

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0184

IN THE MATTER OF DEED OF CONVEYANCE 626 OF 2003
IN THE MATTER OF REGISTERED SURVEY PLANS GR8/69, GR2/45, GR2/89
IN THE MATTER OF ROAD ACCESS TO LANDS SITUATE AT MOONHOLE, BEQUIA

BETWEEN:

RHINOCEROS COMPANY LIMITED

CLAIMANT

AND

MOONHOLE COMPANY LIMITED

DEFENDANT

Appearances:

Mr. Michael Wyllie and Ms. Vynnette Frederick for the Claimant

Dr. Linton Lewis for the Defendant

Mr. Charles Brewer representative for the Claimant present

Mr. Robert Rooth representative for the Defendant present

2020: 10th March
11th March
30th April

JUDGMENT

Byer, J.:

- [1] The defendant company describes itself as a “unique eco-resort”¹ located on the western most tip of Bequia in the Grenadines. It is into this resort that the claimant company with its principals being Charles Brewer, his wife Cornelia and daughter, bought three contiguous lots of land by virtue of an Indenture of Conveyance dated the 13th February 2003 and registered as 626/2003 (the Conveyance). The said conveyance conveyed to the claimant the said lots all together measuring 17,803 square feet and the said land was conveyed “*as the same is shown on three (3) plans bearing registration numbers GR8/69, GR2/43 and GR2/89 respectively ...together with all ways waters watercourses rights lights liberties privileges easements and appurtenances thereto*”

¹ Moonholecompany.com

belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto.”²

- [2] The said survey plans show that there existed from the time of survey the first one being in 1970, that the said lots of land were bounded by a 12-foot road.
- [3] However during trial it was admitted by both parties that in reality the access on the ground was no more than 4 feet at its widest points but that generally it was in the region of 18 inches and was not a road but rather a footpath.
- [4] The claimant having requested of the defendant company to construct the 12 foot road as depicted on their plans was denied the request by the defendant who have insisted throughout that all that the claimant is entitled to, is a footpath which already exists.
- [5] In response the claimant filed this action by way of fixed date claim form on the 14th December 2017 seeking the following relief:
 - i. Damages for breach of contract as the Defendant has not and does not intend to provide the 12-foot access road for the claimant; which is contemplated in the registered conveyance 626 of 2003 signed by the parties.
 - ii. A declaration that the claimant either by themselves or their agents, licensees and visitors has a right to pass and re-pass on a 12-foot road provided for in accordance with registered surveys GR8/69, GR2/45 and GR2/89.
 - iii. An order compelling the Defendant to construct the roads and more specifically the 12-foot road to the claimant's property provided for in surveys GR8/69, GR2/45 and GR2/89.
 - iv. An order that the construction of the access road commence within one month of the order of this Honorable Court.
 - v. In the alternative, an order that the claimant be permitted to construct the access road to their home, and that the cost of such construction be borne by the Defendant.
 - vi. A permanent injunction prohibiting the Defendant whether by themselves and or their servants and or agents from impeding the claimant's access to their property at Moonhole and interfering with the claimant construction of the said access road to their home.
 - vii. A declaration that there are no restrictive covenants preventing or prohibiting the claimant from constructing a 12-foot access road to the property in accordance with the surveys referred to in the schedule of their deed.
 - viii. Costs.
 - ix. Other such reliefs as the court deems fit.

² Extract from the conveyance and the First Schedule thereto

- [6] The defendant duly filed their defence to the action, and categorically denied that the defendant company was in breach of any obligations to the claimant regarding the provision of a 12-foot road. The defendant pleaded that the claimant company has always known that the development of Moonhole was never meant to access by motorized traffic and hence the non-provision of roads. In any event, the nub of their defence was that the claimant was statute barred from enforcing any such obligation, which they deny exists, as the claimant contract was completed in 2003, while the claim was brought in 2017 and as such outside the time limit for an action to be brought in contract.
- [7] The issues for the court were therefore as follows:
- i) Is the claimant entitled to a 12-foot road to their property as shown on the survey plans attached to the conveyance?***
- ii) If they are so entitled, whose obligation is it to construct the said road?***
- iii) Is the claimant's claim statute barred?***
- [8] However before this court proceeds to determine the above-mentioned issues, I wish to take a moment to make certain observations as to how the parties dealt with this matter and in particular the raising of certain issues by the defendant in submissions.
- [9] In making a submission as to the failure of the claimant to respond to the pleading in the defence to the question of limitation, a point to which I will return in due course, the defendant also sought to have the court disregard the Amended Reply filed on the 11th January 2019 as having been filed outside of the time allowed for such filing and that further the said document did not contain a certificate of truth as required by the CPR. The defendant relied on Part 10.9 as supporting this proposition when in fact it is contained in Part 3.12 of the CPR which states that all statements of case must be verified by a certificate of truth³.
- [10] By Part 3.13 of the CPR the court is given the power to strike out any statement of case which has not been verified by a certificate of truth⁴, and any such order can be applied for by any party to the proceedings⁵.
- [11] The defendant never made such an application, and in any event the Amended Reply that this court has had sight of has a certificate of truth attached to the same signed by the Managing Director of the claimant company, Charles Brewer, although the Reply filed on the 20th February 2018 does not.
- [12] Additionally there was also no application by the defendant that the Amended Reply be struck out for having been filed outside of time as prescribed by the rules, rather the defendant sought to make these two points in submissions before the court in a forum where the claimant would not have been able to respond to the same or to be heard.

³ Part 3.12 (1) CPR 2000

⁴ Part 3.13 (1) CPR 2000

⁵ Part 3.13 (2) CPR 2000

- [13] This court has in previous judgments made it pellucid clear that this kind of litigation is unacceptable. In the case of **Michelle Jones v The Saint Vincent and the Grenadines Port Authority**⁶ this court made it clear that such action on the part of counsel was entirely inappropriate and amounted to an act of “trial by ambush”.
- [14] I continue to adopt this viewpoint and this court takes a dim view of the defendant without having made an application before trial to seek to have the court make any orders with regard to the Reply or Amended Reply at this stage of the proceedings. I therefore make no finding on those submissions as proffered.

Issue #1: Is the claimant entitled to a 12-foot road to their property as shown on the survey plans attached to the conveyance?

- [15] The nub of the claimant’s case is based upon the argument that since the claimant’s Conveyance had attached to it survey plans that clearly identified that there was a 12-foot road that bounded the land of the claimant, that the claimant was entitled to the same.
- [16] In making this submission, the argument of the claimant has been that the plan having been incorporated into the Conveyance by the words of reference “*as the same is shown on the three (3) plans...*” resulted in the plan prevailing as the operative description of the parameters of the land as conveyed.⁷ The defendant was therefore obligated to convey to the claimant the road as shown on that plan.
- [17] In the alternative the claimant further argued that even if the claimant was not entitled to the road as part of the parcel as conveyed, they were entitled to the road in any event by virtue of the operation of an ancient principle of “*ad medium filum viae*.” This principle essentially is a presumption imposed in the law as a means to prevent disputes as to the precise boundaries of property. Thus the law found that where land is in boundary with a road or a river, the conveyance would be construed to pass half of the soil of the road or the riverbed to the owner who occupies the land in boundary. It is this submission that the claimant therefore relies on to convince the court that even if the portion of land shown in the plan was in fact not included in the conveyance, that in any event the defendant company does not own the land and at the very most the claimant is entitled to 6 feet of road to do as it wishes.
- [18] The defendant’s submission on this issue is of course to the contrary. In comprehensive submissions the defendant submitted that the survey plans attached to the conveyance of the claimant, did not confer title to the roadway nor does it permit or confer a right to use the said as a roadway. All that the plans did, was to define the boundaries of the land that was in fact conveyed to the claimant, that parcel of land which measured 17,803 square feet.
- [19] The defendant further submitted that in any event although the plan depicted a 12 foot road this did not mean that in fact that that was the intention of the parties to have those physical dimensions obtain on the ground. The defendant approached this argument from two different aspects. Firstly,

⁶ SVGHCV2009/0171 at para 8 and 9

⁷ Gibson’s Conveyancing (21st Edition) Chapter 12

that there was no evidence that the plan was drawn to scale and that the plan that was created showing the 12 foot wide road by the claimant's surveyor Adolphus Ollivierre did not in fact indicate that he found a 12 foot road on the ground when he undertook the survey to facilitate the placement of the road. Indeed the defendant submitted, that Mr. Ollivierre having given evidence that he placed many of the boundary markers in areas where none were found, was evidence that this road did not in fact exist in any such dimensions, and that further more there was no road from the claimant's land to the entrance of the Moonhole development. Therefore, the submission concluded that the claimant could not be entitled to an entire roadway from their home to the point that stood as the entrance of the Moonhole development, as claimed.

- [20] Secondly, the defendant submitted that, since the parcels clause in the claimant's Conveyance was clear and unambiguous, the claimant could not rely on the plans to extend the size of their entitlement. In construing the Conveyance, it was only where the Conveyance was unclear that reference could be made to the plans to determine the intention of the parties as to what was to be conveyed. In the present circumstances this was not required with regard to the Conveyance of the claimant and that all that the claimant obtained was an easement over lands retained by the defendant. This land retained by the defendant, as submitted by the defendant, was simply to provide the claimant with a means of access to its principal's home and since this has not in any way been disrupted by the defendant, all that the claimant would be entitled to is what he had been used up to the acquisition and since the acquisition of the land, that is a pathway or footpath.

Court's Analysis and Considerations

- [21] The essence of this issue for the court is to determine what was in fact conveyed to the claimant by their Conveyance. Once this is determined, the next logical question arises as what the claimant are entitled to and whether they are therefore entitled to the same being constructed at the expense of the defendant.
- [22] In order to address my mind to these questions, it is imperative to look at the Conveyance itself and determine what that document conveyed and what if any contractual obligations arise therefrom.
- [23] The Conveyance at the First Schedule clearly states that the land that was conveyed is:

"THIS IS THE FIRST SCHEDULE HEREIN BEFORE REFERRED TO:-

ALL THOSE LOTS PIECES OR PARCELS OF LAND situate at Moonhole, Bequia in the State of Saint Vincent and the Grenadines and being in total extent SEVENTEEN THOUSAND EIGHT HUNDRED AND THREE 17,803 sq. ft. all as the same is show on Three (3) plans bearing registration numbers Gr8/69, Gr2/45 And Gr2/89 respectively, and approved and lodged at the Lands and Surveys Department of the State of Saint Vincent and the Grenadines or howsoever otherwise the same may be butted or bounded known distinguished or described Together with All ways waters watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto." (My emphasis)

- [24] The reference to the plans are therefore as the “*same is shown*”.
- [25] Plans in conveyancing are primarily used to assist in the confirmation of the parcel of land that is to be conveyed to the grantee under the conveyance.
- [26] However the use and referral to a plan in a conveyance does not obviate the obligation on the conveyancer to ensure that the parcels clause is precise “...*because it embodies the essential object of the whole exercise.*”⁸ Thus the central object in the construction of a conveyance is to have reference to the document itself. It is to the parcels’ - clause that one must look to decipher what is conveyed. However there would be instances where the description contained in the parcels clause does not accurately describe the land to be conveyed and in those instances where there is a plan either referred to expressly⁹ or even incorporated into the conveyance by way of annexure¹⁰ the court and the parties are at liberty to refer and rely on the plan to resolve those difficulties.
- [27] In the case at bar, the parcels clause is clear. The physical dimensions of the land are clear as is the size of the parcel of land. Therefore, when one looks at the plans to the Conveyance their contents definitively set out what was conveyed to the claimant. In plan GR8/69 the endorsement states that it is a plan for a “... parcel of land bordered pink containing one thousand nine hundred and twelve square feet.” The northern boundary of the land is stated to be a 12-foot road. It is clearly not part and parcel of the land bordered in pink. In plan GR2/45 the endorsement states that it is a plan for a “...parcel of land bordered pink containing altogether eleven thousand five hundred and four square feet.” On this plan the northern boundary is also stated to be a 12-foot road. This road is also not included in the parcel of land bordered pink. The final plan that relates to the land bought by the claimant is GR2/89. The endorsement on this plan is for a “...parcel of land bordered pink containing four thousand three hundred and eighty-seven square feet.” Like the other plans this land is also shown as being bounded to the north by an access but this one is indicated as a 12-foot *pathway*. This pathway was also not included in the area designated in pink.
- [28] When one therefore looks at these plans and the way that the same were incorporated into the Conveyance, it is clear in this court’s mind that the same were simply as a means to identify the parcel and its boundaries and that there is no need to refer to the plan to elucidate any insufficient details that the parcels clause may have omitted. This court therefore does not find that the “description without a plan is insufficient or if not insufficient, unsatisfactory...”¹¹ In determining whether the road/pathway is incorporated in the land conveyed to the claimant, I am satisfied that the plans having expressly stated what land was in fact conveyed to the claimant which matched the words of the Conveyance by virtue of the parcels clause, that the defendant did not convey the road/pathway to the claimant. As the court in the case of **Eastwood v Ashton**¹² stated by Earl Loreburn, and to which I wholeheartedly agree, “I see in this plan a perfectly definite delimitation of the land expressed to be conveyed in the deed.”

⁸ JT Farrand Contract and Conveyance (3rd Edition) at page 273

⁹ **Eastwood v Ashton** [1915] AC 900

¹⁰ **Leachman v L & K Richardson** [1969] 1 WLR 1129

¹¹ **Re Sparrow and James Contract** [1910] 2 Ch. 60 at 62

¹² Op Cit at page 907

- [29] Therefore this court determines that the defendant did not convey to the claimant the 12-foot road/pathway as shown on the plans. However, this court finds that there was a reason why there is a depiction of a 12-foot road/pathway on the plan. Thus, it is to be noted with some consternation that even though the plans of the claimant which were dated 1970, 1973 and 2001, show this road/pathway, that the defendant has maintained throughout that this is either an error or a misnomer of what in fact exists.
- [30] The defendant has therefore suggested through the witness Mr. Robert Rooth (one of the directors of the defendant company) that the depiction of a road/pathway on these plans amounted to what the development plan called “buffer zones” to prevent “squabbles” or “bickering” over boundaries¹³. However, in relation to this development plan that spoke to these “buffer zones” several issues arose which the defendant has been unable to answer. Firstly, there is no indication that this development plan was in fact registered under the Town and Country Planning Ordinance CAP 18 of the Laws of St Vincent and the Grenadines 1966 whereby the development plan was given the approval of Government allowing the same to be legally recognized. Secondly, when the conveyance is examined it is also clear that this particular claimant had no contractual obligations to adhere to any covenants with regard to a so-called “buffer zone” as referred to by Mr. Rooth and thirdly, it was clear that up to 2019, the defendant company was still producing plans that demarcated a 12-foot access as a right of way¹⁴.
- [31] Having therefore assessed the evidence and the lack of answers to the pertinent questions, it is clear in this court’s mind that contrary to the contention as provided by the defendant, I am satisfied that the defendant whether mistakenly or otherwise, made provision for a road/pathway/right of way, whatever the nomenclature that was to be attached to it. Therefore, it is clear, that it would be unconscionable for the defendant to deny the existence of the same.
- [32] Further it is pellucid to this court that the access having been consistently described at a dimension of 12-feet, from as early as 1970 to as recent as 2019, that that stands as clear evidence of the intention of the defendant to have retained on to themselves a parcel of land as between the lots as sold at this stated width. The fact that they did not do so and that on the ground the size of the access may in fact be fundamentally less, can be of no concern to the claimant or any other party who would seek to enforce the same. Therefore, the argument by the defendant that the measurements on the ground do not make provision for that stated width, cannot diminish the responsibility of the defendant to provide the same and I find that they must do so.
- [33] That being said, and the court having found that the claimant was not conveyed the 12-foot reserved access, this court however finds that the claimant is entitled to a 12-foot access to their home. Further the argument by the defendant in terms of the questions addressed to the witness for the claimant, the Licensed Land Surveyor and former Chief Surveyor Mr. Adolphus Ollivierre as to how many boundary markers were placed as opposed to how many were found for the creation of the 12-foot access does not assist the defendant in this regard. It would make no logical sense that a plan was produced showing a 12-foot access to the northern boundary of the claimant’s land but that the access led to nowhere. The access must be to the land that is occupied by the

¹³ Cross examination of Robert Rooth on 11/3/2020 paragraph 37 of the WS of Robert Rooth filed on the 15/3/19

¹⁴ Plan attached to conveyance dated 23/11/2019 between the Defendant and Cloud company Limited registered as 3655/2017

claimant to the point where they can exit the development. Without that logical conclusion the provision of the same would make a mockery of the entire identification of the access in the first place.

- [34] However the claimant further contends that not only are they entitled to access but that they are entitled to a road. That is a road over which a motorized vehicle can pass. In this regard, the claimant's counsel in their submissions have been particularly unhelpful in assisting the court, in terms of identifying what evidence presented would lend itself to this interpretation.
- [35] Therefore in looking at this matter, the court accepts the submission of the defendant that in addition to the 17,803 square feet of land that was conveyed to the claimant, that they also obtained an easement over the 12-foot access as provided¹⁵.
- [36] In coming to this determination, as to the nature of that access, it is clear, that the starting point must be the definition of an easement. In Halsbury Laws of England 4th Edition¹⁶ an easement is defined as "a right annexed to land to utilize other land of different ownership in a particular manner or to prevent the owner of the other land from utilizing his land in a particular manner".
- [37] It is therefore clear that the 12-foot access is indeed within the parameter of the definition of an easement. The more important question must however be what is the nature of this easement, as the claimant are seeking to have a construction of a road, not simply access.
- [38] In the case of **Cannon v Willars**¹⁷ Jessel MR had this to say about the way a court should approach considerations of construing a conveyance which contains the reservation of a right of way:
"... the grant of a right of way per se and nothing else may be a right of footway, or it may be a general right of way, that is a right of way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the locus in quo over which the right of way is granted.... Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot-passengers, or restricted to foot-passengers and horsemen or cattle, which is generally called a drift way or a general right of way for carts, horses, carriages and everything else."
- [39] Thus in the instant case what do the surrounding circumstances show? They show that the development as it exists (with or without a registered development plan) has never had motorable roads. The access to the sold properties has always been by way of footpaths that have even been

¹⁵ Submissions of the defendant filed on the 30/3/2020

¹⁶ 1975 Vol 14 paragraph 1

¹⁷ 8 ChD at 420- 421

utilized by the claimant. The only thing that has changed is as the claimant by Mr. Brewer said, that he is now in need of motorized access as he is "... older and frail."¹⁸

- [40] This may indeed be the unfortunate set of circumstances that exist with the claimant but this court is satisfied on a balance of probabilities that the 12-foot access does not amount and was never intended to amount to a 12-foot road in the definition of a road for the purpose of motorized vehicles.
- [41] This court finds and is satisfied that the intention of the defendant was always to provide access to the parcels sold. Further contrary to the contention of the defendant, I am also satisfied that that access is to be 12-feet wide but that this access, as can be gleaned from the surrounding circumstances, is to be utilized as a footpath only. In the same manner in which Megarry J at the first instance trial of **St Edmundsbury and Ipswich Diocesan Board of Finance v Clark**¹⁹ a position upheld by the Court of Appeal, found that the right of way in the conveyance had to be considered in the light of the circumstances which prevailed at the date of the conveyance, I also consider the prevailing circumstances at the time of the date of the conveyance to the claimant and find that in 2003 the access given to the claimant to their land was a footpath, a fact to which the claimant agreed they used and still use to today's date.
- [42] I therefore answer this issue in the negative, the claimant is not entitled to a 12-foot road as pleaded but they are entitled to 12-foot access however the same may be accommodated on the ground.
- [43] For the sake of completeness, the claimant also raised the issue of whether they were entitled to half of the road/pathway by operation of the presumption of the principle of "*ad medium filum viae*," I will consider now whether this applies.
- [44] In the case of **Berridge v Ward**²⁰ the court held that where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance even though reference is made to a plan that is annexed on which the measurements and coloring would exclude it.
- [45] In the case of **Holmes v Bellingham**²¹ this presumption was held to be just as applicable to private roads as public roads.
- [46] The presumption is that where a road or indeed a waterway is in boundary with a parcel of land, and in fact separates two parcels, the owner of each parcel in boundary owns the soil of the road equally. As Cockburn CJ in the case of **Holmes**²² stated in speaking to the reasoning behind the presumption, "the presumption is allowed to prevail upon grounds of public convenience and to prevent disputes as to the precise boundaries of property and is based upon the supposition -which may be more or less founded in fact but which at all events has been adopted - that when the road

¹⁸ Cross examination of the claimant's witness Mr. Charles Brewer at trial on 10/3/2020

¹⁹ [1975] 1 ALL ER 772

²⁰ 10 C.B. (N.S) 399

²¹ 7 C.B. (N.S.) 328

²² Op Cit at 336

was originally formed the proprietors on either side each contributed a portion of his land for the purpose.” He then went on to say that as this principle applied to public and private roads, it was clear that with private roads that the “...user of it has been qua road and not in the exercise of ownership”.

- [47] That being said, this principle in this court’s mind does not help the claim as filed by the claimant. The claimant seeks to rely on this principle to claim that they are entitled to half of the ownership of the road/ pathway as shown on the plan.
- [48] In the case of **McCarthy Phillips v Kenneth Glynn and another**²³ my sister Henry J in considering whether the party in that case could rely on this presumption held inter alia that the party who had relied on the presumption had not done so in their pleadings or their testimony, instead in those documents his claim was for a right of way. My sister found that it was doubtful that the party could in fact establish this right if he had not pleaded it. In any event she found that the party seeking to rely on the presumption knew that the road had been depicted on the plan and that the same would have signaled to “...any reasonable purchaser or observer that the areas reserved for the creation of such roads were not being conveyed.”²⁴
- [49] In the case at bar I find that the claimant is also facing this double-edged sword. Not only did the claimant not plead any such entitlement therefore not giving the defendant an opportunity to speak to the same or to offer evidence on it, but it is also clear in this court’s mind that at the time of Conveyance there was no intention of the defendant to convey half of any road. In any event this court has already found that the claimant is not entitled to a road in addition to their parcel of land.
- [50] Having therefore answered the first issue in the negative, it is now not necessary for this court to determine which entity would be responsible for bearing the cost of the construction of a road. This court therefore makes no order regarding **Issue #2** and in the event that this court is wrong with regard to the whether the claimant is entitled to the road as claimed I will now consider **Issue #3**.

Issue #2: If they are so entitled, whose obligation is it to construct the said road?

- [51] As indicated in the above paragraph there is no need for this court to consider this issue.

²³ SVGHCV2013/0069

²⁴ Op Cit paragraph 41

Issue #3: Is the claimant's claim statute barred?

- [52] By Statement of Defence filed on the 25th January 2018 the defendant pleaded²⁵ that the claimant cause of action did not accrue within 12 years before the commencement of this action and that the same is statute barred under the provisions of the Limitation Act CAP 129 of the Revised Laws of St. Vincent and the Grenadines (the Act).
- [53] By Amended Reply filed on the 11th January 2019 there was no specific response to this pleading save the barest statement at paragraphs 15 and 16 thereof:
"15. The Claimants have in no way waived their right to access to a twelve-foot road as is provided for on the surveys of their lands at Moonhole.

16. The Claimants have in no way acquiesced or relinquished their right to the road access as is defined in their conveyance and registered surveys of the property which they purchased from the Defendant"
- [54] In the case of **Cartledge v Jopling and Sons**²⁶ the court made it clear²⁷ that where there is a joinder of issue on a defendant's plea of the Limitation Act and the burden of proof is on the claimant to show that his cause of action accrued within the relevant period for the purposes of the statute.
- [55] In the case at bar it is very clear that the claimant has not answered the pleading of the Act as contained in the defence. The bald assertion that the claimant has never waived their right of access, in this court's mind is not enough.
- [56] The reply has been recognized by our courts as being the document where any such response to this pleading ought to be contained. In the case of **Daphne Alves v The Attorney General of the Virgin Islands**²⁸ Hariprshad-Charles J stated that the proper place for meeting the defence is in the Reply. In quoting from the treatise Pleadings: Principles and Practice by Jacob and Goldrein she has this to say "the reply is the proper place for meeting the defence...thus...in order to defeat the defence of the Limitation Act the plaintiff must specifically plead in his reply any fact upon which he relies to take the matter out of the statute...."
- [57] This the claimant did not do. Therefore as it stands, there is no defence to that pleading and additionally the claimant did not seek to address it in their submissions despite it still being a live issue having been raised on the pleadings upon which the trial was undertaken.
- [58] Be that as it may, the obligation is still on the court to determine whether this pleading of the defendant has any merit.

²⁵ Paragraph 26 of Defence

²⁶ [1962]1 QB 189

²⁷ Per Person LJ at page 208

²⁸ BVIHCV2007/0306

- [59] The question of whether the Act²⁹ has barred the claimant is based on the nature of the breach that is complained of by the claimant.
- [60] In the statement of claim the claimant claimed in addition to the declarations of ownership of the road and entitlement to a road being constructed, damages for breach of contract. They pleaded that the defendant was in breach of the obligation to provide a 12-foot access road pursuant to the terms of the Conveyance.
- [61] In order to determine whether the claimant is even entitled to rely on any such obligation, it is necessary to examine the conveyance and the covenants that are contained therein. The claimant's pleading in this regard is set out at paragraph 9 of the Statement of Claim:
"9. To date the Defendant has failed and or neglected to establish the road in accordance with the surveys provided which detailed the presence of the 12 ft. road access. The Defendant was contractually obligated to construct that road in accordance with the surveys furnished by the Defendant at the material time of the sale of the property to the Claimants. Since the date of the sale of the property to the Claimants, the Defendant has only constructed a narrow footpath measuring four feet or less in some areas."
- [62] The claimant therefore states that the obligation on the defendant arose based on the survey plans that were attached to the Conveyance.
- [63] The failure of the defendant to provide this access road is therefore a breach of contract as far as the claimant is concerned.
- [64] In the Canadian case of **Champagne v Sidorsky**³⁰ the Court of Appeal of Alberta gave a comprehensive exposition as to how breaches of covenants are considered in relation to the applicability of the limitations act.

At paragraph 9 the court had this to say:

"9. For these purposes, breaches of covenants may be divided into three rough categories:

- a) Breaches of a failure to perform a single obligation due at a specific time, sometimes called "once-and-for-all" breaches. The breach occurs once and the claim rises from the date of the breach – the date of "non-performance of the obligation". Whether it is an act of commission or omission. The damage from the breach may continue, but there is only one breach.*
- b) Breaches of obligations required to be performed periodically, such as an obligation to make monthly payments. The claim for each breach arises once each periodic performance becomes due. Claims for breaches of periodic obligations that arose more than two years before the action was commenced will be statute barred, but the later and ongoing obligations can still be enforced.*

²⁹ Section 10 (1) – **Time limit for action on a specialty:**

(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

³⁰ 2018 ABCA 394

c) *Breaches of continuing obligations that require performance at all times. The claim arises everyday that the obligation is not performed, although damage arising from old breaches may at some point become unrecoverable.*" (My emphasis added)

- [65] The question therefore must be what is the nature of the breach complained of by the claimant? Indeed, if this obligation can be considered a continuing obligation to perform then the failure to do so would accrue every day, the kind of condition that is described by the court at (c) above³¹.
- [66] It is the nature of a breach in that category that would not attract the provisions of the Act. However, if the breach falls within the category of the other two, either there is one breach (a singular breach) or there is a breach of a recurrent obligation (successive breach) then the limitation period would run either after the one breach or after each breach respectively³².
- [67] In the case at bar, this court is satisfied that the act of the defendant, (if there was in fact such an obligation on the defendant) in failing to provide the 12-foot access road can be considered a one-off breach. If there was indeed a right in the claimant, the right accrued to the claimant upon the signing of the conveyance. The defendant would have therefore committed the breach at that time and his "...continued failure to do the act is nothing but a failure to remedy his past breach of his covenant. His duty is not considered as persisting and so to speak being forever renewed until he actually does that which he promised."³³
- [68] Where however there is an ongoing obligation for instance the keeping of a building in repair, or insuring a building or to structurally support a building, the breach of any of those obligations would be a continuous breach giving rise to an active cause of action every day. This obligation is to "maintain a state or condition of affairs."³⁴ As the court in the case of **Wewaykum Indian Band v Canada**³⁵ succinctly stated with regard to covenants in construction, which this court finds is just as appropriate in the present set of circumstances, "...the owner of the servient tenement should be entitled to expect that any allegations of a breach will be brought in a timely fashion... that immunity from any claims will be measured from then and that the risk of allegations of non-compliance will not linger without foreseeable termination."
- [69] In the case at bar, there was one obligation as far as the claimant had pleaded. However, there was one breach when the road was not provided. Even with that one breach, damages may have continued to accrue, but that breach was a "once and for all", as such, time accrued from, the execution of the conveyance. Having so determined that, this court therefore finds that the Act applies and bars the claimant from seeking this relief for damages.
- [70] Therefore the court not only finds that the claimant is not entitled to the declarations as sought but further their claim for any relief flowing from a breach of contract is also statute barred.

³¹ **Capita (Banstead 2011) Ltd and another v RFIB Group Ltd** [2015] EWCA Civ 1310

³² **The Law of Contract (Common Law Series)** Chapter 8 para 8.224

³³ **Larking v Great Western (Nepean) Gravel Ltd (in Liquidation)**(1940) 64 C.L.R.221 (HCA) per Dixon J at page 236

³⁴ Op Cit

³⁵ [2002] 4 SCR 245

The order of the Court is therefore as follows:

1. The claim is dismissed in its entirety.
2. Costs to the defendant on an unvalued claim in the sum of \$7,500.00 pursuant to Part 65.5 CPR 2000.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar