

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2004

BETWEEN:

ASOT A. MICHAEL

Appellant

and

ASTRA HOLDINGS LIMITED

Respondent

AND

CIVIL APPEAL NO.15 OF 2004

BETWEEN:

[1] ROBERT CLEVELAND
[2] LISA CLEVELAND
[3] CLARENCE A. ECKERT
[4] MILDRED I. ECKERT
[5] CHARLES SAWKA
[6] LINDA SAWKA

Appellants

and

ASTRA HOLDINGS LIMITED

Respondent

Before:

The Hon. Mr. Adrian Saunders
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

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

Appearances:

Mr. Elliott D. Mottley, QC, and Mr. John Fuller for the Appellant in Civil Appeal No. 17 of 2004
Mr. John Fuller for the Appellants in Civil Appeal No. 15 of 2004
Mr. Gerald Watt, QC, and Mr. Norris Scholar for the Respondent in both appeals

2005: March 16; 17;
May 23.

JUDGMENT

- [1] **RAWLINS, J.A. [AG.]:** These appeals are against a judgment that Mitchell J delivered in favour of Astra Holdings Limited in April 2004. In that judgment, the learned Judge awarded \$500.00 nominal damages and \$9,000.00 costs to Astra Holdings against the government of Antigua and Barbuda. He made this award because he found that servants of the Public Works Department trespassed upon the lands of Astra Holdings and constructed roads on it without the permission of the owners. The Attorney General filed a Notice of Appeal but has not pursued it.
- [2] Against Appellant Asot Michael, the learned Judge awarded \$250,000.00 general damages and \$250,000.00 exemplary damages for trespass. He awarded interest at the rate of 10% from the date that the claim was filed to judgment, and prescribed costs on the total award of \$500,000.00. In making these awards, the Judge held that the real responsibility for the trespass rested with Mr. Michael. He found that while Mr. Michael was the Minister of Public Works, he caused equipment of the Public Works Department to enter upon the lands and construct the roads. The Judge made the award for exemplary damages under the category described in **Rookes v Barnard** [1964] A.C. 1129, which permits an award for oppressive, arbitrary and unconstitutional conduct by a government servant.
- [3] The learned trial Judge also granted Astra Holdings injunctive relief against Mr. Michael, as well as against the Appellants on the Notice of Appeal in Civil Appeal No. 15 of 2004. The injunction prohibits them from passing and re-passing along the eastern branch road that traverses the lands of Astra Holdings. This is a part of a road that leads from the Willikies Main Road to their properties. They have appealed against the grant of the injunction.
- [4] The Notice of Appeal in Civil Appeal No. 15 of 2004 was filed on 12th May 2004. The appeal was not listed for hearing because the procedural processes for listing were incomplete. However, it was consolidated with Civil Appeal No. 17 of 2004,

by consent, because a decision on this appeal could affect the Appellants who filed that Notice. The appeals were consolidated on condition that the Appellants on the Notice in Civil Appeal No. 15 of 2004 would abandon 3 grounds of appeal that are stated in the Notice. These grounds relate to the acquisition of an easement by prescription over the disputed road.

- [5] A brief background would put the central issues that are to be determined on these appeals into helpful perspective.

Background

- [6] Astra Holdings is a development company. The government owns 25% of its shares. The company holds a parcel of land at Lawries Bay in the Parish of St. Phillip in Antigua. It is registered as Registration Section: St. Phillip North Block 25 3288A, Parcel 44. On the northern boundary of this land is a hilltop property known as Cinnament Hill. Allan R. Wilson, deceased, owned it.
- [7] Astra Holdings acquired title to Parcel 44 in 1989. Prior to this, the government owned it and transferred a portion of about 145 acres to Western Corporation Development Limited in about 1973. These lands were originally a part of Rooms Estate. They supported sugar cane up to the early 1970s. When the planting of sugar cane ended in the early 1970s, they supported vegetables and livestock. Plots were leased to small farmers under the Peasant Development Program.
- [8] The Appellants in Civil Appeal No. 15 of 2004, the Cleavelands, the Eckerts and the Sawkas, own 3 parcels of land at Cinnament Hill. Their parcels are parts of a strip of land, which the late Mr. Wilson had alienated from his Cinnament Hill property lands that were west of Lawries Bay. He purchased these lands during the 1960s from a Cornelius family. The land was about 19 acres, and described as St. Phillip North, Block 25 3190A, Parcel 5. Mr. Wilson sub-divided some of it into the parcels, which he sold.

- [9] The Eckerts purchased their parcel from Mr. Wilson in the late 1970's. They built a house on it in 1984 and took up residence there in 1986. Linda Sawka, who is their daughter, first visited Antigua from the 1970's. She moved to the island in 1982 with her husband, Charles Sawka. They lived in a house that they rented. Her parents subsequently gave her a piece of their parcel of land. The Sawkas built a house on it in 1999 and moved into the house in 2000.
- [10] Mr. Michael and his mother, Mrs. Josette Michael, purchased 2 parcels of land from Mr. Wilson's estate in early 2003. These are registered as parcels 9 and 17. The Michaels also jointly acquired adjoining parcel 12 from Yorie Pigott.
- [11] An access road runs from the Willikies Main Road northwards to the gate of the Wilson's Cinnamon Hill property. About two thirds of the way from the main road, the access road splits into a western and an eastern branch road. Both branch roads provide access to the Wilson property. They also provide access to the properties on the strip of land that Mr. Wilson sub-divided, as well as to the Michaels' lots 9, 12 and 17.
- [12] The western branch road access is not in dispute. Astra Holdings accepts that the Appellants in both appeals are entitled to use it. The dispute arises in relation to the eastern branch road, which runs over Astra Holdings lands. The Appellants have insisted that it is a public right of way, and that therefore, the servants of the Public Works Department did not commit a trespass when they entered upon it to improve it for the use of the Appellants and the public. On the other hand, Astra Holdings has insisted that the eastern branch road is neither a private nor a public right of way, but forms part of its private property. Astra Holdings claims that when Mr. Michael instructed the Public Works Department to enter upon the property to grade it, those acts constituted a trespass. It also claims that the Appellants in Civil Appeal No. 15 of 2004 trespassed on its property by using the road as a public thoroughfare to access their properties at Cinnamon Hill.

The Considerations on these Appeals

- [13] First, I shall state the issues that arise in these appeals, and, second, deal with each substantive issue under the appropriate heading.

The issues

- [14] The Appellants challenge various aspects of the facts that the Judge found, inferences that he drew and his application of legal principles. However, the exact grounds of appeal are not specifically stated.
- [15] It is trite principle that an appellate Court will not impeach findings of facts and inferences of a first instance or trial Court that saw and heard witnesses give their evidence, except in certain circumstances. An appellate Court may interfere in a case in which the reasons given by a trial Judge are not satisfactory, or where it is clear from the evidence that the trial Judge misdirected himself. Where a trial Judge misdirects himself and draws erroneous inferences from the facts, an appeal Court is in as good a position as the trial Judge to evaluate the evidence and determine what inference should be drawn from the proved facts. **[See Francis v Boriel, St. Lucia Civil Appeal No. 13 of 1995 (20 January 1997) and Grenada Electricity Services Ltd. v Isaac Peters, Grenada Civil Appeal No. 10 of 2002 (28th January 2002)].**
- [16] Even if, as it appears in the present case, there are instances in the judgment in which facts were found and inferences drawn on no or no clear evidential bases, little purpose would be served by simple references to those instances, if, in the end, these factual findings and inferences would not adversely affect the central issues around which these appeals revolve.
- [17] As I discern them, the central issues in these appeals are, first, whether the learned trial Judge erred when he held that the eastern branch road was not a

public right of way over the lands of Astra Holdings. The finding on this issue would, to some extent, determine whether the Appellants trespassed on the lands of Astra Holdings. I state “to some extent”, because the trial Judge could have found trespass although a right of way existed over the eastern branch road, if the grading reached outside of the delineated boundaries of the existing right of way and encroached upon areas of Astra Holdings’ lands. The finding on the first issue would also go to the question whether the learned Judge erred when he granted the prohibitory injunction against the Appellants. The resolution of the appeal on this issue would also involve a consideration of a statement that the Judge made that the eastern branch road is not a private road.

- [18] The second substantive issue is concerned with the award of damages. The first challenge is that the award of damages should be struck out because the grading of the road did not constitute a trespass. The second challenge to the award of damages is whether, presuming that the Judge correctly found that there was a trespass, the Judge nevertheless erred when he ordered Mr. Michael to pay \$250,000.00 general damages. The third question is whether the Judge erred when he ordered Mr. Michael to pay \$250,000.00 in exemplary damages. In the fourth place, Mr. Michael appealed against the award of interest. First, however, the appeal against the statement that the eastern branch road was not a public or private right of way.

Right of Way

- [19] In both Notices of Appeal, the Appellants appealed against findings of fact and law in relation to the Judge’s statement that the eastern branch road was neither a private right of way nor a public road.
- [20] It is clear that the Judge held definitively that this road was not a public road. He gave detailed reasons for this decision in paragraphs 10–22 of the judgment.

Notwithstanding his statement that it was not a private road, he did not go into either an analysis of the law or facts on this issue. Did he err?

Private right of way

[21] The learned Judge considered the Cadastral Index Sheets and the Topographical Sheets for the Lawries Bay area. He then made the following observation at paragraph 12 of the judgment:

“In both, there is shown one private right of way running from the main road to Cinnament Hill along what we are calling the western branch road. There are several footpaths shown on these official maps, but none leading along the line of the disputed eastern branch road. There is neither a public road nor a public right of way over the Astra land shown on any map or plan in evidence, only the one private right of way leading along the alignment of the western branch road.”

[22] By these words, the learned Judge did not decide whether the Appellants are entitled to a private right of way over parcel 44 by way of the eastern branch road. He only stated what paths he observed from the Sheets. In fact, at paragraph 16 of the judgment, he stated that he only had to determine whether there was a public right of way over the disputed roads. He noted that there was no claim to a private right of way. The Appellants did not plead entitlement to a private right of way so this was not before the Court as a contested issue. The learned Judge was therefore not required to determine the question.

[23] The Attorney General was the First Defendant. According to the defence that was filed on his behalf, the Ministry of Works carried out a grading project along public roads that existed for over 40 years. The works involved clearing overgrowth and thorny shrubs to make the surface of the roads more easily passable by vehicles. He did not plead that he and other persons were entitled to a private right of way.

[24] Mr. Michael was the Second Defendant. He did not plead that the eastern branch road was a private right of way. According to his Defence, he received advice and consulted with persons who knew the gravel road tracks within parcel 44 for many

years. He concluded from what he was told that the eastern branch road was a public road. It was on this basis that he caused the Public Works Department to reinstate the eastern branch road. He did this in order to permit the lot holders in the area, including himself and his mother, to use "... the said public eastern branch road...". He acquired parcels 9 and 17. As the Minister responsible for Public Works, he requested that Ministry to repair and renovate the existing public gravel roads that ran through parcel 44. These included the eastern branch road. He requested Mr. Winter to survey the roads on behalf of the Ministry. He also requested him to supervise the repair, renovation and restoration of the existing public gravel roads running within the said parcel 44.

- [25] In their defence, the Appellants on the Notice of Appeal No. 15 of 2004 stated that most of them resided at Cinnament Hill for many years and used the eastern branch road to access their properties from the Willikies Main road. They also used the western branch road. They further stated that they had always held the honest belief that the eastern branch road was and still is:

"... a public access and lawful easement designed specifically for the purpose of allowing the owners of land at Cinnament Hill and their visitors and guests a right of way through to their said land."

- [26] Since the pleadings focused on the Appellants' claim to be entitled to a public right of way over the eastern branch road, this was the live issue. The learned trial Judge therefore merely made a passing comment on his observations from the Sheets when he referred to private right of way. He did not err when he did not analyze the legal and factual bases to determine whether the Appellants were entitled to a private right of way over the eastern branch road.

Public Road

- [27] The Appellants complain that the learned trial Judge erred when he ascribed legal significance to the absence of any note of the eastern branch road on any plan or map of the area. I do not agree. He was entitled to consider them. It is significant

that he did not look at them in isolation. He also considered the evidence of the witnesses so far as it was relevant. It was on the compendium of the notings and the evidence that he determined that the eastern branch road did not exist as a public road and was not dedicated and accepted as such.

[28] The trial Judge stated the principles that govern the creation of a public road or highway in Antigua and Barbuda in paragraph 21 of the judgment. He pointed out that inasmuch as there are no statutory provisions that govern the creation of public rights of way, their creation and existence are governed by the common law doctrine of dedication and acceptance. He stated that under this doctrine, a road could only become a public way by its dedication as such by the owner of the land over which it runs and the acceptance of it by the public. According to the learned Judge, dedication means that the owner has said clearly that the road is a public road or has conducted himself in such a way as to lead the public to infer that he meant it to be used as a public right of way. Dedication may be formal or it may be inferred from long usage.

[29] Now, the Appellants did not claim that there was a formal dedication of the eastern branch road. There is no evidence that any prior or present owner of the land over which that road passes ever said that the public is to have a right of passage over it. It was therefore necessary for the Judge to consider whether the claim to a public right of way could be inferred from conduct, for example, from long usage.

[30] Mr. Mottley, QC, learned Counsel for Mr. Michael, submitted that the Judge erred when he stated that the law requires dedication before a public right of way could exist over private land. He insisted that the Judge applied the principle wrongly when he stated, at paragraph 21 of the judgment, that the presumption of dedication could only arise on long and open user in a way that the owner of the land must have known that the public was claiming a right. He referred to **Farquhar v Newbury Rural District Council** [1909] 1 Ch. 12. He noted that it was held in that case that long user, and the existence of persons who are

competent to dedicate, are sufficient for the creation of a public right of way. He also complained that the Judge did not appreciate that Astra Holdings had to show that it was impossible that dedication could have taken place, and not that it was possible that it did not take place.

[31] As far as the burden of proof is concerned, the learned Judge stated that the Appellants, who were the defendants at first instance, had to show long and continued user in such circumstances that an inference should be drawn from that user that the owner of the land had intended to dedicate the roadway to the public for their use. He also stated that the Court would usually be slow to infer a right of user from the mere indulgence of the owner. These are correct statements. A right of way will not usually arise if passage over it was with the permission or tolerance of the owner, unless it is clear that the owner acquiesced in its use as a public right of way. (See, **Megarry and Wade's Law of Real Property**, 6th Edition 2000, at paragraph 18-067.).

[32] Now, if the Appellants discharged their evidential burden, it was then the duty of the Respondent, Astra Holdings, the claimant at first instance, to rebut the presumption or *prima facie* case.

[33] The learned Judge stated that the powers of the Development Control Authority under the **Land Development and Control Act**, Cap. 235 of the Laws of Antigua and Barbuda, encompass the creation, alteration or enforcement of public rights of way. I agree with Mr. Mottley's submission that the Authority does not have powers to create or to enforce public rights of way.

[34] I also agree with Mr. Mottley, that there are statements in the judgment, unsupported by evidence, which could impugn the professional integrity of Mr. Winter without bases in the evidence. For example, there is nothing in the evidence to support the suggestion that Mr. Winter's evidence was tainted by pressure from Mr. Michael. However, these concessions are not in themselves

grounds to strike out the Judge's finding that the eastern branch road is not a public road. The Appellants were required to provide sufficient evidence to make a *prima facie* case that the road was a public road by long user, upon which the presumption of dedication and acceptance could be found.

- [35] The focus must be on the nature of user. This includes the extent to which the general public, rather than a few persons or adjoining lot owners used the road. A determination required a consideration of the facts in the light of the pointers that the principles provide.

The pointers

- [36] In **Farquhar**, there were tracks across an estate. They were used for over 2 centuries as churchways from a public highway to a church. At first they were undefined tracks. In 1836 the estate was limited with a life interest to one Dr. Penrose and the remainder in fee to his nephew, Mr. Eyre. The life tenant did not live on the estate. The remainderman managed it. He expended money and solicited the assistance of the tenants of the estate, as well as parishioners, to assist him to divert the churchways. In 1842, one year after the church was rebuilt, they laid out a new road to the church that was suitable for vehicular traffic, in place of the old tracks. From the time that the road was made up anyone could use it. Persons traversed it on foot, on horseback and with all types of vehicles.
- [37] Some objection was made to the use of the road in 1876. However, the objection was only to the user of the road by certain engines. The parish authorities repaired the road from time to time. The remainderman regarded the road as a public road up until the time of his death. It was some 60 years after the road was made up and was used by the public as a public road that the plaintiff sought to close it to the public. She however agreed that churchgoers had the right to use it for church purposes. It was quite clear from these circumstances that the road had by this time been dedicated and accepted as a public road.

- [38] At page 16 of the judgment, Cozens-Hardy M.R. considered the essential aspects of the user of the road disclosed by the evidence. He noted that it was laid out in the most formal way with adequate width for vehicles. He also noted, among other things, the length of time that it was used by the public, without interruption, in a variety of ways. He then stated that when long user by the public is coupled with the existence of persons who are competent to dedicate, the long user gives rise to a presumption that the road was dedicated to the public as an ordinary highway. Fletcher-Moulton L.J. stated, at page 18, that the essence of the scheme was that the road was to be used as a public way. It was therefore made up in a manner that indicates that it was fitted for general use by the public, who then used it as a public way for a long period with the knowledge of all parties.
- [39] The important considerations in this case, however, were that the road was open for use by the public at large, and they used it. The nature, purpose and length of the user were such that the Court presumed long user for the purpose dedication and acceptance. It was also an important statement by the English Court of Appeal that although the life tenant did not live on the estate, and the remainderman was not in possession, they were competent to dedicate the road because it could be assumed that the acts of the latter were done with the knowledge and approval of the former.
- [40] It is important to bear all of the circumstances that surround the user in mind. Thus, in **Folkstone Corporation v Brockman and others** [1914] A.C. 338 (H.L.), Lord Kinnear stated, at page 354:
- “But the presumption of dedication from user ... is a probable inference from facts proved to the fact in issue, and it follows that in a particular case it is for the Judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn.”
- [41] It is also noteworthy that Kevin Gray states in **Elements of Land Law** (2nd Edition 1993), at paragraph 18-068, that a user of 18 months was sufficient for the presumption of dedication because the circumstances pointed to an intention to

dedicate. He cited as authority **North London Ry. v Vestry of St. Mary's Islington** (1872) 27 L.T. 672. The author stated, however, that where the circumstances are against dedication, a substantially longer time might be insufficient. In the present case, the circumstances do not point to an intention to dedicate, as they point so clearly in Farquhar.

[42] The decision in **Newcomer v Coulson** [1877] Ch. 133 was cited to us. However, it adds nothing to the principle regarding the need for persons who are competent to dedicate, or to the learning that relates to the claim of a right of way in circumstances that are similar to the present case.

[43] In **Newcomer**, a right of way was awarded for the benefit of allottees of agricultural land. The award was made pursuant to statute, to wit, **the Inclosure Act, 1760**. It was made for inclosing common land in 2 English counties. The Act provided for a 33-foot wide road to serve the lots. The road was first made as an ordinary track. Many years later, the defendants, who owned a portion of an allotment, began to lay down a solid granite track and erect a bridge. The plaintiff, the Lord of the Manor, sought an injunction to prevent this. He claimed that under the award the road was for agricultural purposes only. The Court did not grant the injunction. It is noteworthy that although the road was for the use of allottees and their tenants and farmers, the award did not state specifically that it was to be used only for agricultural purposes. **Newcomer** is unhelpful, particularly because the present case does not involve a road that was awarded for public use pursuant to statute.

This case

[44] At the trial, the Appellants provided evidence that persons used the eastern branch road over a period of years for various purposes. It is important to note at the outset, that the learned Judge found that the evidence that the Appellants proffered, particularly that given by Mr. Yearwood and Mr. Winter was unreliable.

He saw and heard their cross-examination. I have no reason to find to the contrary.

[45] Counsel for the Appellants indicated to this Court that the Judge accepted that Mr. Wilson used it as early as 1968 and thereafter as an access road to his little jetty at Lawries Bay. There is evidence that other persons used it during the time that the government, and later the Western Development Corporation, owned Parcel 44.

[46] In his judgment, the learned trial Judge noted that there was evidence that persons used it from the days of the sugar estate as an access to the beach. The roads were then old estate tracks. The learned Judge found, correctly, in my view, that the evidence that the Appellants proffered was not helpful for the purpose of calculating long user during the time that sugar cane was produced on the land. This was because the evidence showed that the roads were used as the estate's own private road by which sugarcane was transported.

[47] After the cultivation of sugar cane ceased, some of the lands were leased to plot-holders. They used the old estate tracks, including that over which the eastern branch road ran, to access their crops and to tend their livestock. Some villagers used them, and still do, as access roads to the beach to fish and bathe. It appears that they used them mainly as footpaths.

[48] The evidence reveals that the Eckerts, Sawkas, Cleveland, Yorie Pigott and their guests used the road to access their properties by vehicles from the 1980s. The learned Judge found from the evidence, correctly, that the Eckerts and other parcel holders were given the western branch road as the legal access road to their properties. He also found that they began to use the eastern branch road as their preferred route. It is a shorter road. The evidence of their user of the road reflects a user in the nature of a private rather than a public right of way, which they have not claimed.

- [49] Mr. Michael could not provide any helpful evidence of long user of the eastern branch road as a public right of way. He was new to the area. His knowledge of the use of the roads came from Mr. Winter, Mr. Yearwood and Mr. Lewis. The Court did not accept their evidence on the matter. Even if I accept the evidence that they gave, it does not speak to long user by the public in a manner that raises the presumption of dedication, particularly in the absence of evidence that points to an intention to dedicate.
- [50] The evidence that the Appellants provided does not show that the public used the eastern branch road in a significant way as a public access road. The Appellants state that there is evidence of cleared tracks that were maintained. They point to evidence that there was some grading of the road in 1989 after Hurricane Hugo to render it fit again for public access. If this occurred, it was to facilitate their own private access to their properties. In his witness statement, however, Mr. David Toms, the Chairman of Astra Holdings, said that it was in 2001 that he noticed that some of the residents of Cinnamon Hill had begun to use the eastern branch road. He stopped their user by causing a hole to be dug in the center of the road and placed a telephone post into the hole. According to Mr. Toms, none of the residents complained about his action. The learned Judge referred to this evidence in his judgment, with obvious acceptance. He noted that Astra Holdings had prior planning permission for a hotel project. He found that Mr. Toms blocked the road to prevent its user as an access road because he decided that its user was new and unauthorized, and to ensure that its user did not interfere with the hotel project.
- [51] In short, the Appellants did not provide sufficiently reliable evidence of user of the eastern branch road by the public in a manner that was enough to raise a *prima facie* case of long user, or upon which to base the presumption of dedication by long user. Astra Holdings was not therefore put to proof that it was impossible that dedication could have taken place. The learned Judge did not err because he did

not find any facts that relate to dedication and acceptance. There was simply insufficient reliable evidence in that regard.

- [52] In the foregoing premises, the appeals against the decision of the learned Judge that the eastern branch road is not a public road or right of way fail and are dismissed.

Damages

- [53] This Court must now consider Mr. Michael's appeal against the award of general and exemplary damages.

General Damages

- [54] Mr. Michael admitted that he instructed the Public Works Department to grade the eastern branch road. The learned Judge therefore correctly found that the real responsibility for the trespass rests with him.

- [55] Trespass is a tort. Damages for trespass is therefore based on the principle *restitutio in integrum*. This requires a tortfeasor to pay a sum of money that would restore the claimant, as nearly as money could possibly do, to the position that he would have been in had the trespass not been committed. (See per Lord Blackburn in **Livingstone v The Rawyards Coal Co.** [1880] 5 App. Cas. 25, at page 35.)

- [56] A claimant who suffers actual damage as a result of a trespass is entitled to be compensated with substantial damages, which he must prove. He must set out in his pleadings the value by which his land was diminished and the expense of removing any debris left by the trespass, if any. On the other hand, he may set out the costs of correcting the damage and restoring the land to its original

condition. Where there is a continuing trespass, damages are usually measured by the worth of the use of the land. This would normally be the rental value.

- [57] In this case, the claimant did not plead any quantifiable particulars of damages. The claimant stated that the land that surrounds the road sustained extensive damage. According to him, he visited the site of the road works on 17th February 2002 and on 20th February 2002 and saw heavy equipment being used to construct the road. He insisted that huge portions of the earth and vegetation were removed to accommodate the construction of the road with wide verges on each side. He said that up until 15th December 2003 when he made his witness statement, he had not been able to commission a full financial report of the loss that the action caused. He presented no evidence to prove actual damage. There was therefore no basis for an award of actual compensatory damages in the sum of \$250,000.00. The appeal against this award therefore succeeds, but nominal damages are available because trespass is actionable *per se*.

Nominal damages

- [58] A claimant may recover nominal damages where he has not suffered actual loss or where he does not prove actual loss because loss is presumed. The Privy Council reminded us in **Greer v Alston Engineering Sales & Services Ltd.** (2003) 63 WIR 388, at paragraph 7, that 'nominal damages' does not mean small damages. **Greer** involved a claim for damages for the loss of use of a backhoe for the period July 1982 to January 1984 and by amendment of the claim, for detinue for a further period of 6 months. Their Lordships stated, at paragraph 9, that although damages for loss of use were not quantified, it was the duty of the Court, in awarding nominal damages, to recognize the loss by an award that is not out of scale. Their Lordships thought that the \$5,000.00 that the Court awarded was low. The daily rates for the use of the backhoe went from \$500.00 per day in 1982 to \$800.00 per day by 1984. They confirmed the award of \$5,000.00 nominal damages on the ground that it was not so low to warrant their interference.

[59] In the present case, there are no figures to guide us and there is no evidence of the extent of any loss that the trespass might have occasioned. In the circumstances, I think that an award of \$5,000.00 nominal damages against Mr. Michael is reasonable in the circumstances of this case.

Exemplary damages

[60] Exemplary damages are awarded for conduct that deserves to be punished. First, therefore, I shall consider whether Mr. Michael's action is deserving of a punitive award. If it is, the amount that is to be awarded will be considered.

[61] In the present case, the learned Judge ordered Mr. Michael to pay exemplary damages because he found that he acted in his position as Minister of Works. He found that he was primarily responsible for the tort and his action constituted oppressive, arbitrary and unconstitutional conduct by a government servant.

[62] Under this head, the object of exemplary damages is to punish for conduct that is deliberate, cynical or outrageous. The award would be to show displeasure with and disapproval of the conduct and to deter the tortfeasor from repeating it. (See **Rookes v Barnard** [1964] A.C. 1129, at page 1228; **Brome v Cassell & Co. Ltd.** [1972] A.C. 1027, at page 1060 and **A v Bottrill** [2003] 3 WLR 1406 [P.C.]). The Judge noted that Mr. Michael's action resulted in the construction of 2 major dirt roads over Astra Holdings' Hotel project. The trespass in the present case is only with respect to the shorter eastern branch road.

[63] As far as conduct was concerned, Counsel for Astra Holdings submitted that Mr. Michael's actions are punishable because he abused his position as Minister of Public Works. He insisted that the action was deliberate, cynical, arbitrary and unconstitutional, particularly as it violated Astra Holdings' right not to be deprived of its property without fair and adequate compensation under section 6 of the

Constitution of Antigua and Barbuda. It is doubtful whether Astra Holdings was deprived of its property within the context of this provision. The issue was not canvassed.

- [64] However, Mr. Toms, whose evidence the learned Judge accepted, outlined a litany of woes that he suffered at the hands of government officials in his efforts to raise funds and to take other steps to develop Parcel 44. He spoke of official threats that the land would have been compulsorily acquired. He said that his efforts to prevent the user of the eastern branch road as a public thoroughfare were thwarted when Mr. Michael caused that road to be graded and smoothed. The road runs right through Astra Holdings' planned hotel project.
- [65] The history of the frustrations, which he said that he suffered at the hands of officials, convinced Mr. Toms that Mr. Michael's instructions to grade the road were deliberate, and were, additionally, for Mr. Michael's own convenience. He said that the action was for Mr. Michael's convenience because of his (Mr. Michael's) interest in Parcels 9, 16 and 17 at Cinnamon Hill, which he purchased just before he directed the road project to be effected. Mr. Toms' evidence was that the eastern branch road would have directed the residents' vehicular traffic that passed through the front pillars of the Wilson's' old Cinnamon Hill property, which he (Mr. Michael) had purchased, through the side gate and over Astra Holdings' property instead.
- [66] This, in my view, was sufficient evidence to support the finding of the learned Judge that Mr. Michael's trespass should draw a punitive award because it was deliberate and oppressive action by him when he was the Minister of Works. In addition, however, Mr. Toms had blocked the road in 2001. Mr. Michael admitted that when he noticed the impediment in February 2002, it occurred to him that the owner of Parcel 44 had closed the road. The evidence reveals that the impediment was placed over the boundary on the Cinnamon Hill land. At the time

when Mr. Toms placed it, he was negotiating to purchase that property, but Mr. Michael bought it in February 2002.

- [67] Mr. Michael gave instructions for the removal of the impediment. He was entitled to do so if it was then on land that he owned. However, he was aware that Mr. Toms was responsible for blocking the road. It must have occurred to him that they intended to close access by that road over their land. He ought reasonably to have consulted with them prior to giving instructions to grade the road. He said that he tried to contact Mr. Toms but the latter refused to meet with him. It is doubtful, however, that he took reasonable steps to speak with Mr. Toms. It is noteworthy that his statement that he tried to contact Mr. Toms did not come in his evidence in chief. It is not clear whether he tried to meet with Mr. Toms prior to giving instructions to grade the road.

The measure of damages

- [68] Various factors should be taken into consideration in order to determine the measure of exemplary damages. The award should be moderate. The learned Judge noted this. He also stated that an award of exemplary damages should take into account Mr. Michael's means. The means of the tortfeasor should be considered if the award is to have a maintainable punitive element. An award that is punitive to an indigent might not have that effect on a person of substantial means. However, no evidence was led to prove Mr. Michael's means. There was therefore no factual basis on which to find, as the learned Judge did, that he is known as a very wealthy businessman. He was, however, a Minister of Government. He is a landowner.
- [69] The conduct of the parties down to the time of the judgment is usually taken into account. An apology by the defendant could cause the Court to reduce exemplary damages. (See per Singleton L.J. in **Loudon v Ryder** [1953] 2 Q.B. 202, at page 207.). Improper conduct by a claimant might reduce or eliminate exemplary

damages. (See per Lord Woolf M.R. in **Thompson v Commissioner of Police of the Metropolis** and **Hsu v Commissioner of Police of the Metropolis** [1998] Q.B. 498, at page 517D.). There was no apology from Mr. Michael. There is no evidence that Astra Holdings have acted improperly.

[70] The size of the compensatory damages awarded is another factor that would affect the amount of exemplary damages. Exemplary damages could be increased if the Court is of the view that compensatory damages do not adequately punish the tortious conduct. Exemplary damages should be reduced or eliminated where a defendant was convicted of a criminal offence for the same tortious conduct. This is because our justice system militates against double punishment for the same conduct. (See **A.B. v South West Water Services** [1993] Q.B. 507.). In this case, the award of compensatory damages is nominal. There was no criminal conviction for the same tort. Mr. Michael was severely criticized by the learned trial Judge. However, it was apparently settled, in **Dingle v Associated Newspapers** [1964] A.C. 371, that criticism of a defendant by a Judge in a judgment should not be taken into consideration by an appellate Court when considering whether to reduce exemplary damages.

[71] I take the forgoing factors and circumstances and the decided cases into consideration. I also take into account **McGregor on Damages** (17th Edition 2003), particularly paragraph 11-032 under the rubric "The Amount of the Exemplary Award". The award that the trial Judge made should be reduced substantially. An award of \$60,000.00 exemplary damages against Mr. Michael is reasonable in all of the circumstances of this case, and I so order.

Interest

[72] Mr. Michael appealed against the award of 10% interest on the total damages from the date that the claim was filed to judgment.

[73] The High Court has discretion in proceedings for the recovery of a debt or damages, to award simple interest on any sum for which judgment is given. Interest may be awarded with respect to all or part of the period between the date when the cause of action arose and the date of the judgment or prior payment. The rate of interest and the period for which it runs are discretionary. In **British Caribbean Insurance Co. Ltd. v Perrier** (1996) 52 W.I.R. 342, the Respondent had suffered the total loss of four heavy generator units by fire in July 1987. The trial Judge found the Appellant liable to meet the claim of the Respondent under their contract of insurance, and awarded interest at the rate of 25% on the damages awarded from September 1987 to the date of judgment. The Court of Appeal of Jamaica upheld the award on the ground that it was not unreasonable.

[74] In **Greer**, the High Court ordered the defendant to pay interest at the rate of 12% on the award. The Lordships noted, at paragraph 4 of their judgment, that de la Bastide C.J. said that interest at that rate was appropriate because it approximated to a commercial rate. Their Lordships agreed that it was appropriate in the circumstances of the case. The award of interest at the rate of 10% per annum from the date that the claim was filed to the date of judgment approximates to a commercial rate and is appropriate in the circumstances of the present case.

Order

[75] In the foregoing premises, the appeals against the decision of the learned trial judge that the eastern branch road is not a public road fail and are dismissed. The appeals against the injunction that prohibits the Appellants from passing and re-passing along the eastern branch road is also dismissed. The appeal by Mr. Michael against the awards of general damages succeeds, and an award of \$5,000.00 nominal damages is substituted instead. The appeal by Mr. Michael against the award of exemplary damages succeeds, in part. The award is varied and reduced to \$60,000.00. The appeal against the award of 10% interest on the

award from the date when the claim was filed to judgment is dismissed, but Mr. Michael shall now pay that interest on the sum of \$65,000.00. He shall also pay prescribed costs on the sum of \$65,000.00 in the Court below.

[76] Taking into consideration the issues on which the parties variously prevailed on this appeal, Mr. Michael will meet one-third of the costs of Astra Holdings Limited for the proceedings in this Court.

Hugh A. Rawlins
Justice of Appeal [Ag.]

I concur.

Arian Saunders
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal