

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2004/0298

BETWEEN:

ROLSTON MICHAEL

Claimant

And

JO HUTCHENS

Defendant

Appearances:

Mr. George Lake for the Claimant

Mr. Septimus Rhudd and Ms. Gail Pero for the Defendant

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2007: March 12th
May 22nd
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JUDGMENT

[1] **Blenman, J**, This is a claim by Mr. Rolston Michael (Mr. Michael) against Mr. Jo Hutchens (Mr. Hutchens) for an injunction restraining Mr. Hutchens from digging up, blocking or otherwise interfering with the public access road (the access road) leading to Parcels 229 and 193 of Registration Section South East, Block 56 2280A (the lands). Mr. Michael also alleges that Mr. Hutchens has trespassed on his lands and seeks compensation. Mr. Michael also seeks damages for public nuisance which is reflected, among other things, in the cost of repairing the road, due to Mr. Hutchens' unlawful interference with the road, and for the inconvenience suffered by him over and above that suffered by the rest of the general public. Mr. Michael also seeks costs and interest. There is a counterclaim by Mr. Hutchens against Mr. Michael for damages for trespass and nuisance.

Background

- [2] Mr. Michael says that he is the owner of the lands mentioned above whereas Mr. Hutchens is owner of lands which are adjacent to his (Mr. Michael's) lands. Mr. Michaels says that with the permission of the relevant authorities he caused repairs to be effected to the access road that is owned by the Government of Antigua and Barbuda thereby making it passable by vehicular traffic. Mr. Michael contends that subsequently and in or about the 5th May 2004, he entered into a contract for the sale of a parcel of his lands with Mr. David Martin and Ms. Denise Martin. It was a term of the contract that the access road be in good condition for entry and access to the parcel of his land. Mr. Michael further contends that Mr. Hutchens by his servants and or agents wrongfully caused an excavation to be made to the access road bordering his lands, thereby preventing Mr. Michael from gaining proper access to his (Mr. Michael's) lands. The excavation impeded the passage of vehicles along the access road and thereby constituted a nuisance. At all material times, Mr. Hutchens knew or ought to have known of the nuisance but permitted the same to remain. Mr. Michael says that Mr. Hutchens knew or should have known that his actions would interfere with his (Mr. Michael's) right to use and enjoyment of his lands also his ability to dispose of his lands by sale. By reasons of the actions of Mr. Hutchens, Mr. Michael says that he has been exposed to liability for breach of his contract to sell parcel of land to Mr. and Mrs. David Martin and has suffered loss and damage over and above that suffered by the general public.
- [3] Mr. Michael complains that additionally, Mr. Hutchens has allowed the overflow from his septic system to be discharged onto Mr. Michael's land. The discharge is a health hazard to the whole of Mr. Michael's property and is also a trespass to his property which has caused material damage to his property; as a consequence has caused a deterioration in the attractiveness and marketability of the lands. Further, Mr. Michael complains that as a result of Mr. Hutchens' actions he (Mr. Michael) has suffered loss and damage over and above that sustained by the public at large. Mr. Michael further alleges that as admitted by Mr. Hutchens he has fenced in approximately 12 feet of Mr. Michael's land on the northern boundary. Mr. Hutchens has also removed topsoil from Mr. Michael's land thereby

causing erosion. Mr. Hutchens admitted removing the soil and stated that it was for the repair of the road.

[4] Mr. Hutchens denies that he has committed any of the breaches alleged. Mr. Hutchens complains that in or around October 2003, while he was "off island" Mr. Michael by himself, his servants and/or his agents trespassed on his (Mr. Michael's) property with a bulldozer and commenced digging an access road to certain lands adjoining those owned by Mr. Hutchens. Mr. Michael gave no notice or any other indication to Mr. Hutchens of his (Mr. Michael's) intentions. In digging the access road, Mr. Michael, spread dirt, mud and debris onto Mr. Hutchens' property thereby making access to Mr. Hutchens' property difficult. Further, by virtue of the work done by Mr. Michael, his servants and/or agents, the driveway to Mr. Hutchens' property was considerably narrowed so that driving became treacherous and unsafe for him to drive and he was forced to drive over large mounds of dirt to get to his property. Mr. Michael, destroyed a gravel driveway that Mr. Hutchens had installed on or around October 23, 2003 at a cost of \$1,940.00 Mr. Hutchens further contends that on or about December 29, 2003, he had to hire a backhoe to correct and rectify the problems caused by Mr. Michael, which included the removal of support for the said road. In having the said rectification carried out, Mr. Hutchens denies that he caused, wrongfully or otherwise, any excavation to be made to the access road adjoining Mr. Michael's land. Mr. Hutchens maintains that the work was done in a proper manner and to prevent soil erosion.

[5] Further, Mr. Hutchens denies that he impeded the passage of vehicles along the said access road and/or created any nuisance. He maintains that it was his efforts that allowed for unimpeded use of the said access road as Mr. Michael had left it in an impassable condition. Mr. Hutchens says that his efforts to correct the problems caused by Mr. Michael were intended to allow access to his (Mr. Hutchens') driveway and to ensure the safety of his family. Further, Mr. Hutchens says that his land is downhill from any land that adjoins Mr. Michael's so that there can be no overflow of the type and in the manner alleged by Mr. Michael.

[6] Further Mr. Hutchens says that in or around 2003, he was overseas at the time, and a neighbour and himself agreed to jointly fence their properties and share the costs. The fencing company that was engaged to do the job erroneously placed a section of the fence in the wrong place. This error has since been corrected. While Mr. Hutchens admits that he owns lands that are near to Mr. Michael's land he (Mr. Hutchens) denies the allegation made by Mr. Michael both in relation to the trespass and nuisance. Mr. Hutchens denies that Mr. Michael suffered any loss or damage as a consequence of any of his (Mr. Hutchens) acts. Mr. Hutchens however, counterclaims for damages against Mr. Michael on the bases of nuisance and trespass.

Issues

[7] The issues that arise for the Court's determination are as follows:

- (a) Whether Mr. Michael has established a claim for public nuisance against Mr. Hutchens and should therefore be compensated;
- (b) Whether Mr. Michael has established his claim for trespass against Mr. Hutchens.
- (c) Whether Mr. Michael is entitled to obtain an injunction restraining Mr. Hutchens from digging up, blocking or impeding his access and those of his servants and or agents to the public road;
- (d) In relation to the counterclaim, whether Mr. Hutchens has established his claim for trespass against Mr. Michael.
- (e) Whether Mr. Hutchens has established a claim of nuisance against Mr. Michael and should therefore be compensated.

Evidence

[8] Mr. Michael testified on his own behalf and called as witnesses Mr. Charles Michael (Mr. Charles) Mr. David Roberts (Mr. Roberts) and Mr. Arnold Lloyd (Mr. Lloyd). Mr. Hutchens testified in his own defence. An agreed bundle of documents was also placed before the Court and to which the Court has had regard.

Claimant's evidence

[9] Mr. Charles in his witness statement said as follows

"I am the brother of the Claimant.

On or about the month of December 2003 my wife and I were visiting our property located at Bailey Hill Estate. As we approached the area of my brother, Rolston Michael the Claimant herein property I observed a man operating a backhoe on the edge of the defendants' property and the public access road leading from the Claimant's property.

I asked the defendant for an explanation. He informed me that there had been a land slide and he was removing the fallen material. We left the two of them there and went over to our property.

Later that day when we returned we observed that the access road had been dug up and a large ditch was left where a large portion of the said public road had been located. It was now impossible for vehicular traffic to gain access to the Claimant's property."

[10] Mr. Charles during cross examination by Learned Counsel Mr. Septimus Rhudd said that when he spoke to Mr. Hutchens he (Mr. Charles) was told that there was a land slide and that he (Mr. Hutchens) had called the backhoe man to clear it. He could not see any evidence of land slide; however, there was something there that Mr. Hutchens was clearing up. Later that day, he returned to the area and he saw a large ditch that was not there before.

[11] The next witness was Mr. Roberts.

In his witness statement Mr. Roberts said as follows:

"I am a Building Contractor and Road Builder by profession.

On or about the month of May 2004, I was approached by the Claimant who asked me to accompany him to a site at Turtle Bay and Bailey Hill to look at a problem he was having with the public access road to his property.

I went with him to the said site and examined the said road. Upon inspection I discovered that someone had dug a large trench across the road damaging between 70% to 80% of the width of the road.

This trench prevented any vehicular access from traveling on the road leading to the Claimant's property.

The Claimant asked if I could remedy the situation. I informed him that due to the slope of the hill and the way in which the trench had been dug it would take significant remedial works to remedy the situation. The Claimant asked me to prepare and submit an estimate for the said works and a sketch of the proposed works. This I did. Mr. Michael took the said sketch to the DCA and submitted it for approval.

Some time later DCA approved the proposed works and we began the remedial works. I was paid approximately EC\$13,800.00 for labour and transportation of some of the materials. The Claimant paid for all of the materials required for the said works. The said works were completed and the said road reopened."

[12] Mr. Roberts during cross examination by Learned Counsel Mr. Rhudd said that while he knew the area he was unsure that he had visited previously that particular property. He did not know what the condition of the access road was in December 2003. He was asked by Mr. Michael "to do some work on the road". The slope of the hill was a concern since he observed a trench across the road and to rebuild the road it needed a wall to keep the soil. "The land was a slope and the road was sloped". Mr. Roberts during further cross examination admitted that the receipts tendered in evidence were authored by Mr. Michael's wife and he (Mr. Roberts) had signed as receiving payments. The bills were done by Mr. Roberts and Mrs. Michael. Mr. Michael admitted that the Roberts were his friends but maintained that he was paid for repairs that he did to the access road.

[13] The third witnesses, Mr. Lloyd in his witness statement said as follows:

"I am a Surveyor by profession and employed with the Government Survey Department.

On or about the month of June 2003 I studied the data sheets for registration section South East section located at Bailey Hill & Cherry Hill for the purpose of ascertaining the correct location of the public access road for parcel 193 owned by the Claimant.

I went on site and inspected the said lands with others and marked out the road so that it could be cleared and excavated.

On or about the month of January 2004 I visited said lands in the company of the Claimant. At this time I observed that someone had used some type of equipment to cut a large trench in the said access road making the road unusable.

I spoke to a Mr. Eddie Hadeed in the presence of the Claimant who informed us that the defendant had previously approached him with a plan for both of them to share the said lands on which the public access road was to be located in order to ensure that no public access road was placed there. He told us that he had informed the Defendant that he was not interested with his plan.

Additionally, I discovered that the Defendant had placed his perimeter fence on the Claimants land encroaching some twelve feet on the Claimant's property."

[14] Mr. Lloyd, during cross examination, by Mr. Rhudd, said that he had caused the survey to be carried out in subdividing Mr. Michael's lands and he did this on the instructions of Mr. Michael who had contracted him to so do, and at the time of carrying out the survey he was employed by the Government of Antigua. In June 2003, he marked out the road and knew that it was an access road and slopes gently, it was owned by the Government. He again visited the road between June 2003 and January 2004 by this time "the construction" had been complete. The "construction" he referred to was the "dug up" they had a concrete construction carried out by Mr. Roberts on behalf of Mr. Michael. Mr. Lloyd agreed that if excavation work is carried out on the road stones will roll down. He insisted that based on what he had seen, particularly, the huge area that had been dug into "the road", not even an excavator could have "passed". In fact no vehicle could have passed there whereas initially vehicles could have passed.

[15] The main witness was Mr. Michael. I am of the view that it is necessary to provide his evidence in some detail.

Mr. Michael in his witness statement said that:

"I am the owner of lands contained in Registration Section South East, Block 56 2280 A Parcel 229 and 193.

The Defendant owns land adjacent to parcel 193 and 229.

On or about the 5th of May 2004 I entered into a contract for the sale of parcel 229 to one David and Denise Martin. It was a term of said contract for sale that the public access road is in good condition for entry and occupation.

In May 2004 Mr. Oliver Joseph Senior Surveyor of Ministry of Public Works visited the said lands and found the road leading to parcel 229 was in the correct position. See his letter to the Town and Country Planner DCA dated October 2nd 2005.

On or about the 29th day of September 2003 I hired equipment from Mr. Edison Baltimore of Wilikies Village to clear the access road to said lands and brought in fill to level the road.

On or about the 29th December 2003 the Defendant hired a backhoe and instructed the backhoe driver to excavate a large ditch in the said public access road. This ditch prevented any vehicle from passing along the said road. Thereby preventing access by vehicle to my lands.

The Defendant would have known that neither I nor anyone else would be able to access the lands after the backhoe had finished damaging the road.

At no time did I nor my agents or servants trespass on the defendant's land. At all material times the road and road bed was located in the exact position that it is presently located. At no material time did I or my servants or agents spread any dirt mud or debris onto the Defendant's property. Further, none of the works done in clearing the said public access road interfered with the Claimant's driveway in so far as to trespass or block the Defendant driveway. Nor do I know of the Defendant ever doing any recent works on said driveway and I was a regular visitor to the lands.

There was nothing done by myself, my agents or my servants that required any rectification by the Defendant and or his agents or servants.

The works done by the Defendant were motivated by malice towards me. He intended and did infect maliciously cause damage to the access road that I had just paid to have cleared and leveled. He did so knowing full well that I was attempting to sell the said property. The works done were done without any permission by DCA or any supervision by any qualified contractor/engineer. The works carried out in fact were not properly done and did significant damage to the said access road and surrounding lands. This excavation in fact causes serious erosion to the road bed and surrounding area. And seriously impeded the passage of vehicle along the said road and created a severe nuisance. Further at no material time after the said access road was cleared and leveled by me did the said

road fall into disrepair prior to the Defendant and or his agent/servant vandalizing the said road with the said backhoe.”

[16] Mr. Michael further stated that:

“On or about the 8th July 2004 the defendant and I met with Mr. Adlin Crump of DCA to try and rectify the situation. In the presence of Mr. Crump the defendant admitted that he had hired the said backhoe and it worked under his instructions.

At the time of the filing of this claim the Defendant fence had encroached on my lands some 12 feet along the southern border. Further the Defendant had removed a significant amount some eight truck loads from my land. He later admitted that he had removed said top soil. He stated it was used when he was working on the road.

In August 2004 Mr. David Roberts/Contractor accompanied me to the said property and examined the works. He wrote me a letter/report of what he saw at the time dated 2nd August 2005. He later presented me with an estimate and a sketch for the necessary remedial works to the access road.

I took the sketch to DCA to show them what remedial works I intended to do. I was given permission to proceed with the remedial works. See letter from Mr. Aldin Crump dated June 7th 2004.

Under the supervision of Mr. David Roberts the remedial works were carried out. The said remedial works were examined by Mr. Roland Francis, Civil Engineer, Senior Engineer, Ministry of Works, transportation and the Environment who in his report dated 30.9.05 stated that the extent of renovation works to this section of road is fully justified and will be of great benefit to all the stakeholders in the immediate vicinity. I was later commended by the Director of the DCA by letter dated 4th October 2005 for my effort in restoring the said access road to its original state.

Additionally, the Defendant placed his perimeter fence on my land encroaching some 12 feet onto my property. He also has placed his sewage system/septic tank in such a position that the run off water comes onto my land. Causing damage and a health risk to my property. The Defendant asserts that his land is downhill from my property, however in fact my land on the other side of his property is downhill of his land.”

[17] Mr. Michael said in amplifying his evidence, that he had caused the access road to be cut clearly and it was left no obstruction. Mr. Michael maintained that after Mr. Hutchens had caused the access road to be dug up the two of them visited Mr. Crump who advised them

that he had gone to the site and that it was badly damaged by someone. Mr. Hutchens told Mr. Crump that he was clearing the road and Mr. Crump indicated to Mr. Hutchens that what was done to the road was not clearing rather someone had completely dug out the access road. At that time, Mr. Crump was in charge of the DCA. He told Mr. Hutchens that the person who had taken the backhoe driver to the road was responsible for the damage to the access road. Mr. Crump then asked Mr. Hutchens why did he damage the access road and Mr. Hutchens responded that it was because Mr. Michael had told him something that he did not like. Mr. Michael received several reports from various government departments that are in the agreed bundle of documents, and denied that he has caused any problems to Mr. Hutchens or had trespassed on his property.

[18] During cross examination by Mr. Rhudd, Mr. Michael said that some part of his property is higher than Mr. Hutchens' while other portions are lower but maintained that Mr. Hutchens pipe had over flown onto his (Mr. Michael's) lands. He agreed that he had contracted with Mr. and Mrs. Martin to sell his property and this was before the Court action. Mr. Hutchens caused the damage to the access road on December 31st 2003 and Mr. Michael 'fixed' it somewhere around May 2004. Mr. Michael hired Mr. Baltimore to do the work on the access road and some of the invoices that were placed before the Court were in relation to both "the first set of the work that he had caused to be done on the road" and the remedial work that was done thereafter.

[19] Mr. Michael denied that initially in 2003 when he was working to clear the access road dirt and debris fell on Mr. Hutchens property. He told the Court that after Mr. Hutchens had dug up the road he met Mr. Hutchens and asked him what he was going to do about the road and Mr. Hutchens told him that "if he allowed him (Mr. Hutchens) to drive up the road to come around and get to his property he will fill back the hole he had dug out". Mr. Michael was convinced that Mr. Hutchens had meant to block him off and he did not want him (Mr. Michael) to pass on the road. Mr. Hutchens' desire was to use his (Mr. Michael's) land to get to his property and because Mr. Michael was not amenable to this he retaliated by digging up the access road.

[20] During further vigorous cross examination by Mr. Rhudd, Mr. Michael admitted that between December 2003 and July 2004 he went to the relevant Government departments including the Public Works department and tried to get them to fix the damaged access road. He was of the view that since he had to fix the access road Mr. Hutchens ought to reimburse him. As a result of Mr. Hutchens having dug up the road his property needed a retaining wall. He denied that he was fixing the road because he had contracted to sell the property. It is untrue that he had caused extensive repairs to be done to the access road rather it was fixed "back to" the usable position (due to the damage done by Mr. Hutchens). Mr. Martin could not purchase the land with the big hole in the road and if the hole had remained the water would "take the land away" so a retaining wall had to be erected. Had he not fixed the access road with a back hoe he would have been unable to access his lands.

[21] Next, Mr. Michael maintained that Mr. Hutchens has encroached on 12 feet of his land and that Mr. Hutchens has confirmed that this was so because he (Mr. Hutchens) had caused a survey to be carried out). Further, Mr. Hutchens had taken top soil from his (Mr. Michael's) land it was approximately 8 truck loads of top soil. Mr. Michael was forced to admit that the road was not paved before and when he had finished the repairs to the road that had been dug out, it was paved. His contract required him to construct and pave the road but he denied that he was trying to recover monies he has spent on repairing the road rather he paved the road to keep "the lose dirt" in place. The entire road is not paved only around the area that was damaged by Mr. Hutchens was paved.

Defendant's evidence

[22] Similarly, I propose to address Mr. Hutchens' evidence in some detail.

He stated as follows:

"I am the owner of a residential property situated at Turtle Bay. This is registered as Registration Section: South East Block: 562280A Parcel 137. I have been the owner of the said property for several years.

One of the properties in close proximity to mine is owned by Rolston Michael, whom I have known for 12 years. To access his land he needed to climb through undeveloped bush behind my property. There was no established easement.

Due to the state of the undeveloped access to Mr. Michael's land it could not be used by vehicular traffic. He would walk up this said piece of hillside on numerous occasions to get to his property. On those occasions, he would leave his vehicle parked on my property. I would allow him to do this in the spirit of good neighbourliness.

In or around October 2003, I traveled overseas. While I was away, I received a phone call informing me that Mr. Michael had got a bulldozer to dig an access road to his land. One of my neighbours, Mr. Nodine spoke to him and asked him to refrain from doing anything until I had returned to the island. I have been told that he refused. I was never given any prior notice that he intended to dig this access road.

I returned to the island on or around December 23, 2003, I was shocked and horrified to see what had been done. The intended "access road" was nothing more than a bulldozed track of mud and debris. A lot of the dislodged mud and debris spilt onto my property. In addition, it became difficult for me to access my own property as the driveway had been narrowed by the dirt and rubble. I was forced to drive over a mound of bulldozed earth to get into the property. Part of the road was unsupported on one side and was quite unsafe.

Prior to Mr. Michael arranging to bulldoze the access road, I had paid approximately \$1,940.00 to George Simon's Construction Company to place gravel in my driveway. This had been completed around October 22, 2003. As a result of the work done by Mr. Michael the driveway was damaged by the dirt and debris.

During the bulldozing on the access road, loose rocks fell behind my house, which was at a lower level than the said road. As a result, the drainpipe for my kitchen got broken.

I became very concerned about the state in which Mr. Michael had left the access road. I felt that loose earth and rocks would continue to fall onto my property. I observed that Mr. Michael was not making any effort to continue construction on the access road. He left it in an unfinished and unsafe condition and susceptible to mudslides. My family and I were worried and concerned by this.

I attempted to reach him on several occasions to discuss the matter with him but I was not able to contact him. In the circumstance, I felt compelled to try to fix the problem."

[23] Next, Mr. Hutchens stated as follows:

"On or around December 29, 2003, approximately two (2) months after the work was done by Mr. Michael, I was forced to hire a backhoe to fix the lower section of the road and to put it in a safe condition. I paid \$340.00 to have this done. The backhoe operator took approximately 2 hours to do the work.

In having the backhoe operator carry out this work, I was safeguarding my property and ensuring that I could obtain unimpeded access to my property.

Sometime after, Mr. Michael had the access road bulldozed. I met him outside Bailey's Supermarket in Falmouth and I approached him to talk about the situation. He became hostile and abusive.

I subsequently became aware that Mr. Michael built a concrete section at the lower portion of the access road. In doing this, he made the concreted section unnecessarily wide. This has reduced the width of the easement access to my property to about nine (9) feet. I have been informed that the standard width is sixteen (16) feet.

As a result of this reduced width, it is impossible for any delivery or emergency vehicles to access my property in the event of a fire or emergency."

[24] Further Mr. Hutchens said as follows:

'In or around July 2004, I made a report to the Development Control Authority (DCA) about the situation. A Mr. Mac from DCA visited the site and confirmed that Mr. Michael had not completed the road properly. I formally wrote to Mr. Aldin Crump of the DCA on July 6, 2004.

Subsequent to July 6, 2004, Mr. Michael and I attended a meeting with Mr. Crump at DCA. As a result of that meeting, Mr. Michael agreed to lay concrete, erect a proper supporting wall and to complete the section of the access road adjoining my property.

Sometime afterwards, Mr. Michael erected a proper concrete road and a wall next to my property. With this, I felt that an acceptable position had been reached, even though the access to my property had been narrowed by approximately seven (7) feet. I considered that the road had finally been made safe and stable and that the matter had been resolved. I did not discuss the matter any further with Mr. Michael. I was quite surprised when I discovered that he brought an action against me arising out of this.

I deny that I have allowed my septic tank to overflow onto Mr. Michael's land. His land is uphill from my property so it is physically impossible for that to occur.

I have never removed any dirt or soil from Mr. Michael's land. To the best of my knowledge, the access road is an easement owned by the Government as a public access road. If Mr. Michael chooses to spend on a public road, he cannot seek to recover his costs for so doing from me. I do not hold myself responsible for the costs incurred by him in constructing the concreted portion of the road."

[25] Mr. Hutchens during cross examination by learned counsel Mr. George Lake said that he knew that there were lands on the hill before and it did not come as a shock to him to know that there was a government road there. On the occasion when the back hoe driver had dug the hole into the road he was not present even though he had hired the backhoe driver. However, he was "probably 50 feet" away when the backhoe man was digging and he probably went to see what the man had done after he had left. He "verified what he had done" before paying the backhoe man. Mr. Hutchens was forced to admit that the backhoe man had done what he was asked to do. He agreed that nothing further was done to the road on that day and that what Mr. Charles and Mr. Michael both observed in relation to the road namely that it was "dug out", it was what himself and backhoe man had done. Further, when Mr. Crump and Mr. Michael came and inspected the area, what they saw there was what himself and the backhoe man had done. When Mr. Michael got Mr. Roberts to repair the area, it also was what himself and the backhoe man had done. He admitted to having attended the meeting that was convened with Mr. Crump but denies having heard Mr. Crump say that who ever did it was responsible. He however agreed that the access road was damaged and that, in his report, Mr. Francis had said that Mr. Michael could have repaired the access road. Mr. Hutchens did not disagree that as a result of the damage that was done to the road a retaining wall was required in order to rectify the situation. In fact he expressly admitted that as a result of the damage caused to the access road by the backhoe man it was necessary for Mr. Michael to construct a retaining wall.

[26] Mr. Hutchens further agreed that the access road was a Government road and it was Mr. Michael who had "put in" the road. However, he (Mr. Hutchens) could not get to his

property very easily and it was for this reason that he contracted the backhoe so that he could have accessed his property easily. During further strenuous cross examination by Mr. Lake, Mr. Hutchens admitted that the access to his property had not been impeded. He maintained however, that there were times that Mr. Michael had parked his vehicle on his driveway without first obtaining his (Mr. Hutchens') permission and it was those circumstances, of which he (Mr. Hutchens) complains, that Mr. Michael had trespassed on his property. He said that the acts of trespass to which he referred occurred before the original construction of the road in 2003. In fact, he clearly recalls that in October 2003 Mr. Michael had trespassed on his property. Additionally, Mr. Michael has constructed the concrete road and has minimized the access to his property. The concrete works have encroached on his property even though he is aware that "the authorities" have said that the work was properly done. Mr. Hutchens said that in relation to the allegation by Mr. Michael about his alleged encroachment on 12 feet on Mr. Michael's property; it was not a 12 feet encroachment and in any event the same day that he learnt of it he had caused it to be rectified. He agreed that the fence had been there for about six (6) months before he learnt of the error.

[27] Mr. Hutchens next admitted to having had a conversation with Mr. Michael about being able to access his property but said that it was all part of their joint efforts to settle the matter amicably. Mr. Hutchens accepted that the remedial work which Mr. Michael had caused to be effected was well done but denied ever telling him that he had removed the top soil from his (Mr. Michael's) property. In fact, he had never removed the topsoil from Mr. Michael's property. He recalls however that a backhoe had knocked down some of the trees several years ago and that he had to pay in order to have the repairs effected even though he does not have the receipts as proof.

[28] Accordingly, he did not agree that Mr. Michael's claim against him had been made out and maintained that he was put to expense in repairing the access road after Mr. Michael had damaged it in clearing it initially and maintained that he did not destroy the access road that Mr. Michael had built. During further cross examination, Mr. Hutchens said that as a

result of his digging up the access road it affected everybody but it affected himself more than anyone since he lived there.

- [29] During re examination by Mr. Rhudd, Mr. Hutchens said that Mr. Michael's lands were above his and further that it was necessary for Mr. Michael to construct the retaining wall in any event, the construction of the retaining wall had nothing to do with the work of the backhoe man.

Mr. Rhudds' submissions

- [30] Learned counsel, Mr. Rhudd submitted that the factual situation is relatively straight forward. Mr. Michael and Mr. Hutchens are adjoining land owners in an area called Turtle Bay. There is a public access road which adjoins Mr. Hutchens' property and leads to Mr. Michael's lands which lies above Mr. Hutchens'. Mr. Michael has alleged that, after having had work done on the access road leading to his property in October 2003, Mr. Hutchens engaged the services of a backhoe operator, in December, 2003, to dig a ditch across the said access road thereby preventing him from accessing his lands. By virtue of this action on the part of Mr. Hutchens, Mr. Michael has maintained that an imminent sale of a portion of his lands was jeopardized. He was, accordingly, forced to expend monies to re-construct the access road and to put in a retaining wall.

- [31] However, for his part Mr. Hutchens has maintained that Mr. Michael, during his (Mr. Hutchens) absence from the country in October, 2003, engaged a backhoe operator to grade the road adjoining his (Mr. Hutchens') property. In doing this, the road was transformed into "a bull dozed track of mud and debris". The road had become so damaged and eroded that Mr. Hutchens could not easily access his property whose driveway had become narrowed by the dirt and rubble. In addition, his property was placed at risk from loose rocks and dirt falling from the recently dug road which was no longer supported on one side and had become quite unsafe. Mr. Hutchens was therefore forced to employ a backhoe operator, in December 2003, to fix the road so that the risks of damage to his property could be eliminated and so that he could gain unimpeded access to his property. It is this action on the part of Mr. Hutchens that has led to Mr. Michael's

claim. He has alleged that Mr. Hutchens has maintained that he had to undertake extensive reconstruction in May, 2004 in order to return the road to the state that it was in prior to Mr. Hutchens' "vandalizing" it. Further, Mr. Michael has alleged that Mr. Hutchens allowed overflow from his septic system to flow onto his land thereby creating "a health hazard to his (Mr. Michael's) property and causing deterioration".

[32] Accordingly, Mr. Rhudd submitted that the issues which arise for consideration by the Court are as follows:

- (a) whether Mr. Michael could properly maintain an action against Mr. Hutchens in view of the fact that this is a public access road owned by the Government;
- (b) whether Mr. Hutchens is liable to Mr. Michael for funds expended by the latter in "re constructing" the road;
- (c) whether Mr. Michael is liable to Mr. Hutchens for the costs expended by him (Mr. Hutchens) in fixing the road.

[33] Mr. Rhudd submitted that this is a matter which is to be determined primarily on the facts. It depends essentially on the credibility of the witness. He said that an analysis of Mr. Michael's case has established an important and fundamental issue; which is that the road, which is at the centre of the claim, is a public access road owned by the Government. Not only Mr. Michael but the witnesses who gave evidence for him all conceded that the road was a public access road. This was never disputed and has never been challenged. The question must then be asked: should Mr. Michael have fixed the public access road? having so fixed it, can he reasonably recover those costs from Mr. Hutchens? Mr. Michael in his evidence has confirmed that his intention in fixing the road, in October, 2003, was to ensure that he could complete the sale of a portion of this land to Mr. David Martin and Ms. Denise Martin. In fact, Mr. Michael's witness statement – along with his admission during cross examination – bears out that the fixing of the road was "a term of said contract of sale". Mr. Michael was required by clause 5 of the sale/purchase agreement to ensure that the road was "in structurally sound condition, resurface and proper drainage and finalized before completion date (sic)" Mr. Rhudd submitted that this was the overriding determining factor in the Mr. Michael's decision to not merely fix the

road but to fix it as extensively as he had done. Mr. Rhudd said that it is noteworthy that, in the series of correspondence exchanged with the several Government Departments and relied upon by Mr. Michael, he did not explore the prospect of the Government compensating him for the extensive road work that he had intended to undertake. In fact, the tone and tenor of the letters from those Government departments, approving of the work done by Mr. Michael, suggest that those departments recognized that Mr. Michael was fixing the roads to facilitate his own purposes. One is left to conclude that Mr. Michael must have realized that he would not have been able to recover any compensation from the Government for the cost of the work that he had carried out. He, accordingly, sought to recoup his costs from the Mr. Hutchens.

[34] Learned counsel Mr. Rhudd said that Mr. Michael, during his evidence, was insistent that there was no damage caused to Mr. Hutchens' property when the road was originally worked on in October, 2003, pursuant to his instructions. He stated that he was present for the entire 2-day period while work was being done and "only a little pebble fell and hit a water pipe". This evidence is to be compared with the evidence of Mr. Michael's own witnesses who admitted that the access road had a slope and it would have been expected that any road work done on it would have resulted in stones and dirt falling down that slope. In fact, it is Mr. Hutchens' contention that loose rocks fell down and caused damage to his property. Mr. Rhudd next submitted that the evidence of Mr. Hutchens is to be believed over that of Mr. Michael. The Court is therefore asked to find that there were loose stones and rocks falling onto Mr. Hutchens' property so that he was required to do what was necessary to safeguard his property.

[35] Further, Mr. Michael has also admitted, during examination in chief, that "the Government should have been the one to proceed with the matter (relating to the damage to the access road) but as they would take a long time he was told by Mr. Crump (of the Development Control Authority) that he must proceed with the matter". Mr. Michael has failed to provide any evidence of any authority issued by any Government department or by the said Mr. Crump for him to initiate action against Mr. Hutchens for or on the Government's behalf to recover compensation for damage to the public road or for the costs of fixing it. In the

absence of any such evidence, Mr. Michael cannot sustain his action against Mr. Hutchens.

[36] Next, Mr. Rhudd submitted that when Mr. Michael chose to expend monies to “reconstruct” the access road he did this to his detriment. Legally, he could only seek to recover compensation from the Government who could, in turn, then seek to recover from Mr. Hutchens on an indemnity basis. Mr. Michael had no legal basis whatsoever for fixing what has been admitted to be a Government road and then seeking to recover from Mr. Hutchens the costs for so doing. Mr. Michael’s primary purpose in fixing the road was to facilitate the sale of his property. He was contractually obligated to do so. He could not, legally – and in good conscience – seek to recover those costs from Mr. Hutchens and the Court should not facilitate him in this effort.

[37] Next, Mr. Rhudd said that Mr. Michael testified that the reason for Mr. Hutchens acting the way he did in “destroying” the road was in retaliation for something that he (Mr. Michael) had said that Mr. Hutchens did not like. This is the basis of Mr. Michael’s claim for aggravated damages. Mr. Rhudd asked the Court to find that this is a spurious and inconsequential motive to ascribe to Mr. Hutchens. This supposed motive was not supported by any other piece of evidence presented to the Court so that the claim for aggravated damages should be rejected. Additionally, while Mr. Michael has insisted that waste water from Mr. Hutchens’ septic system had flowed onto his land, he has also admitted that his land, or a substantial portion of it, was above Mr. Michael’s property. According to him, he saw “water flow marks” on his property. This evidence was not corroborated in any respect. Mr. Michael, despite his allegations of it being a health hazard, appeared to have made no complaints to the Government’s health department about the flow of the septic waste water. Against this background, Mr. Rhudd asked the Court to disregard this allegation as being unsubstantiated and without any merit. Mr. Rhudd also asked the Court to treat Mr. Michael’s allegation of a 12 foot encroachment on to his property by Mr. Hutchens in a similar manner. At first, Mr. Michael asserted that he had a survey done in order to establish the 12 foot encroachment. However, under further cross-examination, he admitted that he only had a surveyor with him and no survey had

been done. His allegations about the removal of some 8 truck loads of top soil are equally spurious and baseless and should be disregarded as being unsubstantiated.

[38] Further, Mr. Rhudd advocated that Mr. Michael is erroneously seeking compensation from Mr. Hutchens for work done to the Government's public access road in an effort to recoup costs that he voluntarily undertook to ensure that his proposed land sale went through. Mr. Michael has not established any reasonable legal basis for his work on the public access road over and above his desire to facilitate the sale of his property. He has not established any reasonable legal basis for claiming compensation from Mr. Hutchens and his expenditure is suspect. Mr. Michael admitted during cross examination that the invoices/bills were prepared by his wife who then produced them to the several named persons for signing, the Court should not accept the invoices, urged Mr. Rhudd.

[39] Mr. Rhudd reviewed the evidence adduced by Mr. Michael and said it was equally weak and unconvincing. Mr. Lloyd, a Government Surveyor, has testified that he visited the site in his private capacity while still in the employment of the Government. He stated that he marked out the road while carrying out a survey of a half acre of land for Mr. Michael who had engaged his services, he readily admitted that it was a Government road although he was paid privately for carrying out the survey for Mr. Michael. He admitted that the slope of the road was such that any work done on it would result in stones rolling down. He also testified that it was his experience that it was customary for members of the public to fix government roads at their own costs. Mr. Rhudd submitted that the Court should find that the evidence of Mr. Lloyd is not particularly helpful to Mr. Michael's case. It is tainted by the nature of the relationship that obviously existed between that witness and Mr. Michael. His evidence does not advance Mr. Michael's case in any respect.

[40] The witness Mr. Charles admitted to being Mr. Michael's brother. Again, the nature of that relationship was such that his evidence, insofar as it attempted to bolster Mr. Michael's case has to be viewed with a degree of suspicion. He has testified that Mr. Hutchens had told him that he was clearing falling material from a land slide at the time when he saw the backhoe working on the road. However, while he saw no evidence of this land slide, he

did not disbelieve Mr. Hutchens' statement. It is curious that the witness did not go on to query Mr. Hutchens' explanation of why he was doing work on the road if there was no land slide visible. Mr. Rhudd therefore submitted that the nature of the work being done at the time was not such as to cause any concern or arouse any suspicion and fits in with Mr. Hutchens' claim that he was merely fixing the road.

[41] The next witness was Mr. Roberts, he too was also unreliable and unhelpful to Mr. Michael. He too readily admitted that it was a public (Government) road. While he has testified that he was paid approximately \$13,800 for reconstructing the road, he could not properly explain or substantiate the bills and invoice that he had tendered when it was pointed out to him that there was some "double billing". He did admit, during cross-examination, that he was a friend of the Michael whom he had known for "a very long time". Importantly, he also admitted that the preparation of his bills and invoices were arrived at in conjunction with Mr. Michael's wife. It is highly unusual and irregular that Mr. Michael's wife should have had such an integral role in the preparation and finalizing of his bill for work done. On that basis alone, his evidence is suspect. His attendance in Court was merely intended to bolster the already weak case of Mr. Michael but his evidence failed in this regard. Mr. Rhudd asked the Court to pay particular attention to the fact that the several invoices – exhibited in Core Bundle 2 – for the work supposedly done for Mr. Michael on the road, were prepared by his wife and presented to the several signatories for signing. This is a highly irregular and questionable activity and calls into question the veracity of the evidence given by these witnesses in relation to payments made to them.

[42] In contrast, Mr. Rhudd urged the Court to find favour with the evidence of Mr. Hutchens counsel said that Mr. Hutchens gave his evidence in a forthright and honest manner. He admitted that he had instructed his backhoe operator to fix the road and that the road was fixed in accordance with those instructions. His purpose was to "access (his) road to get back to (his) property" as he couldn't get to his property "very easily". He denied interfering with the road in the manner alleged by Mr. Michael. He further denied any "malicious encroachment". He admitted that he had given instructions for a fence to be put up on his property during his absence but this had not been done properly. This was

rectified the next day after he found out about it. He has not sought to avoid this fact. He has been straightforward in his admission that there was an error which he corrected. He has effectively denied all the other allegations made against him by Mr. Michael. Mr. Hutchens asserted that he had to pay to fix the road after Mr. Michael had first worked on it and left it in an unsatisfactory state. While he has not produced a receipt evidencing payment, both Mr. Charles and Mr. Michael confirmed that they witnessed the backhoe working (for Mr. Hutchens) and it is only reasonable to conclude that it was paid work for which the backhoe operator was remunerated. Mr. Hutchens stated that he had spent \$340.00 this was not an exorbitant figure. Mr. Hutchens has not made any attempt to inflate the figure.

[43] Mr. Hutchens' further contention was that "loose rocks" fell onto his property as a result of the work carried out for Mr. Michael in October 2003. This is borne out by the evidence of witnesses for Mr. Michael (Mr. Roberts and Mr. Lloyd) who both confirmed that stones would have rolled down the slope while the work was being done for Mr. Michael. The Report from Roland Francis, Civil Engineer, and (dated September 30, 2005) also supports Mr. Michael's contention when it states that the road had a "steep incline" and the road base was of a "loose nature". The totality of this evidence is to seriously counter the evidence of Mr. Michael that there were no stones going onto Mr. Hutchens' property.

[44] Accordingly, Mr. Rhudd submitted that on a totality of the evidence, and based on a balance of probability, Mr. Hutchens has proven his case and thereby defeated the several claims of Mr. Michael. The entire case for Mr. Michael is riddled with inconsistencies and is accordingly unreliable and not to be believed. It is apparent that the witnesses for Mr. Michael have tailored their evidence to support the case of Mr. Michael. This was obviously done in an attempt to help Mr. Michael with whom they all enjoyed a special type of relationship. The witnesses' evidence is not independent and credible and, accordingly, should not be believed. The case for Mr. Hutchens is to be preferred to that of Mr. Michael. On a balance of probability, the case of Mr. Michael has not been proven. Mr. Michael on the other hand, has not been able to get over the hurdle of his claim in respect of a road that he did not own the land but rather it was owned by the Government.

Counsel therefore urged the Court to dismiss Mr. Michael's case as he has not established that he had any "locus standi" to claim compensation from Mr. Hutchens for monies voluntarily expended by him for work on the Government's road. Additionally, the amounts claimed by Mr. Michael are suspect as the bills and invoices do not appear to have been independently prepared and verified. Further, the Court is urged to allow Mr. Hutchens counterclaim and make an order for damages, interest and costs as claimed in the defence and counterclaim.

Mr. Lake's submission

[45] Learned counsel Mr. Lake submitted that the Court should find the following facts: Mr. Michael was the owner of lands in the relevant area, namely parcel 229 and 193 at the material time. He later sold parcel 229 to Mr. Martin. On or about the 29th of September 2003 Mr. Michael hired Mr. Edison Baltimore to clear the said access road and bring in fill for the road base. The road was completed and the area was left without any obstructions. On the 28th December 2003, Mr. Hutchens unlawfully caused a backhoe man to dig up the access road that Mr. Michael had cleared and filled. Mr. Michael made several complaints to various Government departments including the DCA. As a result of those complains persons from DCA and other Government departments visited the site. Mr. Michael and Mr. Hutchens met with the then director of DCA, Mr. Crump who informed Mr. Hutchens that who ever had destroyed the road had destroyed a public access road. Mr. Michael did in fact hire the relevant persons and had the said access road properly fixed to the satisfaction of all relevant persons. Prior to clearing the said public road in October 2004 Mr. Michael engaged Mr. Oliver Joseph, senior surveyor in the Ministry of Public Works to ensure that the said public access road was in the proper location. As a result of Mr. Hutchens unlawful action Mr. Michael suffered damage and loss over and above that suffered by the general public.

[46] In asking the Court to find the above facts, Mr. Lake reviewed the evidence and urged the Court to accept Mr. Michael's evidence in preference to Mr. Hutchens. Mr. Michael gave evidence that Mr. Hutchens hired a backhoe and instructed the driver to excavate a large ditch in the said road. This is confirmed by Mr. Hutchens in his evidence. Mr. Hutchens in

cross examination admitted that he verified what the backhoe had done before the backhoe left the area and that the backhoe had done what he had instructed. This contradicts his earlier contention that the backhoe did more damage than he intended. Mr. Hutchens in his evidence claimed that he done the damage in order to gain access to his driveway which he contends was blocked. Yet the photographs on page 26 of the trial bundle taken after the initial road works were completed show Mr. Hutchens' vehicle in his driveway and there are no obstructions. Mr. Michael gave evidence that Mr. Hutchens at the meeting with Mr. Crump told Mr. Crump that he damaged the road because he did not like something Mr. Michael had told him. Mr. Michael gave evidence that Mr. Crump had told him to go ahead and repair the road because it would take too long for Public Works to get around fixing it. Mr. Lake stated that this fact is "corroborated" by the various correspondences passing between the various Government departments regarding this issue. There is little doubt that the remedial works was necessary and authorized by the various departments responsible for said works. There is little doubt Mr. Hutchens caused the damage to the public road and that it was unlawful, unauthorized and caused a hazard to persons using the access road. The extent of the damage can be seen from his documentation and the photographs.

[47] Learned counsel Mr. Lake further argued that Mr. Michael sought and obtained permission from the relevant authorities to fix the access road. Mr. Michael obtained the proper expertise and properly remedied the damage done by Mr. Hutchens to the road. At the material time, Mr. Michael had entered into an agreement to sell a portion of his lands serviced by the access road to a third party. It was a condition of said agreement that at all times Mr. Michael was obligated to ensure that said road was in a fit and proper state. Mr. Michael did in fact hire the relevant persons and had the access road properly fixed to the satisfaction of all relevant authorities. The cost of the remedial works has not been disputed except for one payment to David Roberts. Mr. Michael paid the total sum of \$13,520 to remedy the damage to the said access road occasioned by Mr. Hutchens. This total of \$13,520.00 does not include the disputed amount paid to Mr. Roberts.

[48] Next, Mr. Lake stated that Mr. Michael gave evidence that Mr. Hutchens had placed his sewage overflow pipes in such a manner that they discharged the sewage water onto his (Mr. Michael's) property. Mr. Hutchens denies this claim. However, Mr. Hutchens also tried to give the Court the impression that although he lives on a hill nothing can flow from his premises onto anyone else's land downhill of his. Mr. Michael insists that his lands are downhill of the Mr. Hutchens'. On this issue, again Mr. Lake asked the Court to accept the evidence adduced on behalf of Mr. Michael in preference to that adduced on behalf of Mr. Hutchens wherever a conflict arise. Further, Mr. Michael gave evidence that Mr. Hutchens erected a fence on Mr. Michael's property this is confirmed by the surveyor Mr. Lloyd in his evidence. Mr. Hutchens admits the trespass but denies the extent however he has produced no evidence to support his denial as to the extent. Mr. Michael gave evidence that Mr. Hutchens had previously conceded, when confronted by Mr. Michael, that he had removed soil from his land to fill in areas of his property. Mr. Michael gave evidence that he estimated the amount to be around 8 loads. However, Mr. Michael denied ever trespassing on Mr. Hutchens' land. Mr. Hutchens admits he gave Mr. Michael permission at times to enter onto his property and that he never saw Mr. Michael enter onto Mr. Hutchens' property without permission, as claimed by Mr. Hutchens in his counterclaim. Nor could Mr. Hutchens speak to any damage done to his property by Mr. Michael. Mr. Hutchens claims a pipe on his property was broken but he gave no evidence that he saw Mr. Michael or any agent or servant of Mr. Michael damage the said pipe and brought no collaborative evidence that the said pipe was indeed broken at all. Mr. Lloyd the Government surveyor gave evidence that he marked out the original road and later inspected the remedial works done to repair the damage done by Mr. Michael.

[49] Mr. Lake next adverted the Court's attention to Mr. Charles' evidence that he met Mr. Hutchens in the area at the material time in the company of a backhoe. He claims Mr. Hutchens told him he was clearing a land slide. Mr. Michael stated he saw no evidence of a land slide, and when he returned a short time later that day the road had a large ditch dug across it preventing anyone from using the said road. Mr. Hutchens admits that the damage seen by Mr. Michael on that day was done at his instructions. Mr. Roberts gave evidence that he, at Mr. Michael request, prepared the plans for the remedial works done

to the access road and after they were accepted by the relevant authorities, carried out the works for which he was paid by Mr. Michael.

[50] Mr. Lake stated that the Court should not rely on Mr. Hutchens' testimony. Mr. Hutchens in his evidence was evasive and contradictory. Only after intense cross examination did he admit that the works the backhoe performed were under his supervision and direction. He initially tried to give the impression that he left the backhoe man to his own direction and he did more than he intended. He later admitted he inspected the works and signed off on them before the backhoe left the area. He had an opportunity to allow the backhoe to try to repair any works he had not intended. Mr. Hutchens admitted that the road was in the proper location and that it was not located on his (Mr. Hutchens') lands. Mr. Hutchens actions were deliberate and intentional. Mr. Hutchins admitted in cross examination that prior to him hiring the backhoe to dig up the road he did have access to his yard. This contradicts his claim in his witness statement that he had to drive his truck over a bulldozed pile of earth to get in to his property.

[51] Next, Mr. Lake made the following submissions on the issue of nuisance as follows: A private nuisance falls into three categories. Firstly where a person causes physical damage to a claimant's property. Secondly where there is substantial interference with the claimant's user and enjoyment of his land. For example, where the plaintiff is subjected to unreasonable smells emanating from the defendants neighbouring lands. And thirdly where the defendant had caused interference with easements and rights of access, for example where the defendant wrongfully obstructs the claimant's right of way or right of access to his property. Two main requirements have developed, firstly the injury or interference complained of will not be actionable unless the injury or interference complained of is sensible and substantial. The defendant will not be held liable unless his conduct was unreasonable in the circumstances. Sensible material damage means damage which is not trifling or minimal. Where an action is founded on interference with enjoyment of land, the interference must be shown to be substantial. That the defendant carried on his activity with the sole or main purpose of causing harm or annoyance to the claimant is a factor to be taken into account in deciding whether his conduct was

reasonable. Counsel referred the Court to **Fritz v Hobson (1880) 14 CH d 542** where the private right of the owner of access to a highway is unlawfully interfered with, he may recover damages from the wrongdoer to the extent of his loss of profits. See: also **Hall v Jamaica Omnibus Services Ltd (1966) 9 JLR 355** where it was held applying the ratio in **Cobb v Saxby (1914) 3 KB 822 p 825** per Rowlett J "the owner of land adjoining a highway has the right of passing from his premises on to the highway, and if that right is obstructed he is a person who has a cause of action by reason of the interference with or obstruction to his private right."

Public nuisance

[52] Further, Next Mr. Lake submitted that a person who can show that he has suffered particular damage over and above that suffered by the general public can sue for public nuisance. The proper defendant in an action of public nuisance is the person who bears some degree of personal responsibility i.e. the creator of nuisance. In cases where the defendant and/or his servant are the creator of the nuisance liability is strict. Counsel referred the Court to **Cambridge Water Co. v Easter Counties Leather plc (1994) 1 ALL ER 53**. Generally speaking in cases of nuisance both private and public damage must normally be proved by the claimant. However, there are three classes of cases where damage need not be proved they are:

- (a) where the on the facts, damage can be readily presumed;
- (b) where the Defendant interferes with an easement or right of access of the claimant see: **Nichols v Ely Beet Sugar Co (1936) Ch 343**;
- (c) where harm to the Claimant is reasonably feared to be imminent though none has actually occurred.

Trespass

[53] Finally, Mr. Lake submitted that the facts of the case at bar give rise to trespass. He told the Court that trespass to land is the unjustifiable intrusion by a person and or his agents or servants upon the land which is in possession of another. The slightest crossing of the boundary is sufficient. It is a trespass to remove part of the soil of land in the possession of another. It is also a trespass to place anything on or in land which is in the possession of

another. To support an action in trespass, it is not necessary that there should have been any actual damage, the trifling nature of the damage is no defence. A claimant is entitled to recover damages, even though he has sustained no actual loss. Where the trespass may involve actual physical damage to land as where a roadway is cut up, the measure of damage in such a case is the amount by which the value of the land has been diminished. In case at bar where the road was damaged, the diminution in value may be the cost of restoration and this would be reflected in the measure of damages.

Mitigation

- [54] Mr. Lake posited that a person must seek to limit his or her loss. Mr. Michael had a duty to mitigate his loss. He could not resile from his obligation to Mr. Martin in regards to his agreement to keep the road in good repair. He had a duty to ensure that his potential damage to Mr. Martin was limited by seeking to repair the road as soon as possible and then seek the necessary compensation from Mr. Hutchens.
- [55] Mr. Lake argued that there is cogent evidence before the Court that Mr. Hutchens created the nuisance complained of. By his own admission he created through his agent or servant the damage that was done to the road. His agent or servant willfully and or negligently damaged the access road leading to Mr. Michael's property, thereby interfering with the contractual relationship existing between Mr. Michael and Mr. Martin. Mr. Hutchens thereby caused what amounts to an interference with Mr. Michael's use and enjoyment of his property and as such created a nuisance for which Mr. Michael is entitled to damages. Additionally, his negligent conduct in damaging the road caused Mr. Michael loss as he was obligated by the sales agreement to keep the said road "in good repair". Mr. Michael had already spent considerable time and monies putting the road in good repair. Mr. Hutchens by his actions additionally caused what amounts to a public nuisance through his interference with the access road. Mr. Michael, as the person to whose land it was necessary to have an access road suffered loss greater than that suffered by other members of the public; as such he is entitled to damages in public nuisance also.

[56] Further, Mr. Lake posited that Mr. Hutchens had admitted to having placed his fence on Mr. Michael's land this trespass also entitles Mr. Michael to damages.

[57] Mr. Hutchens through his negligence also created a further nuisance affecting Mr. Michael's use and enjoyment of his property by allowing his septic system to discharge onto Mr. Michael's property. This material damage to Mr. Michael's land also entitles him to damages. The same can be said for Mr. Hutchens deliberate trespass onto Mr. Michael's property and removing the soil for his own use and benefit.

[58] In contrast, there is no evidence before the Court as to the damages alleged to have been suffered by Mr. Hutchens in his counterclaim. Additionally, by his own admission Mr. Hutchens admitted that he never saw Mr. Michael or any of his servants and/or agents enter his property. And he gave no evidence that Mr. Michael created any nuisance that interfered with his (Mr. Hutchens') use and enjoyment of his property. As such, Mr. Hutchens's counterclaim should fail. Finally, Mr. Lake submitted that Mr. Michael is entitled to his damages as claimed. He has established that Mr. Hutchens is liable for the negligent acts of his servant/employee the backhoe driver who by his negligent conduct caused damage to the road built by Mr. Michael for access to his lands and to the lands subject to his agreement for sale with Mr. Martin resulting in loss to Mr. Michael. These actions caused damage to the access road and created a public nuisance. Mr. Michael is therefore entitled to the reliefs sought together with costs. Further, Mr. Lake stated that Mr. Hutchens has not established his counterclaim for trespass or nuisance it should therefore be dismissed with costs awarded to Mr. Michael.

Court's analyses and findings

[59] The resolution of this matter to a large extent turns on which if any, of the two sides the Court believes. The standard of proof in the case at bar, as in all civil matters is on the balance of probabilities. I have reviewed the evidence in its entirety and have given very careful consideration to the submissions of both learned counsel. Generally, I am of the respectful opinion that Mr. Michael was a more forthright, reliable and credible witness than Mr. Hutchens, on many occasions Mr. Hutchens resiled from his earlier testimony, in

cases where there is a conflict between Mr. Hutchens evidence and that of Mr. Michael, I accept Mr. Michael's evidence. In relation to the other witnesses, who were called on behalf of Mr. Michael I am satisfied that they did not conveniently testify in the way they did. I do not for one moment believe that either Mr. Arnold or Mr. Charles simply provided the evidence they did with the view to assisting Mr. Michael. In my view despite their obvious connection to Mr. Michael they were objective and candid in their testimony and had no interest to serve. I am equally satisfied that they merely spoke the truth about what had transpired.

[60] Accordingly, I am of the view that Mr. Michael owns lands that are adjacent to the access road that is owned by the Government of Antigua and Barbuda; the road was undeveloped but could have been used by him if cleared to access his lands. Mr. Hutchens also owns lands that are adjacent to Mr. Michael's land. Mr. Michael sought and obtained permission from the relevant Government authorities in order to clear and fill the access road thereby making it an access road to his lands. In October 2003, he expended monies in having the road cleared and filled and thereby made it passable by vehicles since prior to so doing it was impossible for vehicles to pass on the road. The road slopes and while Mr. Michael was clearing the road bricks fell onto Mr. Hutchens' pipe damaging it. I am satisfied that the damage occasioned by the brick was not as significant as Mr. Hutchens would have the Court believe. I accept that previously Mr. Michael would traverse on Mr. Hutchens property with the latter's consent since at that time they had a very amicable relationship.

[61] I am equally satisfied that subsequent to the construction of the access road hostility developed between Mr. Michael and Mr. Hutchens; the reason for this is however is unclear. Whatever the reasons for the hostility it was enough to cause Mr. Hutchens to hire a backhoe man to dig a huge trench in the access road thereby making it impassable by vehicles. I do not believe Mr. Hutchens, when he said that he was merely clearing the debris that had accumulated on the road; neither do I believe that Mr. Michael blocked Mr. Hutchens's drive way, in fact Mr. Hutchens recanted from his earlier position on this issue. Neither do I believe that Mr. Michael or his servants trespassed on Mr. Hutchens property as he (Mr. Hutchens) contends. I am of the respectful view that much of Mr. Hutchens'

counterclaim is brought by way of retaliation to Mr. Michael's claim without there being any real basis to do so. For example, his evidence in relation to the trespass was vague and inadmissible being hearsay. It is passing strange that Mr. Michael cleared the access road in October 2003, and Mr. Hutchens dug the trench across the access road in December 2003, under the pretext that he was clearing dirt and debris. Mr. Hutchens prevaricated several times during his testimony. I do not find him to be a reliable witness. I am equally satisfied that at the root of the dispute is Mr. Hutchens having dug the trench in the access road, this has triggered Mr. Michael to appending onto his claim against Mr. Hutchens breaches in relation to encroachment on Mr. Michael's land by 12 feet, which I accept as true.

[62] From the demeanour and the testimony of the witness it is obvious to me that there are underlying hostilities as stated earlier, directed from Mr. Hutchens towards Mr. Michael. Be that as it may, Mr. Michael had entered into a contract to sell a parcel of the lands and one of the conditions of the contract required him to ensure that the access road was structurally sound before the completion date of the contract. I have no doubt that Mr. Hutchens by causing the backhoe man to dig the "ditch" or "trench" as it is referred to interchangeably into the road undermined the structure of the land and thereby necessitated Mr. Michael constructing the retaining wall. Mr. Michael was anxious to have Mr. Hutchens effect remedial works to the access road that he had caused to be damaged, but this was not to be. Mr. Michael was also concerned that had he not put in the retaining wall "the water would take away his lands". I am also satisfied that Mr. Michael was concerned that the value of his land would have been affected. In this regard, he made several complaints about Mr. Hutchens to the Public Works Department and the DCA and a meeting was convened between the parties and Mr. Crump of the DCA and Mr. Hutchens admitted to having caused the road to be dug up. I have no doubt that Mr. Michael obtained permission from the relevant Government authorities to remedy the damage to the access road caused by Mr. Hutchens.

[63] I do not for one moment believe that the sole reason why Mr. Michael repaired the damaged access road was because of the condition of the contract for the sale of land.

While I accept that was one of the reasons there were other equally important reasons such as his wanting to ensure that the access road that he had originally expended monies to make passable by any vehicular traffic remained so. I note in passing that Mr. Michael had originally repaired the road at his own expense, several months before Mr. Hutchens had caused it to be dug up and several months before he had entered into the contract for the sale of a parcel of the land. I accept that Mr. Michael expended monies in having the situation that was created by Mr. Hutchens as stated above, corrected. It is clear to me that Mr. Michael was concerned that if the trench in the access road had not been remedied it would have affected his lands considerably.

[64] I have no doubt that prior to the dispute arising between the two gentlemen they accessed each other property without any objection from the other and with each other's implied permission. However, now there is "bad blood" between the two of them since the digging up of the access road they are each seeking to get even with the other. This is borne out by Mr. Michael's claim in relation to the soil being removed by Mr. Hutchens; and by the latter's counterclaim in relation to Mr. Michael having previously trespassed on his property by parking motor vehicles on his land. I have reviewed the evidence on these two matters and I am far from satisfied that either Mr. Michael or Mr. Hutchens have proved on a balance of probabilities that their allegations are made out. Equally, I am far from satisfied that Mr. Hutchens' septic tank has overflowed and caused damage to Mr. Michael's property. On this particular issue Mr. Michael's evidence was vague and unconvincing. This aspect of Mr. Michael's case seemed to have been included for "good measure" This is in contrast to Mr. Michael's claim against Mr. Hutchens for trespass to his property by the encroachment on his land by Mr. Hutchens' fence which Mr. Hutchens had admitted.

[65] In these circumstances, Mr. Michael seeks compensation for nuisance and trespass. Mr. Hutchens for his part counterclaims for damages for nuisance and trespass.

Nuisance

[66] Mr. Lake submitted that Mr. Michael has suffered damage and loss over and above everyone else due to the public nuisance created or caused by Mr. Hutchens. Halsbury's Law of England Fourth Edition Para 16 states that:

"Every person is required by law to exercise his right, whether over his own or public property and with due regard to existing rights of others, and an unreasonable excessive or extravagant exercise of this rights to the damage of other constitutes a nuisance. Thus a person is guilty of a nuisance who in the exercise of his right of access to his premises, on a public highway acts so unreasonably as to have no regard to the similar rights of access possessed by his neighbour" See: **AG v Brighton and Hove Co-operative Supply Association [1900] 1 CH 276**; **Hall v Jamaica Omnibus Services Ltd** *ibid*; **Fritz v Hobson**.

In Halsbury's Laws of England Fourth Edition at paragraph 5 further states that:

"Every person is required by law to exercise his right, whether over his own or public property and with due regard to existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance who in the exercise of hi right of access to his premises, on a public highway acts so unreasonably as to have no regard to the similar rights of access possessed by his neighbours. See: **AG v Brighton and Hove Co-operative Supply Association [1900] 1 CH 276**"

In Halsbury's Laws of England Fourth Edition at paragraph 5 further states that:

"A public nuisance is one which inflicts damage, injury or inconvenience on all of the members of a class who come within the sphere or neighbourhood of its operation. It may however, affect some to a greater extent than others. There is no requirement that an activity must in itself be unlawful to constitute a public nuisance, and disturbance caused by lawful use of the highway constitute such a nuisance in an appropriate case See: **Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] 3 QB 343**.

[67] It is the law that substantial interference with someone's access to the highway, which is an easement of necessity, gives rise to an actionable nuisance. See: **Marshall v Blackwood Corporation [1934] ALL ER 437 at 439**. Further, it is well settled that to interfere with a person's right of access to the public road is an interference with a private right. Buckley J in **Chaplin v Westminster Corporation [1901] 2 CH 329** at 334 said as follows:

"A person who owns premises abutting on a highway enjoys as a private right the right of slipping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highways that obstruction would be an interference with a private right."

It is also the law that a person is liable for a nuisance who either creates or authorizes its creation or continuance. Halsbury's Laws of England Fourth Edition Para 6, states as follows:

"A private individual or a public authority may bring an action in his or its own name in respect of a public nuisance when he can show that he or it has suffered some particular substantial damage over and above that sustained by the public at large, or when the interference with the public right involves a violation of some private right of his or its own" See: **Halsey v Esso Petroleum Co Ltd [1961] 2 ALL ER 145** in which the plaintiff recovered in public nuisance for damage to his vehicle and for damage to his vehicle and for interference with his sleep."

[68] Applying the above principles together with **Fritz v Hobson** to the case at bar, it is clear to me that when Mr. Hutchens caused the backhoe man to dig the ditch or trench into the road Mr. Hutchens was guilty of a public nuisance. See: **Hall v Jamaica Omnibus Services Ltd** *ibid*.

[69] I would deal now with the sub issue of whether or not Mr. Michael can properly bring an action against Mr. Hutchens on the basis of the public nuisance. In order for the plaintiff to be able to recover damages under public nuisance he must show that he has suffered particular damage. **Gilbert Kodilyne in Commonwealth Caribbean Law of Tort 3rd Edition** at p 157 states:

"As to the meaning of particular damage, one view is that the plaintiff must show that he has suffered damage which is different in kind, and not merely in degree, from that suffered by the general public." See: **Hickey v Electric Reduction Co of Canada Ltd [1970] 21 DLR (3d) 368**. Another view is that it is sufficient for the plaintiff to show that he has suffered damage which is appreciably greater in degree than any suffered by the general public." this latter view was judicially recognized by Lord Denning in **Southport**

Corp v Esso Petroleum Co Ltd [1954] 2 ALL E 561. Particular damage was established in **Campbell v Paddington Corp [1911] 1 KB 869** where the plaintiff intended to let rooms in her house to persons wishing to watch a procession, and the defendants unlawfully created a structure in the public street which obstructed the view from the rooms, thus reducing their letting value. Applying the very instructive principles which were enunciated in the **Campbell's** case to the case at bar, I have no doubt that Mr. Michael has suffered damage over and above other users of the access road. In this regard, I place particular emphasis on the fact that it became necessary after the access road had been dug for him to construct a retaining wall to ensure that his land remained structurally sound. In addition, I accept that Mr. Michael has suffered special damage that was peculiar to him particularly in relation to the sale of the parcel of the land and the erosion of his lands. See: **Campbell v Paddington ibid**.

Abatement

[70] In passing, I would address the fact that Mr. Hutchens takes issue with Mr. Michael having expending moneys in repairing the road and seeking compensation from him. This brings me to the issue of abatement. The right to abate a nuisance exists in any person including a lessee, whose rights or whose property is injured by the nuisance. In **Benton v Winters [1993] 2 ALL ER 847** it was held that it is appropriate to abate the nuisance in cases that require urgent immediate remedy. Its exercise destroys any cause of action in respect of the nuisance except for damages in respect of the harm sustained before the abatement. It is clear to me that the nuisance having been created by Mr. Hutchens there was no legal impediment to Mr. Michael abating it as he did by repairing the access road, and therefore seeking to be compensated for the loss he suffered thereby. In my view, it was well within Mr. Michael's right and interest to so do. It is also well recognized that in abating a public nuisance, a private individual may only interfere with it in so far as it causes special injury to him and so far as may be necessary to enable him to exercise his public rights. Mr. Michael in repairing the access road did this and no more.

[71] Mr. Michael claims damages for the cost he expended to repair the access road together with damages to be assessed for the nuisance. In my view having established his claim

for nuisance Mr. Michael is entitled to be compensated for the damage and loss he has suffered as a consequence. I am not of the view that the money that he expended in repairing the access road are separate and distinct heads from the losses suffered as a result of Mr. Hutchens having caused the nuisance. There should be finality and completion of litigation and since Mr. Michael's application is for the damages to which he is entitled to be assessed I would so order. It seems to me that the cost of restoring the access road may well be an item or loss suffered due to the nuisance and I think that it can well be included as an item in the damages to be assessed. I decline therefore to order that Mr. Hutchens reimburses Mr. Michael the monies he expended in repairing the access road but state that this can be an aspect of his claim in the assessment of the damages to which he is entitled for Mr. Hutchens's act of nuisance.

Injunction

[72] On the issue of the injunction as claimed by Mr. Michael, I find Halsbury's Law of England Fourth Edition *ibid* Para 97-100 very instructive; namely: "The Court may refuse to grant an injunction to restrain obstruction of the right of access to premises, when the nuisance existed at the time when the action was brought but has since ceased. A declaration that the defendant is not entitled to commit the act complained of is sometimes made instead of granting an injunction."

[73] With respect therefore, in the case at bar, I am not satisfied that the Court should exercise its discretion in order to grant the injunctive relief sought. The nuisance no longer exists and I have no evidence before me on which I can properly conclude that unless restrained Mr. Hutchens would commit further acts of nuisance. Accordingly, I decline to exercise my discretion and refuse to grant Mr. Michael the injunction sought.

Trespass

[74] I come now to address Mr. Michael's claim for trespass to land. It is the law that any unjustifiable intrusion by one person upon land in the possession of another amounts to a trespass to land. The slightest crossing of the boundary is sufficient. It is a trespass to remove any part of the land in the possession of another. In view of my earlier findings and

based on his own admissions that his agents caused a fence to be placed on Mr. Michael's land applying the principles stated above it is clear that in so doing Mr. Hutchens trespassed on Mr. Michael's land. It is also a trespass to place anything on or in the land in the possession of another. The fact that the encroachment occurred due to a mistake does not absolve Mr. Hutchens for liability for the unlawful act. **Clerks and Lindsell on Torts 18th Edition paragraph 18 – 06** states as follows "It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. In **Basely v Clarkson (1682) 3 Lev 37** where the boundary between the plaintiff's and the defendant's land being ill defined, the defendant in mowing his own grass by mistake mows some of the plaintiff's, this was held to be a trespass. As I indicated earlier, Mr. Hutchens has admitted that his fence encroached on Mr. Michael's property for approximately 6 months before he became aware of it but that once he so became aware he rectified the situation. This is a trespass (I state for emphasis). It is also a trespass to place anything on or in land in the possession of another, as by driving a nail into his wall See: **Simpson v Weber (1925) 4 1 T.L R 302**

[75] Having reviewed the above authorities I am fortified that Mr. Michael is entitled to be compensated by Mr. Hutchens for the trespass to his land. He seeks damages to be assessed and I will so order.

Counterclaim

[76] Mr. Hutchens seeks damages on the basis of Mr. Michael's act of nuisance. I have no doubt that when Mr. Michael was initially clearing the road in 2003 bricks fell and broke Mr. Hutchens' pipe. I am not of the view however that this trivial/minimal damage without more gives rise to an action of nuisance against Mr. Michael. I do not accept as stated earlier that based on the circumstances the act complained of could properly give rise to a counterclaim for nuisance. See: Halsbury's Laws *ibid* paras 5, 6 and 16.

[77] Further, I do not believe Mr. Hutchens when he said that Mr. Michael has trespassed on his property. I am satisfied that his entire counterclaim is devoid of merit. Accordingly, Mr. Hutchens has failed to establish his counterclaim against Mr. Michael.

[78] Accordingly, I hold that Mr. Rolston Michael has established his claim for damages to be assessed against Mr. Jo Hutchens for nuisance and trespass. Mr. Jo Hutchens has failed to prove his counterclaim against Mr. Rolston Michael for trespass and nuisance.

Conclusion

[79] Judgment is given for Mr. Rolston Michael against Mr. Jo Hutchens for nuisance and trespass, with damages to be assessed unless otherwise agreed.

[80] Mr. Jo Hutchens' counterclaim against Mr. Ralston Michael for nuisance and trespass is dismissed.

[81] Costs to be determined at the assessment hearing unless otherwise agreed.

[82] I thank both learned counsel for their assistance.

Louise Esther Blenman
High Court Judge

