

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

SUIT NO. E-193 of 2000

BETWEEN RORY ROBINSON CLAIMANT
AND TEXACO CARIBBEAN INC. DEFENDANT

Mrs. Ursula Khan and Mr. Ivor Peynado for the Claimant.

Mr. Dennis Morrison Q.C. and Mr. Samuel Harrison instructed by
DunnCox for the Defendant.

Heard: February 25 & 26, 2002, June 10, 11, 12, 13, 14 & 19, 2002,
August 13, 2004.

RATTRAY, J:

Rory Robinson is a Chartered Cost Accountant, Consultant and Businessman who in the latter part of the 1980's was employed to Texaco Caribbean Inc. as Chief Accountant and Chief Financial Officer. After working with Texaco for approximately five (5) years, Mr. Robinson resigned in April, 1990. He widened his professional path by becoming an independent retailer, managing the petroleum filling station at the Norman Manley International Airport under a lease agreement with Texaco.

Although Rory Robinson began managing that service station on the 1st May, 1990, the lease agreement with Texaco embodying the terms and conditions under which he operated same was not signed by the parties until 1991 – on the 21st January, 1991 by Texaco and on the 15th March, 1991 by Mr. Robinson. The term of this lease ran from the 1st May, 1990 to the end of May, 1993 and contained no provision for renewal.

On the expiration of this lease, Rory Robinson remained in possession and control of the service station and continued to manage its operation while negotiations were underway for a new lease. At all material times, Mr. Robinson was aware that the service station at the Norman Manley International Airport was owned by the Airports Authority of Jamaica and was of the view that it was leased to Texaco.

In fact, the preamble to this lease between Mr. Robinson and Texaco clearly identified Texaco as a lessee of a third party and stated as follows:

“The Lessor is the lessee of a third party under a lease or tenancy arrangement (‘the Head Lease’) by which the Head landlord is entitled to terminate the Head Lease by giving appropriate notice thereof to the Lessor and the Lessor agrees to grant to the Lessee under this instrument only such rights but subject always to the rights of the Head Lessor as they relate to termination or otherwise.”

Under Clause 2, the duration of this lease was fixed for a period of three years and this lease expressly provided that it was: -

“... subject to the condition that if Lessor is holding the Leased Properties under Lease from a third party, which Lease expires the term of this Lease shall not continue beyond the date of Lessor’s tenancy.”

By an Agreement signed on the 3rd January, 1996 the parties entered into a new lease agreement for the said premises, more easily referred to as the recent lease, for the period beginning the 1st day of January, 1996 and ending the 31st day of December, 1999. It was a term of the recent lease that it would,

“... be deemed to remain in force and effect for a further period of **THREE** (3) years unless sooner determined by either party giving **THREE** (3) months notice prior to the anniversary date of its intention not to renew...”

It is contended by Mr. Robinson that no such notice was given by either party.

Although this recent lease made no specific reference and contained no explicit provision that Texaco was “the lessee of a third party” as stipulated in the earlier lease, the proviso to Clause 3 of the recent lease which is in almost identical terms to Clause 2 of the earlier lease read: -

“**PROVIDED ALWAYS** that subject to the provision for renewal herein contained if the Lessor is holding the leased premises under a Lease from a third party which Lease will expire then the term of this Lease shall not continue beyond the date of the Lessor’s tenancy.”

Clause 3 of this recent lease also imposed an obligation on Texaco to give Mr. Robinson ninety (90) days notice of its intention not to renew or extend the term of its lease and is set out as follows: -

“The Lessor’s tenancy may terminate by failure to renew or extend the term of its Lease at the expiration or cancellation thereof or by a voluntary surrender of the Lessor’s rights it being understood that the Lessor shall have full and complete freedom to refuse to renew or extend its tenancy without the consent of the Lessee provided that the Lessor shall be obliged to give ninety (90) days notice to the Lessee of its intention so to do and the Lessor shall be under no obligation to exercise any option it may have to renew or extend the term of any Lease under which it holds or may hold the leased premises or to exercise any option of purchase of the leased premises which it may hold.”

The Airports Authority of Jamaica in a letter dated April 19, 2000, addressed to Texaco pointed out that its contract had expired due to effluxion of time and that since February 1998, it had been allowed to operate the facility on a month-to-month basis. In that same correspondence it gave Texaco formal notice of termination of their agreement effective May 31, 2000. As a consequence, by letter dated April 28, 2000, under the signature of the Texaco’s Administrative Manager, Mr. Rupert Murdock, Rory Robinson was advised that he was to vacate the said premises on the 22nd May, 2000. The relevant portion of this letter stated: -

“Dear Mr. Robinson,
Re: Termination of Lease Agreement at Norman
Manley International Airport

As you are well aware Texaco's operation at the Norman Manley International Airport is dependent upon a lease agreement with the Airport Authority of Jamaica. On April 19, 2000 we were served notice to quit the premises on or before May 31, 2000. Enclosed you will find a copy of the notice. We are hereby giving you notice to vacate the property on 22nd of May 2000 at 2p.m. so that we can wind up operation in preparation of our handing over.

Mr. Robinson contended that he received that letter on the 18th May, 2000 and, upset with the notice period given of four days, refused to give up possession of the service station.

By Writ of Summons dated the 25th day of May, 2000 Mr. Robinson filed this action against Texaco, claiming the following relief in the Endorsement:

- (1) A declaration that the defendant is not entitled to terminate its lease to the Plaintiff of the Petroleum Filling Station at the Norman Manley International Airport before a period of ninety (90) days notice so to do.
- (2) An Injunction to restrain the defendant, its servants or agents or otherwise however from taking any steps to evict, dispossess the plaintiff of his possession of the said premises.
- (3) Damages for breach of contract.

On the 26th May, 2000, Rory Robinson obtained an Ex Parte Injunction restraining Texaco from terminating his lease of the said

Petroleum Filling Station or taking any steps to dispossess him of possession of the said premises for a period of Fourteen (14) days.

Subsequently, on the 9th day of June, 2000, on an application brought by the Airports Authority of Jamaica to intervene and discharge Injunction, the Court ordered that: -

- (1) Airports Authority of Jamaica be added as a party to this action.
- (2) The Injunction granted by the Honourable Mr. Justice Hibbert (Ag) on May 26, 2000 remain in effect up to the 19th August, 2000.
- (3) The Court declares that the Airports Authority of Jamaica is entitled to possession of the Petroleum Filling Station at the Norman Manley International Airport.
- (4) The Plaintiff will hand over possession of the said Petroleum Filling Station at the Norman Manley International Airport on or before the 20th August, 2000.

Although an Appeal was filed by Mr. Robinson against this Order, that Appeal was later discontinued and Mr. Robinson subsequently gave up possession of the said service station in or about October, 2000. A Defence

was also filed on behalf of the Airports Authority of Jamaica in this action. However, by a Joint Notice of Discontinuance dated the 12th day of February, 2001, Rory Robinson decided to proceed no further against that Defendant and terminated the proceedings pertinent to that party.

At the commencement of the trial of this action, Counsel for Mr. Robinson amended his Statement of Claim to add the allegation that as a result of the misrepresentations of Texaco that it had a Lease with the owner of the premises, the Airports Authority of Jamaica and had obtained its authority to sub-let, the Claimant acted to his detriment and incurred loss and expense.

In his Amended Statement of Claim, Rory Robinson sought the following relief: -

- (i) A declaration that the Defendant's purported termination of the said lease is in breach of contract and unlawful;
- (ii) An injunction to restrain the Defendant and either of them, their servants and or agents or otherwise however from taking any steps to evict, or deprive the Plaintiff of his possession of the said premises;

- (iii) Damages for breach of contract and/or compensation in damages for unlawful termination of the lease and/or unlawful eviction;

I have outlined the above claimed relief to compare and contrast it with that claimed in the Endorsement already referred to in this Judgment. The Court has observed an apparent shift in Mr. Robinson's position, whereby it seems that he no longer seeks a declaration that he is entitled to a ninety (90) day notice period before Texaco can terminate his lease.

If this observation is correct it would appear that on reviewing the details of this matter, sound counsel must obviously have prevailed. An examination of the relevant provisions of the recent lease clearly reveals that the entitlement of Mr. Robinson to a ninety (90) day period of notice would only arise where Texaco brought about the termination of its lease by its failure to renew or extend the term thereof. That was not the situation in the present case.

At no time while the Airports Authority was a party to this action was there any complaint that it acted improperly in terminating Texaco's right of possession of the service station.

Under cross examination, Rory Robinson frankly conceded that his dispute with Texaco related to the purported termination of the three (3) year

contract and his claim for compensation and was not about the failure of Texaco to give ninety (90) days notice. It follows that this Court can grant no declaration in the terms sought in paragraph 1 of the Endorsement, which was not replicated as a form of relief in the Amended Statement of Claim.

Similarly, the claim for an Injunction restraining Texaco from taking steps to evict or dispossess Mr. Robinson of possession of the service station no longer has any relevance to this action. This is so in light of the Declaration of the Court made on the 9th June, 2000 that the Airports Authority is entitled to possession, and the Order that Mr. Robinson hand over possession, which Order has been complied with.

Learned Counsel for Texaco contended that the full ambit of Mr. Robinson's claim lay squarely within the four walls of the lease agreement signed on the 3rd January, 1996. He further contended that despite the amendment to plead misrepresentation and certain detriment as a result of the alleged misrepresentation, Mr. Robinson's case stands or falls on the contract he had with Texaco and on whether Texaco is found to have acted in breach of that contract.

It is Mr. Robinson's contention that in light of the wording of the proviso to Clause 3, he only signed the recent lease with Texaco because he was assured by Mr. Don Gary, the Manager in charge of Texaco in Jamaica at that time, that Texaco itself had a lease. It does not appear that any

enquiry was made as to the terms of that lease or more importantly as to its duration, which was the foremost concern of Mr. Robinson who was seeking security of tenure. No mention was made by Mr. Robinson in any subsequent correspondence between the parties of the alleged conversation. In weighing this aspect of the evidence including the timing of the introduction of this allegation, which I view as an afterthought, I find that no such representation was made.

I also find that based on the pleadings, the real issue before this Court is whether or not the actions of Texaco which led to Rory Robinson giving up possession of the service station amounted to a breach of contract. If so, the Court will then have to consider the amount of damages to be awarded as compensation for such breach.

Has there been a Breach of Contract by Texaco

The obligation rests solely on Rory Robinson to prove by evidence sufficient to satisfy this Court on the balance of probabilities that the actions of Texaco in this matter amounted to a breach of the contract between the parties.

Texaco's opposition to the claim by Mr. Robinson of breach of contract was based on two (2) main arguments. Firstly, Counsel for Texaco relied on the terms of the proviso to Clause 3 of the recent lease to submit that that lease was terminable by the operation of a condition subsequent,

that condition being that should the lease pursuant to which Texaco held the property from the Airports Authority terminate, then Mr. Robinson's lease would not extend beyond the date of that termination.

It was therefore eloquently argued that what in fact occurred, where Texaco was required to give up possession of the service station by the owner and which prompted the notice being given to Rory Robinson, was the very thing contemplated by the lease. If so, it was submitted that Texaco could not be found to be in breach of contract.

An analysis of the relationship that existed between Texaco and the Airports Authority, as disclosed by the undisputed evidence in this matter reveals that Texaco entered into possession of the said premises under a Lease Agreement dated the 10th July, 1978 to operate a service station thereon. The term of that lease was for a ten (10) year period commencing the 1st January, 1975 and there was no provision for renewal. No new Lease Agreement was entered into with the Airports Authority and Texaco continued in possession after December, 1984 on a month-to-month basis.

At the time Texaco put Rory Robinson into possession of the service station under the earlier lease in May, 1990, Texaco's Lease with the Airports Authority had already expired some four and a half (4 ½) years before that date. Similarly, in January, 1996 when the recent lease between

the parties was entered into, Texaco again had no valid or subsisting Lease Agreement with the Airports Authority.

Although Counsel for Texaco submitted that the Airports Authority was well aware of the fact that his client had entered into leases with third parties, that position was expressly contradicted by the Affidavit of Paul Hall sworn to on the 2nd day of June, 2000 and tendered in evidence as Exhibit 18. In that Affidavit, the Director of Marketing, Commercial Development and Public Relations of the Airports Authority, Mr. Hall stated at paragraph 8; -

“... pursuant to paragraph 5 (0) of the Agreement (between the Airports Authority and Texaco) the Defendant expressly agreed not to assign or sublet the Premises. It now appears that in breach of the Agreement the Defendant has sublet the Premises to the Plaintiff (Mr. Robinson).”

Despite the prohibition referred to in paragraph 5 (0), that Agreement however permitted Texaco to appoint, with the consent of the Airports Authority, an agent, contractor or dealer to operate the service station on its behalf. No evidence was led by Texaco in this matter of any such consent being applied for or granted. In such circumstances, it appears that Mr. Hall's comment of Texaco being in breach of its agreement with the Airports Authority is well founded.

On evidence before this Court, both oral and documentary, I find that Texaco is not entitled to rely on the proviso to Clause 3 of the recent lease. I find that the said proviso affords no protection to Texaco in the circumstances of this case, as it had no lease from a third party at the material time, but was merely holding over on a month-to-month basis. I am fortified in my view on this point by the specific wording of the clause which merits repetition and which must be carefully examined to ascertain its true meaning and intent.

“...if the Lessor is holding the leased premises under a Lease from a third party which Lease will expire then the terms of this Lease shall not continue beyond the date of the Lessor’s tenancy.”

The phrase “which Lease will expire” clearly contemplates there being in existence a valid Lease which will expire at some future date. Here, the Texaco’s Lease with the Airports Authority had expired on the 31st December, 1984.

I accept as correct the submission of Counsel for Mr. Robinson and I also find, that the holding over by Texaco on the same terms and conditions of its original expired lease with the Airports Authority is not the same as having a Lease, which was the circumstance contemplated by the proviso referred to earlier.

I therefore reject the line of reasoning advanced by Counsel for Texaco in reliance on a condition subsequent.

The second argument advanced by Texaco's Counsel Mr. Morrison Q.C. focused on the term of the Rory Robinson's recent lease with that company. This lease ran for a period of four (4) years commencing January 1, 1996, with a provision for renewal. It was provided that on the failure of either party to give three (3) months notice of their intention not to renew the lease prior to the anniversary date, this lease would be deemed to remain in force and effect for a further period of three (3) years.

That lease also contained an express provision that in the event of any renewal, the rent payable for the renewal period would have had to have been agreed upon by the parties not less six months before December 1999, the expiration of the current term.

Before dealing with this specific aspect of the matter, I think it appropriate at this time to comment on the issue of the duration of the extended lease, which apparently was an area of dispute on the evidence of Mr. Robinson and in light of his claim for Special Damages in the pleadings. The parties are agreed that the initial period of this lease was for four (4) years. However, Mr. Robinson contended that the extended term was for either three or four years, the longer period being reflected in his claim for projected loss of profits.

This Court is of the view that the wording of Clause 3 of the recent lease as it relates to the extended term is unequivocal. Only a three (3) year period was contemplated and provided for with respect to the extended term and I so find. This was eventually conceded by Mrs. Khan, Counsel for Mr. Robinson in her closing address.

Mr. Morrison Q.C. contended that the term of Rory Robinson's lease, having expired in December 1999, he could only claim an extended term if he could establish that the right or option of renewal had been exercised in accordance with the stipulations specified in the lease. He further contended that any agreement as to the rental for the extended term would have had to have been reached not less than six (6) months before the expiry of that last term and there was no evidence of any such agreement.

Learned Counsel highlighted the evidence of Mr. Robinson on this issue whereby Mr. Robinson stated that he had agreed the rental for the service station over the extended term with an officer of Texaco, Mr. McKay in or about May, 1999.

Initially, Mr. Robinson testified that this agreement was contained in correspondence between the parties, but he was unable to locate and produce same. This agreement was to the effect that due to certain financial discrepancies concerning the accounts between the parties, he would continue to pay the existing rental over the extended term. This rental was

in fact paid by Mr. Robinson and accepted by Texaco without objection over the period January to May, 2000.

Subsequently under cross examination, Mr. Robinson maintained that although he could not locate the correspondence in question, he had orally agreed the rental with Mr. McKay and also agreed that he would bring his arrears up to date.

Texaco's Administrative Manager, Mr. Rupert Murdock contradicted Mr. Robinson's evidence of there being any agreement as to the rental for the extended term or any correspondence relating to such an agreement on Texaco's file. He however could only speak to records of Texaco as he was not personally involved in the alleged discussions with Mr. McKay. Mr. McKay was never called as a witness by Texaco with respect to this crucial issue nor was any explanation given for his absence from Court.

Another line of defence relied on by Texaco were the provisions of the recent lease which stipulated that after the initial four year period passed, the lease would remain in force for a further three year term unless determined by either party giving three months notice of their intention not to renew prior to the anniversary date.

Texaco alleged in paragraph 21 of its Amended Defence that by letter dated the 20th September, 1999, it had advised Mr. Robinson that the lease would not be renewed. The suggestion of having received such a letter was

emphatically denied by Mr. Robinson and that correspondence was never presented by Texaco.

It was also contended by Counsel for Texaco, as set out in the pleadings filed on his client's behalf and on the evidence led, that Rory Robinson's responsibilities as Chief Accountant of Texaco included ensuring the Company's compliance with its legal obligations with respect to contracts to which it was a party. As such it was argued that he was aware at all times of the terms of Texaco's lease arrangements.

Mr. Robinson on the other hand, admitted being aware that Texaco had leased the premises from the Airports Authority but denied being cognizant of the terms and conditions of that lease. He gave evidence that as Texaco's Chief Accountant and Chief Financial Officer, his job involved internal auditing to ensure that the assets and money of Texaco were properly secured and accounted for. Mr. Robinson testified that the hierarchy of Texaco was such that as Chief Controller for the Jamaican operations of Texaco, he reported directly to Coral Gables in the United States. He further testified that he did not deal with Texaco's legal obligations as those fell under the portfolio of the Administrative Manager, Mr. Rupert Murdock.

The sole witness called by Rory Robinson was Jean Arcott, his mother who was the Assistant Manager in charge of supervising the staff and the

day to day running of the service station. She gave evidence that she was the person responsible for receiving correspondence at the service station and she recalled receiving the letter from Texaco dated the 28th April, 2000, on the 18th May, 2000, instructing Mr. Robinson to vacate the premises on the 22nd May, 2000.

She further gave evidence of the operations of the service station, including its finances as well as a description of the business relationship between Rory Robinson and Texaco with respect to the supply of and payment for petroleum supplies.

Two witnesses gave evidence on behalf of Texaco, Mr. Rupert Murdock and Ms. Andrea Smith. Mr. Murdock had been employed to Texaco for approximately 40 years until he officially retired in August, 1999 but as he was asked by Texaco, his employment with the company continued until June 30, 2000. In the last 12 years of that period, he held the position of Administrative Manager.

He testified that it was part of Mr. Robinson's responsibility to ensure that the terms of any financial document concerning the company such as leases be known and fulfilled. This witness stated that he was aware of this as he helped to write Mr. Robinson's job description, which was tendered in evidence as Exhibit 19. This job description however does not specifically

identify as a function or duty of the Chief Accountant, an obligation to deal with leases or other legal documents.

He further testified as to the complaints and difficulties Texaco was having with the operation of the service station by Mr. Robinson, including lack of funds to purchase petroleum products, returned cheques and his not being present at the service station.

Ms. Andrea Smith gave evidence that she was employed to Texaco in 1997 as a Marketing Representative and in 1998 had oversight responsibility for 22 service stations including that operated by Rory Robinson. Her evidence focused on the system in place at Texaco for the purchasing of and payment for petroleum supplies by dealers and in particular the quantities purchased by Mr. Robinson. She further gave evidence of Mr. Robinson's likely net profits on a weekly basis in light of his markup on the volumes supplied.

An important issue that this Court has to determine in a matter of this nature is one of credibility. During the course of this trial, this Court has heard the evidence of Rory Robinson, his witness and those witnesses called on behalf of Texaco. I have had the opportunity of observing the demeanor of those who have testified in this Court and have carefully considered the nature and extent of the evidence given.

I find the Claimant Rory Robinson, despite certain discrepancies in his evidence, to be a truthful and credible witness. I also find that Mr. Robinson's Assistant Manager, his mother Jean Arcott, gave her evidence in a frank and forthright manner and I accept as truthful her testimony given in this case, particularly as to when she received the letter to vacate the said service station.

I find therefore on the balance of probabilities that rental was agreed between Mr. Robinson and Mr. McKay, the credit officer and agent for Texaco in respect of the service station over the extended term within the time prescribed by the lease agreement.

I find further that Mr. Robinson did not receive any notice of intention not to renew the lease from Texaco. That being the case, the recent lease remained in force for a further period of three (3) years commencing 1st January, 2000. Finally, I find the actions of Texaco in terminating the lease agreement before the expiry of the extended term, a clear breach of its contract with Mr. Robinson for which he is entitled to Judgment and damages for losses sustained as a consequence of the said breach of contract.

Quantum of Damages to be awarded as compensation

As is the case with the issue of liability, when considering the question of the quantum of damages, the burden rests solely on the shoulders of Rory Robinson to strictly prove those losses set out in his Amended

Statement of Claim, which he allegedly sustained as a result of Texaco's breach of contract. The object of an award of damages in a case such as the one before this Court is to put the injured party in the position he would have been in had the contract been performed. This however can only be achieved by credible evidence sufficient to satisfy the court on a balance of probabilities of the party's entitlement to the sums claimed.

Redundancy Payments to Staff Members

The sum of \$162,000.00 is claimed under this head of damages. A breakdown of this claim is provided by letter dated October 30, 2000 addressed to Mr. Robinson from the Jamaica Gasoline Retailers Association, which was tendered as Exhibit 7 in this case. This letter advised Mr. Robinson that upon closure of his service station he would be required to make redundancy payments to his members of staff in a sum amounting to \$123,800.00. He was also advised that his employees were entitled to payments in lieu of vacation in the amount of \$38,400.00. It is those two figures which together comprise the claim for \$162,000.00.

Under cross examination, Rory Robinson admitted that whether or not he had closed the service station, he would have been obliged to make a payment to his workers in lieu of vacation leave. Mrs. Khan in her closing address quite properly conceded the point. I therefore award the sum of **\$123,800.00** for this item of damages.

Redundancy Payment to Assistant Manager

Evidence was given by Mr. Robinson in support of this claim in the sum of \$450,000.00. At the request of Queens Counsel, Mr. Morrison, this witness provided a breakdown of that sum in a document dated 11th June, 2002 which was tendered as Exhibit 6A. That document disclosed that the redundancy calculation for Mrs. Arcott, the Assistant Manager was comprised of \$83,077.00 for redundancy, \$124,615.00 as pay in lieu of vacation and \$242,306.00 under a category entitled "other".

Mr. Robinson testified under cross examination that this category "other" was made up monies loaned to the business over the years by the Assistant Manager, unpaid salary as well as sums due to her for not taking vacation leave. I accept as sound Mr. Morrison's submission that the only portion of this claim for which the Defendant would be liable is in respect of a redundancy payment for Mrs. Arcott is the sum of \$83,077.00. Any claims for unpaid wages and loans to the business or to Mr. Robinson himself would be claims which ought properly to be made against Mr. Robinson personally and would not be obligations for which Texaco could be held liable.

I am therefore of the view that the evidence led in support of this aspect of the claim as pleaded, that is for redundancy payment to Mrs. Arcott, only entitles the Claimant to the sum of \$83,077.00 and I so order.

Loss of Profits

This heading comprises the major portion of Rory Robinson's claim for Special Damages in this matter. It is his testimony that the service station at the Norman Manley International Airport handled ground transportation at the airport and his regular clients included several airlines, rent a car agencies, as well as the Airports Authority. He gave evidence that he supplied petrol to fire engines, maintenance vehicles, managers' cars and provided credit to those regular customers while he purchased his supplies from Texaco on a cash basis.

His evidence further is that once he knew he had a further three (3) year lease, he started trying to expand the business to increase his clientele. In particular, Mr. Robinson stated in evidence that other ground transportation and support services to most of the airplanes were being handled by a third party. He further stated that he was aware that Air Jamaica was unhappy with the existing situation and he was negotiating to get that business. He felt that he had got very far with these negotiations although these arrangements were all verbal.

Rory Robinson's expansion plans came to an abrupt halt after he received four days notice from Texaco to quit and deliver up the premises. His complaint is that having refused to vacate the premises, Texaco became "vicious" and stopped petroleum deliveries to his service station for a time, even when he had paid for such supplies in advance. He alleges that this action by Texaco, together with the loss of some of his regular customers due to the fact that he had no supplies of petrol and having been forced to hand over the service station to the Airports Authority plunged his business into a downward spiral and he suffered severe financial losses.

In giving evidence in chief, Mr. Robinson stated that these losses totalled between \$7 and \$8 million for the remaining contract period, as his evidence is that he lost approximately \$50,000.00 per week, being net profits when Texaco stopped supplies to his service station.

He tendered in evidence as Exhibit 6, three (3) Profit Analysis Reports for the periods April 1998 to March 1999, April 1999 to March 2000 and April 2000 to October 2000. These reports were prepared by Jamaica Cost and Management Accounting Consultants Ltd. from figures supplied by Mr. Robinson and reveal an average annual net profit of over \$3 million from the operation of the service station. One of the reason for this apparently successful enterprise according to Rory Robinson was the fact of having a

captive market at the airport and thereby being able to increase his margin of profit to levels above that of other gas station operators.

On being cross examined, Mr. Robinson admitted using a figure of \$62,000.00 per week in calculating the loss of profits claimed in his Amended Statement of Claim. He also admitted that that figure included an amount of \$2,000.00 for anticipated growth based on the thwarted negotiations to expand his business due to the closure of the service station. Further, he admitted increasing the net figure claimed for profit from \$50,000.00 to \$60,000.00 per week to take into account anticipated sales over the Christmas period.

In contrast to this favourable financial picture painted by Rory Robinson of a thriving business up to May, 2000, his sole witness, Mrs. Jean Arcott, his mother and Assistant Manager of the service station testified that their operation at the airport was not really viable apart from the first few years and that she was unable to collect her monthly salary of \$20,000.00 from the business due to financial constraints. This is corroborated by Exhibit 6A, the report prepared by Mr. Robinson, which inter alia reveals that at no time over the period April, 1998 to October, 2000 was Mrs. Arcott ever paid the agreed monthly salary of \$20,000.00. The most that was paid to her as salary for any one month during that interval was \$8,000.00 in the month of April 1998.

Mrs. Arcott also admitted that she is still owed salary and redundancy payments. She identified a problem of cheques tendered to Texaco being dishonoured, in part due to collection difficulties and a general and continuing decline in business after 1994.

The former Marketing Representative of Texaco, Ms. Andrea Smith testified as to difficulties Texaco had been having with Mr. Robinson with respect to payments for petroleum products. She also testified based on her dealings with Mr. Robinson between 1998 to 2000, that she was aware that the volume of petrol supplied to his service station declined over that period. She also gave evidence that given her experience of supervising twenty-two (22) service stations and based on the normal expenditure of service stations, she was of the view that Mr. Robinson's weekly net profits would not exceed \$25,000.00.

In attempting to arrive at a reasonable figure for compensation as a result of the breach of contract in this matter, this Court is obliged to examine carefully all the figures put before it, as well as the oral testimony of the witnesses.

I am of the opinion that the evidence in support of the claim for losses consequent on possible business expansion which did not materialize, as the Claimant had to give up the service station is too speculative to attract an award of damages. No specific details as to the type of business sought or

the costs of and likely revenues from such a business were put before this Court. Even the sum of \$2,000.00 per week mentioned in the evidence was apparently tacked on to the claim for net weekly loss, without any evidential foundation.

I am satisfied that due to the breach of contract by Texaco, Rory Robinson is entitled to be compensated for consequential loss. However, I find that the amount claimed of \$50,000.00 per week from May, 2000 to December, 2003 exaggerated, moreso when the claim for Loss of Profits is increased to \$60,000.00 per week for that same period because of alleged increases in sales during the Christmas season.

Further, had Rory Robinson been earning net profits of \$50,000.00 per week as claimed in his evidence, payment of his mother's salary, the Manager assisting him in the twilight of her years would surely have been one of his priorities. The thriving business described by the Claimant would not or ought not to have required the financial assistance of Mrs. Arcott as the evidence disclosed. Instead, the figures reflected in Exhibit 6A, Mr. Robinson's own document, reveal that for the year April, 1999 to March, 2000, Mrs. Arcott was paid the grand total of \$10,000.00 as salary rather than the agreed \$20,000.00 per month.

To these observations must also be added the admissions of Mr. Robinson that the volume of petrol he purchased from Texaco over the years

declined although he was able to continue operating due to a captive market and a high markup that was near its limit.

On the totality of the evidence before me, I am unable to accept on a balance of probabilities the figures reflected in Exhibit 6 as being accurate. I find that the evidence of Ms. Smith is more credible on this issue, although in arriving at her estimate of net profits she may not have had at her disposal all the relevant information, such as profits earned from the sale of other products at the service station. Having taken that item into account based on the figures provided by Mr. Robinson in Exhibit 6A, I calculate Mr. Robinson's net profit at \$30,000.00 per week.

I therefore award the sum of \$30,000.00 per week from November, 2000 to December 31, 2002, making a total of \$3,390,000.00 as Loss of Profits. There is also the unchallenged evidence of Texaco failing to deliver petrol for one week when Mr. Robinson refused to vacate the premises, which would increase the award by \$30,000.00.

I am not satisfied that the claim for partial loss of profits for June 2000 to October 2000 has been proven and I therefore make no award in that regard.

From the total award for Loss of Profits of \$3,420,000.00, there is to be deducted liability for tax leaving a balance of \$2,627,832.00 as compensation under this category of damages.

Finally, I accept the submissions of Counsel Mrs. Khan on the issue of mitigation of damages raised by Mr. Morrison Q.C. While generally a litigant has a duty to mitigate his loss, the issue of proving he has failed to carry out that duty rests on the Defendant. Once a Claimant has made out a prima facie case for damages, it is for the Defendant to give evidence to show how and to what extent the claim ought to be mitigated. Texaco on the evidence in this case has not discharged that burden.

Judgment then in favour of Rory Robinson against Texaco Caribbean Inc. in the sum of **\$2,834,709.00** with costs to be taxed if not agreed.

Interest is awarded on this Judgment at the rate of 6% per annum from the 1st November, 2000 to the date hereof. A Stay of Execution is granted for six (6) weeks.