ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2006/025

BETWEEN:

[1] ANDRE WINTER as Personal Representative of Elpert Winter (deceased)
[2] STEPHEN WINTER

Appellants

and

CHARLES RICHARDSON

Respondent

Before:
The Hon. Mr. Justice Denys Barrow, SC — Justice of Appeal
The Hon. Mde. Justice Dancia Penn-Sallah, QC — Justice of Appeal [Ag.]
The Hon. Mde. Justice Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:
Mr. Dane Hamilton Q.C. and Mr. John Fuller for the Appellant
Mr. Hugh Marshall and Ms. Cherissa Thomas and Mr. Mark Harris for the Respondent.

2007: July 17;
2008: April 22.

Land Law – Crown lands – Gratuitous Licensee – Bare Licensee – Tenant at will – Trespasser in factual possession – Registered Land Act Cap 374 – Slum Clearance and Housing Act Cap 404 – Town and Country Planning Act Cap 432 – Crown Lands (Regulation) Act Cap 120

Tort – Trespass to land

Damages – Special damages – Nominal damages

The respondent began squatting on parcel 280 in the early 1970s and was later given permission to occupy the land by the then owner (Mr Punter). Upon the death of Mr Punter, the land was sold

to the government. Over the years, the respondent sought, unsuccessfully, to obtain title to the land. In March 1990, the respondent began stockpiling sand on the land and subsequently built a wooden structure upon it from which he operated his business. COVE, a limited liability company of which the deceased was a shareholder and the second appellant the maintenance manager, paid a deposit on the purchase price for parcel 280 to the Central Housing and Planning Authority (CHAPA) in June 1990; payment being completed in June 1991. The Land Certificate was issued in favour of the deceased on 30th March 1995. In June 1991, the respondent was given 15 days' notice to cease his occupation of the land. Upon the expiration of this period, the deceased and the second appellant demolished the respondent's wooden structure.

Held, dismissing the appeal and awarding costs to the respondent:

(1) The rights of a person in actual occupation under section 28(g) of the Registered Land Act Cap 374 (the Act) are not protected as an overriding interest where that person is a bare or gratuitous licensee. The respondent, who was inferred to have been a bare or gratuitous licensee, did not have a right which could be protected as an overriding interest. Further, a gratuitous or bare licence is revoked by the death of the licensor/licensee or by an assignment of the land over which the licence is granted. The respondent's bare or gratuitous licence determined on the death of the licensor/owner of the land (Mr. Punter).

National Provincial Bank Ltd. v Ainsworth [1965] AC 1175 applied. **Spiricor of St. Lucia Ltd. v Attorney General of St. Lucia and Another** (1997) WIR 123 and **Ulina Jennifer George v Hilary Charlemagne** Saint Lucia Civil Appeal No 24 of 2001 followed.

(2) The owner's affirmative consent is essential to the creation of a tenancy at will. No such consent having been given by the Crown or CHAPA, the respondent was not a tenant at will or a bare licensee, but a trespasser.

FBO 2000 (Antigua) Limited v Vere Cornwall Bird Jnr, Attorney General of Antigua and Barbuda, Stanford Development Company Antigua and Barbuda Civil Appeal No 30 of 2003 distinguished. **Stanford International Ltd. v Austin Lapps** Privy Council Appeal No. 19 of 2005 applied.

(3) The respondent was in factual possession of the land and could only be dispossessed of it by the true owner (the Crown or CHAPA).

(4) COVE, at the time of eviction, had only an equitable interest in the land. The deceased had no interest in the land until it was vested in him as proprietor on 30th March, 1995. There was no evidence that the Crown or CHAPA gave affirmative consent to COVE or to the deceased to take possession of the land; and such consent cannot be implied. The self-help remedy of forcible eviction accordingly was not open to COVE or to the deceased. The forcible eviction of the respondent by the deceased and the second appellant was therefore premature and unlawful in that it constituted a trespass against the respondent's possession.

J A Pye (Oxford) Ltd. and Others v Graham and Another [2002] UKHL 30 applied. **Wuta-Ofei v Danquah** [1961] 3 All ER 596, **Oceans Estates Ltd. v Pinder** [1969] 2 AC

19, **McPhail v persons, names unknown, Bristol Corporation v Ross and Another** [1973] 3 All ER 393 distinguished.

(5) Trespass is an injury to a possessory right. The respondent was accordingly entitled to be compensated for the loss and damage occasioned by the trespass.

(6) It is permissible for the court to make an award of nominal damages where special damages are unproven.

Attorney General of Antigua v Estate of Cyril Thomas Bufton Antigua and Barbuda Civil Appeal No. 22 of 2004 which applied **Greer v Alstons Engineering Sales and Services Ltd.** [2003] UKPC 46 followed.

JUDGMENT

[1] **EDWARDS J.A. [AG.]:** This is the judgment of the court. This appeal raises the pivotal question as to whether or not on the 26th June, 1991, Mr. Elpert Winter (deceased) and the second appellant, without a court order, were entitled to forcibly remove the respondent as a trespasser from land known as parcel 280 which he had been occupying for more than 15 years. The respondent had begun occupying this land when a Mr. Punter was the owner, and continued his occupation of it after the Government had acquired it. On the 2nd November 2006, Thomas J determined that the respondent/claimant was a licensee and not a trespasser, who was entitled to more than the 15 days notice that was given for him to cease his occupation of parcel 280. The deceased, whose company had recently completed paying the Government the purchase price for the parcel entered on the land with the second appellant, and evicted the respondent, by using a bulldozer to demolish the wooden building and level the stockpiled sand that the respondent had on the land.

[2] The learned judge awarded to the respondent against the appellants jointly and severally, the sum of $68,500.00 as special damages, $22,500.00 as general damages, with interest, and prescribed costs in accordance with Part 65.5 of the **Civil Procedure Rules 2000** (**CPR 2000**). The appellants have challenged: (a) the relevant findings of fact and law that there was an equitable licence in favour of the respondent; (b) the learned judge's assessment of the evidence and application of the law in arriving at his conclusions that the respondent was a bare licensee, and at least a licensee or a tenant at will; and (c) the sum awarded as

damages. The action was commenced by writ of summons filed on the 10th January 1995.

Background Facts

[3] Mr. Elpert Winter who died on the 3rd June 2004, became registered owner of the land known as Parcel 280 Block 42 1992B, Registration Section: Cassada Gardens and New Winthropes, on the 30th March 1995. The second appellant is the brother of the deceased, and maintenance manager at Cove Enterprises Limited (COVE). The deceased was a shareholder of COVE. On the 13th June 1990, COVE paid a deposit on the purchase price for parcel 280 to Central Housing and Planning Authority (CHAPA). The function and authority of CHAPA is of some significance in this litigation, and this will be dealt with later on in the judgment. The respondent was in occupation of this parcel before and during the deceased's purchase negotiations with the Government.

[4] The only evidence at the trial as to how the respondent came to be on parcel 280 came from the respondent. He began squatting on parcel 280 in the early 1970's. He had obtained permission to occupy the land from Mr. Punter, after he was informed by Mr. Punter that he was the owner of parcel 280 around the time of the Cadastral Survey in 1974. Mr. Punter had promised to sell parcel 280 to him as soon as the dispute that Mr. Punter had with the Government concerning lands including parcel 280 had been cleared up. The respondent received information that the Government acquired Mr. Punter's estate including parcel 280 from Mr. Punter's daughter after Mr. Punter died around 1986 or 1987.

[5] The respondent went to CHAPA and was referred to the deceased whom he told about his squatting on parcel 280, Mr. Punter's promise to sell this parcel to him, his desire to purchase it along with parcel 281, and the plans he had for the use of the land. The respondent's testimony is inconsistent as to when he went to CHAPA and spoke to the deceased who was the head of that authority. In his witness statement he deposed that this was after he learnt that Government had bought the land from Mr. Punter's daughter upon Mr. Punter’s death, but under cross examination he said he went to CHAPA in 1978, and that all of these events took place in 1978. The deceased requested that he return to CHAPA a week

or two thereafter, and upon his return, the deceased told him that he would get parcels 230, 239 and 165 and they would reconsider allocating the lands in parcels 280 and 281 to the respondent. Subsequently, in December 1989 when the respondent went back to CHAPA to arrange to finalise the purchase of parcels 280 and 281, one Mr. Mason found notes in a log book confirming that parcel 281 had been allocated to him. Mr. Mason found that the page next to the page where the allocation of parcels 230, 229 and 165 had been entered was torn out from the main ledger and told him then that in order for him to get title to parcel 280 he needed a letter from the Minister since it was Crown land.

[6] In January 1990, the deceased visited the respondent at his business place on Long Street, and upon learning about the difficulty he was having in getting to see the Minister about purchasing parcel 280, the deceased offered to assist him, and promised to speak to and convince the Minister on his behalf. In March 1990, the respondent began stockpiling sand on parcel 280 which came from his property at Cove Head. In April 1990, the deceased commissioned the Director of the Development Control Authority and the police to end the respondent's stockpiling of sand, but this was to no avail. Subsequently, and before the 10th June 1990, the respondent built a wooden structure on parcel 280, from which he was operating a business which included the sale of sand.

[7] The purchase of parcel 280 was apparently completed by COVE on the 13th June 1991. By an undated letter COVE requested CHAPA to issue the Land Certificate in the deceased's name. On the 3rd July 1991, CHAPA issued a letter confirming that the full purchase price had been paid, and that the Land Certificate in favour of Elpert Winter was being processed. As a result of the deceased's perception that the respondent was a trespasser he caused a letter to be sent to the respondent, on the 10th June 1991, by his Attorney-at-law. The letter, which described the deceased as beneficial owner of parcel 280, referred to the large quantities of sand that the respondent, as trespasser, was storing on the deceased's property, the erected shed, and his continuing excavation of the land. The letter requested the respondent "to cease excavation forthwith and restore the land to its original state, and further, to remove the sand and shed from his property." It informed the respondent: "Should you fail to heed this request, my client shall be obliged to approach the Court to compel your withdrawal

and to seek compensation for any damage he shall have suffered."

[8] The respondent was in possession of 4 other parcels of land in that locality at that time, which are either adjoining or near to parcel 280. They were parcels 230, 225, and 165, which CHAPA had allocated to him for purchase; and parcel 281 which was subsequently allocated to him after he had squatted on it. On parcel 281 the respondent had his home, storage facilities and containers. The respondent testified that upon receiving the notice letter from the deceased's lawyer, he began erecting concrete pillars on parcel 281 so as to make preparations to move the shed and the office attached to it onto parcel 281, since he did not wish to have a family feud. The deceased, in the company of Mr. Arnold Lloyd (who testified at the trial), went to parcel 280 on either the 22nd or 23rd June 1991, and told the respondent that the land was his and he was to get off his land. There was an altercation between the deceased and the respondent. The respondent said in his witness statement: "I asked him to leave the premises as he can see I am making ready to move and I said to him until then he is trespassing." Mr. Lloyd testified that during the altercation the deceased told the respondent: "that if by Monday and the room is not off, he Elpert will push it off the land."

[9] On the 26th June 1991, the deceased and the second appellant in the presence of a police officer and Mr. Lloyd, pushed the wooden structure off of parcel 280 onto an adjoining vacant lot, with a traxcavator driven by the second appellant, while the respondent was away.

The Grounds

[10] Grounds 4 (i) to (iv) and (viii) of the Grounds of Appeal urge that the learned judge erred in law when he concluded at paragraphs 65, 73 and 76 of his judgment that the respondent was at least a licensee or a tenant at will or a bare licensee with a beneficial interest in parcel 280, which gave rise to an equitable licence between August 1990 to June 1991, and an overriding interest within the meaning of section 28 (g) of the Registered Land Act Chapter 374; that he erred in awarding damages on the basis of such

conclusions; and that he ought to have found that the respondent had no interest in the property whether legal or equitable and was not a tenant at will but a trespasser. Ground (v) suggests that the judge erred in finding that 15 days notice was unreasonable. Ground (vi) contends that the judge's finding that the respondent was the holder of an overriding interest who was entitled to compensation for any loss or damage suffered from his wrongful eviction was an error of law. Ground (vii) challenges the special damages award of $22,500 in the absence of credible evidence to prove special damages. Mr. Hamilton Q.C. has identified the issues for this court to be:

> "(i) Whether on the evidence before the Learned Judge his conclusions that:
>
> a) the respondent was at least a licensee or a tenant at will within the meaning of section 28(1) of the Registered Land Act was correct in law;
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> b) the acquiescence, representations or promise of the deceased Mr. Elpert Winter both in his official capacity at CHAPA and in his private capacity
>
> with a
>
> beneficial interest in Parcel 280 gave rise to an equitable licence was correct in law
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> (ii) Was the respondent in relation to Parcel 280 a trespasser or a licensee who was entitled to be given reasonable notice and if so was he in fact given
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> reasonable
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> so was he in fact given reasonable notice?
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> (iii) Where items of special damages are specifically pleaded and not proven by evidence is a Court entitled to make an award in respect of such pleaded damage on the basis of doing the best it can in the circumstances?
>
> (iv) If the respondent was in fact a trespasser, did any liability in damage arise in the damage arise in the circumstances of his eviction from the land?"

Issues (i), (ii) and (iv)

[11] It is convenient to take issues (i), (ii) and (iv) together. At paragraph 54 of his judgment, Thomas J identified the immediate legal issue for determination to be: "whether the actions of Mr. Punter and later the first Defendant [Mr. Elpert Winter] in relation to the Claimant and parcel 280 gave rise to any rights on the part of the Claimant." The respondent pleaded the following in his Reply And Defence To Counterclaim:

> " 2. The Claimant contends that he first entered onto the subject premises with the consent of the then owner which was given in or about the early 1970's and that in the late 1970's early 1980's the Government of Antigua and Barbuda acquired the property whilst he was in possession and subject to his rights of

> occupation. 3. The Claimant further contends that the First-named Defendant subsequently acquired the said land subject to the rights of occupation of the Claimant in possession." In light of the respondent's pleadings and the evidence, even though the Government was not a party, in our view, the immediate legal issue for the learned trial judge would have been whether the actions of Mr Punter, and subsequently the Government and the deceased defendant , in relation to the claimant and parcel 280, gave rise to any rights on the part of the claimant."

[12] Thomas J also stated at paragraph 56 that: "Among the issues to be determined upon the sale of the land to the Defendants was the legal position of the Claimant in the context of registered titles." Section 28 (g) of the Registered Land Act Chapter 374 of the Laws of Antigua and Barbuda states that: "Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register - (a) to (f) ... (g) the rights of a person in actual occupation of land ... save where inquiry is made of such person and the rights are not disclosed."

[13] In **Abbey National** Lord Oliver pointed out that: "It is not the actual occupation which gives rise to the right or determines its existence. Actual occupation merely operates as the trigger as it were for the treatment of the right as an overriding interest." There are also several decided cases by our court in which the statutory provision similar to section 28 (g) of Cap 284 has been interpreted. In **Spiricor of St Lucia Ltd. v Attorney General of St Lucia and another,** it was emphasised by his Lordship Chief Justice Byron, as he then was, that a similar statutory provision in St Lucia did not protect "the 'actual occupation' .... What is protected are the 'rights' of a person in actual occupation. The word right is not limited by any definition." The learned Chief Justice declared that the equitable interest of a purchaser in possession whose title has not been registered should be included among those equitable rights which are treated as overriding. Also in **Ulina Jennifer George v Hilary Charlemagne,** Byron J.A. again pointed out that what the Act protected were the rights that someone who was in occupation actually had.

[14] In **National Provincial Bank Ltd v Ainsworth,** the three different types of case that come under the head of licence were illustrated and their relationship with equity explained by

Lord Hodson. Lord Hodson expounded as follows: "There are three different types of case that come under the head of licence. (1) Where an owner of land encourages another person to expend money on that land on the faith of an assurance that part of the land or an interest therein will be granted to such person equity will compel the execution of a proper conveyance or, if that is inappropriate for any reason, will treat the money so expended as a charge upon the land. Equities of that kind do bind successors apart from purchasers for value of the legal estate without notice....(2) A licence by the landowner entitling the licensee to use the land for the licensee's benefit without the giving of exclusive possession and without creating an easement. Examples are: a licence to exhibit advertisements on a property or a licence to sell refreshments in a theatre or other place of public resort, a licence to watch a football or other public performance. As to this class of case, which alone bears analogy to ... [a wife's right to occupy the matrimonial home owned by her husband] there is clear authority that the licence is not binding on the licensor's successors in title even though they have full knowledge of it. (3) In quite recent years the Court of Appeal has recognised a kind of right unknown apart from statute (for example, the Defence Acts, the Rent Acts) namely , a right to the exclusive possession of land as against the owner but one that does not create a tenancy or any other known interest in land. There is no clear authority what rights , if any, the licensee has against the successors in title of the licensor. The logical answer is the same as under head (2) because it is a personal right.... As to (1) , this head of equity is contained in a well-defined group of cases....As to (2), the contractual aspect of licenses was emphasised by this House in **King v David Allen & Sons Billposting Ltd....**[1916] 2 A.C.54 H.L.] where it was held that an agreement for a licence to display advertisements on the wall of a picture-house was not binding on a tenant with notice to whom the licensor demised the land... It is a correct statement of the general law of England on the position of a licensee under a personal licence. There is a good reason why the law should be as there stated. Licences vary greatly in their nature and value and if they have to be investigated it would greatly complicate the investigation of titles."

[15] It can be said therefore from the law previously reviewed that the rights of a person in

actual occupation under section 28(g) of the Registered Land Act Cap. 374 are not protected as an overriding interest where that person is a bare or gratuitous licensee. It is also true to say that the rights of a licensee in occupation of land, who has been encouraged by the owner of the land, to spend money on the land upon faith in the owner's promise or assurance that he will acquire a proprietary interest in the land, is protected under section 28(g) of Cap 374 as an overriding interest. It is an overriding interest because the money spent on the land is regarded by equity as a charge upon the land. "Equities of that kind do bind successors" including purchasers, except of course where the purchaser makes an inquiry of the occupier and the occupier does not disclose his rights.

[16] Queen's Counsel Mr. Hamilton complained about these statements of the judge in the following paragraphs: " 65...the Court agrees with the submission of learned counsel for the Claimant that Charles Richardson was at least a licensee or a tenant at will so as to give rise to a right to remain on the property and in turn an overriding interest within the meaning of section 28 (g) of the LRA. This conclusion rests on the following aspects of the evidence: The Claimant informed the first Defendant; then an employee of CHAPA of his intentions regarding parcel 280; the First Defendant's actions in relation to the Claimant ; the fact that a company with which the First Defendant was associated acquired beneficial interest on the said parcel and later the First Defendant himself became the proprietor thereof; no effort was made to evict the claimant prior to 10th June 1991; the concern prior to that was the source of the sand being mined by the Claimant."

[17] At paragraph 74, Thomas J concluded: "Having regard to all the circumstances of the Claimant the Court determines that the acquiescence, representation, or promise of the first Defendant, both in his official capacity at CHAPA and in his private capacity with a beneficial interest in parcel 280 gave rise to an equitable licence in favour of the Claimant at least during the period August 1990 to June 1991." Then at paragraph 76 he said that: "Given the legal and factual circumstances of the Claimant, it was determined that his legal status was that of a bare licensee."

[18] Learned Q.C. remarked that it is difficult to ascertain from the judgment the precise legal basis on which the learned trial judge concluded that the respondent was a bare licensee, a licensee or a tenant at will. This observation could also apply to the judge's finding that the respondent had an equitable licence in parcel 280. It appears from paragraph 62 of his judgment that Thomas J found the facts in this case to be '"in alignment with those in the **FBO 2000** case in terms of the circumstances giving rise to a licence in favour of the Claimant, or a tenant at will in **Stanford International Bank Ltd v Austin Lapps.**"

[19] We agree with Queen's Counsel Mr. Hamilton that there is a fundamental evidentiary difference between the instant case and the **FBO 2000 case.** FBO occupied the airport land owned by the Crown, and expended large sums of money on it as a result of the Government's written representations that the government would grant it a 50 year lease. Such facts propelled the court to conclude that FBO was in lawful occupation of the land when the Government revoked its previous decision and granted a 25 year lease to Stanford Development. Since the Government was a party to the action, the Court of Appeal applied the equitable doctrine of proprietary estoppel against the Government and ordered it to pay compensation to FBO, since it was unconscionable for the Government to renege on its promise in such circumstances. Mr. Hamilton Q.C. also pointed out that every facet of the **Austin Lapps** first instance decision (which was not disturbed by the Court of Appeal), was reversed by the Privy Council on the 20th November 2006. This was after Thomas J had delivered his judgment on the 2nd November 2006. In such a situation the Privy Council decision would have a fundamental impact on the reasoning and conclusions of the trial judge.

[20] In the **Austin Lapps case,** the Cabinet granted Stanford International Bank Ltd. (SIB) a 99 year lease of Crown land near the airport known as parcel 384, on the 6th December 1995. This parcel included 0.6 acre of land that Mr. Lapps was occupying from 1970. Mr. Lapps in or around 1976 had approached Mr. V.C. Bird, the then Prime Minister, and asked to be allowed to purchase or lease the 0.6 acre. He was told that the Government had not yet decided what to do with the land. In 1984 Mr. Bird assured him that steps

would be taken to regularise his occupation of the land. The evidence that was adduced of the procedure to be followed for the leasing or other disposition of Crown lands in the State proved that there was never any agreement between the Government and Mr. Lapps to lease or otherwise dispose of the 0.6 acre to Mr. Lapps.

[21] As a result of an impasse with Mr. Lapps, SIB commenced court action. At the trial, the learned trial judge's findings included that Mr. Lapps' long occupation of the land had been acquiesced by the Government thereby giving him the status of a tenant at will, and entitling him to expect a proper notice bringing to an end his right to occupy the portion of the parcel.

[22] The Privy Council at paragraph 34 of its judgment referred to **Doe d Hull v Wood** which is the authority for saying that an affirmative consent of the owner was necessary and not simply a mere negative or silent consent for a tenancy at will to be implied. It was further observed at paragraph 34 that: "The evidence of the Cabinet Secretary makes it tolerably clear that there was never any affirmative consent by the Cabinet to Mr. Lapps taking possession of the 0.6 of an acre. He went into and remained in occupation of the land to the knowledge and with the encouragement of the Prime Minister but nothing has been shown to their Lordships to indicate that the Prime Minister had any authority to create a tenancy at will over this small piece of Crown land. Paragraph 170 of the same volume of Halsbury's Laws [Volume 27 (1) 4th edition Re-issue] says that: "Entry into occupation of land pending negotiation for the grant of a lease ...gives rise to a tenancy-at-will..." But although Mr. Lapps regarded himself as in occupation pursuant to an oral agreement for a lease there is no evidence that there were ever any negotiations to settle the terms of the lease and no rent was ever paid. Accordingly, their Lordships have some doubt whether there was sufficient justification for according Mr. Lapps the status of a tenant at will."

[23] The learned trial judge never made a finding as to the respondent's legal status immediately after the death of Mr. Punter. Had he done so, the inescapable conclusion to be drawn from the evidence was that the respondent was a trespasser after Mr. Punter died. Although he may have had use of the land during Mr. Punter's lifetime, having

apparently paid no rent, it may be inferred from his evidence that Mr. Punter allowed him to continue occupying the land out of generosity, thus changing the respondent's status on the land from that of a squatter to being a gratuitous or bare licensee. A gratuitous or bare licence is permission, without valuable consideration in support of it, entitling a person to use the premises of the licensor, or to do some act on it which would otherwise be a trespass. It is revoked by the death of either party or by an assignment of the land over which the licence is granted.

[24] Upon Mr. Punter's death in 1986 or 1987, this licence would have been determined, and the respondent would have had more than reasonable time to vacate parcel 280. He chose not to, and he remained as a trespasser on parcel 280. When the Government acquired the land from Mr. Punter's estate the respondent's status was therefore that of a trespasser. There is no evidence that the Government gave "affirmative consent" to the respondent's occupation of parcel 280. Affirmative consent is essential to the creation of a tenancy at will. The learned trial judge therefore erred in law in concluding that the respondent was a tenant at will.

[25] Unlike the circumstances in the **Austin Lapps case,** there was no evidence adduced by any of the parties in this case as to the procedure to be followed for the sale or other disposition of Crown land. Learned counsel Mr. Marshall regarded he evidence at paragraphs 25 to 28 and 41 of Thomas J's judgment as sufficient to discharge the respondent's burden of proof. He submitted that CHAPA was the relevant authority and this is obvious from the fact that the deceased's company, COVE, paid the purchase price to CHAPA. Further, that since CHAPA finalised the arrangements for the respondent to purchase his other parcels, gave him information that he needed to get a letter from the Minister for the purchase of parcel 280, and the deceased who was head of CHAPA had promised to assist him, there was evidence that CHAPA intended to create legal relations with the respondent. This, he argued, supported the learned judge's finding that CHAPA gave permission to the respondent to have exclusive occupation of parcel 280.

[26] In his judgment at paragraph 52, the trial judge alluded to the Crown Lands (Regulation)

Act Cap. 120 (the Act) which Mr. Hamilton Q.C. relied on to support his contention that the respondent was not occupying the land with permission granted to him by the Cabinet or by any other Government Authority acting on behalf of the Cabinet, so as to bring it within the terms of section 4 of the Act. This Act and its Regulations were not considered by the Privy Council in the **Austin Lapps** case.

The Legislation

[27] This Act provides for the appointment of a Land Board and a Land Officer and the making of Regulations for the purpose of renting, leasing, occupying and selling lands owned by the Government. One of these 3 Regulations that Queen's Counsel referred to (The Crown Lands (Land Settlement) Regulations Cap 120) establishes that the allocation of Crown lands for sale is application driven and a deposit must be paid prior to occupancy.

[28] Neither **The Slum Clearance and Housing Act Cap. 404 (The SCAH Act)** nor **The Town and Country Planning Act Cap. 432 (The TCP Act)** which complement each other, were alluded to by Counsel for the parties. These two Acts, which have existed since the 9th April 1948, are important. CHAPA (the Central Authority) is a body corporate created by the SCAH Act, and is vested with the powers and functions prescribed by both the SCAH Act and the TCP Act. CHAPA performs its statutory functions under both Acts with the approval of the relevant Minister.

[29] Sections 24 and 25 of the TCP Act provide for the Minister to acquire land which is the subject of a town planning, or regional scheme prepared or adopted by CHAPA and approved by the Minister. Section 8 of the SCAH Act empowers CHAPA to acquire land or buildings for the development or re-development of an approved scheme under the Act and to execute the purposes of the approved scheme.

[30] The evidence of the respondent, coupled with the fact that COVE paid the purchase price for Parcel 280 to CHAPA, strongly suggest that parcel 280 had been acquired by the Government for an approved scheme under the SCAH Act and/or the TCP Act thereby

rendering inapplicable the **Crown Lands (Regulation) Act Cap 120**. Consequently, parcel 280 could have been vested in CHAPA, and this authority may have been empowered to sell parcel 280 with the approval of the Minister and on such terms as the Minister approved, pursuant to section 8(e) and (g) of the SCAH Act.

[31] It is clear from section 17 (5) of **The Limitation Act No. 8 of 1997** of the Laws of Antigua and Barbuda that the statutory limitation period of 12 years for the recovery of land and rent does not apply to Crown lands. Section 135(1) of **The Registered Land Act Cap 374** also forbids the acquisition of Crown land by adverse possession. Section 29(2) of the SCAH Act makes it a criminal offence for a person to enter into occupation of land under an approved scheme. These statutory provisions could probably operate to prevent a finding of acquiescence by the Government or CHAPA in respect of Crown land occupied by a trespasser.

[32] Focusing on the observations and findings of Thomas J which have been challenged, he apparently ignored these relevant statutory provisions, which, in our view, were crucial to a determination of the issues posed by him at paragraphs 54 and 56 of his judgment. This was an error of law.

[33] In the court's view, the respondent's evidence proved only that he had a longstanding desire to purchase the land he was squatting on, and had been making enquiries about doing so. He admitted that he got no permission from the Government to remain on parcel 280 and he led no evidence that he had made an application or paid a deposit for the purchase of parcel 280. We endorse Mr Hamilton's submissions. It was not proved that any of the persons at CHAPA who dealt with the respondent in connection with parcel 280 had the authority to lawfully give him permission to occupy the land. Despite the respondent's testimony that the deceased was an employee and head of CHAPA, section 7(4) of the SCAH Act requires that: "All acts of the Central Authority, and all questions coming or arising before the Central Authority, and all questions coming or arising before the Central Authority, shall be done and decided by the majority of such members of the Central Authority as are present and vote thereat. In case of an equality of votes, the

Chairman of the meeting shall have a second or casting vote." The deceased's promise to assist the respondent to get a letter from the Minister was not a promise by the Central Authority to sell parcel 280 to the respondent. The deceased made this promise in very informal circumstances in January 1990 when visiting the respondent and his cousin at his business place to borrow a tool, which suggests that he did so in a personal capacity. This was more than 4 months before COVE paid the first deposit for parcel 280, so neither Mr. Winter nor COVE had any interest in the land. In the absence of any documentary evidence proving that CHAPA had given permission to the respondent to have exclusive occupation of parcel 280, and had intended to create legal relations with the respondent, there would, in our view, have had to be testimony similar to such documentary evidence from an appropriate officer of CHAPA to support a finding that the respondent was a bare licensee. Applying the approach of the Privy Council in the case of **Austin Lapps**, the evidence lacks sufficient justification for according the respondent the status of an equitable licensee with an overriding interest in parcel 280.

The Eviction

[34] At the time of his forcible eviction, the respondent would have been a trespasser in occupation of the land. He was not a trespasser in possession of parcel 280 since he had not dispossessed, and could not dispossess the Crown of parcel 280; and "he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner". Learned Queen's Counsel referred us to another passage in **McPhail** where Lord Denning MR considered the law as to squatters and in particular the remedy of self-help. Lord Denning stated: "(i) Now I would say this at once about squatters. The owner is not obliged to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go himself and turn them out without the aid of courts of law. This is not a course to be recommended because of the disturbance which might follow. But the legality of it is beyond question....Even though the owner himself should use force, then so long as he uses no more force than is reasonably necessary, he is not himself liable either criminally or civilly.... (ii) Although the law thus enables the owner to take the remedy into his own

hands, that is not a course to be encouraged. In a civilised society, the courts should themselves provide a remedy which is speedy and effective; and thus make self-help unnecessary."

[35] The law as stated in **McPhail** contemplates that the party using the remedy of self-help has title to or actual possession of the land, or is entitled to immediate possession of the land. "He who is entitled to the immediate possession of realty may make an entry, and may justify in a civil action the use of so much force as is necessary to enable him to effect the entry and to expel an intruder therefrom, provided the degree of ...[force] used does not exceed what is reasonably necessary to effect his purpose."

[36] Learned Counsel Mr. Marshall submitted before us that on the date of the notice letter of 10th June 1991, the deceased had no personal interest in parcel 280. It is trite law that a purchaser of land has an equitable interest in that land pending the completion of the sale. Having regard to the documentary evidence of the appellants, it appears in our view that COVE as purchaser had an equitable interest in parcel 280 probably from the 10th June 1991 until the 30th March 1995 when the deceased was registered as legal owner of parcel 280. The appellants and their learned Queen's Counsel contend that the deceased had an equitable interest and was entitled to possession at the time of the forcible eviction. By paragraph 1 of the respondent's amended reply, the respondent joined issue with the deceased's pleading in paragraph 1 of his Amended Defence and Counterclaim that the deceased "through COVE Enterprises Limited became the beneficial owner of the land when it was allotted to the Defendant [the deceased] by CHAPA by payment therefor of $4,678.25 towards the purchase price…on or about the 13th June, 1991 and was consequently let into possession by CHAPA…" Our attention has not been drawn to any statutory provision that permits a purchaser to take possession of land being purchased without the "affirmative consent" of the vendor. No evidence was led to prove that CHAPA had let the deceased into possession of parcel 280. We reiterate that that issue was joined on the pleadings as to the fact of possession and the letter from CHAPA dated 3rd July 1991 only stated that the purchase price for parcel 280 was paid, and that the Certificate of title was being processed in the deceased's name. We are of the view that

the undated letter from COVE to CHAPA, requesting CHAPA to issue the Land Certificate in the deceased's name, and this letter dated 3rd July 1991, were incapable of transferring COVE's equitable interest in parcel 280 to the deceased. The learned trial judge did not consider whether or not the deceased had any personal interest, or was legally in possession of parcel 280 before he forcibly evicted the respondent. This was probably because of the way the respondent's pleadings were framed, and the fact that at the trial the deceased's title and interest in parcel 280 at the material time were not raised as an issue by counsel.

[37] In **J A Pye (Oxford) Ltd and Others v Graham and Another** Lord Brown-Wilkinson considered what constitutes "possession" and stated:

> " In Powell's case [Powell v McFarlane (1977) 38 P & CR 470] Slade J said at ...470 (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")."

[38] Though a purchaser of registered land who enters into possession with the consent of the owner pending the completion of the purchase is regarded by the law as a tenant at will, there is no proof that CHAPA gave "affirmative consent" for COVE to take possession of parcel 280 from the 10th or 13th June 1991. "Affirmative consent" cannot be implied for a tenant at will. Absolute ownership of parcel 280 did not vest in the deceased as proprietor until registration on the 30th March 1995. Consequently**,** the "doctrine of possession by relation" and the two Privy Council authorities **Wuta-Ofei v Danquah** and **Ocean Estates Ltd. v Pinder,** which Queen's Counsel Mr. Hamilton relied on in his submissions, cannot assist the appellants in our view, in the absence of any proof that the deceased had a right to possession, or that his right of entry had accrued from the 10th or 13th June 1991, or that he was acting under the authority of CHAPA.

[39] We are therefore of the view that the deceased's entry on parcel 280 on either the 22nd or 23rd June 1991 was premature and unlawful, despite COVE's equitable interest in the parcel. The deceased would be a trespasser and logically in the same position as a stranger to the land; and only the Crown or CHAPA as paper owner could then have lawfully entered upon the parcel. Moreover, on the basis that parcel 280 was vested in and subject to the administration of CHAPA under an approved scheme, section 29 of the SCAH Act prescribed the procedure for CHAPA to recover possession of that land from the respondent, which seemingly ruled out the self-help remedy of forcible eviction.

[40] " [I]f a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire title." The evidence shows that the respondent was in exclusive physical control of parcel 280 and dealing with the land as an occupying owner though he did not dispossess the Crown. In J **A Pye (Oxford) Ltd.** Lord Browne-Wilkinson agreed with the following statement of Slade J in Powell**:** "Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances...I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

[41] Since the respondent was in factual possession of the land before the deceased made his entry, "It is no defence to [the deceased] a wrongdoer that the possession of the plaintiff [respondent] is unlawful; the fact of possession is enough. But as against the true owner, the rule is different..." The self-help remedy of forcibly evicting the respondent from parcel 280 on the 26th June 1991 was therefore not legally open to the deceased as an option so far as the proved facts of this case are concerned. Trespass is an injury to a

possessory right and since the respondent proved that the appellants trespassed and caused actual damage to his property and loss, then he would be entitled to receive an amount for compensation from them. Accordingly, the deceased and the second appellant would be jointly and severally liable for the damage caused to the respondent's property as the learned trial judge found.

The Award of General Damages - Issue (iii)

[42] Ground (vii) of the Appeal complains **only** about the sum of $22,500 that Thomas J awarded as general damages. The award was made up of $20,000 for the destruction of the sand and loss of sales and nominal damages of $2,500 for the "tools, filters and the like" for the backhoes and truck. In the respondent's Particulars of Special Damages in the Amended Statement of Claim, he claimed as follows:

> " b) Tools and Equipment damaged and destroyed:
> Value of tools/equipment/sand before destruction $110,643.02
> Value of tools/equipment/sand salvaged $30,310.94
> Net loss of tools/equipment/sand $80,332.08.
> d) Loss of net earnings from sale of sand
> (7 months @ $23,938.50 per month $167,569.50"

[43] Queen's Counsel Mr. Hamilton effectively contended that it was therefore a misnomer to award the $22,500 as general damages when it was claimed as special damages. The trial judge at paragraph 100 of his judgment acknowledged that there was no credible evidence that could go towards proof of special damages. Nevertheless the trial judge relied on the learning in **McGregor On Damages** in making an award of $22,500 as nominal damages. Queen's Counsel argued that it is settled law that any special damages pleaded must be strictly proven, and where not proven, no award should be made as general damages in the circumstances. Learned Counsel Mr. Marshall countered that the $22,500 as nominal damages represented the learned judge's assessment of the respondent's loss of tools equipment and sand which were in quantifiable amounts having a value though not specifically proven.

[44] The value and extent of the claim for special damages in the respondent's pleadings were challenged in the pleadings of the appellants, who put the respondent to strict proof. The

respondent failed to give an estimate of the quantity of sand he had stockpiled on the land that morning of the 26th June 1991. By cross-examination the testimony of the respondent was probed as to the accuracy of his claim concerning the sand on the land at the material time. The trial judge was correct in finding that special damages had not been proved. In our view, having so found, the trial judge could have gone on to consider an award of nominal damages for the unproven special damages representing loss of net earnings from the sale of sand and net loss of tools destroyed, on the authority of the Privy Council decision in **Greer v Alston's Engineering Sales & Services Ltd.** In this Trinidadian case Jones J.A. in his leading judgment for the Court of Appeal, justified an award of $5000 as nominal damages where special damages had not been proven.

[45] It was contended before the Privy Council that whatever the difficulty of computing special damages the appellant was entitled to an award substantially higher than the $5000 that the Court of Appeal awarded as nominal damages in the absence of proof of such loss. Several cases were cited in which the House of Lords awarded a sum for loss of use of a vessel damaged by the defendant's negligence in the absence of proof of such loss. Lord Halsbury LC in **The Owners of the Steamship "Mediana v The Owners, Master and Crew of the Lightship "Comet"** explained that "*the term 'nominal damages' does not mean small damages."* The case **Dixons (Scholar Green) Ltd v JL Cooper Ltd.** was cited as a more modern example of such damages. This was a case in which the plaintiffs called no evidence to prove the loss incurred by the deprivation of a commercial vehicle for 11 weeks, and the English Court of Appeal substituted for the trial judge's award of two pounds an award of four hundred and fifty pounds. The Privy Council held that though the loss under this head was unquantified, it is the duty of the court to recognise it by an award that is not out of scale. The sum of $5000 was found to be on the low side, but not so low as to be wrong in principle and to warrant interference by their Lordships.

[46] Our Court in **Attorney General of Antigua v Estate of Cyril Thomas Bufton** applied the Privy Council decision in **Greer**, and held that it was permissible and just for the trial judge to have made an award of nominal compensation for special damages not proven. Likewise we hold that it was permissible for Thomas J to have made the award as nominal damages in the circumstances.

[47] The trial judge allocated the award of $20,000.00 with respect to the destruction of the sand and loss of sale although the respondent said in his witness statement that he was seeking compensation specifically for loss of business relative to the sale of sand, despite his pleadings. Faced with the claim of approximately $167,570.00 for net loss of earnings from the sand business for seven months, on the basis of the estimated $23,037.99 monthly as anticipated earnings which the respondent mentioned in his evidence, $20,000.00 represents less than 1 month's earnings. In the absence of any evidence breaking down what the monthly $23,037.99 represented or any evidence that sand was destroyed, the award of $20,000.00 seems out of scale and cannot stand. The pictures of the destruction show that sand may have been mingled with debris and the respondent's evidence shows that some of the stock piled sand which had been flattened was salvaged. We consider an award of $5,000.00 to be a reasonable nominal award for compensatory damages in the circumstances. The learned trial judge having rejected the respondent's evidence concerning the loss of tools he had been storing for the tool rental business, awarded $2,500 as nominal damages for "certain tools, filters and the like" for the respondent's backhoes and truck that he was hiring out. In our view, this award was reasonable.

[48] Since this nominal damages of $7,500.00 is for unproven special damages, the interest rate of 6% from the 10th January, 1995 to judgment must also be applied to this sum. We have calculated the interest on the total award of $76,000.00 comprising the unchallenged award of $68,500 and the award of $7,500.00 that we have made as $12.46 per day from the 10th January, 1995 until the 2nd November 2006 which is 4,315 days. This interest amounts to $53,760.65, so the total sum would be $129,760.65.

[49] We therefore dismiss the appeal and order that the appellants pay the prescribed costs of the respondent in the court below. We calculate costs below at $35,964.10; pursuant to CPR 65.5(1),(2)(a) and Appendix B; and the costs on the appeal, being two thirds of the costs below, pursuant to CPR 65(13)(b) at $23,976.07.