

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV2002/0267

BETWEEN:

ASTRA HOLDINGS LTD

Claimant

and

ATTORNEY GENERAL
ASOT MICHAEL
ROBERT CLEVELAND
LISA CLEVELAND
CLARENCE A ECKERT
MILDRED I ECKERT
CHARLES SAWKA
LINDA SAWKA

Defendants

Appearances:

Gerald A Watt QC, for the Claimant
Carla Harris for the 1st Defendant
John Fuller for the 2nd Defendant
Debra Burnette for the 3rd-8th Defendants

2004: March 15, 26, April 1

JUDGMENT

[1] MITCHELL, J: Astra Holdings is a land-owning development company in Antigua and Barbuda. It owns a 167 acre parcel of land at Lawries Bay in Antigua. It has planning permission to construct on it a 250 bedroom hotel, a 361 condominium complex, casino, nightclub, golf course, and retail shopping and sporting facilities. Asot Michael bought a parcel of land between Astra's property and the sea. He was at the time in question a member of the Senate of Antigua and Barbuda, and the Minister of Public Works in the government of Antigua and Barbuda. While serving in such capacity, Mr Michael had Public Works' equipment grade and surface two roads over Astra's property leading to his

property. Mr Michael and his neighbours, the 3rd-8th defendants, claim to be entitled to use the roads as public rights of way. Astra asserts that there is only one right of way, not two, that it is private to the defendants, and not public, and that in any event, they had no right to go onto its land and dig it up and build up the roads without its permission. It claims exemplary damages from Mr Michael and the government for the oppressive way in which they acted.

[2] There are four issues before the court. The first is whether there are supposed to be two access roads to Mr Michael's property or only one. The second is whether one or both of them are public roads or private rights of way. The third is whether the Public Works Department of the government of Antigua and Barbuda was entitled to enter the land and do the construction work. The fourth is what damages, if any flow, from the trespass, if any occurred.

[3] Astra's land on the north coast of Antigua at Lawries Bay is registered as Parcel 44. Parcel 44 consists of some 167 acres of land near Willikies Village. Astra had acquired it with the intention of developing it as a hotel and condominiums. It is at present undeveloped, bush-covered land. Tucked in to the northern boundary of Astra's land, between it and the sea adjacent to Lawries Bay, is a small hill-top property known as Cinnamon Hill. It used to be owned by a Mr Wilson, who is now deceased. At the time Astra acquired title in 1989, an unsurfaced rocky track two-thirds of a mile long ran north from the Willikies main road over Astra's land to Mr Wilson's home.

[4] The Clevelands, Eckerts and Sawkas are the third to eighth defendants. They live on three parcels forming a strip of coast line between Cinnamon Hill and the sea. This strip was created by Mr Wilson who separated it from his Cinnamon Hill property and sold it off in lots. Mr and Mrs Eckert bought their parcel on the coastal strip in the late 1970s. They built a home on it in 1984 and took up residence in 1986. The Sawkas visited Antigua from the early 1970s. They subsequently built their home on an adjacent parcel in the same strip. The Clevelands also purchased a lot from the late Mr Wilson. They did not testify, but they do not dispute that they also built their home and used the disputed

eastern access. The Clevelands, Eckerts and Sawkas all say that they have used the disputed eastern branch road since they first visited the area.

[5] The original access road runs north from the Willikies Main Road through the twin pillared gate at the boundary to the Cinnament Hill property. It is not disputed that this is a private right of way. When about half-way from the main road, it splits into a western branch and an eastern branch. The two branches then go in a circle around the hill and join together. On the plan in evidence the road took the shape of a tennis racket with flattened sides. The western branch road is not in dispute, but the eastern is. The defendants claim it is a public right of way. Astra claims it is neither a private nor a public right of way.

[6] At some point in the year 2001, Mr David Thoms, Astra's chairman, discovered that the residents at Cinnament Hill and the neighbouring houses were using both of these accesses over Astra's land to get to and from their properties. Mr Thoms decided that the use of the eastern branch road was new and unauthorised. It also ran directly over the spot where Astra planned to construct its hotel. Sometime in 2001, he took steps to dig a hole in it and to further block its use by placing an old telephone pole in the hole. This obliged the residents to confine themselves to the western branch road. It appears from the testimony that Mr Thoms' action in blocking off this road was designed to protect and preserve the integrity of the land upon which his company had planning permission to build a hotel. He was concerned not so much to prevent any access to the properties from the east as to ensure that any access to the east did not interfere with the planned development. One of the defendants agreed that he has told her that if they require access to their homes from the east, and would prefer not to take the western access around the hill, he will ensure that when the property is being developed a suitable access is provided. It is to be noted that he dug the hole not on Astra's land but over the boundary in the Cinnament Hill land. No claim is made against him for this action. He was at the time negotiating to purchase the Cinnament Hill land from the Wilson estate, but Mr Michael, he claims, used his influence to block the sale and to acquire Cinnament Hill for himself.

[7] Up to the time of the surfacing of the eastern and western branch roads by Public Works, both were rocky, pot holed tracks of the familiar kind, cleared tracks running through the bush. In times of heavy rain parts of them would be almost unusable. When the potholes became intolerable, some one of the residents might arrange for the odd load of marl to fill them in. So, for example, after the passage of Hurricane Hugo in the year 1989, the eastern branch road had become badly rutted due to rain. Ms Sawka's father was a retired US Air Force officer living in his house on the strip. He persuaded one of his friends at the local US Air Force Base to send a grader to smooth the eastern access out. Other than this, up to the year 2002 neither the eastern nor the western access road was surfaced in any way. Indeed, the 1968 aerial photograph shows the eastern access road only very faintly. That of 1975 shows it slightly more clearly as some sort of a track. That of 1991 shows it very clearly as a track used by vehicles. From this we can deduce that its use began sometime prior to 1968 when only the late Mr Wilson and his guests lived at Lawries Bay.

[8] These photographs show that Lawries Bay was at all times fringed right down to the sea by trees and bush, more likely than not the ubiquitous mangrove that lines the muddy bays of the northern coastline of Antigua. There are only two or three bays on the northern coast that can properly be described to have beaches. At the western end of Lawries Bay, adjacent to the Cinnamon Hill there is no beach of any kind apparent in the aerial photographs in evidence until the very last one of 1991. The opposite or eastern end of Lawries Bay shows from the earliest photograph a small patch of sandy beach a few feet long and a few feet wide and with a faint track running to it over what was to become Astra land. There are at least fifteen other tracks running through the land, the most prominent of which was apparently used by the villagers as access to an illegal rubbish tip in the middle of the land.

[9] All land has a history. Astra's land had originally been part of Rooms Estate on which prior to the 1970s was grown sugar cane, vegetables, and livestock. At that time it was criss-crossed by estate roads that ran between the fields. These were private estate roads. Rooms Estate was acquired by government in the early 1970s. In 1973 government sold

- the Astra portion of it to a developer whose plan failed. It lay fallow, occupied only occasionally by villagers from Willikies who put their animals to pasture on it, as they do today. The villagers also used the abandoned estate roads to dump their rubbish and to access the bay for bathing and fishing. In 1989, after litigation, Astra took title to this parcel of land and put up a sign advising of the proposed development. As part of the settlement of the litigation, government holds one quarter of the shares in Astra. A government minister attends shareholders' meetings.
- [10] In the 1970s, all lands in Antigua and Barbuda had been subjected to a Cadastral Survey. Aerial photographs were used, as well as surveys on the ground. Copies of the aerial photographs were stored at the Survey Department. Any person claiming any right or title to any land or interest in land was required by the Act to make a claim, and all claims were heard and adjudicated on. From the survey, Cadastral Index Sheets were drawn up and deposited in the Survey Department. On these Index Sheets were marked out the boundaries of every parcel of land, together with certain other interests, such as public roads. Public rights of way, as with private rights of way, are not necessarily shown on the Cadastral Sheets. In addition to the Cadastral Index Sheets, there were at the same time created an overlapping Topographical series of sheets. These maps do not show parcel boundaries, but do show roads, tracks, cut lines, beaches, vegetation, hotels, houses, and other topographical features.
- [11] Mr Leo Gore, deceased, was the surveyor who prepared the 1988 subdivision of the Cinnamon Hill property. This was when Mr Wilson created the original parcels out of his Cinnamon Hill property and on which the Cleavelands, Eckerts and Sawkas have built. Mr Gore submitted this plan to the Survey Department for approval and registration. It was certified as correct by the Chief Surveyor. It shows the right of way from the Willikies Main Road leading to Cinnamon Hill. It is shown as 20 feet wide. It is what we are calling the western branch. It does not show the eastern branch.
- [12] In evidence are extracts of both the Cadastral Index Sheet and the Topographical Sheet for Lawries Bay. On both, the Willikies main road is shown as a public road. On 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 foot-paths 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.

[13] In early 2002, Mr Asot Michael acquired jointly with his mother the Cinnament Hill property from Mr Wilson's estate. This is registered as Parcel 9. The Michaels also acquired adjoining Parcels 17 and 12 on the coastal strip that had originally been a part of Cinnament Hill. Mr Michael is not an long-time resident of the area. He depends for his knowledge on what the old timers tell him. He also relies on his surveyor, Mr Elpert Winter, to advise him. Mr Winter advised him that Astra had no right to block off the eastern access road to his property, that it was a public road, and that he had every right to reopen it.

[14] Mr Michael was the Minister of Public Works. His ministry had control of the back-hoes, graders, bulldozers and other heavy-duty road construction equipment owned by government. In February 2002, on Mr Michael's instructions, employees of the Ministry of Public Works, supervised by Mr Winter, came on to Parcel 44 with their equipment. By this time, Mr Michael had gazumped Astra. He had bought the Cinnament Hill property from under its nose. He had paid for it, though he and his mother had not yet been registered as owners. Nevertheless, the Public Works officers bulldozed the land and cut and constructed two marl roads on it. One ran along the alignment of the original access or western branch road. This road is now a prominent feature approximately 16 feet in width and with verges varying in width from 5 to 20 feet along both sides of the main carriage ways. It runs from the public road northwards to the entrance of Cinnament Hill. The other is the eastern branch road running towards Lawries Bay. It passes near to the western extremity of the Bay, over the boundary of Parcel 9 and from there passes around Cinnament Hill alongside the boundaries of the other properties on the coastal strip to rejoin the western branch at the twin-pillared entrance to Cinnament Hill. These road

works cut through the Astra lands that were planned for development as a hotel. The eastern branch has made it impossible, unless the ground is restored, for Astra to complete its development project in accordance with its approved plans. If the eastern branch road is to remain in its present location, the hotel will have to be relocated from its present planned site.

[15] The Hon Mr Robin Yearwood, the elected representative for the Willikies constituency, gave evidence on behalf of his ministerial colleague, Mr Michael. He was most concerned that Astra was attempting to block off the public access to the bay. His concern was that the blocking of the road, when combined with the development plan approved by the Development Control Authority, indicated an intention to block access for his constituents and other members of the public to Lawries Bay. He was adamant that this could not be allowed. He was certain that the roads in dispute were public roads that had been dedicated from the days of the original sugar estate to give access to the public to the beach and bay.

[16] From Mr Yearwood's evidence and that of Mr Winter, it was abundantly clear that Lawries Bay is not a preferred bathing place. It is so out of the way that its preferred use is for skinny-dipping, a furtive activity at best. The very next bay lying to the east of Lawries Bay is Long Bay, with one of the most magnificent beaches on Antigua. That is the preferred beach for public sea-bathing. A few residents at Willikies use Lawries Bay for fishing. They access the coastline by using pathways originally created for estate purposes, and not for public use. These, including the eastern branch road, were until recently no more than tracks. It was Mr Wilson who gave the purchasers at the time of their purchase a right of way by vehicle over his property to the main road. The documents indicate clearly that they were given the western branch road as their legal access road. They began to use the eastern branch road as a short cut, and it has more recently become their preferred route. However, there is no claim for a private right of way. The sole question is whether there is a public right of way along their road. The answer is that there is no reason to believe that there ever was. Even if there was a public right of way to the bay, which I do not accept there was, why would it have continued past the bay to the boundary

of the Cinnamon Hill property and from thence to their properties? What I find is more likely is that Mr Wilson took a chance to trespass over the Crown land to gain access to a small private jetty he built on the bay. He and those who subsequently purchased from him have now grown accustomed to using this route as an occasional alternative to using their registered right of way to the public road. They have neither a private right of way nor a public right of way from their properties to the bay over Astra's property.

[17] The Development Control Authority (DCA) was established in 1977 by the **Land Development and Control Act, Cap 235**. Land development is there defined as including the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or land. By section 6, it is the duty of the DCA to institute a survey of Antigua and Barbuda and to prepare a development plan for the State, to be approved by cabinet. No person is permitted to develop any land in the State without written permission by the DCA. The DCA is given the widest latitude to approve or to disapprove for good cause any development. This would necessarily include the creation, alteration, and cessation of public rights of way. On 8 March 2000, Astra's layout plan for the proposed development received formal approval. It was one of the documents in evidence. It provided for the construction of a 250 bedroom hotel and 361 condominium complex, all as described above. The plan in evidence does not on its face show a public right of access to the beach or to the bay. That does not mean that none is provided for.

[18] Astra has spent a significant sum of money in conducting a full topographical survey of the entire site, commissioning a soil analyst's report, clearing 120 acres of the property, preparing detailed layout plans in respect of roads and services and other aspects of the development, commissioning architects, an environmental impact study, and a promotional video. In addition to Mr Michael having had Public Works construct the eastern branch road right through the location of the hotel, he has now replaced the late Mr Wilson's small jetty with a major docking facility for his use and convenience. His land falls away to Lawries Bay, but he has not built this dock on his land. He has built it on the Astra land. It is some 10 feet wide, goes out some 40 feet and then forms an "L", stretching another 20

feet. He keeps his two boats tied to it. It is not clear whether or not he had planning authority to construct this dock, or whether he holds any lease or licence to trespass on the Queen's bottom.

[19] Mr Yearwood's concern about the blocking of public access to Lawries Bay was misplaced. The blockage was created not on the Astra property over which the alleged rights of way pass, but on the Cinnamon Hill property that had been acquired a year later by Mr Michael. The blockage occurred at a point beyond the bay, when access to the bay had already been achieved. The blockage was at a point after the road had gone past the bay. It could not constitute evidence of a blocking of any public right of access from the opposite direction to the bay. What it blocked was access by the residents of the Cinnamon Hill properties to the bay and to the eastern branch road.

[20] There is a further and more fundamental public policy concern. Public rights of way are protected by law and enforced by the relevant government authority. If the public have a right of access to Lawries Bay, then that is a matter for the DCA, the planning department of the government of Antigua and Barbuda, armed with the necessary legislation, statutory rules, national development plans and other policy documents, to take up with Astra. If Astra acts illegally in blocking a public right of way, the DCA in due process enforces the public's right. No government minister or agency can supersede the authority vested in the DCA by the House of Representatives. If the DCA gives planning permission to a developer to develop its private land as a hotel and condominium resort, then in the absence of any evidence to the contrary, the court will not permit a private person to enter the land and do damage to it in a purported claim of a right to enforce a public right of way.

[21] In Antigua and Barbuda there is no Rights of Way Act, nor Highways Act, nor other statutory provision governing public rights of way. A claim to a public right of way in this State is based on the common law doctrine of dedication and acceptance. A road or other way becomes a highway or public road by reason of the dedication of the right of passage to the public by the owner of the soil and of an acceptance of that right by the public. Dedication means that the owner of the soil has said it in so many words or has so

conducted himself as to lead the public to infer that he meant to say that he was willing that the public should have this right of passage. Dedication may be formal, but this is comparatively infrequent. It may be inferred from long usage. Long usage is thus effective to prove both dedication and acceptance. From the moment that a dedicated right of way has been accepted by the public, there is a right of passage by the public. Before a presumption of dedication can arise, there must have been open use as of right for so long a time and in such a way that the landowner must have known that the public were claiming a right, and the court is slow to find a claim of right where the use is attributable to the landowner's indulgence. The burden is on the defendants to show long and continued use in such circumstances that an inference should be drawn from it that the owner of the land has intended to dedicate the roadway to the public for their use.

[22] Mr Winter, who was called by the Crown in an attempt to prove that the eastern branch road was a public road, is now an employee of government. At the time of this trespass, he was a private surveyor hired by Mr Michael to do his survey work. He did not deny that he earned good fees from both the survey and from supervising the Public Works graders and other equipment in constructing the roads in question. He took up public office while Mr Michael was minister and after performing this service. His evidence was completely unreliable. His demeanour was unimpressive. Not that I can entirely blame him. In relation to the road he found what he had to find, if he knew what was good for him. I am satisfied that there is no public right of way established across the lands of Astra at Lawries Bay. Public Works had no right to go onto Astra's property and improve the roads without Astra's permission. I am satisfied that both Mr Winter and the officers of Public Works acted under pressure from the 2nd defendant, their minister. There will in the circumstances be judgment for the claimant against the government of Antigua and Barbuda for a nominal amount of damages and costs for the trespass.

[23] The third to eighth defendants have done little more than use the road the Public Works and its minister informed them were public rights of way. There is no purpose in making an award in damages against them. They are prohibited from using the eastern branch road without the written permission of Astra.

[24] The real responsibility for this trespass rests with the second defendant, Mr Michael. He must take sole responsibility for the damage done to Astra's land by the Public Works equipment. It was all done for his private convenience. The claim of a public right of way was a cover or pretence, and not a very good one at that. The feature that stands out above all others in this case is the blatant abuse of public office for private benefit. Mr Michael showed not the slightest shred of guilt or remorse in abusing the public road-making equipment in the way he did to construct a private road for his convenience. And this while so many of the public roads of Antigua and Barbuda lay in a state of disrepair. Nor did it matter to Mr Michael that he was disrupting a development project that when it comes to fruition will bring major benefits to the community. All that he was concerned about was the improvement of his private access to his property and to his jetty that he constructed on Astra's coast without its permission. No suggestion has been made to the court as to what figure would be a suitable award of damages. The amount has been left by both counsel to the discretion of the court.

[25] Exemplary damages have been sought. Exemplary damages have long been appropriate where the court finds oppressive, arbitrary or unconstitutional conduct by government servants¹. The object of exemplary damages is to punish as well as to compensate. In this case the court is satisfied that Astra has been the victim of punishable behaviour. Two major dirt-roads have been constructed over its hotel project. At the same time, the award should be moderate. The court should take into account the means of the parties. Mr Michael is generally known to be a very wealthy businessman. The conduct of the parties is relevant. In this case, Mr Michael not only abused his office in directing his officers to do work on a private and not a public project, but the private project in question was his own. Also relevant is the amount awarded as compensation. Taking all things into account, a fair award in this case would be an amount of \$250,000.00 as general damages, and the same amount again as exemplary damages. The court will also direct that the file in this matter be turned over to the Director of Public Prosecutions to consider whether any criminal proceedings should be brought.

¹ Rookes v Barnard [1964] AC 1129

[26] There will be judgment for the claimant as follows:

1. Against the 1st defendant for damages of \$500.00 and costs of \$9,000.00;
2. Against the 2nd defendant for general damages of \$250,000.00 and exemplary damages of \$250,000.00 and prescribed costs on the total;
3. Against the 2nd defendant for interest at the rate of 10% on the total of \$500,000.00 from the date of the filing of the writ to the date of judgment;
4. Against the 2nd-8th defendants for an injunction prohibiting them whether by themselves, their servants or agents or any of them from passing and re-passing along the eastern branch road leading from the Willikies Main Road to their properties; no order as to costs.

Don Mitchell, QC
High Court Judge