COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2018/CLE/gen/00539

BETWEEN:

EXECUTIVE IDEAS OF THE BAHAMAS (1973) LIMITED

Plaintiff

AND

RODNEY WALLACE
(As Executor of the Estate of Harry Christopher Wallace)

Defendant

Before:	The Honourable Mr. Justice Klein
Appearances:	Michela Barnett for the Plaintiff
	Ian Jupp for the Defendant
Hearing Dates:	14-15, 21 July 2022, Final closing submissions November 2024

RULING

KLEIN J.

Land law—Claim for declaration as to ownership of property—Trespass—Injunction—Claim to restrain defendant trespassing on property and for order to pull down wall constructed thereon—Counterclaim for declaration and damages for trespass—Nemo dat quod non habet principle—Conveyance—Principles of Interpretation—Conflict between verbal description in parcels clause and attached plan—Principles applying to resolution of conflicts—Whether Agreement for sale can be considered—Possessory Interest—Limitation period—Possessory Title—Evidence—Expert Evidence—Surveyor's Reports—Private Roads and Subdivision Act 1961—Planning and Subdivision Act 2010—Conveyance deviating from marked out plan in approved Subdivision Plan—Whether conveyance valid—Rectification—Whether relief properly claimed.

INTRODUCTION AND BACKGROUND

1. This is a dispute between long-time proprietors of adjoining land located in the heart of Nassau over the ownership of a 705 sq. ft. triangular strip of land that abuts both properties (the "disputed parcel"). The plaintiff and the defendant each claim that the disputed parcel was conveyed to them and, in fact, the metes-and-bounds description in their respective conveyances does purport to include the disputed parcel.

2. The defendant purchased his lot in 1966 and came to the land first. He erected a boundary wall enclosing the disputed parcel as part of his property. When the plaintiff purchased its property in 1978, the walled enclosure was represented as an encroachment on its land, and it appears the

original landowners struck a gentleman's agreement *circa* 1979 that saw the removal and repositioning of the wall to relinquish the disputed parcel to the plaintiff.

3. However, the underlying conveyancing issue was never resolved. The longstanding arrangement and the peace was shattered in 2018, when the son and executor of the original owner of the defendant land re-constructed the wall to once enclose the triangular strip a few years after his father's death. The court has to decide, based on the construction of a series of conveyances dating back more than 50 years, which of the landowners obtained title to the disputed parcel.

Essential factual and procedural background

4. The properties are in the Pyfrom Estates Subdivision ("the Subdivision"), which is located just west of Jerome Avenue and north of Wulff Road. The plaintiff, a landholding company, is the registered owner of Lot No. 361 in the subdivision, which it acquired on 6 January 1978. In addition, it owns Lot 360, which is located directly above and north of Lot 361. It has operated a well-known commercial printing business on the properties for many years, and its buildings straddle both properties.

5. It claims that at some point in 2018, the defendant removed the old wall boundary and constructed a new wall in its original location, which encroached on the plaintiff's land. This reignited the long-dormant dispute, and the plaintiff instituted legal action. It sought interlocutory relief in the form of an injunction to prevent the defendant trespassing on the land, as well as permanent remedies. The latter included declarations declaring it to be the rightful owner of the disputed parcel, the removal of the wall, a perpetual injunction to prevent any further trespass on the property, as well as damages for trespass.

6. The defendant, Rodney Wallace, is the executor and son of the original owner of Lot 362, which his father acquired on 29 July 1966. It has been the family homestead since then. Following the death of his father, Rodney commissioned surveys and, convinced that the wall was in the wrong position and that the disputed parcel belonged to his father all along, he had the wall moved back to its original position and erected other structures on the parcel. He counterclaims for trespass and damages.

7. A survey plan of the property, extracted from Department of Lands and Surveys ("DLS") Plan 732 NP, recorded 22 November 1977, is annexed to this judgment. It shows the relative location of the lots and the disputed property. But a rough-and-ready description of the relative location and configuration of the properties and the disputed parcel follows.

8. Imagine that Lot 361 is a square located at the bottom left-hand edge of a checkerboard. Lot 360 is the square directly above it, and Lot 362 is the right adjacent square to 360. The disputed property (identified as Parcel "E" on Plan 732) is located in the square that is below 362 and to the right of 361. That square is diagonally divided by a line, and the dispute is whether the wedge or triangular shape constituting the top part of that square (and forming Parcel "E") is a part of Lot 361 or Lot 362.

9. Sub-division approval was given for Pyfrom Subdivision II to Pyfrom Estates Limited by the Government in October of 1964 in respect of an area of some 26 acres of land, located west of Kemp Road, north of Wulff Road and east of Mackey St. The subdivision was divided into 162 Lots. The plaintiff purchased its lot in 1978, and the defendant purchased his lot in 1966. However, Lot 361 had been sold to a Mr. Ricardo Melchoir DeGregory in 1964 ("the 1964 conveyance"), and that conveyance included the disputed parcel. As will be seen, one of the arguments of the plaintiff is that the 1966 conveyance could not effectively transfer the disputed parcel, as it had already been sold to its predecessor in title.

10. Nonetheless, it appears that the disputed parcel was included in the verbal description of Lot 262 when it was conveyed to Harry Wallace in 1966, although the plan annexed to the conveyance does not include the disputed parcel. As mentioned, Harry Wallace built a wall which enclosed the disputed parcel at his southern boundary.

11. After the plaintiff purchased the land in 1978 and took possession, there appears to have been some discussion between Harry Wallace and the developers about the wall encroaching on Lot 361. According to the plaintiff's account, this resulted in Mr. Wallace agreeing to remove the wall and rebuild it according to the boundary shown on the plan annexed to his conveyance, although the plaintiff gave permission for the wall to slightly encroach over the boundary of Lot 361 to enclose a fruit tree(s) which Mr. Wallace had recently planted. As will be discussed, the defendant disputes that this was the reason for the removal of the wall.

12. Apparently, this *modus vivendi* continued for nearly 40 years. However, Harry Wallace died in 2013 and the defendant in 2015 commissioned a survey, which led to the efforts to reclaim the disputed parcel by once again walling it in. Naturally, this soured relationships between the parties, and it appears that the police had to be called at some point. It also appears that there were some matters in the magistrate's court emanating from the conflict.

13. On 8 May 2018, the plaintiff filed a generally indorsed writ and a statement of claim ("SOC") on 12 February 2019 seeking the following relief:

(i) A declaration that the plaintiff is the legal and beneficial owner of Lot 361 as shown in the dimensions granted in the 1978 conveyance;
(ii) In the alternative, a declaration that the plaintiff is the "equitable owner" of that property (apparently based on possession since 1979);
(iii) A perpetual injunction to restrain the defendant trespassing on the property;
(iv) A mandatory injunction requiring the defendant to pull down so much of the wall and buildings recently erected that are situated on the plaintiff's property' and
(v) Special and general damages for trespass.

14. The defendant filed a defence on 1 May 2019, denying the claim and asserting that he was the beneficial owner of the disputed parcel. He counterclaimed for the following relief:

(i) Damages for the plaintiff's trespass from 11 May 2018;
(ii) An order for "continued possession" of the property;
(iii) A declaration that the defendant is the legal and beneficial owner of Lot No. 362, as denoted on the survey plan No. 5919 NP dated 17 October 2018 by the Acting Surveyor General; and
(iv) An injunction restraining the plaintiff from interfering with the defendant's land, as claimed.

15. There were a series of interlocutory proceedings before the Judge with initial carriage of the matter. On 11 May 2018, an *ex parte* (without notice) injunction was granted restraining the defendant from carrying out any further construction or other activity on the disputed parcel until the *inter-partes* hearing of the application. This was discharged on the 7 February 2019, and substituted with another injunction, or conservatory order, which required both parties to maintain the status quo pending the hearing and determination of the trial. On 4 September 2018, an order was also made for the Acting Surveyor General at the time, Mr. Thomas Ferguson, to conduct a survey of Lots 361 and 362 and submit a report to the Court.

16. For the purposes of this Ruling, the court was assisted with the following documents: (i) the transcripts of the hearings; (ii) opening and closing submissions of counsel for both parties; and (iii) a bundle of documents, containing pleadings and agreed documentary evidence ("the bundle").

The issues

17. The parties did not file an agreed statement of facts and/or issues, but based on the pleadings and submissions, the main issues may be distilled as follows:

(i) Whether, on a proper construction of the 1964 conveyance and its plan, the triangular or disputed parcel was conveyed to Mr. Ricardo M. DeGregory and thus formed a part of Lot 361 thereafter;
(ii) Whether, on a proper construction of the 1966 Conveyance and its plan, the triangular or disputed parcel was included with Lot 362 and conveyed to Mr. Harry Wallace;
(iii) If the 1966 conveyance did purport to include the disputed parcel, whether it was effective to convey it given the prior disposition in 1964;
(iv) Whether, on a proper construction of the 1978 conveyance and its plan, the triangular or disputed parcel was conveyed to the plaintiff;
(v) Whether the defendant (or his predecessor) acquired title to the disputed parcel by adverse possession within the applicable limitation period;
(vi) Alternatively, whether the plaintiff (if it did not have paper title) acquired possessory title to the disputed parcel within the applicable limitation period; and
(vii) What orders should the Court make, based on the resolution of the above issues.

<u>Evidential sources</u>

18. The starting point for determining the boundary between the two parcels of land is the conveyance by which the parcels were created. In the present case, this requires looking at a third conveyance, as it forms part of the record of past transactions (i.e., the chain of title) of Lot 361.

The 1964 Conveyance ("the DeGregory Conveyance")

19. By a conveyance dated 22 June 1964, Pyfrom Estates Ltd. conveyed Lot No. 361 to Mr. Ricardo Melchoir DeGregory. The description of the lot was as follows:

> "ALL that piece parcel or lot of land situate in the Eastern District of the Island of New Providence aforesaid being Lot Number Three-hundred and Sixty-one (Lot No. 361) of Pyfrom Subdivision Phase II bounded on the North partly by Lot Number Three hundred and Sixty (No. 360) of the said Subdivision and running thereon One hundred and five and Eighty-one hundredths (105.81) feet and partly by Lot No. Three hundred and Sixty-two (No. 362) of the said Subdivision and running thereon Fifty (50.00) feet on the East by Lot Number Three Hundred and Sixty-three (No. 363) of the said Subdivision and running thereon Six (6.00) feet more or less on the South East by land the property of various small owners and running thereon One Hundred and Seven (107.00) feet more or less on the South by land the property of the Vendor which has been laid out as a planting area and on the West by Jerome Avenue and running thereon fifty-six (56.00) feet more or less…which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached hereto and is delineated on that part which is coloured Pink on the said diagram or plan…".

20. As will be noted, the northern (and critical) boundary of Lot 361 is just over 155 feet, the easternmost 50 feet of which is also the southern boundary of Lot 362.

The 1966 Wallace Conveyance

21. By a conveyance dated 29 July 1966 between Pyfrom Estates Ltd. and Harry Christopher Wallace, Lot No. 362 was conveyed, with the following description:

> "ALL that piece parcel or lot of land situate in the Eastern District of the Island of New Providence aforesaid being Lot Number Three hundred and Sixty-two (Lot No. 362) of Pyfrom Subdivision Phase II bounded on the North by Edward Avenue and running thereon Fifty (50) feet on the East by Lot Number Three hundred and Sixty-Three (Lot No. 363) of the said Subdivision and running thereon One hundred and Twelve and Forty-five hundredths (112.45) feet on the South by land the property of various small owners and running thereon Fifty-four and Thirty-five hundredths (54.35) feet and on the West partly by Lot Number Three Hundred and Sixty One (Lot No. 361) of the said Subdivision partly by Lot Number Three Hundred and Sixty (Lot No. 360) of the said Subdivision and running thereon jointly One hundred and Thirty-three and Fifty-nine hundredths (133.59) feet which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan hereto attached and is delineated on that part which is coloured Pink of the said diagram or plan."

22. There are several notable features about this description. First, the western boundary is 133.59 ft., which means it extends some 27.35 ft. south into the disputed property. Second, Lot 361 is not listed as the southern boundary of Lot 362, which means that according to this description the northward boundary of Lot 362 would form a 90-degree angle with the western boundary of Lot 361. Further, it is noted that the eastern boundary is 112.45 feet, some 21 feet

shorter than the western boundary, forming a wedge shape with the tip of the wedge being the southwestern tip of Lot 362.

The 1978 Conveyance

23. By conveyance dated 6 January 1978, Pine Tree Holdings Ltd. conveyed Lot No. 361 to Executive Ideas of The Bahamas (1973) Ltd. (the plaintiff), as follows:

> "ALL that piece parcel or lot of land situate on the Eastern side of Jerome Avenue near its intersection with Wulff Road in the Southern District of the Island of New Providence and containing approximately Fifteen Thousand One Hundred and Forty-five (15,145.00) square feet in area and bounded on the NORTH partly by land the property of the Purchaser and running thereon One Hundred and Five and Eighty-one hundredths feet (105.81) and partly by land the property of Harry Wallace and running thereon 50 feet on the East by land now or formerly the property of Ricardo de Gregory and running thereon One Hundred and Five and Fifteen hundredths feet (105.15) on the South partly by said land now or formerly the property of Ricardo de Gregory and running thereon Six and Seventy-five hundredths (6.75) and partly by land the property of First Providence Ltd. and running thereon One Hundred and Thirty-six and Forty-one hundredths feet (136.41) and on the WEST by Jerome Avenue and running thereon One-Hundred and Five and Thirty-one feet (105.32) which said piece parcel or lot of land has such position boundaries shape and dimensions as are shown on that part of the survey plan attached hereto and is thereon coloured PINK."

24. It will be seen that the northern boundary of the 1978 conveyance is the same as that in the 1964 conveyance, which means that it encloses the disputed parcel below Lot 362. However, there are notable differences in the length and configuration of the western, eastern and southern boundaries of Lot 361. The western boundary is now said to be 105.32 ft. (compared to 50 ft. in the 1964 conveyance) and the eastern boundary (which ran approximately 6.0 ft. on the east and then ran southwest for 107.0 ft. in the 1964 conveyance) runs 105.15 ft. due south after the approximately 6.75 ft. eastern tip. The southern boundary is now 136.41. What this means (as discussed below) is that the boundaries of Lot 361, as marked on the Subdivision plan, were significantly extended southwards to encompass part of an area that was designated as a planting space by the developer (Parcel "B" on Plan 732), bounded on the west by Jerome Avenue, and another parcel bounded on the east by property of various small landowners (Parcel "C").

25. There is another piece of historical documentary evidence included in the bundle that is of some importance to this matter—the Sales Agreement for the 1978 Conveyance. The general principle is that upon completion, the contract for sale merges with the conveyance, and the latter becomes the definitive record of the parties' rights and obligations. The court will not therefore look to the agreement for sale to alter or supplement the conveyance. But it can be looked at when interpreting the nature of the transaction and effect of the conveyance, especially where there is ambiguity (see, **Stait v Fenner** [1912] 2 Ch. 504).

26. In this regard, it turns out that the Agreement specifically referenced the encroachment by Harry Wallace on Lot 361 and the property was sold subject to this stipulation at Recital "H":

"H. It is mutually understood and agreed that this Agreement and completion thereof is subject to the following special terms and conditions:

(i) […]

(ii) to the resolution of the termination of an encroachment over the said Parcel 'E' by Harry Wallace who claims to own Lot 362 of Pyfrom Estates Subdivision including the removal of incorrect boundary walls erected around the said Parcel 'E' by Mr. Wallace at the cost and expense of the Vendor including the demolition of such walls and the re-establishing of the correct boundary wall as a party wall along the Northern boundary of Parcel 'E'."

Survey evidence

Roland John

27. The Court received a witness statement from Roland John, a licensed surveyor, who was commissioned by the defendant to conduct a survey of the property, and whose report was entered into evidence. Mr. John confirmed that he was engaged in March of 2015 to conduct a survey of Lot 362 in Pyfrom Subdivision. He produced a survey plan dated 1 April 2015. In his evidence, he said his survey plan showed five "critical findings" in "*favour of the defendant's claim*", which he identified as follows:

(1) He found the western boundary of Lot No. 362, running north to south, to be 133.59', which corresponded more or less to the measurement of the western boundary reflected on the Master Survey Plan ("master plan") of the Subdivision. This boundary does not, however, correspond to the boundary shown on the plan attached to the 1966 Conveyance.

(2) The singular common original eastern boundary of Lot No. 361 and western boundary of Lot No. 362 measured 26.55 ft., which again corresponded with the measurement of the single common boundary reflected on the master plan.

(3) Third, it is said that the southern boundary of Lot 362 measures 54.35 ft., which again corresponded with the measurement of the boundary reflected on the master plan.

(4) Fourth, the total square footage of the said encroachment is some 705 sq. feet. This area was not disputed by the plaintiff.

(5) Fifth, he found all of the original boundary markers were in existence on Lot No. 362, which corresponded with the measurements and locations of the original boundaries reflected on the master plan.

28. Mr. John concluded that these factors, when taken together, were "*conclusive evidence of the fact that the area of dispute between the parties to this action is, and always has been, a portion of Lot No. 362*".

29. During live testimony, Mr. John explained the methodology of his survey and indicated that he relied primarily on the master plan for the subdivision and, as a secondary reference, the

conveyance for Lot 362 (the 1966 Conveyance). He admitted in cross examination that "*He had never seen the 'Executive' conveyance*" and that as far as he knew "*he was seeing it for the first time at trial*". He also stated during cross-examination that in his experience, it was not uncommon for land to be conveyed in a manner that does not strictly adhere to the subdivision plan, leading to inconsistencies between adjoining owner's conveyances and the physical reality on the ground.

Thomas Ferguson

30. Thomas Ferguson was the Acting Surveyor General when these proceedings were commenced and, as mentioned, he was directed by the Court to produce a survey to assist with the resolution of the boundaries. He led a team that conducted a survey in October of 2018, and the final survey produced is recorded as Plan 5919 NP. His team referred to plans DLS 502 NP (the Approved Subdivision Plan), and DLS 732 NP (the "Chee-A-Tow Plan"), a 1977 plan produced by Chee-a-Tow and Company Surveying and Engineering Company. Research was also carried out in the records of the Department of Physical Planning, which confirmed that Pyfrom Subdivision Phase II is an approved subdivision, and that there had been a road acquisition in the vicinity of the area. The Report also included photographs of the properties and the disputed areas.

31. The main findings of the report were as follows. Firstly, Lot No. 362 is walled in and does not include all of the portion of land to the east as depicted in the approved subdivision plan as being a part of the Lot. The walled in property was said to be cut short in the north by approximately 9.13 feet and 5.63 feet in the south. (In other words, the wall around the main house and property is not right up on the boundary lines to the north or south of the approved subdivision plan.) Secondly, the survey found a marker at the southwest end of the recent wall erected by Rodney Wallace (the southwest end of the disputed parcel), which was thought to accord with the markers for Lot 362. Thirdly, the measurements of Lot 362 appeared to line up with the original subdivision plan when the boundaries were drawn.

32. Based on these and other findings, the Acting Surveyor General concluded that:

> "[T]he claim that Lot 361 should extend further Eastwards is not supported by both the research and the measurements on the ground. …The location of the wall for Lot 362 does not appear to encroach onto Lot 361 based on the historical plans and the approved plans. […] It is my opinion that there is no encroachment by either of the claimants based on the historical survey information and the approved subdivision plan."

33. At the request of the court, the Acting Surveyor General submitted a Supplemental Report, which was intended to provide details about plan 502 NP. Based on additional research, the supplemental report revealed that: (i) the original subdivision application was submitted in December 1963; (ii) the owners were Pyfrom Estates Limited; (iii) subdivision approval was granted on 19 October 1964; (iv) the Surveyor/Engineer was Nassau Engineering Company Limited; and (v) the total area of the subdivision was 26 acres.

34. During live evidence, Mr. Ferguson assisted the court by explaining the placement of survey marks at lot corners and intermediary points and clarified the meaning of the symbols

contained on the survey plan (double circle for marker found, single/dark circle for marker set during a survey). He also compared the Chee-A-Tow Plan with his survey plan, noting the presence and absence of markers at key locations, and explained that number points on a plan may be used to calculate boundaries, even if no physical markers existed at that location. (There were numbers on the Chee-A-Tow Plan at the corners and intermediary points of the lots.)

35. He admitted that it was not possible to find the original markers denoted on the plans, but a key aspect of his testimony was the identification of a critical survey marker at the south-western boundary of the disputed property. Initially, he indicated that based on its presence and type (i.e., 5/8 steel, possibly dating to the 1960s or 1970s, it could have been an original marker. During cross-examination, however, he admitted that it was not possible to conclusively identify whether the marker was set during the 2015 John survey, or was an older marker: "*It could have been either because they used both in that time*."

36. He also indicated that while portions of Lot 361 are shown as various Parcels ("B", "C", "E"—"E" being the disputed triangular area), the original subdivision plan did not show a parcel "E" , and that the 1977 plan was the first to use that designation.

37. During cross-examination, he was also asked by the Court whether it was possible to convey land contrary to the approved subdivision layout. He explained that this was possible, but that severance or sub-division (of the particular lot) would require approval from the Town Planning Committee. However, he had found no evidence that any severance approval had been obtained in this case. Mr. Ferguson also explained that the legal requirements for severance and real property tax registration evolved over time, with stricter requirements coming into effect after the 1960s. After some discussion between the Court and counsel, it was agreed that it would have been the Private Roads and Subdivision Act, Ch. 257, which would have governed the 1964 development.

The Witness Evidence

38. The Court received witness statements on behalf of the plaintiff from Pierre Dupuch and on behalf of the defendant from Rodney Wallace. As already explained, there was also a witness statement filed by Roland John, a registered surveyor, containing a survey report.

Pierre Dupuch

39. Pierre Dupuch is the Director of the plaintiff, which is a company incorporated on 3 January 1974 as a land-holding company. It holds several parcels of land in Pyfrom Subdivision, namely Lots 360 and 361. Lot 360 was acquired prior to Lot 361 (it was not stated when), and the initial premises of Executive Printers was located on that lot, with apartments on the second floor of the building. When the company needed additional space to expand, Lot 361 was purchased. The building situated on 361 contains the area where the printing machines are located, and the disputed area to the southeast was for many years used as a loading dock.

40. When the property was purchased, it was "obvious" that there was a wall encroaching on it which "*expanded the Wallace property on to our property*". However, there was a discussion between the plaintiff's lawyers and the vendor about the encroachment. Mr. Harry Wallace, whom

he described as "*a very reasonable man*", told him he would remove the wall and retrench it with a slight overlap (if allowed) to include some fruit trees, which Mr. Dupuch agreed.

41. After Mr. Wallace passed away, his sons continued to live on the land, and he was not aware of any issue until about 2018. On or about 28 May 2018, his tenants called to say that they had no water, and when it was investigated, he discovered that one of Mr. Wallace's sons was building a wall to encompass the disputed parcel, which interrupted the water supply. He called the police for assistance, who indicated it was a civil matter for the courts. He later took legal action by filing the writ and statement of claim. He stated that the effect of the encroachment is that Executive Printers can no longer offload their trucks in the space which they have traditionally used as a loading dock. This has caused them considerable expense and difficulty.

Rodney Wallace

42. As explained, Rodney Wallace is one of the sons and executor of Harry Wallace. He executed a Deed of Assent (as executor and trustee of the Estate of the late Harry Christopher Wallace) on 29 March 2018, which granted him legal title to Lot No. 362.

43. Much of his written witness statement contains opinion evidence, which is inadmissible. He deposes that when his father purchased his Lot in 1966, there was an error on the plan attached to the said conveyance, in that Lot No. 362 "*had somehow been redrawn to purportedly show and convey Seven Hundred and Five square ft. (705 sq.') less of land to my father, than what the said Master Plan showed, as opposed to what he thought he was purchasing, and what ought to have been conveyed to him (which later became known as the 'said encroachment area')".* In other words, what was on the plan annexed to the 1966 Conveyance did not conform to what was in the Master Plan for the Subdivision, and he said that "*neither my father, nor I, no any of my siblings, ever realized the error, because none of us had any reason to review the plan attached to the said Conveyance*…".

44. He has lived and resided on Lot No. 362 "*all of my life*" and he remembers playing in the back yard, which he says was always walled in. He and his siblings used to play in the disputed parcel which extended further back than where "*our coconut tree is planted*" well before the plaintiff purchased the adjacent property, and they continued doing this after the plaintiff came onto the property.

45. He recalls that sometime in 1979, a portion of the original back yard wall was "*knocked down by a delivery truck*" whilst making a delivery to Executive Printers. When his father rebuilt the wall, "*for some strange reason*" he rebuilt the rear wall further forward (northward), right up to the base of the coconut tree, reducing the overall size of his property. He said he did not understand this as a child, but much later in life his father "*explained to me that Mr. Dupuch had 'convinced' him by pointing out the southern boundary in the said Conveyance, as well as pointing out the boundaries in the conveyance of the plaintiff's purchase of Lot No. 361*…".

46. His father died in 2013 and he obtained a grant of probate for his father's real and personal estate. He authorized his brother Simon Wallace to engage the services of Roland John in March of 2015 to conduct a survey of Lot No. 362, which was done. He also indicated that two weeks after the John survey, he engaged the services of Mr. Benjamin Ferguson, of Benjamin Surveying

& Engineering Associates Co. Ltd., to conduct another survey to review to confirm the findings of the John survey and produce a report ("the Benjamin Ferguson Survey Report"). He said these reports confirmed that the boundary supported his claim to the expanded land.

47. In 2016, a hurricane destroyed most of the previously existing rear southern boundary wall, as well as part of the western boundary wall of Lot 362. He engaged his brother, Simon Wallace, a contractor, to reconstruct the wall, which he did in conformance with the survey plans that had been commissioned. He said that out of courtesy, he telephoned Mr. Dupuch prior to commencing reconstruction of the wall to inform him of what was occurring and he left messages, but his calls were not returned. He related that at some point, when the construction was more than half way completed, Mr. Dupuch noticed the wall and indicated to him that he (Mr. Dupuch) owned or was entitled to the parcel where the wall encroached, and that if he persisted with the construction, the matter would have to be contested in Court.

48. He also referred to the survey which was conducted by Thomas Ferguson, who was the then Acting Surveyor General, at the direction of the Court to assist with the determination of the boundaries, and which he said also confirmed the findings of the Roland John and Benjamin Ferguson Reports.

Law and Legal Principles

49. The resolution of conflicts or inconsistencies in conveyances is governed firstly by principles of contractual interpretation, and the intention is to give effect to the parties' intention based on a consideration of the conveyances as a whole and in their context. The general approach includes specialized principles that have developed in the specific context of conveyancing. One of these principles is that a clear and detailed verbal description in the conveyance will take precedence over a plan that is for identification purposes only, or which is not stated to be definitive. In cases of ambiguity, the court may have regard to extrinsic evidence to resolve the conflict.

50. These principles have been discussed in numerous judicial authorities and only a few need be cited. In **Jane Elizabeth Akhtar and Others v Christopher John Brewster and Another** [2012] EWHC 3521 (Ch), the UK High Court said:

> "The principles to be applied when construing a conveyance of land are as follows: 27.1 First and foremost a conveyance is a contractual document to which ordinary principles of construction of documents apply. The process of construction involves the application of the usual principles of contract construction as set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896: 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'. 28 As far as conveyance plans are concerned, the applicable principles are these (see Lewison para 11.07): 28.1 A plan which is expressed to be 'for the purposes of identification only' (or words to like effect) is intended to be used to locate the land, but not to identify its precise boundaries. Having said that, it may still be taken into account in the construction process provided that it does not conflict with the verbal description."

51. In **Pennock v Hodgson** [2010] EWCA Civ 873, Mummery L.J. summarized the principles as follows:

> "[9.] …the following points can be distilled as pronouncements at the highest judicial levels:
>
> (1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the defendant being first in time.
> (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 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 reasons 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 evidenced of the boundary."

52. Counsel for the plaintiff cited the case of **Drake v Fripp** [2011] EWCA Civ 1279, where Lewison LJ said in the UK Court of Appeal [at 4]:

> "The answer to the question of where the true boundary lies depends on the interpretation of the transfer by which the land was transferred. A land transfer is a sub-species of written instrument; and the principles that apply to the interpretation of written instruments apply to the interpretation of written instruments apply equally to the transfer. In *Strachey v Ramage* [2008] EWCA Civ 384, [2008] 2 P&CR 154, Rimer LJ said (para. 29):
>
> > 'That required a consideration of the February conveyance in the context of the surrounding circumstances in which it was granted and having regard also to any evidence properly admissible for the purposes of its interpretation. It is a statement of the obvious that the crucial provision in the conveyance was the parcels clause, since it was there that the parties identified the land being conveyed. It is, however, fundamental that the parcels clause in a conveyance should not be considered in isolation from the remainder of the document. It is a general and basic principle of construction of documents that questions of interpretation should be answered by considering the document as a whole, since only then can the provision giving rise to the question be seen in its proper context. There can be no reason for this principle not to be equally applicable in relation to the interpretation of a conveyance for the purposes of identifying the limits of the land conveyed by it."

53. To round off the authorities, in **Lovering and another v Atkinson and Others** [2020] UKPC 14, the Privy Council said:

> "In identifying what are the boundaries of land which is the subject of a conveyance, it will always be permissible to look at any annexed plan, even if the plan is stated in the conveyance as being for identification but not of limitation. In that situation, the words of description will rule in the event of a discrepancy between the words and the plan." ... "the plan could be considered to resolve problems left undecided by the explicit descriptions of the parcels. Where there was no conflict between the plan so described and the explicit verbal descriptions of the parcels, the plan could be used to identify the boundary which was otherwise unclear." ... "In general, a verbal description

may be regarded as prevailing over conflicting indications but a conveyance may subordinate the verbal description to the boundaries shown on a plan" ... "A plan may be referred to "for identification purposes only". This usually means that the verbal description will prevail, where it differs from the plan. Or the land being conveyed may be described as "more particularly delineated on the plan annexed hereto" in which a case the plan will generally prevail over the verbal description." ... "conveyancers may confusingly use both phrases together... left it unclear whether the plan could be relied upon for the determination of precise boundaries. If it could not... the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features...".

Assessment of the Evidence

The factual evidence

54. As indicated the court received evidence from Mr. Pierre Dupuch, the Director of the plaintiff, and the defendant himself. In his closing submissions, counsel for the Defendant went to extreme lengths to attempt to portray Mr. Dupuch's testimony (written and oral) as unreliable and not credible, and the Court must spend some time dealing with these criticisms. In this regard, he identified what he described as "17" errors and "8" critical admissions in Mr. Dupuch's testimony.

55. In my view, not only was this a gross mischaracterization of Mr. Dupuch's evidence, it was a gratuitous exercise in nitpicking, magnifying trivialities, and drawing unwarranted inferences from facts, which were sometimes misrepresented. In any event, as I explain later down, many of these so-called issues of fact were irrelevant to the actual issues to be decided by the Court.

56. It would be a needless waste of judicial space to trawl through these, but it is necessary to give a few examples of what these criticisms were, as contained in the written submissions:

> "4. On page 13, lines 30-32, and on page 14, lines 1-2, this witness testified and admitted that the disputed portion of land, however, was shown as included as a part of Lot No. 362 on the Master Plan. This was Error #3. This was critical admission #1, in favour of the defendant and very damaging to the claimant.
>
> 5. On page 17, line 1-14, the witness testified and admitted that there were two (2) further errors in paragraph 7 of his witness statement, in terms of the directions and positioning of this building. These were errors # 4 and #5. […]
>
> 9. On pg. 23, line 32 and page 24, lines 1-9, and lines 16-20, and in particular on page 25, lines 4-5, this witness testified and admitted that subsequent to a title search conducted by his then Attorney, Mr. Anthony Hepburn, he was given a copy of a letter regarding the same, and as a result, he became aware of an error (not the supposed 'encroachment' but rather an error [because at this point, no one actually knew which party, if any, was 'encroaching', and that was the reason for this action]) in the 1966 Conveyance to Mr. Harry C. Wallace….This was critical admission #2, in favour of the defendant, and very damaging to the Claimant.
>
> 10. On page 25, lines 29-30, this witness testified and admitted that Mr. Harry Wallace had informed him that he was moving the wall, which was there "…*back to its proper place*" and on page 26, lines 1-2, this witness admitted that he told Mr. Harry C. Wallace that he

had no problem with that, and he let it alone. This was error #10. This was critical admission #3, in favour of the Defendant and very damaging to the claimant.

11. On page 26, lines 7-9, this witness testified that none of his trucks ever knocked down the wall. It is submitted that this is an odd statement for this witness to make because he testified on multiple occasions herein that he never went in the back of the building, because of various reasons. So he would not actually know himself, whether or not the wall was knocked down. Yet on page 27, lines 3-5, this witness testified that some person(s) who worked for him helped Mr. Harry C. Wallace rebuild the wall. It is submitted that Judicial notice may be taken of the fact that Bahamian people are not generally that altruistic, and that they would not do something like that just out of the goodness of their heart. They did this simply because the employees know that one of their trucks had knocked down the wall. This was error # 11.

12. On pg. 27, lines 31-33, and from the top of page 28 onward to the bottom of Page 57, this witness was asked questions by both Counsel, as well as the court, about the Plan at Tab 15 of the Court's …bundle (the "Chee-A-Tow" Plan). However, there is absolutely no nexus whatsoever between this witness and the Chee-A-Tow plan. As will be elucidated below, this is the most defining point of this entire action, including the Trial. On page 28, lines 15-23, this witness categorically distanced himself in a particular manner from the Cheeatow Plan. He adamantly testified that he did not even speak to Mr. Chee-a-Tow during the entire process (implying by necessary implication that Mr. Cheeatow was not even his Surveyor). In other words he was saying that he had nothing to do with any part of the entire process relating to the Chee-A-Tow plan. He even went on to emphatically testify the he resented the Defendant's Counsel even saying such a thing. In short, he was saying that it was not his plan. […] It is submitted that…this witness cannot tender and utilize this document in evidence upon his belief, because it would clearly be hearsay evidence, and, as such, would be inadmissible…".

57. With respect to para. 4, it was common ground that the disputed property was marked out as part of Lot 362 on the subdivision plan and the fact that the witness "admitted" this when it was clearly evident and accepted is of no moment. This was no error and no critical admission. As explained below, what is transferred pursuant to a conveyance is not determined by what is indicated on a subdivision plan.

58. Similarly, the observations at para. 5 are similarly not of any relevance. The witness made several corrections to figures, a date, and cardinal directions in his written statement at the commencement of trial. This is a routine occurrence at trial and indicative of nothing more than an attempt to correct errors so that the correct version is put before the court and the other parties.

59. As to para. 9, firstly this is not a complete representation of the evidence actually given by the witness. During cross-examination, counsel for the defendant constantly attempted to browbeat Mr. Dupuch into trying to accept his (counsel's) characterization that there was "error" in the conveyance to Mr. Wallace. Mr. Dupuch never conceded this, and indeed the Court was required to intervene on more than one occasion to keep the process on even keel. A more accurate account is brought out by the following passages, which are quoted elliptically from the transcript. Unless otherwise indicated, the questions are from counsel for the defendant and the answers are from Mr. Dupuch:

"Q: And was it not the case, Mr. Dupuch, that at that time during those goings on the title search and otherwise, your lawyer, and by extension you, found out about an error in the 1966 conveyance?

A: I assume so.

Q: To my client?

A: I said to you I don't know about your client, but I knew there was an encroachment on the land that I did not inspect. I left the buying of the land to Mr. Hepburn at Graham Thompson and he dealt with the people at Pyfrom's Estate.

[…]

Q: Mr. Dupuch, how did the wall—we are still with paragraph 8…how did the wall come to be moved?

A: Mr. Wallace called me after the transaction [purchase of land] had been over. Which year it was, what date it was, I don't know. But I was in the old building. He called me up, introduced himself as my neighbor. That is the first time I heard his name, even with the encroachment. I didn't know…Mr. Harry Wallace. He informed me that he was moving the wall which was there back to its proper place and asked my permission to come a few inches across because he had just planted a tree and he did not wish to pull it down. And I said no problem with that, and I left it.

[…]

Q: But to the extent that you had a difficulty recalling the error, before I put my assertion to you, the error that we had spoked about earlier ...to which you agreed was the fact that there was a mistake, an error in terms of the plan and the lot size and dimensions and square footage of lot 362, when lot 362 was conveyed to my client's late father. That is the error we are speaking about.

A: I didn't say error. I said difference between that and the master plan and there is a difference. You call it error. I call it a difference.

Q: No sir. I disagreed with you. We have agreed. You indicated…

Court: You could disagree, Mr. Jupp. He is saying he calls it a discrepancy. You call it an error.

Mr. Jupp: Well, he is calling it something different now because he agreed with me an hour ago that it was an error, a mistake. That is on the record, my Lord.

Court: A mistake on whose part? In other words, there is objectively a discrepancy in the plans you have taken him to, and he said yes. That is what you are referring to as an error.

Mr. Jupp: Yes my Lord. Error, mistake… I like those terms. Discrepancy…okay.

Mr. Dupuch: I said a difference."

60. As shown, it was Mr. Jupp who tried to insist on characterizing the issue as an "error" in the 1966 conveyance. To the extent that it is suggested, in para. 10, that Mr. Dupuch's concurrence to moving the wall back was nonchalance or disinterest, the "no problem" comment was clearly in respect of a request to permit a slight encroachment, although this critical detail is omitted from Mr. Jupp's description in para. 10. In the circumstances, it is difficult to discern what is said to be the error or omission disclosed by these passage.

61. Paragraph 11 also contains a misrepresentation. But in any event, it is illogical and based on inferences that are unsupported by any evidence. The witness's evidence was that originally

the area where the wall was located was in the "bush" and that he did not go in the back to find "it" (the wall encroachment), because he entered the building through the front door on a daily basis as part of his work routine. Further, there is no evidential (or logical) basis for the inference that Mr. Dupuch could not have assigned workers to assist Harry Wallace with relocating the wall. After all, the developer had offered to remove the wall at its expense as part of the condition of sale, and there was no evidence of whether or not any of that money was actually used for that purpose. In fact, there was evidence that Mr. Dupuch may have paid monies to have a chain link fence erected on top of the original wall when it repositioned to prevent intruders coming over the wall into the disputed parcel and the rest of the plaintiff's property. In any event, the criticisms at para. 11 are pure conjecture and suppositions.

62. As to 12 (to which the defendant devoted nearly 4 pp of his 29-pg closing submissions), this is again a misrepresentation of the facts. What Mr. Dupuch resented, as clearly shown by the evidence and transcript, was the suggestion that he somehow conspired or was in collusion with the 1977 survey (the Chee-A-Tow survey) to create Parcel E, as borne out by the following exchanges:

> "Q: Do you see anywhere on that plan [Subdivision Plan] any piece or parcel or lot of land indicated as parcel E?
> A: No, I don't.
> Q: Now, Mr. Dupuch, is not parcel E a creation by you and your surveyor Mr. Cheeatow for whatever purpose, it doesn't matter. But is it not a creation…
> A: No. it's not. I didn't talk to Mr. Chee-A-Tow during this whole thing and I resent you saying something like that.
> Q: Well, can you tell the Court then how parcel E, how this came into existence?
> A: Well, I asked what this thing was, parcel E, with marks through it. And I was told that surveyors had to mark out anything they saw on the property and that was a part he marked out. Because that is the land that the wall was encroaching on. And he did not see that in the plan, so he marked in because it was there."

63. Secondly, whatever labels may have been attached by the Chee-A-Tow survey to the parcels of land being surveyed, it is clear that the disputed parcel (Parcel 'E') was sold in 1964 as a part of the Ricardo DeGregory conveyance. So it could not have been created in 1977. The suggestion that the survey was not "admissible" because essentially Mr. Dupuch disavowed it (which as indicated was not the case) is also erroneous. The survey was admitted into evidence as part of the agreed bundle of documents, and was properly admitted. What weight, if any, the court should give to it in the absence of any explanatory evidence as to its contents, is a different matter. In any event, as explained below, the present case was not one in any event to be determined on survey evidence.

My assessment of the witnesses of fact

64. For my part, I found Mr. Dupuch's evidence to be credible and reliable. He was, at the time of trial, of advanced age (he indicated during live evidence that some of the events had taken place nearly 50 years ago!), but his evidence was measured and thoughtful. Most importantly, it was based on his personal recollection of events. When he could not remember specific details,

he readily indicated so, and did not try to recreate evidence to support any particular point of view. As noted, he was seeking to remember events which took place nearly half a century ago, and given the fallibility of human memory, it was remarkable that he was still able to remember many of the details.

65. In my view, it was the evidence of the defendant that was less credible and reliable. To begin with, the bulk of his witness statement consisted of opinion evidence on the conveyance of 1966 and the professional surveys he commissioned, which was inadmissible evidence coming from him. The plaintiff's counsel was gracious not to challenge the admissibility of this evidence. Secondly, it was also clear that his recollection of salient events was not based on his firsthand experience. For example, on the one matter of fact that the court thought was of some significance—the circumstances in which the original wall was removed and repositioned—he states in his witness statement that a delivery truck knocked down the wall, as if he had first-hand knowledge of this. But when cross-examined, he was forced to admit that in fact he was "in school" at the time of the alleged incident, and he was told this by his father.

66. Further, he states in his witness statement that from the date of the conveyance neither his father, nor him or his siblings "*ever realized the error because none of us had any reason to review the plan*". I do not accept this. To begin with, it is rather incredulous that children of school-age would be concerned about reviewing a conveyance. But in any event, I accept the evidence of Mr. Dupuch, along with my inferences drawn from contemporaneous documents, that on a balance of probabilities, it was Mr. Harry Wallace who removed the wall and repositioned it to the boundary shown on the plan attached to his conveyance (with a minor deviation for his fruit trees), because he had been made aware of the encroachment at some point during 1978-1979.

The professional surveys

67. While the defendant sought to put great reliance on the professional surveys, in particular that of the Acting Surveyor General, in my view they cannot be determinative of the issue. Professional surveys, such as those submitted to the Court, are very useful tools. But the weight given to them must depend on whether they address technical as opposed to legal questions, their methodology and their consistency with the other evidence. The court has to determine the boundary based on the totality of the evidence, giving primacy to title documents and legal presumptions and principles, and will only rely on expert surveys to assist with factual or scientific matters. This case turned on a legal, not technical analysis.

68. As was said by HHJ Halliwell, in the UK High Court, with reference to well-known UK Court of Appeal authorities, in **Bootle v GHL Property Management and Development Ltd.** [2025] EWHC 317 (Ch) [at 72]:

> "Whilst not in issue, I am satisfied that the expert evidence of Messrs Stranwick and Lovelock was properly admitted for the purpose of assisting the court in determining the alignment of the disputed boundary at trial. Their evidence has assisted me in reaching my conclusions. No doubt, their narrow views about the interpretation of the 1929 and 1930 conveyances and the conveyance plans were and are inadmissible for this purpose. This can be seen from the guidance of Sir Martin Nourse in *Kuligowski v Kenward* [2003] EWCA Civ 1869, at [12], and Zacaroli J in *Charlton v Forrest* [2024] EWHC 1014 (CH), at [16]. Zacaroli J's observations have a particular bearing on

> the status of agreements between the surveyors about the line of a boundary. However, he was astute to observe that "expert evidence may be of assistance insofar as it consists of matters of 'scientific, technical or other specialist knowledge which are outside the judge's expertise' (TUI *UK Limited v Griffiths* [2023] UKSC 48…)". [Emphasis supplied.]

69. Likewise, the Court derived assistance from the reports and the live evidence of the surveyors, particularly with regard to interpreting the technical aspects of the plans, such as symbols, annotations and measurements. Mr. Ferguson was also kind enough to attend the visit to the *locus in quo* and point out certain features based on his survey (see further below). I am not of the view that much weight can be attributed to the expert evidence. In any event, their evidence was primarily directed to ascertaining the original dimensions of Lot 362 as contained on the Subdivision plan, and a key feature of their evidence was identifying the survey markers placed on the original plan for the subdivision. In fact, Mr. John admitted in cross-examination that he never even saw the 1978 conveyance, and the Report of the Acting SG also did not mention these conveyances.

70. It is important to remember also that while boundary marks may be useful indicators in seeking to establish boundaries, their presence on a plan or diagram is not necessarily conclusive of the location of the boundary. As noted by HH Judge Cook (sitting as a judge of the Chancery Division) in **Avon Estates Ltd. v Evans & Anor** [2013] EWHC 1635 (Ch):

> "In my judgment, there is no single meaning or default meaning established by the evidence or authority that can be attached to T marks where a meaning cannot be ascertained by reference to the body of the conveyance or other admissible material. It may well be that the parties to the 1955 conveyance subjectively intended some meaning to be attached, but if they did, given the range of possibilities as to what it might be and the absence of evidence to enable the court to identify what their intention might have been, that intention has not been carried into effect."

71. The Court also conducted a visit to the *locus in quo* on 21 July 2022. That visit allowed the court in the presence of counsel, the main parties and Mr. Ferguson, to have a first-hand view of the orientation of the properties and the disputed area. The court was shown the new wall constructed by the defendant in 2018, as well as remnants of the old wall, which was still standing. At the base of that wall, were several coconut trees (presumably some of the fruit trees that the wall was allowed to enclose when it was retrenched, and which the defendant confirmed were the coconut trees from his childhood memories). Mr. Ferguson also pointed out the survey marker at the southwestern edge of the wall although, as indicated, he could not definitively indicate its vintage. The court was also able to see the orientation of the wall in location to the back drive way. While it remained possible for a vehicle to pull up parallel to the door, it was no longer possible to back into the loading bay because of the location of the wall.

Court's discussion and conclusion

72. As I had cause to remind the parties during the course of the trial and as my comments directed at the evidence of Mr. Wallace intimates, the parties' subjective beliefs and opinions about the boundary and where it is or should be are not relevant (or indeed admissible) in the construction of the various conveyances: see **Investors Compensation Scheme v West Bromwich BS** [1988] 1 WLR 896, and **Rainy Skies S.A. v Kookmin Bank [2011] UKSC 50.** Construction is an

objective exercise performed by the Court to ascertain the meaning of a contractual document based on what the parties would have reasonably understood it to mean against the relevant factual and contextual background.

Main submissions of the Parties

73. The plaintiff's three main arguments in support of its case can be summarized as follows:

(i) The triangular portion of land or the disputed parcel was sold to Ricardo M. DeGregory by the 1964 Conveyance from Pyfrom Estates Ltd., and therefore at the point that the 1996 conveyance to Mr. Harry Wallace purportedly conveyed the same area to him, the Vendor was no longer seized of that property and therefore could not convey it ("*nemo dat quod non habet"* rule).

(ii) Secondly, it would be inconsistent to construe the 1966 Conveyance in a way that was inconsistent with the plans annexed to it and the 1964 DeGregory Conveyance.

(iii) Thirdly, that the defendant's occupation of the disputed parcel from 1966 to 1978 failed to "*dispossess Ricardo Melchoir DeGregory as the limitation period is 20 years*".

74. The case of the defendant, as far as can be discerned from the rather discursive submissions, rested on the following main planks:

(i) That the plaintiff's sole witness was not reliable and credible and counsel "uncovered" some 17 errors and eight "critical admissions" in his witness evidence;

(ii) That the basis and origin of the dispute is a "conveyancing error" which occurred in the description of the DeGregory Conveyance, which was perpetuated in the subsequent conveyances; and

(iii) That he relies on the "*nemo dat quod non habet*" rule to contend that Pyfrom Estates did not have the "*approval and lawful authority*" to sell the disputed parcel and therefore this invalidated any subsequent transfers of the land.

75. Obviously, the critical question in the present cases is whether the disputed parcel, on a proper construction of the documents, was conveyed to the plaintiff or the defendant. The issue for the court is not whether the land conveyed to either of them conformed to the lots that were laid out in the subdivision plan—a point to which I shall return.

76. As indicated by the guiding principles set out above, I start first by examining the conveyances. In the main, what is at issue is the extent of the northern boundary of Lot 361, and the western and southern boundaries of Lot 362. The northern boundary of Lot 361 is described in the parcels clause of the 1978 Conveyance as being 155.81 feet in length, 105.81 of which traverses the southern boundary of Lot 360 (owned by the plaintiff) and 50 feet of which is said to traverse the southern boundary of Lot 361. The property is said to have (in traditional conveyancing language) the "*position, boundaries shape and dimensions*" shown on the "survey plan attached" and coloured pink. The plan, based on the 1977 Chee-A-Tow survey, shows the disputed parcel, identified as "Parcel E", included in the property conveyed to the plaintiff. The Lot was conveyed to the Plaintiff by Pine Tree Holdings Ltd., (the Vendor), who sold the Lot

subject to the restrictions and conditions in the Conveyance dated 22 June 1964, by Pyfrom Estates Ltd. in the Conveyance dated 22 June 1964.

77. It is also useful to have reference to the 1964 Conveyance, as that was the original sale of Lot 361. As discussed, the dimensions of the northern boundary of Lot 361 described in the conveyance mirror what is described in the 1978 conveyance. The land is said to have "*such position boundaries shape marks and dimensions*" as are shown on the plan attached coloured pink, which is the subdivision plan. However, the shaded area representing the property includes the disputed parcel as part of the conveyance to DeGregory.

78. I now turn to the 1966 conveyance. It is said to be bounded on the west by Lot No. 361 and running thereon 133.59 feet. It is said to be have the "*position boundary shape marks and dimensions*" on the plan attached coloured pink. The shaded portion on the plan actually is roughly a rectangular shaped property, with the western boundary being 106.24 ft., the northern boundary being 50 ft., the eastern boundary being 112.45 ft., and the southern boundary being 50 ft. Thus, and this is the crux of the problem, the plan attached (which is the Subdivision Plan) does not include the extra 27.18 ft. (more or less) of the western boundary, which is what would form the common boundary to the northeast of Lot 361 and the southwest of Lot 362, if the parcel were a part of Lot 362.

79. As a further part of the matrix, the dimensions of Lot 362, as shown on the extract of DLS Plan 205 NP (the master Subdivision plan) shows the dimension of Lot 362 as bounded on the north by Edward Avenue (50 ft.), on the east by Lot 363 (112.45), on the south by various small owners (54.35 ft.), and on the west by Lot 361, 360 and 359 (133.59 ft.).

80. I accept, based on the documents referred to, that the original dimensions of Lot 362, as laid out in the master subdivision plan, included the disputed parcel. I think this much was common ground among the parties, and Mr. Dupuch admitted during live evidence that the Approved Subdivision Plan showed the disputed area as contained in Lot 362.

81. However, when the property was sold in 1964, in my opinion it was clearly the intention of the developer to convey to Mr. DeGregory Lot 361 based on the dimensions contained in the conveyance to him and the annexed plan—that is containing the disputed parcel. The verbal description of the property and the diagram are consistent.

82. I am also of the opinion that it was the intention in 1978 by Pine Forest Ltd. to convey the disputed parcel as a part of Lot 361, and again the verbal description and the plan are consistent. However, as the 1966 conveyance was interposed, the question is what was the effect of this? As indicated, the written description of the property conveyed to Harry Wallace included the disputed property, but the plan did not include it, so there was an inconsistency between the verbal description and the plan.

83. As noted above, while the rule of thumb is that an explicit verbal description will prevail over a conflict with a plan, this is not invariably the case, and the court can look at other extrinsic evidence that has a bearing on the matter. I am satisfied, that when all these factors are taken into consideration, the 1966 Conveyance did not convey the disputed parcel to Mr. Harry Wallace, notwithstanding what he or his successor in title may have thought. My main reasons for holding

this to be the correct interpretation of the conveyances based on the context and other evidence are discussed below.

84. Firstly, the disputed parcel had already been conveyed by Pyfrom Estates to DeGregory in the 1964 Conveyance and therefore the *nemo dat quod non habet* rule—one cannot give that which one does not own—as expressed in numerous cases, applies. At the time of the 1966 conveyance, Pyfrom Estates no longer owned the fee simple title to the disputed 705 sq. ft. and could not have conveyed it to Harry Wallace, notwithstanding what was said in the parcels clause.

85. Curiously, the defendant also invokes the *nemo dat* rule in support of the contention that Pyfrom Estates sold an "unapproved" and therefore "*unlawful*" parcel of land to Mr. DeGregory. This claim was not fully developed in written submissions, and not significantly addressed by either party. Presumably, it was based on the contention that the disputed parcel was marked out as part of Lot 362 on the Subdivision plan and therefore, the developer (Pyfrom Estates) needed planning approval to deviate from the dimensions in the approved Sub-division plan. It also presumes they did not get this approval and consequently the sale of Lot 361 contrary to the plan was void.

86. The submission that approval may have been needed to sell property otherwise than as marked out is correct, but the conclusion sought to be drawn as to the consequences of a failure to get such approval is erroneous. As noted, it was accepted at the hearing that the statutory planning regime which would have operated at that time was the Private Roads and Sub-Divisions Act (Ch. 256). The material parts of that Act are ss. 4, 8, and 10. Section 4 requires the approval of the relevant Minister (Minister of Works) for a sub-division and sets out certain conditions for the grant of such approval. Those are not relevant, as there is no dispute that the subdivision was an approved one, although there is some uncertainty about the date of that approval. The research of the Acting Surveyor General shows that subdivision approval was formally recorded as being granted on 19 October 1964, but this evidence was not tested by the parties.

87. Section 8 of the Private Roads and Sub-Divisions Act provides as follows:

> "8. No person shall, without the approval of the Committee [Town Planning Committee], sell, agree to sell, convey, agree to convey, demise or agree to demise any lot in a sub-division not being a marked lot with a number on a survey plan approved by the Committee or whereof the frontage, extent or depth shall vary in any particular from the frontage, extent or depth of such lot as shown on any approved survey plan."

Section 10 provides criminal penalties and fines for failure to comply with various sections, including a fine of up to $4,000.00 for a breach of s.4 and a fine of up to $200.00 for a breach of s. 8. In other words, the Act clearly specified the penalties for any breach of the planning conditions, and it may be seen that a breach of s. 8 (selling property that did not conform to the laid-out plan) only attracted a minor fine. Parliament did not specify what would be the effect on any conveyances or agreements if the statutory conditions were not complied with.

88. It did do so, however, in the legislation which replaced the 1961 Act, the Planning and Sub-division Act 2010, (the "new Act"), and the effect of failure to comply with these statutory planning provisions on conveyances and agreements to convey was considered by the Privy

Council in **Malik Momin v February Point Resort Estates Ltd.** (Bahamas) [2022] UKPC. Importantly, and relevant to this case, the Privy Council affirmed in **Malik** that the effect of s. 62(1) of the new Act was to preserve the validity of all pre-Act (pre 2010 Act) conveyances where there had been a failure to obtain subdivision approval. By parity of reasoning, if failure to obtain subdivision approval does not invalidate any conveyance made under the 1961 Act, then it stands to reason that failure to comply with the dimensions of the marked out lot cannot invalidate the conveyance.

89. In the circumstances, the *nemo dat* rule invoked by the defendant is misconceived and has no application. There is no dispute that Pyfrom Estates held valid legal title to all 162 lots sold as part of Pyfrom Sub-Division Phase II, and they could therefore validly transfer the disputed parcel to Mr. DeGregory. Even if that transfer did not comply with the planning statute at the time, it did not affect the validity of the transfer.

90. For clarity and completeness, however, it should be stated that this court makes no finding of fact as to whether or not Lot 361 was sold without the requisite planning approvals, as no direct evidence was led before the Court of this. The defendant did not produce any evidence to support this claim. The Acting Surveyor General indicated in his evidence that he did not find any evidence of a request for severance, but this cannot be taken as conclusive evidence that no such approval was in fact granted, and in any event the onus was on the defendant to adduce evidence in support of his case.

91. Secondly, it is clear that when the "re-sale" of Lot 361 was being negotiated, the boundary wall of Mr. Harry Wallace, which then enclosed the triangular disputed parcel, was represented as an encroachment on Parcel E. In fact, as set out above, the agreement for sale was contingent on the acceptance by the Purchaser of the resolution of this encroachment, at the expense of the Vendor, which included the demolition of the walls and repositioning them in their correct location. At trial, Mr. Dupuch gave evidence that he was aware of the letter, which had been sent to him in this regard, and that he was therefore aware of the "discrepancy" from he took the property. As set out above, Mr. Jupp for the defendant tried to prevail on Mr. Dupuch to accept that this was an "error" or "mistake" in the plans which originated with the DeGregory conveyance and was perpetuated. However, Mr. Dupuch maintained that he was aware of a "difference" or "discrepancy" in the plans, but in his view it was not an error.

92. Thirdly, I accept the evidence of Mr. Dupuch as to the circumstances in which the original boundary wall was moved. Mr. Dupuch's evidence was that his then attorney contacted Pyfrom Estates about the encroachment, and this was borne out by the contemporaneous documents. Emerging out of this, Mr. Harry Wallace voluntarily moved the wall back to exclude the disputed area. As Mr. Dupuch said in evidence (extracted above), at some point after the purchase, Mr. Wallace introduced himself and indicated that he was moving the wall back to its "proper place" but asked permission to allow a slight encroachment to enclose some fruit trees he had planted. Mr. Dupuch said he could not be sure of the date, but he probably placed it at 1979 when the wall was removed. This would also mean that Mr. Harry Wallace accepted that the wall was encroaching on Lot 361.

93. On a balance of probabilities, I do not accept the evidence of Mr. Rodney Wallace that the wall was knocked down by a delivery truck in or about late 1979, and when his father rebuilt it "for some strange reason" he rebuilt it right up to the base of the coconut tree (i.e., close to the where the boundary line would be if the property was owned by the plaintiff). Firstly, his evidence in this regard is clearly hearsay; he admitted that he was allegedly told this by his father and was "in school" at the time the alleged incident took place. Secondly, his evidence was that the area where the wall was located did not need to be accessed by delivery trucks to make deliveries, as they could pull up to the back-driveway to offload stuff. Thirdly, it is neither logical nor believable that if a truck ran into part of a wall which enclosed 705 sq. ft., that it would be necessary to tear down the entire expanse of wall and relocate it completely to fix the wall. Fourthly, it is more likely than not that there was a request for the wall to be moved by the developers/attorneys, as this was a condition of the sale, and it appears that the conveyance proceeded without any requisitions being raised. In my view, 705 sq. ft. is a sizable plot of land, and no reasonable purchaser would have agreed to purchase property without having such an encroachment removed from the land they were purchasing.

94. Fourthly, and finally, I reject the contention of the defendant that the inclusion of Parcel 'E' in Lot 361 was a mistake which originated in the DeGregory conveyance and was perpetuated in the subsequent conveyances. It is clear that when Lot 361 was sold in 1964, the footprint of the Lot as marked in the Subdivision plan was expanded to include Parcel E. When the property was sold in 1978, it was further expanded to the south to include Parcels B and C, as noted above. In other words, the intention was clearly to sell an expanded Lot 361. As discussed, whether all of the planning stipulations were followed is neither here nor there. The fact is, the property was conveyed by vendors in 1964 and 1978 who owned the fee simple, and who could validly dispose of it.

95. In my judgment, based on my interpretation of the conveyances, and the other available evidence, I find that the disputed parcel of land is attached to Lot 361 and was validly conveyed to the plaintiff in 1978.

The possessory interest argument

96. The plaintiff pleaded in the alternative that its "*agents, assigns, and or lessees*" have been in exclusive possession for a period exceeding 30 years (i.e., from 1979 to 2018), and sought a declaration that the plaintiff was therefore the "equitable owners" of the parcel. Having determined that the disputed parcel was conveyed as part of Lot 361, there is no need to determine any claim based on adverse possession. I also do not need to determine the issue of whether the defendant acquired any possessory interest during the period 1966 to 1979 as against the plaintiff's predecessor in title. In any event, as the plaintiff rightly points out, the applicable limitation period under the pertaining Real Property Limitations Act 1874 was 20 years, which clearly did not expire.

Rectification

97. The defendant did not plead a claim for rectification in his counterclaim, and it was only raised by dint of submissions. I mention it only for completeness, as having regard to my findings

as to the ownership of the property it is clearly not a remedy that is available to the defendant. Rectification is an equitable remedy which seeks to correct an instrument, in this case the conveyance, so that it accurately reflects the parties' intention. As I have found, it was not the intention of the vendor to convey the disputed property to the defendant, so there is nothing to be rectified.

98. However, I make the following brief observation in passing. Although there is, strictly speaking, no fixed limitation period for an application to rectify a conveyance where there is a mistake in the description of the property conveyed, equitable doctrines such as laches and acquiescence may still operate to bar a claim where there has been inordinate delay (see UK Supreme Court in **Test Claimants in the Franked Investment Income Group Litigation and Others v Revenue and Customs Commissioners** [2020] 3 WLR 1369. If the defendant was of the view that his conveyance contained a "mistake", he could have, from as early as 1979, brought an application to have it rectified. Even in 2015, when the current defendant commissioned a survey, he could have applied for rectification. He did not do so, and did not plead it in his counterclaim.

Trespass

99. It is trite law that trespass is actionable *per se*, and a claimant may be entitled to damages even if he has not suffered any loss, although damages may be nominal (see **Armstrong v Sheppard v Short Ltd.** [1959] 2 QB 384. If the trespass has caused actual damage, he is entitled to receive such an amount as will compensate him for his loss.

100. The plaintiff claims special damages in the amount $1,137.33 for damage done to his water supply system, which he says was attached to a pump that was enclosed by the wall put up by the defendant. The defendant does not deny putting up the wall, but he puts the plaintiff to strict proof of damaging the pipes. Not evidence was led of this claim during the hearing, but photographs of the area include in the bundle and led before the court during the interlocutory proceedings in relation to the injunction application show what appears to be a water pipe crossing into the walled area and connected to a pump. Later photos show the water pipe on the ground running along the outside perimeter of the wall.

101. I accept on a balance of probabilities that it is more likely than not that damage was caused to the pipes by the defendant's construction of the wall. In addition, counsel should be reminded that it is not sufficient to simply deny an allegation and "put the plaintiff to strict proof". If the defendant denies an allegation, he or she must state the reasons for that denial and, if advancing a different version of events, must set out those reasons. If a defendant fails to properly deal with an allegation (as here), it is deemed admitted: see **Saeed Akbar v Mohammed Sajead Ghaffer** [2024] EWHC 50 (Ch).

102. In addition to the special damages claimed as a result of the interference with the water supply, the plaintiff claims damages as a result of the enclosure, which he says has prevented him from using his loading area for the loading and off-loading of merchandise and products that are vital to the business. This is not a claim for nominal damages, such that the court could fashion a reasonable figure having regard to all the circumstances and the evidence. The plaintiff is *prima*

facie entitled to damages for the losses sustained consequent to the trespass, and if damages cannot be agreed, his losses will have to be assessed by a Registrar.

CONCLUSION AND DISPOSITION

103. For all the reasons given above, I shall make the following declarations and orders:

(i) The plaintiff is declared to be the legal and beneficial owner of all that piece parcel and lot of land described in the Schedule of the Indenture of Conveyance dated 6th January 1978 between Pine Tree Holdings Limited and the plaintiff (Executive Ideas of The Bahamas Limited) and recorded in Volume 2904 at pp. 586- 593 in the Registry of Records.

(ii) I grant a perpetual injunction to restrain the defendant whether by himself, his heirs, or assigns from trespassing on the plaintiff's property as described above.

(iii) I grant a mandatory order that the defendant do, within 21 days (or such other time as may be agreed between the plaintiff and defendant), pull down and demolish so much of the said wall and buildings recently erected and situate on the plaintiff's said property or that in default of the defendant's compliance with this order, the plaintiff be at liberty to pull down and demolish the wall and buildings located on the property.

(iv) I award special damages in the amount of $1,137.33 for the damage to the water pipes and pump caused by the defendant's construction of the wall on the property in 2018.

(v) I also award general damages for trespass, to be assessed by a Registrar if not agreed.

104. Costs are awarded to the plaintiff, to be taxed if not agreed, with interest to run on the damages awarded at 5% from the date of the Writ and from the date of Judgment until payment at the applicable statutory civil interest rate.

Klein J.

16 December 2025

Annex A

(*For orientation purposes only*): Plan showing the layout of the parties' properties with the disputed parcel represented by the hatched pink area below Lot 362. Extracted from DLS Plan No. 732, NP.