THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

Civil Suit No. 72 of 2011

Francis James Rose ==========Plaintiff No.1
Margaret Rose==========Plaintiff No.2
Dean Rose==========Plaintiff No.3
Stacey Rose==========Plaintiff No.4
Dominick Rose==========Plaintiff No.5

Versus

Civil Construction Company Ltd==========Defendant

Anthony Derjacques for the Plaintiffs

Francis Chang-Sam for the defendant

JUDGMENT

Egonda-Ntende, CJ

1. Plaintiffs No.1 and No.2 are husband and wife while plaintiffs no.3, 4 and 5 are their children. The plaintiffs live on land parcels PR2005, PR3460 and PR3461, situated at La Hauteur, Code D'or, Baie Ste Anne, Praslin. This land is owned by the plaintiffs no.1 and 2. The defendant is engaged in quarry works known as Cap Samy Praslin Quarry on Praslin, a short distance away from the plaintiffs' residence and property.

2. The plaintiffs no.1 and 2 purchased the said property on 29th November 2002 and built 2 houses thereon including one that they occupy together with their children, plaintiffs no.3,4 and 5.

3. It is contended for the plaintiffs that the defendant during the years 2007 and 2008 started removing granite boulders from land at close proximity with the plaintiffs' residence. In 2009 the defendant commenced a complete and full quarry project, including the extraction of granite boulders, the crushing of the said boulders, and mass transportation, in and out of the said project area. Defendant is alleged to be utilising heavy machinery, heavy equipment, blasting material and intense usage of transportation and manpower. This project was commenced without an Environment Impact Assessment Plan.

4. The plaintiffs contend that the defendant's actions, through its employees, servants and agents, constitute a faute in law for which the defendant is vicariously liable to the plaintiffs. The particulars of the faute are stated to be:

> '(i) Failing to carry out an environmental impact assessment plan prior to the commencement of the Quarry project.
> (ii) Blasting the terrain and granite surface areas in proximity to Plaintiffs' properties.
> (iii) Extracting and crushing granite boulders in proximity to the said properties.
> (iv) Causing dust and noise pollution on Plaintiffs' property.
> (v) Causing pollution through activity including personal, transportation and habitation.
> (vi) Causing fright and alarm upon use of explosives.
> (vii) Causing pollution through fuel and heavy machinery emissions.
> (viii) Causing shock waves and vibrations upon the usage

of explosives, heavy equipment and machinery.
(ix) Causing cracks to Plaintiffs houses.'

5. By reason of the foregoing acts of the defendant, the plaintiffs contend that they have suffered loss and damage which was particularised as follows:

> '(i) Labour and materials to repair cracked walls==========R13,000.00
> (ii) Loss of value of property==========R1,000,000.00
> (iii) Moral damages for stress, inconvenience, anxiety, psychological harm, distress, fright, [R50,000.00 for each Plaintiff]==========R250,000.00
> (iv) Special damages for constant colds, flues, coughs and ill health of Plaintiffs====R100,000.00
> Total==========R1,363,000.00.'

6. The plaintiffs seek judgment for the said sum with interest at 4% per annum, a mandatory order of injunction to the defendant to cease from operating Cap Samy Praslin Quarry Project and costs of the suit.

7. The defendant opposes this action. It denied all the contents of the plaint save for paragraph 2. It contends that the site of its quarry activities belongs to the Government which granted it consent to carry out a quarry project since August 2000. It commenced its quarrying activities in June 2002 prior to the plaintiffs no.1 and 2 acquiring PR2005, PR3460 and PR3461 at the end of September 2002. The defendant contends that it commenced its quarrying activities in June 2002 but intensified its activities in 2009 with increased demand. The defendant took additional precautionary measures by bringing in and installing additional equipment in order to reduce to the minimum any possible impact resulting from its increased activities.

8. The defendant further avers that it begun its operations with full knowledge and consent of the Government and at no time was it required to do an Environmental Impact Assessment prior to commencement of its activities. When the plaintiffs bought and chose to develop the lands aforesaid they knew about the quarrying activities and of the risk involved in purchasing land in proximity to quarrying activities. The plaintiffs knowingly and deliberately placed themselves at risk and defendant contends it is in no way at fault. The defendant denies any liability to the plaintiffs.

9. At the trial the plaintiffs no.1 and 2 testified as well as three other witness, Nigel Valentin, a Quantity Surveyor, Jean Savy and Nobert Leon, who are neighbours to the plaintiffs. For the defendant there was a total of 7 witnesses including, the Managing Director of the defendant, Sani Khan, Mr Youmbu, the Director of Lands in the Ministry of Land Use, Louis Barbe, the environmental specialist, Thomas Marie, the Master Blaster, Anel Erikson Marie and Pierre Philoe, neighbours to the quarry site and the plaintiffs, and Martin Fredrick Lewis the General Manager of the defendant's Praslin Quarry operations.

10. What emerges from the testimony of the parties is that the defendant acquired an old quarry site from Government by way of lease in 2000. It was put in occupation of the property as the formalities were being worked upon. There were 2 families on the land. The defendant was required to re locate them and build houses for them elsewhere which it did.

11. It began operations in 2001 with blasting and supplying rock to the Government with regard to the renovation of the port area on Praslin. It

was supplying red soil and rock to its customers. In 2008 it embarked upon expanding its operations into a full quarry operation by importing a crusher and other related equipment which were assembled and installed by September 2009. The quarry started operations in January 2010.

12. An environmental impact assessment was done by Louis Barbe which was submitted to the Department of Environment in October 2009 and received approval towards the end of the year or early 2010.

13. The plaintiffs no.1 and no.2 own land purchased from Government of Seychelles 200 metres away from the defendant's Quarry. This land was purchased in 2003 though they had occupied it as early as 1998 with the consent of Government. There are 2 houses on this land. The plaintiffs live in one of the houses and the other is rented out to tenants. In their testimony the plaintiffs no.1 and 2 state that dust from the quarry gets to their house. The dust is smelly. This come when there is blasting and the wind blows in their direction. It has caused itching and sickness to family members. Dust is a nuisance as they have to clean up. There are cracks all over both houses.

14. Mr Nigel Valentin, a Quantity Surveyor in a report made after examining the plaintiffs properties in 2011 found that there were cavity cracks in both houses but when examined on the sizes of the cavities he failed to provide the information claiming it was in his office. He opined that the cost of remedying the defects would be R167,500.00. He admitted that he had not investigated the cause of the cracks.

15. There was conflicting testimony from the neighbours of the plaintiffs and defendant. With those called by the defendant asserting that the quarry

operations had not adversely affected them in anyway including on their activities while those called by the plaintiff asserted that the blasting and quarry operations had affected them adversely with regard to the safety of their houses. Defendant's witnesses testified that the house that the defendant found on the land had remained there and is unaffected by both the blasting and quarrying operations of the defendant. It had no cracks at all.

16. The defendant's master blast testified to the effect that the blasting techniques and material used by the defendant were such that ground vibrations were minimised and would not cause damage to properties 50 metres away. He admitted though that they had never measured the ground vibrations caused by blasting. The defendant's Managing Director testified that they were purchasing the equipment to do so and had retained an expert who would come to do so.

17. The key issue in this case is what is the cause of cracks on the plaintiff no.1 and 2's houses? Mr Anthony Derjacques, learned counsel for the plaintiff, pressed upon me to find that the cause of the cracks were the operations of the defendant on the adjacent land. He referred me to the cases of Joseph Isnard and others v China Senyang Corporation (Seychelles) CO Civil Side No. 325 of 2002 and Mrs Micheline De Silva and others v United Concrete Products (Sey) Ltd, Civil Side No. 273 of 1993 in support of the case for the plaintiff.

18. On the other hand Mr Chang-Sam, learned counsel for the defendant, submitted that the plaintiff had failed to establish the cause of the cracks. And therefore ought not to succeed. He submitted that an often cited case in such cases as this was Desaubin V United Concrete Products Ltd 1977

SLR 164. This case he submitted was not applicable to the facts of this case and is distinguishable in so far as the plaintiffs had failed to prove the cause of the cracks in their house.

19. This claim is brought under article 1382 of the Civil Code of Seychelles. The plaintiff must be able to prove that the damage it has suffered has been caused by the acts of the defendant, or its servants and agents. Causation is a key element in determining liability. This must be proved on a balance of probabilities. It is not enough for the plaintiff to show that the defendant's acts could be one of several possibilities that could have caused the damage he or she has suffered. The defendant's acts must be the cause of the damage.

20. I accept that the law is correctly stated in all the cases referred to me by both counsel. These are Joseph Isnard and others v China Senyang Corporation (Seychelles) CO Civil Side No. 325 of 2002; Mrs Micheline De Silva and others v United Concrete Products (Sey) Ltd, Civil Side No. 273 of 1993 and Desaubin V United Concrete Products Ltd 1977 SLR 164. These cases are in agreement with the application of article 1382 of the Civil Code of Seychelles. In all those cases the defendant was shown to have been the cause or contributed to the damage suffered by the plaintiffs.

21. None of the plaintiff's witnesses including the plaintiff no.1 and no.2 can be said, to have established in their testimony, singly or taken as a whole, the cause of the cracks or cavities in the houses of the plaintiffs. No investigations were made in relation to the ground conditions surrounding the houses or upon which the houses were built. No investigation was made in relation to the materials used in the construction of the houses or

workmanship thereof. No doubt it is possible that ground vibrations arising from blasting, heavy traffic, or the running of heavy machinery, could cause or contribute to the cracks in the plaintiffs houses. But so could faulty workmanship, faulty or inferior materials, or ground conditions upon which the houses were built, that could cause uneven settlement. It was the duty of the plaintiffs to establish what was the actual cause of the cracks in their houses on a balance of probability. They have failed to do so.

22. With regard to the claim for dust emissions to the plaintiffs' house it has been shown that the defendant has in place sufficient dust suppression measures to minimize the dust emitted from the quarry. Secondly the defendant has shown that the plaintiff no.1 manufactures charcoal on his land and sells the same too from there. This generates smoke as it does dust at different stages of the manufacture through to packing. In fact when the Martin Fredrick Lewis visited the plaintiffs' home what was observed was dark dust consistent with dust from charcoal rather than red dust which would be emitted from the red stone of the quarry. If dust is a problem to the plaintiffs it appears to be a home grown problem.

23. With regard to noise the defendant have put forth evidence to show that there are in place noise suppression measures that are effective both at blasting stage and crushing stage. As for traffic to and from the quarry I would not found any liability on the same as this is largely daytime traffic and is not unreasonable in any case per se.

24. With regard to smell exhibit D 1 notes that the premises were affected by smell from the near by chicken farm. No other source of smell was observed by the PW3, the Quantity Surveyor, when he inspected the

premises on 11 February 2010. I do not find credible evidence in relation to the claims that a nuisance from the defendant's quarry by way of noise, dust, or smell existed or exceeded what would be acceptable in the kind of neighbourhood that the plaintiffs are living in. See Desaubin V United Concrete Products Ltd 1977 SLR 164.

25. Assuming though that I was wrong and the plaintiffs had proved liability would they be entitled to the damage claimed? The plaint claims R13,000.00 for labour and materials to repair the cracks in the houses. There was no evidence brought to prove this claim. On the contrary the PW3, the Quantity Surveyor put the cost at R167,500.00 a sum that was not claimed at all in the plaint. This is *ultra petita*. Where a person has claimed specific damage or loss this claim must be specifically proved. One cannot claim one sum and then purport to prove another. One cannot be allowed to go outside the claim set out on one's pleadings.

26. The plaintiffs claimed loss of value of property R1,000,000.00 only. In exhibit D1, PW3 had valued the negative effect of being affected by 'noise from the quarry and bad smell from the nearby chicken farm' as about R50,425.00 only. The land was valued at R1,065,967.50. The houses were valued at slightly over one million rupees. This was in February 2010. I do not accept, in light of the foregoing, that the plaintiffs' property could have lost value of R1,000,000.00 on account of the activities of the defendant. There was less blasting operations in 2011 than in the preceding years. I am satisfied that on the evidence before me there is no scintilla of evidence to support this head of claim.

27. There is a claim for moral damages for stress, inconvenience, anxiety, psychological harm, distress, and fright of R50,000.00 for each plaintiff.

Plaintiffs no.3, no.4 and no.5 did not testify at all. Neither did anyone present their cases on their behalf. There was no representative action in that regard. Their claim remains unproven. I would award plaintiffs no.1 and no.2 R10,000.00 each for inconvenience.

28. There is a claim for special damages for constant colds, flues, coughs and ill health of the plaintiffs of R100,000.00. A claim for special damages must be specifically proved. There is no evidence before this court to establish this claim at all. There is no evidence to show how this sum was arrived at. Or if it was spent at all. Or was it intended to be a claim for moral damages under that heading? Is it a material damage or moral damage claim? Going by the language of the claim it is a material damage claim. Proof is lacking both in terms of showing that colds, flues, coughs and ill health was suffered on account of the defendant's fault and that the sum claimed was incurred thereby to deal with the said conditions.

29. For the foregoing reasons I find that the plaintiffs have failed to prove their case. I dismiss the same with costs.

Signed, dated and delivered at Victoria this 30th day of July 2012

FMS Egonda-Ntende
Chief Justice