

In the Privy Council.

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ON APPEAL
 FROM THE SUPREME COURT OF FIJI.

BETWEEN

THE ATTORNEY-GENERAL OF FIJI (Defendant) *Appellant*

AND

J. P. BAYLY LIMITED (Plaintiff) *Respondent.*

Case for the Respondent.

RÉCORD.

10 1. This is an Appeal by the Defendant by leave of the Supreme Court of Fiji, against a Judgment and Decree of the Supreme Court of Fiji dated the 19th September, 1946, whereby it was declared—

p. 30, l. 27.
 pp. 25-29.
 p. 29, l. 9.

20 “ That all deposits of gravel forming part of the land described in Certificate of Title Vol. 9/05 Folio 226 are upon the land of the Plaintiff subject to this, that the ownership of the Plaintiff of so much of the land as forms the bed of the Wainadoi Creek is subject to the right of the Crown to exercise such rights over the bed of the said Creek which are necessary to ensure that the said Creek shall be perpetually open to the public for the purposes for which streams may be enjoyed.”

2. The main question for determination in this Appeal is whether the Crown, acting by the Public Works Department of the Colony of Fiji, is entitled, by virtue of Section 5 of the Rivers and Streams Ordinance (Cap. 123 (No. 2 of 1880) of the Colony of Fiji) to take gravel and other materials from the course of a stream without payment of compensation therefor.

p. 31, l. 30.

30 3. Section 5 of the said Ordinance is in the following terms : “ All streams, whether forming the affluents and feeders of rivers and streams or themselves flowing directly to the sea with the bed thereof belong to the Crown to be perpetually open to the public for all purposes for which streams may be enjoyed.”

4. The history of this matter is as follows : At all material times the Respondent have been the owners and occupiers of a large freehold estate known as “ Wainadoi,” comprising some 2,900 acres situate on the main

pp. 1-2,
 p. 4, l. 39.

CASE FOR THE RESPONDENT

road from Suva to Navua and about 17 miles from Suva. A substantial part of the flat land in the estate comprises a rubber plantation. There flows through the estate mainly through the rubber plantation in a very winding course a shallow stream or creek known as the Wainadoi Creek (hereinafter called "the stream") which, in most places except in times of heavy rain, is easy to cross in a vehicle or even by walking and which normally varies in width from 10 ft. to 15 ft.

5. Prior to the 1939 war the Public Works Department of the Government of Fiji took gravel both from the stream and, as the Respondent has contended, from its land adjoining the stream, for road widening; but in small quantities only. This was done in the exercise of rights vested in the Director of Public Works Department under the Roads Ordinance (Cap. 208 (No. 6 of 1914) of the Colony of Fiji) to enter upon land adjacent or near to any public road and take and carry away materials for the making and repairing of any public road, reasonable compensation being paid for the materials and for any damage done by the getting and carrying away of the materials, the amount of such compensation in default of agreement being decided by arbitration. 10

p. 7, l. 13.

6. During the war, however, the New Zealand Air Force, the American Forces and the Public Works Department all removed gravel in substantial quantities from the stream and from land adjoining the same, especially from and after 1943. The Respondent claimed compensation in writing and orally without success, the Director of the Public Works Department writing on the 1st February, 1944, as follows: "I am advised that the gravel so far removed by this Department has been taken from the bed of the stream, which, by virtue of Section 5 of the Rivers and Streams Ordinance, belongs to the Crown, and that the claim for compensation for gravel removed can not be entertained." 20

p. 2, l. 22.

p. 4, l. 22.

p. 1.

7. Accordingly, on the 17th March, 1944, the Respondent commenced proceedings against the Appellant, the Attorney-General of the Colony of Fiji, by delivering a Statement of Complaint wherein the Respondent, after setting forth its title, alleged that on its land adjacent to the stream and upon both sides of the stream and at various distances from it were large deposits of gravel; that the Director of Public Works had entered and taken gravel from parts of the Respondent's lands other than from the bed of the stream and that the Director had replied that by virtue of Section 5 of the said Rivers and Streams Ordinance all streams and the beds thereof belonged to the Crown, but said that those parts of the land from which the gravel had been removed did not form part of the bed of the stream; and claimed:— 30

p. 2, l. 6.

p. 2, l. 10.

p. 2, l. 22.

p. 2, l. 44.

(A) A Declaration that the said deposits of gravel were upon the land of the Respondent.

(B) A Declaration that the land from which the gravel had been removed did not form part of the bed of the stream.

(C) A Declaration that it was entitled to compensation under the said Roads Ordinance with consequential relief by way of enquiry as to the quantity of gravel removed, and payment of compensation and damages. 40

8. The Appellant delivered a Statement of Defence on the 26th April, 1944, admitting that there were large deposits of gravel in the bed of the stream but denying that any part of the gravel deposits in dispute in the action were on the land of the Respondent and alleging that all the deposits lay in the bed of the stream. He admitted the reply of the Director of Public Works Department set out in the Statement of Complaint and briefly referred to in paragraph 6 hereof, and set up for a further and affirmative defence that under Section 5 of the Rivers and Streams Ordinance all streams and beds thereof belonged to the Crown and that all gravel removed by the Director of Public Works was removed from the bed of the stream and none had been removed from the land of the Respondent.

9. The action came on for trial before His Honour Judge J. B. Thomson on the 12th August, 1946. On the 13th August, 1946, the Learned Judge viewed the locus with Counsel and on the 14th and 15th August evidence was called by both parties. There was no dispute between the parties as to the Respondent's title to the land on each bank of the stream and the main point in issue at this stage of the proceedings was whether (as the Respondent contended) the stream for the purpose of the Rivers and Streams Ordinance meant only the normal course of the stream and did not include the land over which the waters flowed in times of flood, and that the gravel in substance had been taken from outside the normal course of the stream ; or whether (as the Appellant contended) the stream comprised all the land over which the waters of the stream flowed at any time and that no gravel had been taken from outside the boundary of the stream when so defined.

10. Considerable evidence was called by the parties as to the precise places from which gravel had been taken. Counsel for the Respondent stated at the close of the hearing that the Respondent sought to vindicate its right, that it was not possible to assess damages and that all it wanted was a declaration of its rights and to that end nominal damages. He also argued in his reply on behalf of the Respondent at the close of the proceedings that there was nothing in Section 5 of the Rivers and Streams Ordinance enabling the Crown to remove property from the bed of the stream and that if they interfered with the freehold thereof they were responsible for damage.

11. Judgment was reserved but on the 21st August, 1946, the Registrar of the Supreme Court wrote to the parties stating that he had been directed by the Learned Judge to intimate that he would appreciate the benefit of argument on the following questions :—

(1) Does Section 5 of the Rivers and Streams Ordinance (or any other statutory provision outside the Roads Ordinance) give the Crown the right to remove portions of the bed of a stream *ex situ* for purposes not connected with the stream ?

(2) Has the Plaintiff (Respondent) any claim to compensation other than under the Roads Ordinance, and, if any, to what extent are his procedure for and time of setting up a claim governed by Section 22 of the said Ordinance ?

Pursuant to this request the matter was turtner argued on the 30th August, 1946.

p. 23, l. 28.

12. On the first question counsel for the Respondent argued, *inter alia*, that the Crown's rights were defined by Section 5, that it was not an absolute right, and that there was no right to take anything away from the bed of the stream. He admitted that the Crown could use the bed for the purposes of the river.

p. 24, l. 2.

13. No point in this Appeal arises on the second question raised by the Learned Judge. The Respondent admits that under the provisions of the Roads Ordinance the Crown are entitled to remove gravel from the bed of the river and the Appellant has admitted since the Judgment of the Learned Judge that the Respondent is entitled to compensation under Section 22 of the Roads Ordinance in respect of the matters complained of in the Statement of Complaint, subject only to the determination of this Appeal. 10

p. 25.

p. 27, l. 1.

p. 27, l. 4.

p. 27, l. 17.

p. 28, l. 5.

p. 28, l. 8.

p. 28, l. 14.

14. The Learned Judge delivered Judgment on the 19th September, 1946, and held that, having regard to the terms of the Roads Ordinance, the Respondent's claim for compensation and damages must fail, such claims being governed entirely by the Roads Ordinance, and equally that the Respondent's claim to a Declaration that he was entitled to recover compensation under the Roads Ordinance also failed. He held, however, that the Respondent was not precluded from asking for a Declaration as to the ownership of the land on which was the gravel which was taken by the Crown. He held that, in the absence of anything to the contrary, the bed of the stream clearly belonged to the Respondent, and then considered the effect of the provisions of the Rivers and Streams Ordinance. He held that there were two possible constructions which could be put on that Section, one, that all right, title and interest in the bed of the stream were vested in the Crown with the corollary that any right, title or interest in the owner of circumadjacent land would be completely and finally extinguished, and the other, that the Section can be read as vesting in the Crown only so much of the estate in the land constituting the bed of the stream as is necessary to ensure that the stream and its bed may be perpetually open to the public, but leaving so much of the estate as did not fall in that description in the owner of the freehold. The Learned Judge said : 20 30

p. 28, l. 28.

“ There is little room for doubt as to which of these two interpretations is to be preferred. The effect of either is to take away *pro tanto* a part of the property of the owner of the freehold, and when read with the Ordinance as a whole, to take it away without compensation. It is a well established principle of construction that ‘ such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms ’ 40
(Commissioner of Public Works (Cape Colony) v. Logan, 1903 A.C. 355, at p. 364) and it follows that where, as here, there are two equally available interpretations each of which takes something away without compensation that is to be adopted which takes away the less, that is to say, that which leaves to the owner of the freehold so much of his estate in the stream and its bed as it is not necessary to vest in the Crown for the assurance of public rights.”

The Learned Judge, therefore, made the Declaration set out in p. 29, l. 9.
Paragraph 1 hereof.

15. Having regard to the construction which the Learned Judge placed upon Section 5 of the Rivers and Streams Ordinance it became unnecessary for him to ascertain or determine the limits of the stream for the purpose of Section 5 or to determine from the evidence before him whether any gravel had been taken from without the limits of the stream as so determined by him.

16. It is submitted that :

10 (A) Having regard to Section 36 of the Supreme Court Ordinance which incorporated into the law of Fiji the Common Law, rules of Equity and Statutes of general application which were in force in England on 2nd January, 1875, the Respondent as riparian owner of both banks of the stream is, prima facie, entitled to the bed of the stream and all gravel and soil thereunder and the Learned Judge held the Respondent to be clearly so p. 28, l. 5.
entitled.

20 (B) Upon its true construction, Section 5 of the Rivers and Streams Ordinance did not transfer the bed of the stream and the soil thereunder to the Crown for all purposes, but only qua stream and solely for the purpose of maintaining the stream in its natural state and for preserving the right of the public to enjoy the stream for all purposes for which streams may be enjoyed, leaving the bed of the stream and the soil thereunder vested in the riparian owner for the time being. p. 31, l. 30.

(C) The Learned Judge's construction of Section 5 of the Rivers and Streams Ordinance is correct in law and is supported p. 28, l. 28.
by the authority to which he refers in his Judgment.

30 17. The Learned Judge without any argument from the parties dealt with the costs of the action by saying that the action was substantially one for compensation and on that the Respondent had failed and that the Appellant, therefore, must have the costs of the action generally, but that in regard to the proceedings consequent upon the Court's request for a further argument, each side would pay its own costs. It is respectfully submitted that the Learned Judge was wholly incorrect in saying that the action was substantially one for compensation. The action was one to determine the rights of the parties. The parties were fully aware of the fact that the quantum of compensation must be determined by arbitration in accordance with the provisions of the Roads Ordinance, and since the Judgment of the Learned Judge the Appellant has admitted as stated in paragraph 13 hereof that if the Judgment of the Learned Judge be affirmed the Respondent will be entitled to compensation in accordance with the provisions of the Roads Ordinance. p. 29, l. 19.
40 It is, therefore, respectfully submitted that there were no grounds upon which the Learned Judge was entitled to deprive the Respondent of its costs and to award costs to the Appellant, who had failed upon the only matter of substance in issue between the parties.

18. It is submitted that the Appellant's Appeal ought to be dismissed and that the Respondent ought to be awarded the costs of the proceedings before the Learned Judge for, among others, the following

REASONS

- (1) THE construction placed by the Learned Judge upon Section 5 of the Rivers and Streams Ordinance 1880 was correct in law.
- (2) THE Respondent was entitled to the Declaration made in its favour by the Learned Judge.
- (3) THE Learned Judge misdirected himself in holding 10 that the Respondent had failed in the substantial matter in the action and ought to have awarded costs to the Respondent.
- (4) THAT the Judgment of the Learned Judge be varied to the extent that the Appellant be ordered to pay the Respondent's costs of the proceedings in the Supreme Court of Fiji.
- (5) THAT save as last mentioned, the Judgment of the Learned Judge was right and ought to be affirmed.

GERALD R. UPJOHN.

GILBERT DARE.

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