IN THE COURT OF APPEAL OF SEYCHELLES

1. FRANCOIS ROSE

2. MARGARET ROSE

3. DEAN ROSE

4. STACEY ROSE

5. DOMINICK ROSE

APPELLANTS

v

CIVIL CONSTRUCTION COMPANY LIMITED

RESPONDENT

SCA 26 of 2012

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Counsel: Mr A. Derjacques for the Appellant
Mr F. Chang-Sam for the Respondent

Date of hearing: 4th April 2014
Date of judgment: 11th April 2014

JUDGMENT

TWOMEY, MATHILDA.,

[1]. The appellants, parents and children, living at Cap Samy, Baie Ste Anne, Praslin brought a claim against the respondent, a quarry company operating in close proximity to them. They alleged that the two houses they owned had numerous cracks caused by the quarry works. They also alleged that they had suffered stress, inconvenience, anxiety, psychological harm, distress and fright and also constant colds, flu, coughs and ill health generally from the activities of the respondent's quarry.

[2]. The Chief Justice in a judgement delivered on 30th July 2012 dismissed the suit finding that the plaintiffs had failed to prove the damage suffered was caused by acts of the defendant. The appellants have appealed that decision on the following grounds:

1. the honourable judge erred on facts and evidence in failing to find that the damage to the two houses were caused by the acts and omissions of the defendant, on a balance of probabilities.

2. the honourable judge erred in law in failing to find that the defendant caused dust, emissions and noise for several years until 2010 when suppression devices were utilised in 2010, and were therefore liable for a period of several years and should compensate the appellants.

3. the honourable judge erred in his obiter assessment of damages for the appellants towards the cost of repairs, labour and material and the property value as a result of the quarry being operational in proximity to the appellants' two houses.

4. the honourable judge erred in law in his assessment in relation to moral damages and lack of representative action for the appellants

[3]. We take ground 4 first as it is easily disposed of. The appellants 3, 4 and 5 are children of the parties. One of them, Dominick is an adult. He did not testify in his own right. As for the minor children, there was no representative action taken on their behalf. If the parents were appearing on behalf of the children, the plaint should have stated that representative status (section 73, Seychelles Civil Procedure Code); it did not. We are of the opinion, therefore, that the learned Chief Justice was quite right to find that their claims remained unproven. This ground is therefore without any merit and is dismissed.

[4]. Grounds 1 and 2 invite this court to contradict a finding of fact by a court of first instance which had the opportunity to hear the evidence at first hand. In *Akbar v R (SCA 5/1998*the Court of Appeal stated

> *"An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial's judge's findings of credibility are perverse."*

We have directed our attention to the pleadings in this case to see if they are supported by evidence. The 1st and 2nd appellants and their witness, the quantity surveyor, Mr. Nigel Valentin, testified that 3 bedrooms, veranda and sitting room had cracks. Two photos were exhibited showing two of the cracks. There was a claim in the particulars of damage in the plaint of R13, 000 for labour and materials to repair cracked walls, yet, the quantity surveyor; he estimated that they would cost R167, 500 to repair. He admitted that he did not inspect the foundations of the houses to assess what could have caused the cracks.

[5]. The respondent's witness, the managing director of the respondent company, Sunny Khan, testified that a pre-existing house in the grounds of the quarry is now converted to an office and remains standing without any cracks, unaffected by the blasting and vibration from the quarry works as is another house close to the quarry used to house expatriate workers of the quarry. Photographs of the buildings were produced. The environmental impact assessment consultant, Louis Barbé, gave evidence that after his assessment of the impact of the quarry activities to the flora, fauna and residence in the vicinity of the quarry in October 2009, he recommended mitigation measures against dust, noise and vibration and

these were met by the respondent. The blaster, Thomas Marie, testified that the quarry used the modern technique of electronic detonators which minimised vibrations and noise compared to the conventional cord detonators. He stated that using that technique, a house at 50 metres from the blast would not be affected and that the appellants' premiuses are about 150 to 200 metres from the quarry. He stated that unlike the Mahé quarry operations only one blast takes place every 3 or 4 months. Other residents closer to the quarry also testified that they had not experienced any cracks to their houses.

[6]. This claim was brought under article 1382(1) of the Seychelles Civil Code which provides that:

> *"Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it."*

The operative word in this context is causes. Given the standard and burden of proof in civil cases we endorse the views of the learned Chief Justice that in order to succeed in their claim the appellants

> *"must be able to prove that the damage [they have] suffered has been caused by the acts of the defendant, or its servants and agents. Causation is a key element in determining liability. This must be proved on a balance of probabilities. It is not enough for the plaintiff to show that the defendant's acts could be one of several possibilities that could have caused the damage he or she has suffered. The defendant's acts must be the cause of the damage."*

In *Desaubin v United Concrete Products Ltd (1977) SLR 164, de Silva and ors v United Concrete Products (Sey) Ltd (unreported) SC 273/1993* and *Isnard and ors v China Senyang Corporation (Seychelles) Ltd (unreported)* SC 325/2002, causation was established and liability proven. This is not the case here. Whilst we believe that there may well be cracks to the houses, we cannot be certain that these are not cracks due to foundation settlement or weak supporting soils especially since there is evidence that one of the houses was constructed around an existing corrugated iron house and that the soil in the area is sandy. It was incumbent on the appellants to bring evidence from a structural engineer or any other expert competent in the field to eliminate these possibilities.

[7]. Learned Counsel for the appellants relied on the evidence of a quantity surveyor as a witness to explain the origin of cracks to the houses. A quantity surveyor appraises the value of proposed constructions or other structures already erected. He is certainly of use in gauging how much it would cost to repair the cracks to the house but he is no better expert than any layman in determining the cause of the cracks. It is clear to us that the only person able to provide professional expertise in the circumstances would have been a civil or structural engineer, failing which someone acceptably competent in the field. Counsel for the appellant has urged us to accept that experts are not available in Seychelles to ascertain what caused the cracks and we must take Seychelles as we find it. We do but are unable to agree with him. This is not the case where say an expert like a nuclear physicist is required; there are numerous civil engineers in Seychelles. In the event, the appellants failed to relate the cracks in the houses to the geophysical movements caused by the activities of the respondent. Their claim as far as the cracks to the houses are concerned remains unproven.

[8]. The appellants fare no better as far as their claim for noise, smell and dust is concerned. There are complications to the appellants claim to say the least. The 1st appellant is not only a self-employed driver of a 5-ton truck collecting and delivering aggregate from the quarry but he also runs a charcoal business on his land. There have been complaints from neighbours about the dust from his charcoal burning. There is a green buffer zone between the quarry and his houses. The trees are healthy and have no dust. The land at Cap Samy is used for farming purposes and his farming neighbours claim there is no dust on the crops. The smell from an adjacent chicken farm seems to feature more than any smell of granite from the quarry. The road surface has been bituminised to reduce dust as has been the addition of speed bumps. There has been installed a dust suppression system which sprays a wetting material to the crusher and the conveyor. There is a sprinkler system to minimise any dust on the ground and on aggregates being taken away by the trucks.

[9]. The 1st appellant stated that the dust affects himself and the children "morally" and it makes them "itchy". The 2nd appellant also stated that if they are in the house when blasting takes place the family move away to the beach. She stated that the "little one" (without identifying him or her) gets scared. She however testified that she has lived in the house for 15 years and in that time has experienced only 3 blasts. The 1st appellant claimed that he had written to the Ministry of Health who had warned him about the dangers of silicosis but no corroboration of such evidence was brought. There was no evidence at all of the constant colds, flu, coughs and ill health brought by the appellants. Even if causation was proven in this case it would have been insufficient to evaluate the quantum of damages in this case. The court cannot conjure up figures from a few facts averred in a plaint and mentioned by claimants in court. The court relies on evidence and not averments to settle claims. The legal burden remains with the claimant throughout the trial to prove his case; on the party who affirms and not the party who denies it. The Roman maxim *actor incumbit probatio* or "he who avers must prove" applies. Similarly, and by parallel, *article 1315* of the *Seychelles Civil Code* categorically states that

> "A person who demands the performance of an obligation shall be bound to prove it."

[10]. Causal uncertainty is probably the biggest stumbling block in successful environmental civil liability cases. Statutory intervention has resulted in reducing the burden on plaintiffs. Hence, for example industry has been regulated to reduce the risk of potential hazards to the environment and the public. We recognise that it is impossible for any plaintiff to prove conclusively the link between injury or damage and the tortfeasors' activities. In such cases the court has adopted a probabilistic approach of causation whereby the offender who caused the damage or increased the most the probability of the damage is held liable as in the case of *Desaubin, De Silva* and recently *Isnard (supra)* Hence, even if causation cannot be established with absolute certainty, courts may find in favour of the plaintiff. The sensible approach would be to rely on cogent evidence, at best on experts to establish that a suspected facility increased the risks of or caused damage. There is a need for scientific evidence to guide the decision making of the judge. In the present case, there was no compelling evidence from the appellants. On the other hand, the respondent presented robust evidence refuting the allegations of the appellants. We are of the firm view that the appellants did not prove their claim and hence grounds 1 and 2 have no merit.

[11]. We are invited by the appellant in ground 3 to consider an *obiter* finding by the learned judge in relation to the assessment of damages. We decline this invitation as this would be a purely academic exercise, the determination of which would not have been particularly advantageous to the appellant given the lack of evidence to support the damage and injury alleged.

[12]. There is no merit in this appeal and it is dismissed with costs.

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M .TWOMEY	**S. DOMAH**	**A. FERNANDO**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Mahé, Seychelles.