

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO: ANUHCV 2004/0155**

**BETWEEN:**

**EDWARD EDWARD PIPER**

Claimant

**and**

**CARLO FALCONE**

Defendant

**Appearances:**

Mr. Dane Hamilton, Q.C. and Mr. D. Raimon Hamilton for the Claimant  
Mr. Jason Martin for the Defendant

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2009: October 20, 21  
2010: April 20  
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**JUDGMENT**

[1] **MICHEL, J.:** By Claim Form filed on 6<sup>th</sup> May 2004 the Claimant, Edward Edward Piper, claimed against the Defendant, Carlo Falcone, the following relief:

1. An injunction restraining the Defendant whether by himself his servants or agents or howsoever otherwise from repeating or continuing any excavations into the bedrock of the adjoining parcel of land owned by him as registered proprietor, that is to say, Parcel 171 Block 35 2479A Registration Section English Harbour.
2. An injunction restraining the Defendant his servants or agents from entering and or trespassing on lands under the occupation and/or ownership of the Claimant until further order.
3. Damages for trespass, nuisance and/or negligence.
4. Interest pursuant to the Eastern Caribbean Supreme Court Act.
5. Costs.

[2] By Notice of Application accompanied by an Affidavit in Support filed on the aforesaid 6<sup>th</sup> May, the Claimant sought an order that:

1. The Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from entering or trespassing on the land occupied by the Claimant in and about his dwelling house which is sited on Parcel 46 Block 35 2479A Registration Section English Harbour.
2. The Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from continuing the excavation of his adjoining land lying to the west of the Claimant's parcel which said excavations constitute a nuisance until further order.

[3] By Affidavit in Reply dated and filed on 14<sup>th</sup> May 2004, the Defendant replied to the Claimant's application and affidavit in support.

[4] The Claimant's application came before Rita Joseph Olivetti, J. in Chambers on 14<sup>th</sup> May 2004 and the Defendant gave an undertaking that no excavation activities by whatever means shall be carried out within 15 feet of the Claimant's dwelling house.

[5] By Application accompanied by Affidavit in Support dated and filed on 29<sup>th</sup> June 2004, the Claimant sought an order that:

1. The Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from continuing the excavation of his adjoining land within 40 feet of the Claimant's dwelling house.
2. That the Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from excavating, blocking or in any way disrupting the Claimant's access to his property until further order.

[6] This application by the Claimant came before Emile Ferdinand, J. in Chambers on 30<sup>th</sup> June 2004 and the Court ordered inter alia:

1. That the Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from continuing the excavation of his adjoining land within 40 feet of the Claimant's dwelling house until further Order.
2. That the Defendant be restrained whether by himself or by his servants or agents or otherwise howsoever from excavating, blocking or in any way disrupting the Claimant's access to his property until further order.

[7] A return date for the hearing of the application was set by the Learned Judge for 9<sup>th</sup> July 2004, on which date an Affidavit in Reply to the Claimant's application and affidavit in support was filed on behalf of the Defendant and the Court adjourned the hearing to 15<sup>th</sup> July.

[8] When the matter came before Emile Ferdinand, J. in Chambers on 15<sup>th</sup> July, the parties agreed by consent:

1. That the Defendant be restrained whether by himself his servants or agents or otherwise howsoever from excavating his adjoining land within 15 feet of the Claimant's building save and except such soft excavation agreed to by the parties at the south western quadrant 10 feet from the Claimant's building until further order.
2. That Ewald Samuel Esq. be appointed as engineer to supervise and approve any further excavatory work to be done in respect of the construction project undertaken by the Defendant on his adjoining land.
3. That any such work as approved shall be by a methodology designed to eliminate any further damage to the Claimant's building.
4. That the costs occasioned by the appointment of Ewald Samuel Esq. be borne by the Defendant.
5. That either party shall have liberty to further apply to the Court.
6. That the costs occasioned by this Application shall be to the Defendant as agreed upon.

[9] By Notice of Application filed by the Defendant on 31<sup>st</sup> August 2004, along with affidavits sworn to both by him and by his engineer, Mr. Sergio Barbot, the Defendant sought an order that:

1. The proceedings in this action be struck out for non-compliance with Rule 8.2 of the Civil Procedure Rules, 2000;
2. In the alternative, the terms of the Order made herein on the 15<sup>th</sup> day of July, 2004 be varied to permit the Defendant to completely fence his premises;

3. The Claimant do pay the costs of this application.

[10] On 3<sup>rd</sup> September 2004 an Affidavit in Reply to the Defendant's application and affidavits in support were filed on behalf of the Claimant.

[11] When the Defendant's application came before Errol Thomas, J. in Chambers on 7<sup>th</sup> September 2004 it was ordered that:

1. The Order dated 15<sup>th</sup> July, 2004 be varied to permit the Defendant liberty to fence the entire perimeter of the premises owned by the Defendant within 15 feet of the Claimant's dwelling house, save and except that on the south-western corner of the Claimant's house the boundary fence shall be placed 10 feet from the Claimant's dwelling house and along the northern boundary of the Claimant's land the boundary fence shall be placed 15 feet from the Claimant's dwelling house.
2. That in placing the said perimeter fence the Defendant shall leave unfenced the existing access road.
3. The Claimant shall file and serve its Statement of Claim herein on or before the 15<sup>th</sup> September, 2004, in default of which, the action to stand dismissed.
4. Costs of this Application to be costs in the cause.

[12] The Claimant's Statement of Claim was filed on 14<sup>th</sup> September 2004 wherein the Claimant claimed:

1. A Declaration that the Claimant has been in uninterrupted possession of the lands shaded red on the Plan drawn by Licenced Surveyor Ato D. Kentish exhibited herewith and marked "A" and that the Defendant holds the said land in trust for the Claimant pursuant to Section 135 of the Registered Land Act Cap. 374.

2. An Order for rectification of the Land Registrar pertaining to Parcel 171, 159 and 170 Block 35 2479A Registration Section English Harbour and the registration of the Claimant as proprietor of the said land shaded in red on the plan as aforesaid.
3. An injunction restraining the Defendant, whether by himself, his servants and/or agents or by his contractors or otherwise howsoever from entering, executing any building works or otherwise interfering with the Claimant's use of and/or enjoyment of the said land shaded red on the plan of Ato D. Kentish marked "A".
4. An injunction restraining the Defendant by himself, his servants, his agents or by his contractors or otherwise howsoever from the repetition or continuance of the acts above complained of or of similar acts obstructing the Claimant's right of way and/or access to his dwelling house.
5. Damages for nuisance, alternatively damages under the rule in *Rylands v Fletcher*.
6. A Declaration that the Claimant is entitled to a right of way extending over the eastern portion of Parcel 170 Block 35 2479A Registration Section English Harbour.
7. Interest on the said damages pursuant to the Eastern Caribbean Supreme Court Act.
8. Costs.

[13] On 25<sup>th</sup> October 2004 the Defendant filed a Defence and Counterclaim and on 17<sup>th</sup> November 2004 filed an Amended Defence and Counterclaim replacing the previously-filed one. In his Counterclaim filed on 17<sup>th</sup> November the Defendant claimed:

1. An Order declaring that the Claimant's occupation of the Defendant's said lands as alleged in paragraphs 1 and 2 of the Counterclaim herein constitutes a trespass;

2. An Order declaring that the Claimant's user of the Defendant's said land as alleged in paragraph 3 of the Counterclaim herein constitutes trespass;
4. An Order for damages against the Claimant in respect of the trespass on the Defendant's said parcels of land; and
5. Costs.

[14] On 8<sup>th</sup> December 2004 the Claimant filed a Reply and Defence to Counterclaim.

[15] On 16<sup>th</sup> September 2008 the matter came before Master Cheryl Mathurin for case management and the Master made the usual case management orders. On 16<sup>th</sup> March 2009, pursuant to an application by the Claimant, the time for compliance with the case management orders of Master Mathurin was extended to 30<sup>th</sup> March 2009 by David Harris, J. in Chambers and the parties duly complied, except that the Claimant's Pre-Trial Memorandum was filed on 6<sup>th</sup> May 2009 which was outside of the time stipulated by the case management order and also just outside the time stipulated by Rule 38.5 of the CPR, given that Pre-Trial Review was on 8<sup>th</sup> May 2009.

[16] Pre-Trial Review of the matter was held on 8<sup>th</sup> May 2009 and the trial of the matter took place on 20<sup>th</sup> and 21<sup>st</sup> October 2009, with the Claimant giving evidence on his own behalf and calling two other witnesses and with the Defendant giving evidence on his own behalf and calling no other witnesses.

[17] At the start of the trial Learned Queen's Counsel, Mr. Dane Hamilton, appearing for the Claimant, made an opening address in the course of which he stated that the case raises issues of adverse possession and damages for nuisance sustained by the Claimant in March, June and July of 2004. That from the Claimant's Pre-Trial Memorandum it would be seen that the Claimant has set out certain concessions that were made by the Defendant at preliminary stages of the proceedings. That the Defendant has unconditionally undertaken in writing to build a new access road with proper retaining wall at his own expense leading to the Claimant's house. That there has been an admission by the Defendant that damage was caused to the Claimant's house during the

excavation process when his (the Defendant's) buildings were being constructed. That this second admission substantially reduces the Court's function to determining the extent of that damage and quantifying it. That the only issue before the Court which is raised on the Counterclaim of the Defendant is whether or not the Defendant can maintain an action for trespass where the Claimant has been in adverse possession of the disputed land for more than 12 years. That the Claimant will contend that the Defendant takes the land from his predecessor in title as he finds it and that there has been no interruption of that period of adverse possession, neither has the Defendant dispossessed the Claimant of the land in question. That in the circumstances, the Defendant cannot maintain an action in trespass; the Claimant has been in possession nec vi nec clam nec precario. That the issues in this case are very narrow and really revolve around the damage to the Claimant's house and adverse possession. That the Claimant will contend that the damage is as alleged by the Claimant and that the Claimant has been in adverse possession of the land since 1982 and more particularly since 1987.

- [18] The first witness in the case was the Claimant himself. His evidence, as per his Witness Statement, is that he is the registered proprietor of land registered in the Land Register as Parcel 46 Block 35 2479A Registration Section English Harbour. That the Defendant is the registered proprietor of Parcel 171 in the same Block and Registration Section and also claims Parcels 159 and 170 thereof. That he has occupied lands at Mast Pond since 1982 when he received permission from the then Minister of Agriculture to occupy a portion of land there and begin construction of a dwelling house thereon. That as soon as he received permission from the Minister he immediately entered into possession of the land that he wished to buy and commenced cleaning and clearing it. That he occupied, cleared and cleaned lands up to the Pigeon Point Road, which formed its northern boundary. That in or about March 1983 he was informed by the Minister that the sale of the land to him would have to await the formulation of a proper development plan for the area. That in 1984 the area became part of a National Park and he was given permission to commence construction of his home, which he did. That because of limited funds the house was built in stages. That the downstairs portion was completed in or about 1985 and he moved in with his family.

[19] The Claimant stated that in or around December 1986 the late Mr. Leo Gore surveyed the Mast Pond area on behalf of the Government and the National Parks Authority and produced a Survey Map or Survey Plan dated December 1986 which purported to show 1.5 acres of land to the west and north of his parcel as being allocated to Ms. Stephanie Morris. That according to this plan the northern boundary of his land was no longer the Pigeon Point Road and the Plan made no provision for an access road to the parcel of land allocated to him. That in February 1987 Mr. Gore came to him and showed him the boundary and the boundary marks, indicated to him that the lands to the north and west were owned by Ms. Stephanie Morris and said to him that although there was no access shown on the map he (the Claimant) could access his land by driving through the north eastern portion of Ms. Morris' land. That he complained (to Mr. Gore) that this was not what was promised to him and that he was being given a smaller parcel than what he had occupied and Mr. Gore told him that that was what was available and was being allocated to him. That the boundaries shown to him (by Mr. Gore) were metal stakes driven into the ground with red cloth tied to them. That since that date he has occupied, maintained and used that portion of land shown to him by Mr. Gore and has also used the access road without interruption, demand or protest by Ms. Morris or anyone. That in 1997 Parcel 46 was transferred to him by the Government.

[20] The Claimant stated that from about February 2004 the Defendant commenced construction work to the west of the Claimant's home. That later in that month the Defendant and a surveyor came to speak to him and the surveyor indicated to him boundary lines that came within 5 feet of his (the Claimant's) dwelling house and told him that his access road to the dwelling house is on the Defendant's land and the Defendant will be developing that land. That he (the Claimant) told the Defendant that this was an incorrect mark and boundary line and he showed the Defendant and his surveyor where the original mark was and pointed out to them that he has always occupied these lands without interruption or complaint. That the Defendant told him that they can work out something. That 3 days later the Defendant invited him to meet with him (the Defendant) at the marina, where the Defendant showed him the plans for the project that he was undertaking and asked him what was his desire with the boundary. That when he told the Defendant that he wanted the boundary at the point where Mr. Gore pointed it out to him, the Defendant told him that he cannot do that because a building was going to fall on that line. That the Defendant then gave him the option of selling to him (the Defendant) or having his (the Claimant's) view blocked.

[21] The Claimant stated that towards the end of February and during March 2004 the Defendant's workmen commenced clearing the land to the west of his home. That on the north western side they cleared the area where the original boundary was located and commenced excavation of the bedrock on 5<sup>th</sup> March using a "Cat Machine". That the resultant shaking affected his house - extensive damage was caused to the downstairs portion of the house and upstairs the concrete floor cracked in several places and the seams in the roof separated, allowing rain water into the house. That the next day he spoke to the Defendant's engineer who inspected the damage and told him to get a lawyer. That he (the Claimant) then had his house examined by Civil Engineering & Architectural Services Limited and they prepared a report dated 25<sup>th</sup> April 2004 which sets out the damage done to his house and estimated the cost of repair at \$51,400.

[22] The Claimant stated that in May 2004 he commenced this suit and on 14<sup>th</sup> May 2004 the Defendant gave an undertaking that no excavation works whatsoever would be carried out within 15 feet of his (the Claimant's) dwelling house. That on 28<sup>th</sup> June 2004 excavation work recommenced outside of the 15 feet, which had the effect of constantly shaking the house and widening the already extensive cracks in the house. That as a result he applied for and obtained an ex parte order restraining the Defendant from continuing excavation within 40 feet of his property. That on the return date of this ex parte interim injunction a Consent Order dated 15<sup>th</sup> July 2004 was arrived at, which was varied on 7<sup>th</sup> August to allow the Defendant to fence the perimeter of his premises, excepting the existing access to the Claimant's property.

[23] The Claimant stated that the Defendant's contention that he (the Claimant) has an alternative access road is not true. That there is a track towards the back of his property leading to a padlocked gate. That it does not lead to any other access or road and is in effect a dead end. That on 14<sup>th</sup> April 2005 the Defendant agreed to provide him with an access road on the following terms:

- a. "the new access road will be built with a proper stone retaining wall with a suitable and stable 'fill-material' which would be compacted and overlaid with either asphalt or concrete;

- b. "during the period of constriction of this roadway [the Claimant] will continue to use the existing access way to the intent that ... the existing access way shall at all times remain in a 'safe condition' for his use;
- c. "[The Claimant] will permit the construction of the roadway; and
- d. "Mr. C. Falcone commits himself as Defendant to unconditionally fund and construct the said new access road."

[24] That the promised access road has not been built in accordance with the agreement. That he understands that the road is marked on the project plans, but no retaining wall has been built, no fill material was placed and it has not been surfaced; it is simply a dirt track. That, as the road now stands, hardly anyone, including emergency vehicles, can use the road provided by the Defendant and the Defendant has since indicated that he does not have to provide the Claimant with access through the said road.

[25] The Claimant stated that Stephanie Morris – the Defendant's predecessor in title – first became the registered proprietor of the disputed land in or about the middle of 1987. That at that time he was in peaceful and open occupation of the land claimed by him and his occupation continued unchallenged for over 12 years and up to 2004.

[26] That in 2007 he again engaged the services of Civil Engineering & Associated Services Limited to survey the damage done to his house and to assess its extent, because construction activity by the Defendant was completed. That he was supplied with a report dated July 2007 which proposed certain remedial works to be undertaken. That in both the report of 2007 and the previous 2004 report, the engineer found that the damage caused to his house was consistent with damage resulting from severe vibration over an extended period of time and that the stability of the house was compromised by the closeness of the excavations. That the engineer's report estimated the cost of remedial works to be done on the house at \$108,480. That he decided to commence some of the repairs to his house, as indicated in the report, and has so far spent about \$80,000 to \$85,000.

[27] Under cross examination by Counsel for the Defendant, the Claimant testified that he moved onto the land in issue in 1982 and started clearing the land and digging out the foundation for his house from then. That he stopped his activities towards construction of his house on the land around the end of 1982 when he received a letter from the Ministry of Agriculture asking him to hold back pending the development of a plan for the area. That he resumed construction activity on the land between 1983 and 1984. That he started living on the land in 1985.

[28] Under further cross examination, the Claimant stated that there is another route that can be used to access his land apart from the route over the land claimed by the Defendant but that route would require him to pass on someone else's property. That he got permission from that other land owner to transport his building materials through that route when work was being done on the route over the land claimed by the Defendant. That the route over the land claimed by the Defendant was cut by him (the Claimant) in 1982 when he was given permission and it was not just a footpath. That it is the only access to his property from the Pigeon Point Road.

[29] The second witness for the Claimant was Everon Zachariah. His evidence, as per his Witness Statement, is that he is a civil and structural engineer and is a director of Civil Engineering & Associated Services Ltd. (C.E.A.S.). That in or about April 2004 C.E.A.S. was asked to inspect and evaluate property owned by the Claimant to determine the nature of damage caused to the Claimant's dwelling house in the aftermath of excavation works carried out on adjacent properties. That he visited the Claimant's home and carried out investigations and produced a report in April 2004 entitled "Report on Damage to Residence of Mr. and Mrs. Edward & Atlyn Piper, which report forms part of his Witness Statement. That he found the following damage to the Claimant's dwelling house:

- a. Damage to ceiling of self contained apartment. Severe cracks and peeling extending over an area of 500 feet.
- b. Cracks along the walls of the kitchen of studio apartment with dislodging tiles.

- c. Extensive cracks along beam on northern wall of the house at floor level of the second level measuring over five feet.
- d. Extensive cracking and scaling of the concrete under face slab of the living and dining room.
- e. Separation of the main supporting cantilever beams and masonry infill wall along the western side of the dwelling house.
- f. Moderate cracks along the western wall of the structure extending over an area of approximately 300 feet.
- g. Severe shelling of the concrete of beams over various other sections of the structure on the western side.

[30] That the damages observed were consistent with severe vibrations caused by the nearby excavation works and that the property's stability was compromised by the depth of the adjacent excavations. That he advised the Claimant that significant remedial work will be needed to be done to the structure and that a system of walls be erected to ensure the long term stability of the property. That he estimated that the remedial works would have cost \$51,400 if undertaken in 2004.

[31] Mr. Zachariah stated that in or about July 2007 the Claimant requested an updated report on the damage caused to his home because the initial report was done during the initial phase of construction on the adjacent property. That he again visited the Claimant's residence, by which time all construction was finished. That he prepared a report dated 11<sup>th</sup> July 2007 entitled "Damage Assessment of Property of Mr. and Mrs. Edward & Atlyn Piper located at English Harbour, Antigua" which represents his final findings on the damage caused to the Claimant's home. That this report forms part of his Witness Statement. That he found that damage extended throughout the dwelling house and on all three of its floors. That there was a concentration of

damage on the northern and western sides which directly faced the adjacent excavation and construction. That cracking reported in his earlier report had widened and extended in some places. That the damages found were consistent with being caused by severe vibration over an extended period of time and will be exasperated by the resulting exposure of the inner reinforcement to the surrounding marine environment. That, as advised before, a system of retaining wall would be needed to stabilise the property. That he estimates that in 2007 the cost of remedial works would be approximately \$108,480.

[32] Mr. Zacharia testified in Court that the access road to the Claimant's property as it stands today is in a condition that makes it very difficult for a motor vehicle to pass safely. That a rough estimate of the cost to put that road in a proper state would be about \$80,000, whether it were constructed with a concrete or asphalt finish.

[33] Under cross examination, Mr. Zacariah testified that when a property is damaged in the way that he reported it is very likely that the extent of the damage would increase with the passage of time if the property is not repaired in a reasonable time, which is between six months to one year. That it would be fair to say that at least some of the additional expenditure assessed in his 2007 report would not have been necessary if the damage found in 2004 had been addressed within a reasonable time. That he would agree that if you have \$51,400 worth of damage you would have to address it soon if you want to cut cost, because \$51,400 worth of damage over a three-year period, if not addressed, can turn into \$100,000. That it would also be correct to say that there would be increased costs because the price of both materials and labour would be increased over time. That between April 2004 and July 2007 the cost of materials would have increased by about 25% and labour costs by about 10%. That the damage noted in his two reports were in the same areas of the Claimant's house, but with slightly more damage on the second occasion.

[34] The third witness for the Claimant was Vernon Bird. His evidence, as per his Witness Statement, is that he is a licensed surveyor employed at the Survey Department of the Ministry of Agriculture for approximately 28 years. That in or about 2000 or 2001 he was employed by Ms. Stephanie Morris to survey lands adjoining the Claimant's land and as such he is familiar with the lands and boundaries in dispute in this case. That the Claimant owns Parcel 46 and he understands that the

Defendant now owns Parcels 159, 170 and 171 created out of Parcel 42 and formerly owned by Ms. Stephanie Morris. That he has had occasion to investigate the boundary between the Claimant's land and what was then Ms. Morris's land. That on going to the land at the time he had asked the Claimant to point out where his boundary marks were and the Claimant had showed him two marks – one to the west of his home and the other to the south – which the Claimant said were shown to him by Surveyor Mr. Leo Gore. That on checking these marks he (Mr. Bird) realised that one of them was not correctly placed. That from his investigations at the Survey Department in relation to the boundary, he realised that the lands in question were subject to at least four surveys in the past. That Ms. Morris and the Claimant's lands were derived from the same parcel of Government land. That the parcel allocated to Ms. Morris (by Government) significantly changed in location, size and shape in the period between 1984 and 1987, growing from 0.77 acres to 1.50 acres. That it is his opinion that the Claimant was not shown the final boundaries and that the mark which the Claimant showed him would have been an earlier mark. That he also finds it strange that the Claimant's final boundary would have been so close to an existing building, because in his experience with the Survey Department boundaries are not put so close to existing buildings. That the Survey Department does not place boundaries or boundary marks within 10 feet of a building.

[35] Under cross examination, Mr. Bird testified that he is satisfied that the official and proper boundaries between Parcel 46 and Parcels 159, 170 and 171 are as shown at points W, X and A on Surveyor Mr. Ato Kentish's diagram on page 48 in Volume 3 of the Trial Bundle. That they are correct boundaries.

[36] This concluded the Claimant's case.

[37] Learned Counsel for the Defendant, Mr. Jason Martin, then made an opening address in the course of which he stated that, for the Defendant, all matters are in issue, save and except that the Defendant has acknowledged that there may have been some damage caused to the Claimant's property but asserted a willingness to compensate the Claimant in the sum of \$11,700 as better particularised in the report of Mr. Barbot, who is currently in Spain and therefore unable to be in Court. That the Defendant is certainly willing to compensate the Claimant in the sum of \$11,700 in

keeping with the report of Mr. Barbot. That adverse possession is certainly in issue in this case. That prescriptive or any other title to the access road is in issue, in terms of whether or not the Claimant has a right. That the Defendant did, in the course of this case, make some accommodation to the Claimant in respect of the Claimant accessing his property over the Defendant's land, but such accommodation was made pending the adjudication of the proper rights of the parties in this matter and so the Defendant leaves it to the Court to decide what is the law as it pertains to these particular circumstances. That it is the Defendant's view that the nature of the land in question and the original owner of the land has a bearing on this matter. That the Registered Land Act speaks to the various issues that arise in this case and that the Act speaks in his favour on these issues.

[38] The defence called the Defendant as their only witness in the case.

[39] The Defendant stated that he read the Witness Summary signed by his lawyer on his behalf and asks that the Witness Summary stands as his evidence in chief in this matter.

[40] The evidence of the Defendant, as per the Witness Summary, is that since 1998 he built and developed his business of a marina dock facility and over the years he invested in and expanded the dock into a fully functional service marina, supply and shopping complex known as Antigua Yacht Club Marina Complex at English Harbour in St. Paul's. That he became the registered proprietor of lands at English Harbour on 30<sup>th</sup> May 2003, namely, Parcel 171 Block 35 2479A Registration Section English Harbour. That he is also the owner of the adjoining Parcels 159 and 170, having purchased them on 16<sup>th</sup> February 2004 and 28<sup>th</sup> April 2004 respectively. That he purchased all three parcels of land from the previous registered proprietor, Stephanie Morris. That the Claimant is the proprietor of a dwelling house and he shares a common boundary with him along a portion of his said lands.

[41] The remaining evidence of the Defendant, as can be deduced from a reading (with adjustments) of the Witness Summary which he asked to have stand as his evidence in chief, is to the effect that in March of 2004 (and not March of 2009) he began clearing the lands which he purchased from Ms. Morris with a view to undertaking his project of constructing and developing an hotel and villa resort

complex. That in the process of clearing the lands the boundary issue with the Claimant surfaced. That when it did surface he asked a surveyor to re-establish the boundaries of his lands, whereupon it was discovered that a portion of the Claimant's step and a small portion of the Claimant's septic tank had encroached over the boundary of his lands. That he attempted to hold discussions with the Claimant to arrive at an amicable solution, but this was to no avail. That in preparation for construction of his complex he undertook excavation works on the lands. That the digging with the excavator-mounted hammer lasted one and a half days at the onset and the remaining work was completed with the deployment of manual air compressor jackhammers. That he does not accept that his excavation or other work caused damage to the Claimant's house in the amount claimed. That he had his engineer, Mr. Sergio Barbot, inquire into the Claimant's claim for damage to his dwelling house and Mr. Barbot estimated the value of any damage caused by his (the Defendant's) construction to be \$11,700, which amount he has always been ready and willing to pay to the Claimant. That the Claimant has trespassed on his land by placing his (the Claimant's) septic tank and steps thereon and by using it to access his (the Claimant's) land. That the correct access road, as confirmed by the Survey Department, is between Parcel 46 (owned by the Claimant) and Parcel 47. That he does not accept that the continuation and completion of construction of the complex after the Court's intervention resulted in any damage to the Claimant's house or created any nuisance.

- [42] Under cross examination by Mr. Hamilton, the Defendant testified that at the time that he purchased the first parcel of land from Stephanie Morris he was aware that the Claimant was living up on the hill and that the Claimant was using what is commonly called the access road to get up to his house. That he was shown the boundaries of the land he was purchasing and he noticed that the Claimant's house was built very close to the boundary, but he made no enquiries of the Claimant. That he purchased two adjoining parcels of land from Ms. Morris about one year later. That he is aware that during the first set of excavation the Claimant had complained that the excavation had damaged his house. That it is correct that part of his hotel building is constructed on what used to be the Claimant's road. That he believes that it is correct that the Court had said that he could not prevent the Claimant from having access road. That he (the Defendant) compromised the matter. That at the time he wanted to put down the foundation for the main building partly on the access road. That there was a meeting between the Claimant and himself

and their lawyers on 9<sup>th</sup> April 2005 and he believes that he compromised the matter. That he did agree to do what is stated in the letter on pages 29 and 30 of Volume 3 of the Trial Bundle. That he did comply with what was stated. That there is no asphalt or concrete on the road, but there is a road with a retaining wall. That there is a proper retaining wall with stable fill material. That it is correct that the old access road is under the main hotel building. That he did contemplate building a new access road for the Claimant and he in fact did so.

[43] Under re examination, the Defendant testified that he agreed that he compromised the matter, but the agreement evinced in the letter was not intended to be a permanent agreement. That it was a compromise intended to keep the project going and to see how the matter before the Court could be resolved

[44] These are the relevant pleadings and evidence on the basis of which the Court must determine the issues in dispute between the parties.

[45] The first determination made by the Court is that the Defendant is liable in nuisance for the damage occasioned to the Claimant's dwelling house from the escape of vibrations from his property generated by the excavation and related work undertaken there. The Claimant has sufficiently proven this allegation and the Defendant has admitted that at least some damage may have been occasioned to the Claimant's dwelling house by virtue of the work that was undertaken on his (the Defendant's) premises.

[46] The second determination made by the Court is that the extent of the damage occasioned to the Claimant's dwelling house is as per the reports of Civil Engineering & Associated Services Limited. The Court does not accept the report by the absent engineer of the Defendant who, perhaps unfortunately for the Defendant, was not present in Court to present his findings and to have his evidence tested under cross examination. Not so the engineer relied on by the Claimant, who presented his findings in Court and was subjected to the scrutiny of cross examination by opposing Counsel. The Court accepts his evidence and awards the Claimant damages in the sum of \$104,480 for the damage occasioned to his dwelling house by the Defendant's excavation and related activities on his adjoining property.

- [47] Although noting the evidence elicited by the Defendant that the damage to the Claimant's dwelling house identified in the first report of Civil Engineering & Associated Services Limited in April 2004 may have been exacerbated by the passage of time and by the lack of repair within six months to one year, the Court also notes that construction activity on the Defendant's property and damage to the Claimant's dwelling house continued after this and it was only by the time of the second report of Civil Engineering & Associated Services Limited in July 2007 that construction activity had ceased and a complete assessment could have been made of the damage to the Claimant's dwelling house.
- [48] The third determination made by the Court, consistent with section 3 of the **Prescription Act**, Cap. 338 of the 1992 Revised Laws of Antigua and Barbuda, is that the Claimant is and was at all material times entitled to access his property from the road on the Defendant's land, having so accessed his property for a period in excess of 20 years up until 2004 *nec vi, nec clam, nec precario*.
- [49] It is a fact that the Defendant has put up a building on the access road used by the Claimant from 1982. The Defendant is accordingly required to provide another suitable access for the Claimant to his property adjoining that of the Defendant. Whether or not there is another road or path over someone else's property that could be used by the Claimant to access his property does not take away from the obligation of the Defendant to restore to the Claimant access to his property over the Defendant's property, albeit in a location different to where it was up to 2004.
- [50] The Court is satisfied that an alternative access road has been created by the Defendant upon which the Claimant can access his adjoining property and the Court will make a declaration as to the Claimant's entitlement to use that alternative access road. The claim by the Claimant however to have the Defendant finish that alternative access road with asphalt or concrete cannot be justified by the facts of this case or the applicable law. The fact is that the previous access did not have an asphalt or concrete finish and there is nothing on the facts or law which justifies the Court in ordering the Defendant to provide such a finish to the alternative access. If it is that the previous access road was accessible by a motor vehicle and the present one is not then the Defendant will

have to correct this and ensure that the alternative access road created by him that allows the Claimant to access his adjoining property is in a condition no worse than the previous access road had been up to 2004 when he (the Defendant) commenced his construction activity.

[51] The Court cannot accept that the fact that the Defendant had agreed at some stage in the discussion phase of this dispute to build an alternative access road and to finish it with concrete or asphalt requires the Court at this juncture to order him to do so, and the fact that his agreement to do so was evidenced by his signature on a document prepared by Counsel for the Claimant does not elevate that agreement to any higher level enabling the Court to make an order on the basis of it. If the Claimant wanted this "agreement" to be binding, then it was incumbent upon him to have it form part of an Order of the Court, by consent or otherwise. Indeed, the Claimant was not one who displayed any shyness in the course of this case to seek and obtain Court Orders. The Defendant will only be ordered therefore to put the access road (if it is not already so) in a condition which will render it suitable for use by both pedestrians and motor vehicles, as apparently the previous one was.

[52] The fourth determination made by the Court is that the Court is not satisfied that there is a basis for any declaration of ownership, beneficially or otherwise, in favour of the Claimant in respect of any land registered in the name of the Defendant, other than the declaration with respect to the access road. It has not been established that the Claimant's septic tank or the steps to his dwelling house which encroach on the lands registered in the name of the Defendant were in existence for a period in excess of 20 years prior to the Defendant's purchase and development of the lands so as to justify any declaration arising therefrom. It does however appear to be the case that the septic tank and steps were there for more than 12 years prior to 2004, since the evidence is that the Claimant's dwelling house was built and occupied by him and his family prior to 1992, and so the capacity of the Defendant to claim against the Claimant for trespass would be extinguished by virtue of section 17 of the **Limitation Act, 1997** of Antigua and Barbuda.

[53] Following from this, the fifth determination is that the Defendant's Counterclaim is dismissed.

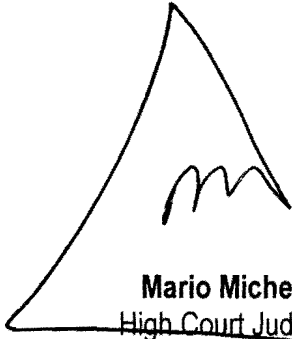
[54] As to damages over and above the award for the damage occasioned to the Claimant's dwelling house, the Claimant makes claim to this on the basis of (to quote the submission by his Counsel) "the general inconvenience suffered by the Claimant." But construction activity in the vicinity of one's home always causes some level of inconvenience, which however does not rise to the level of actionable nuisance. Indeed, if the Courts were to start awarding damages to property owners for the inconvenience caused to them by construction activity on neighbouring property not rising to the level of actionable nuisance, then the Court would be kept busy with such cases and the already costly and irksome business of construction would be rendered even more so. The fact too is that, as with most other new construction in the neighbourhood of one's property, and even more so when it is construction leading to the establishment of a multi million dollar upscale tourism resort, the temporary inconvenience during construction is likely to be more than compensated by the upgrade of one's property value occasioned by the new amenities in the neighbourhood. The Court cannot therefore debit the Defendant for the inconvenience generated during construction without crediting him for the upgrade resulting from the construction, and vice versa for the Claimant.

[55] The Court makes the following orders:

1. That the Claimant, together with Lora Piper, is the owner and entitled to possession of a portion of land shown on the Land Register as Block and Parcel Number 35 2479A 46 in Registration Section English Harbour.
2. That the Claimant has acquired by prescription and is entitled to a right of way over an access road to his property on the adjoining land of the Defendant.
3. That a mandatory injunction is hereby granted ordering the Defendant to put the aforesaid access road (if it is not already so) in a condition which will render it suitable for use by both pedestrians and motor vehicles from the Pigeon Point Road to the Claimant's boundary.
4. That a prohibitory injunction is hereby granted restraining the Defendant, whether by himself, his servants or agents or howsoever otherwise, from obstructing the Claimant's

pedestrian and vehicular access to his dwelling house via the access road over the Defendant's property.

5. That the Defendant is ordered to pay to the Claimant damages in the sum of \$104,480.
6. That the Defendant is ordered to pay to the Claimant interest on the sum of \$104,480 from the 11<sup>th</sup> day of July 2007 to the date of this judgment at the rate of 5% per annum.
7. That the Defendant's Counterclaim against the Claimant is hereby dismissed.
8. That the Defendant is ordered to pay to the Claimant prescribed costs in the sum of \$24,672.



**Mario Michel**  
High Court Judge