[JOSEPHIDES, P.D.C.]

MICHAEL ZORZOU ALETRARI,
Appellant (Plaintiff),

v.

PANTELIS STYLLI PAROUDI,
Respondent (Defendant).

(Appeal No. 2/1959).

Immovable property—Land—Natural right of support—Disturbance of—Damage—Subsidence must be shown—Injunction—Irreparable damage must be threatened—Some damage indicating threatened damage must be shown.

Practice—Pleadings—Body of statement of claim—Relief clause—Not sufficient to raise issues in the relief clause which are not pleaded in the body of the statement of claim—Civil Procedure Rules. O. 19, *r.* 4.

The appellant (plaintiff) was the owner of a plot of land adjoining the plot of land of respondent (defendant). Both plots were on a slope with the appellant's property on a higher level than that of respondent's. The properties were separated by a natural bank (ohto) which was situated within the property of respondent. Some time in 1957 the respondent excavated part of the bank at the base i.e. within his property. As a result of such excavation part of the bank collapsed causing slight damage to the bank.

The appellant (plaintiff) claimed, *inter alia*, for an order of the Court restraining the respondent (defendant) from interfering with the bank and damages. The appellant (plaintiff) pleaded a case of ownership of the bank and interference with the said bank alleged to be owned by him, but failed to plead a right of natural support and its infringement in the body of the statement of claim, although there was some reference in the relief clause.

The trial Court dismissed appellant's (plaintiff's) claim and the appellant appealed against this judgment.

Held : (1) That although there was a reference to the natural right of support in the relief clause, such reference cannot be considered sufficient to raise the issue before the court as it was not pleaded in the body of the statement of claim (*Gregoris Drakou* v. *Ioulia Phylactou* (*unreported*) Civil Appeal No. 4056, 7. 1.54, *followed*).

(2) In order to maintain an action for disturbance of a right of support, some appreciable subsidence must be shown, and as in the present case there was no subsidence of the appellant's property he is not entitled to any damages.

(3) (*a*) When there is no damage to indicate that further damage is threatened, an injunction can only be granted in very clear and strong cases of threatened damage.

(*b*) An injunction cannot be granted as there was no damage to indicate that further damage might occur by reason of the excavation.

Cases referred to:

Gregoris Drakou v. Ioulia Phylactou (*unreported*) Civil Appeal No. 4056, dated 7.1.54, *followed.*

Corporation of Birmingham v. Allen (1877) 6 Ch. D. 284, at p.p. 287 and 289, *per Jessel*, M.R., *followed.*

Appeal dismissed.

Appeal

The appellant-plaintiff appealed from the judgment of the Magistrate of Kyrenia in action No. 15/58.

D. Demetriades for the appellant.

A. Liatsos for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court, delivered by:

JOSEPHIDES, P.D.C. : The appellant (plaintiff) in this case claimed—

(1) an Order of the Court restraining the defendant from interfering with an ohto (bank), which should be considered as a right of natural support of plaintiff's property ;

(2) that the defendant should restore the said bank in its original condition, or that he should be ordered to pay the sum of £30 as compensation ; and

(3) the amendment of the title, if any, in defendant's name excluding the said bank from the defendant's title and adding it in the plaintiff's title.

The defendant counter-claimed for—

(1) an order restraining the plaintiff from trespassing upon the defendant's property;

(2) an order declaring that the said bank was part of the defendant's property ; and

(3) damages.

The learned Magistrate after hearing evidence dismissed both the claim and counter-claim.

The plaintiff appealed from that judgment but at the hearing of the appeal he abandoned paragraph 3 of his claim. The defendant did not cross-appeal in respect of his counter-

claim so that we are now only concerned with the first and second paragraphs of the plaintiff's claim.

The trial Court found that the plaintiff is the owner of a field under registration No. 773, plot 132/2, and that the defendant is the owner of a field under registration No. 1677, plot 140. The plaintiff's plot has a common boundary with the defendant's plot on part of its northern side. Both properties are on a slope, the plaintiff's property being on a higher level than that of the defendant's. The properties in question are separated by an ohto (bank) which is a natural bank. This bank is not perpendicular to the defendant's property but on a slope, its height varying from 3 ft. to 10 ft.

The bank is within the property of defendant and it was never cultivated either by the plaintiff or the defendant or by their predecessors in title. The plaintiff used to cultivate and possess his field up to the top edge of the bank. He used to put some bushes and stones at the edge of the bank on the top side. Some time in October or November, 1957, the defendant excavated part of the said bank at the base, i.e. within defendant's property. As a result of this excavation part of the bank collapsed causing £4 damage to the bank.

These are shortly the findings of fact of the trial court.

The learned Magistrate thought that the plaintiff's claim was partly based on trespass to his property and, *inter alia*, held that plaintiff was not entitled to recover on the first part of paragraph 1 of his claim. But on appeal plaintiff's counsel clarified that his claim was based on the infringement of the plaintiff's right of support. The learned Magistrate considered also this aspect of the case. In his judgment he stated:

> " In the body of the statement of claim nothing is pleaded as to this right of support and its infringement. A reference is made however to this right in the relief clause. In my opinion this is not sufficient ; plaintiff ought to have pleaded this right of support and its infringement in the statement of claim. Every material fact on which a party relies for his claim must be pleaded, see 0.19, r. 4 of Civil Procedure Rules. Therefore plaintiff cannot succeed on this part of his claim either ".

From a reading of the statement of claim, especially paragraph 4, it becomes apparent that the draftsman was pleading a case of ownership of the bank and interference with the said bank alleged to be owned by plaintiff. It is true that there is some vague reference to the stability of the bank and the land of the plaintiff but that to my mind would not be sufficient. For a useful precedent of a statement of claim in a case of infringement of a right of support of the plaintiff's land one should refer to Bullen & Leake's Precedents of Pleading, 9th Edition, at page 497.

In fact what is pleaded in the body of the statement of claim (paragraphs 1 to 6) is the ownership of the bank and the acts of trespass by defendant to the said bank. It is only when we come to the relief clause that we find for the first time reference to the natural right of support, which cannot be considered sufficient to raise the issue properly before the Court (see *Gregoris Drakou* v. *Ioulia Phylactou* (*unreported*), Civil Appeal No. 4056 dated 7th January, 1954.

But apart from this, I do not think that even if the plaintiff's case was properly before the Court, he could have succeeded on his claim. In order to maintain an action for disturbance of a right of support, some appreciable subsidence must be shown, or, where an injunction is claimed, some irreparable damage must be threatened. " The mere withdrawal of support is not of itself a nuisance ; it only becomes wrongful if and when a subsidence occurs. Accordingly, the right of action does not accrue until actual damage is occasioned, and the Statute of Limitations does not run from the date of the excavation but from the date of the damage. Each successive subsidence gives rise to a fresh cause of action, even though there has been no new excavation " (Clerk & Lindsell on Torts, 10th Edition, page 566).

In this case the trial Court found as a fact that there is no subsidence of the plaintiff's property, consequently, he is not entitled to any damages. What we now have to consider is whether some irreparable damage is threatened so that the plaintiff may be entitled to an injunction.

The law on this point has long been settled in England and I need only quote an extract from the judgment of Jessel M.R. in the case of *Corporation of Birmingham* v. *Allen* (1877) 6 Ch.D. 284 at page 287—

Jessel, M.R. :

" As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse v. Bonomi* (1), that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement : it is a right of property. That being so, if the plaintiffs' land had been in its natural state, no doubt the defendants must not do anything to let that *land slip*, or *go down*, or *subside*. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this Court would interfere by *injunction* on the ground upon which it always interferes, namely, to prevent *irreparable damage* when the damage is *only threatened*. Of course they must have a much clearer and much stronger case to call for the interference of this

(1) 9 H.L.C. 503

Court by injunction where the *damage is merely threatened* and *no damage has actually occurred* than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred it makes it manifest and certain that further damage will occur by reason of the prosecution of the works.

Now in this case, if it stands at all, it may well stand merely on opinion evidence, which would be sufficient ground for interference if all the experts agreed and the Court were satisfied that damage had occurred : and I think when I compare the evidence of these various experts, I must take it for this purpose as proved that if the defendants work within fifteen yards of their boundary, and in their New Mine Coal, damage, and serious damage, will accrue to the plaintiffs' buildings. *But the question I have to decide is whether in law that entitles them to an injunction.* I think it does not ".

At page 289 of the same report Jessel M.R. states:—

". . . . . Now, *what is the right of the adjoining owner*? As I said before, it is to the support of his land in its natural state — support by whom ? The Judges have said, " *Support by his neighbour*". What does that mean ? Who is his neighbour ? It was contended that all the land-owners in England, however distant, were neighbours for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring land-owner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my *neighbour* for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbour's land whose support you are entitled to. Beyond that it would appear to me you have no rights ".

The question I have to decide is whether in law, on the evidence before the trial Court, the plaintiff was entitled to an injunction. The evidence before the court on the question of threatened irreparable damage was the following : The plaintiff in his evidence (at page 6 of the record) stated—

" It is very likely that the whole bank will collapse and my field damaged ". In cross-examination he stated " Now the bank near the collapsed one is about to collapse " His witness Iosif Romani (page 7 of the record) stated " If heavy rains come the whole bank may collapse " This witness was giving his evidence on the 24th March, 1959, and the excavation of the bank took place in October or November, 1957, and there was no collapse of the bank in the meantime In cross-examination this witness stated " In October 1958, I again visited the disputed property The bank was still in the same position as I saw it in 1957 The rest of the bank may be damaged in future " Finally, plaintiff's witness, Vrahimis A Haji Hanni (at page 8 of the record) stated " As the ohto was cut the field of the plaintiff will collapse "

On the other hand defendant's witness, Yiannis Antoni (at page 10 of the record) stated " As the bank stands today it cannot collapse " And, defendant's witness Lazaris Haralambous (at page 11 of the record) stated " If the bank collapses the field of the plaintiff will be damaged because the earth due to rain will go down "

No experts were called as witnesses in this case and the bald statements made by the witnesses, that plaintiff's land will at some future point of time collapse cannot be accepted by the Court as reliable evidence on which to base a finding of threatened irreparable damage to found an injunction According to Jessel, M R (see extract quoted above) the Court must have a much clearer and much stronger case to call for the interference of the Court by injunction where the damage is merely threatened and no damage has actually occurred, than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by If some damage has occurred it makes it manifest and certain that further damage will occur by reason of the excavations

To sum up, in this case no damage whatsoever was occasioned to the plaintiff's land, i e there was no subsidence of the plaintiff's land , and there is no satisfactory evidence before the Court proving any threatened irreparable damage

For all these reasons the plaintiff's appeal fails and is dismissed.

Appeal dismissed.