1982 May 20

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

COSTAS MICHAEL TTANTIS,
Appellant-Defendant,

v.

GEORGHIOS NICOLA HADJIMICHAEL AND ANOTHER,
Respondents-Plaintiffs.

Immovable property—Right of irrigation through channel—Section 16 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Does not divest the owner of the land adjoining a channel of his proprietary right.

Trespass to land—Laying cement pipes, without the consent of the owners, at a depth of one foot, and at a distance of between 5 to 8 feet from the boundary of respondents' property—For the purpose of facilitating the conveyance of water from one property of the appellant to another—Trial Court rightly found that there was trespass and made mandatory injunction directing removal of the pipes.

Damages—Trespass to land—Owners failing to prove the damage which they had suffered as a result of the trespass—Entitled only to nominal damages—Award of £150 set aside—Substituted by amount of £5 as nominal damages.

Civil Procedure—Practice—Evidence—Trespass to land through laying of cement pipes—Failure of parties to produce accurate evidence as to position of the pipes by applying for a local inquiry to be carried out by the Department of Lands and Surveys and by asking for plans to be prepared showing the exact position of the pipes —Once such course was not adopted trial Court rightly had to act on the evidence which was before it.

Costs—Appeal—Partly successful appeal—Appellant awarded one-half of his costs on appeal.

The respondents were owners of two adjacent pieces of land.

On or about the year 1960, the appellant laid inside their land near the boundary of their property cement pipes, one to two feet under the surface of the land, for the purpose of facilitating the conveyance of water from one plot of the appellant to another plot cultivated by himself.

In an action by the respondents the trial Court, after hearing the evidence called by the parties, it found that the pipes were laid without their consent and despite their objections and they were situated at a distance of between 5 to 8 feet from the boundary of the property; that thereafter the appellant persistently refused to remove same; and that the respondents proved the commission by the appellant of the tort of trespass. On the basis of these findings the trial Court made a mandatory injunction directing the appellant to remove the said pipes from the property of the respondents and awarded to them a sum of £150.—as damages resulting from such trespass. In dealing with the question of damages the trial Judge said* that the evidence on the subject of damages was, to a degree, obscure.

Upon appeal by the defendant it was contended:

(a) That even if it was found that the pipes were within the boundary of the property of the respondents, they were on a space of land which was not more than 5 feet from the edge of the irrigation channel and, therefore, under section 16** of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, that area was part of the irrigation channel and the property of the Irrigation Division and in consequence the respondents had no cause of action.

(b) That the amount of damages awarded was arbitrary and not based on any reliable evidence.

(c) That the findings of the trial Court were wrong in the light of the evidence adduced.

Held, (1) that section 16 of Cap. 224 does not divest the owner of the land adjoining a channel of his proprietary rights but only restricts him from cultivating or planting "a space of land *not more* than five feet from either edge of such channel

* The relevant passage is quoted at pp. 308–9 *post*.

** Section 16 is quoted at p. 306 *post*.

..... as may be required for the cleaning, repairing or protecting thereof"; that the ownership remains with the owner of the servient tenement and the only thing with which his land is burdened is an extension of an existing right of irrigation over a channel, watercourse, aqueduct, etc. Which right can only be exercised by persons entitled to the right of irrigation if necessary, for the purposes set out in the law; that in the present case the appellants are not claiming the exercise of any such right in connection with the irrigation channel but for the purpose of maintaining the pipes which they had unlawfully placed on the land of the respondents; that even if the pipes had been laid to convey water through the irrigation channel, which is not the case, again the action of the appellants would have amounted to an interference with the property of the respondents by exercising an easement different in nature from the right to conduct water across the land of another through a defined water course; accordingly contention (a) should fail.

(2) That in the light of the evidence which was before the trial Court, the respondents failed to prove the damage which they had suffered as a result of such trespass and in consequence they could have been entitled only to nominal damages in the circumstances of the case; that, therefore, the part of the judgment concerning damages will be set aside and be substituted for an amount of £5.—as nominal damages.

(3) That once the parties have failed to follow the course of producing more accurate evidence as to the position of the pipes, by applying for a local inquiry to be carried out by the Department of Lands and Surveys, and by asking for plans to be prepared showing the exact position of the pipes the trial Court rightly had to act on the evidence which was before it and decide the case on the evidence; that, therefore, the appeal on the issue of trespass must fail and that the trial Court rightly, having found that there was trespass, made the mandatory injunction complained of.

(4) That as the appellant has succeeded in part of his appeal he will be awarded one-half of his costs on appeal.

Appeal partly allowed.

Cases referred to:

HjiNicolaou v. *Gavriel and Another* (1955) 1 C.L.R. 421 at p. 428.

Appeal.

Appeal by defendant against the judgment of the District Court of Larnaca (Pikis, P.D.C.) dated the 7th June, 1980, (Action No. 348/79) whereby he was ordered to remove certain water pipes which had been installed by him through the immovable property of plaintiffs and was, also, adjudged to pay £150 damages for trespass.

C. Varda (Mrs.), for the appellant,

E. Erotocritou, for the respondent.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment of the District Court of Larnaca whereby the appellant-defendant was ordered to remove water pipes which had been installed by him through the immovable property of the respondents-plaintiffs at Afentika locality in the vicinity of Kiti village, Larnaca district, and was also adjudged to pay £150.—damages for trespass.

Respondent 1 and his mother, respondent 2, were the owners of two adjacent plots of land at Afentika locality. It was the case for respondents that on or about the year 1960, the appellant, without their consent and despite their protestations, laid inside their land near the boundary of their property cement pipes, one to two feet under the surface of the land, for the purpose of facilitating the conveyance of water from one plot of the appellant to another plot cultivated by himself.

The trial Court after hearing six witnesses called by plaintiffs and four by the defendant, made the following findings of fact:

> "Having given close consideration to the evidence before me, I make the following findings: cement pipes were laid by the defendant inside the property of the plaintiffs in the year 1961 without the consent of plaintiff 2 and the predecessor-in-title of plaintiff 1 and despite their protestations. They were buried under the surface at a depth of about one foot for the purpose of facilitating the conveyance of water from one property of the defendant to another and make possible thereby the irrigation of a vegetable plantation of defendant and his partner. The water

sprang from a private source and the pipes were in no way connected with the village irrigation system. Water was conveyed through these pipes only in the year 1961 and on no occasion thereafter. The defendant persistently and stubbornly refused to remove the pipes despite the fact that they have fallen into destitute and rusted in parts and notwithstanding the protestations of the plaintiffs and those of the father of plaintiff 1. The pipes are placed at a distance of between 5 to 8 feet from the boundary of the property of the plaintiffs, viz. the water channel. I accept that the water channel now separating the property of the plaintiff from adjoining properties was constructed on the basis and along the course of the pre-existing earthen channel that marked, like the present channel, the boundaries of the property".

With such findings in mind, the learned trial Judge reached the conclusion that the appellant had trespassed on the land of the respondents by placing such pipes over their property. His finding in this respect, reads as follows:

"In this case the defendant, without the consent of the owners, and despite their objections, encroached upon their land and laid cement pipes therein situate at a distance of between 5 to 8 feet from the boundary of the property. Thereafter the defendant persistently refused and still refuses to remove the same; hence the plaintiffs proved the commission by the defendant of the tort of trespass and what remains to consider are the remedies to which they are entitled to".

On the basis of such findings he made a mandatory injunction directing the appellant to remove the said pipes from the property of the respondents and awarded a sum of £150.—as damages resulting from such trespass.

The appellant appealed against both findings of the trial Court. In arguing the case for the appellant, counsel appearing for him submitted that the findings of the trial Court were wrong in the light of the evidence adduced and also that the amount of damages awarded was arbitrary and not based on any reliable evidence. He further contended that even if it was found that the pipes were within the boundary of the property of the

respondents, they were on a space of land which was not more than 5 feet from the edge of the irrigation channel and, therefore, under section 16 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, that area was part of the irrigation channel and the property of the Irrigation Division and in consequence the respondents had no cause of action.

Section 16 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, reads as follows:

> "Wherever any person acquires or possesses any right of irrigation, such right shall extend to a right in or over any artificial or other channel, watercourse, aqueduct, well or chain of wells formed for the distribution of the water to which such right relates. And a space of not more than five feet from either edge of such channel, watercourse, aqueduct, well or chain of wells as may be required for the cleaning, repairing or protection thereof shall be deemed to form part thereof, and such space shall not be interfered with, cultivated or planted by the owner of the land on either side of the channel, watercourse, aqueduct, well or chain of wells".

The wording of this section is quite clear and cannot be construed in the way suggested by counsel for appellants in that a space of 5 feet from either side of the channel does not belong to the owner of the land and that it is part of the channel and belongs to the Irrigation Division who owns the channel. Section 16 does not divest the owner of the land adjoining a channel of his proprietary right but only restricts him from cultivating or planting "a space of land of *not more* than five feet from either edge of such channel ... as may be required for the cleaning, repairing or protection thereof". The ownership remains with the owner of the servient tenement and the only thing with which his land is burdened is an extension of an existing right of irrigation over a channel, watercourse, aqueduct, etc. which right can only be exercised by persons entitled to the right of irrigation if necessary, for the purposes set out in the law. In the present case the appellants are not claiming the exercise of any such right in connection with the irrigation channel but for the purpose of maintaining the pipes which they had unlawfully placed on the land of the respondents. Even if the pipes had been laid to convey water

through the irrigation channel, which is not the case, again the action of the appellants would have amounted to an interference with the property of the respondents by exercising an easement different in nature from the right to conduct water across the land of another through a defined water course.

In *Eleni Gr. HjiNicolaou* v. *Mariccou Antoni Gavriel and Another* (1965) 1 C.L.R. 421, in dealing with the case where pipes had been placed over a channel through which water was conducted through the land of the plaintiffs, this Court had this to say (per Zekia, P.), at p. 428:

> "We are of the opinion that the right of laying pipes through the land of another person for the purpose of conducting water to one's own land, if authorised to do so, would constitute a kind of easement different in nature from the right to conduct water across the land of another man through a defined water course. Laying pipes entails entering the property of the other for installing the pipes, digging and burying the same and keeping them on the land on a permanent basis. This is altogether a different matter than allowing a dominant land owner to take the water along a channel or furrow existing on a servient land. As far as the English authorities, which we have been able to trace, go, they indicate that trifling alterations in the course of a water course or little variations in the enjoyment of the easement, being neither more onerous to the servient land nor more restrictive of the rights of the servient land owner, are permitted and only such alterations or variations do not destroy the right of easement (see *Hall* v. *Swift* [1838] 132 English Reports, 834.

Although section 11 of the Immovable Property (Tenure etc.) Law, governs the recognition and creation of the easement some of the English cases might be usefully referred to. In *Wood* v. *Waud* [1849] 3 Ex. 777 it was stated that the right to artificial water courses as against the party creating them surely must depend upon the character of the water course, whether it is of a permanent or temporary nature and upon the circumstances under which it was created.

Replacement of a channel by pipes is not a trifling altera-

tion in the course of a channel and it may be that the servient land owner's rights are more restricted in not having the benefit of the channel for his own land and not having the right to change the water course as provided under section 15(1) of the Immovable Property Law, Cap. 224".

The learned trial Judge in the present case, very rightly, came to the conclusion that section 16 of Cap. 224 conferred no defence and was of no avail to the appellant.

It has been contended by counsel for the appellant that the finding of the trial Court that there was a trespass was against the weight of evidence. As we have already mentioned, the trial Court made its findings on the evidence before it.

We would like to observe that if any of the parties wished to produce more accurate evidence as to the position of the pipes, that party had the right, either at the stage of summons for directions or at any later stage, to apply for a local inquiry to be carried out by the Department of Lands and Surveys and ask for plans to be prepared showing the exact position of the pipes. In the present case, such course was not followed. The object of a local inquiry is to assist the Court to have before it a clear picture of the locus in each case. It is regrettable that counsel in the present case did not take advantage of such course which might have shortened the proceedings and which might have solved the dispute at the spot when such a local inquiry was taking place. Once such course was not adopted, the Court rightly had to act on the evidence which was before it and decide the case on such evidence. Therefore, we find that this appeal on the issue of trespass fails and that the Court rightly, having found that there was trespass, made the mandatory injunction complained of.

Coming now to the question of damages, we agree with counsel that the evidence on this point was obscure. As a matter of fact, the trial Court in dealing with this matter found that the evidence was obscure to a degree. The learned trial Judge had this to say in this respect:

"The evidence for the plaintiffs on the subject of damages is, to a degree, obscure; although we have evidence as to

the profit plaintiffs were likely to reap from the cultivation of the land in question there is no clear evidence as to the precise extent of the area affected. The income plaintiffs derived from the cultivation of their land is not in itself conclusive evidence of its rental value but only evidence that tends to illuminate the issue. It is manifest the income derived was the combined product of plaintiffs' toil and the cultivation of the land".

In the light of the evidence which was before the trial Court, we find that the respondents failed to prove the damage which they had suffered as a result of such trespass and in consequence they could have been entitled only to nominal damages in the circumstances of the case. We, therefore, set aside the part of the judgment concerning damages and we substitute same for an amount of £5.—as nominal damages.

Coming to the question of costs, we shall not disturb the order for costs made by the trial Court.

Regarding the costs of the appeal, as the appellant has succeeded in part of his appeal, we award to the appellant one-half of his costs on appeal.

Appeal partly allowed. Order for costs as above.