

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF

MONTSERRAT

(CIVIL)

CASE NO: MNIHCV2016/0003

BETWEEN:

**RICHARD JAMES HENRY
ERIC TOMME**

Applicants/Claimants

AND

**SELSI LIMITED
RUPERT ISLES
BRIAN HOLLENDER (Personal representative
of the Estate of Paul Hollender) Respondents/Defendants**

Appearances:

**Mr. Jean Kelsick for the Applicants/Claimants
Mr. David Brandt for Respondents/Defendants**

**2016: February 08 and 09
2016: March 04**

Judgment

- [1] Redhead, J. (Ag): The Ruling in this judgment was given on 4th March 2016. I now produce the judgment in full.
- [2] The Applicants Richard James Henry of Isles Bay Hill and Eric Tomme of Old Towne, Montserrat made application for an injunction to restrain the 1st and 2nd Respondents by their servants or agents or otherwise howsoever from mining sand or any other materials and operating a Sifting/Separation plant in the area that is bounded by former Belham bridge in the East. Isles Bay residential subdivision in the South, Happy Hill, Old Towne and Isles Bay Plantation residential subdivisions in the North and Isles Bay Beach in the West. An injunction to restrain the 3rd Respondent by his servants or agents or otherwise howsoever from authorizing the 1st and 2nd Respondents or anyone.
- [3] The application is supported by affidavits sworn by both applicants. The 1st Applicant Richard James Henry in his affidavit deposed as follows:
“In or about 1988 he and his late wife purchased a vacant lot at Isles Bay Hill residential Subdivision (Isles Bay Hill) and constructed a dwelling house thereon in or about 1990.
- [4] He is a British National. Over these past 25 years he has spent over 5 months a year in Montserrat. He is a resident of Montserrat and pays taxes on his income.
- [5] Mr. Henry deposed that Isles Bay Hill was then and remains an upmarket residential area. Until the inception of volcanic activity in 1995, the valley below Isles Bay (Belham Valley) was a golf course. The Belham is zoned as a recreational area.
- [7] Mr. Tomme also swore that after the commencement of the volcanic activity in 1996, the Belham valley became covered with volcanic deposit rendering it unusable as a golf course. He said that one of the attractions of Isles Bay Hill to him and one of the primary reasons for deciding to live there is its peacefulness surrounded by what

was a golf course and the Old Towne and Isles Bay Plantation residential Subdivisions (“Old Towne” and “Isles Bay Plantation”, respectively).

- [8] I make the observation that having regard to what Mr. Henry deposed to above, it is obvious to me that Isles Bay Hill has lost some of its attractions as a highly residential area.
- [9] This deponent swore that sometime in 2005, the 1st and 2nd Respondents/Defendants erected a Sand Sifting Plant in the upper Belham Valley and commenced sand mining operations in this area. In or around 2012 the 1st and 2nd Respondents/Defendants ceased their mining activities in the upper Belham Valley and relocated their Sand Sifting Plant to a raised area that is immediately below the entrance of Isles Bay Plantation and is much closer to both Isles Bay Hill and Old Towne. The Sand Sifting Plant where it is currently situated in the lower Belham Valley is referred hereinafter as the “Plant”.
- [10] Mr. Henry swore that between 2012 and 28th September 2015, the 1st and 2nd Respondents/Defendants mined sand in the lower Belham Valley intermittently. There were extended periods when no mining at all took place i.e between September 2013 to June 2014 when the 1st and 2nd Respondents/Defendants were engaged in demolishing Gun hill in the North of Montserrat.
- [11] The first named Applicant/Claimant deposed that he was informed by the 2nd Applicant/Claimant, Eric Tomme, who is permanent resident of Old Towne that on 28th September 2015 the 1st and 2nd Respondents/Defendants commenced Sand mining operations in the lower Belham Valley i.e. immediately below Isles Bay Plantation and in close proximity to Isles Bay Hills and Old Towne on a continual basis.

- [12] Mr. James Henry said on oath that the mining and sifting of sand by the 1st and 2nd Respondents/Defendants usually commences at about 9:00am and continues on a daily basis Monday to Friday until 5:00pm and sometimes on Saturdays and Sundays also until about 5:00pm. This is what he observed and experienced when he returned to Montserrat on 15th October 2015.
- [13] The 1st Applicant/Claimant swore that the mining of sand in the Belham Valley takes place within about 800 yards of his house. The mining operation consists of the use of heavy vehicles such as excavators, backhoes and large trucks in the Belham Valley to extract material from the floor of the valley and transport to the plant. The excavator is a tracked vehicle which clanks like a tank and is therefore very noisy. He is able to hear the noise audibly from his house, which is very disturbing to him.
- [14] The plant is situated about 1000 yards from his dwelling house. He is subjected to continuous noise from the plant. The sand extraction is undertaken by a mechanical excavator which makes a clanking noise as the bucket digs into the sand and rocks. The metal trucks of the excavator also contribute to the noise. The excavator then loads two 20 ton trucks which are continuously driven from the excavation site on the Valley floor to the plant. It is the movement of these heavy tracks that raises dust in the Belham Valley. They are also a noise nuisance, especially when they are climbing the incline to the Plant.
- [15] Mr. Henry deposed that at the plant, the sand and rocks are separated on one or two graders. These are conveyor belt devices that are driven by diesel motors. They emit a continuous loud hum that is very disturbing. As the rocks are separated from the sand they clatter down into a rock pile creating more noise. Two front loaders also operate at the Plant loading sand into the trucks.

- [16] His reading a book or taking an afternoon nap is disturbed by the continuous noise caused by the overall mining operation which also upsets his concentration and peace of mind. He also said on oath that the 1st and 2nd Respondents/Defendants are operating a heavy industrial plant in a residential area without any regard for the peace and enjoyment of property owners in the area.
- [17] The 1st named Applicant/Claimant in his affidavit swore that in early 2012 a group of residents of Isles Bay Hill, Old Towne and Isles Bay Plantation instituted legal proceedings against the Government to stop the mining in the Belham Valley. He was one of the Claimants in that action.
- [18] The 2nd Applicant/Claimant in his affidavit swore that the proceedings instituted against the Government in 2012 have not yet come to trial. This Applicant/Claimant, a Belgian National, swore that he has been resident permanently in Montserrat since 2006.
- [19] The affidavits of both Claimants are in most part touch on the same issues. However the 2nd named Applicant deposed in his affidavit, the Plant is situated about 350 yards from his dwelling house. The noise from the mining operation has completely destroyed the enjoyment of his property and is causing him unhealthy stress. It also prevents him from concentrating on tasks at home and makes him very nervous.
- [20] Rupert Isles, the 2nd named Respondent is Montserrat born. He is Director of the 1st named Respondent Selsi Limited. The 3rd named Respondent is the personal representative of the estate of Paul Hollender deceased. The said estate owns the land in Belham Valley where the 1st and 2nd Respondents/Defendants are mining and sifting sand with the 3rd Respondent's/Defendant's authority.
- [21] As I understand the issue, in my view it is the 1st Respondent/Defendant which is doing the mining of the sand in Belham Valley.

[22] In his affidavit Mr. Rupert Isles deposed that at all material times when he took any action in relation to mining, he took such action in his capacity as Director and representative of Selsi Limited.

[23] The 2nd Respondent deposed that at all material times the 1st Respondent always had the permission of the authorities to conduct sand mining. A letter to this effect dated 6th August 2003 is exhibited. The letter is in the following terms:

“Brandt & Associates

Attorneys-At-Law

Chambers

#4 Farara Plaza

Brades

Montserrat

Further to your letter dated 16 July 2003, please be informed that the Governor-in-Council has agreed that Selsi Limited may continue to mine and export sand and aggregate from Belham and also use the landing facility at Old Road Bay on the proviso that:

- (1) Selsi Limited would make no Claim against Government of Montserrat in respect of
 - (a) Injury, loss or damage to person or equipment;
 - (b) Limitations on its activity at Belham, or
 - (c) Its use of the landing facility at Old Road Bay
- (2) Government of Montserrat retained the right to allow the harvesting of materials in the Belham Area and to allow the use of landing facility at Old Road Bay by other interested parties.....

Signed by

Eugene Skerritt
Permanent Secretary”

- [24] There seems to be some confusion here, it seems to me that the letter was treating sand and stone as minerals. Section 3 of Minerals (vesting) Act stipulates 3(1) “It is hereby declared that all minerals being in or under any land of whatsoever ownership or tenure are vested in and are subject to the control of the crown”**
In the definition section “Minerals” does not include
(ii) any material, such as clay, sand, limestone, sandstone or other stones commonly used for the purpose of road making or for building , for the manufacture of any article used in the construction of buildings, where such material does not contain any valuable metal or precious stone in its economically workable quantities.
- [25] It seems quite clear to me having regard to the above that the mining of sand and stones in the Belham Valley falls squarely in what does not include minerals: As I understand the issue the land, Belham Valley where the sand is mined belong to the Estate of Paul Hollender, Brian Hollender, the Personal Representative of the Estate granted permission to the 1st Respondent to carry out the mining of the sand in the Belham Valley, as Brian Hollender is legally entitled to do.**
- [26] The purported authority by the Government of Montserrat to grant permission to the 1st Respondent/Defendant to mine sand in the Belham Valley is of no effect ; null and void; Nemo dat quod non habet!**
- [27] I return to the main issues. Both Applicants in their affidavits complain of intolerable noise and dust created as a result of the 1st Respondent’s mining operations. The first Applicant swore that:- my reading of a book or taking an afternoon nap is disturbed by the continuous noise caused by the mining operation which also upsets my concentration and peace of mind.**

- [28] The 2nd Applicant Eric Tomme, in his affidavit swore that “the noise and dust generated by the 1st and 2nd Respondent/Defendants’ sand mining operation are a serious interference with and disruptions of my peaceable and comfortable enjoyment of my property and is causing me great annoyance and inconvenience. The dust is also a health hazard to me as it is unsafe to breathe it in over an extended period of time. In short, it has led to a serious diminution in the market value of my property as it is a grave deterrent to any prospective purchaser. It therefore decreased permanent employment of construction staff to one person only. At times I had six people working on the project. I estimate another two years of work to finish the major renovation of the adjacent property”.
- [29] The 2nd named Respondent/Defendant in his affidavit swore that it is not true that the company, Selsi commences sand mining at 7:00am daily and continues on a daily basis Saturdays and Sundays until at about 5:00pm.
- [30] The 2nd Respondent/Defendant also swore in his affidavit:
“...In about 2002, the 1st Applicant/Claimant, [Richard James Henry] “He offered to give the Selsi Limited money to buy the equipment and when the company could secure arrangements to export to purchasers:”
His company did not accept the offer of the 1st Applicant and Selsi proceeded on its own without investment from the 1st Applicant/Claimant.
- [31] Finally on this aspect, the 2nd named Respondent/Defendant deposed:
“The 1st Applicant/Claimant is upset because I refused his investment. Additionally when he was building his yacht club in or about the year 2012 he asked me for a donation to sponsor the roof of the building. I told him I was not prepared to do that as I did not own a yacht and could not benefit in any way from such venture.”

- [32] The 2nd named Applicant/Claimant swore that the 1st Respondent/Defendant has been conducting Sand mining in the Belham for over 14 years and the 1st and 2nd Applicant have not complained until the letter before action sent in about the month of December
- [33] Mr. Rupert Isles swore that he was taken by surprise by the 2nd Applicant/Claimant's affidavit since he has never complained to him since the operation commenced in 2001. Selsi has been mining continuously from that time until now. The 2nd Applicant has been living in the same area for several years.
- [34] The 2nd Respondent/Defendant deposed that sand mining is critical to the construction industry of Montserrat. It generates significant revenue to Montserrat. The economy is in dire straits. Unemployment is very high. If the interim injunction is granted, seven (7) full time employees will be affected and the construction industry will be greatly affected.

THE LAW

- [35] The leading authority on the grant of an interim injunction is: American Cyanamid Co v Ethicon Ltd¹

At page 510 Lord Diplock opines:-

“The Court no doubt must be satisfied that the Claim is not frivolous or vexatious in other words that there is a serious question to be tried...”

Continuing Lord Diplock at page 510 said:

“.....the governing principle is that the Court should first consider whether if the plaintiff were to succeed at the trial, in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was

¹ 1975 1 ALL ER 504

sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at Common Law would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiffs appear to be at this stage. If on the other hand damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at trial the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff could be in a financial position to pay then there would be no reason this ground to refuse an interlocutory injunction."

At page 511 Lord Diplock opined :-

"Where other factors appear to be balanced it is Counsel of prudence to take measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a cause of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of succeeding at the trial."

[36] In that regard I take into consideration that the respondent Rupert Isles in his affidavit swore that the company Selsi Limited, 1st named Respondent has been conducting mining business at Belham for the past 14 years².

² See paragraph 30 of Rupert Isles' Affidavit

- [37] The Claimants say otherwise. However I bear in mind the injunction of Lord Diplock in American Cyanamid [supra] “It is no part of the Court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts which the claims of either party may ultimately depend...”
- [38] Mr. Brandt in his Skeleton argument contends that, where for example in a restraint of trade case, an injunction would have deprived the defendant of his job, this was held to be more serious than the prejudice caused to the claimants by the defendants’ continuing to work for a rival firm pending the trial. (See Fellows and Son v Fisher)³
- [39] Mr. Rupert Isles in his affidavit (paragraph 32) swore that if the interim injunction is granted the families of the seven (7) full time employees will be affected. Additionally the construction industry will be greatly affected.
- [40] Mr. Brandt in his skeleton argument contends that the Claimants could be adequately compensated by an award of damages for any loss if the court finds that the Claimant would have sustained and the defendant has the ability to pay. In an affidavit of the Director of the 1st Respondent/Defendant Mr. Isles stated that the 1st Respondent/Defendant owned property in excess of EC\$2,000,000.00.
- [41] Mr. Kelsick Learned Counsel for the claimants argues that the Court of Appeal in City of London Corp v Bovis Construction Ltd⁴ granted an interlocutory injunction regarding noise nuisance in circumstances that bear a close resemblance to the case at bar.
- [42] I think that I am allowed to take judicial notice that unemployment in Montserrat is very high. It is my considered opinion to put seven persons out of employment in

³ 1976 QB 122

⁴ 1992 3 ALL ER 679

the present climate of unemployment, relatively speaking, is a significant number of persons.

[43] Mr. Kelsick submits that as the 1st and 2nd Respondents/Defendants operate a business and must keep account, a reasonable and accurate commercial assessment of any loss they may sustain can easily be made. Conversely, this is not the case in respect of the Applicants/Claimants peaceful enjoyment of their private properties that the 1st and 2nd Respondents'/Defendants' nuisance is causing them. This, because of the disturbance caused by noise nuisance is irreversible (City of London Corp) [Supra].

[44] In my considered opinion if an award of damages is the property remedy to be awarded, the difficulty in calculating the damages should not be a bar in awarding damages.

[45] Having regard to the balance of convenience in this case and taking into consideration that if the claimants were to succeed at trial, an award of damages would compensate the claimants for any loss which they would have suffered; in my judicial discretion the application by the claimants for an interim injunction is hereby refused.

[46] Costs to the Respondents to be agreed if not agreed to be assessed on a Prescribed Costs basis.

Albert Redhead
High Court Judge

