

ST. VINCENT AND THE GRENADINES

CIVIL APPEAL NO. 9 of 1989

BETWEEN:

SAMUEL BARNWELL - Appellant

and

ST. VINCENT BANANA
GROWERS ASSOCIATION - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: C. Dougan for the Appellant
H. Deb. Forde, O.C., A. Cummings, Mrs. Hughes-Ferrari
and Dr. W. Browne for the Respondent

1991: July 16,
Dec. 9.

JUDGMENT

MOE, J.A.

This case concerns the flight of an aircraft over agricultural land and the falling from the aircraft of a noxious substance on to growing crops on the land. The appeal is against the dismissal by a High Court Judge of the appellant's claim against the respondent for damages claimed to have been incurred as a consequence of the respondent's negligence in allowing a pesticide to fall from an aircraft on his crops thereby causing damage; alternatively damages for trespass and/or nuisance.

Background

The appellant is a farmer and exporter of agricultural produce. The respondent is a Corporation established under the Banana Industry Act, 1978 (hereafter referred to as the Act) and by virtue of section 3(2)(b) of the Act has functions, inter alia "to take such steps as may be expedient for the control or prevention of pests and diseases that affect bananas and banana plants". At the material time the appellant had sorrel growing on one and a half acres of his land situated at Greggs. This land adjoins fields of bananas sprayed from time to time by the respondent with a chemical called calixin. On the 16th and 17th September, 1987 during spraying operations by the respondent, the appellant's sorrel was sprayed. The sorrel leaves

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were scorched. The appellant complained to the respondent. On 25th October 1987, the respondent again sprayed the appellant's field of sorrel during spraying operations. The appellant got an investigation carried out by a technologist in crop protection who reported that about one-half of the appellant's field of sorrel showed moderate to severe leaf scorch. It was the opinion of the technologist that this phytotoxic effect on the sorrel would cause a drop in the yield of fruit or a delay in the maturation of the fruit. The appellant applied fertilizer to his sorrel. The sorrel did not mature until the middle of January 1988 at which time the appellant did not have a market for his crop and it perished..

The appellant alleged that the spraying of the sorrel on the 25th October caused substantial damage to it, for the chemicals retarded the maturation of his crop whereby he was unable to sell his sorrel at the correct time and as a consequence he suffered loss in the sum of \$34,000.00. He claimed this loss on the basis of the negligence of the respondent. In the alternative he claimed damages for trespass and nuisance. He also sought an injunction restraining the respondent from causing its aircraft to spray chemicals on to his lands.

The respondent acknowledged that it sprayed banana cultivations in the area of the appellant's fields on the material dates but denied negligence, trespass or nuisance on its part. It averred that the spraying operations were done pursuant to the provisions of the Act and that such spraying is a necessity and vital to the Banana Industry of St. Vincent and the Grenadines. It averred further that if spray did reach the appellant's sorrel crop it was through an act of God, i.e., the wind.

The learned trial Judge found that the spraying of the appellant's crop took place from about fifty to sixty feet above the crop. He accepted the evidence of a consultant in agriculture that the delay in maturation of the sorrel was not due to the spraying of the cultivar on the crop but was caused by environmental conditions prevailing at the time. The Judge held that the act of the respondent of causing the chemical to fall on the appellant's sorrel was not intentional but was caused merely as the result of the exercise of its right to spray nearby banana plantations under authority given to it by Statute. He found there was some interference with the appellant's property, but that the interference was only temporary and not substantial. He accordingly dismissed the appellant's case.

/Negligence.....

Negligence

The appellant's first complaint is that the learned Judge erred in not applying the dilemma principle in determining whether the respondent's act was the cause of his loss. The contention was that because of the respondent's action, the appellant attempted to minimise his loss by applying fertilizer to his crop. But that although the application of fertilizer extended the maturation period, this did not relieve the respondent of his responsibility.

The trial Judge did consider the dilemma principle, set out in Clerk and Lindsell on Torts, 15th Ed. at p. 562 as follows:-

"When a plaintiff himself is put in a position of danger by the defendant's wrong, and has to choose what course to take, his action, even if it turns out to be mistaken and unnecessary, will not necessarily break the chain of causation. The reason is that a sudden decision in an emergency is not regarded as unreasonable even though ample reflection might have led to a different decision. There can hardly be any question of foreseeability of what a person is likely to do in an emergency."

I agree with the learned Judge that the facts of this case do not admit of the application of the principle. The success of the appellant's contention depends on whether application of the calixin led to a delay in maturation. Otherwise the matter of a break in the chain of causation does not arise. The learned Judge accepted the evidence of a consultant in agriculture as already indicated, that the retardation of maturation of the appellant's sorrel crop was caused as a result of environmental conditions then prevailing and nothing else. The trial Judge was fully entitled to accept and conclude as he did. It is sufficient to say that he gave sound reasons for so doing and there is no justification for interfering.

Nuisance

The ground of appeal was that the learned trial Judge misdirected himself as it related to the appellant's case in that he failed to appreciate that the nuisance complained of was the unlawful interference by the respondent with the appellant's vegetation and as such could be temporary, the damage being the actual physical damage incurred.

It is clear from the authorities that a temporary interference with the use and enjoyment of land may amount to nuisance but such interference would have to be substantial. One such authority is *British Celanese, Ltd. v. A.H. Hunt (Capacitors, Ltd.)* (1969) 2 All E.R. 1252.

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There is no challenge to the finding that the interference was not substantial. There was evidence on which the Judge could so hold and his conclusion was entirely reasonable. There is no justification for interfering with this aspect of the matter.

Trespass

The substantial challenge to the decision is against the finding that there was no trespass by the respondent to the appellant's land. One ground under this head is that the learned Judge erred in holding that there was no trespass because the respondent's act was not intentional. Counsel's submission was that intention is not an ingredient in trespass but that the slightest interference with another's property is trespass *per se* in law.

An intrusion, whether intentional or unintentional, by one person upon land of another amounts to a trespass. But there is authority that where intrusion is not deliberate but done negligently the cause of action is in negligence. See *Letang v Cooper* (1965) 1 Q.B. 232. However in the context of this case it was unnecessary for the Judge to advert to the question whether the respondent's act was intentional or put another way whether the appellant's case lay in trespass or in negligence, as will be shown later in this judgment.

A second ground is that the learned Judge, having found that the respondent flew its aircraft at 50 - 60 feet above the appellant's land and while doing so sprayed the chemicals on to the appellant's land, was bound to hold that the respondent committed trespass to the appellant's land.

Allied to this was the ground that the learned Judge failed to consider that the violation of the appellant's air-space without his permission did by itself amount to an act of trespass in the absence of any statutory provisions to the contrary. It was contended that flight at 50 - 60 feet above a person's land is a trespass at Common Law if it interferes with the user of the land. Reference was made to the judgment of McNair J. in *Kelsen v Imperial Tobacco Co.* (1957) 2 All E.R. 343 and to the Civil Aviation Act, 1949, U.K., hereafter referred to as the Civil Aviation Act, which is applicable to St. Vincent and the Grenadines by virtue of S.I. No. 5922 of 1969.

Mr. Forde for the respondent argued that today the circumstances are limited where one may have an action for infringement of the air-space over one's land for a distinction is to be made between objects overflying the land and things placed on or over the land. Evidently

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drawing heavily from a dictum of Griffiths J. in *Bernstein of Leigh v Skyviews & General Ltd.*, (1977) 2 All E.R. 902 Mr. Forde's submission was that the Court had to approach the case on the basis of striking a balance between the rights of the owner of the land in the air-space over it to such a height as is necessary for the use and enjoyment of his land against his rights of the air-space above that height which were no greater than lie in the public at large. He submitted that it was not a trespass to fly aircraft over a person's land at a reasonable and safe height. The respondent's position therefore was that for the appellant to succeed he had to bring himself within the terms of section 40 of the Civil Aviation Act. Indeed the respondent relied heavily on this legislation.

In *Bernstein of Leigh v. Skyviews & General Ltd.*, (supra) Griffiths J. on consideration of the rights of an owner in the air-space above his land said at p. 906 that it may be "a sound and practical rule to regard any incursion into the air-space at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance".

The appellant appears to rely on this proposition but reliance on the position at Common Law appears to me to be of little avail to him. The appellant's contention is not that the mere flight at 50' - 60' above his land caused any interference with its use. The burden of the complaint relates to the falling from the aircraft of calvin on to his sorrel crop which scorched the sorrel leaves.

Civil Aviation Act, 1949, U.K.

It must first be observed that this legislation was not drawn to the attention of the trial Judge and it does not appear that he addressed his mind to it. In my view the terms of the legislation are crucial to the determination of this appeal and the relevant provisions are as follows:

"40. Liability of aircraft in respect of trespass, nuisance and surface damage. - (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight so long as the provisions of Part II and this Part of this Act and any Order in Council or Order made under Part II or this Part of this Act are duly complied with.

/ (2) Where.....

(2) Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from an aircraft while in flight, taking off or landing, then unless the loss or the damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft."

There is a proviso which is not relevant to the issue under consideration.

The above provisions being applicable an issue which arises for determination is whether the flight of the respondent's aircraft over the appellant's land was at a height reasonable in all the circumstances.

Reasonableness of Flight

It is not disputed that at the time the respondent flew its aircraft over the appellant's land, it did so while exercising a function given it under section 3(2)(b) of the Act. The evidence is that in the exercise of this function of spraying banana plants the respondent flies its aircraft normally about 15 feet above the plants being treated or about 25 feet above the earth. The appellant's land is surrounded by banana fields. It is evident that having sprayed bananas on one side of the appellant's land while at a height of about 15 - 25 feet the respondent then climbs or throttles to get to 50' - 60' to cross the appellant's land so as to spray another banana field on the other side of the appellant's land. There is nothing in the evidence to show or even suggest that in order to carry out the manoeuvre over the appellant's land in performance of the respondent's functions, the respondent could be expected or ought to fly at a greater height. It seems to me that in the circumstances of this case the flight of the respondent's aircraft at about 50' - 60' over the appellant's land must be held to be reasonable and again under the provisions of the Civil Aviation Act the appellant could not succeed simply on the basis of the flight of the aircraft through the air-space over his land. In my view at the material time the respondent was protected by section 40(1) of that Act.

But although a person may have been acting within section 40(1) of the Civil Aviation Act, he may yet be liable under section 40(2) of the said Act. This is indicated in the judgment of Griffiths J. in *Bernstein v Skyviews* (supra) where in a pronouncement on the effect of section 40(1) he stated at p. 908:

/"It is, however....

"It is, however, to be observed that the protection given is limited by the words 'by reason only of the flight', so although an owner can found an action in trespass or nuisance if he relies solely on the flight of the aircraft above his property as founding his cause of action, the section will not preclude him from bringing an action if he can point to some activity carried on by or from the aircraft that can properly be considered a trespass or nuisance or some other tort."

Lord Jauncey in *Steel-Maitland v British Airways Board* 1981 Scots Law Times at p. 112 said:

"What the section intended to achieve was the removal of certain activities from the realm of Common Law nuisance or trespass if they only resulted in disturbance or inconvenience but to afford to an aggrieved person a remedy, at least as effective as his abolished Common Law remedy in respect of the same activities if they caused material damage to him or his property."

Material Loss or Damage

It has already been shown that the appellant did not establish that he suffered the loss which he claimed resulted from the negligence of the respondent. Did he suffer loss or damage other than that rejected which would bring him within section 40(2) (*supra*)? Little argument was addressed to the Court on the meaning of 'material' in the phrase "material loss or damage". Indeed there is a dearth of authority on the question. Counsel for the respondent contended that in this case the scorching of leaves which occurred to the appellant's crop was insignificant damage amounting to not even \$3,000 and this could not fall within the terms of the section. I do not accept the submission that the word 'material' means or implies that the damage must be more than 'de minimis'. Such a construction could result in the same kind of activity when affecting 1 acre of land i.e. belonging to an owner of one level does not give rise to liability but when affecting 5 acres of land i.e. belonging to an owner of a higher level, gives rise to liability. In my view the word 'material' given its ordinary grammatical meaning shows that its use in the phrase implies that not all loss or damage that may be conceived would fall within the section and limits the phrase to that loss or damage which is "discernible, evident or plain", that is "physical" damage. In this case physical damage was caused and there is no evidence that it was caused or contributed to by the negligence of the appellant. Consequently by virtue of section 40(2) of the Civil Aviation Act, damages in respect of the damage would be recoverable by the appellant.

/Damages.....

Damages

The appellant's case was directed mainly towards recovery of damages for loss due to delayed maturation of his crop and there is little evidence on which to assess damages for the physical damage caused. Satisfied that he suffered in this respect I can award an amount reasonable in the circumstances. Doing the best I can on the basis of the evidence and in the circumstances I would award the appellant a sum of \$2,500.00.

Injunction

The appellant's complaint is that having found that the respondent's aircraft did spray chemical on to the appellant's crop causing physical damage to the said crop the learned trial Judge erred in not granting an injunction against the respondent so as to restrain it from committing further acts against the appellant.

It is not clear from the judgment of the trial Judge how he came to exercise his discretion against the grant of the injunction sought. It appears that the refusal was simply on the basis that the appellant's claim as pleaded was dismissed. I regard it as settled that once a plaintiff has established the infringement of a right and there is ground for believing that without an injunction there is likely to be a repetition of the wrong committed, the plaintiff in the absence of special circumstances is entitled to an injunction against the repetition. See *Shelfer v. London Electric Lighting Co.* (1895) 1 Ch. 287, *Pride of Derby v. British Celanese Ltd.* (1953) 1 All E.R. 179 at 197. In *Woollerton and Wilson Ltd. v. Richard Costain Ltd.* (1970) 1 All E.R. 483, Stamp J. at p. 485 said "It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction: for if there is no damage done the damages recovered in the action will be nominal and if the injunction is refused the result will be no more nor less than a licence to continue the tort of trespass in return for a nominal payment."

In my judgment therefore the appellant is entitled to have the injunction claimed unless some special considerations dictate the exercise of the discretion otherwise. The respondent urged that a major consideration to be taken into account is that the activity under review is carried out by the respondent as part of its functions

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under the Banana Industry Act an exercise vital to the most important industry in St. Vincent. This appears to be asking that the public interest prevail over the private interest of the appellant. In *Kennaway v. Thompson* (1980) 3 All E.R. 329, Lawton L.J. considered that the proposition that the public interest should prevail over the private interest is not in accord with the principles to be applied in this regard as enunciated in *Shelfer v. City of London Electric Lighting Co.* (supra). In the latter case Lindley L.J. said at page 316 "The Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed". There is authority for saying that in considering whether to exercise a judicial discretion to grant an injunction, the Court is under a duty to consider the interest of the public. See *Wood v. Sutcliffe* (1951) 61 E.R. 203, *Miller v. Jackson* (1977) 3 All E.R. 338. Clearly regard must be had not only to the rights of the parties, but also to all the surrounding circumstances. So that on the facts of this case the Court must take into account the right of the appellant not to have his crops interfered with or damaged and the interest of the general public in having the banana cultivations sprayed for the benefit of the Banana Industry so vital to the economy of the country.

There is nothing in the evidence which shows that the respondent in having to abide an injunction would face a hardship. It seems to me that what is required of the respondent in performing its functions under the Act is care not to cause damage to the appellant's property. My view is that the Civil Aviation Act contains within section 40 itself the very balancing of interests to which Counsel for the respondent directed the Court's attention. Consequently I do not accept that the necessity of having bananas sprayed periodically is a special circumstance such as should inhibit this Court from granting the injunction claimed. The appellant is only entitled to an injunction restraining the respondent from such spraying as cause damage to the appellant's crops.

The result is I would allow the appeal, award the appellant \$2,500 damages for trespass, grant him an injunction in terms of this judgment and one-half of his costs in the appeal and in the Court below.

/G.C.R.....

G.C.R. MOR,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

C.M.D. BYRON,
Justice of Appeal