COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 155 of 2021

B E T W E E N

MICHELET MERONARD

Appellant

AND

BAHAMAS TELECOMMUNICATIONS COMPANY LTD

First Respondent

BAHAMAS REEF DEVELOPMENT COMPANY LTD

Second Respondent

BEFORE:	**The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Jones, JA** **The Honourable Madam Justice Bethell, JA**
APPEARANCES:	**Miss Travette Pyfrom Counsel for the Appellant** **Mr. Raynard Rigby, Q.C. with Ms. Asha Lewis counsel for the First Respondent** **Mr. Robert Adams, Q.C. with Mr. Edward Marshall II, counsel for the Second Respondent**
DATES:	**10 May 2022; 11 August 2022**

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Civil Appeal – Trespass – Appeal from dismissal of Appellant's action – Whether the judge erred in finding that the First Respondent's entitlement to use the land arose from the exceptions and reservations for the utility easements and rights captured in the Appellant's conveyance – Defence of Laches – Negligent Misrepresentation – Fraudulent Misrepresentation – Whether the judge erred in finding that there was no misrepresentation on the part of the Second Respondent when the lot was sold to the Appellant – Importance of Pleadings – Burden of proof – Legal Burden – Evidential Burden – Sections 82, 83 & 84 Evidence Act

The Appellant appealed against the entirety of a written Judgment of a Supreme Court judge which denied his claims for trespass, misrepresentation, and breach of warranty against the Respondents; dismissed his action and awarded costs to the Respondents.

In his Notice of Appeal Motion the Appellant sought an order from the Court of Appeal which would: (i) set aside the Judgment in its entirety; (ii) order the Respondents to pay him damages for trespass and misrepresentation as claimed; and (iii) award him costs of the appeal and in the court below.

The Notice of Appeal raised 17 grounds of appeal (8 grounds against the 1st Respondent (BTC) and 9 against the 2nd Respondent (DevCo)) seeking to impugn the learned judge's decision in various ways.

After hearing arguments, the Court took time to consider its decision.

Held: Appeal dismissed. The judge's decision is affirmed in its entirety. The Appellant shall pay the Respondents' costs of the appeal, to be taxed if not agreed.

On the totality of the evidence led at the trial, the Appellant's complaint that the judge had ignored the pleadings has absolutely no merit and cannot be sustained. Having regard to the evidence led by BTC's 2 witnesses; and having regard as well to section 83 of the Evidence Act, the burden of proof remained on the Appellant to establish *by evidence* that he was in lawful possession of the land through which the 1st Respondent's infrastructure ran. This he was unable to do.

The documentary evidence in the form of the Conveyance on which the Appellant relied to support his trespass action against BTC, clearly established that he was not in possession of those portions of the lot through which BTC's telecommunications infrastructure ran.

Even in the absence of BTC adducing *documentary evidence* of the 1986 purchase and acquisition of the assets and infrastructure of its predecessor, in the face of the exceptions and reservations to the grant set out in the Conveyance itself, the Appellant's trespass case against BTC could not possibly succeed. Quite simply, the evidence confirmed the presence of *pre-existing* utility infrastructure and apparatus within the Windsor Park Subdivision as well as easements, rights and privileges affecting the lot. The Conveyance itself clearly showed that while the Appellant became the legal owner of Lot 2, he never took ownership or possession of the *"land and hereditaments comprised in BTC's undertakings and systems";* and more specifically, those portions of the lot through which BTC's existing cables and telecommunications services, undertakings and systems ran.

For all these reasons the Appellant could not maintain his claim in trespass. In the end, the judge was plainly correct to find that BTC's "*entitlements are captured in the conveyance"* and to dismiss the trespass claim. In the result, we are satisfied that grounds 1 to 8 have no merit and they

are dismissed. The learned judge's decision dismissing the appellant's trespass action against BTC is accordingly affirmed.

In the light of the authorities to succeed in his pleaded claim against DevCo for damages for negligent misstatement, the Appellant had to establish that DevCo knowing that it was being trusted or relied on by him to answer his inquiry of 16 July 2008, and having chosen to answer the question he posed, thereby created a special relationship between them to which the law attached a duty on DevCo to perform with such care as the circumstances required.

To establish a case of negligent misstatement against DevCo Mr. Meronard had a mountain to climb. In the first place his letter of inquiry of 16 July 2008 (extracted above) was addressed to the Port Group Limited, not DevCo. Secondly, Port Group Limited was not joined as a party to the action and agency was not expressly pleaded. Even so, it was denied and needed to be proved. Properly understood, Mr. Meronard's letter of 16 July 2008 inquiring as to the status of the lot was no more than a simple inquiry to the Port Group to ascertain whether Lot 2 Bonita Street, which he wished to purchase, was available for sale.

Furthermore, examination of the letter reveals that nothing in it can or could be interpreted as having conveyed to Port Group that it was being trusted or relied upon to answer questions or convey information as to the validity of the title or as to the existence of easements and underground cables on the property. Quite simply, Mr. Meronard failed to establish that there was any special relationship between himself and DevCo to ground his action in negligent misstatement against DevCo. DevCo's letter to Mr. Shurland of 17 February 2010 enclosing the draft conveyance for his review and approval, contained no false or misleading information, representations or warranties on which Mr. Meronard's pleaded claims could properly be founded.

The judge was quite correct to find that BTC's entitlements were *"captured in the Conveyance"* itself. In the face of the evidence of BTC's witnesses coupled with the exceptions and reservations for the utility easements and rights (expressly excluded from the grant) and described in the Conveyance itself, the judge was also plainly correct in her finding (at paragraph 47) that *"there was contained in the conveyance to the property an easement for utilities";* and her further finding (at paragraph 52) that Lot 2 was *"not burdened by the presence of the cables which ran along the boundary line between Lots 1 and 2."* There is no merit in grounds 9, 10, 11, 12, 13, 14, 15 and 17 and they are dismissed.

Bacciottini & anor v. Gotlee and Goldsmith (A firm) [2016] EWCA Civ 170 mentioned
Bahamas Ferries Limited v. Charlene Rahming SCCivApp. No. 122 of 2018 considered
Bartan Investment Co. Ltd v. Ricardo Anton Russell SCCivApp No. 113 of 2010 considered
Bocardo SA v. Star Energy UK Onshore Ltd and anor [2011] 1 AC 380 considered
Brooks v. Muckleston [1909] 2 Ch 519 mentioned
Chaffe v. Kingsley [2000] 1 EGLR 104 mentioned

Delta Properties Limited v. Bahamas Electricity Corporation SCCivApp. No. 1 of 2013 mentioned
Hedley Byrne & Co Ltd v. Heller & Partners Ltd (1964) AC 465 considered
In re Webb's Lease [1958] Ch. 808 considered
JA Pye (Oxford) Ltd v. Graham [2002] 3 All ER 865 mentioned
John Hanna v. Imperial Life Assurance Company of Canada [2007] UKPC 29 considered
Johnstone v. Holdway [1963] 2 WLR 147 considered
Loveridge and Loveridge v. Healy [2004] EWCA 173 mentioned
Mcphilemy v. Times Newspapers Ltd [1999] 3 All ER 775 considered
Moncrieff & Anor v. Jamieson & Ors (Scotland) UKHL 42 considered
Montague Investments Limited v. Westminster College Ltd & Mission Baptist Church 2015/CLE/gen/00845 mentioned
P. O. Nedlloyd v. BV Arab Metals Co. (No 2) (CA) [2007] 1 WLR 2288 mentioned
Powell v. McFarlane (1977) 38 P&CR 452 mentioned
Regency Villas Title Ltd v. Diamond Resorts (Europe) Ltd UKSC 57 considered
Rosalyn Brown v. Cotswold Group Limited and anor, [2020] 1 BHS J. No. 96 mentioned
Ryadell Defour v. The Attorney-General of Trinidad and Tobago [Unreported] Claim No. CV 2015-02212 mentioned
Schweder v. Worthing Gas Light & Coke Co [1912] 1 Ch. 83 considered
Shannon Ltd v. Venner Ltd [1965] Ch. 682 considered
Stackhouse v. Barston 19 Ves 453 mentioned
White v. Jones [1995] 2 AC 207 applied

J U D G M E N T

Decision delivered by The Hon. Madam Justice Crane-Scott, JA:

Introduction

1. By Notice of Appeal filed on 30 December 2021, the Appellant ("Mr. Meronard") appealed a written Judgment of the Hon. Justice Ruth Bowe-Darville (retired) handed down on 19 November 2021 in which she denied his various claims against the Respondents; dismissed his Supreme Court action and awarded them costs.

2. Mr. Meronard now seeks an order from this Court which would: (i) set aside the Judgment in its entirety; (ii) order the Respondents to pay him damages as claimed; and (iii) award him costs of the appeal and in the court below.

3. After hearing the parties' respective oral arguments, we reserved to consider the merits of the appeal.

4. We have dismissed the appeal. The detailed reasons for our decision appear below.

5. The following background facts (together with excerpts from the pleadings and relevant portions of the judge's written decision) will provide the necessary context for consideration of the grounds of appeal.

Background Facts

6. On 16 June 2008 Mr. Meronard wrote to the Port Group Limited inquiring as to the availability of Lot 2 Bonita Street, "Windsor Park" Subdivision and expressing his interest in purchasing the property. The relevant parts of Mr. Meronard's letter stated:

> **"Dear Sir:**
>
> **Re: <u>Block #2, Lot #2, Bonita Street, Windsor Park)</u>**
>
> **I write to the above captioned to which I request information on the status of the property mentioned.**
>
> **I am seeking to obtain the same from your company and therefore wish to make a formal application to purchase the same.**
>
> **I thank you in advance for your assistance in affording me this opportunity to own a piece of rock in Grand Bahama.**
>
> **I can be contacted at the above address and telephone numbers listed.**
>
> **Best regards,**
>
> **…….**
> **Michelet Meronard"**

7. Approximately 3 months later, the Legal Counsel for the Port Group Limited by way of its letter of 23 September 2008 replied to Mr. Meronard's inquiry and offered to sell the lot to him. The Port Group's letter stated:

> **"Dear Mr. Meronard:**

Re: <u>Windsor Park, Block 2, Lot 2 (Bonita Street)</u>

Your letter of June 16th, addressed to Mr. Albert Gray, regarding the above captioned, has been forwarded to this office for action. The delay in replying is regretted.

Preliminary investigations into the title of the said lot have been completed and we advise that the sale can proceed. Accordingly, Management is agreeable to offering the lot for sale at a price of Twenty-five Thousand Dollars ($25,000.00). The property is zoned as Duplex. Similarly, the annual service charge will be Seven Hundred Thirty-three Dollars ($733.00).

We require a Ten percent (10%) deposit upon acceptance of this offer and the balance of the purchase price within Ninety (90) days of deposit remittance.

Please acknowledge your understanding and acceptance of the above by signing and returning the attached copy of this letter along with your certified cheque deposit of Ten percent (10%), within Fourteen (14) days hereof. Upon receipt of the same, will prepare our standard legal documents to effect this transaction.

Yours sincerely,
PORT GROUP LIMITED
…….
Nekcarla M. Grant, (Miss)
Legal Counsel"

8. By way of his letter dated 6 October 2008, Mr. Meronard signaled his acceptance of the offer to purchase the lot at the price stated and forwarded his certified cheque to the Port Group for the required 10% deposit.

9. The sale/purchase transaction in respect of Lot 2 Bonita Street, Windsor Park was subsequently formalized by way of an Agreement to For Sale and Development dated 31 October 2008 between himself and the 2nd Respondent ("DevCo"). Thereafter Mr. Meronard engaged attorney-at-law Mr. Carlson H. Shurland of Messrs. Shurland & Co to represent him in completing the conveyancing formalities.

10. By its letter of 17 February 2010, DevCo forwarded to Messrs. Shurland & Co a draft conveyance together with an Epitome of Title and other documents for his review and approval. DevCo's letter to Mr. Shurland stated:

> **"Dear Mr. Shurland:**
>
> **Re: <u>Lot 2, Block 2, Windsor Park Subdivision, Freeport, Grand Bahama Bahama Reef Development Company Limited to Michelet Meronard</u>**
>
> **Your letter of the 3rd instant refers.**
>
> **Please find enclosed for your review the following:**
>
> 1) **Draft Indenture of Conveyance**
> 2) **Epitome of Title**
> 3) **Completion Statement**
> 4) **Affidavit of Repossession**
>
> **Once we have received the balance of the purchase price, and the form of Conveyance has been agreed upon, we shall engross the same for execution and proceed with the completion of the matter.**
>
> **Kindly acknowledge receipt of the enclosed documents by signing and returning to us the attached copy of this letter.**
>
> **Yours sincerely,**
> **BAHAMA REEF DEVELOPMENT COMPANY LIMITED LIMITED**
> **…….**
> **Tyrone L.E. Fitzgerald**
> **General Counsel"**

11. By letter dated 27 April 2010 addressed to the Port Group's legal Department, Messrs. Shurland & Co., approved the form of the draft Conveyance and requested the final Conveyance and Completion Statement. The relevant portions of Shurland & Co's letter stated:

> **"Dear Mr. Fitzgerald,**

Re: <u>Lot 2, Block 2, Windsor Park Subdivision, Freeport, Grand Bahama Bahama Reef Development Company Limited to Michelet Meronard</u>

We acknowledge receipt of your letter dated 17 February 2010, draft conveyance in favour of our client Michelet Meronard and copies of back titles for the purchase of the above property.

We advise that we have reviewed and approved the draft conveyance.

In this regard, we ask that you forward to us the final conveyance and your completion statement for the same.

Sincerely.
SHURLAND & CO

……
Carlson H. Shurland Esq"

12. Ultimately, by an Indenture of Conveyance dated the 3 May 2010, DevCo conveyed to Mr. Meronard a parcel of land containing 15,625 square feet or thereabouts, being Lot 2, Block 2 "Windsor Park" Subdivision, Freeport on the Island of Grand Bahama and more particularly described in the Third Schedule to the Conveyance and as delineated on the Subdivision Plan annexed thereto.

13. The Habendum in the Conveyance expressly referenced certain exceptions and reservations ("the Utility Easements and Rights") which were set out at length in the First Schedule. Additionally, the grant to Mr. Meronard was expressly stated to be **<u>subject</u>**, *inter alia*, to the 'Restrictions and Stipulations' as to user more particularly set out in the Second Schedule.

14. The relevant portions of the Habendum provided:

> **"1.(1) <u>The Vendor AS BENEFICIAL OWNER hereby grants and conveys unto the Purchaser</u> ALL THAT the said hereditaments described in the Third Schedule hereto TOGETHER WITH a right of way (in common with all other persons having the like right) with and without vehicles for all purposes connected with the lawful use and enjoyment of the said hereditaments over and along the portion of the road within the Subdivision nearest to the lot of the Purchaser leading to and from the nearest main arterial road and over and along all of the main arterial roads in "the Port Area" delineated and**

coloured pink on the diagram or plans recorded in the Registry of Records of the said Bahama Islands in Volume 585 at pages 496 to 498 inclusive and in Volume 585 at pages 485 to 489 inclusive from and to the Subdivision to and from the public road <u>EXCEPTING AND RESERVING as set forth in the First Schedule hereto</u> TO HOLD the same (except and reserving as aforesaid) unto the Purchaser to the uses following, that is to say:

(a) ….
(b) ….
(c) ….
(d) ….
(e) <u>Subject as aforesaid TO THE USE of the purchaser and his heirs successors and assigns *in fee simple*</u>.

2. <u>SUBJECT</u>:

(a) <u>to the restrictions and stipulations set out in the Second Schedule</u>;
(b) to the observance of the covenants by the Purchaser hereinafter contained; and
(c) to the exceptions and reservations contained in the Crown Grant to the Grand Bahama Port Authority Limited dated the 15th day of December, A.D., 1958 and now of record in the said Registry of Records in Volume 159 at pages 583 to 587A inclusive…" [Emphasis added]

15. The First Schedule containing the "Utility Easements and Rights" which were expressly reserved and excluded from the grant of the fee simple to Mr. Meronard are reproduced in full below:

"THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

<u>Utility Easements and Rights</u>

<u>EXCEPTING AND RESERVING unto the Vendor</u> The Grand Bahama Development Company Limited The Grand Bahama Port Authority, Limited The Grand Bahama Utility Company Limited, Grand Bahama Power Company Limited <u>Bahamas Telecommunications Company Limited</u> and Cable Bahamas Limited and their respective assigns and successors in

title *owner or owners* for the time being respectively *of the* water electricity *telephone* and cable supplies and *services undertakings and systems in the area* and *of the lands and hereditaments comprised in such undertakings and systems* the easements, rights, and privileges of laying erecting inspecting maintaining repairing and renewing all such cables pipes lines conduits wires poles and other apparatus on under and over the said hereditaments as may be necessary or desirable for the purposes of furnishing and maintaining water electricity and cable supplies and services to the Subdivision and every part thereof and the furnishing and maintaining of drainage, sewerage systems and facilities therefor *together with* all such easements rights and privileges of entering upon excavating and breaking open the surface of the said hereditaments hereby assured and otherwise as may be necessary or desirable for or in connection with any of the foregoing purposes PROVIDED that the Vendor and the said The Grand Bahama Development Company Limited, The Grand Bahama Port Authority Limited, The Grand Bahama Utility Company Limited, Grand Bahama Power Company Limited, Bahamas Telecommunications Company Limited and Cable Bahamas Limited and their successors in title doing no unnecessary damage to any building or improvement in the exercise of such easements rights or privileges and restoring and making good the surface of any part of the said hereditaments broken or excavated in any such exercise as aforesaid." [Emphasis added]

16. The relevant portions of the Second Schedule detailing the 'Restrictions and Stipulations' as to user of the lot referenced in the Habendum to the Conveyance are reproduced below:

"THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

Restrictions and Stipulations

1. ...

…

7. No buildings or structures including porches or projections of any kind shall be built or constructed at less distance than twenty (20) feet from any street or road boundary line and at a less distance than fifteen feet from any other boundary line of any lot of land in the Subdivision.

…

16. No structure, wall, fence or hedge over Four (4) feet in height shall be constructed, erected, placed, planted, set out or maintained or permitted upon any lot within Twenty (20) feet of any boundary line thereof which extends along any street or other public way.

…

22. Any or all of the rights, powers and obligations, easements and estates reserved or given to the Vendor may be assigned by the Vendor to any person, partnership, association, group or corporation which shall agree to assume said rights, powers, duties and obligations and carry out and perform the same. Any such assignment or transfer shall be made by appropriate instrument, in writing, in which the assigns or transferee shall join for the purpose of evidencing its consent to the acceptance of such rights and powers, and such assignees or transferees shall, thereupon, have the same rights and powers and be subject to the same obligations and duties as are herein given to and assumed by the Vendor.

23. Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat (sic) *and* over the rear ten (10) feet of each lot. Within these easements no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities, or which may change the direction of flow of drainage channels in the easements, or which may obstruct or retard the flow of water through drainage channels in the easements. Representatives of the utility companies shall have the right to enter upon the said hereditaments if it shall be necessary so to do for the purpose of gaining access to the area reserved for easements of utilities and drainage." [Emphasis added]

17. In 2016 (some 6 years after he had taken possession of the property under the Conveyance) whilst clearing the lot and digging the foundation for construction of a duplex, Mr. Meronard's construction crew discovered underground wires running through the property. Also found was a hole at the entrance to the property with underground cable lines running through.

18. Mr. Meronard then contacted officials from both Respondents regarding these discoveries and demanded the removal of what he considered to be unauthorized encroachments on his property. Having obtained no satisfaction, he filed a Writ action in the Supreme Court against them both.

19. Following the close of pleadings, the matter was referred to a judge for Case Management. On 3 May 2019, Case Management Orders were made in the usual way to ready the action for trial. A trial date of 4 February 2020 was initially fixed for hearing before a judge, but it appears that that trial date was not kept.

20. Ultimately, the trial was held on 2 and 3 March 2021 with witnesses for the respective parties being called for cross-examination before the judge. Three (3) witnesses testified for the Plaintiff, these were Mr. Meronard himself, Mr. Renio Ferguson and Mr. Wendell Grant II. BTC called two (2) witnesses namely, Mr. Trevor Turnquest and Ms. Pavia Crossgill; while DevCo called one (1) witness, Ms. Karla McIntosh.

21. Following the trial in March 2021, the learned judge reserved her decision; and on 19 November 2021 she handed down a written Judgment which (as we noted) is the subject of this appeal.

The Pleadings

22. For ease of discussion, the relevant portions of Mr. Meronard's claims against BTC and DevCo respectively are reproduced below together with extracts of the respective Defences and a summary of Mr. Meronard's Reply to BTC's Defence.

23. *The Claim Against BTC:* As appears from the Writ of Summons filed on 17 May 2018, Mr. Meronard's claim as against BTC was grounded in the common law tort of trespass. He sought the following relief:

> **"*…as against the 1st Defendant*:**
>
> **(a) Damages for trespass and loss arising out of the Defendant's wrongful possession by way of running underground cables on Lot #2, Block 2 situate in "Windsor Park" subdivision on the island of Grand Bahama.**
> **(b) Mesne profit calculated yearly from 21st May 2010 and continuing until possession is delivered up.**
> **(c) An order that the Defendant within 7 days remove the underground and all other cables and connectors.**

(d) Further or alternatively damages, together with interest on those damages, under the Civil Procedure Award of Interest Act.

(e) Costs" [Emphasis added]

24. In his Amended Statement of Claim ("The Amended SOC"), filed 13 January 2020, Mr. Meronard made the following averments in furtherance of his claims:

> **"2. <u>Between October 2010 and to present date the 1st Defendant wrongfully entered and took possession by permitting the installation of underground cable wires on the Plaintiff's property</u> <u>and</u> <u>by use of the Plaintiff property to service its business operations on the island of Grand Bahama</u> <u>and</u> <u>remains in possession of the property</u>.**
>
> **…**
>
> **4. The 2nd Defendant reserved to itself utility easements and rights including the rights of the Defendants to lay, erect, inspect, maintain, repair replace and renew all cable lines, conduits wires poles and other apparatus on under and over the said property as may be desirable for the purposes of furnishing and maintaining water electricity telephone and cable services to the Subdivision ("the said reservation").**
>
> **5. The reservation provided that the Defendants in exercising the easements and rights afforded by the said easements shall do no unnecessary damage to any building or improvements.**
>
> **…**
>
> **20. On or about October 2016 the Plaintiff while clearing the lot to commence construction and digging the foundation, <u>found wires running underground through the property</u>. At the same time the Plaintiff also located <u>a hole at the entrance of his property with cable lines running underground</u> (hereinafter referred to as the "encroachment").**
>
> **…**
>
> **24. Halbert Ledher, an employee of the 2nd Defendant and one of the persons attending to the maintenance of the cables confirmed to the Plaintiff that the duct was owned by the 1st Defendant. Mr. Ledher informed the Plaintiff that the Plaintiff was to contact Elvis Bartlett, another employee of the 1st Defendant for information concerning the encroachment.**
>
> **25. Despite repeated attempts to reach a resolution the 1st Defendant refused, until the Plaintiff retained Counsel to**

> **resolve the issue of the encroachment. <u>The 1st Defendant was persistent in its assertion that it had not encroached on the Plaintiff's property</u>.**
> **26. The delay in determining who was responsible for the encroachment resulted in all building works on the duplex being suspended; the Plaintiff being uncertain as to the nature and extent of the underground wiring. <u>The 1st Defendant during this period also insisted on its right to operate from the property</u>.**
> **…**
> **29. <u>The Plaintiff was given many assurances by the Defendants that the encroachment would be removed</u> but as at the date of filing of the claim herein the encroachment remains.**
> **30. By letter of the Plaintiff's attorneys dated the 24 August 2017 <u>the Plaintiff requested the 1st Defendant to remove the cables, but the Defendants have failed to do so</u>.**
> **31. In all the circumstances <u>the Plaintiff has suffered loss and damage and has been deprived of the use and enjoyment of his property</u>. A reasonable sum for the use and enjoyment of the property is $400.00 per month."** [Emphasis added]

25. <u>*BTC's Defence*</u>: BTC denied Mr. Meronard's claim. It filed its Defence on 10 August 2018. The Defence was subsequently amended on 18 December 2019; and re-amended on 28 February 2020.

26. In its Re-Amended Defence, BTC denied Mr. Meronard's claim and put Mr. Meronard to strict proof of his various assertions. The relevant paragraphs of BTC's Re-Amended Defence contained the following denials and assertions:

> **"3. The Defendant <u>denies that it wrongfully entered and took possession as alleged by the Plaintiff or at all at paragraph 2 of the Statement of Claim.</u> The Defendant avers that <u>through the acquisition of the previous telecommunications provider</u> in Grand Bahama <u>in or about 1986</u> *(sic)* acquired the rights and easements and other appurtenance thereto. Pursuant to section 84 of the Communications Act, 2009 the Defendant is entitled to make use of land for the provision of electronic communications services.**
>
> **5. Insofar as the Communications Act, 2009 makes no provision for the 1st Defendant to access land, the 1st Defendant makes no admission to paragraphs 4 and 5 of the Statement of Claim.**
> **…**

> **7. The 1st Defendant makes no admission to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23 and 24 of the Amended Statement of Claim.**
>
> **8. The 1st Defendant denies paragraph 25, 26, 27, 28 and 29 of the Amended Statement of Claim and puts the Plaintiff to strict proof of the averments therein.**
> **…**
>
> **12. <u>Notwithstanding that the Plaintiff was at all material times fully aware of the facts relied on in the Statement of Claim, he was nevertheless guilty of prolonged, inordinate and inexcusable delay in bringing this action and seeking the relief claimed herein</u> and he acquiesced in the matters complained of, further he thereby caused or permitted the First Defendant to behave, as in fact it did, that the Plaintiff did not intend to make the claim herein or any claim against the First Defendant, such that <u>the First Defendant acted to its prejudice and/or has otherwise or would now be prejudiced</u>.**
>
> **13. In the premises <u>the Plaintiff is barred by laches from claiming the alleged or any relief against the First Defendant</u> and/or it is inequitable and unjust to grant the Plaintiff the alleged or any relief as sought.**
>
> **14. …"** [Emphasis added]

27. <u>*Mr. Meronard's Reply:*</u> On 8 January 2020, Mr. Meronard filed a formal Reply to BTC's Amended Defence of 18 December 2019. He denied the assertions of fact in BTC's Amended Defence and put BTC to proof of the same. He alleged that BTC's underground cable was not at the rear of his lot as depicted on the plan referenced at paragraph 23 of the Second Schedule to the Conveyance (reproduced above).

28. He denied knowledge of the location of BTC's cable infrastructure prior to entering into the purchase agreement with DevCo. He further asserted that at no time during the discussions for the purchase of the lot and before its subsequent conveyance to him did DevCo inform him of the presence of BTC's cable at the front of the property. He further claimed that at the time of the purchase the property had been vacant and overgrown and that the cable easement could not be seen by viewing the property.

29. At paragraph 6 of his Reply, Mr. Meronard referenced paragraph 22 of the Second Schedule to his Conveyance. Relying on this provision, he claimed there had been no assignment of the land through which BTC's underground cables ran. He further asserted that the 'back title deeds' which had been provided to him had not included the appropriate instrument in writing (envisaged by paragraph 22) evidencing any consent or agreement by any assignee or

transferee to assume any or all of the rights, powers, and obligation, easements and estates reserved and given to the Vendor (DevCo).

30. Finally, Mr. Meronard denied BTC's assertion that his claim was barred by Laches. He asserted that any delay which had transpired in his bringing the action was attributable to the conduct of both Respondents.

31. *The Claim Against DevCo:* As appears from his Writ of Summons, Mr. Meronard's action against DevCo was founded in claims for damages for negligent misrepresentation, fraudulent misrepresentation and breach of warranty respectively. The Endorsement of Claim on the Writ stated:

> **"…*as against the 2nd Defendant*:**
>
> **(a) Damages for negligent misrepresentation as to the extent of the easement granted to the 1st Defendant on the property the subject of the agreement for sale between the Plaintiff and the 2nd Defendant in circumstances where there were no visible signs of the easement.**
> **(b) Damages for fraudulent misrepresentation and breach of warranty for falsely concealing the extent of the easement granted to the 1st Defendant.**
> **(c) Further or alternatively damages, together with interest on those damages, under the Civil Procedure Award of Interest Act.**
> **(d) Costs."** [Emphasis added]

32. Between paragraphs 3 through 31 of the Amended SOC, Mr. Meronard made specific averments in furtherance of his claims against DevCo. The relevant paragraphs are reproduced below:

> **"3. The 2nd Defendant by a conveyance dated the 21 September 2010 and recorded in Vol. 11177 at pages 488 to 508 granted and conveyed the lot the subject of the action herein to the Plaintiff.**
>
> **4. The 2nd Defendant reserved to itself utility easements and rights including the rights of the Defendants to lay erect, inspect, maintain, repair and renew all cable lines, conduits wires poles and other apparatus on or under and over the property as may be desirable for the purposes of furnishing and maintaining water electricity telephone and cable services to the Subdivision ("the said reservation").**

5. The reservation provided that the Defendants in exercising the easements and rights afforded by the said easements shall do no unnecessary damage to any building or improvements.

6. Prior to the execution of the said conveyance the Plaintiff visited the property and was satisfied with the layout of the utility easements and the wiring poles and other apparatus referred to in paragraph 4 hereof.

7. By letter dated the 23rd September 2008 from the Port Group Limited to the Plaintiff the Port Group Limited acting on behalf of the 2nd Defendant expressly represented that *"investigations into the title of the said lot have been completed and [that] the sale can proceed*.".

8. By the same letter [23rd September 2008] the 2nd Defendant expressly indicated that *the lot was zoned for a Duplex* and that it attracted annual service charge.

9. By a further letter dated the 17th February 2010 from the 2nd Defendant to Counsel for the Plaintiff, the 2nd Defendant *expressly* represented that *the root of title to the lot as set out in its Epitome of title is a valid root of title*.

10. The Epitome of title did not include any reference to the ownership and operation of commercial duct system from the lot.

11. In reliance on and induced by these representations the Plaintiff on the 3rd May 2010 executed the conveyance.

12. The representations set out above were *express terms* of the agreement to purchase.

13. In fact, the representations were false in that *the title to the lot is burdened by* the 1st Defendant's commercial duct which houses cables running the length of the Plaintiff's property and from which the 1st Defendant supplies telephone services to its Freeport customer base thereby profiting from the use of the Plaintiff's property.

14. The Plaintiff paid the 2nd Defendant the sum of $25,000.00 in consideration of the property.

…

18. On the 9 August 2016 the Plaintiff executed an agreement to construct a duplex unit on the property (the agreement).

19. The construction agreement provided for the payment of a mobilization fee in the amount of $23,246.87 which was paid by the Plaintiff. The duplex was to be completed on or before December 2016.

20. On or about October 2016 the Plaintiff while clearing the lot to commence construction and digging the foundation found wires running underground through the property. At the same time the Plaintiff located a hole at the entrance to the property with cable lines running underground (hereinafter referred to as the "encroachment").

21. The Plaintiff immediately contacted the 2nd Defendant and was informed by Ms. Van-Haylen, an employee of the 2nd Defendant, that the 2nd Defendant had no knowledge of the encroachment.

22. For one year the 2nd Defendant denied knowledge of the existence and ownership of the encroachment on the Plaintiff's property.

23. Almost a year after discovering the encroachment the 2nd Defendant entered the property to conduct maintenance on the cables. It was at this point that the Plaintiff identified the owner and operator of the encroachment.

…

26. The location of the encroachment resulted in the Plaintiff having to reduce the square footage of his building and has prevented the completion of the building as agreed. Consequently, the Plaintiff was forced to rent the premises at a rate of $800.00 per month commencing in January 2017.

28. As a result of the reduction in the overall square footage of the building it is estimated that the Plaintiff will lose $75 to $100.00 reduction in the rental income per month for a period of 20 years. The Plaintiff will lose between $18,000.00 and $24,000.00 per year from rental income.

…

30. By letter of the Plaintiff's attorneys dated the 24 August 2017 the Plaintiff requested the 1st Defendant to remove the cables but the 1st Defendant have failed to do so.

31. In all the circumstances the Plaintiff has suffered loss and damage and has been deprived of the use and enjoyment of his property. A reasonable sum for the use and enjoyment of the property is $400.00 per month." [Emphasis added]

33. *DevCo's Defence:* DevCo (like BTC) also denied Mr. Meronard's various claims. Its initial Defence was filed on 5 October 2018, but this was subsequently amended on 19 February 2020. In its Amended Defence, DevCo denied Mr. Meronard's claims and put Mr. Meronard to strict proof of his various assertions. The relevant paragraphs of the Amended Defence containing DevCo's denials, admissions and assertions are reproduced below:

"…

2. Paragraph 2 of the Statement is not admitted.

3. Save and except –

(i) the Indenture of Conveyance made between the 2nd Defendant and the Plaintiff and dated 3 May 2010 was lodged for record on 21 September 2010,

paragraph 3 of the Statement of Claim is admitted. The Conveyance will be referred to at the trial of this action for its full terms meaning and effect.

4. Paragraph 4 of the Statement of Claim is admitted.

5. Paragraph 5 of the Statement of Claim is admitted.

6. Paragraph 6 of the Statement of Claim is not admitted.

7. Paragraph 7 of the Statement of Claim is not admitted and the 2nd Defendant avers as follows: By letter dated 23 September 2008, legal counsel for Port Group Limited informed the Plaintiff that *"Preliminary investigations into title of the said lot have been completed and we advise that the sale can proceed."* The 2nd Defendant contends notwithstanding the representation as aforesaid the legal counsel for Port Group Limited did not owe the Plaintiff any duty of care in relation *(sic)* the transfer of the subject Lot ("the Property") to the Plaintiff and the Plaintiff is put to strict proof otherwise.

8. Paragraph 8 of the Statement of Claim is admitted.

9. Paragraph 9 of the Statement of Claim is denied. The 2nd Defendant contends that by letter dated 17 February 2010 from General Counsel of the 2nd Defendant to counsel for the Plaintiff, the 2nd Defendant provided to the Plaintiff: (i) a draft Indenture of Conveyance for the Property; (ii) an Epitome of Title; (iii) a Completion Statement and (iv) an Affidavit of Repossession. In doing so, the 2nd Defendant expressly indicated the draft Indenture of Conveyance enclosed with its letter would be executed once, inter alia, the form of the Conveyance has been agreed upon. In addition, the 2nd Defendant further contends that the said documents were provided for approval by the Plaintiff's attorneys *(sic)* who was at material time acting on the Plaintiff's behalf in connection with the transfer of the Property.

10. Paragraph 10 of the Statement of Claim is admitted.

11. …

12. Save that it is admitted an Agreement for Sale and Development ("the Agreement") was made on 31 October 2008 between the 2nd Defendant and the Plaintiff, paragraph 12 of the Statement of Claim is denied. The 2nd Defendant avers that the express terms of the Agreement contain no representations as to the scope of the utility easements and rights reserved by the 2nd Defendant. The Agreement will be referred to at the trial of this Action for its full terms meaning and effect.

13. Paragraph 13 of the Statement of Claim is denied and the Plaintiff is put to strict proof to show that the title to the Property was *burdened by* the installation of the 1st Defendant's duct system under the property.

14. …

24. Paragraph 24 of the Statement of Claim is denied. The 2nd Defendant contends that Halbert Ledher is not and never has been an employee of the 2nd Defendant. In addition, it is further contended that because the cables are owned and operated by

> **the 1st Defendant the 2nd Defendant would and could not have sent any of its employees to perform maintenance on the *(sic)* any cables that may be located under the Property as alleged by the Plaintiff and the Plaintiff is put to strict proof to show otherwise.**
>
> **….**
>
> **30. …"** [Emphasis added]

34. Against the background of the pleadings, we turn to examine the written decision.

The Written Judgment

35. As we indicated earlier, in a written Judgment handed down on 19 November 2021, the judge denied all of Mr. Meronard's claims against the Respondents; dismissed his Supreme Court action and awarded costs to the Respondents. The reasons for her decision are contained in her 54-paragraph written Judgment, now under appeal.

36. Between paragraphs 1 through 13, the judge began by giving a factual background to the dispute and by summarizing the parties' pleadings.

37. Thereafter, between paragraphs 14 through 45, she set out the issues for her determination, and summarized aspects of the evidence and the respective submissions together with the legal authorities on which each party relied in support of their respective positions.

38. As we see it, the core of the judge's reasoning (including her findings of fact and her final conclusions) are located in the Judgment between paragraphs 46 through 54.

39. At paragraph 46 the judge referred broadly to the evidence and to her observations of the demeanour of the witnesses who had testified before her and stated:

> **"46. The Court heard the evidence and observed to *(sic)* demeanour of the witnesses in this matter. After considering the evidence and submissions supplied by the parties, the Court preferred the evidence of the First and Second Defendants herein."**

40. Thereafter at paragraphs 47 and 48, the judge set out why she was satisfied that Mr. Meronard's claims against DevCo were unsustainable and unsupported by the evidence. Her findings at paragraphs 47 and 48 rejecting his claims against DevCo are reproduced below and speak for themselves:

> **"47. In all the circumstances, the claims by the Plaintiff were unsustainable and not supported by the evidence. <u>The Court is satisfied that there was no misrepresentation on the part of the</u>**

> **Second Defendant when the lot was sold to the Plaintiff. On the witness stand, the Plaintiff himself acknowledged that he had independent counsel who assisted him in the completion of the purchase of the lot. The fact *(sic)*, and this court so finds, that there was contained in the conveyance to the property an easement for utilities. Further, the evidence of the First Defendant, which this Court believed, was that the Plaintiff had use of the services, that is, telephone and internet services, which the cables complained of supply to Windsor Park Subdivision.**
>
> **48. Interestingly enough, during cross-examination of the Plaintiff he accepted that the existence of the manhole also did not alter his building plans. Only that the manhole's 'cosmetic view' being a challenge."** [Emphasis added]

41. Between paragraphs 49 and 51, the learned judge turned her attention to Mr. Meronard's trespass claim against BTC and BTC's defence. She considered the issue of laches and BTC's assertion that Mr. Meronard had been guilty of inordinate delay and acquiescence. She extracted dicta from the cases of **P. O. Nedlloyd v. BV Arab Metals Co. (No 2) (CA)** [2007] 1 WLR 2288; **Brooks v. Muckleston** [1909] 2 Ch 519 and **Stackhouse v. Barston** 19 Ves 453 which she appeared to have considered.

42. Between paragraphs 52 and 54 she made the following further findings before finally dismissing Mr. Meronard's claim against both Respondents and awarding them costs. The judge found:

> **"52. The Plaintiff's property was *not burdened by* the cables thereon, as stated above, these were the subject of the easement in his conveyance. To now assert that the underground infrastructure put in place to supply telephone and internet services to the subdivision should be removed from his property and that he should be compensated is wholly unreasonable. There was no trespass to the property in all the circumstances. The Plaintiff's land was *not burdened by* the presence of the cables which from the evidence run along the boundary between lots 1 and 2. The First Defendant's entitlements are captured in the conveyance. The Plaintiff's demands are unreasonable in light of the overall benefit that the infrastructure which this Court has found was accounted for in the easement in the conveyance. For the Plaintiff to assert some years after the purchase without any evidence to support that his building was**

affected and delayed by the presence of the cables is astounding. Even more astounding is that the Plaintiff…

53. <u>The Plaintiff's claim as set out in his Amended Statement of Claim is denied and the action dismissed</u>.

54. Costs to the First and Second Defendant to be taxed if not agreed." [Emphasis added]

43. As we noted at the outset, Mr. Meronard disagrees with the Judge's decision and asks that it be set aside in its entirety and that he be awarded damages together with costs of the appeal and in the court below.

44. Against the foregoing background, we may now examine the grounds of appeal.

The Grounds of Appeal

45. Mr. Meronard raised 17 grounds of appeal. Grounds 1 through 8 focused on the judge's findings with respect to his trespass claim against BTC; while grounds 9, 10, 11, 12, 13, 14, 15 and 17 were directed to the dismissal of his claims against DevCo. Ground 16 was a general ground relating to the award of costs to both BTC and DevCo. The grounds are lengthy and argumentative. Furthermore, they are crafted in very general terms and fail to identify specific paragraphs of the judge's decision against which complaint is made. There is no need to reproduce them here.

46. In her written Submissions (and at the hearing before us) Counsel for Mr. Meronard, Miss Pyfrom identified the gist of his complaints about the judge's decision as they relate to each Respondent.

Grounds 1 - 8 – (The trespass claim against BTC):

47. As we understand the grounds, Mr. Meronard broadly complains about the dismissal of his trespass claim against BTC. He says that the judge was wrong to have found (as she did at paragraph 52 of her Judgment) that: (i) *"The Plaintiff's property was not burdened as he asserted by the cables thereon, as…these were the subject of the easement in his conveyance;"* and (ii) *"There was no trespass to the property in all the circumstances"*; (iii) *"The Plaintiff's land is not burdened by the presence of the cables which from the evidence run along the boundary between lots 1 and 2."* In her submissions Miss Pyfrom was especially critical of the learned judge's further finding (iv) that: *"The First Defendant's entitlements are captured in the conveyance."*

48. The complaints are summarized at paras 14 -16 of Miss Pyfrom's written Submissions in the following terms:

"*As against the 1st Respondent ("BTC")*

14. The Appellant contends generally that the learned judge erred in all her findings *vis-à-vis* BTC.

15. More particularly the judge made findings which were not supported by the evidence and BTC's pleaded case.

16. The judge failed to consider uncontested relevant evidence which supported the Appellant's case that BTC has committed and continues to commit acts of trespass so long as its cables remain on the Appellant's property."

49. Between paragraphs 17 through 25 under the heading *"Issue 1- Trespass"*, Miss Pyfrom took issue with the judge's findings at paragraph 52 (extracted earlier). After summarizing aspects of the *viva voce* evidence of BTC's witnesses given at the trial, Miss Pyfrom continued her submissions at paragraphs 23 through 25 as follows:

> **"23. BTC <u>never pleaded nor did it purport to rely on the Appellant's conveyance to support its claim</u> to an entitlement to use the land in the manner it is presently being used.**
>
> **24. <u>The judge went beyond and outside the scope of the pleadings</u> and the 1st Respondent's evidence to find that the Appellant's conveyance granted BTC an easement to operate from the Appellant's land.**
>
> **25. In fact the 1st Respondent's evidence was that it was unaware that the Appellant had purchased the land."** [Emphasis added]

50. Thereafter, at paragraph 33, Miss Pyfrom submitted that by BTC's own pleaded case, it had asserted that its right to operate from the property arose from a 1986 transaction with a previous utility provider (which document, she said, BTC had never produced). She noted that BTC had further relied, in the alternative, on section 9 of the Communications Act, 2009.

51. In support of her various submissions, Miss Pyfrom laid over the authorities of: **Bahamas Ferries Limited v. Charlene Rahming,** SCCivApp. No. 122 of 2018 (pleadings); **Delta Properties Limited v. Bahamas Electricity Corporation,** SCCivApp No. 1 of 2013 (trespass); **Bartan Investments Co. Ltd v. Ricardo Anton Russell,** SCCivApp No. 113 of 2010 (trespass); **Regency Villas Title Ltd v. Diamond Resports (Europe) Ltd UKSC 57** (easements); **Moncrieff & Anor v. Jamieson & Ors (Scotland),** UKHL 42 (easements); **Chaffe v. Kingsley,** [2000] 1 EGLR 104 (easements); and **In re Webb's Lease,** [1958] Ch. 808 (easements).

52. In his response (summarized at paragraph 17 of BTC's appellate Submissions) Counsel for BTC, Mr. Raynard Rigby, Q.C., contended that Mr. Meronard's appeal should be dismissed because BTC had adduced sufficient evidence to prove its pleaded case. Mr. Rigby further submitted that the trial judge had expressly preferred BTC's evidence over that of Mr. Meronard because it was more plausible. This led, he said, to the judge being satisfied that BTC was not guilty of trespass or wrongful possession; and that Mr. Meronard's claim should be dismissed.

53. Mr. Rigby further submitted that the learned judge did not err in fact or law when she found that there was no trespass. He says that Mr. Meronard had failed to adduce evidence that satisfied the necessary elements to prove a claim of trespass against BTC. He further relied on sections 82 to 84 of the Evidence Act, Ch. 65 which govern the burden of proof; and cited the following authorities: **Ryadell Defour v. The Attorney-General of Trinidad and Tobago, [Unreported] Claim No. CV 2015-02212** (burden of proof); **Rosalyn Brown v. Cotswold Group Limited and another, [2020] 1 BHS J. No. 96** (burden of proof)**; Montague Investments Limited v. Westminster College Ltd & Mission Baptist Church, [2020] 1 BHS J. No. 11** (trespass).

54. Turning specifically to grounds 3, 4 and 6 and the issue of the utility easements, Mr. Rigby laid over for our consideration an extract from page 172 of Gilbert Kodilyne's text *"Commonwealth Caribbean Property Law"* (Cavendish Publishing Limited 2000); and the cases of **Johnstone and another v. Holdway,** [1963] 2 WLR 147 (easement) and **Shannon Ltd v. Venner Ltd,** [1965] Ch. 682 (easement).

55. We have considered the contending submissions. We also had the benefit of the Record of Appeal and the Supplemental Record which included, *inter alia*, the Conveyance, the Judgment, the pleadings, the trial transcripts and other materials contained therein.

56. As we see it, the issues raised by grounds 1 through 8 may be examined under the following headings: (i) Was trespass proved? (ii) Did BTC have an easement?; and (iii) Delay and laches.

57. As is well known, 'a trespass occurs when there is an unjustified intrusion by one party upon land which is in the possession of another.' Blackstone Commentaries on the Laws of England, Vol 3, p.20; *Clerk & Lindsell on Torts* (19th edition) para 19-01.

58. It is also well established that a person who wrongfully bores into or places or fixes anything in or through land owned or occupied by another may be found to have committed a trespass to land at common law. The following extract taken from the Chapter "Torts to Land" in Volume 97A of *Halsbury's Laws of England* (2021 Edition) along with the two authorities cited at footnote 10 thereof, may usefully be considered:

> **"161. A person's <u>unlawful presence</u> on land in the possession[1] of another is a trespass for which a claim may be brought[2], even**

> **though no actual damage is done[3]. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it[4] or takes possession of it[5], or expels the person in possession[6], or pulls down or destroys anything permanently fixed to it[7], or wrongfully takes minerals from it[8], or places or fixes anything on it[9], or in it[10], or if he erects or suffers to continue on his own land anything which invades the airspace of another[11]. He also commits a trespass to land if, having entered lawfully, he remains after his authority to be there expires[12].”** [Emphasis added]

59. The authorities also show that the unauthorized laying of gas and oil pipelines in, under or through land owned and occupied by another may constitute an actionable trespass at common law. See **Schweder v. Worthing Gas Light & Coke Co,** [1912] 1 Ch. 83 and **Bocardo SA v. Star Energy UK Onshore Ltd and anor,** [2010] 1 All ER 26.

60. In its illuminating decision in **Bocardo** authored by Lord Hope, the UK Supreme Court has held, *inter alia,* that the owner of the surface is the owner of the strata beneath it and that accordingly, the claimant's title extended down to the strata through which the 3 oil wells and their casing and tubing passed. The evidence established that the defendants (pursuant to certain Crown licences) had drilled 3 underground pipelines diagonally into an oil reservoir located beneath the claimant's land from a wellhead situated *outside* the claimant's land. At paragraphs 27 and 28 the Supreme Court said:

> **“27. …the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else…There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about…**
>
> **28. I would hold therefore that the appellant's title extends down to the strata through which the three wells and their casing and tubing pass.”** [Emphasis added]

61. Specifically addressing whether the claimant/appellant was in factual possession of the substrata hundreds of feet below the surface of the land ostensibly in its possession, the UK Supreme Court considered the authorities of **Powell v. McFarlane**, (1977) 38 P&CR 452 and **JA Pye (Oxford) Ltd v. Graham**, [2002] 3 All ER 865. The Court agreed with the Court of Appeal that as the paper title holder to the strata and all within it (other than any gold, silver,

saltpetre, coal and petroleum which belong to the Crown at common law or by statute), the claimant/appellant had the *prima facie* right to possession of those substrata so as to be deemed in factual possession of them.

62. At paragraph 31, the Supreme Court said:

> **"31. …<u>As the paper title carries with it title to the strata below the surface, the appellant must be deemed to be in possession of those strata so as to be deemed to be in possession of the subsurface too</u>. There is no one else who is claiming to be in possession of those strata through the appellant as the paper owner."** [Emphasis added]

63. With these principles in mind, we return to consider the 3 issues raised by grounds 1 through 8 which we earlier identified

64. <u>*Was trespass proved?:*</u> In the case at bar, Mr. Meronard (as the occupier and owner of the paper title to Lot 2 in the form of his Conveyance dated 3 May 2010) commenced an action against BTC in trespass following his discovery in 2016 of a manhole and underground cables beneath his land. In its defence, BTC denied the trespass claim, asserting that its cables and infrastructure along with easements and other rights had been acquired in 1986 from the previous utility provider. After considering all the evidence, the learned judge found that there was *"no trespass to the property in all the circumstances;"* and further, that BTC's entitlements had been *"captured in the Conveyance"*.

65. As noted, Miss Pyfrom submitted that the judge erred in <u>all</u> her findings *vis-à-vis* BTC. In particular, she attacked the judge's finding that: *"The First Defendant's entitlements are captured in the conveyance"* on the basis that the finding went beyond the scope of the pleadings inasmuch as BTC had 'never pleaded or purported to rely on the Conveyance to support its defence to the trespass claim."

66. Respectfully, we found no merit in this submission. Miss Pyfrom is obviously correct that in civil proceedings pleadings are *"critical to identify the issues"* and *"to mark out the parameters of the case that is being advanced by each party."* See **Mcphilemy v. Times Newspapers Ltd,** [1999] 3 All ER 775 and **Loveridge and Loveridge v. Healy,** [2004] EWCA 173 referenced in **Bahamas Ferries** *(above).* That said, on this appeal it cannot seriously be contended that BTC's defence at trial was any different from that advanced in its pleadings.

67. In its Re-Amended Defence as well as through the evidence adduced through its witnesses, BTC consistently denied Mr. Meronard's trespass claim and asserted that in or about 1986 (a period well over 20 years <u>*before*</u> Mr. Meronard took possession of the property) it had acquired

the utility apparatus, rights and easements appurtenant to Lot 2 by reason of its purchase and acquisition of the interests of the previous telecommunications provider in Grand Bahama.

68. Miss Pyfrom is correct that BTC did not produce *documentary evidence* to support its pleaded assertion. However, Mr. Rigby is also correct when he says that BTC had adduced sufficient evidence at trial to prove its pleaded case.

69. BTC's Senior Manager of Legal, Regulatory and Carrier Services, Pavia Crossgill, for example, provided evidence of *the fact of* the purchase and acquisition by BTC around 1986 of the assets and line of business of a predecessor. This was evidence which (if accepted) was capable of supporting BTC's pleaded defence. In her Witness Statement, entered into evidence at the trial, Pavia Crossgill testified as follows:

> **"2. Around 1986 BTC purchased the assets and line of business of the Grand Bahamas Telecommunications Company (GBTC). Along with that purchase was all of its rights on the Island of Grand Bahama.**
>
> **3. I note and was reliably informed that GBTC enjoyed certain easements and similar rights to lay wires, pipes and conduits on Grand Bahama.**
>
> **4. I am also aware that by a Conveyance dated 3rd May 2010 between the Plaintiff and the Second Defendant, there were specific rights of easements for the installation and maintenance of utilities, which included telephone lines and maintenance of utilities which included telephone lines and conduits."** [Emphasis added]

70. Apart from Pavia Crossgill, BTC's other witness, Trevor Turnquest, also testified at the trial in BTC's defence. Trevor Turnquest was formerly BTC's Director of Network Maintenance, and his evidence was that he had been stationed in Freeport, Grand Bahama in 1986. Significantly, it was his role to oversee and maintain BTC's entire network. In his Witness Statement (entered into evidence at the trial) Trevor Turnquest provided evidence of his personal knowledge of the area since 1986 and of *the presence of* the manhole and infrastructure in the Windsor Park Subdivision for a period exceeding of 25 years!!! Trevor Turnquest stated:

> **"2. I started my career at BTC in 1986 as a technician in Freeport, Grand Bahama. I was appointed Vice President of Network Operations in 2016 later around November 2018 I moved to Freeport and take (sic) up residence. I am fully aware of BTC's assets on the Island of Grand Bahama.**

3. I am aware of certain easements and similar rights that BTC enjoys on the Island of Grand Bahama to facilitate its telecommunications infrastructure. The easements generally allow and permit BTC to lay wires, pipes and conduits over certain properties in Grand Bahama. These easements may also be extended to other utility companies and are not generally peculiar to BTC.

4. I am familiar with the Plaintiff's property in the Windsor Park Subdivision ("the Subdivision"). I visited it on several occasions prior to the Plaintiff's complaints. The complaints centered on the location of BTC's telecommunications infrastructure and upon investigation it was determined that the apparatus was properly located in the Subdivision. The Plaintiff wanted the manhole and cables removed because he said it prevented him from completing the duplex on the property.

5. I wish to confirm that BTC's apparatus is in the Subdivision. The apparatus includes a manhole and fibre optic cables.

6. The BTC manhole has been on the property for more than twenty-five (25) years. It was likely installed by the Grand Bahama Telephone Company when it owned and ran telecommunications operations in Grand Bahama.

7. The manhole is stationed at the end of Lot No. 2 in the Subdivision and it is approximately 18 feet from Bonito Street. It is a standard manhole, measuring approximately three (3) feet wide. It is not an obstruction on the property or an eye-sore.

8. I also recently surveyed the exact location(s) of the BTC cable in the Subdivision and confirm the following:

- **(a) The cable is running across the rear of lots 1 and 2 of the Subdivision.**
- **(b) It is buried at the standard depth of 3 by 6 feet.**
- **(c) The manhole is 18 feet from the road.**
- **(d) The fence is placed at 18 by 3 feet from the road, and**
- **(e) The dwelling is constructed 18 feet from the property line."**

> **9. As far as I am aware, <u>the Conveyance granted to the Plaintiff grants unto BTC an easement for the installation and maintenance of utilities, which included telephone lines and conduits</u>. The manhole and the cables are lines and conduits used for the provision of telecommunications services…."** [Emphasis added]

71. As will appear from the transcripts, the evidence given by BTC's 2 witnesses remained unshaken following their cross-examination at trial.

72. Apart from BTC's 2 witnesses, the learned judge also had before her in the agreed trial bundle, *documentary evidence* in the form of a Conveyance relied on by both Mr. Meronard and DevCo. In its Re-Amended Defence BTC denied paragraph 5 of the Amended SOC; made no admissions as to paragraphs 3, 4 and 6. It further put Mr. Meronard to strict proof of his various assertions. There is no question that the Conveyance was in evidence before the judge; and that it was central to the issues which were before the court. In our view, the learned judge was unquestionably entitled, if not obliged, to consider it for its full terms, meaning and effect.

73. As is evident both from the Habendum and the First Schedule to the Conveyance (extracted earlier) the grant of the fee simple to Mr. Meronard expressly excluded and reserved the "Utility Easements and Rights" set out in the First Schedule. Furthermore, the First Schedule specifically listed several companies and utility providers, (including DevCo (as Vendor) and BTC) together with their respective assigns and successors-in-title, who were collectively described as the **"owner or owners"** for the time being respectively <u>*not only*</u> of the water, electricity, telephone and cable supplies and services, undertakings and systems in the area, <u>*but also*</u> of the "lands and hereditaments comprised in such undertakings and systems" the easements, rights, and privileges of laying erecting inspecting maintaining repairing and renewing all such cables pipes lines conduits wires poles and other apparatus on under and over the said hereditaments…" [See paragraphs [14] and [15] above.]

74. As we see it, even in the absence of BTC adducing *documentary evidence* of the 1986 purchase and acquisition of the assets and infrastructure of its predecessor, in the face of the exceptions and reservations to the grant set out in the Conveyance itself, Mr. Meronard's trespass case against BTC could not possibly succeed. Quite simply, the evidence confirmed the presence of *pre-existing* utility infrastructure and apparatus within the Windsor Park Subdivision, as well as easements, rights and privileges affecting the lot. The Conveyance itself clearly showed that while Mr. Meronard undoubtedly became the legal owner of Lot 2, he could not claim to have taken ownership or possession of the *"land and hereditaments comprised in BTC's undertakings and systems"*; and more specifically, those portions of the lot through which BTC's *existing* cables and telecommunications services, undertakings and systems ran.

75. We are satisfied that on the totality of the evidence led at the trial, the judge was entitled to hold (as she did at paragraph 47 of her Judgment) that she **"preferred the evidence of the First and Second Defendants herein";** and to conclude (as she did at paragraph 52) that: (i) *"The Plaintiff's property was not burdened as he asserted by the cables thereon, as…these were the subject of the easement in his conveyance;"* and (ii) *"There was no trespass to the property in all the circumstances"*; (iii) *"The Plaintiff's land is not burdened by the presence of the cables which from the evidence run along the boundary between lots 1 and 2";* and (iv) *"The First Defendant's entitlements are captured in the conveyance."*

76. What must not be overlooked is that based on sections 82 through 85 of the Evidence Act, Ch. 65 and paragraph 2 of his Amended SOC, Mr. Meronard had the legal burden of proving that BTC had unlawfully trespassed on Lot 2 in 2010 ***after*** he had taken possession of the land as owner under the Conveyance. At the end of the trial, the totality of the evidence led (including the Conveyance) seriously undermined Mr. Meronard's pleaded case.

77. It is worth reiterating that at the trial, BTC led evidence from its 2 witnesses which (if accepted) supported BTC's defence to the trespass claim. BTC's evidence at trial established (in line with its pleaded case): (i) *the fact* of BTC's acquisition in 1986 of the assets and line of business of the previous telecommunications provider; and (ii) *the fact* that BTC 's manhole and fibre-optic cables had been on the property for more than twenty-five (25) years.

78. Added to this, and as we have already noted, the Conveyance itself expressly excluded from the grant, not only the utility easements and rights for water, electricity, telephone and the cable supplies and services, undertakings and systems already in the area, ***but also*** the *"lands and hereditaments"* through which BTC's infrastructure ran.

79. In summary, we are satisfied that on the totality of the evidence led at the trial, Miss Pyfrom's complaint that the judge had ignored the pleadings has absolutely no merit and cannot be sustained. As we have found, having regard to the evidence led by BTC's 2 witnesses and having regard as well to section 83 of the Evidence Act, the burden of proof remained on Mr. Meronard to establish *by evidence* that he was in lawful possession of those portions of land through which BTC's infrastructure ran. This he was unable to do. Ultimately, the documentary evidence in the form of the Conveyance on which Mr. Meronard relied to support his trespass action, clearly established that he neither owned nor possessed those portions of the lot through which BTC's telecommunications infrastructure ran. For all these reasons Mr. Meronard ultimately could not maintain his claim against BTC in trespass. In the end, the judge was plainly correct to find that BTC's "*entitlements are captured in the conveyance"* and to dismiss the trespass claim.

80. *Did BTC have an easement?:* In view of the position we have taken in relation to the trespass issue, it should follow that it is unnecessary to consider Miss Pyfrom's submissions regarding the intricacies of the law of easements. As we have said, the judge was plainly correct to find

that BTC's entitlements were *"captured in"* Mr. Meronard's Conveyance itself. In the face of the evidence of BTC's witnesses coupled with the exceptions and reservations for the utility easements and rights (expressly excluded from the grant) and described in the Conveyance itself, the issue whether BTC had an easement or not is moot and falls away. In short, the judge's finding on this point is supported by the evidence and we decline to interfere with it.

81. *Delay and Laches:* Once again, in view of our decision on the trespass issue, there is no necessity for us to consider Miss Pyfrom's further complaint about the judge's observation (at paragraph 52 of the Judgment) regarding the delay which had transpired in bringing the action against BTC in 2016, years after he had purchased Lot 2. For the reasons we have just outlined, on the totality of the evidence before the judge, Mr. Meronard was not in possession of those portions of the land through which BTC's infrastructure passed. In short, he had no actionable claim in trespass against BTC. In the circumstances, whether the judge was justified in commenting (as she did) on the delay in instituting the trespass action really has no bearing on the correctness (or otherwise) of her ultimate finding which was that BTC was not liable in trespass.

82. For all the foregoing reasons we are satisfied that grounds 1 to 8 have no merit and they are dismissed. The learned judge's decision dismissing Mr. Meronard's trespass action against BTC is accordingly affirmed.

Grounds 9, 10, 11,12, 13, 14, 15 &17 – (The claims against DevCo):

83. Mr. Meronard's complaints on grounds 9, 10, 11, 12, 13, 14, 15 and 17 challenged the correctness of the judge's decision to dismiss Mr. Meronard's claims against DevCo. The submissions are found between paragraphs 46 through 98 of the Appellant's written submissions. Miss Pyfrom launched her attack on the judge's findings by reference to: (a) the pleadings; (b) the erroneous treatment of the evidence; and (c) the law of easements.

84. *The Pleadings:* Between paragraphs 46 through 50 Miss Pyfrom highlighted the parties' respective pleadings. She set out aspects of Mr. Meronard's Amended SOC, DevCo's Amended Defence and Mr. Meronard's Reply. Miss Pyfrom complained that although DevCo had not pleaded estoppel, the judge erred in fact and in law in 'finding' (as Miss Pyfrom says she did at paragraphs 41 and 42 of the Judgment) that Mr. Meronard's conduct in accepting the title, paying the purchase price and taking possession of the property gave rise to an estoppel as he had waived any objection he might otherwise have had to the title. Miss Pyfrom adverted once again to the law of pleadings and relied once again on the authority of **Bahamas Ferries** (above).

85. In response, Counsel for DevCo Mr. Adams submitted that ground 9 was completely unsustainable as it would be plain and obvious from the written Judgment itself that the learned judge had made no 'finding' whatsoever regarding waiver and estoppel. He submitted that ground 9 should be dismissed. We agree.

86. Having considered the matter, we are satisfied that paragraphs 41 and 42 of the written Judgment contain no 'findings' of fact or of law by the learned judge that an estoppel had arisen in favour of DevCo. Properly understood, all that the judge was doing in those two paragraphs, was reciting DevCo's submissions in relation to waiver and estoppel. In short, ground 9 is without merit and is dismissed.

87. On ground 10, Miss Pyfrom complained that the learned judge could not have reasonably found in favour of an estoppel since DevCo's evidence was that it did not become aware of the underground cables until Mr. Meronard brought their existence to its attention.

88. As we have already found in relation to ground 9, we are satisfied (contrary to Miss Pyfrom's submission) that the learned judge never 'found' that Mr. Meronard was estopped from asserting that the title to the property was burdened by the utility easements beneath Lot 2. What the judge actually 'found' is clearly set out at paragraph 47 (extracted above) which is that there had been *"no misrepresentation"* on the part of the Second Defendant (DevCo) *"when the lot was sold to the Plaintiff*." Once again, there is no merit in ground 10 which is also dismissed.

89. *Erroneous treatment of the evidence:*. Next, between paragraphs 51 and 70 under the sub-heading: *"Issue 1- false representation"*, Miss Pyfrom turned her attention to the remaining gounds. On grounds 11, 12, 13, 14, 15 and 17, she attacked the judge's treatment of the evidence adduced at the trial, making numerous complaints.

90. In support of ground 11, Miss Pyfrom drew attention to Mr. Meronard's assertion set out in his Reply to DevCo's Amended Defence that Clause 23 of the Conveyance had expressly indicated that the easements for installation of utilities and drainage facilities had been reserved *"over the rear ten (10) feet of each lot."*

91. She submitted that the judge failed to properly consider the evidence in relation to the location of the utility easements referenced in the Conveyance and had erroneously found (at paragraph 52 of the Judgment) that the evidence established that the cables *"ran along the boundary line between Lots 1 and 2."* This 'finding', she contended, was erroneous in fact and in law and ignored Clause 23 of the Second Schedule to the Conveyance which expressly provides, *inter alia*, that easements for installation and maintenance of utilities and drainage are reserved *"as shown on the recorded plat (sic) and over the rear ten (10) feet of each lot."*

92. For his part, Counsel for DevCo, Mr. Adams adverted to the Habendum (extracted earlier) and to the exceptions and reservations in respect of the "Utility Easements and Rights" referenced in the Conveyance. He submitted that all of the material necessary for the judge to ascertain the exact locations of the utility easements was before the court. The materials, he said, included (but were not limited to) the Conveyance and various survey plans which had been adduced into evidence by both parties.

93. Mr. Adams submitted that it could not reasonably be contended that the judge failed to consider the evidence as it was plain and obvious that she had done so. He highlighted the fact that between paragraphs 26 and 31 of her written Judgment, the learned judge had extracted portions of Mr. Meronard's testimony under cross-examination by counsel for both Respondents with respect to the location of the utility easements on the property, as well as the restrictions and stipulations with respect to the 'buildable area' permitted by the Conveyance.

94. Mr. Adams submitted that the judge was entitled to state (as she did at paragraph 46) that she *"preferred the evidence of the First and Second Defendants herein*." He cited the Privy Council authority of **John Hanna v. Imperial Life Assurance Company of Canada,** [2007] UKPC 29 and urged us not to interfere with the learned judge's primary findings of fact.

95. We have considered the respective submissions regarding the judge's finding of fact as to the location of BTC's cables. Miss Pyfrom is correct when she says that Clause 23 of the Second Schedule to the Conveyance suggests, *inter alia,* that easements for the installation and maintenance of utilities and drainage were *"reserved as shown on the recorded plat (sic) and over the rear ten (10) feet of each lot."* Respectfully however, Clause 23 cannot be read in isolation from other provisions within the Conveyance itself, more especially its operative parts such as the Habendum and the First Schedule.

96. As we have already found at paragraph [78] in our discussion of grounds 1-8, read in conjunction with the First Schedule, the Habendum expressly carved out of the grant of the fee simple to Mr. Meronard exceptions and reservations regarding *pre-existing* "Utility Easements and Rights" which were declared to be **"owned by"** DevCo (as the Vendor) and by the named entities and utility providers, including BTC.

97. It seems to us that additionally, Clause 23 ought not to be read in isolation from Clause 22 and the other provisions within the Second Schedule which contain the "Restrictions and Stipulations" as to user to which the grant to Mr. Meronard was expressly made subject. Clause 22 in particular provides that any or all rights, powers, easements or estates "reserved or given" to DevCo may be assigned by appropriate instrument in writing to third parties who were required to join in the instrument for the purpose of accepting the rights, powers, easements or obligations.

98. Properly understood, Clause 23 of the Second Schedule references two distinct categories of easements described as easements for installation and maintenance of utilities and drainage facilities. These were firstly, those "*reserved and shown on the recorded plat"* (sic), and secondly, those *"over the rear ten (10) feet of each lot."*

99. Apart from Clause 23, the operative provisions of Mr. Meronard's Conveyance specifically carved out of the grant, *pre-existing* utility easements and rights together with "the land and hereditaments" through which they passed, and this undoubtedly provided other evidence from

which the judge could find (as she did at paragraph 52) that Lot 2 was *"not burdened by the presence of the cables which ran along the boundary line between Lots 1 and 2."*

100. Additionally, apart from the operative portions of the Conveyance, there was also other evidence, specifically the testimony of BTC's Trevor Turnquest and Mr. Meronard's own witnesses, Renio Ferguson and Wendell Grant, all of whom identified the location of BTC's cables as running along the boundary line between Lots 1 and 2.

101. As we see it, the totality of the evidence before the court strongly suggested that BTC's manhole and the associated cables and conduits located along the boundary line between Lots 1 and 2 together with the land through which they ran, never passed into Mr. Meronard's ownership or possession. In the circumstances, the judge could not be said to be plainly wrong in her conclusions of fact and of law that Lot 2 was *"not burdened by the presence of the cables which ran along the boundary line between Lots 1 and 2."* In our view, ground 11 has no merit and is dismissed.

102. Ground 14 is obviously connected to ground 11. Miss Pyfrom contended that the judge erred and misdirected herself when she found (at paragraph 52) that the property *"was not burdened by the presence of the cables"* since the location of the cables was in line with the utility easement granted by the Conveyance. In ground 14 Miss Pyfrom alleges that the judge ignored Clause 23 of the Conveyance. She contends that had the judge properly considered the implications of Clause 23 she ought to have found that that while the Conveyance reserved unto the Vendor a right to assign utility easements to a third party, Clause 23 of the Second Schedule directed where those easements were located, and that was, *"over the rear ten feet of each lot."* Miss Pyfrom contended that the judge's failure to properly consider Clause 23 was an erroneous misdirection of fact and law which rendered her decision plainly wrong.

103. As we have just found in our discussion of ground 11, this submission has no merit. Clause 23 cannot be read in isolation from Clause 22 of the Second Schedule or from the operative provisions of the Conveyance itself. As we have said, there was undoubtedly other evidence before the court which was capable of supporting the judge's conclusions of fact and of law. Accordingly, ground 14 cannot be sustained and is similarly dismissed.

104. Grounds 12, 13, 15 and 17, broadly attacked the judge's finding (at paragraph 46) that she *"preferred the evidence of the First and Second Defendants"*; her subsequent finding (at paragraph 47) that Mr. Meronard's claims *"were unsustainable and unsupported by the facts and by the evidence";* and her final conclusion (at paragraph 53) that *"The Plaintiff's claim as set out in his Amended Statement of Claim is denied and the action dismissed."*

105. Developing her complaint about what she said was the "erroneous" dismissal of Mr. Meronard's claims against DevCo, Miss Pyfrom highlighted, correspondence (referenced at paragraphs [6] and [7]) above) which had passed between Mr. Meronard and the Port Group

Limited in 2008 *before* he paid the deposit agreeing to purchase Lot 2. According to Miss Pyfrom the contents of the Port Group's letter of 23 September 2008 to Mr. Meronard (extracted above) were misleading as the letter omitted any reference to the commercial duct system running beneath the lot or the existence of any third-party rights or utility easements in relation thereto.

106. Miss Pyfrom relied on the authority of **White v. Jones** [1995] 1 All ER 691 (a majority decision of the House of Lords) which is widely recognized as having extended the principles governing tortious liability for negligent misstatements initially laid down in **Hedley Byrne & Co Ltd v. Heller & Partners Ltd,** (1964) AC 465.

107. She contended that DevCo owed a duty of care to Mr. Meronard which required DevCo to provide him with a complete and accurate answer to his inquiry of 16 June 2008. She submitted that DevCo failed to answer Mr. Meronard's inquiry completely and accurately and accordingly, breached the duty owed to him, causing him to suffer loss. The judge erred, she said, in denying Mr. Meronard's claim and in dismissing his action against DevCo.

108. As we understood them, Miss Pyfrom's submissions on the duty of care and negligent misstatements were relevant to paragraphs 7 through 13 the Amended SOC where Mr. Meronard asserted that DevCo had represented to him firstly, that: *"preliminary investigations into the title of the said lot have been completed and …the sale can proceed";* and secondly, that: *"the property is zoned as Duplex."* She contended that these statements coupled with a third representation (contained in DevCo's letter to Mr. Meronard's attorney-at-law referenced at paragraph 9 of the Amended SOC) were false and misleading. Mr. Meronard claims he was induced by all 3 of these representations to enter into the Agreement and to execute the Conveyance on 3 May 2010. According to Miss Pyfrom in the face of the pleadings, the law and the evidence before her, the judge's decision to dismiss the claim against DevCo was unreasonable and plainly wrong.

109. For his part, Counsel for DevCo, Mr. Adams submitted that all 4 grounds lacked merit and should be dismissed. We agree.

110. In the light of the authorities, we are satisfied that to succeed in his pleaded claim against DevCo for damages for negligent misstatement, Mr. Meronard had to establish that DevCo knowing that it was being trusted or relied on by him to answer his inquiry of 16 July 2008, and having chosen to answer the question he posed, thereby created a special relationship between them to which the law attached a duty on DevCo to perform with such care as the circumstances required.

111. In this area of the law, it is now accepted that apart from the existence of contract or a fiduciary relationship between the parties, a special relationship may arise even in *ad hoc* situations. The following excerpt taken from Lord Browne-Wilkinson's speech at page 716 of **White v. Jones**, speaks for itself. He said:

> **"…Even in the case of *ad hoc* relationships, it is the undertaking to answer the question posed which creates the relationship. If the responsibility for the task is assumed by the defendant, he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed."**

112. As we see it, to establish a case of negligent misstatement against DevCo Mr. Meronard had a mountain to climb. In the first place his letter of inquiry of 16 July 2008 (extracted above) was addressed to the Port Group Limited, not DevCo. Secondly, Port Group Limited was not joined as a party to the action and agency was not expressly pleaded. Even so, it was denied and needed to be proved. Properly understood, Mr. Meronard's letter of 16 July 2008 inquiring as to the status of the lot was no more than a simple inquiry to the Port Group to ascertain whether Lot 2 Bonita Street, which he wished to purchase, was available for sale.

113. Furthermore, examination of the letter reveals that nothing in it can or could be interpreted as having conveyed to Port Group that it was being trusted or relied upon to answer questions or convey information as to the validity of the title or as to the existence of easements and underground cables on the property. Quite simply, Mr. Meronard failed to establish that there was any special relationship between himself and DevCo to ground his action in negligent misstatement against DevCo. As we see it, DevCo's letter to Mr. Shurland of 17 Feb 2010 (see para [10] above) enclosing the draft conveyance for his review and approval, contained no false or misleading information, representations or warranties on which Mr. Meronard's pleaded claims could properly be founded. Grounds 12, 13, 15 and 17 have no merit and are dismissed. The judge's finding (at paragraph 47) that Mr. Meronard's claims *"were unsustainable and unsupported by the facts and by the evidence"* is affirmed.

114. *Easements:* Between paragraphs 71 and 98 under the sub-heading: *"Issue 2 – Easement,* Miss Pyfrom sought (as she did in relation to grounds 1-8) to delve into the law of easements to support her case in relation to DevCo that the judge failed to consider the evidence as to the location of the utility easements and was wrong to have found that *"there was contained in the conveyance to the property an easement for utilities."*

115. She relied on **Regency Villas** (easements); **Moncrieff** (easements); **In re Webb's Lease** (easements); **Bacciottini & anor v. Gotlee and Goldsmith (A firm),** [2016] EWCA Civ 170 (negligence and misrepresentation); and **Delta Properties Limited v. Bahamas Electricity Corporation,** SCCivApp. No. 1 of 2013 (damages for trespass).

116. In view of the position we have taken in relation to the trespass issue (grounds 1-8) as well as in relation to grounds 11 and 14, it should follow that it is unnecessary to consider the technicalities of the law of easements. The Conveyance itself provided the key to unlocking much of what had to be determined in the court below.

117. As we have already found at paragraph [74] in our discussion of grounds 1-8, read in conjunction with the First Schedule, the Habendum in the Conveyance expressly carved out of the grant of the fee simple to Mr. Meronard exceptions and reservations regarding *pre-existing* utility undertakings, systems and apparatus, including specific "Utility Easements and Rights" which were declared to be **"owned by"** DevCo (as the Vendor) and by certain named entities and utility providers, including BTC.

118. The First Schedule to the Conveyance itself expressly described DevCo, BTC (and the other named utility providers and companies) and their respective assigns and successors-in-title as the **"owner or owners"** for the time being of, *inter alia*, the water, electricity, **telephone** and cable supplies and **services, undertakings and systems in the area** AND of the *"land and hereditaments comprised in such undertakings and systems*."

119. Additionally, the First Schedule to Mr. Meronard's Conveyance (extracted at para [15] above) further referenced the existence of easements, rights and privileges of laying, erecting, inspecting maintaining, repairing and renewing all such cables, pipes, lines, conduits, wires, poles and other apparatus "**on, under and over the said hereditaments"** as may be necessary or desirable for the purposes of furnishing and maintaining water, electricity and cable supplies and services to the Subdivision and every part thereof. Based on the wording of the grant itself, Mr. Meronard could not claim to be the owner of the fee simple in the *"land and hereditaments"* through which BTC's *existing* telecommunications infrastructure and apparatus passed. Simply put, Mr. Meronard neither owned nor possessed those portions of Lot 2 under and through which BTC's subterranean cables and infrastructure ran.

120. As we have already said, the judge was quite correct to find that BTC's entitlements were *"captured in the Conveyance"*. In the face of the evidence of BTC's witnesses coupled with the exceptions and reservations for the utility easements and rights (expressly excluded from the grant) and described in the Conveyance itself, the judge was also plainly correct in her finding (at paragraph 47) that *"there was contained in the conveyance to the property an easement for utilities";* and her further finding (at paragraph 52) that Lot 2 was *"not burdened by the presence of the cables which ran along the boundary line between Lots 1 and 2."* There is no merit in grounds 9, 10, 11, 12, 13, 14, 15 and 17 and they are dismissed.

Grounds 16 – (The Costs award to BTC and DevCo):

121. At ground 16, Mr. Meronard seeks to impugn the judge's award of costs to BTC and DevCo on the basis that Mr. Meronard had proved his case and that his action against them ought to have succeeded. It follows from everything we have said that this ground is unsustainable, and it is similarly dismissed.

Disposition and Order

122. For all the reasons set out in this judgment, the appeal is dismissed, and the learned judge's decision is affirmed in its entirety.

123. The usual order is that costs follow the event. Accordingly, Mr. Meronard shall pay the Respondents' costs of the appeal, to be taxed if not agreed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA

The Honourable Madam Justice Bethell, JA