

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

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0014

BETWEEN:

**[1] LESLIE EMANUEL (Personal Representative of
Leopold Allan Emanuel (deceased))**

[2] LENNARD EMANUEL

Appellants

and

[1] ACE ENGINEERING LIMITED

[2] ANTHONY Le BLANC

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde Gertel Thom

Justice of Appeal

The Hon. Mr. Tyrone Chong QC

Justice of Appeal [Ag.]

Appearances:

Mr. Lennox Lawrence, for the Appellants

Ms. Coleen Felix Grant and Ms. Fenoni John-George, for the
Respondents

2015: June 17;
December 8.

Civil appeal – Requirement for express reservation of right of way or easement in memorandum of transfer of sale – Section 25 of Title by Registration Act (Dominica) – Absence of express reservation – Whether reservation can be implied – Circumstances where reservation can be implied – Common intention – Easement of necessity – Unjust enrichment – Subsequent discovery of excess land – Surveyor’s error in original acreage reflected in certificate of title.

By memorandum of transfer of sale dated 8th September 2006, the first-named respondent purchased from the deceased ‘a portion of land, part of Wall House Estate, in the parish of St. George, containing 13.219 acres, being the remaining part of a larger portion of land...containing 13.950 acres’, (“the Subject Land”). Upon the sale of the Subject Land, the estate road (“the Road”) which divides the first-named respondent’s land in two was not expressly reserved by the deceased as an easement road to access his adjoining

lands to the east. It was later discovered by a subsequent surveyor that the overall size of the original parcel was 14.584 acres and not 13.950 acres. This was due to an acknowledged mistake in calculation of the size of the parcel by the previous surveyor. The actual remainder of the land, which is what the parties intended to be the subject of the agreement, was therefore 13.623 acres as opposed to 13.219 acres (a difference of approximately 0.404 acres). The central issue of whether the appellants were entitled to a right of way over the Road as a common access over the Subject Land to the remainder of the Wall House Estate to the east was what generated a claim in the High Court. The learned trial judge dismissed the appellants' claim and held that the appellants were not entitled to a right of way over the Road as a common access over the Subject Land to the remainder of the Wall House Estate to the east. The appellants, dissatisfied with the decision, appealed to the Court of Appeal.

Held: dismissing the appeal and upholding the judgment of the learned trial judge save for the items identified in paragraph 39(1)(a) and (b) and ordering that the appellants pay the respondents costs of the appeal in the sum of \$2500.00 which represents one-third of the costs in the court below, that:

1. The duty to expressly reserve any easement or incorporeal right in or over land is a well-recognised and established legal principle. The general rule is that if a grantor intends to reserve any such right over the tenement granted, it is his duty to reserve it expressly in the grant. However, this general rule is subject to two exceptions, in which cases the law will imply the grant or reservation of such easement in the clear absence of an expressed reservation of a right of way. This implied reservation can only come about by way of an easement of necessity and/or to give effect to the common intention of the parties to a grant of real property. Notably, the threshold to imply a reservation of an easement is a high one as the courts are not quick to imply an easement not expressly reserved.

Wheeldon v Burrows (1879) 12 Ch.D.31 applied; **Pwllbach Colliery Co. Ltd. v Woodman** [1915] AC 634 applied; **Section 25 of Title by Registration Act (Dominica)** applied; **Stafford v Lee** (1993) 65 P&CR 172 applied.

2. The onus of proving common intention is on the grantor to establish the facts to prove clearly that his case was an exception. Before the court can imply the reservation of an easement, it must be shown that the facts are not reasonably consistent with any explanation other than that such a reservation was intended. It does not suffice to show that the facts are simply consistent with the implication of the reservation of an easement. In this appeal, the appellants failed to discharge the onus of proof to show clearly and affirmatively that the common intention of the grantor and the grantee was to reserve a right of way over the Road. The evidence clearly shows a conflict and as such negates any intention that was common to the parties that an easement/ right of way over the Road should be reserved by implication.

Re Webb; Sandom v Webb [1951] 2 AER131 applied; **Stafford v Lee** (1993) 65 P&CR 172 applied.

3. An easement of necessity is one without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property. Such easement will be implied if the remaining land is effectively landlocked. The right of way arises out of necessity, not convenience. It would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use that way than another, it must exist as a way of necessity. Further, once alternative access is available, even if it is by water rather than land, no matter how inconvenient, a right of necessity cannot arise, unless that other way is merely precarious. In this appeal, the appellants have a possible alternative access to all parts of the retained land and as such are not entitled to a right of way over the Road by virtue of an implied reservation based on necessity.

Dodd v Burchell (1862) 1 H. & C. 113 applied; **Boisson v Letrean** TT 1989 HC 135 applied.

4. Unjust enrichment presupposes three things, first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly that it would seem unjust to allow him to retain the benefit. In the present case, the first-named respondent is in possession of a benefit i.e. more land which it did not pay for. All three criteria have therefore been met and so to allow the first-named respondent to benefit from a difference in acreage miscalculated without compensation would result in the respondents being unjustly enriched to the detriment of the appellants. This is more so since the difference resulted from a mistake by the surveyor whose task was to calculate the size of the remainder for sale by the vendor to the purchaser. It is therefore only fair and just for the first-named respondent to disgorge that benefit by paying to the first-named appellant the value of the 0.404 acres of excess land.

JUDGMENT

- [1] **CHONG JA [AG.]**: Central to the determination of this appeal (as at the trial) is whether the estate road which divides the first-named respondent's land in two and shown on the 1967 plan 2 Wall House Estate¹ was reserved as an easement road by the vendor, Leopold Emanuel ("the Deceased") on the sale to the first-named respondent in memorandum of transfer of sale dated the 8th September

¹ Appeal Bundle # 1 p. 413.

2006 (“the Transfer”) for accessing the Deceased’s adjoining lands to the east (“the Road”).

[2] The making of this determination will effectively deal with the issue raised in grounds 1 – 5 of the appellants’ grounds of appeal and for that matter the appeal itself.

[3] The facts as they relate to the issues raised by this appeal are as follows:

(i) By the Transfer the first-named respondent purchased from the Deceased ‘a portion of land, part of Wall House Estate, in the parish of St. George, containing 13.219 acres, being the remaining part of a larger portion of land known as part of Wall House Estate in the parish of St. George, containing 13.950 acres’ (“the Subject Land”).

(ii) Upon the sale of the Subject Land to the first-named respondent, the Deceased did not expressly retain any right of way over the Road or other easement.

[4] The learned trial judge, in his judgment dated 1st May 2013 dismissing the appellant’s claim, held that the appellants were not entitled to a right of way over the Road as a common access over the Subject Land to the remainder of the Wall House Estate to the east. This essentially is what the appellants are dissatisfied with and say that this finding is not supported by the facts and wrong in law.

[5] In deciding whether the learned trial judge was correct in holding as he did that the Road was not a common access over the Subject Land, this Court must direct its mind to the following:

(i) In the absence of expressed reservation to reserve a right of way over the Road, under what circumstances would the law imply a reservation; and

- (ii) Based on the facts and circumstances of this case, can the Court imply such a reservation in favour of the appellants' right to use the Road over the Subject Land to access their lands to the east?

Expressed Reservation

- [6] The duty to expressly reserve any easement or incorporeal right in or over land is a well-recognised and established legal principle and dates back to the often cited case of **Wheeldon v Burrows**² (broadened in **Pwllbach Colliery Co. Ltd. v Woodman**³). The general principle governing cases of this kind was categorized by Thesiger, LJ as follows:

"The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant."⁴

- [7] The common law duty to expressly reserve easements or other incorporeal rights now finds its statutory counterpart in most if not all modern day statutory regimes which seek to regulate the registration of land and the Commonwealth of Dominica is no exception. Section 25 of the **Title by Registration Act** ⁵("the Act") reads:

"Whenever any easement or any incorporeal right in or over any land is to be added to any land contained in a certificate of title, the person selling,

² (1879) 12 Ch.D.31.

³ [1915] AC 634.

⁴ At p.49.

⁵ Cap. 56:50 , Revised Laws of Dominica 1990.

granting, or transferring the right shall execute a memorandum of transfer in Form 7, and the Registrar of Titles shall file the same when presented, and either grant a new certificate of title to the registered proprietor, with the easement or other right mentioned therein added to the land, whenever required to do so, or shall note the acquisition of the easement or incorporeal right on the existing certificate of title of the land to which it is added, as well as on the certificate of title of the land to be thenceforth subject to the easement or right.”

[8] There is absolutely no dispute in this case that the Deceased, Leopold Emanuel did not expressly reserve or retain any right of way or other easement over the Road in the Transfer.

[9] In the clear absence of an expressed reservation of the right of way over the Road, any reservation of the appellants’ right of way over the Road, if at all, must in the circumstances of this case be implied. Based on the principles laid down in **Wheeldon v Burrows** and broadened in **Pwllbach Colliery Co. Ltd. v Woodman**, this implied reservation can only come about by way of an easement of necessity and/or to give effect to the common intention of the parties. Lord Parker of Waddington in **Pwllbach Colliery Co. Ltd. v Woodman** stated:

“The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See *Jones v. Pritchard* (1) and *Lyttelton Times Co. v. Warners* (2) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.”⁶

[10] For the purposes of this case, the issue of implied reservation will be dealt with under two sub-heads – common intention and easement of necessity and its impact on the outcome of this appeal.

⁶ At pp. 646-647.

Common Intention

- [11] At the outset it should be made clear that the onus of proving common intention is on the grantor and in the present case that means the Deceased or his successors-in-title, namely, the appellants. In **Re Webb; Sandom v Webb**, on appeal the Court held, that: ⁷

“Prima facie the landlord could not assert against the tenant any right which was not expressly reserved to him in the lease; and that the landlord had failed to discharge the onus, which was on him, to show that a reservation of the right must be implied and the general rule did not apply.”

Lord Evershed, MR. had this to say on the matter:

“...it is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee or, at least, to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant.”⁸

- [12] In applying the facts to the law, Jenkins, LJ stated:

“That question must be approached with the following principles in mind: (i) If the landlord intended to reserve any such rights over the demised premises it was his duty to reserve them expressly in the lease of 11 August 1949: *Wheeldon v Burrows*. (ii) The landlord having failed in his duty, the onus was on him to establish the facts to prove clearly, that his case was an exception to the rule: *Aldridge v Wright*. (iii) The mere fact that the tenant knew at the date of the lease of 11 August 1949, that the landlord was using the outer walls of the demised premises for the display of the advertisements in questions did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them he intended to claim, or to take the case out of the general rule....”⁹

- [13] The evidence of the grantee, through its director, the second-named respondent Anthony Le Blanc, was to the effect that there was never any such common intention at least not on his part. This can be gleaned from his answer to Mr. Lawrence’s question – ‘I was aware the Road was part of the property I was purchasing, yes’.¹⁰ Further, the evidence of Leslie Emanuel is telling and supports

⁷ [1951] 2 All ER 131.

⁸ At p.139.

⁹ At p. 144.

¹⁰ Transcript of trial proceedings (23rd -24th November 2011), Appeal Bundle #2 p.247 – lines 1-6.

in my mind that the Road was never intended to be reserved. This is his response given to questions put to him by counsel for the respondents:

“There was a gate there that was locked after working hours I only had access to the property during that time, I could not go after 5 o’clock, on weekends I couldn’t go in. The gate was always locked”.¹¹

[14] In the absence of any direct evidence understandable in the circumstances from the Deceased, what other evidence is there to assist the Court in determining the issue of common intention? If one puts aside the evidence of the direct representatives of the appellants and respondents, I daresay very little, and whatever evidence there is, shows clearly a conflict and as such negates (rather than proving affirmatively) in my opinion, any intention that was common to the parties that an easement/ right of way over the Road should be reserved by implication.

[15] The evidence of the employees of the parties is as follows:-

(i) Witness summary for Lipson Lugay employee of the Deceased who had daily contact with the Deceased reporting and taking instructions daily at paragraph 16 of his witness summary he states, ‘.... no time whatever prior to the death of [the Deceased] was he or anyone else required to seek or obtain permission by ACE Engineering to enter the said lands.’¹²

(ii) However Jerry Alfred, employee of the first-named respondent in his witness statement had this to say at paragraph 8:

“As far as I am aware, no one outside ACE Engineering Ltd had free access to the property.”

Paragraph 11: I have also never seen Mr. Emanuel or anyone on his behalf, drive through the property, or use the road thereon as a means of accessing his lands to the east of the ACE property.”¹³

¹¹ Transcript of trial proceedings (23rd -24th November 2011), Appeal Bundle #2 p.101, lines 19 – 25; p.102 lines 1 – 4.

¹² Appeal Bundle #1, p. 62.

¹³ Appeal Bundle #1, p.143.

[16] Clearly, the statement and summary from these witnesses, whose physical presence on the property cannot be denied, are in conflict and in my mind indicate a lack of common intention on the part of the parties that an easement or right of way should be implied. The resolution of this conflict in the evidence can be found in the witness statement of Vincent Robinson, where he states at paragraph 13: 'Based on the calculations generated from Mr. Seaman's work, it would appear that the road is included in the area of the property sold to ACE Engineering Ltd.'¹⁴

[17] For the reason stated above together with the learned trial judge's findings at paragraph 2 of his judgment i.e., 'They allowed access during regular business hours to permit removal. The claimant failed to remove the equipment in a timely manner and the relationship between the parties broke down. The defendants locked the gate and denied the Claimants entry', I am of the opinion that the appellants failed to discharge the onus of proof to show clearly and affirmatively that the common intention of the grantor and the grantee was to reserve a right of way over the Road hence the learned trial judge was right in holding that there was no implied reservation of a right of way over the Road.

[18] The threshold to imply a reservation of an easement is a high one.¹⁵ This is so because the principle is that a landlord (and in this case, the Deceased) should reserve the easement in writing or in a clear manner and the courts are not quick to imply an easement not expressly reserved.

[19] The learned author of **Cheshire's Modern Law of Real Property** explains the law in this way:

"The law is disinclined to imply easements in favour of a grantor. The reason is not far to seek. In the case of a grant of land, the law is guided by two principles: the words of a deed must be construed as far as provided in favour of the grantee, and the grantor cannot derogate from his own absolute grant by claiming rights over the thing granted. If the

¹⁴ Appeal Bundle #1, p.306.

¹⁵ See: *Stafford v Lee* (1993) 65 P&CR 172.

grantor intends to retain a right over the land, it is his duty to reserve it expressly in the grant. As a general rule there will be no implication in his favour.”¹⁶

[20] Peter Butt, in his textbook Land Law, expresses a similar view –

“The law will not readily imply the reservation of an easement by a vendor in favour of land he retains over land he has sold. The reason for this is clear: a vendor who wishes to reserve an easement in such circumstances is in a position to, and should, reserve it expressly; the law should not readily assist a vendor by implying easements in his favour where he has omitted to reserve them expressly.”¹⁷

Overriding Interest

[21] The issue of overriding interest for the purposes of this appeal can be dealt with under the sub-head of common intention as the two are inextricably tied and in the absence of an expressed reservation, the grantor can only claim an overriding interest/quasi-easement on an implied reservation based on common intention.

[22] Any overriding interest/quasi-easement was extinguished by the sale to the first-named respondent which did not expressly reserve the right/interest and for the reasons stated above, could not be implied by virtue of a common intention so to do by the parties, based on the fundamental principle in **Wheeldon v Burrows** that ‘a man could not delegate from his own grant’. See also **Re Webb**; **Sandom v Webb**.

[23] In **Andrew David Scott Walby, Richard Scott Walby v Malcolm Seamus Scott Walby, Laura Christina Scott Walby**¹⁸ the court had this to say on quasi-rights (which is tantamount to an overriding interest):

“The fact that the right or quasi-right was being openly enjoyed at the time of the grant did not suffice as the basis for implying a reservation of the right to continue that enjoyment following the transfer of the quasi-servient land. Before the court can imply the reservation of an easement, it must be shown that the facts are not reasonably consistent with any explanation other than that such a reservation was intended. **It does not**

¹⁶ E.H. Burn, Cheshire's Modern Law of Real Property (12th edn., London Butterworths 1976) 533.

¹⁷ Peter Butt, Land Law (2nd edn, Sweet & Maxwell Ltd 1998) 314.

¹⁸ [2012] EWHC 3089 (ch).

suffice to show that the facts are simply consistent with the implication of the reservation of an easement".¹⁹ (my emphasis)

In the Trinidad & Tobago case of **Majio v Beepath**²⁰ similar sentiments were expressed as follows:

"The principle of this mode of creation is that although there has been no express mention of an easement in the grant of the land, yet it may very well be that the common intention of the parties cannot be carried out unless some particular easement is deemed by implication."²¹

"Where the common owner sells the quasi servient tenement, the law is disinclined to imply easements in favour of the quasi dominant tenement, if the latter is retained by him. So that, if on the creation of the lease to the plaintiff, the common landowner thought that is [sic] was (end of page 7) necessary to have a right of way which he could pass on for the benefit land occupied by the defendant, it was his duty to reserve it expressly in the grant; ..." ²²

With that said, I am of the opinion that there can be no easement or right in this case by way of an overriding interest.

[24] Having found that there was no right of way over the Road by implied reservation based on common intention of the vendor and purchaser; I can now turn to the other exception, namely, easement by necessity.

Easement by Necessity

[25] The learned trial judge at paragraph 10 of his judgment expressed in my view correctly the principle where an easement of necessity will be implied when he states:

"As far as the present case is concerned an easement of necessity will be implied if the remaining land is effectively landlocked ... that there can be implied an easement of necessity where part of the retained property cannot be used without the access. It is not necessary that the entire property be landlocked. This is important because the topography of the

¹⁹ At para. 44.

²⁰ TT 1981 HC 40.

²¹ At p. 4, para. 5.

²² At p. 4 para. 7.

retained land is such that access to different parts can be had otherwise”
– Union Lighterage Co. v London Graving Dock Co.²³.

[26] With the law correctly stated the learned trial judge found as follows:

- (i) it was clear that the public road bound with the remaining 272.5 acres at different points.
- (ii) these alternatives do not permit access to the part of the remaining lands which it can access through the defendants lands, however access could be gained by constructing a bridge over a small stream.

[27] The learned judge found based on the evidence and the visit to the locus in quo that there was an alternative access and therefore rightly concluded in my opinion at paragraph 12 that:

“In the circumstances of this case it is not open to this court to imply an easement of necessity as the claimant has a possible alternative access to all parts of the retained land. That access might be expensive to construct but it is available”.

[28] In **Megarry & Wade: The Law of Real Property**, the authors capture the law succinctly in these terms:

“If some other way exists, even if it is by water rather than over land, no way of necessity will be implied unless that other way is merely precarious and not as of right, or unless, perhaps, it would be a breach of the law to use that other way for the purpose in question. Nor will there be a way of necessity if the other way is merely inconvenient, as where the land abuts on a highway in a cutting 20 feet below; for the principle is that an easement of necessity is one ‘without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property.’”²⁴

[29] Similar sentiments are expressed by Peter Butt in his textbook **Land Law**:

“There will be impliedly reserved, in favour of the land retained by the grantor over the land conveyed, such easement as are “necessary” for the use of the land retained. A common example is a right of way of necessity, which arises where a grantor has disposed of part of his land in

²³ [1902] ch 557.

²⁴ Charles Harpum, Stuart Bridge and Martin Dixon, Megarry & Wade: The Law of Real Property (7th edn, Sweet & Maxwell 2008) 1245, 2nd para.

such a way as to leave the part retained landlocked. An easement of necessity will not be impliedly reserved simply because it is convenient for the grantor; it seems that the easement must be one without which the land retained cannot be used at all, and certainly is not sufficient for the easement merely to be necessary for the reasonable enjoyment of the land retained.”²⁵

- [30] The above exposition of the law on easement of necessity by the learned authors is supported by judicial pronouncement made as far back as 1862 in **Dodd v Burchell**²⁶ and in more recent times in the case of **Boisson v Letrean**²⁷. In **Dodd v Burchell** this is what the court had to say:

“It seems to me that it would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use that way than another way, it must exist as a way of necessity. There is no foundation whatever for such a doctrine.”²⁸

In the case of **Boisson v Letrean** the learned trial judge expressed similar views this way: ‘Right of way arises out of necessity not convenience and that once alternative access is available, no matter how inconvenient, a right of necessity cannot arise.’²⁹

- [31] With the disposition of the matters relating to the easement by implication, whether by common intention or necessity, the Court must now turn its mind to excess land resulting from the discovery by surveyor Robinson that overall size of the original parcel was 14.584 acres and not 13.950 acres due to an acknowledged mistake by surveyor Seaman.

- [32] The difference based on Robinson’s calculation would be approximately 0.404 acres arrived at as follows:

	Robinson	Seamen
Original acreage	14.584	13.950
Balance after small lots subtracted	13.623	13,219

²⁵ Peter Butt, *Land Law* (2nd edn., Sweet & Maxwell Ltd 1998) 315.

²⁶ (1862) 1 H. & C. 113.

²⁷ TT 1989 HC 135.

²⁸ At p. 122.

²⁹ At para.11.

Difference

plus 0.404

- [33] It is clear from the Transfer that the vendor intended to sell the remainder of a larger portion of land known as part of Wall House Estate registered in Volume 010 Folio 32 of the Register of Titles and the memorandum of transfer dated 8th September 2006 so states:

“I Leopold Allan Emmanuel, being the registered proprietor of a portion of land, part of Wall House Estate, in the parish of St. George containing 13.219 acres, being the remaining part of a larger portion of land known as part of Wall House Estate, in the parish of St. George containing 13.950 acres, as the same is bounded and described in the Certificate of Title in my favour dated the 5th day of January 1994 and registered in Volume O10 Folio 32 of the Register of Titles .”³⁰

I can find no fault with the learned trial judge’s findings at paragraph 5 of his judgment when he states: *‘They intended to sell and buy the remainder of the land in the certificate of title after the small lots had been subtracted.’*

- [34] The intention of the parties was to sell and buy the remainder being 13.219 acres after the small lots which had been sold were subtracted for the purchase price of \$740,000.00. The true purport of this intention was not only to sell and buy the remainder (including the Road) but that remainder as determined by surveyor Seaman to be 13.219 acres. However due to a mistake on the part of surveyor Seaman the original acreage was incorrectly calculated to be 13.950 acres instead of 14.584 acres as found by surveyor Robinson. This error resulted in a difference of plus 0.404 acres.
- [35] To allow the first-named respondent to benefit from this difference without compensation would result in the first-named respondent being unjustly enriched to the detriment of the first-named appellant, more so when this difference resulted from a mistake by the surveyor whose task was to calculate the size of the remainder for sale by the vendor to the purchaser and the maxim *quantum valebat* would apply.

³⁰ Appeal Bundle #1, p.396.

- [36] The first-named respondent is in possession of a benefit i.e. 0.404 acres which it did not pay for and it is only fair and just for the first-named respondent to disgorge that benefit by paying to the first-named appellant the value of the said excess land determined to be 0.404 acres.
- [37] 'Unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a *benefit*; secondly, that he has been so enriched *at the plaintiff's expense*; and thirdly, that would seem *unjust* to allow him to retain the benefit'.³¹ All three criteria have been met in the present case and I am of the firm opinion that the Aristotelian concept of corrective justice in re-establishing the equality between the vendor and purchaser can be invoked in the circumstances and in so doing, the first-named respondent should be ordered to pay for this excess of land of approximately 0.404 acres calculated on the original purchase price of \$740,000.00 which I calculated to be \$22,615.93 arrived at using the following formula: $\$740,000.00 \times 13.623 \div 13.219 = \$762,615.93 - \$740,000.00 = \$22,615.93$, and I so order.
- [38] It stands to reason that having found that the appellants are not entitled to right of way over the Road by virtue of an implied reservation based on common intention or necessity, the claim for trespass as ordered by learned trial judge at paragraph 15 of his judgment must therefore be upheld. Suffice it to say that trespass is an action available to persons in possession and the first-named respondent was in possession at all material times.³²
- [39] This therefore effectively disposes of the appeal and our order is as follows:
- (1) That the appeal is dismissed; that the judgment of the learned trial judge is upheld save (a) that the Registrar of Titles proceed to cancel certificate of title, Volume 010 Folio 32 in the name of the Deceased and to issue a new certificate of title in favour of the first-named respondent for 13.623

³¹ Lord Goff of Chieveley and Gareth Jones, *Goff & Jones: The Law of Rectification* (3rd edn., Sweet & Maxwell 1986) 16; *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762.

³² *Halsbury's Laws*, (3rd edn., 1962) Vol 38 para 1214.

acres on the basis of the plan prepared by surveyor Vincent Robinson dated 21/04/2010;³³ (b) that the first-named respondent pay to the first-named appellant the sum of \$22,614.93 for 0.404 acres which is the difference between the amount paid for 13.219 acres and the actual amount received i.e. 13.623 based on the error made by surveyor Seaman when calculating the original remaining acreage.

- (2) Taking into consideration that the appellants did have some limited success in this appeal we will order the appellants to pay the respondents the costs of this appeal in the sum of \$2,500.00 which represents one-third of the costs in the court below.

Tyrone Chong Q.C
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

³³ Appeal Bundle #1, p.393.