

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

CLAIM NO.: SLUHCV2008/0261

BETWEEN:

QUALITY MOTORS LIMITED

Claimant

and

**DEANNA CLARKE
(Representative of the Estate of HUNTER JOSEPH FRANCOIS)**

Defendant

Consolidated with:

CLAIM NO.: SLUHCV2008/0262

BETWEEN:

QUALITY MOTORS LIMITED

Claimant

and

**DEANNA CLARKE
(Representative of the Estate of HUNTER JOSEPH FRANCOIS)**

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Stanley John QC with Mr. Deale Lee for the Claimant

Mr. Peter Foster QC with Ms. Renee St. Rose and Mr. Peter Marshall for the
Defendant

2019: July 18 and 19;
July 8, 16; (written submissions)
August 16; (written submissions)
2020: August 17.

JUDGMENT

Background

- [1] **CENAC-PHULGENCE, J:** This claim is characterized by a long and somewhat untidy history, which, if ordinarily permitted, would tend to cause confusion. Suffice it to say that this, now consolidated claim, was initially commenced by the claimant, Quality Motors Limited ("Quality Motors"), in 2008, by way of three separate claims. The three claims were SLUHCV2008/0261; SLUHCV2008/0262; and SLUHCV2008/0574, which involved between them, three defendants, Clarke Investments Limited ("Clarke Investments"), Hunter Joseph Francois ("Mr. Francois") and Bluerock Quarries Limited ("Bluerock Quarries"). It is common ground that these three claims arose from the same set of facts and concerned similar causes of action, being trespass to land and abuse of usufruct.
- [2] At some point in its muddled history, it was realized that claim SLUHCV2008/0574 had become otiose, as it was subsumed under the relief sought in the other two claims; and the other two claims were consolidated. Further, by order of the Court dated 17th April 2013, the claim against Clarke Investments and Bluerock Quarries was withdrawn, and judgment was entered in their favour with costs to be assessed. Mr. Francois is now deceased, and pursuant to order dated 13th March 2017, Ms. Deanna Clarke ("Ms. Clarke") was appointed to represent his Estate. Therefore, the claim that proceeded to trial was a consolidation of claims SLUHCV2008/0261 and SLUHCV2008/0262 between Quality Motors and Ms. Clarke, as representative of Mr. Francois' Estate.
- [3] Given its vintage, it is important to briefly note some of the procedural background. This claim has been the subject of several applications, including an application for an interim injunction against Clarke Investments and Bluerock Quarries granted in April 2009; and an application for its variation and/or discharge, upon which an order was made in October 2009, varying the injunction upon Quality Motors fortifying its security in the sum of \$1,000,000.00, failing which the injunction would be discharged. It was also the subject an appeal to the Court of Appeal filed on

26th July 2010, concerning the admissibility of an expert report. By consent order approved by the Court of Appeal, dated 22nd March 2011, the report was ordered admissible, and the expert that of the claimant; the defendant was permitted to call an expert witness of its own and directions were given in respect thereof; and the matter was remitted to the High Court for trial.

- [4] The claim has also undergone several periods of case management, there having been at least four trial dates fixed – 14th July 2008, 29th June 2011, 9th and 10th May 2012, and 17th and 18th April 2013, all of which were vacated for various reasons. There was another notable application made orally before Belle J on 17th April 2013 by Mr. Francois, after the claim was withdrawn against Clarke Investments and Bluerock Quarries, seeking an order restricting the claim against him to declaratory relief only. Belle J delivered his decision dismissing the application on 22nd July 2016. Thereafter, in 2017 and 2018, the claim was the subject of several mediation referral and extension orders; however, mediation proved unsuccessful. The case therefore returned to case management in November 2018, when case management directions were again given. The parties filed their list of documents in January 2019, expert reports in February and March 2019, and witness statements, witness summaries and pre-trial memoranda between March and May 2019. The matter thereafter came up for pretrial review, and then for trial on 18th and 19th July 2019 when it was finally heard.

The Claim

- [5] Quality Motors' case is that it is the owner of land registered in the Land Registry as Block 1054B Parcels 10 and 52 ("the Property"), which it purchased from Mr. Francois by Deed of Sale, dated 5th December 2006¹ (the "Deed of Sale"). Quality Motors asserts that on the Property is a quarry, which is limited in area to 4 acres (the "Quarry") which has been known to be so defined and limited from the time quarrying work first commenced there. Quality Motors says that it was registered as owner of the Property subject to:

¹ Registered in the Land Registry on 13th July 2007, as Instrument number 4161/2007.

- 1) a usufruct to Mr. Francois for a period to end on 31st December 2012 (the “Usufruct”); and
- 2) a lease dated 30th November 2006² from Mr. Francois as lessor to Clarke Investments as lessee for a term to end on 31st December 2010 (the “Head-Lease”).

[6] Quality Motors states that in April 2008, it became aware that a sub-lease agreement had been entered into without its knowledge or consent, with Clarke Investments as sub-lessor and Bluerock Quarries as sub-lessee of the Property. This sub-lease agreement dated 21st February 2007³ was executed by Mr. Francois, Clarke Investments and Bluerock Quarries (the “Sub-Lease”).

[7] Quality Motors alleges that, without its knowledge, consent or intervention, by a document entitled ‘Amendment to Lease Agreement’, dated 27th September 2007⁴, between Mr. Francois and Clarke Investments, Mr. Francois purported to extend the term of the Head-Lease for a period to end on 31st December 2012, (the “Amendment Lease”). Quality Motors contends that Mr. Francois was not authorized, nor had the right, whether by law or otherwise, to extend the term of the Head-Lease. As a result, the purported amendment to the Head-Lease, that is, the Amendment Lease, is null, void and of no effect, and registration of the Amendment Lease against the Property must therefore be cancelled.

[8] Quality Motors further alleges that in or about February 2008, Clarke Investments and/or Bluerock Quarries, whether by themselves or by their agents, in particular C.O. Williams Limited (“C.O. Williams”), commenced quarrying works on areas of the Property other than the Quarry, thereby causing destruction of the Property. The first such area is stated to be an area of approximately 2.39 acres in size, which was destroyed by felling trees, excavating, digging, and eroding the soil and other material (the “2.39 Acre Site”). Quality Motors says it contacted Clarke

² Registered in the Land Registry on 20th December 2006, as Instrument number 6801/2006.

³ Registered in the Land Registry on 21st September 2007 as Instrument number 5471/2007.

⁴ Registered in the Land Registry on 22nd October 2007, as Instrument number 6088/2007.

Investments in respect of this area and subsequently, work there ceased. The second such area is described as an area beyond the 4 acres known to be the Quarry which has been destroyed by excavating, digging, and removing material therefrom (the "Further Excavated Site"). For convenience, together, they will be referred to as the "Sites".

[9] Quality Motors states that it verbally contacted Mr. Terrence Clarke, representative of Clarke Investments and mentioned the possibility that the 4-acre area that is the Quarry may have been surpassed. It suggested a meeting to determine whether this was in fact so and to demarcate the Quarry in the interest of all parties. It also requested that Clarke Investments, by itself or its agents, cease excavation to avoid possible destruction of areas of the Property outside of the Quarry. However, Quality Motors alleges that Clarke Investments and Bluerock Quarries continued excavation during the period in which their respective attorneys-at-law were in discussion with a view to resolving the matter. Consequently, by letter dated 18th February 2008 and further letter dated 28th February 2008, Quality Motors, through its attorneys-at-law, wrote to the attorneys-at-law for Clarke Investments and requested that Clarke Investments cease all operations until the boundaries of the Quarry could be physically determined. Notwithstanding both letters, Clarke Investments and/or Bluerock Quarries, not only continued but intensified quarrying operations.

[10] As a result of the quarrying works undertaken by Clarke Investments and Bluerock Quarries on the Sites, Quality Motors contends that it has suffered loss and damage in that:

- 1) Clarke Investments, Bluerock Quarries and Mr. Francois have trespassed and caused damage on the Property;
 - 2) the terms of both the Head-Lease and the Sub-Lease have been breached;
- and

3) Mr. Francois, in allowing such destruction, and by virtue of his obligations under the Usufruct, has committed waste of the Property and thereby abused the Usufruct.

As a result of the quarrying works undertaken at the Further Excavated Site, Quality Motors contends that it has suffered further loss and damage to the extent that the Property has been and continues to be diminished beyond that which was contemplated by the parties.

[11] In the premises, Quality Motors claims to be entitled to compensation for the damage to the Sites and to exercise its right to terminate the Usufruct. It therefore claims the following relief: orders that (i) the Amendment Lease is null and void; (ii) registration of the Amendment Lease be cancelled; (iii) Mr. Francois has abused the Usufruct; (iv) the Usufruct be terminated and its registration cancelled; (v) a permanent injunction be granted restraining the defendant, whether by himself, his servants, agents, or otherwise, from continuing operations in the Quarry until further order; (vi) the Head-Lease be improbated and its registration cancelled; (vii) the Sub-Lease be improbated and cancelled, and its registration cancelled; (viii) damages for damage to the Property be assessed and payment of compensation therefor; (ix) any other relief deemed just by the Court in all the circumstances; (x) interest; and (xi) costs.

The Defence

[12] Mr. Francois confirmed Quality Motors' ownership of the Property and its purchase subject to the Usufruct and Head-lease as asserted. He also confirmed the existence of a quarry on the Property, however, denied that the quarry is limited to 4 acres only. Rather, he averred that the area leased as a quarry comprises approximately 4 acres.

[13] Mr. Francois also confirmed that by a sub-lease agreement, Clarke Investments sublet the quarry situate on the Property to Bluerock Quarries. He stated that the Sub-Lease was for a term of 3 years and 10 months commencing on 1st March

2007. He stated, however, that he was not a party to the Sub-Lease but was invited to, and did give his consent thereto, by signing same.

- [14] He also admitted the fact of the Amendment Lease but contends that by the Amendment Lease, he lawfully extended the term of the Head-Lease to 31st December 2012, the scheduled date on which his Usufruct was due to expire. Mr. Francois further asserted that no knowledge by, or consent or intervention from Quality Motors was required in order for him, as Usufructuary, to lawfully lease, extend any lease, or consent to any sub-lease of the Property.
- [15] With respect to the allegation of quarrying work at the 2.39 Acre Site undertaken by Clarke Investments and Bluerock Quarries, Mr. Francois stated that he did not authorize any quarrying work to be done by anyone outside of the Quarry; he was unaware of any such quarrying work taking place; and that Clarke Investments, Bluerock Quarries, and C.O. Williams are not his servants and/or agents. He further denied that there has been any destruction, erosion or waste of the 2.39 Acre Site as alleged or at all and puts Quality Motors to strict proof thereof.
- [16] Mr. Francois also denied any damage, destruction or waste arising from quarrying of the Further Excavated Site and put Quality Motors to strict proof thereof. If there should be found to be any such destruction or waste, he was not aware that quarrying works had taken place beyond the Quarry and the same was neither authorized nor permitted by him. He further stated that he was not privy to any correspondence or conversations between Quality Motors and Clarke Investments or their attorneys-at-law and denied knowledge of the continuation or intensification of quarrying work in spite such communication.
- [17] Mr. Francois asserted that he was entitled to lease his right to mine the quarry so as to continue its mode of operation. He denied any trespass to the Property; breach of the Head-Lease or Sub-Lease; or abuse of the Usufruct, as alleged. Mr. Francois, therefore, denied that Quality Motors has suffered any loss or damage or

that it is entitled to terminate the Usufruct or to compensation for any of the reasons alleged by it.

Preliminary Matters

- [18] Before stating the issues, it is appropriate to note that by the time the claim came to trial, Quality Motors' case had evolved, and new facts and allegations which had not been pleaded, or hitherto alluded to, were introduced. I wish to note these new facts and allegations, and for convenience will refer to the claimant's pre-trial memorandum where they are conveniently set out.
- [19] Before doing so however, I find it useful to summarise Quality Motors' case as pleaded, as I understand it, which is that Mr. Francois, as usufructuary, did not have the legal right or authority to amend the Head-lease to extend the term thereof. Further, quarrying at the 2.39 Acre Site and the Further Excavated Site, beyond the 4-acre limit of the Quarry caused destruction and waste of the Property. These actions amounted to an abuse of the Usufruct for which Mr. Francois is responsible and for which it seeks declaratory relief and damages.
- [20] The first departure from the pleaded case concerns relief that has become otiose due to lapse of time and is no longer being sought, which I necessarily accept. These are the claims for termination of the Usufruct and cancellation of its registration; cancellation of the Amendment Lease, Head-lease and Sub-lease and their registrations; as well as the injunction to restrain quarrying operations.⁵ These agreements have long expired and quarrying has ceased. For ease of reference, these would be the relief outlined at numbers (ii), (iv), (v), (vi) and (vii) in paragraph 11 above.
- [21] The new and additional facts and allegations consist of the following:

⁵ Claimant's Pretrial Memorandum filed on 9th May 2019, paragraphs 4-6.

- 1) Mr. Francois abused the Usufruct by purporting to be the proprietor of the Property when he executed the Amendment Lease and Sub-Lease, when at all material times he was the Usufructuary, thereby exceeding his authority.⁶
- 2) The Deed of Sale by which Quality Motors acquired title to the Property and by which Mr. Francois was granted the Usufruct in and over the Property did not expressly give Mr. Francois the right to mine or quarry on the Property.⁷
- 3) Under its request for further and other relief, a claim for a declaration that Bluerock Quarries was unlawfully in occupation of the Property as of 1st January 2011 as both the Head-Lease and Sub-Lease expired on 31st December 2010 given that the Amendment Lease was void and of no effect because: (i) it was executed by Mr. Francois as proprietor and not as usufructuary; and (ii) he was not entitled to lease the Property for quarrying/mining operations.⁸
- 4) Mr. Francois executed a lease dated 1st March 2008⁹ purporting to demise the Property (previously demised by the Head-Lease) to Clarke Investments for a term to end on 31st December 2012 (the “New Lease”) and applied for rectification of the Land Register to reflect same. Consequently, pursuant to a ruling of the Registrar of Lands dated 7th March 2011¹⁰ under section 47 of the Land Registration Act, the Head-Lease was substituted by the New Lease, which incorporated the terms and conditions expressed in, and the purported amendments to the Head-Lease. To give effect to the Registrar’s ruling, the Land Register was rectified by the opening of a Lease Register to reflect the particulars of the New Lease, Sub-Lease and the relation of the Sub-Lease to the New Lease. Quality Motors asserts that the effect of the foregoing is that the Head-Lease and the Amendment Lease have been deemed cancelled by virtue of the New Lease. However, Quality Motors contends that the New Lease is also illegal and void because: (i) Mr. Francois wrongfully assumed

⁶ Claimant’s Pretrial Memorandum filed on 9th May 2019, paragraphs 1-2.

⁷ Claimant’s Pretrial Memorandum filed on 9th May 2019, paragraph 8.

⁸ Claimant’s Pretrial Memorandum filed on 9th May 2019, paragraph 7.

⁹ Registered 13th March 2008, bearing instrument number 1440/2008.

¹⁰ Registered 8th March 2011, bearing instrument number 1045/2011.

the title of proprietor in executing the New Lease and (ii) did not have the right to lease the Property for quarrying operations.¹¹

- 5) Mr. Francois unlawfully failed to notify Quality Motors that Clarke Investments and Bluerock Quarries had attacked its rights as proprietor by encroaching on and committing waste of the Property.¹²
- 6) In addition to quarrying beyond the 4-acre area of the Quarry, Clarke Investments and/or Bluerock Quarries and or their servants or agents quarried beyond the depth of 10 feet in breach of clause 6(2) of the Head-Lease and clause 3 of the Sub-Lease, which amounted to further abuse of the Usufruct.¹³
- 7) Escalation of quarrying activities by Clarke Investments and Bluerock Quarries and/or their servants or agents, including the introduction of new quarrying equipment, of which Mr. Francois had knowledge, was unlawful and also amounted to an abuse of the Usufruct as it was beyond that which was being carried on prior to December 2006 when the Usufruct was created.¹⁴
- 8) Excavation beyond the 4-acre area of the Quarry has diminished the Property causing loss and damage that can never be recovered or reclaimed, and therefore a claim to entitlement to recover all revenue made by Mr. Francois and/or Clarke Investments and/or Bluerock Quarries in quarrying beyond the 4-acre area of the Quarry.
- 9) Under its claim for further and other relief, a claim for the cost of restoration of the Property.¹⁵

[22] Quality Motors did not, however, seek to introduce these new facts, allegations and relief by way of amendment to its pleadings. The **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the “CPR”) is clear that a claimant has a duty to set out its case and must specify the relief sought in its pleadings.¹⁶

¹¹ Claimant's Pretrial Memorandum filed on 9th May 2019, paragraphs 12-15; Supplemental Witness Statement of Goddard Darcheville filed 1st April 2019, paragraphs 4(d) – 7.

¹² Claimant's Pretrial Memorandum filed on 9th May 2019, paragraph 1.

¹³ Claimant's Pretrial Memorandum filed on 9th May 2019, paragraph 19; Amended Witness Statement of Goddard Darcheville filed 16th July 2008, paragraph 26.

¹⁴ Claimant's Pretrial Memorandum filed on 9th May 2019, paragraph 20.

¹⁵ Claimant's Pretrial Memorandum filed on 9th May 2019, paragraph 42.

¹⁶ CPR 8.6.

A claimant cannot attempt, as it were, to amend its pleadings through witness statements, pretrial memoranda or submissions. The case law supports such application of the rules.

[23] In **Kirin-Amgen Inc v Transkaryotic Therapies Inc et al**,¹⁷ the court stated in relation to the nature of general or other relief which a plaintiff may have, that if the statement of claim contains allegations offering issues on facts that are material, the plaintiff is entitled to the relief which those facts will sustain, but he cannot desert specific relief claimed and ask for specific relief of another description, unless the facts or circumstances alleged on the pleadings, will consistently with the rules of the court maintain that relief. It was held further that where there is a claim for further or other relief, unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed: (a) relief will not normally be accorded in respect of a claim of a type which is not pleaded; (b) relief will not be accorded which is inconsistent with the relief specifically claimed, but that will not preclude alternative relief being granted, e.g damages or declaration in lieu of an injunction or damages in lieu of specific performance; (c) relief will not be granted if it is not supported by the allegations in the pleaded case; and (d) relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise.

[24] Further a claim to relief in the form of further or other relief is not an open door to any and every form of relief. The case of **Bertha Francis v First Caribbean Bank (Barbados) Ltd**.¹⁸ makes clear that any remedy granted must be one that is justified by virtue of the allegations made in the body of the pleadings upon which the relief claimed is effectively contingent.

[25] To my mind, the learning suggests that any relief against and involving allegations made against Bluerock Quarries and/or Clarke Investments cannot be entertained on this claim in circumstances where the claim against both these entities was

¹⁷ [202] IP & T 321.

¹⁸ SLUHCV1998/0583

dismissed and judgment entered in their favour against the claimant. The claimant cannot now seek relief that was not contemplated on the pleadings as filed and as at the date of trial.

Issues

[26] The issues for determination are as follows:

- 1) Whether Mr. Francois, as Usufructuary, had the right to amend the Head-Lease, consent to the Sub-Lease or grant the New Lease; and if so, whether describing himself as proprietor therein, vitiates such right?
- 2) Whether Mr. Francois as Usufructuary, or anyone claiming through him, had the right to quarry or mine any part of the Property in the absence of an express grant of such a right in the Deed creating the Usufruct? If so, whether there were any limitations to the right to quarry?
- 3) Whether Mr. Francois, Clarke Investments, Bluerock Quarries or their servants or agents carried on quarrying operations beyond the permitted scope of any such right to quarry, and/or or otherwise destroyed or committed waste of the Property?
- 4) Whether Quality Motors is entitled to damages and if so, the quantum?

Law and Analysis

Issue 1: Whether Mr. Francois, as Usufructuary, had the right to amend the Head-Lease, consent to the Sub-Lease or grant the New Lease; and if so, whether describing himself as proprietor therein, vitiates such right?

(a) Whether Mr. Francois, as Usufructuary, had the right to amend the Head-Lease, consent to the Sub-Lease or grant the New Lease?

[27] Mr. Deale Lee, ("Mr. Lee") on behalf of the claimant submitted that Mr. Francois did not have the legal right or authority, as Usufructuary, to amend the Head-Lease, consent to the Sub-Lease or grant the New Lease. In respect of the Head Lease he submitted that since only a part of the land owned by the defendant at the time was being demised, section 44 of the **Land Registration Act**¹⁹ (the "LRA") required a plan or other description of the parcel to have been provided to the satisfaction of the Registrar, upon registration of that lease. However up to 10th

¹⁹ Cap 5.01 of the Revised Laws of Saint Lucia.

April 2008 no such plan had been provided and the land was merely described in the Head Lease as *“the quarry comprising approximately 4 acres being part of Hunter J Francois’ forty-four (44) acre estate”*. He argued that the Head lease was therefore invalid.

[28] This allegation was never pleaded and arose for the first time in submissions, a practice that the Court will not countenance. The claimant itself has stressed the importance of pleadings and seeks to rely on the exclusionary rule of pleadings; the same must therefore apply equally to it. Rule 8.7(1) of the CPR requires the claimant to include in the claim form or statement of claim a statement of all facts on which it relies and CPR 8.7A provides that the claimant may not rely on any allegation or factual argument which is not set out in the statement of case, but which could have been set out there without permission. Therefore, this submission will not be considered.

[29] It was also submitted that Mr. Francois, having sold the Property, was no longer proprietor but Usufructuary. He was therefore entitled to limited interests and could not grant an extension of the Head Lease without the intervention of the claimant who was then proprietor. Mr. Lee submitted that the Amendment Lease was therefore invalid. As to the New Lease, which must also have been granted in the capacity of Usufructuary as Mr. Francois then was, he was not entitled to grant a lease for conduct of quarrying activities on parts of the Property that were not previously used as a quarry.

[30] Furthermore, Mr. Lee submitted that after registration of the New Lease, Clarke Investments became the proprietor of two leases in respect of the same parcel such that the Registrar cancelled the Head Lease and Amendment Lease and substituted the New Lease. Consequently, any leasehold interest which may have been vested by the Head Lease and the purported Amendment Lease and the Sub-Lease were cancelled and could no longer support the continued occupation and conduct of quarry operations on the Property.

[31] To the contrary, pursuant to the ruling of the Registrar of Lands dated 7th March 2011 under section 47 of the LRA, the Head-Lease was substituted by the New Lease, which incorporated the terms and conditions expressed in, and the purported amendments to the Head-Lease. I find it very disingenuous for Quality Motors to seek to make this argument before the court when the Head Lease, Amendment Lease and Sublease were cancelled on its own application to the Registrar and at its insistence, despite the Registrar's initial decision declining to do so on the basis that the necessary preconditions had not arisen, with which I would tend to agree. It appears that it was for the very purpose of now making and hoping to succeed with this argument that the claimant sought to have the leases cancelled. However, I find that Quality Motors has not achieved the intended effect because the Registrar, in reaching a compromise position by cancelling those leases and substituting the New Lease, specifically made the notation that the New Lease was substituted subject to all the terms and conditions of the Head Lease and Amendment Lease. Therefore, while the documents have been cancelled, their terms subsist and are for all intents and purposes incorporated into the New Lease. In the circumstances, their terms and conditions will be considered and applied.

[32] Mr. Peter Foster QC ("Mr. Foster"), counsel for the defendant, submitted that Mr. Francois had the right of enjoyment of the Property as owner thereof and pursuant to article 408 of the **Civil Code**²⁰ had the right to lease the Property.

Analysis

[33] I will start by examining the Deed of Sale with respect to the Usufruct. I note that it states only that purchase and ownership of the Property by Quality Motors is subject to a usufruct granted to Mr. Francois, commencing on the date of execution and ending on 31st December 2012. The Deed of Sale does not state any terms or conditions upon which the Usufruct is granted or to which it is subject.

²⁰ Cap 4.01 of the Revised Laws of Saint Lucia.

It does not expressly or impliedly limit the rights of the Usufructuary or impose any particular obligations on him. Therefore, it cannot be said that there is anything in the Deed of Sale which would preclude Mr. Francois, under the Usufruct, from amending or granting any lease or consenting to any sub-lease over the Property. Consequently, the legal principles applicable to usufructs generally would govern the Usufruct and would determine Mr. Francois' rights and obligations thereunder.

- [34] The provisions of the **Civil Code** as to rights of a usufructuary in this regard provide as follows:

“394. Usufruct is the right of using and enjoying things of which another has the ownership, in the same manner as the owner uses and enjoys them, but subject to the obligation of preserving their substance.

408. The usufructuary may enjoy his or her right by himself or herself, or lease it, and may even sell it or dispose of it gratuitously.

If he lease it, the lease expires with his or her usufruct. But the planter or the tenant has a right and may be compelled to continue his or her enjoyment during the rest of the year which had begun before the usufruct expired; payment of the rent being made to the proprietor.”

- [35] The provisions of the **Civil Code** are clear. The Usufructuary has the right to lease his rights as such, which to my mind would include the right to lease the Property itself. The only restriction is that lease is to expire when his usufruct expires and even then, there is provision for the lease to continue to the end of the year which begun before the usufruct expired. Article 408 is very wide and understandably so when considered in the context of article 394 which gives the usufructuary use and enjoyment of the subject property as the owner would use and enjoy it. Mr. Francois could have even sold his rights as Usufruct or disposed of them gratuitously. In the circumstances, I find that Mr. Francois was entitled to grant the extension of the Head Lease and the New Lease both of which were to expire on the same date as his Usufruct. I also find that he had the right to consent to the Sub-Lease, all of which are rights that an owner would enjoy.

[36] Furthermore, I must take into account that the Deed of Sale states that purchase and ownership of the Property by Quality Motors is subject to a lease of four acres of land of Parcel 52 registered in the name of Clarke Investments to end on 31st December 2010. The claimant sought to rely upon the fact that the Deed of Sale notes the expiration of the lease as 31st December 2010. The true effect of this clause, however, is that it refers Quality Motors to that lease agreement, the Head-Lease, and to the terms and conditions stipulated therein to which Quality Motors' ownership is made subject. The clause in the Deed of Sale cannot be read as standing alone without consideration of the terms of the document to which it refers, and which establishes the lease to which the Deed is subject. When one examines the Head-Lease, while it does not expressly give Clarke Investments the right to sublet the Property, I am of the view that it implicitly grants that right, by virtue of clause 6(6) which requires the lessee *"to notify the lessor of the identity of any sublessee or assignee of this lease and also of the duration or term of any such assignment or sublease."* It is obvious that the right to sublease was contemplated by the parties and provisions were made and agreed for exercising such right. It therefore cannot now be said that Clarke Investments did not have the right to sublease, and that Mr. Francois, in consenting to the sublease, abused the Usufruct.

Conclusion

[37] The Head-Lease is silent on the right to renew the agreement or to extend its term; it neither permits nor prohibits the same. However, I am of the view that if a usufructuary has the right to grant a lease as established, the usufructuary would have the equal right to renew or extend the term of such lease as long as it does not exceed the term of the usufruct. No logical reason for the position to be otherwise has been presented.

[38] Finally, I would just mention that if Quality Motors had any objection to Mr. Francois leasing the Property or any part thereof, it had ample opportunity to make that objection known at the time of granting the Usufruct and to expressly stipulate

such a restriction as a condition thereof. I accept that it could not have applied to the Head-Lease which would have been in existence prior to the grant of the Usufruct. However, the provision could have been made prohibiting grant of any further leases and restricting renewal or extension of the Head-Lease. It would now be unfair, given the silence of the Deed as to any terms or conditions of the Usufruct and the acceptance of the Head-Lease, for Quality Motors to complain that Mr. Francois had no right to grant or extend any lease or consent to a sublease of the Property. On this basis, even if I am wrong that the title of usufruct carries with it the right to grant a lease and other rights incidental thereto, I would, in any event, be minded to hold that Quality Motors would be estopped from now challenging the Amendment Lease, Sub-Lease and New Lease.

(b) Whether Mr. Francois being described as 'proprietor' vitiates his right to extend the Head-Lease, consent to the Sub-Lease or grant the New Lease?

[39] It was submitted on behalf of Quality Motors' that Mr. Francois was described in the Amendment Lease, Sub-Lease and New Lease as proprietor and acted in that capacity in executing those documents, when in fact he was not proprietor of the Property but Usufructuary. This, it is argued, vitiates these documents. I begin my analysis by noting my observations as to what each document contains in this regard:

The Amendment Lease: In the section identifying the parties, it states:

"BEWTWEEN: HUNTER JOSEPH FRANCOIS, proprietor of Trou Gascon... and holder of Saint Lucia Driver's License Number... and of mailing address... of the one part..."

The Sub-Lease: Towards the end of the agreement, it states:

"AND AT THE MAKING OF THESE PRESENTS, there came appeared and intervened HUNTER JOSEPH FRANCOIS, proprietor of Trou Gascon... and holder of Saint Lucia Driver's License Number... and of mailing address... WHO having taken communication of these presents hereby consents to the same as appears by his signature hereunder."

In the section noting the root of title in the Property, it states:

"TITLE: Deeds of Sale to THE SUB-LESSOR dated... and recorded in..."

The New Lease: In the section identifying the parties, it is exactly as set out above in respect of the Amendment Lease – Mr. Francois is described as proprietor.

In the section noting the root of title in the Property, it states:

“TITLE: The USUFRUCT granted by QUALITY MOTORS LIMITED to THE LESSOR contained in the Deed of Sale executed...”

Analysis

- [40] I accept that in the section identifying the parties in all three agreements, Mr. Francois is misdescribed as ‘proprietor’. However, I am of the view that this misdescription is of no moment because this section is intended simply to identify the parties to the agreement. To do so, this section usually give the parties’ full names, occupation, address and a national identification number. While this section is important and undoubtedly requires clarity and accuracy, it is not intended to convey the legal capacity that entitles the parties to enter into the agreement. This is self-evident based on the type of information usually contained in the clause. Despite the mis-description here, there is no dispute as to the identity of the parties. Such misdescription, in the circumstances, cannot have the effect of vitiating the agreement.
- [41] With respect to the section that states the title in the Property, the Sub-Lease clearly contains an error, beyond which even Quality Motors complains. It states that the title in the Property is derived from deeds of sale to the Sub-Lessor. This is clearly wrong as the Sub-Lessor is Clarke Investments and Clarke Investments has never been owner of the Property by any deed of sale or otherwise; and the deeds of sale identified are those by which Mr. Francois purchased the Property in 1959. Despite the error, it is accepted by all parties, that at all material times, Clarke Investments was a lessee of the Property. It is further accepted by everyone that at time of the Sub-Lease, Mr. Francois was no longer the owner of the Property, but Usufructuary. In the New Lease, the section which states title is correct, properly identifying Mr. Francois’ title as being by virtue of the Usufruct granted to him by Quality Motors.

Conclusion

- [42] Given that there is no dispute as to Mr. Francois' true title and capacity at the material time, all parties accepting that he was Usufructuary, I do not see how these misdescriptions could vitiate the agreement in the absence of a finding that the title of Usufructuary did not carry the capacity to take such actions. As I have found above, as Usufructuary, Mr. Francois was entitled by law to lease the Property, extend the term of a lease and consent to a sublease thereof, and this is all that is important for establishing the validity of the agreements in this regard. On the basis of all of the foregoing, I find that the agreements are valid despite the misdescription of Mr. Francois as proprietor instead of Usufructuary.

Issue 2: Whether Mr. Francois as Usufructuary, or anyone claiming through him, had the right to quarry or mine any part of the Property in the absence of an express grant of such a right in the Deed creating the Usufruct? If so whether there were any limitations to the right to quarry?

Analysis

- [43] Mr. Lee submitted that article 410 of the **Civil Code** restricts the use and enjoyment of the land under a usufruct for quarrying by providing that mines and quarries are not included in a usufruct unless the circumstances fall within the exception where before the opening of the usufruct, the quarry has been worked as a source of revenue by the proprietor. In such a case the usufructuary may continue such working in the way it had begun. He submitted that a proper interpretation of article 410 leads to the irresistible conclusion that the reference to proprietor relates to Quality Motors which was the proprietor at the point in time when the Usufruct commenced. Although Mr. Francois had previously worked the quarry as a proprietor, because Quality Motors had not been working the quarry as proprietor as a source of revenue before the usufruct was opened, Mr. Francois did not acquire the right to continue to work the quarry nor could he have granted a new lease for that purpose.

- [44] Mr. Lee argued again that the Head Lease and the Sub-Lease could not have maintained their legal efficacy upon the defendant entering into the New Lease, upon which the Head Lease and Sub-Lease were cancelled and the New Lease substituted therefor, which did not grant the right to conduct quarry operations. I have already ruled on the point above. I would only say further that on a proper and careful reading of the New Lease, it does not grant a lease over the same land as alleged by Quality Motors. It grants a lease of the remainder of Parcels 10 and 52 not already demised in the Head Lease, which demised only the approximately 4-acre quarry, as the New Lease was specifically made subject to the Head Lease. It is clear that the terms in the New Lease did not supersede the terms in the Head Lease in relation to the Quarry but dealt with the remainder of the land. Therefore, Quality Motors could not in any event succeed with this argument.
- [45] Mr. Foster submitted that whilst there is an express provision that quarries and mines are not comprised in the usufruct of land, the law is clear that a usufructuary may work a quarry opened and worked before the usufruct by the proprietor as a means of revenue before the usufruct commenced. The only obligation on the usufructuary is that the working of the quarry is restricted to the continuation of the mode of operation already begun. He accepts the statement in the text **The Law of Real Property**²¹ where it states that the usufructuary cannot install new machinery with a view to increase output.
- [46] Mr. Foster, however, submitted that Clarke Investments was not initially restricted to the rights and obligations on the Usufructuary, as its lease, the Head Lease, was executed and registered prior to execution and registration of the Deed of Sale to Quality Motors and the grant of the Usufruct to Mr. Francois, both of which were made subject to the Head Lease. The Head Lease vested the leasehold interest in the area defined in the lease as the Quarry together with the rights to enjoy, mine, quarry and excavate the Quarry. For this, Mr. Foster relies on section 25 of the LRA which states that:

²¹ William Marler 1932 Toronto Canada, Burroughs and Company [Eastern] Limited.

“...the registration of a person as proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

He also relied upon article 1566 of the **Civil Code** which provides that:

“The lessee cannot, by reason of the alienation of the property leased, be expelled before the expiration of the lease, by a person who becomes the owner of the property under a title derived from the lessor, unless the lease contains a special stipulation to that effect and be registered.”

- [47] Mr. Foster therefore submitted that Clarke Investments had the right to quarry in accordance with the terms of the Head Lease up to the date of its expiry on 31st December 2010 and was not subject to the Usufruct or any rights of Quality Motors. As such Clarke Investments was therefore not restricted in the level of production, amount of equipment or otherwise on the Quarry and their only obligations were those contained in the Head Lease, which did not in any way restrict output or operations thereon. The same would apply to the Sub-Lease which derived its authority from the Head Lease and was also for a term to expire on 31st December 2010. Therefore, the actions of Clarke Investments and Bluerock Quarries could not be considered an abuse of the Usufruct.
- [48] Mr. Foster further submitted that the Head Lease was lawfully amended on 27th September 2007 after the Usufruct and Quality Motor's purchase of the Property in accordance with article 408 of the **Civil Code** which permits a usufructuary to lease his rights and enjoyment of the usufruct. It was also extended in accordance with article 410 as quarrying had commenced on the Property before the Usufruct and before the date of expiration of the Head Lease. Mr. Foster submitted that it is only for the extended period of 1st January 2011 to 31st December 2012 that Clarke Investments and Bluerock Quarries would have been bound by the obligations of Mr. Francois under the Usufruct, the only restriction being that after 1st January 2011, they were prohibited from increasing output by installing new

machinery. He submits however, that the evidence in the case does not concern this period, that is post 1st January 2011. The evidence adduced by Quality Motors concerns actions which occurred up to and during 2008, whilst the Head-Lease was still in effect.

Discussion and Conclusion

[49] As stated above, the Deed of Sale does not stipulate any terms or conditions upon which the Usufruct was granted or to which it subject. It does not limit the rights of the Usufructuary or impose any particular obligations on him. In fact, in cross examination, Mr. Darcheville admitted that he had made no conditions or stipulations to the use of the Usufruct but knew that there were certain conditions to a usufruct and that the quarry had to continue in the same manner as it had begun. It is therefore puzzling how there could then be any question as to the existence of the right to quarry. In any event, there is nothing in the Deed of Sale which would preclude Mr. Francois from mining the quarry and it is therefore the legal principles applicable to usufructs generally that would determine whether Mr. Francois had the right to work the quarry and any restrictions thereto.

[50] The relevant provision of the **Civil Code** is section 410 which provides as follows:

“410. Mines and quarries are not comprised in the usufruct of land.

...

If however these quarries, before the opening of the usufruct, have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun.”

In the text **The Law of Real Property**, the author William Marler comments on the article of the **Quebec Civil Code** equivalent to article 410:

“193. **Quarries and mines:** - these are not comprised in the usufruct of land as they diminish its substance... He may however work a quarry opened and worked by the proprietor as a means of revenue before the usufruct commenced but his working of it is restricted to a continuation of

the mode of operation already begun C.C. 460. He cannot install new machinery with a view to increase the output...”

[51] I agree with Mr. Foster’s submissions as to the effect of registration of a lease under the LRA and the **Civil Code**. It is undisputed that the Head Lease was executed and registered prior to execution and registration of the Deed of Sale by which Quality Motors purchased the Property and granted the Usufruct to Mr. Francois. Further, Quality Motors’ ownership and Mr. Francois’ Usufruct were specifically stated therein to be subject to the Head Lease. Therefore, despite alienation of the Property by the Deed of Sale, all the rights given under the Head Lease vested in Clarke Investments upon its registration, which included the very wide right to mine the Quarry as discussed above, and both Quality Motors and Mr. Francois were bound by those rights for the duration of the lease, unamended. Therefore, in determining the permitted manner and extent of quarrying, I must consider the quarrying operations of Clarke Investments and Bluerock Quarries up to 31st December 2010 against the terms of the Head Lease.

[52] Whilst Mr. Foster argues that the actions of which Quality Motors complains are actions which occurred under the initial term of the Head Lease, when Clarke Investments and Bluerock Quarries were not bound by the Usufruct but by the wider terms of that lease, I am not of the view that the matter ends there. I must take into account that the basis of Quality Motors’ claim is that Clarke Investments and Bluerock Quarries, in quarrying beyond the manner and extent permitted, committed trespass which amounted to an abuse of the Usufruct by Mr. Francois by virtue of his obligations thereunder. It is accepted that a trespass is a continuing offence and if it is found that Clarke Investments and Bluerock Quarries’ operation of the Quarry after the expiry of the Head Lease breached the restriction on quarrying under the Usufruct, I must consider any damage continuing to occur after 2008.

[53] The extension of the Head-Lease after 31st December 2010 would have to be subject to and in accordance with Mr. Francois’ obligations as Usufructuary and

Quality Motors' right as proprietor. It is in this context that section 410 of the **Civil Code** becomes relevant, wherein it states that though mines and quarries are not usually comprised in the usufruct of land, if quarries, before the opening of the usufruct, have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it begun.

- [54] I do not agree with the interpretation of this article as propounded by counsel for Quality Motors, which is a very restrictive reading without any authority in support. I do not agree that 'proprietor' here can only refer to Quality Motors. The circumstances of the case must be taken into consideration, in particular the fact that Quality Motors acquired title and granted the Usufruct in the same instrument. The proprietor immediately prior to the grant of the Usufruct was therefore Mr. Francois. There would have been no opportunity for Quality Motors to exercise its proprietorship prior to the grant of the Usufruct, given that both titles – Quality Motors as proprietor and Mr. Francois as Usufructuary coincided. I have also examined the equivalent provisions in the Civil Codes of France and the State of Louisiana, USA and it appears to me that the emphasis is not on who used the property before, but how the property had been used.

The **Louisiana Civil Code** of 1870 in article 552 states:

"The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened."

The translated excerpt of article 598 of the **French Civil Code** as I have been able to find provides:

"He has also the enjoyment, in the same way as the owner, of the mines and quarries which are being worked when the usufruct begins... He has no right to the mines and quarries which have not yet been opened..."

- [55] The learning in respect of such similar provisions from other civil jurisdictions rests upon the 'Destination Theory' whereby the usufructuary's right is determined by the use to which the Property had been prior designated. The theory reconciles

the restriction on mines and quarries being comprised in the usufruct with the principle that the usufructuary is entitled to use and enjoyment as proprietor. It was explained thus:

“... Article 598 is a compromise between two conflicting ideas – the general principle that the usufructuary, although entitled to the fruits of the thing, both natural and civil, must not impair its substance; and the notion that the usufructuary is entitled to the same enjoyment as the original owner of the thing. The compromise which resulted from this conflict was that, if the mines and quarries have been set apart for exploitation prior to the creation of the usufruct, the things extracted therefrom, although falling naturally within the category of products, are nevertheless assimilated to fruits and belong to the usufructuary. Thus, the character of the usufructuary's right is determined by the destination that has been given to the thing by the owner.”²²

[56] The uncontroverted evidence is that the Property has been operated by Mr. Francois, and those to whom he leased it, as a Quarry for revenue from 1984 – over 30 years. This was so up to the date the Property was purchased by Quality Motors and thereafter by virtue of the Head Lease to which its ownership was made subject. I therefore find that under the Usufruct Mr. Francois had the right to continue to enjoy and work the Quarry, the only restriction after the date of expiration of the initial term of the Head Lease being that operation of the Quarry continue in the same manner.

[57] I take cognizance of the statement by Marler, that where a quarry is continued under a usufruct, no new machinery may be installed to increase output. However, I note that this prohibition is not contained in article 410 or any other article of the **Civil Code**, nor in the equivalent provision in the Codes of other civil jurisdictions. Marler also cites no judicial authority for this proposition. In the circumstances, I am not inclined to apply it universally and absolutely without more. I am not convinced that the intention of article 410 is that a quarry the subject of a usufruct is to be stuck in a time warp for lack of a better description. I

²² Usufructuary's Right to the Proceeds of Oil and Gas Wells in Louisiana, Cyrus A Greco, Louisiana law Review Vol II Number 1 November 1939 page 169 at page 172. Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol2/iss1/19>.

do not believe that the provision would compel a usufructuary to continue to use old, outdated, inefficient machinery when newer, more efficient machinery that are standard in the industry are available. I am of the view that one is required to compare the manner and extent of quarrying operations before the grant of the usufruct and after and to see if there is any material difference. What was the extent and manner of quarrying prior to the Usufruct being granted?

The Size of the Quarry

- [58] On behalf of Quality Motors, it was submitted that the Quarry is limited to 4 acres only and has always been so defined and limited. It was argued on behalf of Mr. Francois that the quarry has always been defined as approximately 4 acres. I have examined the documents before the Court that refer to the quarry, in particular the Head-Lease which states the position existing prior to and at the time the Usufruct was granted. I note that it states as follows:

“THE LESSOR hereby leases unto THE LESSEE thereof accepting the piece or parcel of land measuring approximately FOUR ACRES hereinafter referred to as THE QUARRY and more particularly described in the Schedule hereto...” (my emphasis)

The Schedule states:

“ALL that piece or parcel of land known as THE QUARRY comprising approximately FOUR (4) ACRES...” (my emphasis)

- [59] Mr. Stephen Shingleton Smith, witness for the defendant who had been General Manager of Bluerock Quarries, stated that Bluerock Quarries, prior to the grant of the Head Lease and Usufruct, at a time when Mr. Francois was proprietor of the Property, had also taken a lease of the Property from him. His evidence was that that lease “concerned approximately 4 acres of land out of... Parcel 1054B 52 (the Quarry) and... was for the purpose of quarrying stone”.²³ He exhibited to his

²³ Witness Summary of Stephen Shingleton Smith filed 29th March 2019, paragraph 6 and Exhibit SSS1.

witness statement, a lease dated 13th November 2000 from Mr. Francois to Bluerock Quarries (the “2000 Lease”) which contains the following:

“THE LESSOR hereby leases unto THE LESSEE thereof accepting the piece or parcel of land hereinafter called THE QUARRY and more particularly described in the Schedule hereto...”

The Schedule states:

“ALL that piece or parcel of land known as THE QUARRY in area four (4) acres more or less...”

[60] Mr. Shingleton-Smith’s evidence was also that prior to Bluerock Quarries’ 2000 Lease, Clarke Investments had taken leases of the land from Mr. Francois from 1988 up to 2000. Though these leases were not exhibited, he stated that they also included the right to quarry and referred to the quarry as “as a portion of land comprising approximately 4 acres ... for the purpose of quarrying stone.” He stated that all the leases between Mr. Francois and Bluerock Quarries and Clarke Investments, referenced the quarry as ‘approximately four acres.’ There had never been a survey prior to these proceedings, so there was never any precise description of the Quarry.

[61] I accept based on the Head-Lease and the 2000 Lease that prior to the Usufruct being granted, the area which was usually mined as a quarry was ‘approximately 4 acres’ or ‘4 acres more or less’. It is not a precise measurement and could reasonably refer to an area more than 4 acres. In this regard, Mr. Darcheville’s own evidence was that before his purchase of the Property and the grant of the Usufruct, he did not have a survey of the Quarry carried out to be in a position to say that it was limited to four acres. According to him, he did a visual survey and documented it in his brain. Nonetheless he insisted that the Quarry was four acres, although it could be less, but was not five acres as five is not approximately four. I also take into account the evidence of Mr. Isidore Emmanuel, who worked with three different companies that had operated the Quarry in the position of Foreman for an aggregate of thirty years, one of those companies being Bluerock Quarries, with whom he worked for 18 years up until 2009. To his knowledge, no

survey of the Quarry had ever been done. While he was aware of the boundaries of the Quarry, he could not say the actual size. Their evidence corroborates that of Mr. Shingleton-Smith that no survey had ever been done and the exact area is unknown. In the absence of any evidence to the contrary, I accept the Head Lease and the 2000 Lease as evidence of the size and extent of the Quarry as understood and accepted by those who owned and operated it as 'approximately 4 acres' and that this could mean more than 4 acres.

The Manner of Use of the Quarry

[62] As to the manner or extent of quarrying prior to the Usufruct, Quality Motors' provided little to no evidence. However, I have examined what evidence there is before the Court. This evidence consists in the use of the Quarry as permitted by the Head-Lease and the 2000 Lease. Both the Head-Lease and the 2000 Lease contain precisely the same terms in this regard, and provide as follows:

"3. THE LESSEE shall by this lease be empowered to dig, excavate, and carry away, sell or dispose of the stone, waste material, and any other saleable material apart from the topsoil (hereinafter referred to as "THE PRODUCTS") from THE QUARRY and to do all such acts as may be necessary or proper for the purpose of effectually working, getting and disposing of the same.

...

5. THE LESSEE shall be entitled to erect upon THE QUARRY such buildings and machinery as may be necessary or convenient for its quarrying operations.

6. The LESSEE hereby covenants with THE LESSOR:

...

(2) To work get and carry away THE PRODUCTS in a proper and efficient manner and in the best and most approved method practiced in similar undertaking in Saint Lucia and not to commit any unnecessary damage, spoil or waste in or upon THE QUARRY or unnecessarily disfigure the same."

I note the content of the Sub-Lease in this regard for reasons that will be discussed subsequently. It contains one material difference from the Head-Lease and 2000 Lease. Clause 3 thereof is identical save that it contains, in addition, the following proviso:

“PROVIDED ALWAYS that any excavation shall not be to a depth greater than 10 feet and shall be refilled within 3 months of the expiration of the term of the lease.”

- [63] These clauses admit of very wide and liberal powers being granted to mine and operate the Quarry and of very little restriction. The only restrictions in the Head-Lease and 2000 Lease is that top-soil may not be taken away and no unnecessary damage, spoil or waste be committed. Otherwise, the lessee had the right to dig excavate and take away stone, waste and any other saleable material. I do not see what wider power to mine the Quarry could have been given. Notably there is no restriction as to how much material may be dug, excavated or taken away, disposed of or sold, or the rate at which this may be done. Significantly, there is no documentary evidence as to how much material had been excavated or otherwise removed from the Quarry at any time in the prior to the Usufruct. I note that this omission makes it virtually impossible to conduct the required task of comparing the manner of quarrying before and after the grant of the Usufruct, the only way upon which any liability for abuse of the Usufruct could be established.
- [64] As alluded to earlier, there was also no restriction as to depth to which quarrying was permitted, as is contained in the Sub-Lease. To my mind the restriction in the Sub-Lease is immaterial, to the extent that this restriction is only found in this lease, which was executed subsequent to the grant of the Usufruct and is not indicative of the manner and use of the Quarry prior to the Usufruct or at the time the Quarry was begun. Further, the Sub-Lease was derived from the Head Lease under which there were very wide powers to use and enjoy the Quarry and which was itself not subject to the obligations under the Usufruct. Therefore, this clause is only binding as between the Sub-lessor Clarke Investments and the Sub-lessee Bluerock Quarries, applying the well-known principle of privity of contract. It does not affect the rights as between Mr. Francois, as Usufructuary, and Quality Motors, as proprietor; and Quality Motors not being a party to that lease cannot sue for or obtain any remedy for breach of that clause, if any breach was committed.

Issue 3: Whether Mr. Francois, Clarke Investments, Bluerock Quarries or their servants or agents carried on quarrying operations beyond the permitted scope of the right to quarry, and/or or otherwise destroyed or committed waste of the Property?

- [65] As I have noted before, there is little to no evidence of the manner and extent of operation of the Quarry prior to the Usufruct, to be able to assess whether quarrying work subject to the Usufruct exceeded the prior manner and extent of use and to assess any damage arising therefrom. In relation to the 2.39 Acre Site, it is undisputed that prior to Bluerock Quarries' activities there in 2008, that site had never been used or prepared for use for quarrying.
- [66] The evidence that exists consists of the averments of the witnesses for the parties as well as evidence from each of the three experts in the matter. Quality Motors' appointed expert was Mr. Adrian Dolcy, Civil and Structural Engineer and Property Valuer, who provided 4 reports between 2009 and 2019. He was instructed to assess and value the damage done to Parcel 52 as a result of quarrying works carried out there. Mr. Tedburt Theobalds, an Agronomist and certified Valuation Surveyor was appointed as an expert on behalf of Quality Motors by Consent Order dated 22nd March 2011 approved by the Court of Appeal. He was commissioned to prepare a report detailing the value of damage to Parcel 52 and the cost of reinstating the land to its previous condition. I note that his report is limited to the 2.39 Acre Site. Mr. Egbert Louis is the expert appointed by the defendant. He is a Civil Engineer and Valuation Surveyor and was instructed to undertake the cost impact of the alleged damage to a section of Parcel 52 which I note is the 2.39 Acre Site.

The 2.39 Acre Site

- [67] **Mr. Goddard Darcheville:** The evidence of Mr. Darcheville, representative of Quality Motors is that Clarke Investments and Bluerock Quarries commenced quarrying works in this area by felling trees, excavating, digging and eroding soil and material thereby causing destruction. He stated that work appeared to have been going on for 5 weeks. A Caterpillar 330 Excavator and a Caterpillar D8 Bulldozer had been brought onto the 2.39 Acre Site during this period. After he

spoke to Mr. Terrence Clarke work there stopped. The bulldozer was removed permanently, however the excavator remained, which he says signified that from the start, their intention was to increase production. It was put to him in cross examination that the expert Egbert Louis stated that the best use of the land was for quarrying purposes and therefore clearing the area of trees and shrubs would have increased the value. He insisted that it did not. Rather, it diminished the value and that he had intentions for use of the Property other than quarrying.

[68] **Mr. Isidore Emmanuel:** Mr. Emmanuel, witness for Quality Motors, had been Foreman with Bluerock Quarries for 18 years and had an aggregate of 30 years' experience as Foreman of the Quarry. He stated that in early 2008, two caterpillar excavators and a bulldozer had been brought in to extend the Quarry because it had been exhausted and they needed stones to crush. Bluerock Quarries had used the additional equipment to clear the side of a hill and bench it with a view to commence drilling and blasting. This took about 4 weeks, after which the equipment was removed. Mr. Emmanuel stated that the hill was to the north of the road used by Mr. Francois and workers would be on stand-by to stop clearing and benching when he was passing to allow for his safe passage. He noted that he was familiar with the 2.39 Acre Site because after it was cleared, he planted watermelon there. In cross examination, he specified *"on the topsoil is where I planted after they cleared."* He stated that in January 2009 there was a huge landslide to the east of the area cleared which occurred as a result of the benching which channeled water towards the cliff. The slide brought down thousands of yards of stones and some trees.

[69] **Mr. Canice Benjamin and Mr. Lennox Butcher:** Mr. Benjamin and Mr. Butcher, also witnesses for Quality Motors, were both heavy equipment operators with Bluerock Quarries; Mr. Benjamin for 16 years, and Mr. Butcher for some 29-30 years. Their evidence was essentially the same which is why they are treated together. Both stated that they were aware that an area of land on the hill above the Quarry was cleared. Additional large pieces of equipment were brought on

and the road had to be widened to enable the equipment to reach that area. Both observed that the land had been cleared and benched. Mr. Benjamin said specifically that 4 benches had been cut into the hill. Both noted that what had been done was similar to the technique used when preparing to blast in the Quarry. Mr. Butcher noted however, that no stone was ever produced from this area and under cross examination reiterated that no blasting was ever done in that area. Mr. Benjamin also admitted under cross examination, that no blasting occurred in the area which had been cleared. Mr. Benjamin's evidence was that at the time of clearing the area, they had exhausted the stones on the hill of the Quarry but had not yet started digging into the Quarry floor. Mr. Butcher stated that at the time, they had mined all the stone on the hill of the Quarry, and it was after the area had been cleared but the work halted that they started to blast the Quarry floor. Both say that one morning, after the hillside had been cleared, a massive rockslide occurred. It had been raining very heavily when the hillside above the Quarry collapsed. It took at least a month to clear the debris from the slide. Some of the stones which came down were crushed and the rest was stored and eventually taken away.

- [70] **Mr. Stephen Shingleton-Smith:** Mr. Shingleton-Smith, the sole witness for Mr. Francois, stated in his witness statement that the 2.39 Acre Site was incorrectly identified in the report of Surveyor Dunstan Joseph dated 11th April 2008 as "area prepared for new quarrying operations". He says that Bluerock Quarries, with Mr. Francois' permission, cleared the area of brush, bush and shrubs, but that no blasting, mining or quarrying was ever conducted in this area. In cross examination, Mr. Shingleton-Smith strenuously maintained that Bluerock Quarries never benched the 2.39 Acre Site; the site was only cleared. He admitted that there was an intention to quarry there but maintained no quarrying ever occurred. He also insisted that the Quarry was not exhausted at the time the area was cleared and pointed out that Bluerock Quarries continued working the Quarry until December 2012. He agreed that there was a landslide in 2009 but stated that it did not occur as a result of benching; rather it occurred naturally due to heavy

rainfall and the characteristics of the rock in the area which was not horizontal but angled. The rainfall created instability which resulted in the landslide.

- [71] **Mr. Adrian Dolcy:** Mr. Dolcy, expert for Quality Motors, in his property damage assessment report dated 25th June 2009, stated that work consisted primarily of extending the roadway and creating of 4 benches. He states that the benches had the effect of redirecting storm water drainage, which resulted in large amounts of erosion and slippage mainly from the upper bench in January 2009, in addition to being unsightly. The most probable cause for the slippage is that the benches were cut at an unstable angle and the nature of the soil. He concluded that reinstatement of the area to its original state is not practical due to its steep topography.
- [72] He again assessed and valued this area and produced a report dated 20th June 2012. In this report, he said that the area that had been benched has, since his 2009 report, been overgrown with shrub vegetation, however, areas of erosion, slippage and gullies still exist. Water is redirected in a fixed path along the slope to the open quarry creating gullies along the remaining land. He then stated that reinstatement would require the importation of suitable material, placing it in the cut areas and reinstating the slope. Provision would have to be made to prevent erosion of the material during rains and quick revegetation would be necessary requiring placement of topsoil.
- [73] In his 10th January 2019 report, Mr. Dolcy refers to 'Area B – The Bench', marked on a very unclear google earth image and states: *"It is a bench created on the slope. It has an area of approximately 23,000 square feet and an average depth of 35 feet."* He also refers to 'Area D – The Slide' and states that an approximate area of 16,000 square feet and average depth of 10 feet came down as a result of quarrying works that created unstable slopes. An estimated 6,000 cubic yards of material was moved and carted away from the quarry area. He then provides the

cost of replacing the material moved by the slide and the cost of reinstating that section of the Property to its original state.

[74] In cross examination, Mr. Dolcy made several admissions that impinged upon the reliability of his reports. He admitted that he did not receive any written instructions from Mr. Darcheville regarding preparation of his report. There were only verbal instructions which he summarized in the section of his report entitled 'Objective'. He was not made aware that his instructions were to have been attached to his report. He had further not been given a copy of the pleadings in the case. He agreed that he prepared his report 'partially' based on information given to him. For example, he agreed that he was told about the 2.39 Acre Site being cleared in February 2008 and that he was told about it in or about June 2009; he also agreed that whatever happened concerning slippage in February 2009 was information told to him; and he agreed it was told to him that material had been carted away but not by whom. He also admitted that he had not referenced material in his report, except a survey which does not contain measurements, though he stated that it gave broad areas.

[75] He agreed that the photographs in his first report are from 2009 when he first visited; not from 2008; that material was still there in 2009 and did not contain overburden. He agreed that he gave estimates of the land value prior to and after the work carried out, stating that the land is no longer in the same configuration as before. He admitted that he did not see the configuration of the land before it was benched but assumed from the surrounding areas. He agreed that the area where the benches were created valued approximately \$150,000.00. but that reinstating the property to its original state would be impractical due to the steepness; not because quarrying was the best use of the Property. He stated that the Property was also suitable for building town houses, hotels etc. He agreed that in order to build, the land would have to be cleared, but that clearing of the land did not add value as it had also been benched which has implications for drainage. It was put to him that the Property had replenished itself to which he explained that the

benches are still there although some vegetation/shrub has grown on the benches, and some erosion may have lessened the benches. Nonetheless he insisted that it is still very much in the same state.

[76] He stated that he was aware that Mr. Darcheville carried out excavation works above the benches but he was not aware that it was done in preparation for quarrying but to arrest drainage of storm water that was draining into the quarry. He admitted that it left a big scar on the property and that there are now no trees in that area. He could not say whether the area cleared by Mr. Darcheville was bigger than the 2.39-Acre area.

[77] He was asked what would be the purpose of reinstating the 2.39 Acre area in terms of a cost benefit analysis? He stated that it would be impractical. He was then asked whether it would be just to go through the exercise to which he replied – to an extent, yes and that the benches should not have been created there; the original configuration has been altered. He said this though he admitted that the reinstatement cost is high and uneconomical given that the area is valued at \$150,000.00 and the cost of reinstatement is some \$11,000,000.00.

[78] He was aware of Hurricane Thomas in October 2010 that dropped record amounts of rainfall on Saint Lucia, however, was not aware whether there was land slippage during or as a result of Hurricane Thomas. He visited the site after 2010 and saw no land slippage.

[79] **Mr. Tedburt Theobalds:** Mr. Theobalds' report dated July 2008 states that the plot of land that his report assesses is the 2.39 acres per the sketch plan of Mr. Dunstan Joseph, Licensed Land Surveyor dated 10th April 2008. He described the subject site as an area of approximately 2.39 acres which had been cleared of all bush and trees, and the vegetation, topsoil and tree stumps were stacked at specific points towards the centre of the site. Land clearing activity towards the

top area was more noticeable and the subsoil exposed and very unstable. He also stated that an access road was constructed to reach the site measuring 404 feet in length and 24 feet in width. He also says that a total of 4 terraces of varying lengths and widths were excavated along the contour of the land. He provided the measurements and based on that, calculated the amount of soil and material removed. He recommended that to reduce soil erosion, certain activities needed to be undertaken including replacing and compacting subsoil, replacing and compacting topsoil, and revegetation. He concluded by providing the cost of undertaking these activities.

- [80] The Plan to which he referred drawn by Licensed Land Surveyor Mr. Dunstan Joseph on 20th April 2008 was done per order of the Court dated 6th April 2008 and was referred to by several of the witnesses in their evidence. Accompanying that Plan is a short report by Mr. Joseph which identifies the areas shown on the Plan and is worth noting. It reads:

“The attached Plan drawn on 20th April 2008 shows the area currently occupied for quarrying purposes. 4.86 acres is used for quarrying and blasting, 2.64 acres is used for crushing and storage, 29,300 square feet is used for access road, 33,000 square feet is covered with shrub, with the remaining rock platform measuring 23,000 square feet. There is also an area measuring 2.39 acres which is cleared of all shrubs with an access road to the north face of the existing quarry.”

- [81] In cross examination, Mr. Theobalds was unable to say from whom he got his instructions, which ought to have guided his report. He also agreed that he did not make reference to any material he relied on in preparing his report and in support of his findings as it was not necessary. It was pointed out to him that he did not state how he went about measuring the figures in his report to which he replied, ‘it’s not there, let’s move on’. He stated that he arrived at the price per cubic yard of material based on his years of experience and good knowledge of labour requirements which put him in a position to say what would be required to make good the plot. He admitted to what he described as a mathematical error that the cost of digging holes and planting would be \$600.00 and \$6,000.00. He stated that he could not say the particular types of trees that were in the cleared area as it

had been defaced and stated it was not necessary. Yet, he agreed that different species of vegetation would be priced differently. It was put to him that none of his appraisals related to a quarry. He said he had done it, but it was not included in his report. It was put to him that the case involved a quarry and therefore a valuation in the context of a quarry would have been relevant to which he said merely that it was an oversight.

[82] Mr. Theobalds agreed that the best use of the land would be for quarrying purposes and that this would have involved clearing of the land. Clearing of the land would also have been required if it were to be used for building houses or for a hotel development, although he stated clearing would not have been in the same way for these purposes. He was asked if clearing the land would have prevented any use that could be made of the property. He stated that putting down topsoil would 'make it more of a green space' which was 'the whole purpose' and 'what we are moving towards'. It would also 'add to furthering the value of the property'. He also stated that a major purpose was to prevent soil erosion. He admitted however that he was aware that there was a hurricane in 2010 and that there was no land slide, although he insisted that topsoil had been lost by the clearing in 2008. He was asked whether he was aware that the plot had regenerated itself to which he replied, 'partially'. It was put to him that there is then no need to reinstate the property with which he disagreed because it was necessary to prevent slippage. He was reminded that there was no slippage during the 2010 hurricane to which he responded that he had answered that question before.

[83] **Mr. Egbert Louis:** Mr. Louis was instructed on behalf of Mr. Francois to provide a report on any damage evident to the 2.39 Acres Site and the extent of any damage, as well as to provide a cost impact of any such damage. In his report he provides an overview of the characteristics of the site, observations based on his site visits and other documentation analysed that impacted upon his findings and conclusion, portions of which I have extracted below:

1. "The area of land which the claimant has indicated as being damaged is perhaps less than 2.39 acres...the upper handle of the 2.39-acre section may not have been affected as the vegetation appears untouched.
2. The lot of land...reduced in area in this report, had only been subjected to clearing of trees and brush.
3. During the 60 hours operations of the bulldozer on the subject lot, 139 metres of tracks were most likely cut to allow for the movement of the equipment. The clearings/tracks which were in a north to south direction did not involve any major cutting of subsoil or subgrade.
4. Topsoil and subsoil were not removed from the surface. However, during the clearing of the trees and brush, de-rooting would have resulted in some soil being raised with the roots.
5. The stockpile of soil mentioned in the report by Tedburt Theobalds was most likely stockpiles of tree trunks, twigs and loose soil stuck to the roots of the trees.
6. The operations conducted on the subject lot appear to be more one of clearing trees and brush as opposed to symbolizing quarrying operations. There was no obvious benching of the site, which would then have signified quarry operations or working.
7. The inspection of the site on August 23, 2011, the few holes dug, the probing with the steel bar and the overall vegetation of the subject lot all reveal the existence of soil above the subgrade...
8. ...
9. ... Thus, the highest and best use of the land is for quarry operations. Therefore should it be necessary to undertake a valuation of the subject lot, the analysis /value assessment would have to be based on its use as quarry reserves... Noteworthy therefore is the fact that the removal of overburden on a lot identified or zoned for quarrying lands would be an asset to its value as opposed to a cost. Therefore, if soil was actually removed, it should not have been seen as damage. However, the observation is that the topsoil was not removed...
10. Despite the heavy rains of Hurricane Thomas and the drought of early 2010, there was no obvious loss of material due to erosion or unabated flow of run-off over the 2.39-acre section...; had any of the adverse conditions prevailed, the subject lot would have performed much worse during Hurricane Thomas.
11. Had the land been devoid of topsoil, then many of the trees and shrubs would have died, leading to increased run-off and possibly loss of soil. Further, if there was loosely placed topsoil, the drought would have caused major deep cracks which would then be filled with water during Hurricane Thomas leading to erosion. Neither of these two scenarios existed in 2010.
12. Whereas trees were obviously felled, the current condition of the subject section and its performance during the weather anomalies in 2010 suggest that there is no need for replacement of any trees.
13. ...

- Based on the aerial photograph of 2009 the area of land affected is estimated at 1.67 acres and not 2.39.
- With an estimate of 371 metres of traces cut, the amount of topsoil covering an effective area based on widths of 4.0 metres would be around 236 cubic metres (308 cubic yards) and not 400 cubic yards identified in the Tedburt Theobalds report. It must, however, be noted that traces cut along the contours would result in minimal excavations. In fact, the perimeter trace... was really a removal of trees rather than any cutting. Therefore, even the figure of 236 cubic metres would be excessive.
- Not many traces across the contours were observed from the aerial photography or during the site visit. Thus, if the 371 metres is used as benchmark, with average widths of 4 metres and cuts of 1.5 metres, this translates to a quantity of 1,113 cubic metres (1,455 cubic yards) far less than the 3,795 cubic yards calculated in the Tedburt Theobalds report.
- The growth of the plants within the last 3 years suggest that there is no need for any fertilizer treatment.

Essentially, the reinstatement as recommended by the expert Tedburt Theobalds is not necessary as the land did not sustain any extensive damage to classify it as being desecrated as suggested by the claimant..."

[84] In his conclusion, I would highlight the following passage:

"The clearing of the land may have been an eyesore but could not have been as aesthetically displeasing as the exposed rockface of the quarry pit, above which it is located. The incident of February 2008 could be considered a temporary defacement or scarring of the landscape. It therefore cannot be concluded that the land sustained damage as was established by Tedburt Theobalds. The vegetation appears to be quickly returning to its 2008 condition... Essentially, the 2.39-acre section is undergoing a natural regeneration of its existing vegetation with the passage of time. I therefore emphasize that it is not necessary to undertake any tree planting and land restoration of the 2.39-acre section."

[85] In cross examination, it was put to Mr. Louis' that prior to August 2011 he had not visited the site and he could not say what its condition was in February 2008. Mr. Theobalds' visit in July 2008 would have been fresher and the physical condition of the land would have been more evident. Mr. Louis did not deny any of this and stated that his opinion was based on his observations in 2011 and the aerial photograph of 2009 from the government map sheet obtained from the Land and Surveys Department of the Land Registry. From both, he was able to interpret what came out of the Property.

- [86] He was asked whether Mr. Theobalds measurements of terraces in his report are consistent with benches of the type he would contemplate. His reply was that he was not sure he could say that it was. He stated that a terrace could be a meter or 3ft but for quarrying, he would expect the height of the benches to be higher. In terms of width, it has to accommodate equipment – 6 meters to 20 ft wide; and in terms of height, it would depend on the material type. It could be as much as 6 meters. In relation to his conclusion that there was no benching based on looking in the rearview mirror, he was adamant that he was on the ground in 2011 and he saw the cuts when he walked the site. He therefore saw the original level where it was in 2008. He admitted there were cuts for which he identified the quantity of material which may have been excavated. These terraces were cut fairly levelled so equipment could pass.
- [87] It was put to him that it was not unreasonable to conclude that with heavy rainfall, heavy free flowing water would pass over the area. He stated that it is unreasonable to make a determination in that way because of the vegetative nature of the area. He could not say that water movement would have affected benching. Benches are normally flat, so water flow would be on sloping aspect of the site. He insisted that he saw no benches only traces.
- [88] He explained that traces are a cut road but not a full road, more like a pathway. His reference in his report to defacement of landscape was to the traces. He stated that the aerial photograph which picks up the colour of roofs shows the traces but does not show benching. He could not with certainty say there were never any benching, as it could have been done and covered with vegetation, but the existence of benches was not clear to him. In response to the Court's question supposing there were benches, whether two years later anything would have prevented him from seeing them, he stated he was unsure. He said that if one benched for quarrying purposes, the level of excavation would be much deeper. It would be exposed rock, which would have been seen from the photos. The Court

further asked if it is possible to have benches that could disappear. He said no; that benches are vertical and exposed to show clean rock and all vegetation and material are removed. Benches most likely would have been seen if there from 2008.

Analysis

- [89] I will begin my analysis by acknowledging that the activity on the 2.39 Acre Site occurred in 2008 under the Head Lease. Though under the Head Lease, the right to mine granted was very wide and not subject to the Usufruct, I find that this area must be taken to be outside the 'approximately 4 acres' or '4 acres more or less' of the Quarry, which was leased to Clarke Investments, and in respect of which it was given the right to quarry. Therefore, the question is whether the activity undertaken there amounted to quarrying, and if it fell short of quarrying, whether the activity was in any way prohibited and the extent of damage caused, if any.
- [90] I must state that the report of Mr. Louis is far more thorough and detailed than the reports of either of the other experts. Unlike Mr. Dolcy and Mr. Theobalds, who merely accepted information given to them by Quality Motors and based on that information gave a cost assessment, Mr. Louis appeared to have conducted independent investigation into what occurred, how and why it likely occurred, and its impact on the status of the Property. He made certain observations and included scientific reasoning for his conclusions. For these reasons his report is considerably preferred to that of the other two experts.
- [91] Where I admittedly had some difficulty is the question whether the cleared area, which I accept based on Mr. Louis's report is less than 2.39 acres and closer to 1.67 acres, was also benched. The other two experts say that it was, as well as the four witnesses for Quality Motors. Mr. Shingleton-Smith and Mr. Louis both say it was not. Though Mr. Louis admitted that he could not say with absolute certainty, I accept as more likely than not, that there was no benching given that it could not be detected by the aerial photography and he saw only what he described as 'traces' on his visit. Whilst I acknowledge that he was the last to visit

the site, I note that the aerial photograph on which he relies was taken in 2009, the same period in which Mr. Dolcy would have first visited and only months after Mr. Theobalds would have visited.

[92] Nevertheless, I accept that his evidence of traces indicates that there were cuts and at least some material removed regardless of whether the cuts rise to the level of benches. That being said, I also accept Mr. Louis' evidence that there was no indication of subsoil or subgrade having been cut and no exposed rock. Considering that all the experts acknowledged that the Property has replenished itself to some degree or another and that it is overgrown with brush and shrubs, this would mean that subsoil and likely topsoil remained. I also take into consideration Mr. Dolcy's evidence that when he visited the site in 2009, the material removed was still there and did not contain overburden. Mr. Isidore Emmanuel, Quality Motors own witness, indicated the presence of topsoil which is where he specified that he planted his watermelons after the 2.39 Acres Site was cleared. All this supports Mr. Louis' findings that the subgrade had not been interfered with and remains intact. Whatever name is more suitable for describing these cuts is really of little moment. What is clear to me is that the Property has over the years replenished itself and I accept Mr. Louis' evidence that there is now very little remarkable difference between it and the surrounding areas.

[93] I also accept as an important consideration that the best and most likely use of the Property is quarrying, especially given Mr. Darcheville's quarrying activity above the 2.39 Acre Site since the claim was filed and the presence of the Quarry immediately below. Any defacement would not have changed the character or visual aspect of the Property and the use to which it could reasonably be put. As to the issue of erosion, I accept the scientific evidence of Mr. Louis as to the weather anomalies of 2010 (the drought followed by the hurricane and the significant potential for erosion this would have caused) during which there was no landslide or slippage or loss of soil or material complained of. This leads me to believe that the slippage of February 2009 was a natural occurrence due to the

heavy rainfall and character of the soil and vegetation of the area, rather than the result of the clearing and any cuts as concluded by Mr. Louis. The other experts acknowledge that there was no slippage or erosion resulting from Hurricane Thomas in 2010 yet offer no explanation for that phenomenon as against the slippage in February 2009.

[94] I have also not overlooked the very revealing testimony of Mr. Dolcy who indicated from the first of his four reports (without any explanation as to why four analyses were undertaken with the same objective and without any change in circumstances) that reinstatement of the area would be impractical. In cross examination, after acknowledging the significant cost of reinstatement (approximately \$11 million) when compared with the value of the land (approximately \$150,000), stated that the purpose of reinstatement was to go through the exercise because the benches should not have been created and the original configuration of the land had been altered. I combine this with the not dissimilar evidence of Mr. Theobalds who stated the reason for reinstatement as being to make the Property greener and add value. These reasons do not justify the cost of reinstating the Property given the uncontroverted evidence that the Property has self-replenished. Mr. Louis has stated that there is now hardly any difference between the 2.39 Acre Site and the surrounding areas.

[95] Nonetheless, article 406 of the **Civil Code** provides that “[t]he usufructuary cannot fell trees which grow on the land subject to the usufruct.” The evidence reveals that trees, brush and shrub were felled in breach of this provision for which Mr. Francois is liable pursuant to article 426 which provides:

“If during the continuance of the usufruct, a third party commit any encroachments on the land, or otherwise attack the rights of the proprietor, the usufructuary is obliged to notify him or her of it, and in default thereof he or she is responsible for all the damage which may result therefrom to the proprietor, in the same manner as he would be if the injury were done by himself or herself.”

[96] It is undisputed that Mr. Francois did not notify Quality Motors of this breach, his defence being that he was unaware of it and further that any such activity was not prohibited and did not amount to an attack on Quality Motor's rights. In the circumstances, although no damage has been caused to the Property such that reinstatement is unnecessary and no damages will be awarded therefor as claimed, I will award nominal damages in recognition of the breach of article 406.

[97] However, for the avoidance of doubt, I do not find that felling of trees in breach of article 406 amounts to committing waste of the Property which invokes article 430 which provides that "[t]he Usufruct may also cease by reason of the abuse the usufructuary makes of his or her enjoyment, either by committing waste on the property or by allowing it to depreciate for want of care."

The Further Excavated Site

[98] **Mr. Darcheville:** Mr. Darcheville stated that the fact that the excavator was retained after work ceased at the 2.39 Acre Site signified that from the start, their intention was to increase production because a new 200 tonne per hour Goliath Crusher was also brought on site, erected and tested. He said many truckloads of boulders were removed from the Quarry, so much that during the two weeks when the injunction was granted, Bluerock Quarries dug, crushed and removed in one week alone about 5,000-6,000 tonnes of material. He said that on the weekend in question there were about 11 22-tonne Mack Dump Trucks and 16-tonne Hyundai Dump Trucks moving material. It was put to him in cross examination that there was no evidence of how he arrived at the above to which he replied that he took pictures. It was pointed out that pictures would not provide definitive quantification, with which he agreed.

[99] He stated that despite his complaints in February 2008 that the Quarry had been exceeded, quarrying continued unabated and intensified. Blasting increased from once every 5 months to once every week at a depth of 30 feet instead of the previous 20 feet and production increased from 40,000 tonnes to 80,000 tonnes

annually from two years prior. In cross examination, he admitted that he had produced no documented levels of production before his purchase of the Property and after for comparison. When asked about any restriction as to depth, he stated it was in one of the leases, but he could not recall.

[100] Further, Mr. Darcheville said in his witness statement that he instructed a surveyor to mark the area being occupied by Clarke Investments and Bluerock Quarries in or about February 2008 and attached a copy of the Surveyor's drawing which he says shows that approximately 10 acres were being occupied by them for quarrying purposes. However, later in his witness statement he stated that "damage to the area which has been erroneously deemed the Quarry is an area of approximately .86 of an acre." It was put to him in cross examination that there was no evidence of 10 acres being occupied by Clarke Investments and Bluerock Quarries with which he disagreed. He referred to the report of Mr. Dunstan Joseph, Surveyor, but accepted when it was pointed out to him that the report stated the quarrying and blasting area as 4.86 acres. He also accepted that the crushing and storage area mentioned in the report existed long before 2006. Further, he agreed that the drawing of the Surveyor attached to his witness statement did not indicate any extension or going beyond what the Quarry is or was and that there was no document from prior to his purchase to compare with what he says now goes beyond the Quarry.

[101] In cross examination, Mr. Darcheville agreed that quarrying had been taking place on the Property for some 30 years. He also admitted that he would have expected that whatever was being done on the Property before the Usufruct was granted would have continued including use of the Quarry; however, he did not expect an intensification of activity but for it to continue in the way it had begun. Yet, he admitted that the business of quarrying would be dictated by the demand for quarry products and that if there was an increase in demand for quarry products there would be an increase in quarrying. He was asked whether the quarry products being crushed quicker suggested that production increased and if it

mattered whether the products were crushed or taken away? He said it mattered because new equipment was brought in. It was put to him that all the work he complains of was normal quarrying activities to which he replied that it was with greater intensity, though he again accepted it could have depended on the demand for products.

[102] **Mr. Emmanuel:** Mr. Emmanuel stated that the area for which he was responsible as Foreman comprised 4 acres of land where mining and blasting took place. He knew the boundaries as they had been shown to him by Mr. Francois' watchman. In early 2008, a Goliath Crusher had been brought into the Quarry, mounted and tried out as well as a Caterpillar articulated dump truck and excavator to load and carry stones. The additional equipment was brought on to increase production. The existing Moxy truck was too small to feed the jaw of the crusher because they were blasting more material and the new equipment reduced the waiting time. He indicated that they used to blast ten holes before 2007 but in 2008 they blasted 30-40 holes. He stated that before 2007, they produced 40,000-50,000 tonnes of crushed material annually but production almost doubled when C.O. Williams Construction took over the Quarry.

[103] Further, while they never used to drill the Quarry floor before, in November 2009, Bluerock Quarries dug a hole in the floor of the Quarry and started drilling as there were only a few stones left on the ground for crushing because they had exhausted the Quarry. The middle of the Quarry floor was drilled 15 feet deep, was blasted and the material removed. A crater about 20 feet wide was created, a trench dug towards the swamp and a pipe installed to drain water which would accumulate in the crater during rain. In cross examination, he acknowledged, the size of the crater in the quarry floor was never actually measured but was his estimation. He accepted that it was normal to drill when quarrying and that he was unaware of any restriction to going down to blast in the Quarry.

[104] **Mr. Benjamin and Mr. Butcher:** Their evidence was that they had always quarried stones from the hillside of the Quarry. Around 2008 however, they exhausted the stones from the hill, so they started to dig the floor of the Quarry. Mr. Benjamin stated that they dug about 30 feet down and a ramp had to be built to access the stones at the bottom. The hole was very large; about the size of Derek Walcott Square. Both say around this time also, a new crusher was brought onto the Quarry. It was much bigger than the existing one and would have greatly increased output, however it was damaged by the landslide and never put into full-time operation. Both state that two new large articulated lorries and an excavator were also added enabling them to increase production. They also stated that in 2008 there was an increased demand for stone. As a result, they began to blast more often – about 2-3 times per week as opposed to once per week or every other week as was the practice before 2008. In cross examination Mr. Benjamin acknowledged that throughout his time working at the Quarry, increase or decrease in blasting depended on demand. Both say they continued to produce stone from the Quarry into 2012. Mr. Butcher stated that by the time the Quarry closed in 2012, the Quarry had been exhausted and all the stone taken away.

[105] Both of them indicated that when blasting they would have to halt to allow Mr. Francois safe passage. Under cross examination Mr. Benjamin was asked whether Mr. Francois would have seen them blasting; he indicated that they would have to let him know – when the sirens were sounding it was an indication that they were blasting.

[106] **Mr. Shingleton-Smith:** He said that from the 2000 Lease, Bluerock Quarries has continued to operate the Quarry in the same manner and within the same boundaries as it was operated during the time in which Clarke Investments operated the Quarry under prior leases from Mr. Francois. They confined their activities to the same 4 acres which they blasted, dug, excavated and from which they removed material in the same manner and mode in accordance with the leases. At all material times, quarrying extended downward and the boundaries of

the Quarry had not changed laterally. He said there had been no installment of new machinery or equipment, except for a tertiary crusher which could not increase the tonnage extracted from the quarry, but simply assisted in producing stones of a smaller size.

[107] In cross examination, it was put to Mr. Shingleton-Smith that there was excavation beyond the depth of 10 feet in breach of paragraph 3 of the Sub-Lease by virtue of which Bluerock Quarries was at the material time operating the Quarry. He denied that this was the case. He indicated that the 10 feet does not go beyond the level of the lower road, so that what is defined as 10 feet depended on where you took your datum from. He also stated that they created a 10-foot-deep pit, approximately a quarter of the base of the quarry. It was not refilled in accordance with the Sub-Lease because Mr. Darcheville asked them not to. He disagreed with the allegation that the pit was 30 feet deep and the size of Derek Walcott Square, stating that it was substantially smaller and that it was 10 feet deep and does not go below the level of the road.

[108] He further disputed that Bluerock Quarries had exhausted the stone on the hill because there was an injunction preventing them from blasting. In 2008 the whole area was covered in boulders. With the injunction, they could only drill on the rock platform and when that was depleted, they used boulders that had been stored. During the injunction, they did not quarry anywhere else. Once the injunction was lifted, they were again confined to the 4-acre area. They did not stray from it; they continued in that area and went downwards. He did not agree that additional equipment being a crusher, two lorries and an excavator were brought on to increase production. When asked whether production remained the same or increased, he stated that it related to demand. He denied that quarrying operations increased after 2008 in terms of drilling and blasting; he stated the crushing operation remained in place all the time. He denied that they brought on a new crusher stating that you do not simply add one, as it is a network. He stated that Bluerock Quarries remained there until 2012.

[109] **Mr. Dolcy:** In his November 2009 report, Mr. Dolcy noted that “[t]here is a quantity of mined stone on the ground area... There has also [been] excavation below the existing quarry floor. A crater 70 feet in length, 50 feet in width and 10 feet in depth has been formed.” He produced an estimate of the volume of stone extracted from the ground area of the quarry.

In his June 2012 report he states that “quarrying activities have extended beyond the limits of the leased quarry area (4-acre limit) and into the quarry floor... The owners... are claiming damage... due to the additional activities which were carried out beyond the limit of the quarry area.” He then identifies several areas “in and around the quarry” identified as follows: A – Eastern Section of the Quarry Area (30 feet), B1 – Central Area of Quarry (10 feet below existing quarry floor level), B2 – Central Area of Quarry (30 feet below existing quarry floor level), C – Western Section of Quarry (30 feet). He again provides the volume of material extracted and an area to be refilled.

[110] In his January 2019 report, he states “material has been illegally extracted from the quarry” for which he provides a cost for the material extracted and the cost of making good any damage caused as a result of that illegal action. In this report, he refers to a different set of areas, Area A – The Lake, Area B – The Bench, Area C – The Platform, and Area D – The Slide. The Lake he says is below the rockface and is a large pond filled with runoff from the slopes and rainwater. Excavation works were carried out below normal ground level to an average depth of 30 feet. The material there consisted of hard basaltic rock similar to the adjacent rock face. The Platform is located on western section of the rock face. Excavation was carried out on an area of 5,000 square feet at an average depth of 35 feet. The areas are identified on a very poor quality google earth image which made it impossible to determine the location of the areas.

[111] In cross examination, Mr. Dolcy agreed that Quality Motors was claiming damages for activities beyond the limit of the Quarry. He was asked whether he had compared activity which was said to be beyond the quarry area with any maps showing the limit of the original quarry area. He said he relied on a survey plan which shows the quarry area as 4 acres which is well defined. In his report he was speaking to what occurred beyond that. However, he admitted that he had not been given surveys which showed what existed prior to 2006; he was not aware that the quarry area had never been surveyed, and he was never shown a copy of any of the leases under which Clarke Investments or Bluerock quarries were occupying the Quarry. He was asked to ascertain the volume of stone extracted from the ground area of the Quarry but could not say positively that he was told by Mr. Darcheville that Bluerock Quarries was permitted to mine the area by virtue of a lease agreement with Clarke Investments. He stated that using the crater as a starting point, he was looking at the area beyond which quarrying was allowed which was 10 feet. He clarified that his understanding was that a 10ft depth was allowed for quarrying in the crater as that is what had been told to him. He also stated that the quarry area in the survey plan indicates that it includes 4.86 acres, but it extends beyond that in two areas. There is excavated material to the east and west of the 4.86 acres. He agreed that the volume of material mined as found by him would only be relevant if it is found to have been mined illegally in other words to have belonged to Mr. Darcheville. He agreed that he was told, and as far as he is concerned, activity beyond the 4-acre limit would be going beyond what was permitted. He agreed that he was limiting activity within 4 acres.

[112] Mr. Dolcy is the only expert who was asked to address quarrying activity outside the 4-acre limit of the Quarry (not being the 2.39 Acre Site). Therefore, his reports are the only material before the Court upon which any assessment could be made of the extent of such activity, if any, and the damage suffered as a result. However, Mr. Dolcy's reports raise some concern, which lead me to the opinion that little weight can properly be placed on them. As noted in the discussion relating to the 2.39 Acre Site, Mr. Dolcy admitted to merely relying on information

he was told by Quality Motors. Very concerning is that he provided a cost analysis of material extracted from the Quarry, seemingly without a proper understanding of the areas of the Quarry the defendant was permitted to work.

[113] Mr. Dolcy admitted knowing that Quality Motors was claiming damages for activities beyond the limit of the Quarry and that the volume of material extracted as found by him could only be relevant if it is found to have been mined illegally. He stated that he relied on a survey plan which shows the Quarry as 4 acres which is well defined. However, this Survey was never mentioned in any of his reports nor was there any clear identification of the areas he deemed to be outside of the 4 areas to which he said the Quarry was limited. The Plan of which he speaks shows 4.86 acres as being occupied and operated as the Quarry and is the Plan drawn by Surveyor Dunstan Joseph on 20th April 2008. It was therefore drawn at a time when the alleged acts of trespass were being or had already been committed and would not have shown the area of the Quarry prior to 2006 or before the alleged acts of trespass. Mr. Dolcy admitted that he had never been shown any survey of the 'area of the quarry' prior to 2006; was not aware that the quarry area had never been surveyed prior to the survey of Mr. Dunstan Joseph; and was never shown a copy of any of the leases under which Clarke Investments or Bluerock quarries were occupying and operating the Quarry. This then begs the question what was his basis for determining and quantifying volumes of material extracted illegally and damage suffered as a result.

[114] In relation to his conclusion of illegal mining of the quarry floor, he relied upon information he was told by Quality Motors that mining was not permitted beyond a 10-foot depth. This is a false premise. Quality Motors must prove its case and has failed to prove that quarrying below 10 feet was not permitted by the Head Lease. Clause 6(2) does not say so as alleged and there is no basis for implying this restriction into the clause. Quality Motors has also failed to prove that there was any restriction to quarrying the floor at all or below any particular depth from the time the quarry opened. It is not found in any prior lease for example. It must

be taken that once one area of the Quarry has been utilized, then one would be expected to move to another and so on and so forth. After all, the material is finite.

- [115] In any event Mr. Dolcy did not explain his measurements in this regard such as how and from where they were taken. In his November 2009 report, there is no mention of excavation below the depth of 10 feet and this report was dedicated to activity on the quarry floor. This is considered against the evidence of Mr. Shingleton-Smith who maintains that the quarrying in the floor of the Quarry did not exceed 10 feet, a determination which depended upon where the datum was taken from.
- [116] As for the areas identified by Mr. Dolcy in his two later reports, it has not been proven that these areas were outside the approximately 4 acres of the Quarry. In the June 2012 report, the areas quantified are the eastern, central and western section of the Quarry. If all those areas were prohibited from being quarried, what exactly of the Quarry was permitted to be mined? Similarly, the 2019 report quantifies material removed from the platform and from the ground (from which it appears the crater/lake was created). Again, where then was quarrying permitted if not the platform or the ground. No evidence has been provided of the areas in which quarrying operations had been conducted between 1984 and 2006 and therefore it seems to me impossible to say that quarrying has been undertaken under the Usufruct in a manner different from that in which it began.
- [117] As to the allegation of machinery being added to increase production, additional trucks and crushers were mentioned. I do not see how this affects the volume of material extracted. The lessees would have been entitled to crush material at any rate they saw fit and to use any number of trucks to carry away that material. As I stated earlier, I am not convinced that article 410 prohibits a new excavator being brought on site, if that was done.

[118] All four witnesses for Quality Motors state that production doubled from about 2008 and thereafter. I note that Mr. Darcheville is not in a position to say so and his evidence in this regard is hearsay. There is no documentary evidence provided in support of these statements as to production levels and I must reiterate that it is for Quality Motors to prove its case. Mr. Benjamin acknowledged that throughout his 30 years working at the Quarry, increase or decrease in blasting depended on demand. All the witnesses say that this was the situation during 2008 and after - quarrying depended upon the demand and the demand for quarry products increased. Mr. Darcheville himself stated that he understood and would expect this to be the case.

Conclusion

[119] I find that the claimant has failed to make out its case that the quarrying under the Head Lease exceeded the permitted manner and extent. I also find, in the absence of any definitive evidence as to the area used as the Quarry and the level of production prior to 2006, that Quality Motors has failed to prove that the Quarry was operated under the Usufruct in a manner different from which it began.

Issue 4: Whether Quality Motors is entitled to damages and if so, the quantum?

[120] I will award \$25,000.00 as nominal damages for the felling of trees in breach of article 406 of the **Civil Code** in light of my earlier discussion at paragraphs 82-90 above and taking into consideration the market value estimate given by Mr. Dolcy in his report as regards the 2.39 Acre Site.

Overall Conclusion and Order

[121] Based on the foregoing discussion, I hereby make the following orders:

- 1) The claim that the lease dated 30th November 2006 from Mr. Francois to Clarke Investments (the "Head-Lease"); the lease agreement dated 21st

February 2007 from Clarke Investments to Bluerock Quarries (the “Sub-Lease”) and the Amendment to Lease Agreement, dated 27th September 2007 between Mr. Francois and Clarke Investments (the “Amendment Lease”) are null and void, is hereby dismissed.

- 2) The claim that Mr. Francois abused the usufruct granted from Quality Motors to Mr. Francois by Deed of Sale dated 5th December 2006 (the “Usufruct”) is also dismissed.
- 3) The claimant shall be awarded nominal damages in the sum of \$25,000.00 in recognition of the breach of article 406 of the **Civil Code**.
- 4) Each party shall bear their own costs.

Costs

- [115] The usual order as regards costs is that prescribed costs are awarded, and costs follow the event. However, having looked at this case, its conduct, protracted history, several attempts at settlement and the fact that the claimant has not succeeded on its claim in the main, the Court will order that each party bear their own costs.

Judgment delivery

- [116] I sincerely apologise to counsel and the parties for the delay in the delivery of this decision which was solely as a result of my demanding schedule over the past months.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar