was implied by the conduct of the parties: **Blyth v Fladgate** [1891] 1 Ch. 337 applied.

6. The Court finds that the attorney also acted for the Plaintiffs when she did the following: (i) she invoiced the Plaintiffs for the fees for the transaction and they paid her; (ii) she secured a Report on Title for the Plaintiffs (something that the vendor of property does not generally require); (iii) she assured the Plaintiffs that "the title was good"; (iv) she prepared affidavits of citizenship for the Plaintiffs and (v) she sent the documents for recording after the transaction (which is always the obligation of the Attorney representing the purchasers). She was also the attorney for the First and Second Defendants. In short, she acted for both parties in the transaction.

7. A solicitor or attorney owes a duty of care to his client in both contract and in the tort of negligence to exercise reasonable skill, care and diligence in relation to the work he undertook. The extent of a solicitor's responsibilities is derived from his retainer. He is under no general obligation to expend time and effort on issues outside the scope of his retainer. While as a matter of general principle a solicitor's duty is strictly circumscribed by his instructions, it must not be taken too far. So, if in the course of doing that for which he was retained, a solicitor becomes aware of a risk, or a potential risk, to his client which it was reasonable to assume the client did not know about it was the solicitor's duty to inform the client: **AW Group Ltd v Taylor Walton** [2013] All ER (D) 10 (Oct).

8. In an action founded on negligence, a plaintiff is not entitled to succeed unless he could prove two elements namely (i) that the defendant had been negligent and (ii) he suffered damage as a result of that negligence: **Rankine v Garton Sons & Co. Ltd** [1979] 2 All E.R. 1185 considered. The Third Defendant was negligent and liable in damages in that she failed to properly advise the Plaintiffs in the execution of a conveyance which did not accurately reflect what the Plaintiffs agreed to during initial discussions and negotiations with the First Defendant. Further, she failed to advise the Plaintiffs on the following (i) the implications of the transaction they were involved in; (ii) the weight and effect of verbal agreements in reference to access of the access road; and (iii) the fact that there were no restrictive covenants or any other equitable right which would prevent a commercial enterprise from being built near to their house.

JUDGMENT

Charles J:

Introduction

[1] The Plaintiffs, Alan Crawford and Sharon Crawford (together "the Crawfords") sued the First Defendant ("Mr. Stubbs"), the Second Defendant, a company of which Mr. Stubbs is the Principal and sole shareholder ("the Company") and the Third Defendant (Mrs. Major") (together "the Defendants") seeking the following relief namely:

1. A Declaration that neither Mr. Stubbs nor the Company nor their successors in title are entitled to build any structure on the access road or obstruct or interfere in any way with the Crawfords' passing and re-passing along the access road and use thereof as a roadway;

2. Alternatively, a Declaration that the structures built on the access road constitute a substantial and unreasonable interference with the Crawfords' use and enjoyment of their property;

3. An Order directing Mr. Stubbs and the Company to immediately remove the structures already built on the access road and to return it (the access road) to its original state;

4. A permanent injunction preventing Mr. Stubbs and the Company and their successors in title from building any structure on the access road or interfering with or obstructing in any way the Crawfords passing and repassing along the access road and use thereof as a roadway.

5. A Declaration settling the precise boundaries and dimensions of the property owned by the Crawfords and an Order directing Mr. Stubbs to execute a Confirmatory Conveyance to the Crawfords;

6. Damages for breach of contract and;

7. Damages for nuisance.

8. As against Mrs. Major, damages for professional negligence and breach of fiduciary duty.

9. Costs.

Background facts

[2] The background facts are based on positive findings of fact made by me. The Crawfords are American citizens. They came to The Bahamas, and more specifically, to Cat Island in 2010. Captivated by the island's beauty and serenity, they began looking at the prospect of purchasing a second home there. In the summer of 2010, they learnt from a friend that Mr. Stubbs was selling one of his waterfront lots at Shanna's Cove. The friend told them to contact Mr. Stubbs immediately which they did. Mr. Stubbs told them that he was interested in selling one of the two waterfront lots and they could choose either lot A or lot B. The Crawfords told him that they would be interested in lot A ("the property") because it was slightly larger. They came to an agreement on the phone and agreed to meet in Nassau to close the deal. The price was negotiated at $150,000.00. The Crawfords had very little knowledge of Bahamian law and they did not know any attorney here. Mr. Stubbs suggested that his attorney, Mrs. Major could close the transaction for them. The Crawfords agreed to this. Mr. Crawford then contacted Mrs. Major who agreed that she would represent both parties without any conflict of interest.

[3] At that meeting, which took place in Mrs. Major's office on 30 August 2010, the Crawfords saw the survey plan ("the plan") of the property for the first time. After reviewing it, they realised that the property was irregularly-shaped. The Crawfords did not want to purchase an irregularly-shaped property so they negotiated to purchase an enlargement to the property. They requested the length of the northern boundary to be increased from 60 feet to 75 feet in order to give the property a regular, rectangular shape and to give them room to construct a

separate garage. The enlargement to the property was agreed. Mr. Stubbs and Mr. Crawford hand-drew amendments on the plan attached to the Conveyance. The new dimensions were initialled by the Crawfords on the plan. Mr. Stubbs' only condition for the enlargement of the property was for the Crawfords to pay the cost of $1,500.00 to have it resurveyed. It really was not a "gift" as stated by Mr. Stubbs. The Crawfords agreed to that sum which was paid to Mr. Stubbs then and there. The discussions and negotiations of the new proposed boundary lines took place in Mrs. Major's office in her presence.

[4] Shown on the plan and running along the southeastern boundary of the property that the Crawfords were purchasing, was a piece of property marked "Access Road" ("the access road"). The agreed adjustment of the boundaries of the property also had the effect of making the access road a regular rectangle, 90 feet long and 15 feet wide along its entire length. Mr. Stubbs stated that the access road was already provided for in the title deeds of other purchasers in Shanna's Cove and would never be built upon. It was also agreed that the access road would be a "buffer" between the two lots. Mr. Stubbs only changed his mind about the access road when the Crawfords built their residence a few feet from the eastern boundary for which they subsequently obtained planning approval.

[5] After the handwritten changes had been made to the plan in the presence of Mrs. Major, she changed the written description of the boundaries of the property and told the Crawfords and Mr. Stubbs to sign the conveyance ("30 August Conveyance"), which they did.

[6] Everything appeared fine. The parties even celebrated the close of the transaction. They left Mrs. Major's office with Mr. Stubbs undertaking to have the property resurveyed and new plans produced and the Crawfords waiting to transfer the balance of the purchase price to Mrs. Major for Mr. Stubbs. The Crawfords returned to Cat Island feeling elated.

[7] Not too long after the meeting in Mrs. Major's office, the Crawfords received a copy of what appeared to be a survey plan amended in accordance with the hand-written amendments drawn on the original plan in the meeting. Upon receipt of this plan, they sent the balance of the agreed purchase price to Mrs. Major.

[8] Several weeks later, Mrs. Major sent to the Crawfords an Agreement for Sale of the property which was dated 30 August 2010 ("the Agreement"). It bore the same date as the 30 August Conveyance which they had already signed in Mrs. Major's office on 30 August 2010. They were asked to sign it and return it to her. She also sent to the Crawfords a copy of her Statement of Account dated 30 August 2010 addressed to "Mr. Christopher Stubbs/Mr. Alan Crawford". The Crawfords signed the Agreement and arranged for payment of the Statement of Account.

[9] The Crawfords then proceeded to build a house and separate garage upon the property. The buildings were constructed within the space bounded by the survey pins they found upon the property. However, when the foundation of their house was being built, their contractor made a mistake and the length of the house was accidentally increased by 5 feet over the length shown on the plans for which they had received a building permit. This meant that the footprint of the house was still within the boundaries indicated by the survey stakes but not within the usual statutory setbacks of 5 feet. The Crawfords immediately applied for and were granted a variance on their building permit.

[10] Shortly after the 30 August Conveyance was executed, Mr. Stubbs's behaviour changed drastically.

[11] In the middle of September 2014 when the Crawfords were in the United States, they were notified by a neighbour that Mr. Stubbs had begun constructing a building right next to their property and where the access road was located. The Crawfords said that Mr. Stubbs also constructed a septic tank near the beach opposite their property. The septic tank has no inspection access covers and does

not comply with the rules and regulations governing the placement of a septic tank so close to the ocean.

[12] Despite numerous requests by the Crawfords and their attorneys to cease and desist all construction, Mr. Stubbs failed and/or refused to heed any of the warnings. This is discussed more fully under the sub-heading: Non-co-operation by Mr. Stubbs.

[13] The Crawfords also sued Mrs. Dorsett-Major for professional negligence. She was the only attorney engaged in this transaction. The Crawfords alleged that Mrs. Major was negligent in that she did not properly advise them as to the implications of the transaction they were involved in with Mr. Stubbs and the Company. The Crawfords next alleged that, due to her negligence, they suffered damage as they did not receive what they bargained for. They also allege that although there was no written retainer as between themselves and Mrs. Major, based on the conduct of the parties, an implied retainer can be inferred. To sum up, the Crawfords alleged that had it not been for the negligence of Mrs. Major, this "chaotic" situation would not have existed.

[14] Mrs. Major vehemently denied the allegation and maintained that she never represented the Crawfords in the transaction.

The issues

[15] The parties did not agree on the issues. However, looking at the respective issues which were submitted to the Court, in my opinion, the following arise for consideration namely:

1. Whether the parties had agreed for the access road between the Crawfords' property and Mr. Stubbs/the Company's property to remain free and clear of any obstruction?

2. Whether Mr. Stubbs is permitted to construct a restaurant next to the Crawfords' house or a septic tank on the beach near to the Crawfords'

property?

3. Whether any of the conduct of Mr. Stubbs and/or the Company complained of by the Crawfords amounts to a nuisance?

4. Whether any of the conduct of Mr. Stubbs and/or the Company complained of by the Crawfords has been otherwise unlawful or gives rise to any cause of action or claim for relief on the part of the Crawfords against any of the Defendants?

5. Whether Mrs. Major owed a duty to the Crawfords and if so, whether there was a breach of that professional/fiduciary duty?

6. If she did and there was a breach, whether the Crawfords have suffered any loss or damage?

The evidence

Alan and Sharon Crawford

[16] Both Mr. and Mrs. Crawford gave viva voce evidence. They both signed witness statements on 26 March 2018 which stood as their respective evidence-in-chief.

[17] The following facts can be distilled from their testimony. Prior to the meeting on 30 August 2010 in Mrs. Major's office, the Crawfords had reached an "in principal" verbal agreement via telephone that they would purchase from Mr. Stubbs' company a parcel of land with 75 feet of beachfront for $150,000.00 and they would pay all of the legal expenses associated with the transaction. It was agreed that Mrs. Major would represent both parties. To show good intent to purchase, Mr. Crawford told Mrs. Major that he would send $15,000.00 as a down payment. She gave him her wiring instructions to wire the money which he did before meeting her on 30 August 2010.

[18] The agreement was neither complete nor binding on either of the parties when they arrived on 30 August 2010 at Mrs. Major's office to complete the transaction.

At Mrs. Major's office, Mr. Stubbs produced the original "survey plan" of the property he proposed to have the Company sell to the Crawfords. The plan showed that an access road would run between the property to be sold to the Crawfords and the portion that Mr. Stubbs proposed to retain.

[19] The Crawfords testified that they did not want to purchase an irregularly-shaped piece of land which was 75 feet wide at the beach side and only 60 feet wide at the rear. So, they negotiated with Mr. Stubbs to have the length of the rear boundary of the property increased to 75 feet to correspond with the front boundary, i.e. for the property to be squared up.

[20] The Crawfords stated that Mr. Stubbs agreed to this, subject only to them paying the $1,500.00 costs of having a new plan prepared, which sum the Crawfords paid to him in cash then and there. Subsequently, under the supervision of Mrs. Major, the parties hand-drew and initialed amendments on the survey plan and both parties signed the Deed of Conveyance to which it was attached. Mr. Crawford stated that he paid Mrs. Major an extra $100.00 cash to expedite the process as she stated that it could take weeks or months to get the papers properly filed.

[21] Mr. Crawford further testified that an issue arose during the closing when Mrs. Major said that she never received the $15,000.00 deposit that he had wired to her some weeks before. He said that this concerned him so he emailed the then Minister of Finance about his concerns with the lost money. The following day, he was informed, via email, copied to Mrs. Major, that the funds were placed in hernal account. He said that Mrs. Major was very angry that he contacted the Minister.

[22] The Crawfords subsequently paid the balance of the purchase price to Mrs. Major, who accepted the same, on behalf of Mr. Stubbs and the Company.

[23] A few weeks later, Mrs. Major forwarded a draft Sale and Purchase Agreement to the Crawfords with an amended plan attached to it. The amended plan still showed the 15 foot access road running between the two lots. The Crawfords signed and returned this document.

[24] Later on, the Crawfords commenced construction of their home. They showed Mr. Webb, the general contractor ("Mr. Webb"), where they wanted the house on the lot. Mr. Crawford said that they were not present when Mr. Webb laid the foundation out. He made a mistake with the front dimension. Upon realizing that, Mr. Crawford said that he went to the building inspector Mr. Bert Newbold who issued a variance to continue.

[25] The Crawfords testified that immediately after construction begun, Mr. Stubbs started complaining to Mr. Webb that they did not provide him with the plan for him to approve. According to them, he continued to harass the workmen on a weekly basis but when Mr. Crawford would show up on the job site, Mr. Stubbs never complained to him.

[26] Mr. Crawford stated that, around March 2013, Mr. Stubbs told a neighbour who was on their property that he was going to move the access road next to the Crawfords' house to lot B. He said that "*he could do whatever he wanted in Shanna Bay*".

[27] The Crawfords stated they were led to believe that they were purchasing and actually purchased a parcel of land that abutted an access road that was 15 feet wide, the existence of which was appurtenant to their property.

[28] Subsequent events revealed to the Crawfords that the property had never been properly surveyed by a licensed surveyor and the boundaries shown on both the original plan and an amended plan that they received could not be relied upon because they did not "close".

[29] Later on, when they were not in The Bahamas, they received an email that Mr. Stubbs was building a large and unsightly structure on the land which they had understood was and would remain an access road. They also learned with distress that the building was going to be a restaurant. They were of the opinion that it is a residential area.

[30] The Crawfords alleged that their quiet enjoyment of their property has been destroyed, not least by the fact that they have no certainty as to the precise location or shape of the property they own, but also by the ongoing abuses and unsightly and illegal construction perpetrated by Mr. Stubbs.

[31] Both Mr. and Mrs. Crawford were extensively cross-examined by learned Counsel, Mr. Anthony Newbold, who represented the Defendants in the proceedings. Under cross-examination, they were unwavering and resolute in their evidence. I accepted their respective evidence as being credible.

Mr. Christopher Stubbs

[32] Mr. Stubbs testified on his own behalf and that of the Company. He is the Principal and the sole shareholder of the Company. He signed a witness statement on 18 October 2018, many months after the Case Management Order had directed him to.

[33] He acknowledged that, in August 2010, the Company sold part of a property to the Crawfords. He said that it was a single piece of land which he subdivided to sell to the Crawfords after they pleaded with him. He said that the original parcel of land measured 60 feet by 90 feet. Since the Crawfords asked him for a bigger place, he consented and “gifted” them an additional 15 feet for no consideration. A plan was to be drawn up to reflect the new dimensions of 75 feet by 90 feet.

[34] In paragraph 8 of his witness statement, Mr. Stubbs asserted that, under the first 60 feet by 90 feet plan, provision was made for beach access located between the Crawfords property and his property. He further stated that since the access road was also meant to accommodate the other potential residents at the rear of the property and the first plan was invalidated when the Crawfords asked for a “bigger piece”, a new plan had to be drawn up. Since he gifted an extra 15 feet of land to the Crawfords, the access road had to be moved to the eastern side of his property.

[35] Mr. Stubbs contended that the Crawfords have not suffered any irreparable loss and/or damage and, since he and the Company are the lawful owners of the

adjoining lot of land, he may develop it subject to lawful requirements.

[36] Mr. Stubbs was extensively cross-examined by learned Counsel Mr. Roy Sweeting who appeared for the Crawfords. That cross-examination took place on 17 January 2019 and is recorded in the Transcript of Proceedings ("the Transcript) for that day.

[37] During cross-examination, Mr. Stubbs adamantly refused to acknowledge that (i) he had arranged for the preparation of the plan attached to the Deed of Conveyance, (ii) he had brought the same plan with him to the meeting at Mrs. Major's office, or (iii) he had even seen the plan before that date: pages 47 and 48 of the Transcript. Mr. Stubbs alleged that he never saw the plan attached to the Deed of Conveyance until he was served with the Writ of Summons. This was the plan showing an irregularly shaped piece of land, the southeast boundary of which was 60 feet long, on which the parties inserted hand-drawn amendments.

[38] However, at paragraph 6 of his witness statement, Mr. Stubbs explicitly acknowledged the prior existence of the original plan when he stated "*it was understood that the plan representing the 60 x 90 would be nullified and another plan accurately reflecting the new dimensions of 75 x 90 would be drawn.*"

[39] At various times during cross-examination, Mr. Stubbs was inconsistent. He alleged that:

a) He never met with the Crawfords at Mrs. Major's office: page 43. Then, at page 44, he said that he did meet the Crawfords in Mrs. Major's office.

b) At page 39, line 16, he stated that he did not arrange for the original survey plan to be prepared. Then, at page 39, line 24, he said that he did arrange for the survey to be prepared although he alleged that his instructions were not followed.

c) Notwithstanding paragraph 8 of his witness statement where he

averred that, under the first 60 x 90 plan, provision was made for beach access between the Crawford's property and his property; during cross-examination, he insisted that he never instructed the "surveyor" to show an access road on the original plan and the surveyor had shown it on the plan for reasons unknown to him.

d) He had never seen the plan with the hand-drawn changes on it before the Writ was served on him several years later. Subsequently, he said that he might have seen a plan at Mrs. Major's office but he could not say what plan he saw, if he saw one.

e) He agreed in Mrs. Major's office to have a new survey plan prepared showing the property with even dimensions of 75 x 90 conditional upon the Crawfords paying the cost and that the Crawfords paid the cost then and there.

f) That he only ever had one survey plan prepared and knew nothing of the plan that the "new" survey plan was to replace.

g) He did not have a new survey plan prepared after the Crawfords paid him the $1,500.00 in Mrs. Major's office, and then; at pages 59 and 60, he said that he did have a new survey plan prepared although once again the "surveyor" (unlicensed") mysteriously inserted an access road without any instructions from him (pages 59 and 60 of the Transcript).

Mrs. Donna Dorsett-Major

[40] Mrs. Major is an Attorney-at-Law. She was called to the Bar of England and Wales in July 2004 and to the Bahamian Bar on 24 September 2004. Mrs. Major swore a witness statement in the proceedings on 22 August 2018. She asserted that, in or about June 2010, she received instructions from Mr. Stubbs to represent him and the Company with respect to the sale of property belonging to the Company. She was unaware of any conversation between Mr. Stubbs and Mr. Crawford that she

should also represent the Crawfords in this transaction. However, she recalled Mr. Crawford telephoned informing her that he had received her phone number from Mr. Stubbs. She said that Mr. Crawford asked her whether Mr. Stubbs had discussed with her the proposed sale of the property to which she responded that she had brief discussion with him and Mr. Stubbs had instructed her to prepare a draft agreement for sale relative to the property.

[41] Mrs. Major stated that Mr. Stubbs instructed her to obtain the necessary information from Mr. Crawford in order to complete the draft agreement for sale. She then requested further details from Mr. Crawford in order to prepare a draft agreement for sale including the name and address of his attorney. It was at this juncture that Mr. Crawford informed her that he did not need an attorney because he was familiar with the property, and several of his friends had purchased property from Mr. Stubbs. And, it was a cash sale.

[42] She further stated Mr. Crawford informed her that it was agreed between him and Mr. Stubbs that they (the Crawfords) would be responsible for Mr. Stubbs' legal fees including the stamp duty. She said that there was an increase in stamp duty which Mr. Crawford was willing to pay.

[43] Then, on 30 August 2010, while at her office, she told the Crawfords to get an attorney. She said that Mr. Crawford said that they did not have time as they were scheduled to return to Texas the following day and they wanted the Conveyance completed and executed before their departure. Further, she said that Mr. Crawford reiterated that he did not need an attorney.

[44] Mrs. Major emphasized that she was never retained by the Crawfords neither did she represent them in the transaction. Her instructions came from Mr. Stubbs and the Company. She said that the only legal fees invoiced by and paid to her by the Crawfords were on behalf of Mr. Stubbs and the Company. She received $3,500.00 from the Crawfords. According to her, the standard legal fees on conveyances is 2.5% of the selling price. So, for a conveyance of $150,000.00, the

legal fees is $3,750.00.

[45] Mrs. Major stated that the discussion for an additional 15 feet was not done in her office. It was agreed between the parties prior to the meeting on 30 August 2010 and the first time she ever heard the words “garage” and “access road” were when they were mentioned in the Statement of Claim and/or the Amended Statement of Claim filed on 4 September 2015 and 17 March 2016 respectively. This is inaccurate as she wrote a letter to the Crawfords on 2 October 2014 discussing these very issues.

[46] Mrs. Major claimed that the Crawfords initialed the drawing with respect to the amendment for the additional 15 feet and that was her only concern. Cognizant of the fact that the Crawfords were unrepresented, she explained the agreement to them in layman’s terms discharging any duty of care owed to them.

[47] She acknowledged that there was an error made with respect to the total square footage of the property. She hastened to add that it can be easily rectified with a Confirmatory Conveyance and, notwithstanding that error, the Crawfords have suffered no loss and/or damage due to the fact that the structure of their house has been built on the entire property give and take a few feet from the boundary.

[48] Under cross-examination, Mrs. Major admitted that she was the only attorney involved in the transaction and she drew up the sale and purchase agreement. She did not recall Mr. Crawford asking her to have a title report on the property but she always does title searches, even when acting for the vendor.

[49] Mrs. Major said that Mr. Stubbs told the Crawfords in that meeting that a corrected plan would be prepared although she denied ever receiving a corrected plan. Seven months later, she sent the Deed of Conveyance with the hand-marked plan attached to it to the Registry of Records to be recorded.

Factual findings

[50] Having had the opportunity to observe the witnesses as they testified, I found Mr. Stubbs to be an unimpressive and inherently unreliable witness. With respect to Mrs. Major, I found some parts of her evidence to be reliable and other parts not to be. I did not believe when she testified that she did not represent the Crawfords. I shall return to this issue momentarily.

[51] In my opinion, only one party ever had survey plans of the property which was sold to the Crawfords and that was Mr. Stubbs. I found that both plans were prepared at the behest of Mr. Stubbs and his "surveyor" did not miraculously insert an access road on two separate plans without Mr. Stubbs' instructions. Despite his denials, Mr. Stubbs clearly instructed his "surveyor" to draw the original plan showing the property with its northeastern boundary line only 60 feet long, and an "access road" running along the southeastern boundary.

[52] Later, Mr. Stubbs instructed his "surveyor" to amend that plan and increase the length of the northeastern boundary to 75 feet without otherwise disturbing the access road. The prepared plans state that they were prepared at the instance of Mr. Stubbs.

[53] Further, with respect to the plan, Mrs. Major contradicted Mr. Stubbs' evidence. She said Mr. Stubbs brought that plan to her office on 30 August 2010. It was marked up in her office in her presence. The markings reflected the change for the additional 15 feet. This corresponded with the Crawfords' evidence on this point and contradicted that of Mr. Stubbs that he had never seen that plan before it was served on him at the commencement of the proceedings.

[54] At the end of the day, I preferred the evidence adduced by the Crawfords. I believed them when they said that, at the time of negotiating for the purchase of the lot, it was agreed that the 15-foot access road that divided the two lots was to remain as a "buffer" and also to provide beach access for the other property owners of Shanna's Cove. Mr. Stubbs changed his mind about the access road around the

time that Mr. Webb mistakenly laid out a foundation for the Crawfords' house that was wider than what the approved plans called for. Mr. Stubbs had already begun complaining that the Crawfords had not submitted their plans to him for approval prior to commencing construction. He was not happy that the Crawfords' house was going to come within two feet or so of the property line. In fact, he corroborated the Crawfords' account in paragraph 15 of his witness statement where he stated:

> **"The move of the Access was especially necessary since the Crawfords built their residence a mere two (2) feet from their eastern boundary. We however built some six (6) feet away from the Crawfords' eastern boundary."**

[55] Mr. Stubbs appeared to have developed a personal animosity toward the Crawfords and a desire to remain the "boss" in Shanna's Cove. His former position as the administrator of the island seemed to have "gone to his head" giving him false aspirations. His desire to bend the Crawfords and the other residents of Shanna's Cove to his self-control was further exacerbated when the Court visited the locus in quo. On that visit, when the Court asked Mr. Stubbs a question about the location of the survey pins, he marched onto the Crawfords' property, laid hold of a mature plant that was near one of his recently installed survey pins and wrenched it from the ground. He did so without permission and without thought or care for whose land he was on or whose shrubbery he was destroying. In the words of Mr. Sweeting, "*there could hardly be a clearer demonstration of his imperious, bullying attitude or the accuracy of the claims against him*".

[56] In addition, I believed Mr. Crawford when he testified that Mr. Stubbs has threatened his life and the safety of his wife and his dog. He said that Mr. Stubbs has also threatened to bring a bulldozer to demolish their house and had stated that "*no judge in The Bahamas can tell him what he can or cannot do with his property*". This is indeed unfortunate language coming from a man who once held the prestigious position of Administrator of Cat Island.

[57] All things considered, I preferred the evidence adduced by the Crawfords to that of Mr. Stubbs and Mrs. Major. I find, as a fact, that Mr. Stubbs agreed that the 15-foot access road that divided the two lots was to remain unobstructed.

Discussion and analysis

Issues 1 and 2

[58] Issues 1 and 2 are dealt with together since they relate to the same matter. The main contention between the parties relate to the 15-foot access road which, on the evidence adduced, I found that the parties had agreed that the access road between the two lots was to remain free and clear of any obstruction.

[59] The second issue relates to the construction of the conveyance: whether Mr. Stubbs and/or the Company is (are) permitted to construct a restaurant near to the Crawfords' house and on the access road and a septic tank on the beach directly in front of the Crawfords' house?

[60] In succinct submissions, Counsel for the Defendants submitted that, following the completion of the Crawfords' house, Mr. Stubbs decided that he would commence construction. According to Mr. Newbold, this caused a lot of tension on the part of the Crawfords. As a result, they boldly asserted that Mr. Stubbs has no right to build on his land. In turn, when Mr. Stubbs produced documentary evidence of a permit and approved building plan, the Crawfords knew that their claim would fail, so they resorted to the secondary claim of blocked access to their property. Mr. Newbold next submitted that the Crawfords confirmed during their testimony that no such blockage exists and they confirmed that the path leading to their house at the rear of Mr. Stubbs' **building** had but a mound of sand. Mr. Newbold argued that there is no evidence of the **building** obstructing the Crawfords' access to their home.

[61] Learned Counsel Mr. Newbold next submitted that Mr. Stubbs committed no trespass by building on the so-called access road which separates the two properties. He argued that it could hardly be said to be the case since it was the Crawfords who built some two feet from the common boundary and what is more,

is that Mr. Stubbs built six feet from the boundary. According to him, had the Crawfords built six feet from the common boundary, then the two properties would have been separated by twelve feet or more of access rather than the eight feet which now exists.

[62] Mr. Newbold further submitted that what is especially important is the fact that Mr. Stubbs is the owner of the land described as the access road. For this reason, he is free to do as he pleases with his property so long as that use is in no way harmful to the Crawfords. Mr. Newbold argued that when the Crawfords could not get "their way", they turned their wrath to Mrs. Major and joined her as the Third Defendant in this action.

[63] To compound the factual finding I arrived at, that the parties had agreed that the 15-foot access road which abuts the two lots was to remain unobstructed, I now turn to the law.

[64] Learned Counsel for the Crawfords submitted that the description provided in the first schedule of the 30 August 2010 Conveyance is inconsistent with that which is provided on the annexed plan recorded in Volume 11418 at page 099. He further submitted that the written description of the property does not accurately reflect what the Crawfords purchased and it is the plan and the handwritten amendments that accurately reflect what was intended to be purchased.

[65] Counsel for the Crawfords supported this assertion on the authority of **Megarry and Wade The Law of Real Property 5th ed.** at page 166 para. 9 where the general rule on Parcels is:

> **"This is the description of the property. Description by reference to an annexed plan is a common alternative, but is not essential if an accurate verbal description can be given. Very often a conveyance both describes the property verbally and also includes a plan. In that case it is advisable to provide that one or the other shall prevail in case of inconsistency. For example, if the plan is expressed to be included "for the purposes of facilitating identification only" the verbal description will prevail; but if the property is said to be "more particularly described in the plan," then the plan will prevail. If the**

verbal description is insufficient, as by failing to indicate a boundary, the court may have recourse to the plan, even though it is "by way of identification only."

[66] The relevant portion of the parcels clause states:

> **"…. which said piece, parcel or lot of land has such position shape marks boundaries and dimensions as are shown on the said diagram or plan hereto attached and is delineated in the part of the said diagram or plan which is coloured Pink."**[Emphasis added]

[67] Mr. Sweeting submitted that although the above description does not use the exact wording ("more particularly described in the plan") there is a strong implication that the plan should prevail as it uses the language "*land has such position shape marks boundaries and dimensions as are shown on the said diagram or plan hereto attached and is delineated in the part of the said diagram or plan which is coloured Pink."*

[68] According to Mr. Sweeting, the wording (above) suggests that an accurate description of what is to be conveyed is reflected more precisely on the plan and therefore, the plan ought to be given more weight than the written description.

[69] Learned Counsel referred to Lord Hoffmann's opinion in **Alan Wibberley Building Limited v. Insley** [1999] 1 WLR 894 which is now regarded as the leading modern authority on the construction of the parcels in a conveyance. His pronouncements were summarized by Mummery L.J. in **Pennock & Anor v Hodgson** [2010] EWCA Civ 873 at paragraph 9:

> **"(1)The construction process starts with the conveyance which contains the parcels clause describing the relevant land….**
>
> **(2)An attached plan stated to be "for the purposes of identification" does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.**
>
> **(3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.**

> **(4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary."**

[70] Such pronouncements were also relied on in **Dixon v Hodgson** [2011] EWCA Civ 1612. In **Dixon**, the court also had to interpret an ambiguous conveyance in order to determine the actual boundaries of the land. The court further relied upon the following dicta of Mummery L.J. in **Pennock** (at paragraph 12):

> **"Looking at the evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction…."**

[71] Mr. Sweeting also relied on the case of **Chadwick and others v Abbotswood Properties Ltd and others** [2004] All ER (D) 213 (May) with regard to the interpretation of parcel clauses in conveyances. Lewison J. stated:

> **"43…. Where the definition of the parcels in a conveyance or transfer is not clear, then the court must have recourse to extrinsic evidence, and in particular to the physical features on the ground. As Bridge L.J. put it in *Jackson v Bishop* (1979) 48 P. & C.R. 57:**
>
> > **'It seems to me that the question 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 constructions seems to give the more sensible result.'**
>
> **44. The question is one to be answered objectively: what would the reasonable layman think he was buying? Since the question must be answered objectively, it follows that evidence of the parties' subjective intentions, beliefs and assumptions are irrelevant; as are their negotiations."**

[72] Counsel for the Crawfords further argued that, as the plan in the present case was not said to be "for the purpose of identification only", more weight and reliance ought to be placed on it.

[73] It seems logical to me that the amount of importance to be attached to a conveyance plan must depend on the words used in the document that refer to it. Therefore, the first place to look at is the "parcels clause". If the conveyance states that the land to be conveyed is that shown "on the plan attached hereto", in my opinion, the plan is highly important. In the present case, the Conveyance goes a bit further in stating "*which said piece, parcel or lot of land has such position shape marks boundaries and dimensions as are shown on the said diagram or plan hereto attached and is delineated in the part of the said diagram or plan which is coloured Pink.*

[74] Applying the aforementioned principles to the facts of the present case, one must first look at the parcels clause (which the Crawfords contend is inaccurate), along with the attached plan. As there is an inconsistency, the precise boundaries of the land itself must be established by extrinsic evidence. This includes any evidence of physical features, such as photos, along with the plan itself. Not only that, but the actual survey pins accurately reflect the 75 x 90 x 75 x 90 dimensions as the Crawfords desired and purchased.

[75] I agree with Mr. Sweeting that, aside from the written description of the property, there is no evidence contrary to the lines drawn on the plan. In fact, there were two survey plans prepared. Both plans are inconsistent with the written description as provided by the Conveyance itself. To that end, the Crawfords contended and I agree with their contention, that the plan should be the definitive description.

[76] Further, applying the reasonable man test as stated in **Chadwick** [supra], the reasonable man would follow the plan attached along with the physical features of the land at the time of the Conveyance. Based on the evidence adduced, I found that the Crawfords asked for an enlargement of the irregularly-shaped property and Mr. Stubbs agreed. In addition, I also found that the parties made handwritten amendments and the Crawfords, having paid $1,500.00 for the new survey plan, were assured that the new plan would accurately reflect that what they wish to purchase.

[77] Moreover, the written description of the property is fundamental. It does not accurately reflect that which the Crawfords agreed to purchase. Not only that, but such description does not appear to derive from a proper survey.

[78] Mrs. Major admitted that she erroneously misdescribed the boundary of the Crawfords' property. She contended that this is not unheard of in the legal profession and it could easily have been cured by drawing her attention to the "mistake" in a letter. She says that this is a courtesy extended to one another in the profession. She says that a Confirmatory Conveyance would cure the misdescription.

[79] With respect to the access road, I found that it was meant to act as a "buffer" between the two lots and also to provide beach access for the property owners of Shanna's Cove. This is also the evidence of the Crawfords. At no time did the Crawfords suggest that Mr. Stubbs should convey the access road to them. What they say is that it was agreed that no structure would be built on the 15-foot access road which belongs to Mr. Stubbs and the Company.

[80] Accordingly, I will order that Mr. Stubbs executes a Confirmatory Conveyance to cure the misdescription which was made in the 30 August 2010 Conveyance recorded in Volume 11418 pages 092 to 099. He must do so not later than 31 July 2020. In addition, the written description provided in the Conveyance must be abandoned altogether and the attached plan prevail to reflect the dimensions of 75 feet x 90 feet x 75 feet x 90 feet.

Issues 3 and 4

Nuisance and the rule in Rylands v Fletcher considered

[81] The Crawfords alleged that they have been obstructed in the access of their home to the beach and that the septic tank is a despicable sight in front of their property and so very close to the ocean. Counsel for the Defendants say that there is no evidence amounting to nuisance based on the legal standard.

[82] A convenient starting point in this discourse is to look at the law of nuisance. At

page 152 of his treatise, **Commonwealth Caribbean Tort Law, 4th ed.,** the learned author, Gilbert Kodilinye identified two main requirements which must be satisfied to ground a case of private nuisance. They are:

(i) the injury or interference complained of must be substantial; and

(ii) the defendant will only be held liable if his conduct was unreasonable in the circumstances.

[83] The classis formulation of what is considered "substantial interference with enjoyment of land" was articulated by Luxmoore J. in **Vanderpant v Mayfair Hotel Co, Ltd** [1929] All ER Rep 296. At page 308, the learned judge stated:

> **"…[E]very person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him; and, in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people... It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case."**[Emphasis added]

[84] The evidence in the present case establishes the fact that Mr. Stubbs constructed a building to be used as a restaurant. When Mr. Stubbs informed the Crawfords of this, they were baffled and distraught as they understood that the property was in a residential community. The Crawfords were not happy by this news and they sought to prevent the erection of the restaurant in the building in fear of an impending nuisance.

[85] The Crawfords conceded that no actual interference has occurred as yet. However, there will be an impending nuisance based on the ordinary, daily activities and occurrences of a typical restaurant. As with any restaurant, there will be unwelcomed vermin, noise in the form of music (for the patrons of the restaurant's enjoyment) playing for hours, the influx of vehicles and individuals frequenting the restaurant as well as a multitude of varying odours emanating from the restaurant.

[86] In his concise witness statement, Mr. Stubbs makes no mention of the building and its intended use. What he said at paragraph 17 of his witness statement is that "*the First and Second Defendants are the lawful owners of the unsold portion of the land and may develop the same subject to lawful requirements*."

[87] In submissions, learned Counsel Mr. Newbold referred to "building" but did not go any further to state whether the building is a dwelling house or a restaurant. Then, there was a mention of "cottages" in a letter that Mrs. Major wrote to GSO on 20 October 2014. So, there was no direct evidence coming from Mr. Stubbs and the Company as to what is being constructed except what the Crawfords alleged were told to them by Mr. Stubbs. I believed the Crawfords and found that Mr. Stubbs constructed a building to be used as a restaurant. In addition, during my visit to the locus in quo, the building appears to be a restaurant. That said, the Court ought not to speculate as to the use of the "building." There ought to have been direct evidence regarding the intended use of the building.

[88] Returning to the issue, the tort of nuisance is not actionable per se, however, Counsel for the Crawfords submitted that, where harm is reasonably feared to be imminent though none has actually occurred, then an injunction may be granted in a *quia timet* action. To fortify this point, Counsel cited the case of **Attorney General and others v Manchester Corpn** [1891-94] All ER Rep 1196. In that case, the defendant corporation sought to erect a small pox hospital on land belonging to them. The government and private persons (owners of property near the site of the hospital) sought an injunction to prevent the defendants from

establishing the hospital so as to cause a nuisance to the inhabitants of the neighbourhood. The plaintiffs failed in their application due to insufficiency of evidence of an imminent or apprehended danger. At pages 1197-1198, Chitty J stated:

> **"Where it is certain that the injury will arise, the court will at once interfere by injunction….<u>But the court does not require absolute certainty before it intervenes; something less will suffice</u>….The principle which I think may be properly and safely extracted from the quia timet authorities is that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise."**

[89] According to the Crawfords, **Manchester Corpn** is distinguishable from the present case in that the neighbourhood was not adjacent to the intended small pox hospital. Unlike that case, the Crawfords' home is directly next to the intended restaurant of Mr. Stubbs and the Company.

[90] In his very persuasive arguments, learned Counsel Mr. Sweeting relied on the case of **Hooper v Rogers** [1975] Ch. 43. There, the court, in determining whether or not to grant a quia timet injunction, relied on a dicta of Pearson J in **Fletcher v. Bealey** (1885) 28 Ch.D. 688 at page 698:

> **"T<u>here 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</u>. I should almost say it must be proved that it will be irreparable, because, if the damage 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 shown 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."**[Emphasis added].

[91] The principle extrapolated from the above authorities is that, in order for the court to grant a quia timet injunction, there must be: (i) proof of imminent danger and (ii) there must be proof that the apprehended damage will, if it comes, be very substantial.

[92] In my opinion, the evidence adduced by the Crawfords that Mr. Stubbs intends to use the building as a restaurant seems sufficiently cogent to grant the injunction which they seek. Once the restaurant becomes operational, the imminent danger would be the offensive scents and odours emanating from the restaurant along with the inevitable presence of rats, cockroaches and other vermin. In addition, the injury would be practically irreparable because the impending nuisance would not be reversed as the business would be operational on a daily basis. By then, the injury would occur on a daily basis; potentially even on weekends. This would, unquestionably, militate against the comfort and quiet enjoyment that the Crawfords aspired to enjoy in their second home.

[93] Unquestionably, each case will turn on its own peculiar facts and circumstances. On a site visit to Shanna's Cove, it did not take much for the Court to form the view that the natural beauty of that part of the island with its pale pink sand beach which stretches for miles is the perfect setting for visitors to its shore. A restaurant in its neighbourhood is bound to attract not only locals but visitors. In other words, it will be a bustling restaurant. The tranquility and serenity that the Crawfords desired when they chose Shanna's Cove as their second home are bound to be seriously affected.

[94] Applying the threshold requirements of the law for the grant of a quia timet injunction, I am satisfied that this is a case in which I ought to grant such injunction.

[95] Furthermore, the Crawfords have testified that, in May 2016, Mr. Stubbs constructed an unapproved and uninspected septic tank directly on the beach in front of their property. Mr. Stubbs and his Counsel had sight of the witness statements of the Crawfords for months before the trial but never responded to this allegation.

[96] On the site visit, it was distressing to see such a harrowing structure so very close to the turquoise ocean and directly in front of the Crawfords' house. The fear that

the sewage may leak from the septic tank onto the beach and onto the Crawfords' property is understandably justified.

The rule in Rylands v Fletcher

[97] In the light of that observation, I agree with Counsel for the Crawfords that even if the septic tank is not a nuisance, its presence warrants liability under the rule in **Rylands v Fletcher** (1868) LR 3 HL 330 as the sewage accumulation would negatively impact the Crawfords' enjoyment of their property. The case of **Rylands v Fletcher** was the progenitor of the doctrine of strict liability for abnormally dangerous conditions and activities. In that case, the defendants employed independent contractors to construct a reservoir on their premises. During construction, the contractors discovered the existence of disused mines when digging but did not seal them properly. The reservoir was then filled with water upon completion. Consequently, water flooded through the mineshafts into the plaintiff's mines on the adjoining property. The plaintiff brought an action against the defendants for the ensuing damage. The court gave judgment for the plaintiff and, at page 339, adopted the pronouncements made by Blackburn J (today, known as the **rule in Rylands v Fletcher**):

> **"We think that the true rule of law is, that the person who, for his own purposes, [and in the course of a non-natural user of his land] brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape".**

[98] Blackburn J expressed that things within the scope of the rule is "*anything likely to do mischief if it escapes.*" Then, in **Humphries v Cousins** (1877) 2 C.P.D. 239, innocuous things which become hazardous, such as sewage, fall within the scope of the rule. So also, is a person whose mine is flooded by the water from his neighbour's reservoir, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works.

[99] As Mr. Sweeting correctly submitted, the accumulation of sewage directly in front of the Crawfords' house and the potential risk of such sewage spilling onto their

property squarely fall within the ambit of the rule in **Rylands v Fletcher**. What the plaintiff needs to prove are:

1. that the defendant brought something onto his land that is accumulating;
2. that the defendant made a non-natural use of his land;
3. that the thing brought on to the land is something likely to do mischief if it escapes;
4. that the thing did escape and cause damage and;
5. the damage must not be remote.

[100] In the present case, the Crawfords asserted that constructing a septic tank so close to the ocean directly in front of their house (even though it is on Mr. Stubbs' property) cannot be seen as any natural use of the land. It is clearly intended for special use bringing with it increased danger to others. The increased danger is the possible hazardous material (i.e. sewage) that would be accumulating in the septic tank that would more than likely be affected by water due to the tank's proximity to the ocean. They also assert that, yet another required limb, as was mentioned in **Cambridge Water Co. v Eastern Leather Co** [1994] 2 A.C. 264, was reasonable foresight of damage. The Crawfords argued that damage is reasonably foreseeable based on the location and proximity of the septic tank to their property as well as to the beach. The tank is not large enough to accommodate an entire restaurant. The possible damage is eminent and impending, thus it needs to be prevented before it becomes an issue.

[101] The Defendants did not fully elaborate on this issue but merely assert that they can do anything on their land which is within the confines of the law. That said, there is no evidence that the positioning of the septic tank so close to the ocean and directly in front of the Crawfords' property complied with the rules and regulations governing the placement of a septic tank. In addition, the septic tank has no inspection access covers.

[102] On this basis, as the Crawfords submitted, the potential nuisance is actionable and ought to be prevented by way of a quia timet injunction.

[103] I believe that the more appropriate order that this Court should made, under further or any other relief, is for Mr. Stubbs and his Company to remove the septic tank not later than 31 July 2020.

Non-cooperation by Mr. Stubbs

[104] Before I move to the remaining issue of professional negligence, one cannot help but refer to the numerous correspondence that the firm of Glinton Sweeting O'Brien ("GSO"), attorneys for the Crawfords, penned to various authorities with the hope that Mr. Stubbs would discontinue the construction of the building and that this matter could have been amicably resolved between two neighbours rather than long-drawn-out litigation in the courts.

[105] I start with a letter dated 5 April 2013 written by GSO to the Director, Physical Planning Department which refers to the access road and Mr. Stubbs' intention to build on the access road.

[106] A reply from the Department of Physical Planning indicated that "*We have not received an application for development for properties in this area including the reserved sites*…"

[107] A litany of other letters was written by GSO to the Department of Physical Planning and other relevant authorities complaining about the development on the access road.

[108] Fast-forward to a letter written by Mrs. Major dated 2 October 2014 to GSO wherein she chastised the Crawfords for being ungrateful after Mr. Stubbs "gifted" them with an extra 15 feet and amended plans, free of charge. In concluding, she wrote:

> "**Finally, we have also been instructed that the Crawfords by whatever means they used were successful in bringing to a halt the construction of Mr. Stubbs' cottages, of which he had already been granted approval to construct. We hereby put the Crawfords on notice that we are in the process of investigating this matter, and in short order, it is our instructions to bring legal proceedings against the Crawfords for Damages and costs."**[Emphasis added]

[109] According to the letter, Mr. Stubbs was constructing cottages to which he had planning approval. This is strange because, on 25 November 2014, the Cat Island District Planning Board issued a Cease and Desist Notice to Mr. Stubbs (see paragraph 112 of this Judgment - below).

[110] By letter dated 10 October 2014, GSO wrote, in part, to Mrs. Major:

> **"…We are advised by Mr. Crawford that there was in fact an oral agreement between him and Mr. Stubbs with respect to the 15' Access Road. When the Crawfords purchased their Lot from Mr. Stubbs, it was agreed that a 15' Access Road would be left as a buffer between the Crawfords lot and the then vacant lot next to them. Mr. Stubbs also indicated at that time that the 15' Access Road would provide access to the beach by the other property owners in the Subdivision.**
>
> **…It should be noted that if Mr. Stubbs is allowed to continue to construct on the 15' Access Road, the Crawfords will not be able to access their driveway.**
>
> **…Mr. Stubbs was ordered by the local Building Inspector and the Building Plans Committee to cease construction, as the Building Permit that was in Mr. Stubbs possession has expired, and therefore, he was in breach of the Town Planning Act. Even more concerning is that the Crawfords understand that Mr. Stubbs is trying to build a restaurant, NOT cottages, which would be a dramatic departure from what was represented to the Crawfords when they purchased their lot…."** [Emphasis added]

[111] On 25 November 2014, a Cease and Desist Notice from the Cat Island District Town Planning Board was addressed to Mr. Stubbs. It states:

> **"Our visit revealed that you are in violation of the following Bahamas Building Code Act Regulations:**
>
> 1. **Zoning infraction**
> 2. **Building without a valid building permit number.**
>
> **You are hereby requested to cease and desist from any further works until such time the forestated requirements are met."**[Emphasis added]

[112] On 5 December 2014, GSO wrote to the Administrator, Cat Island stating that Mr. Stubbs is continuing construction irrespective of the issuance of a Cease and

Desist Order. At that time, the Crawfords alleged that the construction work undertaken by Mr. Stubbs was blocking the access to their garage. Photographs to reflect the obstruction were attached.

[113] GSO wrote to Mrs. Major on 20 February 2015 seeking a meeting with the hope of resolving this matter amicably. Whether or not that meeting took place is unclear.

[114] Once again, on 5 March 2015, GSO wrote to the Administrator enclosing two photographs showing the significant construction which had taken place in flagrant disobedience of the Cease and Desist Order. The photographs show a complete foundation, a two-storey building, walls on the first floor and a nearly completed roof.

[115] On 6 March 2015, GSO wrote to Mr. Stubbs requesting that he ceases construction and threatening legal action.

[116] Throughout the construction phase, Mr. Stubbs was well aware that the Crawfords were complaining about the building encroaching on the 15-foot access road. It was made clear to Mr. Stubbs and Mrs. Major that the Crawfords were relying upon an oral agreement made between Mr. Stubbs and the Crawfords.

[117] Mr. Stubbs defied all of the letters even those from the Planning authorities to desist and cease construction. This is unfortunate.

[118] In light of the foregoing, I will order that Mr. Stubbs and the Company remove, not later than 31 July 2020, the structure already built on the access road and to return the access road to its original state.

Issues 4 and 5

[119] These two issues are dealt with together. The Crawfords sued Mrs. Major for professional negligence. She was the only attorney involved in the transaction. The Crawfords alleged that Mrs. Major was also their attorney. They next alleged that she was negligent in that she did not properly advised them as to the implications

of the transaction they were involved in with Mr. Stubbs and the Company. They say that, due to her negligence, they suffered damage as they did not receive what they bargained for. They further alleged that although there was no written retainer as between themselves and Mrs. Major, based on the conduct of the parties, an implied retainer can be inferred. To sum up, the Crawfords alleged that had it not been for the negligence of Mrs. Major, this "chaotic" situation would not have existed.

[120] Mrs. Major's contended that she never represented the Crawfords in the transaction. She said that she only requested further details from Mr. Crawford in order to prepare a draft agreement for sale including the name and address of his attorney. It was at that time that Mr. Crawford informed her that he did not need an attorney because he was familiar with the property and that several of his friends had purchased property from Mr. Stubbs. Also, it was a cash sale. Subsequently, on 30 August 2010, while at her office, she again informed the Crawfords to get an attorney. Mr. Crawford insisted that he did not need an attorney.

[121] Mrs. Major emphasized that she was never retained by the Crawfords neither did she represent them in this transaction. Her instructions came from Mr. Stubbs and the Company; not from the Crawfords. She said that the only legal fees invoiced by and paid to her by the Crawfords were on behalf of Mr. Stubbs and the Company as per the Sale and Purchase Agreement. She insisted that she did a "favour" for the Crawfords for which they have been relentlessly ungrateful.

[122] Mr. Newbold submitted that in order to establish professional negligence, the Crawfords have to prove that Mrs. Major represented them. This is correct. He further submitted that, aside from the Sales and Purchase Agreement, it is unclear whether Mrs. Major represented them as there was no retainer. According to Mr. Newbold, the only evidence of a retainer is that of Mr. Stubbs whom Mrs. Major represented in the transaction. Notwithstanding, says Counsel, Mrs. Major went at great lengths to protect the Crawfords and ensure the integrity of the transaction.

[123] Mr. Newbold next submitted that when the Crawfords realised that their claim was bound to fail, they turned their fury to Mrs. Major. According to him, the Crawfords took over nine months to amend their claim to join her as a party. Procedurally, a plaintiff could amend their claim so nothing really turns on this point.

[124] The account given by Mr. Crawford is diametrically opposite to that given by Mrs. Major. Mr. Crawford said she represented them. Mrs. Major says she did not. However, it is not in dispute that Mrs. Major was the only attorney involved in the transaction. In addition, it cannot be disputed that Mrs. Major did the following things namely:

1. she invoiced the Crawfords for the fees for the transaction and they paid her;

2. she secured a Report on Title for the Crawfords (something that the vendor of property does not generally require) but which she says she always does to protect herself;

3. she assured the Crawfords that “the title was good”;

4. she prepared affidavits of citizenship for the Crawfords and;

5. she sent the Conveyance for recording after the transaction (which is always the obligation of the attorney representing the purchasers).

[125] According to Mr. Sweeting, if Mrs. Major genuinely was not representing the Crawfords, she was certainly aware that they were foreign purchasers of Bahamian Real Estate, entirely unrepresented, then the least that could be expected of her would be that she would ask them to sign a disclaimer confirming that they knew she was not acting for them and that she had cautioned them to secure legal representation. This is especially so in circumstances where the Crawfords had agreed to pay her fees for the transaction. Instead, says Mr. Sweeting, Mrs. Major shrugged her shoulders and;

(a) allowed the parties to sign a Deed of Conveyance with a plan attached that was not signed by a licensed surveyor or, for that matter, any surveyor;

(b) allowed the parties to sign a Deed of Conveyance with a plan attached that had been hand-corrected by the parties;

(c) allowed the parties to sign a Deed of Conveyance with a legal description of the property set out in it that did not correspond with the plan attached which was expressly incorporated into it; and

(d) sent for recording the Deed of Conveyance.

[126] Mr. Sweeting submitted that Mrs. Major appeared to have no appreciation of her duties as a Counsel and Attorney-at-Law and a member of the Bar in this jurisdiction. She simply did what Mr. Stubbs instructed her to do without any concern as to the legality or even the fundamental task of ensuring that a clear and sound title was passed from Mr. Stubbs and the Company to the Crawfords.

[127] Having carefully considered the facts relating to this issue of whether Mrs. Major represented the Crawfords in this transaction, I prefer the evidence of Mr. Crawford that Mr. Stubbs introduced him to Mrs. Major who was his lawyer. During the telephone conversation, Mrs. Major told Mr. Crawford that she could handle the sale of the property and there would be no conflict.

[128] I therefore find that Mrs. Major acted as attorney for the Crawfords despite the fact that there was no written retainer.

Applicable legal principles - negligence

[129] The next question to be asked is whether Mrs. Major was negligent in her professional duty to the Crawfords.

[130] In **Rankine v Garton Sons & Co. Ltd** [1979] 2 All E.R. 1185, it was held that in an action founded on negligence, a plaintiff is not entitled to succeed unless he

could prove two necessary components namely: (i) that the defendant had been negligent and (ii) he suffered damage as a result of that negligence.

[131] Counsel for the Crawfords, Mr. Sweeting argued that due to the negligence of Mrs. Major, they were not properly advised as to the implications of the transaction they were involved in with Mr. Stubbs and the Company resulting in damage since they did not receive what they bargained for.

[132] To reiterate some facts, in or about August 2010, the Crawfords agreed to purchase land from Mr. Stubbs and the Company. The parties used the same attorney to complete that transaction, that is, Mrs. Major. At no time did Mrs. Major ensure that the Crawfords received adequate legal advice in the matter. Her own evidence is that Mr. Crawford said that he did not need an attorney. At that point, she should have told them clearly that she cannot not proceed with the transaction.

[133] The Crawfords purchased the land which did not meet the boundary specifications they intended. The land was never properly surveyed because the attached plan did not mark the exact boundaries as orally agreed between the parties.

[134] Further to this, Mrs. Major did not advise the Crawfords about the weight and effect of verbal agreements in reference to access to the “access road” as shown on the plan. Here, I am unable to accept her evidence. The plan clearly depicts a 15-foot access road. In my opinion, in serious transactions such as this one, Mrs. Major should have ensured that all agreements entered into between the parties be reduced to writing to ensure not only that the parties received that which they bargained for but to ensure that there was definitive proof of the existence of such an agreement. In this way, she would also have been protected. Mrs. Major’s failure to do so can only be described as negligent. She owed a duty of care to the Crawfords. The standard of care is that of a reasonably competent solicitor.

[135] It was admitted by the Crawfords that there was no written retainer. The Court has already found that, based on the conduct of the parties, an implied retainer can be inferred: **Blyth v Fladgate** [1891] 1 Ch. 337. In **Blyth**, it was held that though there

had not been an express retainer, the relationship of solicitor and client might be inferred from the acts of the parties; that it subsisted between the firm and the trustees, and that the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients.

[136] Having established the existence of an implied retainer, the Crawford submitted that there was no proper legal advice given to them in relation to this matter. They relied on the case of **AW Group Ltd v Taylor Walton** [2013] All ER (D) 10 (Oct). This was a professional negligence claim against a firm of solicitors who failed to advise the purchasers of the property that the property was conveyed without all necessary planning consents and that had the plaintiff known, it would not have completed the conveyance. The Court held that there had been a breach of duty on the part of the defendant however that breach had not caused any loss or damage to the plaintiff as it would have gone ahead with the conveyance in any event. The Court held:

> **"A solicitor owed his client a duty of care in both contract and in the tort of negligence to exercise reasonable skill, care and diligence in relation to the work he undertook. The extent of a solicitor's responsibilities was derived from his retainer. It was right that he was under no general obligation to expend time and effort on issues outside the scope of his retainer. But if, in the course of doing that for which he was retained, a solicitor becomes aware of a risk, or a potential risk, to his client which it was reasonable to assume the client did not know about it was the solicitor's duty to inform the client. The standard expected of a solicitor in the performance of that duty was to be assessed against the reasonably competent practitioner having regard to the standards normally adopted in his profession…. It was not an excuse for a solicitor to say that he did not know his client's intentions; it was up to him to find out. It was the duty of a solicitor to ask the client appropriate questions designed to ensure that the solicitor was aware of the client's relevant circumstances and intentions, and that the client had all the relevant information and did understand the legal consequences."**

[137] The Court concluded that, on the facts, the defendants were in breach of duty in failing to give proper advice as to the planning status of the Packhorse Place site.

[138] The Crawfords asserted that, in the present case, Mrs. Major's failure to give proper advice as to the effect of oral assurances operated to their disadvantage. Mrs. Major should have been aware of the real risk of relying on oral assurances alone in lieu of a written agreement.

[139] The Crawfords fortified their assertion that Mrs. Major was negligent by relying on the case of **Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp(a firm)** [1978] 3 All ER 571. The brief facts of this case is that a father agreed with his son to offer an option to purchase land. They went to the defendant firm of solicitors to put the agreement in writing. Upon executing the deed, the solicitors failed to register the deed as they ought to have done. The father sought counsel from fresh attorneys and, upon the new attorneys revealing the error, sought to sell the land to his wife, which he did. Upon learning of the error, the original firm of solicitors sought to register the deed. The son then served notice to exercise the option, but neither of his parents acknowledged the notice. The son then brought an action against his parents claiming a declaration that the option was valid and sought specific performance. He also brought an action against his original solicitors for professional negligence for their failure to register the deed. In relation to the claim for professional negligence, the court held that the solicitors were not liable under a general retainer since the extent of a solicitor's duties to his client depended on the terms and limits of his retainer.

[140] It was also held that:

> "**The solicitors were however liable to the plaintiffs in tort because under the general law the relationship of solicitor and client gave rise to a duty on a solicitor to exercise the care and skill on which he knew that his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do".** [Emphasis added]

[141] Oliver J stated, at page 583:

> **"Now, no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting**

> **profession, but I think that the court must beware of imposing on solicitors – or on professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck, Griffiths v Evans and Hall v Meyrick* that demonstrate that the duty is directly related to the confines of the retainer.**'[Emphasis added]

[142] Mr. Sweeting further argued that Mrs. Major ought to have explained to the Crawfords the consequences of relying on oral assurances and the fact that it would not invest any legal or equitable interest in the access road. To that extent, I agree that Mrs. Major should be held liable for failure to give proper advice as the Crawfords no longer have access to the access road.

[143] Mr. Sweeting next argued that Mrs. Major did not exercise reasonable skill, care and attention which can only be seen as professional negligence. Further to that, Mrs. Major allowed the Crawfords and Mr. Stubbs to execute a conveyance before signing an agreement for sale. Failure to do so has caused the Crawfords to execute a document which did not accurately reflect what they agreed to during initial discussions and negotiations with Mr. Stubbs.

[144] Mrs. Major also failed in her duty to advise the Crawfords that there were no restrictive covenants or any other legal or equitable right which would prevent a commercial enterprise from being built near their house. Due to the lack of such advice, the Crawfords were forced to bring proceedings against Mr. Stubbs and the Company to prevent the impending nuisance. The Crawfords have incurred substantial loss based on the need to retain legal counsel and pursue this matter at their own expense.

[145] From the testimony given by the Crawfords, it was evident that they did not understand the conveyance. It was the attorney to ascertain that the client understands what the conveyance is about. In this regard, the Crawfords relied on

the case of **Meadows v Meadows** (1853) 51 ER 833***.*** In that case, the court stated:

> **"The usual practice is, on the execution of a deed, for the solicitor either to read or explain it to the persons who have to execute it, or the solicitor informs them that the deed is in accordance with some draft or copy previously explained or submitted to them, and the parties usually trust their solicitors."**

[146] In **Meadows**, the plaintiff sought to have a resettlement set aside on the ground that it had been prepared either fraudulently, or from a gross misapprehension, and had been executed by the plaintiff in ignorance of its true effect.

[147] Mr. Sweeting submitted that based on Mrs. Major's negligence, she should be made to pay damages.

[148] Applying the above principles to the facts of this case, I find that Mrs. Major was negligent and as such, she is liable to pay damages to the Crawfords; for the loss which they have incurred. Such damages will be assessed on Wednesday, 17 June 2020 at 11.00 a.m.

Other issues raised

[149] The issues of trespass and damages for breach of contract and nuisance were raised. The Court did not find that trespass was aggressively pursued. With respect to damages for nuisance, the nuisance complained of are: (i) erecting of the building so close to the Crawfords' house and on the access road and (ii) the erection of a septic tank which is not yet in use. In my opinion, I have made appropriate orders relative to these matters.

Conclusion

[150] Land matters are a particularly painful form of litigation. Feelings run high and vast amounts of money are expended to pursue never-ending litigation. This is one such case. It is even more painful since the parties are neighbours and would be in contact with one another very frequently.

[151] Furthermore, it is very painful when a court has to conclude that one of its own officers was professionally negligent. Had Mrs. Major properly advised the Crawfords, it is unlikely that they would have suffered any loss and damage as they may not have entered into the transaction. They relied on the advice of Mrs. Major since they had no knowledge of Bahamian Real Property Law.

[152] Now, the practice of the same attorney acting for a vendor and a purchaser in the same purchase and sale of land may be properly characterized as a non-contentious matter, but it is a practice that has been deprecated by courts. It has been said that an attorney who acts for both parties put himself/herself in such a indefensible position that he/she must be liable to one or the other. Take an example, it is the duty of the attorney for the purchaser to undertake certain searches of the property being purchased to determine that what the vendor states is being sold actually conforms to what the vendor has contractually agreed to sell. Unquestionably, this involves one client - the purchaser - making an inquiry of the other client - the vendor. The attorney is bound to inform the purchaser of the result of the searches undertaken. It is for this reason that courts frown upon attorneys representing both purchaser and vendor but despite strong judicial admonitions, the practice of the same attorney acting for both parties in non-contentious matters continues.

Declarations and Orders

[153] As against Mr. Stubbs and his Company, this Court makes the following Declarations and Orders:

1. A Declaration that neither Mr. Stubbs nor Shanna's Cove Estate Company Limited nor their successors in title are entitled to build any structure on the access road or obstruct or interfere in any way with the Crawfords' passing and re-passing along the access road and use thereof as a road way;

2. An order directing Mr. Stubbs and/or Shanna's Cove Estate Company Limited to remove the structures already built on the access road not later than 31 July 2020 and to return the 15-foot access road to its original state;

3. An order directing Mr. Stubbs and/or Shanna's Cove Estate Company Limited to remove the septic tank not later than 31 July 2020.

4. A permanent injunction preventing Mr. Stubbs and Shanna's Cove Estate Company Limited and their successors in title from building any structure on the access road or interfering with or obstructing in any way the Crawfords' passing and re-passing along the access road and use thereof as a roadway;

5. A Declaration that the precise boundaries and dimensions of the property owned by the Crawfords are 75 feet x 90 feet x 75 feet x 90 feet and an Order directing Mr. Stubbs to execute a Confirmatory Conveyance thereof to the Crawfords not later than 31 July 2020.

[154] As against Mrs. Major, damages for professional negligence and breach of fiduciary duty. Such damages will be assessed on Wednesday 17 June 2020 at 11.00 a.m. The parties may apply to the Court for further case management directions.

Costs

[155] The Crawfords seek costs in the amount of $152,924.91. Counsel for the Crawfords shall submit their Bill of Costs to the Defendants within 21 days hereof by electronic transmission. The issue of costs will also be heard on Wednesday 17 June 2020 at 11.00 a.m.

[156] The Court will hear the parties by any available means of technology and/or written submissions if in-person hearing is not practical.

Postscript

[157] I conclude this judgment on a sorrowful note. Mr. Roy Sweeting, who argued this case for the Crawfords, untimely passed away in late December of 2019. He has gone to the Great Beyond. May his soul continue to rest in eternal peace.

Dated this 1st day of May, A.D.,2020

Indra H. Charles
Justice