JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44/05

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE G.SMITH, J.A. (Ag.)

BETWEEN	**ROBERT EVANS**	**1ST APPELLANT**
AND	**MARJORIE EVANS**	**2ND APPELLANT**
AND	**CABLE & WIRELESS JA. LTD.**	**RESPONDENT**

Paul Beswick and Terrence Ballantyne instructed by Ballantyne, Beswick and Co. for the Appellants.

Miss Maliaca Wong and Miss Lisa Russell instructed by Myers, Fletcher and Gordon for the Respondent.

29th, 30th, 31st January; 1st February and 5th December, 2008

HARRISON, J.A:

1. This appeal arises from a judgment delivered by Dukharan J., (as he then was) on the 28th February 2005 whereby he found that no actionable trespass had been committed by Cable & Wireless Jamaica Limited ("the respondent") upon lands of Mr. Robert Evans and Mrs. Marjorie Evans ("the appellants"). The learned judge held as follows:

> "I am of the view and so find that the running of telephone wires over the Claimants' premises does not constitute a trespass to their land. The Telephone Act and the All Island Telephone Licence were applicable when the lines were installed in 1996. This authorized the Defendant to install the wires. There was a service obligation which was imposed on

> it, based on the legislation under which such licences (sic) and the legislation under which such licences were issued gave the Defendant permission to erect and maintain telephone wires across the Claimants' land. The Defendant supplied a service which they were entitled to supply based on an application for service by the occupants to the land albeit that they are squatters."

2. Judgment was awarded in favour of the respondent with costs to be taxed if not agreed.

3. At the trial, trespass was apparently not an issue. What the respondent maintained is that it was justified. The question which therefore has to be determined, is whether section 11 of the Telephone Act impliedly permits the respondent to enter the appellants' land without their consent in order to provide services to unlawful occupiers.

The Facts

4. The appellants are the legal owners of land situate at Lot No.1 Aylsham Heights, Kingston 8, St. Andrew registered at Volume 1026 Folio 173 of the Register Book of Titles. In the month of January 2000 they discovered that telephone lines originating from Enman Avenue, Kingston 8 crossed the boundary of their property and terminated into five (5) squatter houses on their land.

5. On January 26, 2000, the appellants wrote to the respondent and requested that the drop wire be removed from their property. On the 8th August 2000, the respondent's service manager, Brian Chin wrote to the appellants and admitted that the service provided by the drop wire had been provided to the respondent's subscribers (five houses) since 1996. A further request was made by the appellants for the removal of

the drop wire but this was not done. On March 9, 2001 the appellants brought an action in the Supreme Court against the respondent for trespass to their land.

6. The Defence pleaded inter alia, that at all material times, the respondent was obliged to provide the squatters with services and that there was implied permission pursuant to sections 11 and 23 of the Telephone Act and Clauses 15 and 21 of the All Island Telephone Licence, 1988 to erect and maintain wires across the appellants' land in order to fulfil that obligation. It was also asserted that by section 11 of the Telephone Act it was not required to enquire into the legitimacy of the status of customers who request telephone services. The respondent further contended that entry onto the appellants' property without their consent was justified.

7. The respondent also contended that its obligation to provide services to anyone who requires it has been retained by the Telecommunications Act 2000 and that by virtue of its obligations as a Universal Service Provider it was not required to remove the lines unless there is a request from its customer for it to do so.

The Relevant Statutory Provisions

8. Before examining the several grounds of appeal, I think it is convenient at this stage to set out the relevant statutory provisions relating to telephone services.

9. Section 11 of the Telephone Act states as follows:

> "Every person having a residence or place of business within the area shall be entitled, on complying with the conditions stated in the licence, to require the licensee to supply him with a telephone at such residence or place of business, and to connect such telephone with the telephone exchange: and thereupon, and within one calendar month thereafter, the

> licensee shall supply such telephone, and shall, so long as such person shall continue to comply with the said conditions, maintain it continually in good working order, and in telephonic communication with the telephone exchange, and shall at all times when required forthwith connect such telephone with any other telephone in the area and similarly disconnect it when required".

10. Clause 21 of The All Island Telephone Licence, 1988 reads as follows:

> "21 – The Company may exercise such rights and shall observe such conditions relating to way-leaves, entry of private property and the construction of lines above or below ground, as the relevant laws may provide".

And Clause 23 (a) provides:

> "23(a) – Subject to the provisions of this Licence and of the Telephone Act and subject to the consent of any authority, company or person whose authority, is necessary under the Act, the Company may from time to time and at all times for the purposes of this Licence lay and maintain cables and erect and maintain poles, wires and mechanical appliances under, along, over or across any public street, lane, road or open space within the licensed area".

Applicable Legal Principles

11. The general presumption is that Parliament does not intend to take away private property rights unless the contrary is expressly indicated. Lord Bingham of Cornhill in **R v Secretary of State for the Environment Exp. Spath Holme** (2000) UKHL 301 said:

> "I have no doubt that clear and unambiguous words should be used if the citizen is to be deprived of his property without compensation and any reasonable doubt should be resolved in his favour".

12. What should the Court do in giving effect to the intention of Parliament? Lord Nicholls of Birkenhead sitting in the House of Lords said in **R v Secretary of State for the Environment Exp. Spath Holme** (2000) UKHL 301 at 322:

> "...the intention of Parliament is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman...Thus, when courts say that such – and – such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning".

13. Section 18 of the Constitution of Jamaica which clearly recognizes an individual's property rights as fundamental, states inter alia:

> "18 - (1) No property of any description shall be compulsorily taken possession of and no interest or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that:
>
> (a) prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and
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> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –
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> (i) establishing such interest or right (if any)
>
> (ii) determining the amount of such compensation (if any) to which he is entitled; and
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> (iii) enforcing his right to any such compensation.
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> 18 – (2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it

> provides for the taking of possession or acquisition of property –
>
> (f) as an incidence of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract."

The Grounds of Appeal and Submissions

Grounds 3(a) (b) (c) (d) (e) (f) (h) (i)

14. It is my view that these grounds of appeal can be conveniently dealt with together. Mr. Beswick submitted that the learned judge fell into error in accepting the interpretation of section 11 propounded by the respondent that the section had conveyed a right to the respondent to provide telephone service to the squatters without the consent of the registered owners of the land.

15. Mr. Beswick further contended that in general the following principles apply to the interpretation of all Acts of Parliament:

> i). That Parliament's intention in the first instance is to comply with the specific terms of as well as the spirit and intent of the fundamental rights and freedoms enshrined in the Constitution of Jamaica.
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> ii). That Parliament's intention in creating legislation is to protect and preserve any existing body of property rights unless a clear and convincing contrary intention is expressed.
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> iii). That even where Parliament intends to vary, modify, or remove extant property rights, such variation, modification, or removal is never intended to countermand or abrogate rights enshrined in the Constitution of Jamaica.
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> iv). That in the absence of express, clear, and unambiguous terms, an Act of Parliament is not to be taken to legitimize or render overt support to a nuisance and a deprivation of property rights (in this case the act of trespass by squatters).
>
> v). That in the absence of express, clear, and unambiguous terms, an Act of Parliament is not to be taken to licence a trespass to 3rd party property.

vi). That in interpreting an Act of Parliament, the preferred interpretation is the one which does no violence either to the Constitution or existing fundamental rights and freedoms.

vii). That accordingly any interpretation of an Act of Parliament which abrogates rights enshrined in the Constitution of Jamaica must be rejected as repugnant and inconsistent with the Constitution and the principles set out therein and the interpretation which serves both the purposes of the legislation as well as conforming to the express provisions as well as the intent of the fundamental rights and freedoms ought to be accepted.

16. In the circumstances, he submitted that it was improper for the Court to conclude that the Acts of Parliament were intended to and did in fact authorize a trespass on the appellants' land.

17. Mr. Beswick also submitted that the learned judge had erred in finding that the licences issued under the previously repealed Telephone Act had imposed a service obligation on the respondent to erect and maintain wires across the appellants' land without the consent of the appellants or compensation payable to them. He submitted that the "application for service" to which the learned judge refers in his holding, is an application which the Telephone Act intended to be made by a legitimate holder in possession of the land in respect of which the service application is made. He said that the judge's interpretation that the Telephone Act intended to convey rights to squatters and/or persons illegally in possession of land without authority is without foundation and flies in the face of established and accepted notions of legal permissibility and practice, and the notions of property rights.

18. Mr. Beswick further submitted that the learned judge had erred in construing section 21 of The All Island Telephone Licence, 1988, because it did not create any

additional authority for the respondent to commit acts of trespass on the appellants' land in order to further its commercial purpose.

19. In a slight concession on the part of Mr. Beswick, he argued that the appellants do not suggest that the respondent in responding to an application for service is bound to enquire into the applicant's interest in premises occupied by him or that it is automatically a trespass to enter land to provide service to an apparent lawful occupier who turns out to be a squatter. However, he submitted that when the respondent is put on notice that an occupier is a squatter and that the rightful owner does not consent to the entry on his land to provide service to the squatter, the action of the respondent in refusing to remove its drop wire and other apparatus installed for the purpose of providing the telephone service thereafter becomes a trespass.

20. Mr. Beswick also joined issue with the finding of the learned judge that he had wrongly assumed that when section 11 of the Act stated: "*Every person having a residence or place of business within an area shall be entitled....*" it recognized the right of a squatter to contract in relation to property which is not his own.

21. Miss Wong for the respondent, argued that by virtue of clauses 15 and 21 of the All Island Telephone Licence, 1988, the respondent was permitted to install necessary equipment with a view to fulfilling its obligation to provide telephone service. She referred to and relied on the cases of **Re Dudley Corporation** (1881) 8 QBD 86 and **Birkenhead Corporation** (1885) 15 QBD 572.

22. In **Re Dudley Corporation**, the Court of Appeal held that a statute which imposed a duty on local authorities to lay sewers "by necessary implication confers upon them that right of support which under ordinary circumstances is necessary." Cotton L.J. stated at page 95:

> "... think that the legislature, in requiring the local authority to make and maintain sewers, by necessary implication confers upon them that right of support which under ordinary circumstances is necessary. It is impossible to suppose that the duty to maintain the sewers was imposed without the local authority being able to prevent a landowner from rendering them useless."

23. In the **Birkenhead Corporation** case, the Court of Appeal considered the issue of right of way. The relevant legislation authorized the plaintiffs to make the sewer and imposed a duty to repair it, but did not give them any express right of access to it. The court held that a right of access to the sewer had not been expressly given by the local Act, but ought to be implied so far as was reasonably necessary for enabling the repair of the sewer to be done.

24. Miss Wong also submitted that if the approach taken by the courts in **Re Dudley Corporation** and in **Birkenhead Corporation** is to be followed, the respondent was entitled by law to erect telephone lines over the appellants' property (when it did so, in 1996) in order to provide the required service. The Telephone Act and the All Island Telephone Licence she said, impose a duty upon the respondent to supply telephone services and to maintain such services in good working order. She therefore submitted that by necessary implication the Act and the Licence conferred upon the respondent

the rights connected with the land which under ordinary circumstances are necessary to comply with the obligations.

Grounds 3(o), (r) (s) (t)

25. These grounds deal with constitutional issues and can also be dealt with together. The learned judge dealt with the issue of compulsory acquisition of property and said this:

> "The Claimants also rely on section 18 of the Constitution of Jamaica as it relates to the compulsory acquisition of property. I agree with Counsel for the Defendant that it would not be appropriate for this Court to make a finding on the constitutionality of the legislation without the Attorney General having an opportunity to respond to it".

26. Mr. Beswick submitted that the constitutionality of the licence was a point of law in issue between the parties, and the learned judge was duty bound to rule on this issue irrespective of the parties to the action. At paragraph 164 of his written submissions he said:

> "164. The action as filed was confined to the issue of the respondent's trespass on the appellants' land. The respondent filed an amended defence which raised the licences and permissions granted by the Government of Jamaica as a defence. To that defence, the appellants filed a Reply raising their constitutional rights under s. 18 of the Constitution of Jamaica as a bar to the respondent's defence. The issue of the appellants' constitutional rights and the applicability of such rights if any, was therefore squarely before the Court in this action, and the Court erred in failing to determine and rule on this question".

27. Miss Wong submitted orally in relation to the constitutional point that all the various Acts did was to give a licence in respect of the appellants' property which is

distinct from a right over the property. These statutes she said, which the respondent relied on, do not infringe section 18 of the Constitution since there is no acquisition of property. At paragraphs 25 and 26 of her written submissions she submitted as follows:

> "25. Therefore, the question of compulsory acquisition as enunciated in section 18(1) of the Constitution does not arise. Further, section 18 (2) (f) of the Constitution provides:
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> > 'Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property- (f) as an incidence of a lease, tenancy, **licence**, mortgage, charge, bill of sale, pledge or contract.' [emphasis added]
>
> 26. Thus, even if the licence amounts to some possessory right or interest within the meaning of section 18(1), the Constitution expressly states that the prohibition in section 18(1) does not affect a law providing for property to be possessed as an incident of a licence. In the present case, the permission which, we submit, was granted to the Defendant was granted as an incident of a licence. It therefore does not contravene section 18 of the Constitution".

The Discussion

28. On a literal reading of section 11 of the Act, it would suggest that the respondent has an obligation to provide service to "every person who has a residence" but one would have to determine whether this obligation is unconditional and conveys the right to provide a service to squatters without the consent of the registered proprietor or owner of land.

29. It appears to me that if section 11 were to be construed so as to convey on the respondent an automatic right to enter the appellants' land without their consent this

would seem to derogate from the spirit and purpose of section 18 of the Constitution of Jamaica. Section 18 clearly recognizes an individual's property rights as fundamental in a democratic society and it states inter alia:

> "18 - (1) No property of any description shall be compulsorily taken possession of and no interest or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that:
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> (a) prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and
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> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of-
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> (i) establishing such interest or right (if any)
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> (ii) determining the amount of such compensation (if any) to which he is entitled; and
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> (iii) enforcing his right to any such compensation.
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> 18 – (2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property –
>
> (f) as an incidence of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract."

30. It is further my view, that section 11 should be construed on the basis that Parliament has no intention of legitimizing the illegal possession by a squatter on land owned by a third party and that the effect of interpreting the phrase "every person who has a residence" to include persons having illegal possession and residence on land would be to assist persons in illegally taking possession of property owned by a third party. Thus a construction of the words "every person who has a residence" in section

11 to include those who may lawfully permit the respondent to enter land and those who may not lawfully provide such permission is inconsistent with the existing statutory provisions.

31. Miss Wong had referred to and relied on the cases of **Re Dudley Corporation** (1881) 8 QBD 86 and **Birkenhead Corporation** (1885) 15 QBD 572 but it is certainly my view, that these cases are distinguishable from the current circumstances. Section 16 of the UK Public Health Act was at issue in the Dudley case. By section 16:

> "16. – Any local authority may carry any sewer through, across, or under any turnpike road...and, after giving reasonable notice in writing to the owner or occupier....into, through, or under any lands whatever within their district".

32. It is seen that the UK Act expressly provides that the authority could enter property for the purpose of installing sewers after giving reasonable notice. There was no need to infer the entry as in the current situation.

33. In my researches I have come across the case of **Woodcock and Another v South Western Electricity Board** [1975] 1 W.L.R. 983. The plaintiffs in that case were squatters who had unlawfully occupied two adjoining premises without the knowledge or consent of the owners. The defendants, who were the electricity authority for the area, supplied the plaintiffs with electricity until they discovered the nature of their occupation of the premises and cut off the electricity supply to the premises. The plaintiffs brought an action for a mandatory injunction to require the defendants to reconnect electricity to the premises pursuant to their duty to supply electricity to the 'occupier of any premises' under section 27 (1) of the Electric Lighting (Clauses) Act 1899. It was held that

'occupier' in section 27(1) of the Act of 1899 did not include a person whose original entry upon the premises was unlawful and forcible; and that the defendants were entitled to discontinue the supply of electricity to the premises as they were under no duty to provide the plaintiffs with electricity.

34. The **Woodstock** case clearly establishes that since the 'occupiers' did not fall within the act, the electricity company was under no obligation to provide the plaintiffs with electricity and were therefore entitled to disconnect. It seems therefore on the authority of the **Woodstock** case that the way would be clear for the respondent in the instant case to disconnect the services and remove the lines from the appellants' premises.

35. It is my considered view therefore that the Telephone Act and All Island Telephone Licence, 1988 did not confer on the respondent an implied right to enter onto the appellants' premises without their consent in order to provide services to the unlawful occupiers.

36. At the time of trial, the relationship between the occupiers and the respondent was governed by the Telecommunications Act 2000, which repealed the Telephone Act. Section 45 of the Telecommunications Act states:

> "Service providers may -
>
> (a) refuse to provide retail services to consumers; or
>
> (b) discontinue or interrupt the provision of such services to a customer whether or not that customer is a consumer, pursuant to an agreement with that customer,

> only on the grounds which are reasonable and non-discriminatory and where any such action is taken, the service provider shall state the reasons therefor."

37. It seems to me, that on a proper construction of section 45 it would mean that if the Respondent has an agreement with the customer, it may discontinue provision of services so long as the grounds for disconnection are reasonable and non-discriminatory. It is abundantly clear therefore, that once there is an assertion of a proprietary right by an owner of registered property that he or she does not consent to the presence of the respondent's apparatus on his or her premises, particularly in light of the current circumstances where the apparatus is being used to provide illegal occupants with a service, this would satisfy the requirement of the 'reasonable' and 'non-discriminatory' grounds necessary under section 45. The way would therefore have been made clear for the respondent to have disconnected the services and remove the lines from the appellants' premises.

38. When all of the above factors are taken into consideration it is my considered view that the learned trial judge was in error when he found that the act complained of by the **appellant** did not constitute a trespass on their land.

The Award of Damages

39. Once a trespass is proved, the Court may grant an award of damages for the trespass even though the Claimants have sustained no actual loss. In situations where there has been no loss to the Claimant, the courts have tended to adopt a restitutionary approach to the assessment of damages. **Penarth Dock Engineering Co Ltd v Pounds** [1963] 1 Lloyd's Rep. 359 is a classic example where the defendants were

trespassers in the claimants' dock and they failed to remove their pontoon. It was clear from the facts of the case that it could not have been said that the claimants had suffered a loss and it was clear that the claimants would not have made any gain by letting out the dock to the third party during the period. Lord Denning stated that in such a situation the

> "test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant has obtained by having the use of the berth".

40. In the later case of **Swordheath Properties Ltd v Tabet** [1979] 1 WLR 285 damages for trespass by tenants remaining in premises after they should have left were assessed according to the ordinary letting value of the property. Here, the Court of Appeal held that it was irrelevant whether the claimants would have used the property or not.

41. In the present case I am faced with the problem as to what damages ought to be awarded to the appellants since damages were not assessed in the court below. If the appellants are merely given a nominal sum, as suggested by Miss Wong, it seems to me that justice will not have been manifestly done. Mr. Beswick submits that this Court should make an award of $844,149.24 for compensatory damages. This figure has been arrived at based on documents obtained from the respondent's published accounting documents. He argued that since the respondent failed to account for the revenue associated with the land lines which it provided the squatters, the court ought to accept the unchallenged evidence given by Mr. Evans (the first appellant) and make the award of $844,149.24. He submitted that the evidence of the first appellant had

determined the average earnings of the respondent from incoming international calls to the fixed lines and that this stands as the only measure which the Court has to assist in the determination of the value to the respondent of the revenue generated by the lines.

42. For my part, I am most hesitant in accepting these calculations and am of the view that the assessment of damages exercise ought to be remitted to the Supreme Court for that to be done before another Judge since Dukharan J. (as he then was) has been elevated to this Court.

43. Mr. Beswick also submitted that the appellants would be entitled to both exemplary and aggravated damages but it is my view that they would not be so entitled.

44. One cannot deny that the purpose of putting up the lines in question was for commercial gain, this is the business of the respondent. The respondent may no doubt have conceived the possibility of being confronted with a lawsuit from the customer and it may clearly feel justified in continuing to provide the service in view of its universal service obligation to provide telephone services under the Telecommunications Act. However, I do not believe that its refusal to remove the lines was oppressive, cynical or was a high-handed response to the appellant's request. This is especially in light of the suggestion that it probably was not making any significant revenue from the lines. Indeed at the time of the trial only one line was connected. In my judgment I do not think that such behaviour warrants an award of exemplary damages. I therefore reject the submission that an award of $300,000,000.00 would be appropriate.

45. Mr. Beswick also submitted that an amount of $14,743,543.20 should be awarded to the appellants in respect of aggravated damages. I do not believe that the drop wire on the property would have aggravated the appellants' damages in a real sense, thus aggravated damages is also not an appropriate remedy and I reject the sum proposed.

The Grant of an Injunction

46. I now turn to consider the grant of an injunction. In **Kelsen v Imperial Tobacco Co. (Of Great Britain and Ireland) Ltd.** [1957] 2 All ER 343 an advertising sign which was erected by the defendants projected some four inches into the air-space of a neighbouring occupier. McNair J. held that this was a trespass and granted a mandatory injunction for the removal of the sign. In my judgment the **Kelsen** case is persuasive. The grant of a mandatory injunction to prevent the continuation of the trespass would be appropriate in the instant case.

Disposal of the Appeal

47. In view of the foregoing conclusions arrived at in relation to the grounds discussed above, there is no need for me to deal with the remaining grounds of appeal. I would allow the appeal and make the following orders:

(i) Judgment of Dukharan J. set aside and judgment entered in favour of the Appellants.

(ii) Matter remitted to the Supreme Court for an inquiry into the assessment of compensatory damages in favour of the appellants.

(iii) Application for the award of exemplary and aggravated damages refused.

(iv) Mandatory injunction granted. The respondent is ordered to remove the drop wire on the appellants' land within seven (7) days of the making of this order.

(v) Costs of the appeal and in the court below to the appellants to be taxed if not agreed.

SMITH, J.A.

I agree.

SMITH, J.A. (Ag.).

I agree.

SMITH, J.A.

ORDER

The appeal is allowed. The following orders are made:

(i) Judgment of Dukharan J. set aside and judgment entered in favour of the Appellants.

(ii) Matter remitted to the Supreme Court for an inquiry into the assessment of compensatory damages in favour of the appellants.

(iii) Application for the award of exemplary and aggravated damages refused.

(iv) Mandatory injunction granted. The respondent is ordered to remove the drop wire on the appellants' land within seven (7) days of the making of this order.

(v) Costs of the appeal and in the court below to the appellants to be taxed if not agreed.