[2016] JMSC Civ. 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.2011HCV 05421

BETWEEN	**ERROL TROWERS**	**CLAIMANT**
AND	**NORANDA JAMAICA BAUXITE**	
	PARTNERS LIMITED	**DEFENDANT**

Mr. Garth McBean, Q.C. instructed by Pickersgill, Dowding and Bayley Williams for the claimant

Mr. Matthieu Beckford instructed by Rattray Patterson Rattray for the Defendant

Heard: July 20 and 21, 2015 and April 7, 2016

Nuisance – Mining operations – Dust and Noise – Whether substantial or trifling

Negligence – Duty of care - Whether Statutory Duty breached Damages - Quantum

LINDO J.

[1] Errol Trowers, claiming as the owner of premises at Calderwood in the parish of St. Ann, on August 30, 2011, filed a claim against the defendant to recover damages for nuisance, negligence, breach of statutory duty, an injunction "to restrain the defendant, its servants or agents from causing excessive noise and dust to go onto the premises..." and special damages in the sum of $711,961.00, as well as interest and costs.

[2] The Defendant is a partnership between Jamaica Bauxite Mining Limited, a limited liability company incorporated under the laws of Jamaica with its registered office at 36 Trafalgar Road, Kingston 10 and Noranda Bauxite Limited a limited liability

company with its registered office at Port Rhoades, Discovery Bay in the parish of St. Ann engaged in mining activities.

[3] Between January 24 and February 7, 2011 the defendant carried out mining operations in the area of Calderwood to the rear of the claimant's premises and the claimant contends that the defendant excavated up to 1½ feet of the rear boundary. He also contends that as a result of the mining activities he was exposed to excessive dust and noise and that the vibrations resulted in a crack in his water tank causing water stored therein to leak from same.

[4] The defendant filed its defence on October 27, 2011 indicating that it had a right, pursuant to its Special Mining Lease No.165, and the Mining Act, to enter upon the land for the purposes of prospecting and mining and that the excavation went only within 10 feet of the claimant's boundary. It also denied liability for the crack to the water tank, claiming that it did not do any blasting work and that it carries out industry best practices.

[5] During the trial the following were agreed and tendered in evidence:

1. Estimate of Ivan Anderson dated June 1, 2011
2. Surveyors report of Fitz Henry dated October 6, 2011
3. Permission to Mine and Release and Discharge dated July 12, 2010
4. Inter-Office Memorandum dated August 4, 2010
5. Inter-Office Memorandum dated September 7, 2010
6. (2) Photographs of area of Pit No. 9033

The Claimant's case

[6] The claimant's witness statement dated January 31, 2014 stood as his evidence in chief. His evidence is that his land "is designated by Pre-checked plan dated 14th October, 1997 and bearing examination no. 254037" and that over the years the residents of Calderwood had experienced dust and noise from the defendant's operations in the general area. He states that during the period when mining commenced behind his house, the heavy equipment started at daybreak and continued

until nightfall without a break and that apart from the heavy equipment there was also noise from trucks which came to take out the mined material. He states that the dust levels were “incredibly high...nothing was free from dust...if you poured yourself a glass of water you have to drink it immediately as to put down the glass even for a few minutes would result in the water becoming red-brown.”

[7] He indicates that while the mining was taking place there was vibration “which was sufficiently strong to cause a crack in my concrete water tank... sufficiently large to permit the water to run out of the tank...” He also states that he has had to buy water for his domestic needs and that the cost of repairing the tank is $714,001.00.

[8] Mr. Trowers adds that since the mining ended, the defendant sent back heavy equipment to partially refill the mined out areas, including the area behind his house, and that despite working for several days the land is not level and there is still a fall of several feet from his back fence to the land below.

[9] His evidence also is that in mid July 2010, persons from the defendant company spoke to him about compensation “on account of the dust nuisance...The offer was $20,000.00...I signed where the man showed me...” He states further that it was in June 2012 when he was asked about a document he had signed “agreeing to the defendant mining within 300 feet of my house, that I was for the first time aware of what I had signed.”

[10] In cross examination, the claimant stated that the dust from the mining is “double worse” than when travelling behind a truck which is letting out smoke. He indicated that Mr. Anderson who gave him the estimate in relation to the water tank, was not his friend and that mining took place for a month. When it was suggested to him that if the dust was as bad as he said, he could not live in his house, he stated that he had nowhere else to go. He disagreed with Counsel’s suggestion that there was no crack in his water tank otherwise he would produce evidence of it.

[11] Mr. Audley Morris gave evidence on behalf of the claimant. His evidence is that Noranda owns land adjoining his back fence and that he lives in close proximity to the claimant. He states that in or around June 2010 he signed a document in which the defendant offered compensation of $20,000.00 for the dust nuisance.

[12] He also states that shortly thereafter, Noranda started mining and the dust caused persons to have respiratory problems and that while the mining was taking place, he visited the claimant who showed him "how Noranda had mined right up to his back fence..." He states further that vibrations from heavy equipment affected the houses in the area and that Mr Trowers showed him where cracks had appeared in his water tank.

[13] In cross examination he admitted to seeing cracks in the water tank but indicated that he could not say the true cause of the cracks.

The Defendant's case

[14] Talesia Davis, Jason Edwards, and Carlynton Chatoo gave evidence for the defendant.

[15] Ms. Davis states that she is a Property Officer employed to the defendant and that along with Kent Skyers, she advised residents of Calderwood that there would be mining in the area and that she spoke to the claimant on a separate occasion and he "sign the form giving the company permission to mine... he signed the release and discharge form". She also indicates that Mr. Trowers received "a first payment of $20,000.00...and he also got a further $12,000.00 per month for temporary (sic) until the mining was completed". She states that the claimant complained to her sometime afterwards that the company mined near to his boundary and she went and looked and later went to the property with Ms. Marshalee White, Noranda's Property Manager and showed her the area which Mr. Trowers was alleging was his property. She indicates that the claimant never complained of any excessive dust or noise or any damage to his water tank.

[16] In cross examination, she admitted that she went to Calderwood and met with the Claimant. She indicated that Exhibit 3, (Permission to Mine and Release and Discharge dated July 12, 2010) is not the form which the claimant signed at the time. She stated that the claimant signed a 'Release and Discharge' and that she did not explain to him that he needed to get the advice of a lawyer.

[17] Mr. Jason Edwards' evidence is that he was a Land Transaction Administrator employed to Noranda Bauxite Limited and his employment with the defendant terminated in June 2014. He indicates that the defendant has a Special Mining Lease No. 165 which covers lands including parcels in the Calderwood area. He indicates that "Noranda meets and satisfies all NEPA/Government of Jamaica standards for Ambient Air Quality and Stack Emissions...". He also states that Noranda uses industry best practices in its mining operations and has installed dust machines which are regularly maintained. He also states that a dust machine was installed at the Calderwood main road in September 2009 and the readings have never breached the Ambient Quality requirement for any 24 hour period.

[18] In relation to noise, he indicates that the defendant does not have any machine installed to measure this, and that the area is a mining community and many of the parcels of land were purchased with the knowledge that the neighbouring parcels were acquired for mining purposes.

[19] He admitted, in cross examination, that he could not speak to the level of noise and was not in a position to refute what Mr. Trowers said in relation thereto. He indicated that he went out in the field, but that he is not there "from daybreak until nightfall", and with regard to whether there were any readings from the dust machine and whether he recorded any readings, he indicated that he personally did not record any and neither did he have any records from that machine. Additionally, he stated that he was not contracted to see that the contractors uphold the environmental and mining standards and he was not able to say if they carried out the standards.

[20] Mr. Chatoo states that he is the Senior Mine Surveyor employed to the defendant and that during the months of January and February 2011, mining was done "in the Calderwood area at Pit No. 9033...". He gave evidence of the general procedures undertaken when mining is to take place and indicated that persons within 300 feet of the mine "not only receive an *ex gratia* payment but are required to give permission to mine" and that Mr Trowers entered into an agreement with Noranda allowing Noranda to mine within 300 feet of his property.

[21] Under cross examination, he admitted to going to the area after mining had taken place and stated that if Mr Trowers' property fell within the 300 feet of the mine, he would be given an *ex gratia* payment. He indicated that he has never seen a document signed by Mr. Trowers and was not in the field to see if the caution tape which was put in place had been breached. He agreed that Mr. Trowers' property would be in the area of Pit #9033.

[22] I will not repeat the submissions of Counsel and if I fail to discuss any authority cited, Counsel can rest assured that I have given due consideration to all the points that have been raised by them.

[23] The main issues which fall to be determined are:

a. Whether the claimant is entitled to bring a claim in private nuisance and if so, whether he has made out a case
b. Whether the defendant owed a duty of care to the claimant, there was a breach of that duty and the claimant suffered damage which was foreseeable and
c. Whether the defendant has breached its statutory duty under the Mining Act

[24] The authorities show that the essence of nuisance is an activity which unduly interferes with the use or enjoyment of land and that only those persons who possess a proprietary interest in land have a cause of action in nuisance.

[25] Mr. Trowers has to prove on a balance of probabilities that the defendant's actions in the use of its property by carrying out mining activities substantially or

materially interfered with some proprietary right he held in the land and caused damage to his use or enjoyment of his property.

[26] His evidence that he is the owner of the land has not been disputed although Counsel for the defendant sought to show that he did not prove ownership by way of reference to a certificate of title or a deed of conveyance. I note that he was not cross examined in relation to whether he was in fact the owner of the land. I accept the evidence of the defendant's witness Mr Chatoo who agreed that the claimant's property would be in the area of Pit #9033 where mining took place. I find that the claimant was more likely than not possessed of an interest in the land, the subject of the claim. The precise interest has not been ascertained, but it is clear that he was an occupier of the land and has been for some time. I therefore accept that Mr Trowers has a right to bring the claim in private nuisance.

[27] The court has to consider the reasonableness of the defendant's conduct having regard to matters such as the locality and the standard of comfort that a person living in the Calderwood community might reasonably expect, as well as the time and duration of the nuisance, especially as it relates to noise and the nature of the effects of the interference on the claimant.

[28] For damage which is not physical, Lord Wright in **Sedleigh Denfield v O'Callaghan** [1940] AC 880 laid down the test as being what is reasonable in accordance with common and usual needs of mankind in a particular area. According to Lord Wright:

> "*A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society."*

[29] The character of the neighbourhood in which the lands of the claimant and defendant are situated is in my view residential. The claimant and his witness gave evidence of residing in the area, Mr Morris stating that he has lived in Calderwood for over twenty years and in close proximity to the claimant. While I find that mining has taken place in the general area in the past, I find on a balance of probabilities that it is a wholly residential area.

[30] Even if I am wrong and the area is in fact a mining area, on the facts of the case the locality may be irrelevant as the claimant is asserting that as a result of the defendant's actions he also suffered physical damage as excavation was close to his boundary and his water tank became cracked and he lost crops and animals.

[31] The claimant has presented a claim that the defendant engaged in mining activities for about one month and it generated dust and noise as well as vibrations which caused damage to him and his property and has given evidence that the vibrations, noise and dust have adversely affected his use and enjoyment of his property. I accept the evidence in relation to the discomfort although this was not corroborated by any expert evidence. The activities have not been denied save and except in relation to vibrations, as the defendant claims that it did not carry out any blasting works to cause any vibrations.

[32] I find on the evidence that the mining activities were carried out over a period of about two weeks, between January 24 and February 7, 2011. Although it could be considered a short period, I find that the duration may not be a relevant factor in this case as part of the claim is in relation to the excavation of the land which is direct physical damage and is permanent.

[33] It is my view that to carry out such mining activities in the neighbourhood clearly amounts to a substantial interference with the claimant's rights and would be injurious to any person living in such a neighbourhood as in all the circumstances the residents

should not be expected to put up with it. It is self evident that heavy vehicles and equipment carrying out excavations will generate dust and noise especially when the proximity of the activities to the claimant's house is taken into consideration. I do not doubt that the operations carried out by the defendant caused loud noises and dust to affect the claimant and his family while it lasted, but I believe the claimant exaggerated when he stated that water poured in a glass would turn red-brown after a short time.

[34] Relying on principles from **Halsey v Esso Petroleum Co. Limited** [1961] 2 All ER 145, I have accepted the claimant's evidence of interference by dust and noise without the need for the production of medical reports. I note also that there was no evidence to refute the claimant's claim that the noise from the heavy equipment started at daybreak and continued until nightfall. I therefore find that the claimant has made out a case against the defendant and is entitled to an award of damages for the nuisance caused by the noise and dust.

[35] With respect to the claim in negligence, the claimant needs to prove that the defendant owed him a duty of care, breached that duty and the breach caused him damage which is not too remote. In **Donoghue v Stevenson** [1932] UKHL J0526 – I Lord Macmillan at page 31 stated that:

> *'[The law] concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in the law of negligence...The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of the breach of that duty*."

[36] Harris JA in the case of **Jamaica Public Service Co v Winsome Ramsay** SCCA No. 17 of 2003, unreported, delivered December 18, 2006, stated that the approach and the test in imposing a duty of care are foreseeability of damage as a

consequence of the negligent performance of an operation, the existence of sufficient relationship of proximity between the parties and whether it is fair and just that a duty be imposed.

[37] The claimant lived and did his farming on the property which he states that he owns and this property adjoins the property of the defendant. There was therefore a sufficient relationship in terms of proximity. The potential damage to the claimant was in my view, clearly known to the defendant.

[38] The Claimant alleges that in addition to excessive noise and dust arising from the defendant's mining activities, in excavating his land, the Defendant was in breach of a duty of care owed to him. In his Particulars of Negligence, the Claimant states that the mining activities were carried out by the defendant "up to about one foot from the boundary..." and that the defendant "threatens and intends, unless restrained... to continue to commit the said nuisance".

[39] In relation to his claim as to the excavations carried out by the defendant, Mr Trowers did not give any or any reliable evidence as to the dimensions. The defendant however, in its defence, indicated that the excavation went only within 10 feet of the claimant's boundary. A claim in this regard would be properly proven with reference to some expert evidence on the extent and effect of the excavation on the Claimant's property. No such evidence was given and the court is unable to make a finding on the extent of same. However, I find on a balance of probabilities, that the claim for actual physical damage has been established.

[40] Having regard to my findings that damage to the claimant's land has been shown, even on the defendant's case, and to the lack of evidence as to the extent of damage, or the monetary extent of this infraction, I hold that this is a fitting case which would attract an award of nominal damages. Additionally, it is clear that the defendant has ceased operations in the Calderwood community and there is no indication of a recurrence, so an injunction would not be an adequate remedy.

[41] The claimant has pleaded that the defendant carried out its mining activities in breach of the Mining Act, while the defendant seeks to rely on Exhibit 3, the Permission to Mine & Release and Discharge dated July 12, 2010.

[42] I find as a fact that the defendant carried out its activities in the Calderwood community pursuant to the mining lease under the Mining Act. This authorisation or permission however, does not automatically vitiate its liability.

[43] It is clear that the defendant was aware that the mining operations could create a nuisance. I find on the evidence that there is dispute as to whether in addition to the document, Exhibit 3, another, or other documents may have been signed by the claimant. In this regard, I note that the defendant has not set out any pleadings in its defence in respect of the exhibit, and therefore may not rely on it. I will therefore decline to make a finding in relation to its validity, but must note that I am of the view that it has the evidential value of showing that both the claimant and defendant were operating under the belief that the defendant had the claimant's permission to carry out its mining activities within 300 feet of the claimant's dwelling house.

[44] I have considered whether it was possible for the defendant to take precautions to prevent the nuisance caused and find that there is evidence of a general nature from the defendant as to what it does to minimise the dust nuisance and as to the use of "best practices", as well as the installation of machinery to measure the level of dust. The evidence in my view was not specific enough and cannot absolve it of its liability which I find has been established.

[45] Based on the principles extracted from the authorities cited, including **Greenidge v Barbados Light & Power Co. Ltd** (1975) 27 WIR 22 and **Hunter v Canary Wharf Limited** [1997] 2 All ER 426**,** I have had regard to the factual circumstances of this case including the time and place where the nuisance was carried out, the seriousness of the harm caused, whether Noranda acted maliciously or in the reasonable exercise of its

rights, and whether the interference is transitory or permanent. It is my view that the physical harm caused to the claimant's land is serious and of a permanent nature, although the extent has not been established. In so finding, I have also taken into consideration the evidence of the efforts by the defendant to carry out remedial work, subsequently.

[46] In considering the reasonableness of an interference that arises from an activity of the nature carried out by the defendant, the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation. In the case of **St. Helen's Smelting Co. v. Tipping** (1865), 11 H.L.C. 642, 11 E.R. 1483, the Lord Chancellor distinguished between nuisance causing "material injury" to property and nuisance "productive of sensible personal discomfort", finding that only the latter category required an assessment of whether an interference is reasonable, taking into account all of the surrounding circumstances. In this case however, I find that there was both physical injury and nuisance which produced personal discomfort.

[47] I am satisfied that notwithstanding the licence to mine in the area, the defendant acted unreasonably in carrying out the mining activities as it has not been shown on the evidence that it did anything specific to prevent the noise and dust or to minimise their effects and neither has it been shown that it was necessary to carry out its excavation works so close to the claimant's boundary.

Claim for special damages

[48] The claimant has claimed that the defendant's activities involving vibrations, caused damage to his water tank and under the head of special damage he has claimed the sum of $711,961.00 as the cost of repairing it. There was no corroborative evidence adduced to support this contention. The estimate of Mr. Ivan Anderson (Exhibit 1) shows a price of $714,001.00 with no reference whatsoever to the fact that it is for repairs to the tank. There is also no evidence before the court of the true nature of the damage to the water tank complained of, neither is there evidence as to when

exactly this damage occurred. At best, the estimate is an invoice showing certain activities to be carried out and the amount and cost of material and labour to carry out such activities.

[49] It is a question of fact whether the operations of the defendant caused the damage to the claimant's water tank or caused him any loss or damage at all. Mr. Trowers has not provided any evidence to support this contention or that the activities of the defendant significantly contributed to it, neither has he shown that the defendant's mining activities resulted in respiratory problems or damage to his crops and animals. He admitted that he lost crops and animals yet he did not produce a single document to establish that, neither did he call a witness to substantiate his claim in this regard.

[50] Special damages must be specifically pleaded and proved. The claimant has not satisfied the court on a balance of probabilities that he is entitled to the special damages claimed.

Disposition

[51] In view of all of the foregoing, there will be judgment for the claimant.

[52] Using the case of **Pamella Davis v McQuiney Card** [2012] JMCA Civ. 39 as a guide in arriving at the damages to be awarded, I find that general damages in the nominal sum of $500,000.00 would be an appropriate award.

[53] The claimant is also entitled to costs which are to be taxed if not agreed.