

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2016/0026

BETWEEN:

**[1] CHOO LOI POI
[2] CHOO LIU YUE XIN**

Appellants

and

DONALD FREDERICK

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Celia Edwards, QC with her, Mr. Deloni Edwards for the Appellants
Mr. John Carrington, QC with him, Ms. Winnifred Duncan Phillip for
the Respondent

2020: April 19
September 15.

Civil appeal – Contract law – Specific performance – Right-of-way – Part performance – Trespass – Damages – Whether there was a concluded agreement between the parties between November 2004 and January 2005 based on the offer contained in the letter of November 2004 and the acceptance of the cheque from Mrs. Brathwaite in January 2005 – Whether the parties made an agreement between 2005 and 2008 for the grant of reciprocal rights-of-way over their respective properties – The appellants’ liability for trespass and the quantum of damages

The appellants and the respondent own adjoining freehold properties at Lance Aux Epines in St. Georges, Grenada. The respondent purchased his property in 1992 from Justice and Mrs. St. Paul whose predecessor in title, Mr. Gordon Braithwaite, was the original owner of

all the lands in the Lance Aux Epines estate that are relevant to this case. The respondent's property comprises two lots where the larger, Lot 2, includes a small, triangular-shaped area which is at the centre of the dispute between the parties.

The sale of Lots 1 and 2 to the respondent included a right-of-way passing in part over the adjoining property and leading to the main road in Grand Anse. The adjoining property was then owned by Mr. Braithwaite or his company, Eastern Caribbean Cement Products Ltd. The main road from Grand Anse to the Brathwaites' property is known as the Estate Road, and where it continues unto the Brathwaites' property it is called the Old Road.

The appellants purchased the adjoining property in 1999 from Eastern Caribbean Cement Products Ltd. The property comprised two lots, Lot A and Lot B. The Old Road is located on Lot B. The sale to the appellants included a right-of-way over the Old Road and the Estate Road. Lot B abuts the small triangle on the respondent's Lot 2.

The appellants reside in Grenada and commenced construction on Lot A shortly after acquiring their property. They claim that the Old Road did not exist when they purchased their property and they used the small triangle on Lot 2 to access Lot A. The respondent resides in England and visited Grenada in May 2002. Having observed the construction on Lot A and the use of the small triangle to gain access to Lot A, he advised the appellants to make alternative arrangements to access their property and to desist from encroaching on his property.

On 20th September 2002, the respondent wrote to Mr. Choo Loi Poi complaining about the encroachment on his property and advising of his intention to erect a fence around Lot 2 (which would block the appellants' access to the small triangle). However, the appellants continued to use the small triangle as their access to Lot A.

On 20th February 2003 the respondent's lawyer, Mr. Alban John, wrote to the appellants confirming the respondent's complaints about the wrongful use of the small triangle and instructing the appellants to confirm in writing, within fourteen (14) days, their preparedness to restore the Old Road to the respondent's Lot 2, agree just compensation for the area encroached upon, pay damages for trespass to the respondent's property, and pay the costs of the survey from licensed land surveyor, Mr. Michael D. Lett.

One year later on 24th February 2004 the appellants' lawyers, R C Benjamin & Co, responded to Mr. John's letter enquiring whether the respondent would sell the small triangle to avoid unnecessary conflict. The respondent did not respond to the request to sell the small triangle. Instead, by letter dated 11th November 2004, Mr. John submitted a new proposal for a possible settlement, offering to grant a right-of-way to the appellants on the terms set out in the letter, stipulating payment of a settlement amount to the respondent of \$13,761.00, and leaving the offer open for acceptance until 30th November 2004.

Mr. Benjamin responded to the offer on 18th November 2004, however, the response did not find its way into the proceedings before the trial judge or this Court. Mr. John replied to the missing letter on the same day rejecting the appellants' position, whatever it was, but offered

to reduce the costs payable to the respondent resulting in a revised offer of \$12,761.00. In all other respects the terms of the offer in the letter of 11th November 2004 remained the same.

The deadline for accepting the offer passed without any further word from the appellants or their lawyers.

Thereafter, on 26th December 2004, Mr. Benjamin wrote to Mr. John advising that he was holding a cheque from Mrs. Christine Brathwaite, the widow of Gordon Brathwaite, for \$10,125.00 as Eastern Caribbean Cement Ltd.'s contribution towards settlement of the matter, with the balance of \$2,636.00 to be paid on execution of the conveyance of the easement. Mr. Benjamin also requested the original of a survey plan of the respondent's property that had been prepared by Mr. Lett in order to prepare the deed granting the right-of-way.

On 4th January 2005, Mr. John accepted the cheque and signed a receipt acknowledging the sum as being part payment in the matter of Donald Frederick and Choo Loi Poi on the agreed settlement of \$12,761.00.

On 17th January 2007, Mr. Benjamin forwarded the draft deed of conveyance for the proposed easement to Mr. John without the survey plan. Mr. John replied by email on 10th May 2007 and raised the issue that the draft conveyance did not make provision for the respondent to have a reciprocal right-of-way over the appellants' Lot B and that the right-of-way which his client was willing to grant to the appellants (over the small triangle) was on the basis that he would be granted a reciprocal right-of-way over the appellants' Lot B.

The appellants maintained that they were purchasing a right-of-way over the small triangle on Lot 2 and that they had no intention to grant a separate right-of-way over their Lot B in favour of the respondent.

The parties being unable to resolve their differences, the respondent took steps to fence his property which would obstruct the right of passage over the small triangle on his land.

On 14th November 2008, the appellants filed an action in the High Court claiming specific performance of an agreement for the respondent to grant a right-of-way to them over the small triangle, an injunction to restrain the respondent from interfering with their use of the said right-of-way, and damages for trespass. The respondent counterclaimed for a mandatory injunction compelling the appellants to allow him, his servants and agents access to the right-of-way described as the Old Road, and for damages for trespass. The trial judge heard the claim and delivered his judgment in May 2016.

The trial judge concluded that no agreement was made in November 2004 for the respondent to grant a right-of-way to the appellants over the small triangle, neither was there a concluded agreement for the grant of reciprocal rights-of-way over the appellants' and the respondent's respective properties. The trial judge therefore dismissed the claim, allowed

the respondent's counterclaim to the extent of awarding \$10,000.00 general damages for trespass, but dismissed his claim for a mandatory injunction. The judge also ordered the appellants to pay prescribed costs of \$7,500.00 on the claim and \$1,500.00 on the counterclaim.

The appellants, being dissatisfied with the judge's decision, appealed to this Court. The issues arising on appeal were: (i) whether there was a concluded agreement between the parties during the period 11th November 2004 and 4th January 2005 based on the offer contained in the letter of 11th November 2004 and the acceptance of the cheque for \$10,125.00 from Mrs. Brathwaite on 4th January 2005; (ii) whether the parties made an agreement during the period 2005 to 2008 for the grant of reciprocal rights-of-way over their respective properties; and (iii) the appellants' liability for trespass and the quantum of damages.

Held: dismissing the appeal, affirming the orders of the learned trial judge and awarding the respondent costs on the appeal of \$6,000.00, being two-thirds of the amount awarded in the court below, that:

1. There was no acceptance of the offer made to the appellants in the letter of 11th November 2004 to bring about an agreement between the parties. The offer lapsed, having not been accepted by the 30th November 2004 deadline, and the respondent's acceptance of the settlement payment from Eastern Caribbean Cement Products Ltd. did not have the effect of extending the offer made to the appellants. Furthermore, the acceptance of the settlement payment did not amount to part performance since the act of part performance must relate to an existing agreement. The act that is claimed to bring about an agreement (acceptance of the payment) cannot also be part performance of the same agreement.

Chitty on Contracts (31st edn, 2012) Vol. 2, para. 96 considered.

2. The parties did not agree terms of a new agreement after January 2005 for the grant of reciprocal rights-of-way over their respective properties. The appellants maintained throughout the High Court proceedings that the only concluded agreement was for them to be granted a right-of-way over the respondent's Lot 2, and that during the negotiations between 2005 and 2008 the respondent tried to introduce a new term of reciprocal rights-of-way. There was no evidence to support a finding that the parties agreed to grant reciprocal rights-of-way over their respective properties.
3. Assuming, without finding, that the 2005 payment included damages for trespass, and having found that there is no agreement to grant a right-of-way over the small triangle on Lot 2, the trespass to Lot 2 would have re-started in January 2005 and continued up to the date when the judge made his award in May 2016. The judge awarded \$10,000.00 for the several years of trespass

which is a reasonable sum in the circumstances. There is no basis for this Court to interfere with the award.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned trial judge, Sir Clare Roberts, QC, [Ag.] delivered on 17th May 2016 by which he dismissed the appellants' claim for specific performance of an agreement for the respondent to grant a right-of-way over the respondent's property to the appellants, an injunction to restrain the respondent from interfering with the appellants' use of the said right-of-way, and damages for trespass. The judge also allowed the respondent's counterclaim to the extent of awarding \$10,000.00 general damages for trespass but dismissed his claim for a mandatory injunction compelling the appellants to allow the respondent, his servants and agents access to a right-of-way over the appellants' property. The judge also ordered the appellants to pay prescribed costs of \$7,500.00 on the claim and \$1,500.00 on the counterclaim.

Background

- [2] The appellants and the respondent own adjoining freehold properties at Lance Aux Epines in St. Georges, Grenada. The respondent purchased his property in 1992 from Mr. Justice Lyle St. Paul and Mrs. St Paul. The St. Pauls' predecessor in title was Mr. Gordon Braithwaite who was the original owner of all the lands in the Lance Aux Epines estate that are relevant to this case. The respondent's property comprises two lots. The larger of the two lots, Lot 2, includes a small, triangular-shaped area at the southwestern corner measuring 303 square feet. As will appear below, this smaller piece of land, which I will describe in this judgment as "the small triangle", is at the centre of the dispute between the parties.
- [3] The sale of Lots 1 and 2 to the respondent included a right-of-way passing in part over the adjoining property and leading to the main road in Grand Anse. The adjoining property was then owned by Mr. Braithwaite or his company, Eastern Caribbean Cement Products Ltd. It is my understanding of the evidence that the

main road from Grand Anse to the Brathwaites' property is known as the Estate Road and where it continues unto the Brathwaites' property it is called the Old Road.

- [4] The appellants purchased the adjoining property in 1999 from Eastern Caribbean Cement Products Ltd. The land purchased by the appellants comprised two lots measuring 16,240 square feet and 1,714 square feet respectively. I will describe these two lots for convenience only as "Lot A" and "Lot B" respectively. The Old Road is located on Lot B. The sale to the appellants included a right-of-way over the Old Road and the Estate Road. Lot B abuts the small triangle on the respondent's Lot 2.
- [5] The respondent resides in England and has not developed his property.
- [6] The appellants reside in Grenada. Shortly after acquiring their property they commenced construction of their home on Lot A. Their case is that the Old Road did not exist when they purchased their property and they used the small triangle on Lot 2 to access their property. The respondent visited Grenada in May 2002. Having observed the construction on Lot A and the use of the small triangle on his property to gain access to Lot A, he advised the appellants to make alternative arrangements to access their property and to desist from encroaching on his property.
- [7] On 20th September 2002 the respondent wrote to Mr. Choo Loi Poi complaining about the encroachment on his property. He advised him that he intended to erect a fence around his property, Lot 2 (which would have the effect of denying access to the small triangle). However, the appellants continued to use the small triangle as their access to their property, Lot A.
- [8] In late 2002, the respondent commissioned a licensed land surveyor, Mr. Michael D. Lett, to survey his property. Mr. Lett conducted the survey and on 6th January

2003 produced his report with a plan attached. The findings in his report are interesting. Mr. Lett stated that:

- (a) According to the 1968 survey plan of Mr. Norris Williams, licensed land surveyor, the road to Lot 2 is shown as the line FJ on the Lett Plan (which is the Old Road);
- (b) Between 1968 and 1989 the direction of the right-of-way was changed in a manner that caused it to encroach on the respondent's Lot 2; and
- (c) The encroached area is 303 square feet as shown on the plan (which is the area that I describe in this judgment as "the small triangle").

[9] Mr. Lett was not called as a witness at the trial and the findings in his report were not tested by cross-examination. Indeed, both sides made use of and referred to Mr. Lett's plan in presenting their case. Mr. Lett's statement that the right-of-way changed position between 1968 and 1989 is supported by evidence in the case that the swimming pool of Mr. Roger Phillip, an adjoining owner, was built on the Old Road and blocks the use of the Old Road. The use of the small triangle became the new access to Lot A.

[10] On 20th February 2003 the respondent's lawyer, Mr. Alban John, wrote to the appellants confirming the respondent's complaints about the wrongful use of the small triangle and instructed the appellants to restore the Old Road so that he could get access to Lot 2 on his property. The letter required the appellants to confirm in writing within fourteen (14) days their preparedness to:

- (i) restore the Old Road to the respondent's Lot 2;
- (ii) agree just compensation for the area encroached upon;
- (iii) pay damages for trespass to the respondent's property; and
- (iv) pay the costs of Mr. Lett's survey.

[11] There was no written response to this letter. However, one year later on 24th February 2004 the appellants' lawyers, R C Benjamin & Co, having reviewed Mr. Lett's report, responded to Mr. John's letter enquiring whether the respondent would sell the small triangle to avoid unnecessary conflict. The respondent did not respond to the request to sell the small triangle. Instead, on 11th November 2004 Mr. John submitted a new proposal for a possible settlement. The letter is very important in understanding the dispute between the parties. It reads:

"Dear Sirs,

Re: Donald Frederick – Claim for Compensation for Trespass to Property –
Easement Offered to Choo Loi Poi

We spoke (John/Benjamin) on Monday 1st November, 2004. In an effort to bring closure to the long-outstanding matter at caption, we have been instructed by our client to propose a settlement whereby your client would pay compensation to our client for trespass, his costs incurred in pursuing a resolution of the matter and he will grant to your client an easement over the land trespassed upon on the condition that the same be paid for and that our client will have unrestricted access over the said parcel of land.

The settlement proposed is broken down as follows:

• Damages for trespass since 2002	\$6,500.00
• Cost of easement	3,636.00
• Surveying fees paid to determine extent of trespass	1,125.00
• Costs	<u>2,500.00</u>
TOTAL	<u>\$13,761.00</u>

Should your client accept the foregoing, the easement and the terms thereof are to be prepared at your client's expense and by Counsel of his choice but to be perused by us on behalf of our client.

The foregoing offer stands good for fourteen (14) days from the date hereof and, in any event, will be withdrawn by November 30th, 2004 if not accepted and concluded.

Yours truly,

Alban John" (underlining supplied)"

[12] At least three things are apparent from the letter:

- (1) it contained an offer by the respondent to grant a right-of-way to the appellants on the terms set out in the letter;
- (2) it stipulated payment of a settlement amount to the respondent of \$13,761.00; and
- (3) the offer was open for acceptance until 30th November 2004.

[13] Mr. Benjamin responded to the offer on 18th November 2004. Regrettably, the response did not find its way into the proceedings before the trial judge and was not available to this Court. Mr. John replied to the missing letter on the same day. He rejected the appellants' position in the letter, whatever it was, but offered to reduce the costs under the amount payable to the respondent to \$1,500.00 resulting in a revised offer of \$12,761.00. In all other respects the terms of the offer in the letter of 11th November 2004 remained the same.

[14] The deadline for accepting the offer of 30th November 2004 passed without any further word from the appellants or their lawyers.

[15] The next event was on 26th December 2004 when Mr. Benjamin wrote to Mr. John advising him that he was holding a cheque from Mrs. Christine Brathwaite for \$10,125.00 "being Caribbean Cement Ltd contribution towards settlement of this matter... [and that] [t]he balance of \$2636.00 will be paid on execution of the conveyance of the easement". Mr. Benjamin also requested the original of Mr. Lett's survey plan "by reference to which [they] should convey the easement".

[16] Mrs. Christine Brathwaite is the widow of Mr. Gordon Brathwaite referred to above.

[17] On 4th January 2005, Mr. John accepted the cheque and signed a receipt in the following terms:

"RECEIVED FROM R. C. BENJAMIN & Co CHEQUE IN THE SUM OF \$10,125.00 DRAWN ON THE ACCOUNT OF CHRISTINE BRATHWAITE

IN THE MATTER OF DONALD FREDERICK AND CHOO LOI POI BEING
PART PAYMENT ON AGREED SETTLEMENT OF \$12761.00."

The receipt also had a note in manuscript signed by Mr. John saying: "I have spoken with Lett – he has agreed to reproduce plan gratis. Will advise as soon as I have same. Many thanks. [Sgd.] A John".

- [18] The appellants complained that there were delays in the production of the original survey plan by Mr. Lett which they required to prepare the grant of easement. On 17th January 2007, Mr. Benjamin forwarded the draft deed of conveyance for the proposed easement to Mr. John without the survey plan. Mr. John replied by email on 10th May 2007 and raised the issue of a "reciprocal right of way" over Lot B on the appellants' property. He noted that the draft conveyance did not make provision for the respondent to have "...a reciprocal right of way to them over the small triangular lot measuring 1,714 Sq Ft...". Mr. John made the point that this was the right-of-way that was granted to the respondent when he purchased his property in 1992. His position was that the right-of-way that his client was willing to grant to the appellants (over the small triangle) was on the basis that he would be granted a reciprocal right-of-way over Lot B which was by then owned by the appellants.
- [19] The appellants' position was that they were purchasing a right-of-way over the small triangle on Lot 2 and that the right-of-way would be enjoyed in common with the respondent and his servants, agents and successors in title. There was no intention to grant a separate right-of-way over Lot B in favour of the respondent.
- [20] The parties could not resolve their differences. Eventually, the respondent took steps to fence his property which had the effect of blocking the right of passage over the small triangle on his land, Lot 2.
- [21] On 14th November 2008, the appellants filed an action in the High Court claiming specific performance of an agreement for the respondent to grant a right-of-way to the appellants over the small triangle on Lot 2, an injunction to restrain the

respondent from interfering with their use of the said right-of-way, and damages for trespass. The respondent counterclaimed for a mandatory injunction compelling the appellants to allow the respondent, his servants and agents, access to the right-of-way described as the Old Road, and for damages for trespass. The trial judge heard the claim and delivered his judgment in May 2016.

[22] The trial judge carried out a careful and detailed analysis of the oral and written evidence and concluded that an agreement was not made in November 2004 for the respondent to grant a right-of-way to the appellants over the small triangle, neither was there a concluded agreement for the grant of reciprocal rights-of-way over the appellants' and the respondent's respective properties. His findings on these important matters in the trial are set out at paragraphs 35 and 36 of the judgment.

[23] On the issue of the November 2004 agreement the judge found at paragraph 36:

"Having considered the evidence before me and having observed the witnesses who gave oral testimony, I hold that there was no agreement between the claimants and the defendant or between Mrs. Brathwaite on behalf of the claimants and the defendant, on 11th November 2004 and 5th January 2005 whereby the defendant agreed to grant and the claimants agreed to purchase an easement of way over the defendant's land at Lance Aux Epines, St Georges, or at all."

[24] On the issue of the agreement for reciprocal rights-of-way made after January 2005 the judge found at paragraph 35:

"There is uncertainty of the terms of the agreement claimed. The claimants do not indicate when the negotiations ended and the final document arising from the negotiations. Indeed my finding is that one key issue of the negotiations has not been resolved. The issue is that [of] the reciprocal right of way over the claimants' and the defendant's properties... On the witness stand both claimants held strongly to their position that they would not grant the defendant a reciprocal right of way over their land. They were willing to take but not to give."

[25] Having found that there was no concluded agreement for the grant of a right-of-way over the small triangle, or for reciprocal rights-of-way over the appellants' and the

respondent's respective properties, the trial judge dismissed the claim, allowed the counterclaim in part, and made the orders set out in paragraph 1 above.

The Appeal

[26] The appellants, being dissatisfied with the learned judge's decision, appealed to this Court. The notice of appeal lists five grounds of appeal which I summarise as follows:

- (a) Ground 1 - The judge's decision is against the weight of the evidence.
- (b) Grounds 2 and 5 – The judge failed to adequately consider that there was a valid and enforceable agreement to purchase a right-of-way over the small triangle and that the respondent in January 2005 accepted and retained a deposit therefor.
- (c) Ground 4 - The judge failed to adequately consider the report of the land surveyor, Mr. Lett, that by the time the respondent purchased his land the Old Road was no longer in existence and therefore there could be no right-of-way over it.
- (d) Ground 3 – The judge, in awarding damages of \$10,000 trespass, failed to consider that the parties had already agreed a sum for damages which sum was paid to the respondent in 2005.

[27] Ground 1 is a general challenge to the sufficiency of the evidence with no specific allegations. I will consider it as a part of the more specific grounds 2, 4 and 5 which challenge in various ways the trial judge's finding that there was no agreement between the parties for the grant of a right-of-way over the small triangle. Ground 3 deals with the issue of damages for trespass.

Issues

[28] The following issues arise for consideration by this Court:

- (a) Whether there was a concluded agreement between the parties during the period 11th November 2004 and 4th January 2005 based on the offer contained in the letter of 11th November 2004 and the acceptance of the cheque for \$10,125.00 from Mrs. Brathwaite on 4th January 2005;
- (b) Whether the parties made an agreement during the period 2005 to 2008 for the grant of reciprocal rights-of-way over their respective properties; and
- (c) The appellants' liability for trespass and the quantum of damages.

The November 2004 Agreement – Grounds 1, 2 and 5

- [29] The terms of the offer for a right-of-way over the small triangle are set out in Mr. John's letter to Mr. Benjamin on 11th November 2004. The background to this letter is summarised in paragraphs 6 to 11 and is reproduced in full in paragraph 11.
- [30] The offer was for a right-of-way over "the land trespassed upon" which, in the context of the correspondence and discussions between the parties, was the small triangle on the respondent's Lot 2. This was followed in the same sentence by the respondent's request for "unrestricted access over the said parcel of land". On a plain reading of the letter, this was an offer to the appellants to acquire a right-of-way over the small triangle to be enjoyed in common with the respondent. If by using the words "unrestricted access over the said parcel of land" the respondent was negotiating for a right-of-way over Lot B following the request in his letter of 20th February 2003,¹ it was not clearly expressed. Had the offer been accepted in accordance with its terms this could have led to a disagreement between the parties as to the land over which the respondent wanted to have unrestricted access. As it turned out this is a non-issue because the offer contained in the letter was not accepted by the deadline of 30th November 2004. The offer therefore lapsed and was no longer available for acceptance after 30th November 2004. Mr. John Carrington, QC who appeared for the respondent supported this very basic principle

¹ See paragraph [10] above

of law with a reference to **Chitty on Contracts**:² “[a]n offer which expressly states that it will last only for a specified time cannot be accepted after that time...”. In the circumstances, Mr. Benjamin’s letter of 26th December 2004 could not amount to an acceptance of the offer bringing about an agreement between the parties.

[31] Ms. Celia Edwards, QC who appeared for the appellants submitted that the deadline of 30th November 2004 for accepting the offer was extended by the conduct of the parties. She referred to the evidence that by the time the appellants purchased the property in 1999 the Old Road no longer existed, and they were advised that they could have access to their property over the small triangle. As it turned out the small triangle was located on the respondent’s property. The appellants therefore entered into negotiations with the respondent to purchase the small triangle. The negotiations resulted in the letter of 11th November 2004 with the offer of the right-of-way over the small triangle on condition that the appellants pay to the respondent \$13,761.00 broken down as set out in the letter. By accepting the cheque for \$10,125.00 from the appellants’ solicitor on 4th January 2005, and retaining the proceeds of the said cheque, the respondent extended the offer in 11th November 2004 letter and the acceptance of the cheque was effective acceptance of the offer resulting in a full agreement for the grant of an easement over the small triangle, subject only to the execution of a formal grant of easement. Ms. Edwards, QC did not support her position on this important part of the appellants’ case with an authority.

[32] I note that the cheque for \$10,125.00 was drawn on the account of Mrs. Christine Brathwaite and was styled “part payment of agreed settlement”. This begs the question why Mrs. Brathwaite or Eastern Caribbean Cement Products Ltd. was paying the respondent an amount of money that was close to the amount of the agreement to settle. The trial judge answered this question in paragraph 31 of his judgment:

² (31st edn, 2012) vol 2, para 96

“The claimant was cross examined as to why Mrs Brathwaite was paying for the right of way and it was suggested and accepted that it was the responsibility of Gordon Brathwaite to provide a right of way when he sold the property. It is reasonable to infer that Mrs Brathwaite (widow of Gordon Brathwaite) was making amends by paying the consideration and was the party to the negotiations. The Claimants admitted that it was Gordon Brathwaite’s obligation to provide a right of way. The claimants paid nothing. There was no evidence that Mrs Brathwaite was acting as the agent of the claimants. The evidence is that she was fulfilling an obligation that should have been fulfilled when the claimants purchased the land from her husband through his company, Eastern Caribbean Cement Products Limited. The second document^[3] raised the question whether any consideration came from the claimants. The document also raises doubt as to who [were] the parties to the agreement claimed by the claimants.”

These are important findings of fact by the trial judge. In a nutshell the judge found that the payment by Mrs. Brathwaite on behalf of Eastern Caribbean Cement Products Ltd. was to make amends for the company’s failure to provide the appellants with a right-of-way to their property; in making the payment Mrs. Brathwaite was not acting as the appellants’ agent; the appellants did not pay anything; and the receipt raises doubt as to who were the parties to the settlement agreement claimed by the appellants.

[33] I agree with and accept the judge’s findings which, in any event, were not challenged by the appellants. I find that the 11th November 2004 offer, having lapsed on 30th November 2004, the acceptance of a settlement payment from a third party, Eastern Caribbean Cement Products Ltd., which had its own reasons for settling the dispute, did not have the effect of extending the offer made to the appellants in the letter of 11th November 2004. I also find, contrary to the appellants’ alternative submission, that the acceptance of the payment did not amount to part performance. The act that is claimed to bring about an agreement (acceptance of the payment) cannot also be part performance of the same agreement. The act of part performance must relate to an existing agreement. It follows that any agreement for the grant of a right-of-way over the small triangle to the appellants would have to be on the basis of a new agreement to which I now turn.

³ The second document is the receipt which is set out at para. 16 above.

The Agreement for Reciprocal Easements

- [34] The alleged new agreement is that following the non-acceptance of the November 2004 offer the parties, by conduct, entered into a new agreement for the grant of reciprocal easements over their respective properties. The new agreement fails at the outset for two basic reasons.
- [35] Firstly, as Mr. Carrington, QC submitted, the appellants did not plead a case that there was a new agreement. I would go further and say that the appellants did not claim in their notice of appeal that the trial judge erred by not finding that there was a new agreement. Their position throughout was that there was a completed agreement in January 2005 and during the negotiations in 2005 to 2008 the respondent tried to change the terms of the concluded agreement by introducing the new term of reciprocal rights-of-way. The appellants categorically denied in their witness statements and oral evidence that there was any agreement to grant a reciprocal right-of-way over their property – Lot B. In fact, a finding of a new agreement, especially one that included reciprocal easements, would be contrary to their wishes expressed before and during the trial.
- [36] This is sufficient to dispose of any finding that there was a new agreement for reciprocal rights-of-way. But, out of deference to the very full submissions that were made to this Court, I will deal with the evidence that could support such an agreement.
- [37] The evidence is that, on 17th January 2007, Mr. Benjamin forwarded the draft deed for the grant of a right-of-way to Mr. John. The proposed right-of-way in the draft was for the appellants to have access over the small triangle in common with the respondent. Mr. John replied on 10th May 2007 to the effect that the draft deed did not make provision for the respondent to have a right-of-way over the Old Road on Lot B. The appellants contended that this was the first time that the respondent mentioned a right-of-way over Lot B in their favour. This is not strictly correct because Mr. John did ask the appellants in February 2003 if they were prepared to

restore the Old Road on Lot B. However, it was not clear that the respondent was requiring a right-of-way over the Old Road in his 11th November 2004 letter. None of this really matters because the appellants position was that they were not willing to grant a right-of-way over Lot B to the respondent. That position has never changed.

- [38] In short, the position after 2005 was that the parties were negotiating for a new agreement but could not agree the terms of the agreement. In fact, they were in complete disagreement on the basic term of a new agreement – the easement or easements to be granted to each other. On this issue the trial judge found that:

“Indeed my finding is that one key issue of the negotiations has not been resolved. The issue is that [of] the reciprocal right of way over the claimants’ and the defendant’s properties.”

This finding is completely consistent with the oral and written evidence and I have no hesitation in adopting it as my own.

- [39] In the absence of a finding that the parties had agreed terms for granting reciprocal rights-of-way, the possibility of finding that there was a new agreement after January 2005 must be dismissed.

- [40] Before leaving this part of the case there are two matters that I should mention. Firstly, the majority of the judge’s findings that I have adopted are findings of fact based on the judge’s observation of the witnesses giving their oral evidence and his assessment of the written evidence. He also drew inferences from the evidence that was before him. On principles that are very well known, an appellate court should not interfere with a trial judge’s factual conclusions unless it is shown that the trial judge did not take proper advantage of having seen and heard the witnesses and/or if the findings are plainly wrong.⁴ There is no basis in this case to interfere with any of the judge’s findings of fact.

⁴ Watt (or Thomas) v Thomas [1947] 1 All ER 582.

- [41] I also agree with and would not interfere with the trial judge's findings of mixed fact and law that there was no agreement between the parties and that the November 2004 offer lapsed and was not extended by the acceptance of the payment from Mrs. Brathwaite on behalf of Eastern Caribbean Cement Products Ltd.
- [42] The second additional point is the judge's finding, which I have adopted, that the payment by Mrs. Brathwaite was not made by or on behalf of the appellants towards settlement of the matter. Having found that the settlement offer lapsed and was not consummated, the money should be returned to Mrs. Brathwaite. However, as Mrs. Brathwaite is not a party to the proceedings and the issue of the return of the money was not before the Court, I will not make an order on the matter.
- [43] I would dismiss grounds 1, 2 and 5 of the notice of appeal.

The Surveyor's Report – Ground 4

- [44] The appellants complained in ground 4 of the notice of appeal that the trial judge failed to adequately consider Mr. Lett's report that by the time the respondent purchased his land the Old Road was no longer in existence and there could be no right-of-way over it. This complaint was partially dealt with in paragraph 9 above. It is common ground that Mr. Roger Philip built his house on property adjoining the Old Road in such a way that his swimming pool blocked the use of the Old Road. The evidence is very sketchy on this point, but it is reasonable to infer that following the building of the swimming pool on the right-of-way, the date of which is unclear, the Old Road beyond the swimming pool fell into disuse. Ms. Edwards, QC submitted that by the time the appellants bought their property the Old Road was no longer in existence. I do not doubt that this is correct as a matter of fact, but it does not mean that the right-of-way was extinguished as a matter of law. That issue was not before the trial judge and he was not obliged to treat with it. Suffice it to say that, in the absence of evidence sufficient to show that the right-of-way was extinguished as a matter of law, it should still be possible for the Old Road to be

restored as requested by the respondent in his letter to the appellants on 20th February 2003.⁵

[45] This ground of appeal has no merit and I would therefore dismiss it.

Damages – Ground 3

[46] The appellants complain that in awarding damages of \$10,000.00 for trespass under the counterclaim the trial judge failed to consider that the parties had already agreed a sum for damages that was paid to the respondent in 2005. Assuming, without finding, that the 2005 payment included damages for trespass, and having found that there is no agreement to grant a right-of-way over the small triangle, the trespass to the small triangle would have re-started in January 2005 and continued up to the date when the judge made his award in May 2016. The trial judge described the trespass as “wanton” and “persisted in”⁶ by the appellants. He awarded \$10,000.00 for the several years of trespass which is an entirely reasonable sum in the circumstances and there is no basis for this Court to interfere with the award. I would accordingly dismiss this ground of appeal.

[47] There was no appeal against the trial judge’s orders dismissing the applications for injunctions by both parties.

Conclusion

[48] In all circumstances, I would dismiss the appeal and affirm the orders of the learned trial judge. The respondent is awarded costs on the appeal of \$6,000.00, being two-thirds of the amount awarded in the court below.

⁵ See para. 10 above.

⁶ See para. 43 of the judgment.

[49] The assistance of counsel is gratefully acknowledged.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar