SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HIGH COURT CIVIL APPEAL NO.16 OF 2003

BETWEEN:

DIPCON ENGINEERING SERVICES LIMITED

Appellants

and

WEBSTER JORDAN

Respondent

Before:

The Hon Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Samuel Commissiong Q.C. and with him Ms. Suzanne Commissiong
for the Appellant
Ms. Zhinga Horne for the Respondent

2004: March 2;
2004: May 24.

JUDGMENT

[1] GORDON, J.A. [AG.]: By an amended Statement of Claim dated 12th November 2002 the Claimant/Respondent claimed against the Defendant/Appellant the sum of $40,106.45 Special damages and General Damages arising out damage allegedly caused to his house and deriving from nuisance caused by or negligence of the Appellant in the course of the Appellant's business of quarrying involving blasting at the Lowmans Bay Quarry. The Respondent also prayed for an injunction restraining the Appellant from further continuing mining and blasting of stones at the quarry.

[2] The Appellant filed an Amended Defence on the 20th November 2002 admitting that it used explosives in the course of its quarrying operations but stated that in relation to the instant proceedings, its quarrying operations have always been safe. In essence the Defence denied that the Appellant was a cause of nuisance and denied that it was negligent. Further, the Appellant denied that the Respondent suffered any loss or damage as a result of the Appellant's quarrying operations and in particular as a result of the blasting carried out by the Appellant that is an integral part of such operations. At the trial the Appellant led evidence of a previous occasion when the Respondent's house suffered damage during the course of operations carried out by another operator of the Quarry, a Dutch company.

[3] After a trial that lasted three days the learned trial Judge gave judgment for the Respondent and awarded him $24,000.00 Special Damages and $10,000.00 General Damages and costs in the sum of $10,200.00. The Appellant appealed from this decision. There were three grounds of appeal which were: (i) that the learned trial Judge failed to pay any or any sufficient attention to the seismograph readings provided by the Appellant, and, as a result, the Court came to a wrong conclusion as to the cause of damage to the Respondent's house; (ii) that the learned trial Judge was wrong when he held that the walls of the Respondent's house had been damaged as a result of the Appellant's quarrying operation; and (iii) that the learned trial Judge was in error in accepting the valuation of the Respondent's valuator and that the quantum of damages was excessive.

[4] The Respondent filed a Counter-Notice of Appeal claiming that the learned trial Judge failed to consider at all the question of injunctive relief against the Appellant prohibiting the Appellant from further blasting at the Lowmans Bay Quarry having found as a fact that the blasting operations of the Appellant were the likely cause of the damage to the Respondent's house.

The First Ground

[5] The Appellant's first ground that the learned trial Judge failed to pay any or any sufficient attention to the seismograph readings submitted in evidence by the Appellant is dealt with in the judgment of the Court below at paragraph 10 thereof thus:

> "Mr. Singh produced a quantity of seismograph records, but the Court was not given the benefit of a professional analysis of the readings, and this data has been of little value in the court's appreciation of the case."

A reading of the evidence of Mr. Singh would reveal that at one point he says:

> "a reading of two inches per second would denote danger."

At another point Mr. Singh says:

> "The blast which triggered the complaint would not have been monitored at Mr. Jordan's (the Respondent) house."

These two statements in the context they were made were of no assistance to the Court.

[6] Again, the Appellant's expert witness was of little assistance. He qualified each opinion he gave, for example:

> "The perimeters of safety in relation to buildings is a matter of some contention in the area of seismology. There are varying opinions. However, it is considered in general that a reading of below 0.4 inches per second or 1 inch per second is considered safe. Above that reading it is generally felt that the intensity of the event may be such as to cause unacceptable damage, but we must be cognizant of the fact that it is not the intensity of the blast alone that will cause damage in a building. The nature of the ground on which the building is located and other factors mentioned."

[7] Further, The learned trial Judge found that Mr. Singh's evidence of safe blasting limits relative to vibration was based on the U.S. Bureau of Mines analysis chart, which itself, he concluded was predicated on minimum building standards applicable in the United States of America. The learned Judge found that there

were no such standards in St. Vincent and concluded:

> "I am of the view that Dipcon has to take the environment in which it operates as it finds it to be, and must tailor its operations in the context of that reality. To carry on operations based on standards applicable in another environment where building regulations exist and standards of construction are designed to withstand defined forces, which regulations and standards are not applied in the situation in which Dipcon finds itself, will not provide Dipcon with protection."

[8] In Northrock Ltd v Jardine[1] Sir Vincent Floissac CJ stated:

> "the result is that there is a relationship of geographical proximity or neighbourhood between the appellant and the respondents and the appellant ought reasonably to have foreseen a substantial or sufficient probability (as distinct from a bare or remote possibility) that severe detonations at the quarry would result in physical damage to the dwelling house. The appellant therefore owed to the respondents a duty to take reasonable care or precautions to prevent such damage."

The learned trial Judge having found as a fact that the Respondent did repair his house after the first episode of blast damage (by another operator of the quarry, the Dutch company) and accepting the evidence that immediately after the blast in March 1996 after which the Respondent made determined efforts to have the representative of the Appellant, Mr. Singh, to visit his house, concluded:

> "that it is likely that the damage to Mr. Jordan's house was caused by the blasting operations at the quarry operated by Dipcon."

I can find nothing objectionable in that conclusion. Indeed, I cannot see how the learned trial Judge could have come to any other conclusion.

The Second Ground

[9] The Appellant's second ground is that the learned trial Judge was wrong in fact and in law when he held that the walls of the Respondent's house had been damaged as a result of the vibrations of the Appellant's quarry operation. As I understood the argument of learned Counsel for the Appellant, a two-pronged attack was mounted for this ground of appeal. Firstly, that the damage that was

[1] (1992) 44 WIR 160

evident derived from an earlier incident not involving the Appellant, and which damage had been paid for. It was the allegation of the Appellant that the previous damage had not been repaired after the compensation had been paid and that the Respondent was seeking a second bite of the same cherry. The learned trial Judge disposed of this point quite shortly when he stated at paragraph 15 of his judgment:

> "Mr. Stewart's conclusion that no repairs had been done on the house following the earlier event struck me as unconvincing, and I accept the evidence of Mr. Jordan and his wife that repairs had indeed been carried out to their new house after the Dutch company settled their claim."

There was no real effort to persuade this Court that there were grounds for reversing a finding of fact by the learned trial Judge.

[10] The second prong of the Appellant's attack on this ground goes to causation. It would appear to me that the Respondent having proved that the Respondent's house was in proximity to the Appellant's quarrying operation, that the Appellant carried out blasting operations and that his house suffered damage after blasting, then, the evidentiary burden shifted onto the Appellant to show that his action did not cause the damage complained of, or that if it did, there was no negligence attached to his action. This the Appellant failed to do. This ground also fails.

The Third Ground

[11] The Appellant's third ground is that the learned trial Judge accepted the erroneous valuation of the Respondent's valuator. The learned trial Judge at paragraph 21 gives his reasons for rejecting the estimate of repairs given by the Appellant's expert. He says this at paragraph 21 of his judgment:

> "Mr. Stewart, for his part, has provided a rather summary assessment in his report dated 13th June 2002. He estimates repairs to the masonry walls at $5,300.00, painting and decorating at $2,500.00 and a provisional sum for contingencies at $750.00, to a total of $8,500.00. Mr. Stewart makes no provision for repairs to the upper floor slab (RC deck), for timber purlins on the roof deck, or for preliminaries, demolition, or fees, all of which are provided in Mr. Huggins' report."

I am satisfied that the learned trial Judge did take into account and apply a judicial assessment as to the relative merits of the estimations of repairs of the two experts. I can find nothing wrong in his approach, far less any reason for an appellate Court to substitute its own assessment for that of the Learned Trial Judge. This ground also fails.

The Counter-Notice of Appeal

[12] The Respondent complains that the learned trial Judge erred in failing to consider at all the question of granting an injunction against the Appellant to restrain it from continuing to carry out blasting operations at Lowmans Bay Quarry. It is undeniable that nowhere in the judgment of the learned trial Judge has he referred to the request for an injunction, or indeed his reasons for not granting one. Following Northrock Ltd v Jardine[2] where a trial judge gives no reason for the failure to grant an injunction, nor does he indicate the factors or circumstances which influenced the exercise of his discretion then an appellate Court is entitled to approach de novo the issue of the grant or withholding of an injunction.

[13] In Northrock Floissac CJ listed five circumstances to be taken into consideration in the exercise of a Court's discretion in this context. They are, firstly, whether the operation of a quarry is in the public interest; secondly, the award of precisely quantified damages indicates that the damage caused is capable of being estimated in monetary terms; thirdly, an award of substantial damages is likely to have a salutary effect on the methods and quantities of explosive used in the operation of the quarry; fourthly, whether the grant of an injunction would inflict hardship and oppression disproportionate to the advantage to be derived from the grant of the injunction; and fifthly, the grant of an injunction denies the tortfeasor the opportunity to repent the wrongful act that incurred the sanction of the Court. The Court takes judicial notice of the fact that the quarry at Lowmans Bay is a significant supplier of stone material within St. Vincent, and hence prohibition of

[2] see supra

operation would be against the public interest. Further, I am of the view that in this case not only are damages a suitable remedy, but damages are "likely to have a salutary effect on the methods and quantities of explosive used in the operation of the quarry". Taking these five matters into consideration in the circumstances of this case I do not believe that this Court's discretion should be exercised in favour of the grant of an injunction against the Appellant at this time.

Conclusion

[14] I would dismiss the Appellant's appeal and I would also dismiss the Respondent's Counter-Notice of Appeal. In the circumstances I would make no order as to costs.

Michael Gordon
Justice of Appeal [Ag.]

I concur.

Albert Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal