Privy Council Appeal No. 68 of 1998

Alcoa Minerals of Jamaica Inc. *Appellant*

v.

Herbert Broderick *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 20th March 2000

Present at the hearing:-

Lord Slynn of Hadley
Lord Mackay of Clashfern
Lord Jauncey of Tullichettle
Lord Hope of Craighead
Lord Clyde

*[Delivered by **Lord Slynn of Hadley**]*

From 1973 Mr. Broderick has owned, and from 1975 has lived in, a house in Clarendon, Jamaica. The appellant ("Alcoa") is an American company which at all material times held mining leases permitting it to mine and win alumina from bauxite deposits in Clarendon. Clarendon Alumina Production Limited ("Clarendon"), a Jamaican company, is a subsidiary of Alcoa.

By a writ and statement of claim dated 9th April 1990, the latter as amended on 26th July 1993, Mr. Broderick claimed that in and from 1972 Alcoa and Clarendon erected and operated a smelting plant in Clarendon. They applied to the alumina a process ("the Bayer process") which generated and dispersed into the atmosphere pollutants, noxious gases and corrosive dust. These caused corrosion to the galvanised zinc panels of the roof of his house and other injury to his property and to his health.

[11] When the damage first occurred he repaired it but by 1989

the damage had occurred again and he was not able to pay for the necessary repairs. In 1990 in his statement of claim he put his special damage at $211,140 being $135 for each of 1564 square feet of the building. But on 25th March 1994 he was allowed to amend this figure to $938,400 being $600 per square foot of the same area. This increase from $135 to $600 represented the increase in the cost of doing the repair between the two dates.

Mr. Broderick alleges that in 1987 on various dates representatives of Alcoa and Clarendon admitted that the two companies were responsible for the damage to the roof and building not only of Mr. Broderick but also of other residents in the area: they also agreed that the defendants would repair the same at their expense. Mr. Broderick alleged that a representative of the two companies again admitted in May 1988 that they would repair all the damaged houses. These allegations were denied by both defendants.

After a trial lasting 17 days between 7th October 1991 and 19th December 1994 Theobalds J. on 15th February 1995 gave a judgment for Mr. Broderick for $938,400 special damages and $30,000 general damages. He also granted an injunction restraining the companies from maintaining "the nuisance" from 30th June 1995. The judge accepted that the companies had caused the damage – "on an overwhelming preponderance of evidence the plaintiff has discharged the burden of proof". But he did not give detailed findings of fact nor did he give his assessment of the evidence which had been given.

The Court of Appeal on 11th November 1996 affirmed the order as to damages but set aside the order for an injunction. Because the judge had not made sufficient findings of fact, the judges of appeal found it necessary to analyse in detail the record of the evidence. Having done so they concluded that Mr. Broderick had proved his claim in nuisance. Alcoa had caused the damage and, however much it had sought to remedy the position, the nuisance continued.

There is no issue as to liability before their Lordships. The issue is as to the quantification of the damages. The latter is important to Mr. Broderick, a carpenter and Pastor of his church, because of the high cost involved; it is

important to Alcoa partly for the same reason but principally because some 60 other claims have been made by other residents which may turn on the results of this appeal.

Alcoa contends that the original figure was right. It was the cost of repair at March 1990 by which time the physical damage had occurred. The general rule in tort is that damages should be assessed at the date of breach (*Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443, 468D per Lord Wilberforce). That rule applies here. The increase in cost was due to Mr. Broderick's failure to do the repair at or soon after the date of breach. Alcoa was not liable for that increase in costs which was essentially due to inflation and to the fact, as Downer J.A. in the Court of Appeal put it, that "because of the dramatic fall in value of the Jamaican dollar building prices and labour costs have soared" (page 57 transcript). The cost of repairs should be taken at the time when reasonably he could be expected to have done the repairs and insofar as the delay in repairing was due to his lack of funds, as two members of the Court of Appeal held, his impecuniosity should be ignored when considering the date when damages ought to be assessed (*Leisbosch Dredger v. Edison* [1933] A.C. 449).

Alcoa contends further that the two judges of appeal who accepted that it was prudent for Mr. Broderick to delay the repairs in view of the promises made on behalf of Alcoa to do the repairs and pay for them did so without sufficient evidence to support such a finding. Moreover there was nothing to show that Mr. Broderick had delayed repairs because of any such promise.

There are thus really two separate but related questions: (a) is the plaintiff entitled to have damages assessed at a date other than the date by which the physical damage was complete; and (b) does the fact that he could not afford to pay for repairs until he had obtained judgment have to be ignored when fixing the date by which damages must be assessed.

As to the first question Alcoa is entitled to say that the starting point for assessing damages is the so-called "breach date" rule. But Lord Wilberforce in his speech in *Miliangos* made it clear that the rule is subject to

exceptions. In that case it was held that damages in sterling were not an adequate remedy so that an order for the delivery of a foreign currency *in specie* might be made. It would have been unjust to award damages in sterling at the breach date. It is a very different case from the present, but it seems to their Lordships that in a case where damages are the appropriate remedy, if adoption of the breach date rule in assessing them produces injustice the court has a discretion to take some other date. Even in contract of sale cases where the assessment of damages is normally taken as at the date of breach, Lord Wilberforce in *Johnson v. Agnew* [1980] A.C. 367 citing *Ogle v. Vane* (1867) L.R. 2 Q.B. 275, (1868) 3 Q.B. 272 considered that "this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances". See also Oliver J. in *Radford v. De Froberville* [1977] 1 W.L.R. 1262.

In a case where repairs have to be done at what is a heavy cost in relation to the plaintiff's financial position there may be stronger grounds for delaying the date of assessment than in a case where the plaintiff has undertaken a contractual obligation to buy and pay for goods where he could go out into the market and buy the goods at or near the same price. There is in their Lordships' view force in the statement of I.N. Duncan Wallace in (1980) 96 L.Q.R. *Costs of Repairs: Date for Assessment* at page 342 that "... failure by a wrongdoer to accept liability will in many cases be a crucial factor in justifying a plaintiff in postponing work of repair until final judgment".

The breach date rule is therefore not a conclusive answer to the plaintiff's claim.

The second question turns on a consideration of the decision in *The Liesbosch*, which in Alcoa's contention precludes the plaintiff from claiming the cost of repair at the date of judgment since the delay was due to his impecuniosity and not to the defendant's breach of duty. In view of the importance attached to what is said in *The Liesbosch* by Sir Sydney Kentridge Q.C. for Alcoa and to the criticism of it made by Mr. Cherryman Q.C. for Mr. Broderick it is important to consider what it in fact says and what developments have taken place since.

In *The Liesbosch* the dredger's moorings were fouled by the Edison and consequently the dredger sank. It was doing construction work under a contract with heavy penalties for delay. The dredger's owners could not, because of want of funds, purchase another dredger and so they hired a dredger. They were awarded as damages the market price of a comparable dredger on the day the Liesbosch sank together with the cost of adapting it and transporting it to the site. Lord Wright, with whom other members of the House agreed, said at page 459 that the owners of *The Liesbosch* "... should recover such sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage". The Admiralty Registrar and the judge had also held that the owners were entitled to recover their actual loss taking into account their want of means, so long as they acted reasonably, "even though but for their financial embarrassment they could have replaced *The Liesbosch* at a moderate price and with comparatively short delay". Lord Wright rejected this approach:-

> "The respondents' tortious act involved the physical loss of the dredger; ... But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts ... In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger" (page 460).

Lord Wright referred to the statement of Lord Collins in *Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees* [1907] A.C. 291, 303 to the effect that the wrongdoer has to take his victim as he finds him so that "... if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for

the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act". Lord Wright said that this was dealing not with the measure of damages "but the victims' duty to minimise damage, which is quite a different matter" (page 461). Thus "the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace *The Liesbosch*" (page 462).

The precise scope of this decision has been much discussed, not always favourably. In "The Law of Damages" (Looseleaf Edition) (December 1998) S.M. Waddams it is said:-

> "It is unclear whether Lord Wright was here laying down a rule of law that loss caused by the plaintiff's impecuniosity is never compensable, or whether the decision is to be explained as holding the loss in the particular case to be too remote. Lord Wright himself said in *Monarch S.S. Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [[1949] A.C. 196] that the result depended on reasonable contemplation as to damages and that there was no difference in this respect between contract and tort." (para. 15.330)

The decision has in some cases and by some writers been regarded as having a wide application. The respondent cited in particular *Ramwade Ltd. v. W.J. Emson & Co. Ltd.* [1987] R.T.R. 72 where on facts analagous to those in *The Liesbosch* The Liesbosch was followed.

Courts have, however, from time to time distinguished it or sought to set limits to its scope. In this regard three cases in the Court of Appeal in England are important. First in *Dodd Properties Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433 the cost of repairing damage to a building caused by nuisance and negligence increased from £11,375 in 1970 to £30,327 in 1978. The trial judge accepted that if there had been no money problems the company would not have spent money on the building before it was sure of recovering the cost. It was commercially reasonable to postpone the expense, *inter alia*, whilst the defendant was denying liability.

Megaw L.J. said in the Court of Appeal at page 451:-

> "The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all the relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages."

He added:-

> "It has to be borne in mind that these were defendants who were wrongly maintaining a denial of any liability and thereby leaving the plaintiffs faced with all the potentially heavy expenditure of money required for the mere purpose of establishing by litigation what we now know to have been their rights." (page 452)

In his view "impecuniousness" was not "the cause or even, I think, an effective cause, of the decision to postpone repairs". Moreover:

> "A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do: particularly where, as here, the plaintiffs' 'financial stringency', so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendants' wrongdoing."

Donaldson L.J. accepted that where a "plaintiff has *not* effected reinstatement by the time of the hearing, there is a prima facie presumption that the costs then prevailing are those which should be adopted in ascertaining the cost of reinstatement". It would however be different if the plaintiff acting reasonably should have undertaken the reinstatement earlier than the hearing.

> "Whether this is regarded as arising out of the primary measure of damage. i.e. that the relevant time is when the property should have been reinstated, or whether it is regarded as being a reflection of a plaintiff's duty to mitigate his loss, may not matter."

As to this latter point see also Denning M.R. in *Compania Financiera "Soleada" S.A. v. Hamoor Tanker Corp. Inc.* [1981] 1 W.L.R. 274 at page 281 and Oliver J. in *Radford v. De Froberville* [1977] 1 W.L.R. 1262 at page 1272.

Dodd was different from *The Liesbosch* in Donaldson L.J.'s opinion in that the plaintiffs were not impecunious in the sense of not being able to go out into the market. It was commercially prudent for them to wait until they knew if they could recover the cost of repairs. At page 458 Donaldson L.J. said:-

> "... it is not at once apparent why a tortfeasor must take his victim as he finds him in terms of exceptionally high or low profit-earning capacity, but not in terms of pecuniosity or impecuniosity which may be their manifestation."

Second in *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297 Lord Denning M.R. said at page 1302 that Lord Wright's statement must be restricted to the facts of *The Liesbosch* and was not of general application. Oliver L.J. said at page 1305:-

> "One reason, no doubt, [for not carrying out the repairs] was the plaintiff's poverty. As I said, if that were the only reason, *The Liesbosch* might well provide an answer for the defendants. But in fact the plaintiff's conduct in not carrying out the repairs was quite reasonable for a number of other reasons; and one of the reasons why he did not do them was because the defendants were strenuously resisting any liability at all for the repairs and denying that they were responsible."

Kerr L.J. said that:-

> "If it is reasonably foreseeable that the plaintiff may be unable to mitigate or remedy the consequences of the other party's breach as soon as he would have done if he had been provided with the necessary means to do so from the other party, then it seems to me that the principle of *The Liesbosch* ... no longer applies in its full rigour." (page 1307D).

Thirdly more recently in *Mattocks v. Mann* [1993] R.T.R. 13 at page 19 Beldam L.J. (with whom Nourse and Stocker L.J.J. agreed) referred to what he had said in *Bolton v. Price* (unreported) C.A. Transcript No. 1159 of 1989:-

> "I there said that at the present day it is generally accepted that, in what Lord Wright termed 'the varied web of affairs' that follows a sequence of events after an accident of this kind, it is only in an exceptional case that it is possible or correct to isolate impecuniosity, as it is sometimes called, or the plaintiff's inability to pay for the cost of repairs from his own resources as a separate cause and as terminating the consequences of a defendant's wrong. It seems to me necessary today to consider whether, having regard to all the circumstances of the case and the resources available to a plaintiff, resources known by the defendant or her representatives to be of a kind that will not be able provide for the repairs themselves, in all the circumstances the plaintiff has acted reasonably and with commercial prudence."

Regard should also be had to two cases from other jurisdictions. In *Attorney-General v. Geothermal Produce NZ Ltd.* [1987] 2 N.Z.L.R. 348 the Court of Appeal of New Zealand held that "where a loss is contributed to or is consequent upon impecuniosity it will be recoverable if the loss was reasonably foreseeable". At page 355 Cooke P. said:-

> "... it seems to me that *Liesbosch* is certainly not to be extended as far as logic could be said to carry it. The difficulties so generally experienced in accommodating the decision with principle and justice, as commonly understood at the present day, suggest that any continuing effect given to it as a precedent should at least be strictly confined to damages for the loss of a profit-earning chattel, in use for performing a contract, for which a replacement is available by purchase on the market. That is not the present case, which is much more complicated. It is a case of interference at a crucial stage with a long-term development plan. In my opinion it was reasonably foreseeable that the greenhouse and roses would be owned by a family or other private company not having funds readily available to surmount an unexpected major financial crisis. On the judge's findings, fully supported by evidence, the company acted reasonably to mitigate its losses, and that is enough to exclude any defence based on impecuniosity."

In *Margrie Holdings Limited v. City of Edinburgh District Council* 1994 S.L.T. 971 the Court of Session (per Lord President Hope) following *Dodd* accepted that the test whether the loss claimed was recoverable depended on whether or not it was foreseeable and that was a question of fact.

It is also to be noted that in regard to contract Denning L.J. said in *Trans Trust S.P.R.L. v. Danubian Trading Company Ltd.* [1952] 2 Q.B. 297:-

> "It was also said that the damages were the result of the impecuniosity of the sellers and that it was a rule of law that such damages are too remote. I do not think there is any such rule. In the case of a breach of contract, it depends on whether the damages were reasonably foreseeable or not."

In the opinion of their Lordships the position in contract and tort in this respect is and should be the same.

The decision in *The Liesbosch* has thus obviously been much discussed but it is not necessary for their Lordships in the present case to consider whether as a part of the law of Jamaica what is said by Lord Wright should be rejected as in the alternative they were invited to do. It seems generally to be accepted that there is no absolute rule that where the plaintiff at the date of breach did not have the funds to repair the damage that his impecuniosity is to be ignored in all cases when deciding the appropriate date for the assessment of damages.

In the Court of Appeal in the present case Carey J.A. rejected the argument based on *The Liesbosch*. He distinguished between the cost of replacing the damaged dredger and the cost of hiring a replacement. He said:-

> "The law then is that in the present state of our economic malaise, the time at which the cost of repairs is to be assessed is when the repairs can reasonably be undertaken having regard to all the facts of the case which might well include financial embarrassment. In my view, it is this approach which in all fairness should be adopted. In this case, impecuniosity was not the only reason for the delay in carrying out the repairs. There was nothing imprudent in delaying effecting repairs. The appellant was offering to repair

> roofs within a two and a half mile radius of its operations and the respondent was within that range. The respondent was not to know that the appellant would ultimately deny liability." (pages 14-15 of the transcript)

Downer J.A. considered "Certainly it was prudent for the respondent to await the promises of Alcoa to repair. It turned out that they did not." Patterson J.A. said "... it is plain that the general rule that damages are to be assessed at the date of breach is inapplicable as it would create undue hardship to the respondent".

It seems to their Lordships that this case is clearly to be distinguished from the position in *The Liesbosch* where the cost of hiring was categorised as a separate head of damage from the cost of replacing the dredger, the cost of hiring being due to a separate cause namely the plaintiff's impecuniosity. In the present case there is only one head of damage namely the cost of repairing the building. The increase in that cost was due to rapid inflation and the fall in the value of the Jamaican dollar. There are not here two heads of damage, one of which must be separated from the other and attributed to the plaintiff's lack of funds. The need to repair the roof was a direct consequence of the tort and the real question is whether Mr. Broderick was in breach of his duty to mitigate his damage.

Lord Wright in *The Liesbosch* thought in the alternative that the owners of the dredger's financial embarrassment was too remote. In the present case it seems to their Lordships to have been obviously foreseeable that if the house of a person in the position of Mr. Broderick was seriously damaged he would not or might not have the wherewithal to repair it and that his ability to do so would depend on his establishing the liability of, and recovering damages from, the defendant.

Even assuming that he could have raised the loan, by waiting and not borrowing money at a high rate of interest for some six years the plaintiff was not in breach of his duty to mitigate. It seems to their Lordships as it apparently seemed both to the judge and the Court of Appeal that Mr. Broderick behaved reasonably in waiting,

if indeed he had any realistic choice to do anything but wait, until money was available from Alcoa.

Although this case can be distinguished from *Dodd,* in that in that case the plaintiffs took a commercial decision not to raise or spend the money until they had a judgment and it has not been said that Mr. Broderick took a comparable decision not to do repairs even if money was available, it seems to their Lordships that Mr. Broderick reasonably needed to be sure that Alcoa would pay or be liable before he did the repairs. That took time and it has not been suggested that the delay in obtaining the judgment was his fault.

As to the question whether the breach date rule should be applied, the Court of Appeal was in their Lordships' view fully entitled to find that it would not have been just here to take the date of breach. The majority in the Court of Appeal accepted that he had been told that Alcoa would pay for the repairs and that justified his waiting. Alcoa denies this but the position plainly is that either he was told that they would pay and could rely on it or Alcoa was strenously denying all liability. This was not a case where liability was obvious. There were complex issues of fact and law to be gone into and it is not possible to say that the plaintiff should have assumed that he was virtually bound to succeed so that he should have done the repairs even borrowing at a high rate of interest pending the eventual determination of the case. Whether Alcoa promised to pay or whether it was strenously denying liability it was reasonable for Mr. Broderick to wait either until Alcoa paid or liability was established. There is no question here of Mr. Broderick deliberately delaying doing the repairs so as to increase the defendant's liability. What he wanted was the cost of repairs either, if liability had been accepted in 1990, at those values, or at 1995 values when liability was eventually established. There is no windfall in it for him. On the contrary it would be a hardship to him not to get the cost of repairs the first time it was clear that Alcoa had to pay. Alcoa has not shown that Mr. Broderick could and should have gone ahead with and paid for repairs at an earlier stage.

In his valuable article "The date for the assessment of damages" (1981) 97 L.Q.R. 445 Professor Waddams has illustrated the difficulties which can be caused by

postponing the date at which the assessment of damages falls to be made but it seems to their Lordships clear that in this case justice required that at the earliest the date of judgment by the trial judge be taken.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed with costs.