No. 12 of 1951.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE McKINNON INDUSTRIES LIMITED (Defendant) *Appellant*

AND

WILLIAM WALLACE WALKER (Plaintiff) - - *Respondent.*

Case for Respondent

RECORD.

1. This is an appeal from the judgment of the Court of Appeal for Ontario dated the 30th day of March 1950 whereby such Court of Appeal varied in minor respects the judgment of the trial judge, the Honourable the Chief Justice of the High Court of Ontario dated the 15th day of June 1949, and whereby the Court of Appeal restrained the defendant company from discharging or allowing to be discharged from its works in the pleadings mentioned any substance, gas or matter in such a manner or to such an extent as to occasion damage to the plaintiff's property (as described in the pleadings) or the buildings thereon and/or the plants, shrubs and flowers thereupon or therein, provided however that the operation of this injunction be suspended until the 1st day of October 1950; and whereby the Court of Appeal referred to His Honour the County Judge of the County of Lincoln to inquire and assess the amount of damages the plaintiff has sustained during the years 1945, 1946, 1947, 1948 and 1949 and down to the date the said injunction goes into operation, provided that in assessing the said damages the said County Judge will not take into consideration any claim for damage sustained by reason of vibration nor for invisible injury to plants as distinguished from acute or chronic injury; and whereby the Court of Appeal adjudged that in all other respects the appeal from the trial judgment should be dismissed and that the defendant should pay to the plaintiff his costs of such appeal forthwith after taxation thereof.

Vol. II, p. 1160.

Vol. II, p. 1129.

2. The plaintiff brought action for damages sustained by him from the beginning of the year 1945 to his business and property as a florist and grower, situate in greenhouse premises, which he had carried on for the past 45 years, specialising particularly in orchids and maintaining in addition to a dwelling-house on the premises, several large greenhouses. The plaintiff also claimed an injunction to prevent the continuance of such

damage by the continued discharge from the works of the defendant of gas or matter in such a manner or to such an extent as to occasion damage to the plaintiff and to the plants, shrubs and flowers on his premises, and succeeded after a lengthy trial both as to his damage claim and his claim to an injunction. The trial judge suspended the operation of the injunction until the 1st day of November 1949 to afford the defendant company an opportunity to remedy the wrong by abating the nuisance, and the Court of Appeal upheld the right of the plaintiff both to damages and to an injunction, and further suspended the operation of the injunction until the 1st day of October 1950, to enable the defendant company to abate the nuisance.

Vol. III, p. 1227 (not printed).

3. The plaintiff filed a plan (Exhibit 1) verified by an engineer and surveyor, Douglas G. Ure, which shows the location where the defendant is carrying on its business of a foundry, forge and machine shop close to the plaintiff's greenhouse property. The plaintiff's buildings and area covered by same as well as their distance from the defendant's offending cupolas and forge shop, are conveniently summarised by Exhibit 2, the surveyor's

Vol. III, p. 1228.

memo. The uncontradicted evidence established that the defendant had since 1938 operated four large cupolas situate about 600 feet from such

Vol. I, p. 54, ll. 1–27.

greenhouse and operated a large forge shop situate about 450 feet therefrom. The chief complaint resulted from the operation of the cupolas and forge shop.

Vol. I, p. 45, ll. 11–19; ll. 39–45.

4. The plaintiff, who had a lifetime of experience as a florist and orchid grower, gave evidence in great detail covering the operation of his business under his personal supervision over the relevant period, and showed in detail the losses and damage sustained by him due to gas, smoke, fumes, dirt and the deposit of substances such as iron rust, ash and dirt both on the roofs of his greenhouse obstructing the sunshine, and on his plants, flowers and bulbs both inside and situate outside also in his garden plots—and that such injuries were the direct result of the operation by the defendant of its adjacent plant. The plaintiff was amply corroborated as to different aspects of the causes of the nuisance and different aspects of the injury done, by the following witnesses who were employed by him over the relevant period, and others who visited his property from time to time for the purpose of investigating and observing the nature of the injuries and the causes thereof :—

Vol. I, p. 282 *et seq.*

John Henry Walker (a son), many years Manager of the greenhouse properties.

Vol. I, p. 256 *et seq.*

George Thomas, many years an employee at the greenhouse properties.

Vol. I, p. 446 *et seq.*

John Campbell, many years an employee at the greenhouse properties.

Vol. I, p. 278 *et seq.*

Joseph Scott, occupant of the house on the greenhouse properties since 1947.

Vol. I, p. 304 *et seq.*

Kaleb Steeves, many years an employee at the greenhouse properties.

These men all testified to smoke, fumes, dirt and deposits coming directly from the defendant's plant. They gave various descriptions of the

appearance of the smoke and the smells therefrom. All but Scott testified as to the deposit of substances on the plants and flowers inside and outside the greenhouses.

5. The plaintiff also called a number of witnesses who were experts in their field, each and every one of whom had personally visited the greenhouse property on more than one occasion and had firsthand, practical knowledge of the actual conditions observed by him at such property. The trial judge has accepted the evidence adduced by and on behalf of the plaintiff and refers to it as convincing evidence, and then examines it in detail. He further finds : " There is abundance of reliable evidence given by witnesses without scientific training," and quotes Leslie Dwyer, an independent witness, who said that on some days " it was a smoke screen ; it comes down as a haze ; you can taste the smoke sometimes."

Vol. II, p. 1136, ll. 39–46 ; p. 1137, ll. 1–32. Vol. II, p. 1139, ll. 13–20.

6. The Appellant through its solicitors, Bench, Keogh, Rogers and Grass, in a letter signed by Mr. J. L. G. Keogh, K.C. who appeared for the Appellant as chief counsel at the trial and on appeal, dated 15th December, 1950 written to Mr. A. G. Slaght, K.C., chief counsel for the Respondent, has materially shortened the task of the Judicial Committee of His Majesty's Privy Council on this appeal and also the task of counsel for the Respondent. The letter states :—

> " It may save you some time in connection with the preparation of your case, if I tell you that my intention in my case is to confine myself to questions concerning the injunction.
>
> " In other words, in view of the well-known rule of the Privy Council against interfering with concurrent findings of fact in the Courts below, I do not intend in my case to question the findings of fact of the Trial Judge as to credibility of witnesses."

This constitutes an abandonment by the Appellant of its appeal from that portion of the judgment of the trial judge contained in paragraphs 2,3 and 4 of the trial judgment, confirmed also by the Court of Appeal in paragraph 1 (2) and paragraphs 2 and 3 of its formal judgment, whereby the plaintiff recovered damages against the defendant for injury which the plaintiff sustained during the years 1945, 1946, 1947, 1948 and 1949 with a reference to the County Judge of Lincoln County to assess the amount thereof, and also recovered the costs of his action including the costs of the said reference, forthwith after taxation thereof. The Respondent will therefore confine his Case to the portion of the appeal not so abandoned, namely " questions concerning the injunction " as granted in paragraph 1 (1) of the formal judgment of the Court of Appeal. The Respondent relies upon the findings of fact of the trial judge set out at great length in his reasons, and also upon the law referred to in such reasons at some length, which findings of fact on the evidence were expressly upheld by the concurrent finding of the Court of Appeal who also dealt with the relief granted by the trial judge by way of injunction, and concurred with the trial judge in finding that the remedy of injunction was a proper remedy, and in their reasons stated " This is eminently a proper case for the granting of an injunction."

Vol. II, p. 1130, ll. 22–40. Vol. II, p. 1160, ll. 36–45 ; p. 1161, ll. 1–7. Vol. II, p. 1160, ll. 22–35. Vol. II, p. 1131 to p. 1157. Vol. II, p. 1158, ll. 21–31.

7. The injuries which the defendant caused the plaintiff in the operation of his business as a florist, and his seven greenhouses connected therewith, were over the period reviewed shown by the evidence and found by the trial judge to be of the most serious and irreparable character, not only with reference to the deterioration and destruction of his orchids, but also of the very numerous other types of flowers and plants cultivated and sold by him. The cost of the plaintiff's premises and plant incidental to his operations, was shown by Exhibit 12, verified by the plaintiff, to be $62,360.00 which the plaintiff explained would involve cost of building them new to-day of an additional 75 per cent., or approximately $108,000.00. In addition to land and plant, he placed as a fair approximate value of his bulbs, flowers and plants, being his stock-in-trade, including the orchids, a total of $70,000.00, making his present investment there in stock along with his plant investment, total the very substantial figure of approximately $178,000.00. The substantial character of the damage suffered by the plaintiff over the five year period is made clear by the fact that on the Appellant's application before Mr. Justice Aylesworth to fix the security to be given by the Appellant on admitting the appeal, he ordered the Appellant to furnish a bond in the amount of $50,000.00 as security for the damages and costs which might be awarded the plaintiff on the reference, in addition to a further bond in the amount of $11,000.00 as security for payment of costs awarded to the plaintiff in the action and on the appeal to the Court of Appeal. The plaintiff was not seriously cross-examined on his figures nor was any evidence called by the defendant to throw any doubt on same.

Vol. III, p. 1244.

Vol. I, p. 82, ll. 44–48; p. 83, ll. 1–2.

Vol. II, p. 1163, ll. 1–45.

8. The Appellant is unable in this case to urge the Court to dissolve the injunction on the ground that the nuisance and resulting damage merely produces a sensible personal discomfort. The findings of fact by the learned trial judge approved by the Court of Appeal make it clear that in this case—the nuisance produces "*material*" injury to property. The following definite findings of fact to this effect are referred to :—

Vol. II, p. 1150, ll. 28–40; p. 1152, ll. 7–30; p. 1153, ll. 12–16; p. 1154, ll. 38–45.

Deterioration in the plaintiff's plants from chronic SO_2 injury by gas causing material injury.

Vol. II, p. 1151, l. 11 to p. 1154, l. 45; p. 1155, l. 40 to p. 1156, l. 23.

The Respondent submits that the law reviewed by the learned trial judge to which he refers as having guided him in coming to a decision, and which he has applied to the facts in this case, is well settled law on the question of the right to the remedy of injunction.

The Respondent submits that the attempt to dissolve the injunction in this case is a patent attempt to ask the Court to sanction the defendant in continuing to commit a wrongful act and thereby purchase his neighbour's right by assessing damages in that behalf, leaving his neighbour with the nuisance. The Respondent relies upon the condemning of this course by Lord Justice Smith quoted by the trial judge as follows :—

Vol. II, p. 1156, ll. 20–23.

> "In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction."

9. The Respondent further specifically relies on the finding of fact at trial concurred in by the Court of Appeal that Mr. Beaumont, a witness for the plaintiff, testified that if the proper controls were established, the fumes from the cupolas would not be injurious, and that on the other hand no evidence was given by the defendant that if fumes were being emitted from its works, they were beyond its control. Vol. II, p. 1157, ll. 9-13.

10. The Respondent further relies on the evidence of Larry Edwards, who had been Plant Engineer for three and a half years for the defendant company prior to 1944. The company sent him to Walker's greenhouses to investigate conditions in 1941, and he was shown through by Walker. Edwards found the orchid leaves were discoloured—the white chrysanthemums had a greyish tinge, and after cutting one bloom wiped it on a sheet of white paper which showed an accumulation of dust and other small particles of dirt. He reported to his firm and after investigation recommended that the company instal a Whiting Water Arrester which his company declined to do because the cost was considered too excessive. They did instal a cheaper method of chain curtains. The chain curtains they did instal only eliminated about 20 per cent. of Walker's trouble. Vol. I, p. 373, ll. 17-40; p. 374, all page. Vol. I, p. 381, ll. 1-18.

The trial judge dealt expressly with this incident in his reasons. Vol. II, p. 1134, ll. 42-44; p. 1135, ll. 1-39.

11. The Respondent further relies on the finding of fact at trial also concurred in on appeal, that—

> ". . . this is a case where damages are inappropriate. It is impossible to find, with any degree of precision, what damage to his business the plaintiff suffers by reason of the injury to the plants. Some plants are more susceptible than others. He is restricted in the use of his property in the way that he wishes to use it by reason of the fact that he is unable to grow certain plants with success. There is, in fact, no standard against which monetary loss can be measured." Vol. II, p. 1157, ll. 16-23.

12. The Respondent submits that a type of damage accruing to the plaintiff in this case which is almost impossible to measure, arises from the fact that one of the main outlets for his greenhouse products is a retail florist shop owned and operated by the plaintiff in the City of St. Catharines, where this action was tried in a trial lasting 17 days and creating great public interest. The result to the plaintiff, affirmed on appeal, awards him an injunction restraining the defendant from continuing to injure the plaintiff and his flowers and orchids by showering them at times with iron rust, soot and SO_2 and by depriving them of proper sunlight.

13. Should this injunction be dissolved and the defendant thereby sanctioned to continue its injury to the plaintiff's products year by year on a mere payment of damages for so doing—it is respectfully submitted that it will be literally impossible to determine what previous customers and what prospective customers will in future refuse to deal with the plaintiff because of the danger of their being furnished with inferior and defective flowers and orchids which have been submitted to such type of destructive damage.

14. The facts connected with the making by the plaintiff and defendant of the agreements of 2nd January 1942 and 12th January 1942, have been dealt with by the trial judge and affirmed in the Court of Appeal. The finding of fact is :—

> In view of the fact that at the time the plaintiff made such agreements he was advised by his solicitor, Mr. Schiller, that in his opinion a court would not grant an injunction against the defendant by reason of the fact that it was engaged in the manufacture of munitions of war on a very large scale, which were urgently needed, and that when the plaintiff was so advised by a competent solicitor acting in good faith—he could not have been expected to have insisted on the injunction remedy at that time, and ought not to be prejudiced in claiming his full rights now that his action is before the court for determination.

Vol. II, p. 1156, ll. 31–43 ; p. 1157, ll. 1–8.

These findings are supported by the evidence of the plaintiff.

Vol. 1, p. 62, ll. 3–23.

Exhibit 10, letter written September 7, 1945.

Vol. I, p. 63, ll. 11–47.

15. The Respondent relies on extracts from the following authorities referred to by the learned trial judge :—

Vol. II, p. 1151, ll. 16–40. *St. Helen's Smelting Company* v. *Tipping*, 11 H.L. Cas. 641. Lord Westbury, L.C. at p. 650.

Vol. II, p. 1152, ll. 16–38. *Fleming* v. *Hislop*, 11 A.C. 686. Lord Fitzgerald at p. 695 ; also Lord Halsbury at p. 697.

Vol. II, p. 1152, ll. 38–48 ; p. 1158, ll. 1–11. *Bamford* v. *Turnley*, 3 B. & S. 62.

Vol. II, p. 1153, ll. 12–16. *Rushmer* v. *Polsue and Alfieri Limited* (1906) 1 Ch. 234. Vaughan Williams, L.J., at p. 435.

Vol. II, p. 1154, ll. 24–37. *Walter* v. *Selfe*, 4 De G. & Sm. 315. Lord Justice Knight Bruce at p. 322.

Vol. II, p. 1154, ll. 38–45. *Crump* v. *Lambert*, L.R. 3 Eq. 409. Lord Romilly, M.R., at p. 413.

Vol. II, p. 1155, ll. 15–32. *Salmond on Torts*, 10th ed. p. 229.

Vol. II, p. 1155, 40–47 ; 1156, ll. 1–23. *McKie* v. *The K.V.P. Company Limited*, 1948, O.R. p. 398 at p. 416 ; affirmed on appeal, 1948 O.W.N. 812.

16. The Respondent relies also on the following cases :—

McNiven v. *Crawford* 1939 O.W.N. 414 ; affirmed 1940 O.W.N. 323.

McKie v. *The K.V.P. Company Limited*, Canada Law Reports, Part X (unbound) 1949, p. 698 (Supreme Court of Canada). The sole point argued before the Supreme Court was as to the injunction. Mr. Justice Kerwin delivered the unanimous judgment of the Court (p. 699), and after referring to several English authorities with respect to granting injunctions, and after quoting Section 17 of the Ontario Judicature Act, found that damages were not a complete and adequate remedy, and that where pollution has been shown

to exist, damages would not be a complete and adequate remedy and the court's discretion should not be exercised against the "current of authority which is of many years' standing." Vol. II, p. 1219, ll. 10–47; p. 1220, ll. 1–20.

17. The Respondent respectfully submits that the *McKie* v. *The K.V.P.* case is of great value in this case at bar on the question of the granting of an injunction in addition to damages, and without repeating the analysis of the English authorities on the subject which Mr. Justice Kerwin made in that case—the Respondent begs to refer to his analysis which is found elsewhere in the Record in this case, in the Statement of Law and Fact filed by the Respondent in the Court of Appeal for Ontario, and relies particularly on the judgment of Viscount Finlay in *Leeds Industrial Cooperative Society Limited* v. *Slack*, with whom Lord Birkenhead and Lord Dunedin expressly agreed, where in referring to *Lord Cairns Act*, 1858 (which is the precursor of Section 17 of the Ontario Judicature Act) pointed out :— Vol. II, p. 1219, ll. 10–48; p. 1220, ll. 1–20.

> "that the courts have on more than one occasion expressed their determination to prevent any abuse of the Act by legalizing the commission of torts by any defendant who was able and willing to pay damages."

18. The Respondent adopts the reasoning of the trial judge and of the judges of the Court of Appeal for Ontario.

19. The Respondent therefore humbly submits that this appeal should be dismissed and that the judgment of the Court of Appeal for Ontario should be affirmed, for the following amongst other

REASONS

(1) BECAUSE the injury to the plaintiff caused by the defendant was found to be of a very serious nature, having regard to his business, and the damage sustained by him to be "material."

(2) BECAUSE on concurrent findings of fact this was found to be a case where damages are inappropriate and that it is impossible to find with any degree of precision what damage to his business the plaintiff suffers by reason of the injury to his plants, and that there is in fact no standard against which monetary loss can be measured.

(3) BECAUSE evidence accepted by the trial judge on behalf of the plaintiff was given that if the proper controls were established, the fumes from the cupolas would not be injurious, and on the other hand no evidence was given by the defendant that if fumes were being emitted from its works, they were beyond its control.

(4) BECAUSE the plaintiff's business as a florist, specialising also in orchids, was of a very substantial character with a heavy investment involved, and an estimate of the approximate damage to the plaintiff in the order

requiring a bond for security on this appeal, was fixed after hearing both counsel, at the substantial figure of $50,000.00.

(5) BECAUSE the essential element in granting a remedy by injunction is where the injury sustained has been a material one, and where the business of the plaintiff which has been interfered with by the nuisance, has been of a real and substantial character.

(6) BECAUSE the well-known rule where a person committing a wrongful act asks the Court to sanction his doing so by purchasing his neighbour's right by assessing damages in that behalf, leaving his neighbour with the nuisance—is not to accede to such an application but to grant the injunction sought for the invasion of the plaintiff's legal right.

(7) BECAUSE in the interpretation of Lord Cairns Act which in Ontario is in effect Section 17 of the Ontario Judicature Act, the cases have clearly established the principle that the courts have on more than one occasion expressed their determination to prevent any abuse of the Act by legalising the commission of torts by any defendant who was able and willing to pay damages.

(8) BECAUSE the judges of the trial court and of the Court of Appeal for Ontario were right and ought to be affirmed for the reasons given by them.

ARTHUR G. SLAGHT.

No. 12 of 1951.

In the Privy Council.

ON APPEAL

From the Court of Appeal for Ontario.

BETWEEN

THE McKINNON INDUSTRIES LIMITED (Defendant) - *Appellant*

AND

WILLIAM WALLACE WALKER

(Plaintiff) - - - *Respondent.*

Case for Respondent

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