COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 59 of 2020

B E T W E E N

CHRISTOPHER STUBBS
SHANNA'S COVE ESTATE COMPANY LTD.
Appellants

AND

ALLAN CRAWFORD
SHARON CRAWFORD

Respondents

BEFORE:	**The Honourable Sir Michael Barnett, P** **The Honourable Mr. Justice Evans, JA** **The Honourable Madam Justice Bethell, JA**
APPEARANCES:	**Mr. Caleb Dorsett, Counsel for the Appellants**
	Mrs. Giahna Soles-Hunt with Mr. Glen Curry, Counsel for the Respondents
DATES:	**21 October 2021; 2 November 2021; 13 January 2022**

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Civil appeal – Conveyance – Purchase of property – Sale of land – Oral agreement – Nuisance – Private nuisance – The rule in Rylands v Fletcher – Injunction – Quia timet injunction – Judge's duty to give reasons - Whether the property marked "Access Road" was to remain free and clear - Whether an agreement is not enforceable by virtue of section 4 of the Statute of Frauds – Whether an agreement is unenforceable for want of consideration – Judicial deference - Section 4 of the Statute of Frauds

The appellants are owners of land in Cat Island and, in 2010, were interested in selling one of two waterfront lots; Lots A and B. The respondents are American citizens who, by telephone, agreed

to purchase Lot A from the appellants and further agreed to meet in New Providence to close the deal. The appellant Stubbs suggested that his attorney could also act for the respondents. At the meeting in New Providence on 30 August 2010 the respondents saw the survey plan for the first time. Upon noticing that the property was irregularly shaped they negotiated an increase to the northern boundary by 15 feet so as to purchase a rectangle shaped property. Handwritten amendments were made to the plan attached to the draft conveyance and initialed by the respondents. The plan contained an access road. The respondents say the appellant Stubbs agreed that the access road was to remain unobstructed and was to act as a buffer between Lots A and B. The respondents also say that the appellant Stubbs indicated the access road was to provide beach access to the other residents of Shanna's Cove. The conveyance was signed on 30 August 2010.

The respondents built a home on their property. In September 2014 the respondents were notified that the appellant Stubbs was constructing a building next to their property on the access road. The respondents also noticed that the appellant Stubbs constructed a septic tank near the beach opposite their property.

The respondents brought an action in the court below against the appellants for breach of contract, breach of collateral contract and derogation from grant (relative to the agreement to keep the access road open and unobstructed) and nuisance (relative to the erection of a building so close to their property). The appellants' defence to the claim was that no agreement was made between them and the respondents relative to the access road. Further, that the access road is the property of the appellant Stubbs who is free to use it as he pleases. After hearing the evidence, the judge preferred the evidence of the respondents. As a result, she ordered that the appellants are not entitled to build on the access road and imposed a permanent injunction upon them from so building, she directed the appellants to remove any structures built on the access road and to remove the septic tank. The judge also ordered the appellant Stubbs to execute a confirmatory conveyance to the respondents setting out the precise dimensions and boundaries of the property owned by the respondents.

The appellants have appealed the judge's decision on a number of grounds, the principal grounds being that the judge erred in finding that an agreement was made between the appellants and the respondents that the access road would remain unobstructed; that the judge erred in her application of the law of nuisance and that the judge erred by failing to provide reasons for her decision.

Held: Appeal dismissed, save for the order requiring the appellants to remove the septic tank; that requirement is quashed. The Court reserves its decision on costs.

Unless a finding of fact is unsupported by the evidence an appellate court will not interfere with that finding as the trial court has had the advantage of seeing and hearing the witnesses give evidence. In the present case the judge below also visited the locus in quo. Based on the evidence before her, it was reasonable for the judge to conclude that an agreement was in fact made that the access road was to remain free and clear.

The appellants' submission is that the agreement was never made, but even if it was it was unenforceable as it did not comply with Section 4 of the Statute of Frauds. However, the Statute of Frauds was never pleaded as a defence and was not argued before the court below. Nor was it

pleaded that any agreement with respect to the access road was not enforceable for want of consideration.

In the absence of seepage or odor, the fact that the septic tank is aesthetically unappealing is insufficient to ground an action in nuisance.

The judge clearly laid out why she did not find the appellant Stubbs to be a credible witness. The submission by the appellants that the judge did not provide reasons to support her conclusions cannot succeed.

Bahamasair Holdings Ltd v Messier Dowty Inc [2018] UKPC 25 applied
Barr and others v Biffa Waste Services Ltd [2012] EWCA Civ 312 applied
Clarke v Callow (1876) 46 L.J. Q.B. 53 mentioned
Cresseri and Another v Halla Resources Corporation [1987] LRC (Comm) 439 applied
Drury v Rafique and another [2018] EWHC 1527 (Ch) considered
English v Emery Reimbold & Strick Ltd and other appeals [2002] EWCA Civ 605 mentioned
Fitzroy Mc Kree v John Lewis Civil Suit No. 88 of 1999 considered
Lawrence and another v Fen Tigers Ltd and others [2014] 2 WLR 433 applied
Rowe v Health and Care Professions Council [2019] EWHC 695 (Admin) mentioned
*Staechelin and others v ACLBDD Holdings Ltd and other***s** [2019] EWCA Civ 817 applied

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J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by vendors of property arising out of a judgment against them in an action brought by purchasers of the vendors' property.

2. At the outset, I should say that Mr. Caleb Dorsett, who appeared as counsel for the vendors/appellants, did not represent the appellants in the court below, nor did he prepare the

Notice of Appeal and submissions in support of the appeal. Mrs. Gianha Soles-Hunt, who appeared on behalf of the respondents on this appeal, did not appear on their behalf at the trial.

3. In this case, after a full trial that had three days of oral testimony and a subsequent visit to the property in Cat Island, the trial judge entered judgment against the vendors and granted declaratory and injunctive relief as more particularly described later in this judgment.

4. I set out the facts as found by the trial judge and set out in her judgment:

> **"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.**
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> **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 initialed 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 re-turned 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…"

5. The Crawfords brought an action against Stubbs and Shanna's Cove. For this appeal the material parts of the Amended Statement of Claim are as follows:

> **"3. The Third Defendant (hereinafter called "Mrs. Dorsett Major" is a Bahamian citizen and a Counsel and Attorney of the Supreme Court of the Bahamas, practicing under the name and style of Dorsett Major & Co.**
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> **4. During the summer of 2010, in a series of meetings and telephone calls between the Crawfords and Mr. Stubbs. it was agreed in principle that the Crawfords would purchase a parcel of real estate within Shanna's Cove (hereinafter referred to as "Parcel A") from SCEC for a price of One Hundred Fifty Thousand Dollars ($150,000.00), with the Crawfords to be responsible for the payment of the applicable stamp duty and their own legal fees. Mr. Stubbs suggested that the parties be jointly represented in the transaction by an attorney who customarily acted for himself and SCEC, Mrs. Donna Dorsett Major of the firm Donna Dorsett Major & Co. The Crawfords agreed to this suggestion and confirmed their agreement to Mrs. Dorsett-Major in a subsequent telephone call. It was further agreed that the parties would meet at Mrs. Dorsett-Major's chambers on the 30th of August 2010 to finalize the terms and complete the transaction.**
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> **5. During the meeting on the 30th of August 2010, Mrs. Dorsett Major produced a draft Conveyance for Parcel A with a plan of the property attached. In the presence of Mrs. Dorsett Major the Crawfords requested that the northern boundary of Parcel A be increased from the 60 feet shown on the plan to 75 feet in order to allow space for the construction of a separate garage on the property. Mr. Stubbs agreed to this on the condition that the Crawfords pay for the property to be resurveyed. The Crawfords agreed to this condition and paid the cost of the new survey to Mr. Stubbs then and there. Mr. Crawford and Mr. Stubbs then sketched corrected property lines and wrote corrected measurements for the**

property lines onto the plan attached to the conveyance. These hand-drawn corrections were then initialed by the Crawfords. All of the aforementioned discussions and negotiations and the drawing of the proposed new boundary lines took place in the presence, and with the participation of Mrs. Dorsett Major.

6. The effect of the widening of the northern boundary of Parcel A from 60 to 75 feet was to decrease the size of a parcel of land shown on the plan as running along the eastern boundary of Parcel A and marked "ACCESS RD" (hereinafter called the "Access Road") from approximately 90 feet x 90 feet x 15 feet x 25 feet to a regular 90 x 15 foot rectangle. In the discussions and negotiations that followed the hand-drawn corrections to the plan, Mr. Stubbs agreed that the Access Road was already provided for in the title documents of other purchasers in Shanna's Cove and would never be built upon or obstructed in any way. Mr. Stubbs stated that the Access Road would a) provide other property owners with the beach access promised to them, b) would provide the Crawfords with easy and permanent vehicular access to the back portion of Parcel A and c) would serve as a buffer between Parcel A and the parcel of land shown on the plan and marked "B".

7. Following the hand-drawn corrections to the plan and the aforementioned agreements and assurances, the Deed of Conveyance was executed by both parties and payment was made by the Crawfords.

8. On a date uncertain several weeks after the meeting and execution of the Conveyance, Mrs. Dorsett Major forwarded to the Crawfords a draft Agreement for Sale to which was attached a plan of Parcel A that appeared to have been corrected in accordance with the hand-drawn corrections on the original plan, but was otherwise the same as the original plan attached to the Conveyance. Specifically, the corrected plan showed the 15 foot wide Access Road along the eastern boundary of Parcel A, although the written description of the property still described the Access Road as being 25 feet wide. The survey plan was later determined to have been prepared

incorrectly and by someone other than a licensed surveyor.

…

11. Commencing shortly after their purchase of the property, the Crawfords caused a house and separate garage to be constructed on the property. The house and garage were built pursuant to a building permit obtained for that purpose from the Cat Island District Council. The eastern wall of the house was set five feet back from. and ran parallel to, the eastern boundary of the property, which boundary runs along the Access Road.

12. On a date uncertain in or around September of 2014, Mr. Stubbs and/ or SCEC commenced construction of a concrete building on the Access Road and extending onto the land marked "B" on the plans attached to both the Deed of Conveyance and the Agreement for Sale. The western corner of the foundation of the building extends almost to the eastern boundary of the Crawfords' property, and the western corner of the roof of the building now actually extends over the eastern boundary thereof. Immediately upon the commencement of construction, the Crawfords protested verbally and, through their attorneys, in writing to Mr. Stubbs that the building was blocking the Access Road and would prevent their having convenient access to the back of their property and demanding that construction cease. Mr. Stubbs response was to deny that the Access Road was designated as such and to deny that he and / or SCEC was bound to leave the Access Road undeveloped and/ or open for passage back and forth over it by the Crawfords or any other person. Mr. Stubbs also advised that the building was intended to be a restaurant. Mr. Stubbs did not cease construction.

13. The Crawfords made enquiries with the Cat Island District Town Planning Board (hereinafter called "the Board") and were advised that no building permit had been applied for or issued in respect of the construction underway on Lot B and the Access Road. In the circumstances, the Crawfords requested that the Board issue an order directing that construction cease. On the 25th of November 2014, following a visit to the

construction site by a Building Inspector, the Board wrote to Mr. Stubbs advising him that he was committing a zoning infraction and building without a valid building permit and demanding that he cease construction immediately. Mr. Stubbs did not cease construction.

14. On the 5th of March 2015, the Crawfords' attorneys wrote again to Mr. Stubbs demanding that construction cease immediately. The letter was delivered by a policeman instructed for that purpose by the Crawford's attorneys and finally, construction appeared to come to a temporary halt.

15. The Board then took proceedings against Mr. Stubbs in the Magistrate's Court and, after some delay caused by Mr. Stubbs' contention that the District Councilor had a conflict of interest and could not hear the case, the matter came on for hearing in May of 2015. The Crawfords had not been informed of the hearing date in advance and in any case could not have attended due to Mr. Crawford's hospitalization for serious injuries suffered in an airplane crash. However, the Crawfords were informed afterward that it was claimed by Mr. Stubbs and accepted by the court that in 2011 Mr. Stubbs had applied for and received a building permit for a restaurant.

16. The number of the alleged building permit has never been posted anywhere on the site and no evidence has ever been produced to show that such a building permit ever existed. Mr. Stubbs never mentioned having a building permit when the Crawfords protested verbally to him about the construction project. Mr. Stubbs- only response was to say that the property in question was his and that he could do whatever he wanted with it. Nor was the building permit ever mentioned in any of the correspondence between the attorneys representing the Crawfords and Mr. Stubbs respectively before the Magistrate's court hearing. Construction has continued since the Magistrate's court hearing.

17. On the 3rd of February 2016, the Crawfords attended at the office of the District Councilor and asked to inspect any records kept there in respect of a building permit granted to Mr. Stubbs. After initial resistance by the District Councilor, they were allowed to inspect the

records and discovered that they indicated that in July of 2011 Mr. Stubbs had been granted a building permit, No. 55 of 2011, by the Cat Island District Council for a building to be constructed on an unspecified parcel of land said only to be in the Shanna's Cove area, and that in September of 2014, Mr. Stubbs had paid a small fee to have that permit renewed. The records did not indicate that any inspections had been carried out on Mr. Stubbs' building project.

18. The construction on Lot B and the Access Road constitutes a breach by SCEC of the contractual terms of both the Agreement For Sale and the Conveyance dated the 30th of August 2015.

PARTICULARS OF BREACH OF CONTRACT

i. Failing to transfer to the Plaintiffs a parcel of land matching the written description(s) set out in the Conveyance and / or the Agreement for Sale, i.e. a parcel of land bounded on the east by a road reservation.

ii. Breaching the implied term of the Agreement for Sale providing for the Access Road to remain indefinitely open, unobstructed and available for use as a roadway.

19. Further or alternatively, the oral agreements made between Mr. Stubbs and/or SCEC and the Crawfords during the meeting at the chambers of Donna Dorsett Major & Co. on the 30th of August 2010 constituted a contract collateral to the Agreement for Sale and the Deed of Conveyance, the consideration for which was the Crawfords' purchase of Parcel A and the construction on Lot B and the Access Road constitutes a breach by Mr. Stubbs and / or SCEC of the terms thereof.

PARTICULARS OF BREACH OF COLLATERAL CONTRACT

i. Building on the Access Road in breach of the express agreement not to do so.

ii. Closing and / or obstructing the Access Road in breach of the express agreement not to do so.

20. The construction on Lot B and the Access Road constitutes a derogation by Mr. Stubbs and SCEC from the grant set out in the Conveyance dated the 30th of August 2015.

PARTICULARS OF DEROGATION FROM GRANT

i. Blocking and rendering un-useable the Access Road shown on the plan produced by the Defendants and attached to the Conveyance prepared by the Defendants, on which the Plaintiffs relied in the purchase of the property from the Second Defendant.

ii. Operating a commercial establishment, namely a restaurant and bar, in a heretofore residential neighborhood with the inevitable increase in traffic, noise, odors, garbage and vermin, all of which will directly and negatively affect the Plaintiffs' use and enjoyment of their property.

21. Further or alternatively the construction on Lot B and the Access Road, and the proposed opening of a restaurant on that land, does and will constitute a nuisance and an unreasonable interference with the Plaintiffs' use and enjoyment of their property.

PARTICULARS OF NUISANCE

i. Erecting a building so close to the Plaintiffs' residence that the occupants of each property will inevitably be disturbed by the everyday noises and activities of the other.

ii. Erecting a building so close to the Plaintiffs' residence that the privacy they are entitled to enjoy within their home and property will be substantially reduced.

iii. Erecting a building that will permanently block the Plaintiffs' vehicular access to the rear of their property.

iv. Operating a commercial establishment, namely a restaurant and bar, in a heretofore residential neighborhood with the inevitable increase in traffic, noise, odors, garbage and vermin, all of which will

directly and negatively affect the Plaintiffs' use and enjoyment of their property.

v. Operating a commercial establishment so close to the Plaintiffs' property that its value as a residence will be destroyed.

22. By reason of the matters aforesaid, the Plaintiffs are entitled to declaratory and injunctive relief against the Defendants."

6. The appellants Stubbs and Shanna's Cove filed a joint defence with Dorsett Major. I set out their defence in its entirety:

"1. The Defendants neither admit nor deny paragraph 1 of the amended statement of Claim.

2. Save and except that it is denied that the First defendant is the owner of the second Defendant as distinct from being the owner of the shares of said second Defendant, Paragraph 2 of the Amended statement of claim is admitted.

3. Paragraph 3 of the Amended statement of claim is admitted.

4. Save and except that it is denied that the First Defendant suggested that the Third Defendant represent the Plaintiffs in this transaction or that there was ever any confirmation of any such agreement to the third Defendant via telephone or otherwise, Paragraph 4 is admitted.

5. Third Defendant avers that On 30th day of August, 2010 while at her office, in the presence of the first Defendant acting as director for the second Defendant, and prior to execution of the agreement of sale, she advised the Plaintiffs that they get an attorney, to which the first Plaintiff responded they did not have the time as they were scheduled to return to Texas the following day and wanted this conveyance completed before their departure, neither was any money paid by the Plaintiffs to instruct an attorney.

6. The third Defendant nevertheless advised the Plaintiffs in the presence of the first Defendant to seek independent legal advice to which the first Plaintiff declined further indicating that they did not need an attorney because they knew the First Defendant very well and friends of theirs had purchased property from him before coupled with the fact that they frequented Cat Island and were familiar with the property.

7. The Third Defendant therefore contends that she did not represent the Plaintiffs in this matter and that her instructions came from the first and second Defendants alone. That the only legal fees invoiced by and paid to her by the Crawfords were on behalf of the Second Defendant as per clause ten of the agreement for sale. Further and/or alternatively, if, which is denied, the Third Defendant did represent and or owed a fiduciary duty to the Plaintiffs as alleged, no such duty was breached as the instructions received by the third Defendant from the first and second Defendants were discussed in detail in the presence of the Plaintiffs while in her office on 30th August, 2010.

8. Save and except that the Defendants and each of them deny that the Plaintiffs made any mention of any garage or gave a reason for requesting the additional fifteen feet save for the fact that it was a little narrow, paragraph 5 of the amended statement of claim is admitted.

9. Save and except that the widening of parcel A as per the amended agreement effectively and proportionately reduced the size of the said parcel of land marked "Access Rd", paragraph 6 of the amended statement of claim is vehemently denied.

10. The Defendants and each of them contend that no such assurances covenants were ever given to the Plaintiffs orally or otherwise neither were any discussions had at any time pertaining to the parcel of land marked "Access Rd" save and to the extent of the amended agreement as is alleged in paragraph 6 of the amended statement of claimant (sic) denying each and every allegation therein and puts the Plaintiffs to strict proof thereof. The Third Defendant contends that each and

every term of the amended agreement for sale and subsequent conveyance are reflected in the agreement and conveyance documents. The Third Defendant, understanding that the Plaintiffs were unrepresented explained the agreement in layman's terms to the Plaintiffs in discharge of her duty of care to them.

11. Save and except that any reference to assurances as are mentioned in paragraph 6 of the amended statement of claim are categorically denied in response to which paragraph 9 above is repeated, the Defendants admit paragraph 7 of the amended statement of claim.

12. Save and except that there were a series of meetings and telephone calls between the Plaintiffs and the First Defendant wherein it was agreed in principal that the Plaintiffs would purchase a parcel of land within Shanna's Cove for a price of one hundred and fifty (sic) ($150,000.00) and the Plaintiffs would be responsible for the applicable stamp duty, paragraph 4 of the Plaintiff's statement of claim is denied.

13. Paragraph 8 of the amended statement of claim is denied. The Defendants contend that the Plaintiffs are in full possession of the property as per the terms of the amended agreement and the amendments of the attached plan.

14. Paragraph 9 of the amended statement of claim is admitted save and except that the third Defendant denies any inference that the agreement for sale and conveyance were executed on a date other than 30th August, 2010 and that any legal fees were paid to her or invoiced by her for representing the Plaintiffs.

15. Paragraph 10 of the amended statement of claim is denied and the above paragraphs repeated. Further the third Defendant denies that she breached any duty to the Plaintiffs, be it professional, fiduciary or otherwise.

16. Save and except that the Defendants admit that a structure was built on the subject property, the

Defendants are unable to admit or deny paragraph 11 and the plaintiffs are required to prove same.

17. The Defendants deny that the first and or second Defendant has constructed a concrete building, the roof of which encroaches upon the Plaintiffs property as is alleged in paragraph 12 of the amended statement of claim. The Defendants contend that notwithstanding the wording on the description on the plan of a parcel of land dividing parcel marked "A" from parcel marked "B", the Defendants never gave any assurances in respect of this land neither do the Plaintiffs have any right either at common law, equity or statute to prevent the First and/or Second Defendants from doing such thing or things over or in respect of same to the extent that it is otherwise lawfully permissible. The Defendants contend that the land marked "access rd" measuring 15 x 90 is the property of the second Defendant and said Defendant is free to do with it as it pleases. Further, the Plaintiffs have access to the beach via their lot A which goes from the main road at the northern boundary to the beachfront via the southern boundary.

18. The Defendants deny paragraph 13 of the amended statement of claim. Furthermore and notwithstanding said denial, the Plaintiffs have no locus standi to assert any statement of fact or to bring any action or to assert any right or claim on behalf of the Cat Island District Town Planning Board.

19. Save and except that a letter was received by the first Plaintiff written by the purported attorney for the Plaintiffs, paragraph 14 of the amended statement of claim is denied and paragraph 17 above repeated.

20. Save and except that the Defendants admit that the first and second Defendant had a building permit, the Defendants do not admit neither deny paragraph 15 of the amended statement of claim and puts the Plaintiffs to strict proof thereof.

21. The Defendants deny paragraph 16 of the amended statement of claim and makes no admissions nor denials

to paragraph 17 of said statement and requires the Plaintiffs to prove same.

22. The defendants deny paragraph 18 of the amended statement of claim for the reasons mentioned above which are herein repeated. The contractual terms of the agreement for sale and conveyance were specifically and in every respect conveyed to and is in the possession of the Plaintiffs in that it was agreed that the second defendant would convey to the Plaintiffs land measuring 90 x 90 x 75 x 75 which the second defendant did convey and which the Plaintiffs are in possession of and fully utilizing, Any allegation of any express or implied term or covenant in respect of the property marked "access rd" is categorically denied as the Plaintiffs are accessing the beach over parcel "A" which is a beach front property.

23. Paragraph 19 of the amended statement of claim is denied as no such request was ever mentioned in the chambers of the third defendant neither does any of the defendants have any knowledge of any such request neither was any assurance given in respect of same.

24. Paragraph 20 of the amended statement of claim is denied. The defendants contend that the subject conveyance did not convey unto the Plaintiffs any such right to access the beach as no such right is required given that the Plaintiffs property is in fact beach front property. Moreover the second defendants gave the Plaintiffs an additional fifteen feet as requested without any further consideration. The Defendants contend that notwithstanding the subject property being marked "access rd", no such right of access to the Plaintiff existed either expressly nor impliedly as their property is not otherwise land locked. Furthermore, that the operation of a restaurant by the second defendant on its property does not infringe upon the Plaintiffs "reasonable enjoyment" of their land.

25. Paragraph 21 of the amended statement of claim is denied and the defendants aver that the proposed restaurant is unlikely to amount to any or any alleged nuisance and or an unreasonable interference with the

Plaintiffs property and the Plaintiff is put to strict proof to the contrary.

26. Additionally, the Defendants contend that if, which is denied, any nuisance or interference with the Plaintiffs property is occasioned it is caused or materially contributed to by the fact that the Plaintiffs have built their dwelling structure too close to their own boundary in contravention to the ministry of public works/town planning building code, in particular that the eastern side of their dwelling structure is erected within four to five feet from their boundary.

27. Additionally, the defendants contend that the subject agreement for sale and subsequent conveyance neither expressly nor impliedly gave the Plaintiffs any right to access the eastern boundary of their property via vehicle by traversing over the Second defendants property. The Plaintiffs were and remain free to have vehicular access to the beach via their own property.

28. Save as hereinbefore specifically admitted, the Defendants deny each and every allegation contained in the amended statement of claim as though the same were herein set out and traversed seriatim."

7. A few things are readily apparent from the defence. Firstly, Mrs. Dorsett-Major denied that she represented the Crawfords in the transaction. Secondly, Stubbs and Shanna's Cove did not deny that Mrs. Dorsett-Major represented both them and the Crawfords in the transaction. Thirdly, both Stubbs and Dorsett-Major denied that any agreement was made between the parties as to the property identified as the "Access Road".

8. The trial took place before the trial judge. Mr. and Mrs. Crawford gave oral evidence. Mr. Stubbs also gave oral evidence and Mrs. Dorsett-Major gave oral evidence.

9. In her written judgment the judge identified the issues for her consideration and determination. They were:

"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?"

10. These last two issues only related to Mrs. Dorsett-Major and are the subject of separate appeals.

11. After considering the evidence and making her findings of fact the trial judge gave judgment in the following terms:

> **"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."

12. It is against that judgment that Stubbs and Shanna's Cove have appealed.

13. In their Notice of Appeal the appellants sought to set aside that judgment on the following grounds:

"1. The Learned Judge in the Court below erred in law and in fact in associating Mr. Stubs and Shanna's Cove Estate Company Limited as being one and the same, and in her assessment of the evidence before the Court below.

2. The Learned Judge erred in law and in fact and misdirected herself in a) showing during the trial bias against the Appellants and an unreasonable amount of sympathy for the Respondents; b) that she could not have been fair and objective in assessing the evidence and in her judgment and in failing to consider that there was no evidence to support the conclusions she arrived at and or that the evidence did not warrant or reach the standard required to support such conclusions.

3. The Learned Judge erred in law and in fact in using and or relying on facts or evidence which were not adduced at the trial or a part of the evidence of the trial.

4. The Learned Judge erred in law and in fact in finding that there was an agreement between the parties regarding the access road or that it (the access road) was a part of the agreement for the purchase of the land by the Respondents and in failing to take into consideration applicable principles of law relative to the sale of land and conveyancing matters; and in fact principles which

if they had been applied would have produced different conclusions and which would have been favourable to the Appellants.

5. The Learned Judge erred in law and in fact in finding that the Appellants created a nuisance upon their property for the Respondent and in her interpretation and application of the law of nuisance.

6. The Learned Judge erred in law and in fact in she did not give satisfactory reasons for her conclusions, and that she has not taken proper advantage of having seen and heard the witnesses."

14. At the hearing of the appeal, counsel for the appellant advised the Court that they were abandoning ground two which alleged bias on the part of the trial judge.

15. He indicated that he was relying on the written submissions filed on behalf of the appellants and in his oral submission would focus on the fourth ground contained in the Notice of Appeal.

Ground One - The Learned Judge in the Court below erred in law and in fact in associating Mr. Stubbs and Shanna's Cove Estate Company Limited as being one and the same, and in her assessment of the evidence before the Court below

16. No submissions were made either orally or in writing in support of this ground. It is unclear what the appellants are alleging. The ground complains that the judge erred in **"associating Mr. Stubbs and Shanna's Cove Estate Company Limited as being one and the same".** The judge simply finds that the actions of Mr. Stubbs were the acts of Shanna's Cove. Companies act through their officers and directors. In his evidence Mr. Stubbs admitted that he was **"the principal in the company known as…"**. He is a director of Shanna's Cove. He negotiated the agreement to sell the property owned by Shanna's Cove. He attended the meeting at the offices of Mrs. Dorsett-Major on behalf of Shanna's Cove. He signed the conveyance on behalf of Shanna's Cove. These are not disputed facts.

17. As there are no submissions in support of this ground, it must fail.

Ground Three - The Learned Judge erred in law and in fact in using and or relying on facts or evidence which were not adduced at the trial or a part of the evidence of the trial

18. Again, in his written or oral submissions, counsel for the appellants did not identify what facts or evidence he asserts were relied upon by the trial judge but were not admitted at the trial.

19. To the extent that Mr. Dorsett is referring to the affidavit of Darron Pickstock, who did not give evidence at the trial, the basis of this ground is not clear as the affidavit was admitted into evidence as part of an agreed bundle. Mr. Dorsett confirmed as much during the course of his submissions on appeal as follows:

> **"THE PRESIDENT: Did Mr. Pickstock give evidence at the trial?**
>
> **MR. DORSETT: No, my Lord, he did not. However, her Ladyship referred extensively to Mr. Pickstock's affidavit.**
>
> **THE PRESIDENT: Okay.**
>
> **MR. DORSETT: It was in the agreed bundle, according to the transcript."**

20. In the absence of any information as to what facts or evidence were relied upon by the judge but not adduced at the trial, there is no basis for acceding to this ground and it must fail.

Ground Four - The Learned Judge erred in law and in fact in finding that there was an agreement between the parties regarding the access road or that it (the access road) was a part of the agreement for the purchase of the land by the Respondents and in failing to take into consideration applicable principles of law relative to the sale of land and conveyancing matters; and in fact principles which if they had been applied would have produced different conclusions and which would have been favourable to the Appellants

21. This ground was the primary focus of attack by counsel for the appellants. The trial judge said:

> **"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 go-ing 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.'"**

22. And later:

> **"58 …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."**

23. The submissions of counsel on this ground can be summarized as follows:

> **1. The judge was wrong to find as a fact that the parties agreed that the property marked access road was to remain free and clear.**
>
> **2. Even if there was in fact such an agreement in was not enforceable by virtue of section 4 of the Statute of Frauds'**
>
> **3. Any such agreement was unenforceable for want of consideration.**

24. I will consider each in turn.

25. Appellate courts are loathe to set aside findings of fact made by a trial judge unless it can be demonstrated to be wholly unsupportable on the evidence. In **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25 Lord Kerr said:

> **"[36] The basic principles on which the Board will act in this area can be summarised thus:**
>
> > **1. '…[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which he or she had, as the trial judge, an advantage over any appellate**

> **court. The greater that advantage, the more reluctant the appellate court should be to interfere …'—Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, [2016] 2 LRC 46, [2016] 1 BCLC 26, para [5].**
>
> **2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination—Anderson v City of Bessemer, cited by Lord Reed in para [3] of McGraddie.**
>
> **3. The principles of restraint 'do not mean that the appellate court is never justified, indeed required, to intervene.' The principles rest on the assumption that 'the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.' Where one or more of these features is not present, then the argument in favour of restraint is reduced—para [8] of Central Bank of Ecuador."**

26. This point is also made in **Rowe v Health and Care Professions Council** [2019] EWHC 695 (Admin).

27. In this appeal, the judge, who had heard the evidence and seen the witnesses, preferred the evidence of the Crawfords over that of Mr. Stubbs and Mrs. Dorsett-Major. There is no doubt that a meeting took place at Mrs. Dorsett-Major's office and that the dimensions of the lot and the access road were discussed. A plan with the access road and property was amended and signed by both Mr. Stubbs and the Crawfords. In my judgment it was perfectly reasonable on that evidence to find that there was an agreement made that the property identified as access road was to remain free and clear. Indeed, it would be unreasonable to find that a property identified as an "access road" could be blocked at anytime by the owner.

28. There is no basis for setting aside the finding of the trial judge that the agreement was in fact made.

29. The appellants' reliance on the Statute of Frauds cannot succeed on this appeal.

30. Section 4 of that statute provides:

> **"4. Noe action shall be brought whereby to charge any executor or administrator upon any speciall promise to answere damages out of his owne estate or whereby to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of marriage or upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorised."**

31. Or in modern English:

> **No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement which is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.**

32. The appellants' ground is that any agreement that the access road was to remain free and clear, as the judge so found, was an oral agreement. It was not evidenced in writing and therefore unenforceable by the court. It cannot be given effect.

33. The short answer to this ground is that section 4 of the Statute of Frauds was never pleaded as a defence. The appellant only pleaded that the agreement was never made. At the hearing of the appeal Mr. Dorsett conceded that the issue was never argued before the trial judge. He said:

> **"MR. DORSETT: My Lord, I say, yes, it is the main issue, but, again, Statute of Frauds wasn't argued in the court below."**

34. In The Supreme Court Practice (The White Book) 1991 ed. the learned editors state:

> **"Statute of Frauds or s.40 of L.P.A. 1925 Must be specially pleaded if the defendant desires to rely on it".**

35. The editors refer to **Clarke v Callow** (1876) 46 L.J. Q.B. 53.

36. In **Cresseri and Another v Halla Resources Corporation** [1987] LRC (Comm) 439 the plaintiff brought an action to enforce a guarantee. The following is extracted from the head note:

> **"The trial judge had refused to entertain a defence raised by the appellants based on … the Statute of Frauds … on the ground that it had not been specifically pleaded as required by [the Rules]. The appellants then appealed to the Supreme Court [of Papua New Guinea] arguing that the respondent's original statement of claim was wrong and misleading, in that it referred to a claim on an amount stated and the reference to the guarantee did not give its date or state whether it was oral or written."**

37. The Supreme Court dismissed the appeal. It stated at page 441:

> **"Our rule that specific defences, such as the Statute of Frauds, must be specifically pleaded is not unique to Papua New Guinea. It is copied from England where it had existed at least since the Judicature Acts, see Clarke v Callow (1876) 46 LJ (Com. Law) 53…"**

38. That court continued at page 443:

> **"The function of pleadings is to give fair notice of the case which has to be met and to define the issues which the court will have to decide. Despite the potentially misleading reference to a claim on an account stated in the claim, I do not consider that the present appellants were not informed of the claim on the guarantee, and hence of the need to plead the Statute of Frauds by way of defence to it. They could have obtained details of the guarantee by a request for particulars before framing their defence. They missed that chance to plead the Statute. Later they could have sought leave to file an amended defence. The plaintiff's reply clearly alluded to an oral guarantee; to refer to a note in writing is to adopt**

> **words of section 5 of the Statute "unless … some memorandum or note thereof shall be in writing… "The present appellants could have sought by leave to file a rejoinder to the reply (see Order 8, rule 6) and plead the Statute. Or they could have attempted at outset of the trial to amend their defence to plead the Statute of Frauds, preferably after having given prior notice…"**

39. In the present appeal, counsel for the appellant readily admits that section 4 of the Statute of Frauds was never pleaded or argued before the trial judge.

40. In the circumstances it would simply be wrong to allow this appeal on the ground of the Statute of Frauds.

41. With respect to the absence of consideration, it is important to again recite the facts as the judge found them to be. The agreement was made at the meeting in Mrs. Dorsett-Major's office in August 2016. No written agreement for sale had been made. At that meeting the agreement was made and the conveyance executed. A few days later the purchase price for the property was paid.

42. Again, it was never pleaded that any agreement with respect to the access road was not enforceable for want of consideration. The appellants' case was that it was never made. The Defence stated:

> **"10. The Defendants and each of them contend that no such assurances covenants were ever given to the Plaintiffs orally or otherwise neither were any discussions had at any time pertaining to the parcel of land marked "Access Rd"…"**

43. And later:

> **"22. …Any allegation of any express or implied term or covenant in respect of the property marked "access rd" is categorically denied as the Plaintiffs are accessing the beach over parcel "A" which is a beach front property."**

44. It is readily apparent that the consideration with respect to the agreement relating to the access road was the completion of the agreement to purchase Lot A. In short, the Crawfords would not have completed the purchase without the agreement as to the access road.

45. In my judgment, the issue as to the lack of consideration has no merit. Ground four must also fail.

Ground Five - The Learned Judge erred in law and in fact in finding that the Appellants created a nuisance upon their property for the Respondent and in her interpretation and application of the law of nuisance

46. As to this issue the trial judge said:

> **"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.'

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 (own-ers 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….But the court does not require absolute certainty before it intervenes; something less will suffice….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 mis-chief 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:

> **'There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the 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.'**

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 any-thing 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 (sic), under further or any other relief, is for Mr. Stubbs and his Company to remove the septic tank not later than 31 July 2020."**

47. The tort of private nuisance was considered recently by the Supreme Court of England in the case of **Lawrence and another v Fen Tigers Ltd and others** [2014] 2 WLR 433. In that case, which involved noise emanating from a stadium used for motor sports, Lord Neuberger discussed the law of private nuisance. He said:

> **"2 As Lord Goff of Chieveley explained in Hunter v Canary Wharf Ltd [1997] AC 655, 688, "[the] term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, "The**

Boundaries of Nuisance" (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705–707, where he explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.

3 A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in Sedleigh-Denfield v O'Callaghan [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

4 In Sturges v Bridgman (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

5 As Lord Goff said in Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264, 299, liability for nuisance is

> **'kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see Bamford v Turnley (1862) 3 B & S 66, 83, per Bramwell B.'**

I agree with Lord Carnwath JSC in para 179 below that reasonableness in this context is to be assessed objectively." [Emphasis added]

48. In 2012 the English Court of Appeal, in the case of **Barr and others v Biffa Waste Services Ltd** [2012] EWCA Civ 312, considered the issue of private nuisance arising from foul scents emanating from a neighbouring landfill. The Court said:

"[36] In my view this case is governed by conventional principles of the law of nuisance, which are well-settled, and can be found in any of the leading textbooks. Thus, in Clerk & Lindsell on Torts (20th edn, 2010) Ch 20, the third category of nuisance is that caused by a person 'unduly interfering with his neighbour in the comfortable and convenient enjoyment of land'. Typical examples include 'creating smells by the carrying on of an offensive manufacture or otherwise' (paras 20–06 to 20–09). Relevant to this case are the following rules. (i) There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case (20–10). (ii) There must be a real interference with the comfort or convenience of living, according to the standards of the average man (20–11), or in the familiar words of Knight Bruce VC: 'not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.' (See Walter v Selfe (1851) 4 De G & Sm 315 at 322, (1851) 64 ER 849 at 852.) (iii) The character of the neighbourhood area must be taken into account. Again in familiar nineteenth century language, 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey' (20–13, citing Thesiger LJ, Sturges v Bridgman (1879) 11 Ch D 852 at 856). (iv) The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance (20–16). (v) Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. The latter will apply where a statute authorises the user of land in a way which will 'inevitably' involve a nuisance, even if every reasonable precaution is taken

(20–87). (vi) The public utility of the activity in question is not a defence (20–107)." [Emphasis added]

49. Mitchell, J of the High Court of St. Vincent and the Grenadines in the case of **Fitzroy Mc Kree v John Lewis** Civil Suit No. 88 of 1999 said at paragraph 6:

> **"[6] … At Clerk and Lindsell on Torts, 14th Edition, at para 1393, the following definition appears:**
>
> > **A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.**
>
> **And, a little later in the same paragraph, appear the following relevant examples, none of which help with the question that has to be answered in this case:**
>
> > **Nuisances of the second kind, causing physical damage to land or to something erected or growing upon it, occur when a man allows a drain on his own land to become blocked or makes a concrete paved drive so that the water overflows onto his neighbour's land, maintains a mound of earth or other artificial erection on his own land so as to cause damp to enter his neighbour's land, works the mines under his own land so as to cause the surface of his neighbour's land to subside, allows buildings upon his land to become dilapidated so that they, or parts of them, fall upon his neighbour's land, sets up vibrations on his own land which cause damage to his neighbour's buildings, or emits noxious fumes from his land which damage his neighbour's crops or trees…" [Emphasis added]**

50. It is not disputed that the septic tank is on the appellant's land. In her judgment the judge said:

> **"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…"**

51. Later she said:

> **"93 …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."**

52. The septic tank was "unapproved and uninspected" by local government authority. In my judgment, that is an issue for local government but does not make a septic tank automatically a nuisance. Septic tanks are often placed on a person's property to collect sewer.

53. The judge acknowledged the Crawfords' position:

> **"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."**

54. The judge found that the Crawfords' fear that **"the sewage may leak from the septic tank onto the beach and onto the Crawfords' property is understandably justified"**. She held:

> **"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. <u>The increased danger is the possible hazardous material (i.e. sewage) that would be accumulating in the septic tank that would more than</u>**

> **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." [Emphasis added]**

55. Given that the court had ruled that Stubbs and Shanna's Cove could not build a restaurant on the access road, the speculative fear about "**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."** is academic. The real basis for the removal of the septic tanks as a nuisance was not because of the fear of sewerage, but because the septic tank was aesthetically unappealing. In the absence of any evidence of seepage or odor, in my judgment, the fact that the septic tank is unattractive is insufficient to ground an action in nuisance.

56. As to Rylands v Fletcher, putting a septic tank on your property cannot amount to a "non natural user" of a property.

57. Based on the above, I am of the view that the judge's finding of nuisance and Rylands v Fletcher, grounded upon the placement of the septic tank is wrong and ought to be set aside. The requirement that the appellants remove the septic tank is quashed.

Ground Six - The Learned Judge erred in law and in fact in she did not give satisfactory reasons for her conclusions, and that she has not taken proper advantage of having seen and heard the witnesses

58. This ground simply has no basis.

59. There are two recent decisions of the English court that have addressed the judge's duty to give reasons for his decision. Both explained the seminal decision in **English v Emery Reimbold & Strick Ltd and other appeals** [2002] EWCA Civ 605.

60. In **Staechelin and others v ACLBDD Holdings Ltd and others** [2019] EWCA Civ 817, the court, at paragraph, 39 said:

> **"39. …The principle is clear. The judge must give reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and**

the reasons that have led him to his decision. They need not be elaborate. The judge's duty is to give reasons for his decision. He need not give reasons for his reasons: Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767 at [19]. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted: English v Emery Reim-bold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409; FAGE at [115]. Where there is a conflict of fact between witnesses, it may be enough for the judge to say that one witness was preferred to another because he had a clearer recollection of events, or the other gave answers which demonstrated that his answers could not be relied on: English at [19]." [Emphasis added]

61. Earlier, in **Drury v Rafique and another** [2018] EWHC 1527 (Ch) the court said:

"17. A judge's duty to give reasons was explained in Flannery v Halifax Estate Agents [2000] 1 WLR 377 at 381 g-h. These principles were not in dispute:

'(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex p. Dave) whether the court has mis-directed itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong

on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.'" [Emphasis added]

62. The trial judge was very clear in her judgment why she did not find Mr. Stubbs to be a credible witness: At paragraph 39 she said:

> **"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 pre-**

pared. 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 un-known 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 Craw-fords 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)."

63. And then:

"50 Having had the opportunity to observe the witnesses as they testified, I found Mr. Stubbs to be an un-impressive 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 north-eastern 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 go-ing 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."

64. The submission that the trial judge **"did not give satisfactory reasons for her conclusions"** is incredulous. This ground cannot succeed.

Conclusion

65. This appeal is dismissed, save for the order requiring the appellant to remove the septic tank which is quashed.

66. The Court reserves its decision on costs.

The Honourable Sir Michael Barnett, P

67. I agree.

The Honourable Mr. Justice Evans, JA

68. I also agree.

The Honourable Madam Justice Bethell, JA