**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO: 75/1998**

**BEFORE** **THE HON MR. JUSTICE BINGHAM, J.A.**
**THE HON MR. JUSTICE LANGRIN, J.A.**
**THE HON MR. JUSTICE PANTON, J.A.**

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| **BETWEEN:** | **EXPLOSIVE SALES & SERVICES** | **DEFENDANT/APPELLANT** |
| **AND** | **CLIVE GREEN** | **PLAINTIFF/RESPONDENT** |

**Maurice Manning instructed by Nunes, Scholefield, DeLeon & Company for the appellant**

**Ravil Golding instructed by Ernest Smith & Company for the respondent**

**June 11, 2001 and November 07, 2002**

**BINGHAM, J.A:**

On June 11 2001, we heard arguments in this appeal at the end of which we allowed the appeal and set aside the judgment below and entered judgment for the defendant/appellant. We also ordered costs both here and below to the appellant such costs to be taxed if not agreed. At the time of judgment we promised to reduce the reasons for coming to our decision into writing. This we now do regretting the delay in handing them down.

## The facts

The Plaintiff's Case

In May 1994 and again in October 1994, blasting operations were carried out at the Desnoes and Geddes depot in Discovery Bay, St Ann, by the defendant company on behalf of Desnoes & Geddes ("D & G").

The blasting in May 1994, was on a larger scale than that later in October 1994. The plaintiff said that as a result of the blasting that took place his house which was situated about five chains away from the blasting site suffered damage by cracks appearing on the walls and roof of the building.

He testified that other householders in the area also experienced damage to their houses. He also saw a portion of the wall over by the D & G depot which collapsed following the blasting operations.

Prior to the blasting being undertaken, persons from the defendant company visited his house and carried out inspection of the premises. Following the blasting in October 1994, he made a complaint to his attorneys and in November 1994, persons from the defendant company visited his home and carried out an inspection of the premises. On leaving they promised to get in touch with him but they never returned.

The damage was later assessed by Mr. Christopher Boscoe who prepared an estimate of the damage. The respondent paid $4,000.00 to have this estimate done.

The repairs to the premises were subsequently carried out by Undel Green the contractor who had been responsible for the construction of the house. This construction was still in progress at the time of the blasting operations. The house was eventually completed in 1995. It had commenced in 1991, the first phase being completed in January 1994.

A Writ of Summons and a Statement of Claim were subsequently filed. The Particulars of Special Damages claimed the sum of $531,000.00 as being "estimated overall cost of repairs inclusive of labour".

**The defendant's account**

The defendants are licensed blasters having some twenty years and over of experience in this particular field of operation. In 1994, they carried out blasting in the Discovery Bay area. The blasting site was the Desnoes and Geddes distribution plant there.

In May 1994, before the blasting was done Mr. Neville Shields, a director of the defendant company and a licensed blaster since 1964, carried out a pre-blast inspection of all buildings in close proximity to the blasting site. On this inspection which was in respect of some ten houses situated in close proximity to the blasting site including the plaintiff's house, he found that all these houses had cracks on all their concrete walls. The plaintiff's house in particular had a number of cracks on the walls. These were both vertical and horizontal. The concrete roof also had visible cracks. The cracks were identified by his placing

masking tape along with an identification number on them. He explained that blasting was done in May 1994 and again in October 1994.

The pre-blast inspection was done for the purpose of protecting properties and life by informing the residents of the blasting operation to take place and the date. He would then plan and design the blast to suit each job. For this particular blast in May and October 1994 a seismograph, an instrument used to measure and record movement from vibrations was in place. Every necessary precaution adopted in carrying out the blasting was utilized.

Following the blasting an inspection was carried out on the same premises within the area. There was no damage seen to the Denoes and Geddes building or the Catholic church which was 56 feet from the blasting site. The blast site was situated 5½ chains to the nearest wall of the plaintiff's premises. An inspection of the house disclosed that the original cracks seen on the pre-blast inspection were the only ones noted. It was after the blasting in October 1994, that a complaint was made by the plaintiff. Of the ten householders in close proximity to the site the plaintiff was the only one who complained.

The learned trial judge following a hearing over three days entered judgment for the plaintiff on the claim for $485,000.00 with interest and costs.

The appellant sought to challenge this judgment on the following grounds viz:

> "1. The judgment of the learned trial judge was unreasonable in the light of the evidence."

Before us counsel for the appellant obtained the leave of this Court to add a second ground of appeal. This reads:

> "2. The learned trial judge erred in departing from the principle that a plaintiff is required to strictly prove his special damages."

**Ground 1**

Learned counsel for the appellant has submitted that if the respondent whose evidence stood alone was being truthful as to the damage that he said occurred, it is strange that no attempt was made by him to call the Assessor, Mr. Boscoe, who did the inspection and prepared an estimate in November 1994. Counsel submitted that the learned judge below from the evidence presented to him does not appear to have taken advantage of having seen and heard the plaintiff and the three witnesses called by the defendants. The matter was therefore one, the evidence which being at large it was for this Court to weigh and assess and to make its own independent determination. **Watt or (Thomas) v Thomas** [1947] A.C. 484; [1947] 1 All E.R. 582, applied in **Barrow v Barrow** [1968] 12 W.I.R. 440.

The respondent's account did not stand by itself, but was pitted against that of Neville Shields, a director of the appellant company, and an experienced blaster since 1964, as well as the accounts of Delroy Shields and Granville Gayle who were in charge of the blasting operations in October 1994. These latter two witnesses were also blasters with over 20 years experience.

These witnesses whose accounts were unshaken and uncontroverted, revealed the following material facts:

(i) In May 1994 and October 1994, the amount of explosives used was the same, 21 lbs. This evidence was not challenged.

(ii) In May 1994, the seismograph test determined that a safe distance for blasting was 261 feet which meant that there would be no movement (vibrations) at this distance.

(iii) The unchallenged evidence of Mr. Neville Shields was that a reading of less than one quarter of an inch at the nearest structure, was at the Catholic church. That reading would not result in damage to any structure around the blast site.

(iv) Inspections subsequent to the blasts on both occasions revealed no damage seen to any structure viz; the D & G depot, the church or the respondent's house among other premises in the vicinity of the blast site.

(v) There was a marked absence of any complaints emanating from other residents who lived closer to the blasting site than the plaintiff.

In the light of this evidence coming from the appellant, and as there was no countervailing evidence brought by the plaintiff, from a structural engineer or a building contractor such as Mr. Undel Green indicating that there were fresh cracks or other structural damage to the respondent's building, there was no evidence that could establish on a balance of probability that the blasting operations in May and October 1994 was the cause of the alleged damage by the respondents.

As the unshaken accounts of the appellant's witnesses clearly negatived liability on their part, an examination of the evidence of the plaintiff standing by itself could not provide the sufficiency of proof to found liability in his favour. The learned trial judge properly applying his mind to the material facts set out (supra) ought to have rejected the claim. Although he had the distinct advantage of seeing and hearing the witnesses, this was a case in which the evidence to be weighed, assessed, and a determination made, fell in the area of what was of a highly technical and scientific nature. Such evidence as was adduced was clearly weighted in favour of the appellant, and ought to have been accepted by the tribunal of fact.

**Ground 2**

Learned counsel for the appellant submitted that in awarding the sum of $485,000.00 for special damages, the learned trial judge erred in not requiring the plaintiff to strictly prove his damages. Counsel argued that it is now settled law that a plaintiff must in this area of his claim ought not merely to throw figures at the Court and ask the Court to make an award.

Learned counsel further submitted that the plaintiff failed to make any effort to satisfy the Court whether by documentary evidence or from viva voce evidence of his contractor Mr. Undel Green, that he incurred any loss or expenses as a result of the alleged damage to his home. He relied on **Algie Moore v Rahman** [1993] 30 JLR 410 and **Bonham Carter v Hyde Park Hotel** [1948] TLR 177.

In **Algie Moore v Rahman** (supra) the facts summarized were that the plaintiff/appellant while standing at a bus stop with his load, was hit down by a vehicle driven by the respondent which also hit down a sign post, then hit the load before colliding into the plaintiff. This account was supported by the evidence of two eyewitnesses.

The respondent testified that the appellant was hit while running across the road. In the face of the conflicting accounts, the learned trial judge rejected the accounts of the appellant and his witnesses and gave judgment for the respondent. This Court [Carey, Downer; Patterson, (ag) JJA] in allowing the appeal, setting aside the judgment of the court below and remitting the case for assessment of damages, held:

> "Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong; in the instant case the trial judge in considering the conflicting evidence, did not take into account the objective fact provided by the evidence of the loss adjuster, and consequently his findings were flawed."

Learned counsel for the respondent, in the face of the very cogent arguments advanced on behalf of the appellant submitted that there was sufficient evidence to support the finding of liability. He said that of these witnesses who testified for the appellant below, only Granville Gayle was present when blasting was done in October 1994. That whereas Mr. Neville Shields testified to taking photographs of the cracks in the respondent's building they

were not tendered in evidence. As the defendant (appellant) was contending that there were no new cracks in the plaintiff's (respondent's) house he argued that it was strange that they did not have the photographs admitted into evidence in proof of this fact.

In this case given the fact that the weight of the evidence was decidedly in favour of the appellant, and having regard to the nature of that evidence, the determination for the respondent must be wrong. This is further supported by the marked absence of any reasons coming from the trial judge as to how he applied his mind in coming to his conclusion on what was highly technical and scientific evidence bearing on the critical question as to what may have caused fresh cracks and other damage, if that was the case, to the respondent's building, following the blasting in May and October 1994.

There being no dispute that the defendant did carry out blasting in the Discovery Bay area in May and October 1994, the critical question for the learned judge to determine therefore, was as to whether the cracks on the walls and slab roof of the respondent's house were as a result of these blasting operations. While the respondent gave evidence that it was after the blasting that he observed these cracks and that other residents in the area close to the blasting site also had similar experiences, none of these residents gave evidence supporting the respondent's account. Mr. Shields also testified that the respondent was the only resident in the area who complained of his house being damaged as a result of the blasting operations.

What the learned trial judge was left with at the end of the case was the account given by the plaintiff pitted against the highly technical nature of the evidence given by the experienced blasters from the defendant company. Their account of the measures taken to ensure that no damage resulted from their operations based on the skill and experience brought to their task, unless shaken at the trial, meant that as there was no countervailing evidence brought by the plaintiff aimed at establishing on a balance of probabilities that such damage to the plaintiff's house as complained of was the result of the blasting operations undertaken by the defendants, then the claim ought to have been rejected.

Given the bare ipse dixit put forward by the plaintiff, for the learned trial judge to reject the unshaken testimony of the three competent witnesses for the defendant company it would have been important to this Court as an appellate body to discover what may have influenced the learned judge to come to the conclusion which he did, he having had the advantage of seeing and hearing the witnesses. Regrettably, we have not been blessed in that regard. Added to this was the fact that although the plaintiff testified of employing an assessor to examine the premises in November 1994, someone whom he paid $4,000.00, this individual was not called to give evidence at the trial.

On the question of causation, the uncontroverted evidence by Mr. Neville Shields for the defendant was that for the blasting operations carried out to cause damage to the plaintiff's house that would have required the use of at least 300 lbs of explosives which was not the amount utilized on this job.

In advancing his argument on this ground of complaint learned counsel for the appellant submitted that the plaintiff's claim being one for $531,250.00 as being "estimated cost of repairs inclusive of labour," he was required to strictly prove this damage.

The plaintiff testified as to the following expenditures viz:

1. He paid Christopher Boscoe $4,000.00 to prepare estimate for assessing the damage to the house.

2. .He paid $4,000.00 for repairs to the roof of the house.

3. He paid $20,000.00 for repairs to the fence wall.

The $15,000.00 for repairs to the building was paid after the repairs were done. This sum was for paint and workmanship. It was Undell Green, plaintiff's cousin, who carried out the repairs to the house. He was also the contractor who built the house which was not completed at the time of the blasting.

From his evidence, the plaintiff would have expended a total of $43,000.00 on repairs. He produced no receipts in support of any of these payments which he said he made to these persons; none of whom were called to substantiate the work done or that they received these sums.

Although the evidence elicited from the plaintiff related to $43,000.00 the learned judge awarded a sum of $485,000.00 with interest. As there was no reasoned written judgment available to this Court, one is unable to ascertain on just what basis the learned judge did arrive at this sum. As the measure of damages, given the principle laid down in **Hadley v Baxendale** [1854] 9 Ex.

341, relates to the actual loss suffered by the plaintiff, which sum on the plaintiff's evidence was for $43,000.00 only, it would be of interest to discover what led the learned trial judge to award the sum which he did.

Learned counsel for the appellant added another string to his bow in relying on the dictum of Lord Goddard, C.J. in **Bonham-Carter v Hyde Park Hotel** [1948] TLR 177, where, in dealing with a similar claim for special damages, the learned Chief Justice remarked:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying; 'This is what I have lost, I ask you to give me these damages' they have to prove it."

This is exactly what the plaintiff sought to do in this case. It is trite that where special damages are claimed they must be specifically alleged and strictly proven. Here the evidence was far from approaching the required standard, with the result that, the learned trial judge ought to have dismissed the claim as the damages were not proved in the manner called for by the rules governing pleadings.

The additional ground therefore, is also equally well founded and succeeds.