ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NOS. 24 AND 25 of 1990

BETWEEN:

1. WILLIAM I. MARTIN
2. JOHN I. MARTIN JR.
3. WINSTON NEDWELL

Appellants

and

1. CUTHWYN LAKE
2. BERNICE LAKE

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice S. Singh J.A.
The Honourable Mr. Justice A.N.J.Matthew J.A. (Ag.)

Appearances: Mr. C. Maundy for Appellants Nos. 1 and 3
Mr. John I. Martin, Appellant No. 2 in Person.
Mr. F. Clarke for the Respondents

1992: June 21;
November 23.

JUDGMENT

MATTHEW J.A. (Ag.)

Cuthwyn Lake in 1970 bought approximately 14.959 acres of land from John I. Martin Sr, the father of the first and second Appellants. In 1978 he transferred to his sister Bernice Lake approximately 2 1/2 acres from his purchase. John I.Martin Sr.'s land was of an extent of 498 acres approximately.

On April 3, 1985, the Respondents commenced proceedings against the Appellants for wrongful entry upon the Respondents' land on or about April 2, 1985. In their statement of claim dated April 25, 1985, they sought damages and other consequential orders. The trial lasted four days before **Redhead J,** who on September 17, 1990 gave judgment for the Respondents. The learned Judge awarded Cuthwyn Lake damages in the sum of $35,000 and he awarded Bernice Lake damages in the sum of $25,000. He made certain other orders,

namely, a declaration and he granted injunctive relief but these are not the subject of appeal.

By Civil Appeal No. 24 of 1990, John I. Martin Jr. appealed against the decision of the learned Judge. By Civil Appeal No. 25 of 1990 William I. Martin and Winston Nedwell have also appealed against the said decision. Both appeals were heard together. Three issues arise on the appeal, namely:

1) The ownership of the land over which the alleged trespass was committed:
2) whether in fact there was a trespass; and
3) the quantum of the damages.

Ownership of Land

At the beginning of his submissions learned Counsel for No.1 and No. 3 Appellants conceded that the Respondents are the owners of the land in question.

John I. Martin Jr. did not concede ownership. Indeed he began his submissions by objecting to Mr.Maundy's statement that he conceded ownership of the land to the Respondents. Martin referred to a copy of a certificate of title in the name of JOHN I. MARTIN ENTERPRISES LIMITED dated September 6, 1960 of an estate called Cedar Hill and consisting of 498 acres. He also referred to a copy of a certificate of title in the name of CUTHWYN LENNARD LAKE of a parcel of land situated at Cedar Hill comprising an area of 14.959 acres.

As was pointed out to John I. Martin Jr., the very certificate of title in the name of John I Martin Enterprises Ltd. which he was asking the Court to look at recognised the title of Lake because at the back of it was recorded a note of a memorandum of partial transfer to Cuthwyn Lennard Lake dated November 5, 1970. I also referred to the Privy Council case **Attorney General of Dominica vs Shillingford (1970) 14 WIR 526** which decided that certificates of

title granted under similar legislation were indefeasible. As the Appellant was reminded by the learned Chief Justice, for him to succeed he would have to show he had a better title than the Respondents and this he was unable to do.

I have no doubt whatsoever that the No.1 and No.2 Respondents are the owners of the land in issue, land which they hold as registered proprietors in parcel 24 Bloc 14 2288A and parcel 25 Bloc 14 2288A respectively.

Trespass to Land

In their defence dated May 13, 1985 the Appellants state at paragraph 4, the following:

> "4. The Defendants deny paragraph 4 of the Statement of Claim. At no time on or about the 2nd day of April, 1985 did the First Defendant go onto the lands alleged to be owned by the Plaintiffs ..... At these times the First Defendant was engaged elsewhere and had no knowledge of the alleged trespass or at all. The alleged trespass by the Second and Third Defendants was made in their capacity as servants and/or agents of JOHN I. MARTIN ENTERPRISES LIMITED, a company duly incorporated under the laws of Antigua and Barbuda and having its Registered Office at Briggins Road, St. John's Antigua, the party lawfully entitled to ownership and possession of the said lands presently registered in the names of the Plaintiffs. No linestones nor any top soil were removed by the Defendants during the alleged trespass. On or about the 30th day of March and the 1st day of April, 1985, JOHN I. MARTIN ENTERPRISES LIMITED through their servants and agents, the Second and Third Defendants used a bulldozer to clear the lands alleged to be owned by the Plaintiffs and which were badly overgrown and unsightly and the Defendants acted in the belief that the said lands were the property of JOHN I. MARTIN

ENTERPRISES LIMITED and that the Plaintiffs were not entitled to ownership of same and were unlawfully in possession thereof. Only a small quantity of the uprooted trees and other materials were deposited in the roadway leading to the dwelling house of the Second Plaintiff and which obstruction was totally removed two days later. The clearing of the lands, pushing down of the trees and obstruction of the roadway were done on the instructions of JOHN I. MARTIN ENTERPRISES LIMITED the true owners of the lands and the employer of the Second and Third Defendants."

It appears from that pleading that No.2 and No.3 Appellants have admitted the trespass. But further than that learned Counsel for appellant No.3 in his submissions before this Court has maintained that Nedwell was in fact the driver of the bulldozer. Counsel in this context stated:

"His Lordship took the view that Nedwell cleared all the land. Evidence is that Nedwell did not do all the clearing. Nedwell's contention is that he trespassed on one day only and there was a second party clearing."

So all learned Counsel is advocating is that Nedwell's trespass was not as lengthy as alleged. Of course Bernice Lake testified that Nedwell was on the land on the next day after she had first seen him. Whether Nedwell was on the land on one or two days does not matter as far as liability is concerned.

I considered Nedwell's position in the light of the evidence which revealed that he was acting on the instructions of another. Indeed Cuthwyn Lake testified that while he was on the spot when the trespass was going on he had a conversation with Nedwell who indicated to him that he was only doing a job. I consulted the text book, **Clerk and Lindsell on Torts, Fifteenth Edition, paragraphs 25 to 40 of Chapter 22** dealing with justifications for

trespass. Unfortunately I found no escape clause for No.3 Appellant. I perceive however that those who instructed Nedwell would have to indemnify him. I hold that No.3 appellant is clearly liable and was rightly so found by the learned trial judge.

In respect of John I. Martin Jr. paragraph 4 of the defence is equally applicable. In his submission before this Court Martin reiterated that he did not trespass on the Respondents' land. He had said the same thing at the trial; though he also seemed to have said the contrary. In evidence in chief he said:

> "I did not take it upon myself to go on the property alleged to be that of the Plaintiffs. I was working in my capacity as General Manager. I was doing a job. If my Lordship finds I trespass which was admitted in my defence I was working for a company of which I was shareholder. I believed that the property that the company sent me to clear was the property of John I. Martin Enterprises Ltd."

But the learned Judge clearly believed the evidence of Cuthwyn Lake and Bernice Lake who testified that they saw him on their lands committing the trespass. The learned Judge set out the evidence of the Lakes which he accepted.

The belief of the Appellants that the land was that of John I. Martin Enterprises Ltd. does not avail him. **Paragraph 22-05 of the Fifteenth Edition of Clerk and Lindsell on Torts** states:

> "**Intention or negligence in the Defendant.** It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary; as where a person strays off a footpath in the dark, or 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, where a person delivers goods by mistake to the wrong address and places them on the land of the occupier without his consent, but if the act be

involuntary it is otherwise. If the entry is quite involuntary no liability is incurred."

I believe the learned trial Judge had an abundance of evidence from which he could find No.2 Appellant liable in trespass to the Respondents' land.

I turn to consider the issue of trespass in relation to William I. Martin. In his submissions learned Counsel for Martin pointed to the evidence which showed that Martin was in New York at the time of the trespass. He pointed to the fact that the learned trial Judge found that the bulldozer was hired by the First Appellant's servant vicariously. He submitted that the Judge erred in coming to the conclusion that No. 3 Appellant acted on the instructions of No.1 Appellant.

Learned Counsel for the Respondents pointed to the evidence of Nedwell who stated:

"I was using a bulldozer to clear the land. This clearing was done I would say about March/April 1985. I was then working for Wills Martin."

Now if the learned Judge believed Nedwell that at the time he was working for Wills Martin, it might be possible to hold Martin liable if it could also be established that Martin authorised the trespass. But there was no such evidence that Wills Martin so authorised Nedwell.

Martin, on the other hand said this:

"I have several pieces of heavy equipment. I employ persons to operate those. I did so in April 1985. In April 1985 I did not have in my employ Winston Nedwell.

On 2nd April 1985 I was in New York. No one at that time approached me for a bulldozer to clear any land or do any work in the vicinity of Lunar Park ..... I did not authorise

any one to use my machine to clear the said lands. I did not authorise any one to use my bulldozer to clear those lands."

In like manner if the Judge believed William Martin he could well have found him not liable. And it will be remembered that when Nedwell gave evidence in chief he stated:

"I worked for William Martin as a heavy equipment operator. I know Lunar Park. Miss Lake lives there. I cleared a barricade there for John and them. For John and Miss Martin."

But the learned Judge made no findings of fact in respect of the evidence of Nedwell or William Martin. He did not say that he believed the evidence of Nedwell and that is why he found William Martin liable.

The findings of fact by the learned Judge are clearly set out in the record. The relevant portions are as follows:

"I find as a fact that there were trespasses to the Plaintiffs' land by all three Defendants. The First-named Defendant's heavy duty equipment were used to clear and push down trees on the Plaintiff's land. ..... The use of the vehicles was authorised by the servant of the First-named Defendant."

First of all I see no evidence on the record to indicate that "the use of the vehicles was authorised by the servant of the First-named Defendant." The relevant evidence in that context comes from William Martin under cross-examination by learned Counsel for the Respondents. Martin stated:

"When I came back from New York I heard that my equipment had been used to clear some lands up there. I made inquiries from my secretary, Miss Brodie. She told me somebody had used

my loader. She said Charles Henry had used my vehicle. He is an operator who operates for me. I contacted him. He said that he had used the loader. The one that pushes down trees. He said he cleared the land."

In his closing address before the learned trial Judge learned Counsel for the Respondents stated:

"He admits that the instructions were given from his office to use his equipment."

With respect I see no evidence of such an admission. And it must be remembered that although No. 2 Appellant and No. 3 Appellant made admissions in paragraph 4 of the defence the No.1 Appellant pleaded in the same paragraph that he did not go on the Respondents' land and at the time he was engaged elsewhere.

It will be realised that William I. Martin rents out heavy equipment. If someone were to come to ask him to rent out a piece of equipment and that person uses the equipment to commit a trespass does that make him liable for the trespass? And if his servant were to rent out equipment in the normal course of business does that make her liable? I do not think so. In my judgment, to hold William I. Martin liable because his equipment was used would be tantamount to "hanging" him, not by a passport, but by a bulldozer.

Learned Counsel for the Respondents drew our attention to the number of cases he cited where an Appellate Court will not readily interfere with a finding of fact of a trial judge based on credibility. The learned Judge in this case gave his findings of fact on which he held that all three Appellants were trespassers. The Court cannot be shown other evidence on which he made no findings to support the trespass.

I agree with the submission of learned Counsel for William I.

Martin that the learned Judge erred in coming to the conclusion that the third Appellant acted on the instructions of the first Appellant.

Quantum of Damages

This is a case where the learned judge found that the Appellants trespassed on the Respondents' land with a bulldozer which was used to uproot pear, mahogany and guinip trees and boundary marks on four acres of land and to denude about half of an acre of the land. No evidence was adduced as to the value of the trees and boundary marks uprooted. However, there was evidence which could form the basis of an award of aggravated (as distinct from exemplary) damages. I refer to the following passage in the learned judge's judgment.

> "In apportioning damages I however take into account the Defendants' conduct towards the second-named Plaintiff. Apart from the denudation of her land they heaped up the trees, soil and other debris unto the entrance of her road making it virtually impossible for her to drive her car along the roadway. When the Defendants went into the Plaintiffs' land she was terrified to the extent that she locked herself in her house. When they returned to the land, because of their conduct, I infer that the maid of the second-named Plaintiff was so terrified that she fled from the house and has never