

1/84

No.46 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

10 NELLIE EVELYN CRICHLAW (Widow)
 GEORGE CARLTON CRICHLAW
 DONOVAN RUSSEL CRICHLAW
 VERONICA AUGUSTA CRICHLAW
 GEORGINA ELIZABETH CRICHLAW
 PHILMORE HAMEL CRICHLAW
 EILEEN ESTHER FORRESTER (Nee Crichlow) Appellants

- and -

THE ATTORNEY GENERAL OF TRINIDAD
 AND TOBAGO Respondent

CASE FOR THE APPELLANTS

RECORD

20 1. This is an appeal from a unanimous judgment
 of the Court of Appeal of Trinidad and Tobago
 (Corbin J.A., Kelsick, J.A. Cross J.A.) dated
 21st May 1981 dismissing the Appellants' Cross-
 appeal and allowing with costs the Respondent's
 appeal from a judgment of Braithwaite, J. in
 the High Court of Justice of Trinidad and Tobago
 dated 1st December 1978, whereby, the learned
 trial judge assessed mesne profits for trespass
 to an area of land of twenty perches ("the said
 land") by reference to the commercial rental
 value of a larger plot of land of 2 roods
 22 perches (the "larger parcel of land"), the
 larger parcel of land being owned in fee simple
 by the Appellants and encompassing "the said
 land", in circumstances where the trespass to
 the "said land" denied the Appellants the
 commercial value of the "larger parcel of land".

30

P.84

P.65

2. The main issues in this appeal are :

RECORD

(a) Whether the trial judge was correct in assessing mesne profits for the "said land" by reference to the commercial value of the "larger plot of land".

(b) The principles applicable to the assessment of the commercial value of the "larger plot of land".

(c) The duration for which mesne profits are correctly payable.

P.89 L.8
P.88 L.19
P.89 L.20

3. (a) The Court of Appeal of Trinidad and Tobago held that the learned judge in assessing mesne profits for the "said land" by reference to the commercial value of the "larger parcel of land" erred in law and that the learned judge's method of assessment had no logical or evidential basis. The Court of Appeal rejected the Appellants' cross-appeal for assessment of mesne profits from 1952 rather than 1958 as assessed by the learned trial judge and held no mesne profits were payable for any period after 1972.

10
20

(b) It is the respectful submission of the Appellants that despite a certain lack of clarity in Braithwaite J's judgment, the principles of assessment applied were logical, based on evidence and correct in law; the quantification of damages, however, and the duration for which mesne profits were held to be due was incorrect, and the judgment should be varied accordingly.

P.1

4. As the learned trial judge remarked in his judgment, the case had had a long, curious and extraordinary history, and in order to clarify the issues on this appeal it is necessary to summarise the salient matters and facts.

30

(a) On 16th June 1966 the Appellants commenced an action in the High Court against Texaco (Trinidad) Limited, (Texaco) and by a Statement of Claim dated 4th November 1966 claimed

(i) Possession of the "said land"

(ii) Mesne profits

(iii) Costs for (sic) further and other relief.

40

P.4 L.18
P.39-42

The "said land" is more particularly described in paragraph 1 of the Statement of Claim, and is stated to be a portion of a "larger parcel of land". Paragraphs 2 to 6 set out the Appellants' full proof of title to the fee simple in the "larger parcel of land". Paragraph 8 alleges that in 1952

Shell Leasehold Distributing Company Limited
(after various name changes now known as
"Texaco") wrongfully took possession of the
"said land" and still keeps possession thereof.

RECORD

(b) By a defence delivered on 14th March 1967
Texaco

(i) Admitted possession of the "said land"

(ii) Denied possession of the remainder of
the larger parcel of land.

10 (c) By an affidavit sworn on 29th April 1967
by Bernard Martinez on behalf of the Respondent,
the Respondent on behalf of the Crown sought
leave to be joined as a Defendant in the action,
and stated :

P.8

20 (i) By a Deed of Lease dated 22nd day of
September the Crown leased to "Texaco"
(formerly Shell Leaseholding) an area of
land of 1 acre 3 roods and 34 perches for
a period of 25 years. The area leased
included the "said land".

P.9 L.5

(ii) The Crown was in possession of the
said land by "Texaco", and was the owner
of the fee simple expectant on the reversion
of the Lease.

P.9 L.15

30 (d) By an order of Bastide J, dated 5th June
1967 and entered on 31st October 1967, the
Respondent was joined as second defendant to the
action. Consequently the Appellants applied for,
and were granted leave to deliver a re-amended
Statement of Claim which was so delivered to the
Respondent on 11th November 1971. By the prayer
to the Re-Amended Statement of Claim, the
Appellants claimed

P.10

P.17

(i) Possession of the "said land"

(ii) Mesne profits from the year 1952 to
date of delivery of possession

(iii) Costs

(iv) Further and other relief.

40 (e) By reason of the Respondent's failure to
enter a defence to the Appellants' Re-Amended
Statement of Claim, the Appellants by notice of
motion dated 10th July 1972 applied for an
order for judgment against the Respondent. The
application was heard by Rees J. on 19th May and

P.26

RECORD
P.30

the following consent order was made:

(i) The Appellants to recover possession of the "said land", and,

(ii) Mesne profits to be assessed by a judge in chambers from the year 1958 until delivery up of possession.

P.57 (f) Subsequent to a summons issued by the Appellants,
and dated 4th April 1975, McMillan J. on 21st
P.58 April 1975 ordered the ascertainment of the damages
for which final judgment was to be signed against 10
the Appellant.

P.67 5. (a) On 1st December 1978 Braithwaite, J. gave
reserved judgment on the assessment of mesne profits
for the wrongful occupation of the "said land".
In the respectful submission of the Appellants,
despite some confusion in the judgment, the learned
judge applied the correct principles in assessing
damage. The learned judge assessed mesne profits
for the "said land" by reference to the commercial
value of the "larger parcel of land", because the 20
Respondent's trespass to the "said land" denied the
Appellants the commercial value of the "larger
P.67 L.14 parcel of land". The learned judge stated :

"The scope of the assessment of mesne profits that is to say from the year 1958 to the date of judgment, is only in respect of the 20 perches described above (the said land) and occupied by the defendants but also in respect of a further 2 roods and 22 perches (the larger plot of land) from which the plaintiff was debarred by reason of that occupation." 30

"As I see it, what happened was that (see deed 9950/52) the Government of Trinidad and Tobago leased to what has now become Texaco (Trinidad) Limited a parcel of land which it had no right in law so to lease. As a result the Plaintiffs have been unable to utilise not only the 20 perches (the said land) which figures so much in this judgment, but also another parcel estimated by the Plaintiffs at 18,500 sq.ft. (approximately the area of the "larger parcel of land" minus the "said land") which were rendered inaccessible by reason of the unlawful occupation of the 20 perches aforesaid (the said land)". 40

(b) The learned judge correctly accepted the unrefuted evidence given by George Crichlow that:

"18,500 sq.ft. (approximately the area of the "larger parcel of land" minus the "said land") would have in these (those) days (referring to 1952) brought about 31,000 (\$1,000) per month. Rent per commercial properties have increased about 12½% per annum since then."

Phrases bracketed and underlined are the Appellants own interjections.

10

(c) Having correctly identified the principles of assessment of mesne profits, the learned judge wrongly quantified the mesne profits in that :

20

(i) No allowance was made for the yearly 12½% increase in commercial rents accepted by the learned judge in evidence. Consequently mesne profits were wrongly assessed at \$12,000 in 1958 and for each successive year during the period of the Respondent's wrongful occupation.

P.70 L.5

P.70 L.20

(ii) The learned judge wrongfully held that the profitability of the Appellants' pig farming business on the "larger parcel of land", which was destroyed by the Respondent's wrongful occupation of the "said land", could not be used to determine the commercial value of the "larger parcel of land" for the purpose of determining mesne profits.

P.69 L.37

30

6. Subsequent to the Respondent's notice of appeal dated 12th January 1979, and the Appellants' notice of cross appeal dated 19th January 1979, the Court of Appeal of Trinidad and Tobago heard the appeal and gave judgment on 21st May 1979.

P.79

P.83

P.84

(a) In allowing the Respondent's appeal the Court of Appeal held that :

40

(i) in assessing mesne profits for the "said land" by reference to the commercial value of the "larger plot of land", the trial judge erred in law and the judgment disclosed no logical or evidential basis for the assessment made.

P.89 L.8

(ii) The correct principle for ascertaining mesne profits was to determine the profits from farming the "larger parcel of land"

RECORD

(ascertained to be \$9,000): Since the wrongly occupied "said land" was approximately one-fifth of the area of the "larger parcel of land", the profits referable to the "said land" were held to be \$1,800 per annum.

P.30

(iii) By the consent order of Rees J. of 19th May 1972 mesne profits were to be assessed only up to the date of possession. The court held that possession of the "said land" would have been delivered up to the

10

P.89 L.20

Appellants shortly after the order of Rees J. made on 19th May 1972 and that in assessing mesne profits up to the date of judgment in 1978, the trial judge erred in law.

(iv) Mesne profits were thus assessed at \$1,800 per year for 14½ years.

P.86 L.8

(b) In rejecting the Appellants' cross-appeal that it was a mere clerical error that caused Rees J. on 19th May 1972 to order the assessment of mesne profits from 1958 and not 1952 (the date of the wrongful occupation of the said land), the Court held that there was no reason and no jurisdiction to go behind the order of Rees J.

20

7. The Appellants respectfully submit that :

(i) The principles applied by the learned trial judge for assessing mesne profits of the "said land" are correct in law. Mesne profits are assessed on the basis of the reasonable market rental of the wrongfully occupied land for the duration of the wrongful occupation. The law was correctly stated by Somervell L.J. in Strand Electric and Engineering Co.Ltd. v. Brisford Entertainments Ltd. (1952) 2 QB 246 at 252

30

"In other words the defendant must pay what the Plaintiff would have obtained if the defendant had lawfully been in possession."

40

(ii) In circumstances where (as is the present case) the wrongful occupation of the "said land"

(a) destroys the profitable enterprise of pig farming undertaken of the "larger parcel of land", or

(b) Renders the remaining portion of the "larger parcel of land" commercially valueless such that no commercial rent could be obtained for the remaining portion

10 the reasonable market rental for the "said land" must be at minimum equivalent to the profit of the pig farming venture undertaken on "the larger parcel of land", or, the commercial rental value of "the larger parcel of land", whichever is the greater. Since, the Appellants, would not have let "the said land" to the Respondent unless the rental received was at minimum the equivalent of the greater of either of the above, mesne profits must be assessed by reference to the commercial value of the "larger plot of land" for only thus will "the defendant....pay what the Plaintiff would have obtained if the defendant had lawfully been in possession" - (per Somervell L.J.).

20

(iii) The learned trial judge thus applied the correct legal principles in assessing mesne profits for the "said land" by reference to the "larger parcel of land".

8. In the alternative the Appellants respectfully submit that the reasoning of the trial judge was wrong, and mesne profits for the wrongful occupation of the "said land" cannot be assessed by reference to the commercial value of "larger parcel of land" the decision of the learned trial judge to award compensation for the loss of the commercial value of the "larger parcel of land" is justified as an award for loss consequential to the Respondent's wrongful occupation of "the said land". The Appellants respectfully submit that Barclays Bank v. Jones /1955/ J. PL. 822 and Whitwam v. Westminster Brymbo Coal and Coke Co. /1896/ 2 Ch 538 support the learned judge's decision.

30

40

9. Moreover although the Court of Appeal correctly stated that mesne profits could only be awarded up to the date of possession, the Court wrongly assumed and without any evidence that the Appellants obtained possession of the "said land" shortly after the order of Rees J. on 19th May 1972. On the evidence the Respondent, by Texaco, were still in possession of the "said land" until 1976 or 1977, and possession was never delivered up to the Appellants. The Court of Appeal thus erred by

50

P.88 L.19

P.81 L.21

RECORD

refusing to assess mesne profits for the period 1972 onwards.

10. It is further respectfully submitted that the Court of Appeal in failing to amend the slip in the order of Rees J. of 10th May 1972, thereby dismissing the Appellants' cross-appeal for mesne profits to be assessed from 1952, either failed to consider or in the alternative wrongly exercised the Court of Appeals powers under order 59 rule 11 Rules of the Supreme Court, in particular Order 59 rule (1)(3)(4) and (6). 10

11. On 7th December 1981 the Court of Appeal of Trinidad and Tobago made an order granting the Appellants final leave to appeal to the Judicial Committee of the Privy Council. The Appellants respectfully submit that the appeal should be allowed with costs and the order of Braithwaite J. varied for the following among other

R E A S O N S

- (1) BECAUSE the principles applied by the learned trial judge in assessing mesne profits were correct. 20
- (2) BECAUSE in any event the conclusion reached by the learned trial judge fairly reflected the issues in the case and the evidence before him.
- (3) BECAUSE the Court of Appeal erred in reducing the damages awarded by the learned trial judge and in so doing misunderstood the correct basis for awarding mesne profits. 30
- (4) BECAUSE mesne profits for the period 1952 to 1958 should be assessed.

FENTON RAMSAHOYE

JONATHAN HARVIE

No. 46 of 1982

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD
AND TOBAGO

B E T W E E N :

NELLIE EVELYN CRICHLOW (WIDOW)
GEORGE CARLTON CRICHLOW
DONOVAN RUSSEL CRICHLOW
VERONICA AUGUSTA CRICHLOW
GEORGINA ELIZABETH CRICHLOW
PHILMORE HAMEL CRICHLOW
EILEEN ESTHER FORRESTER
(NEE CRICHLOW)

Appellants

- and -

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO

Respondent

CASE FOR THE APPELLANTS

INGLEDEW BROWN BENNISON & GARRETT,
International House,
26 Creechurch Lane,
London, EC3A 5AL