

Date: 19980218  
Docket: 14323  
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THOMAS THEE

PLAINTIFF

AND:

JAMES MELVIN MARTIN  
carrying on business as  
CLUCULZ ENTERPRISES  
and the said  
CLUCULZ ENTERPRISES LTD.

DEFENDANTS

AND:

TABOR LAKE LOGGING LTD.

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BURNYEAT

Counsel for the Plaintiff: S.D.M. Wagstaffe

Counsel for the Defendants  
and Third Party: T.P. Matte

Place and Dates of Trial: Prince George, B.C.  
October 8 - 10, 1997 and  
January 6 - 9, 1998[1]

The plaintiff claims as against the defendants for trespass. The trespass occurred when the defendant, Cluculz Enterprises Ltd. was logging its own property which is adjacent to the property owned by the plaintiff. The defendants went onto the plaintiff's land and cut and removed timber belonging to the plaintiff. The defendants also cleared and graded certain areas of the plaintiff's land by removing top soil from the land and depositing it into a different location. Liability has been admitted by the defendants and this trial revolves around the question of what damages the plaintiff has suffered as a result of the trespass of the defendants.

THE PROPERTIES

[2] The property of the plaintiff consists of the southeast quarter section (160 acres) of District Lot 2433, Cariboo District. The trespass occurred on the east boundary of the property of the plaintiff which shares the west boundary of the property of the defendant, Cluculz Enterprises Ltd.

[3] The property owned by Cluculz Enterprises Ltd. was purchased in February, 1987 for the purpose of logging and later sale. The plaintiff purchased his property and another property in 1968 with the intention of potentially developing both. When the plaintiff purchased this property in 1968, he paid about \$35,000 for it. By the time of the trespass in 1987, the B.C. Assessment Authority valuation for his property was \$66,000. The other property was subsequently developed by the plaintiff but the 1976 application of the plaintiff to develop this property was turned down by the regulatory authorities.

[4] The area where the two properties are located is known as the Glenview Area. This area is in the north part of Prince George: north of East Austin Road and east of Highway No. 97. In a March 14, 1988 appraisal, the area in 1987 was described as follows:

The area comprises of a number of subdivisions and a variety of development. The subject property is located in the northeast corner of the neighbourhood and would be the next logical property to be developed when demand increases. Services to the area are a sanitary sewer, municipal water, paved roads, natural gas, electricity, telephone and cablevision. An elementary school is located in the area and a secondary school is within 2 kilometres (1.5 miles) of the neighbourhood. A sub-regional shopping centre is located near the neighbourhood.

In the same appraisal, the topography of the property was described as follows:

Topography of the property is quite varied with four level benches at the periphery and the core of the property being low lying and forming part of a natural drainage channel, including beaver dams. The soil base is silty sand and is subject to erosion.

The site is well-treed with some selective logging having been carried out. The quantity and quality of trees vary as to the species. A number of mature trees are on the property and the whole property had a park-like setting.

Both properties had two distinct zonings. The majority of the property of the plaintiff is zoned AFO-1 and the intent of that zoning is to:

... designate and encourage the conservation and management of the forest and wild lands ... recognizing they may have potential for conversion to residential or other urban development ...

Two "small benches" along the south part of the plaintiff's property were zoned URS-2B. The "intent" of that zoning was to:

... accommodate the demand for average-site urban residential development at low densities for one-family dwelling or mobile home use under the same conditions and subject to the same principles as prescribed for the URS-1 Districts, except that the URS-2 Districts are intended more specifically to accommodate the currently prevailing average-density, fully-serviced urban residential subdivision development pattern throughout the City.

#### THE TRESPASS

[5] The trespass occurred during the months of May and June, 1987. It was the intent of the defendants to clear-cut log their own property, sell the logs and then sell their property. Prior to logging, the defendants prepared their own property for the logging which would be undertaken.

[6] A sister of the defendant, James Martin, has a Forestry Technician Degree or Diploma from the College of New Caledonia. She was asked by Mr. Martin to mark out the boundary between the two properties and she did so using orange ribbons to mark trees about every 20 to 50 feet along what she perceived to be the boundary line. She was not a qualified surveyor.

[7] At the time the trees were marked by Mr. Martin's sister, it appears that there were already two other lines marked by ribbon, one with orange ribbon and one with blue ribbon. While a "cut line" was created on the east side of the defendant's property, no such cut line was created on the west side of the defendant's property.

[8] Mr. Martin's father supervised the first day of cutting

but Mr. Martin supervised the remainder of the cutting. At the time of the trespass, Mr. Martin had been working as a logging foreman for about 17 years and was then employed as the Logging Foreman of the third party, a company owned by his father and by his uncle. I find, at the time of the trespass, that he could be described as a "well qualified logging foreman".

[9] Once the logging of his property and a portion of the plaintiff's property was concluded, the timber was trucked to Netherlands Overseas Mills. All of the logging produced 3,000.21 cubic metres of timber for which the defendants received \$105,884.06. The cost of logging was \$33,843.17 and the cost of hauling the timber to Netherlands was \$8,720.29.

[10] After the plaintiff became aware of the trespass, there were discussions between the plaintiff and Mr. Martin regarding the trespass, the extent to which the plaintiff wished his lands returned to their original state, and the restitution expected from the defendants. Those discussions and subsequent discussions did not lead to a settlement of these matters.

[11] In March, 1988, the plaintiff arranged for an appraisal of his property by Jorgensen Appraisals Ltd. This appraisal assessed the value prior to and after the logging. In 1993, the plaintiff obtained an evaluation of the tree species removed as well as the cost of the "Recommended Replacement Planting" prepared by his consultant, Phillip Tattersfield. On November 6, 1996, S.B.S. Forestry Inc. prepared a further report for the plaintiff setting out their assessment of the net merchantable timber which had been removed from the plaintiff's property. Almost ten years after the trespass, the plaintiff seeks to be recompensed for the damage done by the defendants when they logged part of his property without his consent.

#### WHEN SHOULD DAMAGES BE ASSESSED

[12] The first issue raised by the pleadings is the date when the damages of the plaintiff should be assessed. The defendant relies on the following decisions in its submission that the date should be the date of the trespass: *Jens and Jens v. Mannix Co. Ltd.* [1986] 5 W.W.R. 563 (B.C.C.A.); *Taylor v. King* (1993), 82 B.C.L.R. (2d) 108 (B.C.C.A.). The rationale for this "ordinary rule" was set out by Proudfoot J.A. in the Taylor decision:  
When fixing the measure of damages for loss of property, the fundamental principle is restitutio in integrum. What is attempted to be achieved is to place the injured party in the same position as before the tortious conduct which caused the loss. (See *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 (H.L.), at p.39.) (at p.121 of the Taylor decision)

[13] On the other hand, the plaintiff urges that damages be assessed as at March 7, 1995, being the date when the plaintiff logged and then sold other trees on his property. Counsel for the plaintiff says that this is the best evidence as to when the plaintiff would actually have logged his own property and that he should be allowed to have damages set as at that time. The price for the timber he sold in 1995 was \$140 per tonne as opposed to the \$42 per tonne obtained by the defendants in 1987. The price of \$140 per tonne appears to be towards the highest price available for similar timber between the time of the trespass and the date of trial. Alternatively, counsel for the plaintiff submits that, if the damages for the timber taken in 1987 are not to be assessed in accordance as at 1995, the damages should be set at the average price for similar timber over the time between the date of the trespass and the time of trial. That average is suggested to be \$80 per tonne.

[14] The complications surrounding the submission by counsel for the plaintiff illustrate why courts have traditionally held that the date to assess damages is the date of the trespass. Firstly, the fundamental principle surrounding the measure of damages is restitutio in integrum. It is difficult to reconcile that principle with a date for the assessment of damages which is more than a short time after the date of trespass. Secondly, the evidence given by the plaintiff was that he had no intention of ever clear-cut logging this particular portion of his property. Accordingly, the proceeds in 1995 from selective logging of a different portion of his property can hardly be taken as evidence of what his intention was with regard to this portion of his property. Thirdly, the

mix of species on the other portion of the land appears to be substantially different from the mix of species on the land which was subject to the trespass. The price obtained in 1995 for the timber from the other part of the property cannot be equated to what would have been obtained by the plaintiff if he had taken the opportunity of logging the trespass site in 1995 on a clear-cut basis. Lastly, the alternative argument raised by counsel for the plaintiff suggests that the court can arbitrarily set an average price. This assumes a finding which cannot be made: that the plaintiff would have logged this portion of his property either selectively or by clear-cut. This also assumes that the court can arbitrarily set an average price on the assumption that restoration should have taken place sometime during a ten year period.

[15] Without holding that the court can never set a date other than the date of trespass as the date when damages should be assessed, a consideration of the factors noted above leads me to conclude that it is appropriate in this case to set the date for assessment of damages at June 1, 1987.

#### EXTENT OF THE TRESPASS

[16] In his March 14, 1988 appraisal of the value of the property as at June 1, 1987, Mr. Jorgensen of Jorgensen Appraisals Ltd. estimates the trespass as being approximately 10 hectares. In the Report of Industrial Forestry Service Ltd. (R.W. Parolin, P. Eng.), the area is estimated to be approximately .45 hectares. An October 1, 1993 survey of the trespass area by Kilbride Surveys found the area of the trespass to actually be 1.00 hectares. After reviewing all of the information available relating to the area of the trespass, I find that the assessment by Kilbride Surveys most accurately assesses the area of trespass and, accordingly, I find that the area of trespass was 1.00 hectares.

#### DAMAGES: RESTORATION OR DIMINUTION OF VALUE

[17] Proudfoot J.A. in the Taylor v. King decision, supra, and Justice Halvorson in the Sinkewicz v. Schmidt [1994] 4 W.W. R. 569 (Sask. Q.B.) both cite the following observations in McGregor on Damages, 15th Edition (1988) at pp.865-66: The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land.

[18] In coming to the conclusion in the Sinkewicz decision that the plaintiffs would only be compensated for the reduced value of their property and not for the cost of restoring their property to its pre-trespass state, Halvorson J. reviewed a number of factors. In that case, the plaintiffs had purchased acreage with the intention of building a home but after seven years had not done so. The defendant municipality removed the trees believing that they were on adjacent property owned by it. The issue was whether the defendant should pay \$3,400 damages for the reduced value of the property or \$60,000 being the cost of restoring the property to its original state.

[19] In dealing with the "reasonableness" of the plaintiff's desire to restore the property to its original state, the court considered the following factors: (1) A finding that, although the plaintiffs had purchased the property with the possibility of developing a home, that intention had been "... relegated to a vague possibility ...". In this regard, the court said further that their desire to reinstate must be "... assessed in light of the fact the acreage was never used as a home and likely never will be ...". (2) Regarding the amenity of the property, it was "... little more than an isolated piece of relatively flat, Saskatchewan prairie". There was no evidence of aesthetic qualities, utilities were not close by, obtaining adequate water might be expensive and there was: "... nothing which makes this acreage unique". (3) It was possible for the plaintiffs to receive compensation of \$3,400 and combine that sum with the selling price of the property without the trees to "... acquire a treed acreage similar to their's before it was

bulldozed". (4) As a "... very significant factor", there was a wide "... disparity in costs of the two measures of damage" and concluded:

In weighing the advantages to the plaintiffs of restoring the property against the disproportionate cost to the municipality of paying for this restoration rather than paying for the reduced value, there is clear imbalance against the municipality". (at p.578)

and, (5) It was "... inconceivable the funds [being the lowest estimate of \$60,000 to restore the trees] would be utilized for remedial purposes. No reasonable person would expend \$60,000 planting trees on this parcel".

[20] After reviewing all of the circumstances in the case at hand, I find that the position taken by the plaintiff that the defendant should have restored his property to the pre-trespass position is "unreasonable" as that term is used when dealing with the question of the appropriate measure of damages:

(a) On October 22, 1993, Phillip Tattersfield on behalf of the plaintiff estimated that it would cost \$56,355 to replace trees on the plaintiff's property. It is also critical to note that Mr. Tattersfield estimated that 84 trees were taken whereas later estimates of the trees lost are considerably higher. The plaintiff estimated the removal of 314 trees. The estimate of SBS Forestry Inc. was 253 trees. Accordingly, the estimate of Mr. Tattersfield of \$56,355 would increase to somewhere between \$170,000 and \$210,000 if a more accurate assessment of the number of trees removed was used. In a March 14, 1988 appraisal, Mr. Jorgensen assesses the reduction in the value of the land as being \$8,850. It is clear that there is a disproportionate difference between \$210,000 and \$8,850. There is also a disproportionate difference between \$210,000 and the B.C. Assessment Authority valuation of the property of \$66,800 representing a valuation of all 160 acres as opposed to the trespass area of about 2« acres. No reasonable person would spend between \$170,000 and \$210,000 to replace the trees that were removed. At the same time, the cost of replacement is out of line with the assessed value of all 160 acres of the property and with the reduction in the value of the property as a result of the logging.

(b) Even Mr. Tattersfield concludes that the replacement of coniferous trees varying in height from 80 feet to 100 feet and deciduous trees having an average height of between 40 and 60 feet would "... even if available, would pose major problems in transportation, installation, and establishment ...". Under cross-examination, Mr. Tattersfield had to admit that "Replacement would be impossible". At trial, the plaintiff indicated that replacement trees should have been helicoptered into the site and that "I don't care what it costs." The plaintiff is totally unrealistic in his expectations of what might have been done in order to replace the trees removed.

(c) In the circumstances, Mr. Tattersfield can only recommend the re-planting of trees "... readily available at a size which can be easily transported and installed without excessive cost". A "... re-planting to achieve eventual replacement of trees removed ... " is what he recommends.

(d) While the desire to eventually develop this part of the property was expressed by the plaintiff, the only evidence before the court was that, almost 30 years after the purchase of the property, no part of the property has been developed by the plaintiff and the plaintiff has only sold a small portion of his property (including a portion of the trespassed property) for development by another. The plaintiff is 84. His intention to develop the property himself or to build a home on that portion of the property which was included within or was close to the trespass area has now been relegated to a "vague possibility". Nothing has been done by the plaintiff to proceed with what he said were his intentions in the 9« year period since the trespass. In the circumstances, it is not likely that the plaintiff will ever develop the property or build a home on that portion of the property within or close to the trespass area.

(e) While it is clear that this property was somewhat typical of many properties north of Prince George, it is clear that this property was uniquely positioned to be the next property to be developed. Utilities and roads were brought to the property and an elementary school had already been built across from the property. Accordingly, there was a uniqueness to the property which distinguished it from many properties in the Prince George area. Therefore, it would not be possible for the plaintiff to replace this property with another comparable

property. However, that uniqueness is not sufficient to lead me to conclude that it was reasonable or even possible in the circumstances to require the defendant to restore the property of the plaintiff to its original state prior to the trespass.

[21] It is clearly the case in British Columbia that the defendant can only be called upon to do that which is "reasonable" in the circumstances and not that which reflects the "express wishes" of a plaintiff: *Dykhuizen v. Saanich (District)* (1990), 63 D.L.R. (4th) 211 (B.C.C.A.); *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (B.C.C.A.); and *Prince Rupert (City) v. Pederson*, [1995] 1 W.W.R. 421 (B.C.C.A.). Accordingly, the express wishes of the plaintiff will not be acceded to as restoration is not reasonable.

WHAT DIMINUTION OF VALUE OF THE PLAINTIFF'S PROPERTY WAS OCCASIONED BY THE TRESPASS

[22] The plaintiff purchased the property for \$35,000 in 1968. The B.C. Assessment Authority evaluation for 1987 was \$66,000. In his appraisal for the plaintiff, Mr. Jorgensen appraised the property before the logging at \$76,400 as at June 1, 1987. Mr. Jorgensen is a very experienced and well respected appraiser in the Prince George area. He based his evaluation of the property (with trees) on the basis of three comparable sales. I am satisfied that his assessment of all 160 acres of the property as being worth \$76,400 as at June 1, 1987 is correct and I find that that was the value of the plaintiff's property prior to the trespass.

[23] In dealing with the diminution of value, Mr. Jorgensen was only able to find one property that he found to be "comparable". His appraisal of what the plaintiff's property was worth after the logging takes into account a 45% decrease in value between the market value before logging and the market value after logging of this other property. Under cross-examination, Mr. Jorgensen admitted that he had spoken to neither the vendor nor the purchaser of the comparable property and that he had strictly relied on M.L.S. figures. While he admitted that the sale might be "abhorrent", he did indicate that this one sale did indicate to him "some attitude" as to market reaction to such logging.

[24] In assessing the reduction of value at \$8,850, Mr. Jorgensen unfortunately grossly over-estimates the area that was logged as being 10.12 hectares when we now know that the actual logged area was 1 hectare (2.47 acres). If he had used the correct amount of land actually logged, his estimate of \$8,850 would become approximately \$885. Taking into account the paucity of information available to Mr. Jorgensen and the errors contained within his appraisal, I am satisfied that a diminution of value of only \$885 is not sufficient evaluation of the loss to the plaintiff. This amount is not sufficient to compensate the plaintiff for the damages suffered by him as a result of the wrongful trespass of the defendants. Before quantifying those damages, the plaintiff should also be compensated for the value of the trees which were removed from his property.

VALUE OF TREES REMOVED

[25] There is considerable variation in the estimates and opinions about what species, size and number of trees were removed wrongfully by the defendants. Industrial Forest Service Ltd. came to the conclusion that there were 45 cubic metres of merchantable timber removed based on their assumption that .45 hectares had been logged and that there was an average of 100 cubic metres of merchantable timber per hectare on these properties. SBS Forestry Inc. estimated 226 cubic metres of timber removed based on their count and estimate of 253 stumps. The plaintiff states that he and his wife did a physical count and found 314 stumps as a result of the logging of the defendants.

[26] The plaintiff called Messrs. Stauble and Nickerson of SBS Forestry Inc. to describe the methods whereby they arrived at their estimate of 226 cubic metres of timber. Counsel for the defendants filed as an exhibit the December 3, 1997 letter from D.R. Estey Engineering Ltd. drawing to the attention of the court certain inaccuracies they perceived to be present in the SBS report. Despite extensive cross-examination of Messrs. Stauble and Nickerson and after taking into account the criticisms contained in the December 3, 1997 letter of D.R. Estey Engineering Ltd., I am satisfied and therefore find that the November 6, 1996 report of SBS Forestry Inc. most

accurately represents the volume of trees lost as a result of the trespass of the defendants.

[27] The physical count undertaken by them, the fact that they ignored stumps that they could not clearly find to be within the boundaries of the trespass, the fact that they excluded selective logging outside the boundaries of the trespass even though there was some evidence before the court that these trees had also been logged by the defendants, the fact that the measurements they undertook appear to coincide with the boundaries of trees not logged by the defendants, the fact that they used means of measurement which are usually accurate within 1 to 4%, and the fact that their boundaries of trespass were in accordance with the actual survey of the trespass area done by Kilbride Surveys in 1993 lead me to find that their assessment was accurate. Accordingly, I find that the volume of trees removed represented 226 cubic metres of timber.

[28] I am also satisfied that their method of assessing the species was accurate. Based on Mr. Nickerson's experience and the methods used by him, I am satisfied that his conclusions as to the species that were present are accurate. After observing the mix of the species of trees remaining on the plaintiff's property and after physically examining each of the stumps for bark, he came to the conclusions outlined in his report. While there may well have been fewer spruce trees in the trespass area than what was estimated by SBS Forestry Inc., I am satisfied that no attempt was made by Mr. Nickerson to over-estimate spruce. As well, any uncertainty in this regard should be resolved in favour of the plaintiff rather than the trespasser. The results obtained by SBS roughly coincided with the observations of Mr. Tattersfield who made a physical count of species and sizes of a "typical adjacent section ... of the remaining forested area ... ". The 2,000 square metre area surveyed by Mr. Tattersfield produced a percentage mix of species roughly equivalent to that which was found by SBS. Accordingly, I find that the mix of species found by SBS represents the mix of species of the timber improperly logged by the defendants.

VALUE OF 226 CUBIC METRES OF TIMBER REMOVED (AS AT JUNE 1, 1987)

[29] The best gauge of the value of the timber removed from the plaintiff's property was the price obtained by the defendants for the timber removed from the two properties. The defendants were very experienced in the market and there was nothing before the court to suggest that they did not obtain the best possible price for the timber which was logged. A total of 3,000.21 cubic metres of timber were delivered by the defendants to Netherlands. That volume resulted in \$105,884.06 being paid for the timber. The total cost of logging and transporting was \$42,563.46. Taking into account the revenue and the costs, the net proceeds available from all of the logs delivered to Netherlands was \$63,320.60 or \$21.09 per cubic metre of timber. Assuming as I do that the volume and species mix of the timber on the plaintiff's property was exactly the same as that which was on the defendant's property, 226 cubic metres of timber removed from the plaintiff's property would have provided a net value of \$4,766.82. Taking into account all the evidence presented to the court, I find that the net value of the timber removed from the plaintiff's property was \$4,766.82 as at June 1, 1987. This amount is equal to 226 cubic metres of timber at \$21.09 per cubic metre. Accordingly, the plaintiff is entitled to that sum as the commercial value of the timber taken from his property.

COST OF CLEAN UP ON THE PROPERTY

[30] No effort was made by the plaintiff to push resulting stumps and logging debris into a pile in order that this debris could be burnt. A later offer was made by the defendants to go onto the property to clean it up but this was refused as the plaintiff wanted an "independent company" to undertake the clean up. The defendant, James Martin, estimated that it would cost about \$3,000 to clean up the property by having a D8 Cat push the stumps and debris into a pile which could then be burned. It appears that this cost would be the same whether that had been done in 1987 or whether it is done now. Accordingly, the sum of \$3,000 for this clean up is awarded.

GENERAL DAMAGES

[31] In assessing the damages available to the plaintiff and having concluded that it would not be reasonable to require the defendants to restore the property to its pre-trespass state,

it is necessary to review the damages ordinarily available for loss of opportunity, for reasonable restoration, and for loss of amenities.

#### DAMAGES FOR LOSS OF OPPORTUNITY

[32] It is clear that the court can award damages for loss of opportunity if the range of choices regarding the future use of land has been diminished as a result of the trespass of the defendant: *Bawa and Bawa v. Noton and Noton*, [1996] B.C.J. No. 567 (B.C.C.A.) and *Philip v. Smith*, [1996] B.C.J. No. 1863 (B.C.C.A.). In those decisions, damages were provided for the deprivation of "... range of choices regarding the future use of land", for the instability of remaining trees (*Bawa* decision) and for slope failure because of the trespass.

[33] There was no evidence before the court to suggest that the stability of the remaining trees on the property of the plaintiff has been diminished as a result of the loss of support as a result of the activities of the defendants. One would expect that, after almost 10 years, any wind loss or damage because of loss of stability would have been evident.

[34] However there is evidence of slope failure. I find that there has been significant erosion on what was referred to in the evidence as the "gully" as a result of the activities of the plaintiff and that this has caused some reduction of the range of choices available to the plaintiff regarding the use of his property. While some of the damaged land has been sold to a developer, I am satisfied that the range of choices available regarding the future use of the remaining land have been diminished as a result of the trespass of the defendant. While it is not clear if the plaintiff would ever have developed the remainder of the property or would have built a family home on the property as was suggested by him, it is the case that the possibility of future use for those purposes has been diminished. While it is difficult to assess these damages, I set the sum of \$10,000 as the plaintiff's loss in this regard. This amount takes into account the diminished value of land being sold for development or being developed by the plaintiff and the lesser value attached to that land as a result of slope failure and diminished desirability of the land for development.

#### COST OF REASONABLE RESTORATION

[35] In his 1993 Report, Mr. Tattersfield recommended a re-planting of 10 to 13 foot trees at a cost of \$20,700 in order that 84 of the trees removed could be replaced. While I doubt that \$20,700 would have been sufficient to allow the re-planting in 1993 or in 1987 of 84 trees as suggested by Mr. Tattersfield, I find that the plaintiff has shown on a balance of probabilities that at least \$20,700 was required to implement the re-planting program recommended by Mr. Tattersfield. I also find that this re-planting of 84 trees was reasonable in the circumstances. Even though the assessment of cost was made by Mr. Tattersfield some six years after the trespass, the plaintiff has shown on a balance of probabilities that at least this cost would have been incurred in 1987 if the recommended re-planting had been done by the plaintiff. The planting of 84 10 to 13 foot trees would have allowed the return of some of the aesthetic qualities of trees sought by the plaintiff. At the same time, the growth of 10 to 13 foot trees would allow an eventual return to what was originally on the plaintiff's property. While not all of the trees would have been returned, the return of 84 trees would have been a reasonable restoration. Accordingly, the plaintiff is entitled to \$20,700.

#### DAMAGES FOR LOSS OF AMENITIES

[36] Since the decision in *Dykhuisen*, supra, it is clear that damages are not limited to the diminution in value of land and the value of the timber removed:

In the case of trees used for the purpose of public or private enjoyment, damage for their deliberate destruction is not limited to the resulting diminution in value of the land, or the value of the wood as lumber or firewood, or the value which might be awarded in respect of them as compensation on an expropriation. The damage in such cases may extend to the cost of restoration or restitution, within reasonable bounds, together with compensation for loss of amenity to the extent that complete restoration cannot reasonably be affected. (*Taylor J.A.* at p.215)

Proudfoot J.A. in the Kates decision described these damages as follows:

... in recognition of the loss of use and enjoyment that the ... [plaintiff] would suffer as a result of less than perfect reinstatement. (at p.334)

[37] There is little evidence before the court in order to allow a quantification of the loss of amenities suffered by the plaintiff. It is clear that the plaintiff has very strongly held views about the advantages of a treed landscape and the advantages of trees being left on subdivided lots where residential lots are being marketed. It is obviously the case that even land that is not being held for subdivision purposes is usually more pleasing when the trees are left in place. Certainly more pleasing than where property has been clear-cut and the debris of logging has been left on the property.

[38] Both the plaintiff and the defendant sold land to a developer who subsequently developed the southern portion of both properties as a residential-mobile home subdivision. There was no evidence before the court to suggest that the price paid for the property bought from the defendant was any less than the price paid by the developer for the land of the plaintiff. The developer had been called as a witness for the plaintiff but he subsequently did not testify. For the land that he sold to the developer, the evidence before the court was that the plaintiff received \$210,000 plus future payments of \$1,750 per lot once each lot was sold. While he was adamant that he would have obtained \$60,000 to \$70,000 more for the property if there had not been a trespass, the failure to have the developer testify in this regard has cast considerable doubt on the assertions of the plaintiff.

[39] A number of photographs were entered into evidence indicating the development which has now been undertaken. That evidence allows me to conclude that there has been a substantial removal of trees by the developer from lots within the subdivision which were previously owned by the plaintiff but which were not part of the trespass area. Accordingly, the present developer does not appear to totally share the views of the plaintiff as to the value of leaving a substantial number of trees on residential subdivision lots. Additionally, a review of those lots within the subdivision which were formerly part of the land of the plaintiff does not lead to the conclusion that the lots improperly logged by the defendant have sold for any less than the lots not logged by the defendant. While how the purchaser of the land from the plaintiff has developed the property is not indicative of how the plaintiff might have developed the property or how the plaintiff might wish to develop the remainder of the property, it does indicate that an attractive residential mobile home development can be undertaken without the number of trees favoured by the plaintiff. Having concluded that, however, it is clear that the plaintiff should still be compensated for the loss of amenity to the lands which remain to the extent that complete restoration cannot reasonably be affected.

[40] While it is difficult to assess the appropriate amount of damages which should be available to the plaintiff for this loss, I set the sum of \$10,000 in the circumstances. This award of damages takes into account the aesthetic values, shade, noise screen, and other screening qualities lost when the trees were improperly removed by the defendants.

#### EXEMPLARY OR PUNITIVE DAMAGES

[41] It is clear that exemplary or punitive damages for trespass can be awarded by the court. The following passage from Halsbury's, 4th Edition, Vol.45, para.1403 is cited with approval as a statement of the law on damages for trespass in *Webb v. Attewell* (1993) 88 B.C.L.R. (2d) 1 (B.C.C.A.) at p.7: Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

Can it be said in this case that the conduct of the defendants was "... harsh, vindictive, reprehensible or malicious in nature ... [and with an] element of wilfulness or recklessness

... (per MacFarlane J.A. at p.22 in the Webb decision).

[42] Hollinrake J.A. in *Shewish et al v. MacMillan Bloedel et al* (1990) 48 B.C.L.R. (2d) 290 (B.C.C.A.) adopts with approval this passage of what the trial judge said on the issue of the measure of damages:

An examination of the authorities shows that the method of assessing damages for trespass depends on the nature of the trespass. In cases where the trespass is accidental or inadvertent, damages are assessed on the basis of the value of the thing taken less the cost of harvesting it from the land. In *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25, the plaintiff and the defendant were both under the misapprehension that the minerals below the surface of the plaintiff's property belonged to a third party and that the defendant was authorized to mine them. When their mutual error was discovered, the plaintiff claimed damages from the defendant. The value of the coal "in situ" was used as the measure of damages. This award reflects a deduction for the defendant's labour costs. This method of assessing the damages was used because the removal was done "perfectly innocently and ignorantly, without any negligence."

In cases where the defendant was not perfectly innocent and was found to be a wilful trespasser, the defendants were found not to be entitled to any allowance for their costs. See: *Union Band of Canada v. Rideau Lumber Co.* (1902), 4 O.L.R. 721, *Wasson v. California Standard Co.* (1964), 47 D.L.R. (2d) 71, and *Blazicevic v. B.C. Lumber Industries Limited* (1955), 15 W.W.R. 317.

The in-between area which does not involve inadvertence or deliberate trespass is the case of a trespass resulting from negligence or indifference on the part of the defendant. The case of *Last Chance Mining Co. v. American Boy Mining Co.* (1904), 2 *Martin's Mining Cases* 150, is authority for the proposition that the measure of damages for negligent trespass is the same as that for wilful trespass. See also the dissenting judgment of Irving J.A. in *Chew Lumber Co. v. Howe Sound Lumber Co.* (1913), 4 W.W.R. 1308. In the *Last Chance Mining Co.* case the defendant failed to survey the area before beginning its mining operation, even though it was aware that the plaintiff's property was adjacent to its own. The court held that it was negligent in failing to conduct a survey and awarded damages for the value of the coal taken from the property without any deduction for mining costs. (at pp.292-293 in the B.C.C.A. decision)

[43] The objectives for awarding exemplary or punitive damages are set out by the following "general rule" expressed in *Paragon Properties Ltd. v. Magna Investments Ltd.*, [1972] 3 W.W.R. 107 (Alta. C.A.):

The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction. (at p.117)

If punitive damages are only nominal then the "cost" of trespass is merely a licensing fee which must be paid by a trespasser. If punitive damages are warranted, they should be set in an amount to show:  
... that, in British Columbia, trespass does not pay.

(per Southin J.A. in Prince Rupert (City) v. Pederson, supra, at p.428)

[44] A review of the evidence in this case leads me to the conclusion that the trespass of the defendant was deliberate or grossly negligent. Mr. Martin's sister was not a trained surveyor. Mr. Martin was very experienced in logging property and following logging boundary markers to do so. At trial, Mr. Martin admitted that he knew that the boundary was a straight north - south line, that his logging activities were not being conducted on a straight line basis, that he saw more than one ribboned line when he began to log the property, that he knew that there would be confusion because of there being more than one line, that he did not know which line of ribbons marked the boundary, that he did not know who had put the other ribbons there, that he had been advised by his sister before the logging that she could not find the northern boundary marker although she could find the southern boundary marker, that he saw that his sister had used the same coloured ribbons to mark the property boundary that had been used by someone else to mark another boundary, that he had not stopped logging when he reached the point where the two boundaries of orange ribbons diverged, that he could not be sure that he was following the line that his sister laid out, that he and his father had "supervised" the logging, that his sister was not present when the logging was undertaken in order that she could clarify any confusion arising as a result of there being three lines of ribbons in the area, that his sister had cut a line to mark the east side of the property but had not cut a line in the bushes to mark the west side of his property, that the presence of a second orange line made logging "more confusing", that his logging followed a road that was present on the plaintiff's property although he confirmed that he did not know whether the road followed the lot line or not, that his sister did not paint any trees as is custom in the industry, that it was clear to him during the logging that the lines set out by the orange markers were not running parallel and that he could not tell the north or westerly direction when he was logging as he merely followed the line that had been laid out. Under cross-examination, the following questions were asked and answers given:

Q You knew there was a major problem in the making?  
A We should have done a better job but we didn't think there was a problem.  
Q If you had taken a few minutes to think about it you would have seen the problem?  
A Yes.  
Q You didn't think it through did you?  
A No.

In his cross-examination, Mr. Martin stated that he had not spoken to the plaintiff before he began the logging as "He was out of town" and that he had not phoned the plaintiff "part way through logging". When his inconsistent statements on discovery were drawn to his attention, he admitted that he had reached the plaintiff by telephone during the logging and before its completion. On discovery, the following questions were asked and answers given:

421 Q You telephoned Mr. Thee or telephoned his residence during the period of May and June, 1987, didn't you?  
A I did.  
422 Q That was with a view to offering to purchase the timber rights to his property, isn't that correct? Isn't that why you phoned him because you wanted on behalf of Cluculz Enterprises Ltd. to buy the timber rights to his land, the plaintiff's land?  
A When was this time?  
423 Q May or June of 1987 while the logging operation was going on.  
A Yes.  
424 Q That is why you phoned him, isn't it?  
A Yes.  
425 Q Isn't it true that you suspected you might be on part of his property during the course of that logging operation?  
A Yes.  
426 Q That was because you weren't sure about these ribbons, were you?  
A Yes.

427 Q You were also concerned about the fact that your sister hadn't found the second corner post, isn't that true?  
A Yes.

[45] I find that the defendants were negligent in proceeding to log after they had failed to take proper steps to make sure they would only be logging their own property. After starting the logging, it was readily apparent to the defendants that they were logging on the property of the plaintiff. In blatant disregard of that fact, the logging continued. Mr. Martin admitted on discovery and at trial that he phoned the plaintiff prior to the completion of the logging. I find that the only reasonable explanation as to why that call was made was that the defendants were fully aware that they were logging the property of the plaintiff and that they were attempting to buy the timber rights after they were aware of the trespass. Despite being unsuccessful in their attempt to buy the timber rights, the logging continued.

[46] I find that the conduct of the defendants was of such a "harsh, vindictive, reprehensible or malicious" nature as to require the awarding of punitive damages. Even if it can be said that the defendants were only initially negligent, I find that their actions quickly became deliberate.

[47] After reviewing the decisions dealing with negligent trespass and whether such trespass automatically attracted the same damages that deliberate trespass would, Hollinrake J.A. in the *Shewish*, supra, decision concluded:  
What the law has looked for in assessing damages in cases such as this is what I see as the degree of culpability, or want of bona fides, in the trespasser. I do not think it can be said the law has developed to the point that it sees negligent trespass in cases such as this as necessarily attracting the severer rule for the assessment of damages. There are degrees of negligence and I think the degree of negligence in terms of culpability and bona fides must be looked at in determining the rule to be applied to the assessment of damages in cases such as this. (at p.297)

I am satisfied that the degree of negligence present here is such that the damages usually awarded for deliberate trespass are appropriate. Even if I am incorrect in that finding, I find that the trespass was quickly converted from negligent trespass to deliberate trespass. There is no evidence before the court as to when the telephone conversation was made in relation to the logging undertaken by the defendant. However, I am of the view that any such uncertainty should be resolved in favour of the innocent land owner. Accordingly, there should be damages of the type which would be awarded for a deliberate trespass.

[48] In assessing the level of punitive damages in the *Shewish* decision, Hollinrake J.A. adopts the following measure of damages as set out in *Union Bank v. Rideau Lumber Co. (1902)*, 4 O.L.R. 721 (C.A.):  
The value of the timber after it was severed and manufactured, as far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it. Such value may be conveniently ascertained by taking into account the amount for which defendants afterwards sold the articles, less the cost of carriage, and excluding the cost of severing and manufacturing. (at p.299 of the *Shewish* decision)

While a number of subsequent decisions have assessed punitive damages on the basis of the value of the trees removed, it is clear that the amount of punitive damages must be reasonable in the circumstances: *Prince Rupert (City) v. Pederson*, supra.

[49] To establish the level of punitive damages in accordance with the *Shewish* decision, it is necessary to subtract the cost of the logging (\$33,843.17) although not the cost of transportation (\$8,720.29) from the \$105,884.06 obtained by the defendants for the timber sold by them in order to establish the new "net" per cubic metre profit obtained. After subtracting only the trucking and hauling costs from the \$105,884.06, a price of \$32.36 per cubic metre is established. Accordingly, the 226 cubic metres of timber removed from the

land of the plaintiff multiplied by \$32.36 produces punitive damages in the amount of \$7,314.55.

[50] This amount is not sufficient to express the condemnation which is required in this case. Owners of all property in British Columbia should be in a position to assume that their neighbours will not trespass. I have found that the defendants were grossly negligent in establishing the boundaries for their logging. Additionally, they showed a blatant disregard for the rights of the plaintiff when they proceeded with the logging after knowing that they were trespassing. In the circumstances and in order that the punitive damages are more than a mere licence fee, I am satisfied that the punitive damages which are reasonable in the circumstances are \$15,000.

#### MITIGATION

[51] It is clear that there is an obligation on the plaintiff to mitigate his damages as the court will not compensate a plaintiff for damages which arise, not from the acts of a defendant, but from the failure of a plaintiff to take reasonable steps to reduce his losses. The following passage from McGregor on Damages, 15th Edition, para. 275 is quoted with approval by Southin J.A. in the Webb, supra, decision: The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

The extent of the damage resulting from a wrongful act, whether tort or breach of contract, can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss. (at pp.11-12)

[52] In this case, I find that the plaintiff has not acted reasonably to reduce his loss. In 1993, Mr. Tattersfield recommended a re-planting of 10 to 13 foot trees at a cost of \$20,700 in order that some shade and separation from the adjacent property could be obtained. In his testimony, the plaintiff indicated that he wanted the property cleaned up within a one week period and, as to the possibility that he should replace the trees, he stated emphatically: "Why should we do it when we are not responsible for it [the trespass]". His suggestion at trial that the trees should have been planted by helicopter is unreasonable. Even his advisor, Mr. Tattersfield, says that the replacement suggested by the plaintiff would be "impossible."

[53] The planting of 10 to 13 foot trees in 1988 would have diminished his damages for loss of amenity and loss of opportunity. In the circumstances, I find that the failure of the plaintiff to mitigate those damages has resulted in those damages being higher than what they would have been if he had acted reasonably. It is these damages which are affected by the refusal of the plaintiff to act reasonably by either doing the remedial work himself or allowing the defendants to do it. In the circumstances, the damages of the plaintiff will be reduced by \$10,000 in order to reflect what would have been a diminished loss of amenities and loss of opportunity if the plaintiff had acted reasonably.

#### SUMMARY

[54] The plaintiff is awarded damages totaling \$53,466.82. Counsel will be at liberty to speak to the question of costs in due course.

"G.D. Burnyeat, J."

Mr. Justice Burnyeat

