IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – GHANA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
YEBOAH, JSC
ARYEETEY, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO.J4/2/2010
29TH JULY, 2010

BOGOSO GOLD LIMITED ... DEFENDANT/APPELLANT/APPELLANT

VRS

THE ESTATE OF JOSEPH NTRAKWA

1. KOJO NTRAKWA

2. SOLOMON NTRAKWA ... PLAINTIFFS/RESPONDENTS/RESPONDENTS

J U D G M E N T

GBADEGBE, JSC:-

This is an appeal from the judgment of the Court of Appeal that allowed in part the appeal lodged thereto by the appellants herein (hereinafter referred to as the defendants). By its decision the Court of Appeal affirmed the finding of the High Court, Sekondi with a variation in the various heads of damages that were allowed by the trial

High Court in favour of the respondents (hereinafter referred to as the plaintiffs). It appears from the judgment of the Court of Appeal that it accepted the plaintiffs' case that the damage caused to their cocoa farms was consequent upon the erection of a plant in the neighborhood by the defendants, which emitted noxious fumes from a chimney. Although the decision on appeal to us was not specific as to whether the cause of action for the tort, on which the action was based was in nuisance or negligence, before us the parties have conducted their cases on the common ground that for the plaintiffs to sustain their claims there must be proof by them that the destruction to their farms was caused by an unlawful act of the defendant. Following the decision of the Court of Appeal, the defendant lodged an onslaught on the delivery in which several grounds of appeal were filed in the notice of appeal to this court.

We have carefully examined the grounds on which we are invited in the nature of a re-hearing of the matter herein to set aside the decision of the Court of Appeal and dismiss the action herein. Those grounds in so far as they are relevant raise for our consideration the question whether the finding of liability for the destruction of the cocoa farms and the consequential award of damages were proper? We think that it being so the issues that turn on the proceedings herein touch and concern whether the plaintiffs had discharged the evidential burden on them to sustain the issue of liability for the damage to the crops and the award of damages. Whiles these issues are substantive, there is one matter, which though not turning on the merits of the appeal herein we need turn our attention to. It relates to what has been set out in the defendant's statement of case as a preliminary legal argument.

Although it is not clear the rule of Court under which the said point, which was not contained in the grounds of appeal, was taken, since the parties have fully argued it we should pronounce upon it. The defendant contended for the first time in this court that from the evidence contained in the record of appeal the action herein is caught by section 3(1) of the Limitation Act, NRCD 54. The section provides thus:

"An action claiming damages for negligence, nuisance or breach of duty howsoever the duty exists where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries to any person shall not be brought after the expiration of three years from the date on which the cause of action accrued."

In response to the above, the plaintiffs argue that to be a good plea it ought to have been pleaded in compliance with Order 8rule 11 of the High Court (Civil Procedure) Rules, CI 47 0f 2004.Further to this, it was said that the action herein does not contain or include a demand in the nature of personal injuries and therefore section 3(1) of the Limitation Act on which reliance is placed by the defendant is inapplicable to the proceedings herein. We think that the submissions of the plaintiffs on this point are right; for the meaning of the words by which the section in contention is expressed do not in their ordinary or extended meaning have the effect that is urged on us by the defendant. This aside, the point that it raises is one of mixed law and fact and as such it should have been pleaded earlier on in the trial court to enable the plaintiffs respond thereto. To have it raised at this stage is to deny the plaintiffs any opportunity of answering the factual basis of the argument on which it is based. In our view, having regard to the rule on pleadings, it is the defendant's responsibility to raise the defence of statute of limitation even if it appears on the face of the pleadings that the action is caught by the statute of limitation. When such a defence is pleaded then the burden of dislodging it shifts to the plaintiff. See: **WILBY v HENMAN** (1834) 2 Cr & M 658.We do concede, however, that in appropriate cases, a statement of claim that on its face discloses that the period of limitation has expired may be struck out as disclosing no reasonable cause of action. See: **RICHES v DIRECTOR OF PUBLIC PROSECUTIONS** [1973] 2 All ER 935.The requirement of the plea of limitation being pleaded is to afford a plaintiff who relies on any disability when the cause of action arose such as being an infant or 'non compos mentis' to plead it fully in his reply.

Further, a consideration of the circumstances of the action herein tend to be supportive of the fact that the nature of the tort that provoked the issue of the writ were of a continuing nature and as such the tort or wrongful conduct was repeated by the defendant from any date while it was continuing or the date of each such repetition. Therefore, on this ground also the Limitation Act appears not to be applicable to the action herein. See: **DUKE OF BRUNSWICK AND LUNEBERG v HARMER** (1849) 14 QB 185.

Having disposed of the preliminary legal point, we now direct our attention to the issue of liability for damage to the cocoa farms of the plaintiffs. While both the trial High Court and the Court of Appeal accepted the plaintiffs' version of the cause of damage to the cocoa farms, the defendant has in his statement of case urged us to the contrary. It was contended on behalf of the defendant that there was no proof of causation between the conduct of the defendant of emitting fumes into the atmosphere and the alleged damage to the cocoa crops. This raises in our view the question whether the plaintiffs were able to discharge the obligation on them to introduce sufficient evidence in the action that would entitle them to a determination in their favour on the issue of liability for damage to the crops? The answer to this may be found in the Evidence Act, NRCD 375. The relevant sections of the law are contained in sections, 11 (4) and 12 of the law, which require the plaintiffs to prove their case by a preponderance of the probabilities. See: **SARKODIE v F. K.A Co Ltd** [2009] SCGLR 65.

The main issue for determination on the question of liability for damage to the cocoa crops was whether it was caused by the act of the defendants as a result of the emissions of noxious fumes from the plant that they had installed? On this, the plaintiffs introduced sufficient evidence that before the installation by the defendant their crops were doing quite well as was noted by the harvest in 1988 to 1993. The evidence discloses without doubt that the defendant installed its plant in the area around 1990. Following this there was an appreciable decline in the harvest of the cocoa. There were protestations from farmers over the effect of the emissions on their farms which were

inquired into and found to be credible and compelled the defendant to remove its plant from the area in 1994.We think that the act of removal of the plant in the wake of protestations from farmers coupled with the findings of inspection teams make the removal which was voluntarily done by the defendant, a conduct that reasonably entitled the plaintiffs to infer that it was being done to avert further damage to their crops. Further, following the evidence placed at the disposal of the court by the plaintiffs and the PW1, the defendant was unable in my view to prove that the damage was not attributable to the emissions. Indeed, on the state of the evidence at the close of the case of the plaintiffs, it was such that required of the defendant to

> **"raise a reasonable doubt concerning the existence or non-existence of a fact by a preponderance of the probabilities ……"** See: section 10 (2) of the Evidence Act, 1975, NRCD 323.

The defendant's evidence on the likely effect of the emissions on the crops of the plaintiffs to say the least was bare and when they attempted to dislodge the effect of the inspection report they relied on a witness who did not testify from knowledge obtained from his own inspection of the farms but rather sought to offer some other interpretation to the report of the inspection team. We think that the defendant could have made efforts to provide the court with a more cogent explanation of the cause of the damage to the crops if any were available and construe their failure to do so against them and conclude that on the facts the more reasonable conclusion to be reached on the cause of damage to the crops was the emissions from the defendant's plant. It is not probable that the destruction was caused by natural causes and indeed the scientific evidence that was tendered supported the version of the plaintiffs as other crops that were tried on the land to verify the effect of the emissions on the vegetation proved adverse to the case put forward by the defendant.

Then comes the consideration whether the conduct of the defendant was one rooted in nuisance or negligence. In the trial court, the learned trial judge considered these

heads of liability separately as he was indeed bound to do since the claims under both heads were not expressed to be in the alternative but in our thinking in view of the continuing nature of the tort that has affected the property of the plaintiffs it was one that sounded more in nuisance than negligence. See: **CUNRAD v ANTIFYRE, LTD** [1932] All E.R. Rep. 558 at 560; [1933] 1 K.B. 551 at 557.We make bold to say that an act of negligence may also constitute a nuisance where it occasions a dangerous state of affairs and satisfies the other requirements of nuisance. In our opinion the cause of action herein is connected with the user or occupation of land and the ensuing damage to the plaintiffs cocoa farms arising out of the user by the defendant – the interference by the defendant with the plaintiffs' enjoyment of the land on which their farms were. On the evidence, the interference with the rights of the plaintiffs cocoa farms by the emissions of fumes from the defendant's plant was unlawful. We note that the issue of nuisance was determined against the defendant in the trial court and affirmed by the first appellate court and in these proceedings the said determinations have not been proved to be either unreasonable and or perverse such as to cause us to intervene to reach a different conclusion on the facts and accordingly we reject the lame attack on the question of liability for damage to the plaintiffs' crops. In our opinion, the Court of Appeal's finding in negligence on the issue of damage to the plaintiffs' farms ought to have been as mentioned in the course of this delivery one in nuisance and accordingly we proceed with the proceedings herein on the basis that the liability for the damage to the crops was in nuisance, it being an order that on the evidence the court below could have made if it had properly considered the nature of the wrongful act of the defendant.

The defendant also strenuously attacked the award of damages by the Court of Appeal. It was contended that in making the wards, the Court of Appeal did not distinguish between general and special damages and that if it had applied its mind to the fact that the damages sought by the plaintiffs were general it would have made only a nominal award. We have carefully and anxiously considered the considerable submissions urged on us in support of this and have come to the view that although the damages were not

specifically pleaded, having regard to the fact that they related to loss of income over a period of years that could not have been reasonably computed by anybody with arithmetical precision as might be the case regarding for example loss of wages or salaries that were previously predetermined under a contract of employment or past expenses incurred consequent upon a tort such as hospital expenses, travel and lodging expenses, past nursing care and the like the head of damage that was suffered by the plaintiffs flowing from the tortuous act of the defendants included past and future loss of income from their farms. These earnings being the natural consequence of the defendant's wrongful acts were in their nature at large and were to be awarded by the court taking into account what it considered fair and reasonable .It appears therefore that it is impossible for them to have specifically pleaded these as special damages and that the proper mode of seeking relief on them is to lead evidence thereon for the trier of fact and or a court of law to assess the damages. The statement that general damages must be nominal is perhaps in our view to broad in the context of this case to be accepted as correct. The correct position that runs through a collection of cases on the point is that where an act of a defendant ordinarily entitles a plaintiff to an award of damages without proof of actual damage such as an act of unlawfully entering upon the close of another, the award under this head is general damages, which in its nature is nominal and only intended to vindicate the right of the occupier to have undisturbed possession of his property. Writing on the subject 'Nominal damages', the learned authors in Halsbury's Laws of England, Volume 12 (Fourth Edition), paragraph 1114 at page 417 state as follows:

> **" A plaintiff is entitled to ` nominal damages" where (1) his rights have been infringed, but he has not in fact sustained any actual damage from the infringement, or fails to prove that he has; or (2) although he has sustained actual damage, the damage arises not from defendant's wrongful act but from the conduct of the plaintiff himself; or (3) the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right."**

This being the position, the learned justices of the Court of Appeal were right in describing the awards as general damages. The term "special damage" appears in current usage to refer to past pecuniary loss that is calculable at the date of the trial while "general damages" relates to all other items of damage whether pecuniary or non- pecuniary. In the instant case, the losses that were claimed by the plaintiffs in the past were such that they could not have been precisely calculated by them and as regards the future incomes they were anticipated and so equally incapable of being calculated at the date of the trial and thus fell into the category of general damages since their right to the amount of damages was dependent on what the court thought was fair and reasonable.

The next matter that comes up for consideration is the award of damages by the Court of Appeal. It is to be observed that the damages from the emissions to the plaintiffs farms were foreseeable for which the defendant must suffer in its pocket. In its computation of the damages, the Court of Appeal though varying the damages did not particularly as regards the general damages provide any basis for the global award. The Court ought to have provided a rational criterion for the awards. In our view it was not proper for it just to have varied the award by reducing it without indicating what the 'multipliers were'. Since the Court of Appeal acted upon wrong principles in assessing the damages to the cocoa crops, it is competent for us to reverse the award. See: **STANDARD CHARTERED BANK GHANA LTD V NELSON** [198-99] SCGLR 810.

Turning to the damages suffered by the plaintiffs as a result of the tort committed by the defendant, we wish to observe that since the claim is essentially one in general damages, the pleadings and the evidence led on the quantity of the yield per acre are only anticipatory and are only offered to enable the trial court or the court to determine from the totality of the admitted evidence what it considers fair and reasonable. In the proceedings before us as is revealed by the record of appeal, the plaintiffs in their

statement of claim specified the yield that they were having prior to the installation of the plant by the defendant. In the evidence in support of their claim to damages, they indicated a yield that was over and above what was contained in the pleadings filed on their behalf. In our view this should not prevent the court from coming to its view on what is considered fair and reasonable. At the trial before the High Court, evidence was tendered by both parties on what the yield from the cocoa should be. While the plaintiffs appeared from the oral evidence tendered to have exaggerated their loss, the defendant on the other hand sought by their evidence to reduce the loss that they were likely to suffer consequent upon their wrongful conduct. In such cases, the court proceeds by taking into account all the relevant circumstances and as said earlier on in the delivery herein making an award that is fair and reasonable. In the case of the Court of Appeal, which in its judgment took the view that the award by the High Court was wrong thereby resulting in an excessive and erroneous award, it did not unfortunately provide how it came by the award that it substituted for that of the High Court. All that was said by the learned judge who delivered the opinion of the court was to the following effect:

> **"The trial judge awarded the 1st respondent GH1 485, 000.00 and the 2nd respondent GH 371,250.00 for general damages and loss arising out of gas pollution, poisonous smoke etc caused by the appellant to the respondents' cocoa farms. On these awards too, I shall award the 1st respondent GH 990, 000.00.For the 2nd respondent, he would have his award assessed at GH 248, 000.00."**

There is obviously a legitimate ground for complaint by the defendant; for the above does not provide any basis for reaching the amount allowed as general damages. The court ought to have at least provided the figures that were used as multipliers in its computation. We think the defendants were right in their complaint and proceed to compute the damages in terms of what we consider to be fair and reasonable and indeed in line with the settled judicial opinion in such matters.

We think that the number of years allowed as the remaining life span of fifteen years which we may describe as the years of purchase so to say is reasonable having regard to the evidence that was placed before the court by the parties. Regarding the yield of cocoa per acre, we think that four bags would be a fair and reasonable quantity. There is in our opinion no credible challenge to the price of a bag of cocoa as at the date of the trial in the High Court, which was put at GH 75.00 and accept same. Based upon this the damages of the 1st plaintiff would be the number of acres -132 multiplied by number of bags per acre -4. This then is multiplied further by the price per bag of GH 75.00 that is finally multiplied by the years of purchase-15. In simple arithmetical terms it comes to 132x4x75x15=GH 594,000.00. That of the 2nd plaintiff would be computed using the same multipliers of 75, 15, and 4 but with a reduced acreage of 33. The 2nd respondent's award thus comes to 32x4x75x15=148,500.00.

Since the defendant's nuisance was coupled with damages and the same has already been computed, the award of damages for nuisance in respect of which the law presumes damage as distinct from proof of actual damage that was allowed by the Court of Appeal in favour of the plaintiffs were wrong and accordingly the same are hereby set aside. We have no doubt in our minds that if the learned justices of the Court of Appeal had properly determined that the nature of damage to the crops was in nuisance they would not have made a separate award under this head also the result of which was that the court had made double awards for the same head of damage.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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