Privy Council Appeal No. 12 *of* 1951

The McKinnon Industries Ltd. - - - - - - - *Appellant*

v.

William Wallace Walker - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1951

Present at the Hearing :

LORD SIMONDS
LORD NORMAND
LORD OAKSEY
LORD RADCLIFFE
THE CHIEF JUSTICE OF CANADA (THE RIGHT HON. T. RINFRET)

[*Delivered by* LORD SIMONDS]

This appeal is brought from an Order of the Court of Appeal for Ontario which affirmed with a slight variation the judgment of the Chief Justice of the High Court dated the 15th June, 1949, whereby it was adjudged that the Appellant Company, its servants and agents be restrained from discharging from its works any substance, gas or matter in such manner or to such an extent as to occasion damage to the Respondent's property or the buildings thereon or the plants, flowers or shrubs thereupon or therein. By the same judgment it was referred to the County Judge of the County of Lincoln to enquire and assess the amount of damages the Respondent had sustained during the years 1945 to 1949 and "down to the date the said injunction comes into operation". The last words had reference to the fact that the operation of the injunction was suspended by the original Order and to the possibility that it might be further suspended.

The question which their Lordships have to determine lies within a narrow compass. The Appellant Company does not challenge the general findings of fact by the learned Trial Judge, in which the Court of Appeal concurred, but appeals only against the remedy of an injunction which has been granted. In other words, the Appellant Company does not deny that it has committed a wrongful act against the Respondent or that it is liable in damages for that act, but claims that the Trial Judge wrongly exercised his discretion in granting an injunction and that the Court of Appeal erred in refusing to set it aside. In these circumstances the relevant facts can be shortly stated.

The Appellant Company is engaged in the manufacture of steel and iron products for the automotive industry in the City of St. Catherines in the Province of Ontario. It has at all material times operated a forge shop and foundry, the foundry having four cupolas and being situate about

600 feet in a south-westerly direction from the Respondent's property and the forge shop being situate about 400 feet in a westerly direction from the same property. Upon his property the Respondent has at all material times carried on the business of a commercial florist and grower. In addition to a dwelling-house he has a number of large greenhouses; he specialises particularly in the growing of orchids, in which he has gained the reputation of being the second largest grower in Canada, but he grows and sells a large number of other flowers and shrubs. He has also a retail store in another part of the City of St. Catherines.

On the 19th March, 1946, the Respondent commenced the action out of which this appeal arises. He alleged that the Appellant Company had wrongfully caused to be emitted from its foundry and forge shop offensive, poisonous and unwholesome smoke vapours and noxious matter which spread and were diffused over and deposited on his land and greenhouses causing his trees, hedges, shrubs and flowers to sicken and to die and to be covered with oil smudge, dirt, dust and ashes. After a hearing of many days in which much expert and other evidence was given, the learned Trial Judge came to the clear conclusion that the Respondent had proved his case, and, though he did not himself assess the damage, was clearly of opinion that damage of real gravity had been suffered by the Respondent. He therefore granted an injunction in the terms already stated, subject to a period of suspension, and referred the damage to the proper Tribunal. The Appellant appealed to the Court of Appeal which held that the findings of fact made by the Trial Judge were amply supported by the evidence and rejected the contention that even on those findings the case was not a proper one for the granting of an injunction, observing that the evidence supported a finding that it was feasible for the Appellant Company to prevent the discharge on to the Respondent's land of the deleterious matter complained of and that in that circumstance the case was eminently a proper one for the granting of an injunction.

In these circumstances learned counsel for the Appellant Company was confronted with a task of peculiar difficulty. Rightly holding that he could not challenge the concurrent findings of fact by the Courts of Ontario, he sought, nevertheless, to establish that both Courts had so clearly exercised their discretionary jurisdiction wrongly that this Board should interfere and, discharging the injunction, leave the Respondent to his remedy in damages. The principles upon which an Appellate Court should interfere with the discretion of a judge acting within his jurisdiction do not need to be re-affirmed. They may be summed up by saying that an Appellate Court should not interfere unless it is clearly satisfied that the discretion has been wrongly exercised either because the Judge has acted upon some wrong principle of law or because on other grounds the decision will result in some injustice being done: see *Evans* v. *Bartlam* 1937 A.C. 473. Their Lordships will say at once that so far from being satisfied that the learned Judge wrongly exercised his discretion, they are well satisfied, having read his careful and exhaustive judgment, that he exercised it properly and that in the words of the Court of Appeal this was eminently a proper case for the grant of an injunction.

The substantial ground on which learned counsel based his appeal was the familiar plea that the Respondent could be adequately compensated by a payment of money and that by his conduct he had shown it to be so. This must be briefly examined.

The action, as has been said, was not commenced until 1946. But already by 1942 the Respondent had had cause for complaint and had complained of the wrongful acts of the Appellant Company. He did not at once take proceedings at law but entered into two agreements with the Appellant Company. By the first of them which was dated the 1st January, 1942, he granted to the Appellant Company for the sum of $600 per annum the right for the three years 1942, 1943 and 1944 to discharge over and upon his lands " smoke of whatsoever nature and kind and the constituent parts and ingredients thereof, oil smudge gases ash

vapours and noxious fumes . . . and to do and create over along and upon the said lands and premises for the purposes of the manufacturing operations of [the Appellant Company] such other acts which, but for the existence of this agreement might be deemed to constitute a nuisance thereon." By the second agreement, which was dated the 2nd January, 1942, the respondent for the sum of $1225.00 paid to him by the Appellant Company released and discharged it from all claims causes of action and demands up to that date by reason (to put it shortly) of past acts similar to those sanctioned by the first agreement for the years 1942 to 1944. The sums provided for by the two agreements were duly paid, and on the 7th September, 1945, after some negotiation had taken place, the Respondent's then solicitor wrote to the Appellant Company a letter in which he said " We could not effectively claim an injunction during the war period, but now that the war is over there is no reason why we could not get an injunction." This letter meeting with no satisfactory response, the action was accordingly started.

It was upon these facts that learned counsel founded his plea, urging that they showed conclusively that the injury to the Respondent could be adequately and properly compensated by a money payment and that an injunction ought not to be directed. He called in aid the fact that the learned Judge had said that his first view was that there was much weight in the argument but that on further consideration he had concluded that, when the Respondent was advised by a competent solicitor acting in good faith that a Court would not under those circumstances grant an injunction, he could not have been expected to have insisted on that remedy at that time and ought not to be prejudiced in claiming his full rights when his action was before the Court. He therefore considered the case irrespective of those agreements.

It is not clear to their Lordships how these observations assist the Appellant Company. If indeed the learned Judge had declined to consider these agreements, it might have been urged that he had ignored an element which must always be taken into consideration. But, so far from this being the case, he was, temporarily at least, disposed to give greater weight to them than mature reflection appeared to him to justify. Having fully considered them, he concluded, as he was well entitled to do, that the injury to the Respondent could not be adequately met by a money payment and that his conduct was not such as to justify the denial to him of an injunction to restrain the further violation of his legal right. In this conclusion their Lordships concur. It is, no doubt, necessary to bear in mind, as numerous authorities have pointed out, that special circumstances may occur in which the remedy of damages will adequately compensate a Plaintiff for the loss he has suffered and may in the future suffer. But it is for the wrong-doer to satisfy the Court that such special circumstances exist. The learned Judge rightly took the view that he had failed to do so. The damage that the Respondent suffered was extremely grave and of a recurrent nature and there was some evidence that it was increasing. Whether or not he was advised by his lawyer in 1941 that he was unlikely then to obtain an injunction in legal proceedings, as their Lordships think he probably was, it is no ground for denying him that relief in an action brought in 1946 that in a grave crisis of the war he took no step that would interfere with the performance by the Appellant Company of war contracts.

It was further urged that the Respondent's failure to apply for interlocutory relief after he had commenced his action in 1946 should debar him from obtaining permanent relief at the trial. In this plea there is no merit. The cross-undertaking in damages which is imposed on a plaintiff who obtains interlocutory relief may justifiably deter him from seeking it.

Then it was contended that at least the injunction should be modified so as in some way to exclude damage to orchids from its operation. The ground of this contention was that the growing of orchids is from the horticultural point of view a particularly difficult and delicate operation.

But, however this may be—and their Lordships express no opinion upon it—there is no reason to treat damage to orchids differently from damage to any other flower plant or shrub when the wrongdoer admits, as the Appellant Company has here admitted, that it has violated the Respondent's legal right by damaging his orchids.

Other modifications of the form of the injunction were suggested but their Lordships do not think that they merit detailed consideration. The injunction as slightly varied by the Court of Appeal is in the proper and usual form in such a case.

Finally it was urged that in any event the operation of the injunction should be suspended for a further term. By successive Orders of the Chief Justice of the High Court and of the Court of Appeal it has been suspended until the determination of the present appeal. The Respondent does not oppose some further suspension. Their Lordships in all the circumstances think that a further suspension is reasonable. They will therefore humbly advise His Majesty that this appeal should be dismissed and that the operation of the injunction should be suspended until 1st November, 1951. The Appellant Company must pay the costs of the appeal.

(12481) Wt. 8137—69 110 7/51 D.L./P.L./3

In the Privy Council

THE McKINNON INDUSTRIES LTD.

v.

WILLIAM WALLACE WALKER

[DELIVERED BY LORD SIMONDS]

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