[2016] JMSC Civ 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 03228

BETWEEN	**MILTON ARTHURS**	**CLAIMANT**
AND	**TARA ESTATES LIMITED**	**DEFENDANT**

Injunction – Nuisance – Noise, dust and smoke, vibrations, water – Construction site – Whether conditions of building approval relevant – Whether action or inaction of planning authorities relevant – Delay in application

Christopher Kelman, Stephanie Ewbank instructed by Myers, Fletcher & Gordon for the Claimant.

Georgia Gibson Henlin Q.C., Weiden Daley instructed by Hart, Muirhead & Fatta for Defendant.

Ronald Young watching proceedings.

HEARD: 8th and 16th December, 2016

IN CHAMBERS

CORAM: BATTS J.

[1] On the 16th December 2016, I made the Orders stated at paragraph 30 of this judgment. I promised then to put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

[2] On the first morning of the hearing I was informed that Ms. Peta Gaye Rookwood, counsel for the National Environment and Planning Agency (NEPA) was present. Mrs. Gibson Henlin Q.C., quite properly expressed doubt as to the reason for NEPA's presence. Mr. Kelman advised that the agency had been

served but that they were neither party nor witnesses in the matter at this time. I asked the agency's representative to withdraw. Matters heard in Chambers are prima facie private. The Defendant may, for example have a legitimate reason to be concerned about the use to which information gleaned at time of hearing will be put. In any even as potential witnesses or possible future parties, NEPA ought not to be allowed to listen in at this hearing in Chambers.

[3] Learned Queen's Counsel then informed the Court that she intended, as part of her submissions, to challenge the admissibility of certain expert evidence relied on by the Claimant in his affidavits. This on the ground that the reports were not in conformity with the rules. Mr. Kelman stated that this was the first time he was being made aware of such an objection. He did not wish any further delay and submitted that in these interlocutory proceedings the Court ought not to allow the form to prevail over the substance. The matter involved technical considerations and reference to the report was necessary. He proceeded with his application.

[4] For the record, I agreed with Mr. Kelman and will not allow technical rules concerning the form of a report to delay justice at this interlocutory stage. To the extent necessary, and having reviewed the reports, I am prepared to exercise my discretion as per Rule 26.9 and make such orders and give such directions as will enable the matter to proceed and the reports considered. In this regard the expert reports exhibited are allowed to stand for the purpose of this hearing.

[5] Both parties relied on written submissions. Each was allowed one hour to speak to the submissions. I have considered carefully the written and oral submissions and intend no disrespect to the parties if in the course of this judgment they are not referenced in great detail.

[6] This claim concerns the tort of nuisance. The Claimant seeks an injunction and damages consequent on certain construction activity carried on by the Defendant on premises which adjoin the Claimant's land. The alleged acts of nuisance involved: a) Burning of waste and debris.

b) Noise levels above 70 decibels

c) Excessive vibrations which occasioned physical damage.

d) Excessive dust smoke and fumes.

e) Conducting construction work prior to 7:00 a.m. or after 6:00 p.m.

f) Conducting certain work on Sundays

g) Causing the accumulation of stagnant water resulting in increased mosquito infestation.

[7] The Defendant asserts that reasonably competent contractors were retained and denies that it "consistently or at all" committed the breaches alleged. There is a detailed response to each particular of nuisance alleged. It is clear that issue is joined on the claim.

[8] The Claimant approaches the Court at this interlocutory stage for relief. His amended Notice of Application seeks:

"An injunction to restrain the Defendant, until the trial of this action or further order of this Court, whether by its servants or agents or otherwise howsoever from doing the acts listed herein or any of them on its property registered at Volume 1050 Folio 312 of the Registrar Book of Titles so as to cause a nuisance to the Claimant by noise, vibrations, dust, smoke, fumes and other emissions to the Claimants property registered at Volume 1090 Folio 837 of the Register Book of Titles.

a) Burning of waste or any other debris on the Defendant's property.

b) Causing or permitting noise levels exceeding 70 decibels at the boundary of the Defendant's property.

c) *Causing or permitting excessive vibrations to occasion physical damage to the Claimant's property.*

d) *Causing or permitting construction materials which generate excessive dust to be uncovered during transportation and when stock-piled on the construction site.*

e) *Conducting construction work prior to 7:00 a.m. or after 6:00 p.m. on weekdays and prior 8:00 a.m. or after 6:00 p.m. on Saturdays.*

f) *Conducting construction work on Sundays.*

g) *Causing or permitting the accumulation of stagnant water on the Defendant's property resulting in increased mosquito infestation.*

h) *Or any nuisance of any kind.*

[9] The Claimant contends that the order seeks to have the Defendant do nothing more and nothing less than the law already requires. In this regard reliance is placed on the building permits filed by NEPA and the relevant planning authority as well as on the general law.

[10] The Defendant's response is slightly more nuanced and I hope I do no disservice to their clearly articulated submissions by the summary to follow. The Defendant asserts that the Court will not make an order which it cannot monitor or which will require monitoring/policing. Secondly the Defendant says it is not in breach and therefore to make such an order will reflect a prejudging of the issues for determination. Thirdly the Defendant says that the Claimant can be adequately compensated in damages, that its use of the property is reasonable and therefore injunctive relief ought to be refused.

[11] Both parties in their submissions relied on the authorities of ***American Cyanamid v Ethicon Ltd. [1975] 1AER J04 and National Commercial Bank Ja. Ltd. v Olint. [2009] UKPC 16.*** Lord Hoffman's words at paragraph 16 of their lordships opinion in the Olint case appears particularly apt:

"16. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The Court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a Court has to take into account. The purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial.

At the interlocutory stage, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid Co v Ethicon Ltd. [1975] AC 396****, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should accordingly be granted.*

17. In practice however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the Court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreversible prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld as the case may be. The basic principle is that the Court should take whatever course seems likely to cause the least irreversible prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396,408.

> *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*

[12] The Defendant adds the following legal consideration. It is said relying on **Caynev *Global Resources [1984] 1All ER 225 and Locabail International Finance Ltd. v Agroexport and others (the Sea Hawk) 1 Aller 901,*** that the practical result of granting this interlocutory injunction will be to grant the final remedy; and therefore the Court should be reluctant to grant the injunction. It ought only to do so if a high degree of probable ultimate success is demonstrated. It is also submitted that the Court does not make orders that will require monitoring or policing.

[13] At this juncture I will review aspects of the evidence I consider particularly relevant. The Claimant is a joint registered owner of the subject property and resides thereon. He also operates his office on the premises. His parents are the co-owners and reside there also. He describes his business as one of "construction and design". The Claimant's lot is located in Reading Pen and at the time of purchase was an "extremely peaceful private rustic relaxing sparsely populated place." He had few neighbours. The Defendant purchased a large tract of land part of which adjoins the Claimants land. The Defendant obtained approval to subdivide and build on 86,830.44 square metres (22.616 acres) of the land, being some 62 lots.

[14] The St. James Parish Council approved a development by the Defendant on certain terms and conditions. Most relevant among those, as stated in Exhibit T.E. 7(b) to Affidavit of Edmund Depass filed 16th September 2016, were the following:

a) *"5. The registered proprietor and/or occupier of the property shall not at any time permit or suffer any garbage to remain or be burnt on this premises otherwise than in accordance with the requirements of the Public Health Authority"*

b) *"6. The building/property thereon shall not be used for any unlawful purpose or any purpose which shall or might be or become a source of annoyance or objection to any person for the time being entitled to the benefit of this covenant and no nuisance shall be created or permitted on this premises.*

c) *"29. No sullage (waste or effluent water) shall be permitted to be discharged onto any road or adjoining lands"*

d) *"31. Construction materials that generate fugitive dust shall be covered during transportation and also when stockpiled on the site."*

e) *"32. Noise levels during construction shall not exceed 70 decibels at a distance of fifty meters from the property boundary."*

The National Environmental & Planning Agency had earlier granted its own permit for subdivision. Relevant conditions of that permit are:

a) *"14. The Permittee shall ensure that the noise level during construction does not exceed 70 decibels at the boundary of the site"*

b) *"15. The Permittee shall ensure that work is carried out between the hours of 7:00 a.m. and 6:00 p.m. from Mondays to Fridays and 8:00 a.m. to 6:00 p.m. on Saturdays. There shall be no work on Sundays and Public Holidays. Any work to be done outside of this period will require the permission of the authority."*

c) *"16. The Permittee shall ensure that there is no burning of waste or any other debris on the site."*

[15] The Claimant contends, and supports the allegation with an expert opinion and readings recorded on dvd, that noise levels have regularly exceeded 70 decibels. The Defendant has endeavoured to deny that this is so. They rely on among

other things an expert report and opinion of Dr. Carlton Campbell an environmental scientist (Exhibit T.E. 8 to the Affidavit of Edmond Depass filed on the 16th September 2016). That report raises questions as to the accuracy and calibration of the sound level meter used by the Claimant. The report also says that no burning of waste or debris or vibrations or excessive dust or stagnant water was observed on the day of the site visit. Dr. Campbell also stated that the average decibel reading taken was 65.7. However the maximum reading was measured at 100.6 and the peak at 108.6. These were measurements taken at the boundary of the premises.

[16] The Claimant's environmental consultant, Mr. Paul M. Carroll, in a report dated 22nd November 2016 (Exhibit MA24 4th Affidavit of Milton Arthurs filed on 23rd November 2014 says in part:

"5. The maximum and peak levels quoted by Dr. Campbell appears to be at variance with his conclusions that ambient noise levels were compliant with what Dr. Campbell's report refers to as the NEPA permitted noise "guideline" level of 70 decibels."

[17] The Claimant complains that there has been dust emanating from trucks which carried uncovered material. He complains about the burning of refuse and the settling of stagnant water. This later resulted in an increase in mosquitoes.

[18] The Claimant says he has suffered and continues to suffer from headaches and an inability to concentrate. He has sought medical attention. He says that his live-in helper of many years quit her job in consequence of the conditions which made her ill. He alleges also that vibration caused cracks to his building. He exhibits dvd recordings and photographs all of which I have examined.

[19] These conditions the Claimant contends have continued from August, 2015 to the date of the application before me. The Defendant's counsel has made some point of this as the time which has passed may suggest that the matter is not so urgent as to require interim remedies. The Defendant says that the activity

closest to the Claimant's premises is expected to come to an end by the 15th February 2017 (Affidavit Edmond Depass filed 6th December 2016 at paragraph 5).

[20] I do not hold the Claimant's delay against him because the period September 2015 to August 2016 was marked by extensive correspondence and contact between the Claimant and the Defendant on the subject. It is fair to say that the Defendant's general response has been to promise to ameliorate or remove the matters complained of. The Claimant says he was lulled by these promises, many of which have not been kept. There is some documentary evidence to support the Claimants assertions and I will reference a few examples:

a) A letter dated 21st September 2015 from the Defendant (Exhibit MA12 to affidavit of Milton Arthurs filed 29th July 2016) begins with the words "we would like to apologise for the burning of material at Tara Estates." They promised it would not reoccur.

b) Email dated 6th November 2015 explains that a fire was set to "burn a duck ants nest" (Exhibit MA 14 to Affidavit of Milton Arthurs filed on the 29th July 2016)

c) Email dated 6th December 2015 letter from the Claimant commencing, "I write now at what is 8:15 a.m. on a Sunday morning to inform you that work involving large construction machines is presently taking place.... yet again the (sic) we the residents are made to bear the consequences...." [Exhibit MA15 to the Affidavit of Milton Arthurs filed 29th July 2016]

d) Email dated 4th March 2016 from Claimant to the St. James Parish Council seeking its intervention (Exhibit MA17 to the Affidavit of Milton Arthurs filed or the 29th July 2016).

e) By Affidavit filed on the 9th August 2016 Edmond Depass for the Defendant, admitted that work had intensified (para 19) and that in March 2016 their project

manager was dismissed partly for allowing "burning on the site notwithstanding warnings by Tara's Fredrik Moe and Damien Moe." (para 23).

[21] The Defendant denied many of the Claimant's factual assertions. They maintain that where infractions occurred or complaints were made measures were taken to prevent further breaches. So for example a security change was made to ensure that there would be no further work done on Sundays. They also explained the dust from trucks on the basis that these were contractors. The Defendant encourages these "third parties" to ensure trucks are covered (paragraph 38 Affidavit of Edmond Depass filed 9th April 2016). It is denied that there is physical damage to the Claimant's premises. As we have seen it is also denied that the decibel levels were exceeded. The Defendant relied also on a site visit by NEPA on the 3rd August 2016 after which Ms. Annette Brown of NEPA advised the Defendant that they were compliant. They rely also on the fact that the planning authorities have not served them with any notices. The Defendant contends also that there have been no complaints by other residents (Affidavit of Edmond Depass filed 9th April 2016 paragraphs 27, 31 and 32).

[22] It does appear to me that the Claimant has an arguable claim or at any rate one with some real prospect of success. At this interlocutory stage I make no findings one way or the other. However, it is incumbent on me to consider whether the claim is credible and it certainly is. In this regard whether or not there is a nuisance is not a function of whether there has been planning permission or of any conditions imposed by the authorities, although the opinion of planning authorities constitute relevant, and sometimes very relevant, evidence. Neither is the inaction of planning authorities determinative of the issue. Indeed it may be that very inaction which makes the intervention by the Court necessary; see ***Lawrence and Another v Fen Tigers Ltd. and others [2014] AC 822 [2014] UKSC 13***, a decision of the Supreme Court of the United Kingdom, per Lord Neuberger of Abbotsbury PSC at paragraph 90:

> "*Quite apart from this it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance without providing her with compensation when there is no provision in the planning legislation which suggest such a possibility."*

And at paragraph 94:

> *"Accordingly, I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause (sic) a nuisance to her land in the form of a nuisance or other loss of amenity"*

and at paragraph 96.

> "However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8:30 a.m., or if it is limited to a certain decibel level, in a particular locality may be of real value, at best as a starting point as *Lord Cranworth JSC* says in paragraph 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9:30 a.m. or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the Court, the existence and terms of the permission are not irrelevant as a matter of law but in many cases they will be of little or even no, evidential value, and in other cases rather more."

[23] It also does appear to me, that in a case such as the present, damages may not be an adequate remedy in the event of success by the Claimant. He complains that for in excess of a year, the dust, noise and vibrations have continued in a manner which prevent enjoyment of his property. He alleges that this has

resulted in loss of sleep, concentration, ability to carry on his business and has taken a toll on his health and others in his household. This latter allegation, as the Defendant points out, is unsupported by medical evidence. The Claimant however, identifies by name, the doctor he attended. Again I make no findings of fact nor am I obliged to. However, if true, it renders the adequacy of damages as a remedy unlikely. The Claimant offers an undertaking to the Defendant that he supports by the value of property and other investments he owns which he asserts exceed thirty million dollars, ($30,000,000.00) in value. (paragraph 10 Affidavit of Milton Arthurs filed on the 5th August 2016).

[24] His counsel makes an additional point, that insofar as the Claimant does not seek to end construction activity but merely to uphold the standards imposed by the planning authorities, it is unlikely that damage could flow as a result of an interlocutory injunction. In other words if, as the Defendant contends, it has complied with the standards set forth by the planning authorities, the injunctive relief claimed will not have any impact on its construction activity. Claimant's counsel cites a decision recently delivered by me and upheld on appeal in support of the proposition see ***Claim 2015 CD 000140 ALGIX JAMAICA LTD. v J. WRAY & NEPHEW LTD. 2016 JMCC COMM, 2 unreported judgment delivered 25th January 2016 upheld on appeal SCCA No. 15 of 2016***.

[25] There are parallels in the fact situations of that case and this one, that is clear. In this case however, there is an important distinction. The condition issued by the Parish Council, insofar as noise levels are concerned, refers to 70 decibels "50 metres, from the property boundary." The NEPA condition does not say 50 metres from the boundary. None of the measurements in evidence, whether by the Claimant or the Defendant, measures decibel levels 50 metres from the boundary. The evidence, such as it is, suggests that the Claimant's house is closer than 50 metres from the boundary.

[26] It will be a matter of mixed fact and law for the judge at trial to determine the relevance in this case of a 70 decibel requirement 50 metres from the boundary;

and whether, if an excess of the decibel level occurred within 50 metres, it constitutes an actionable nuisance in law. An order for an injunction at this stage, on the evidence presented, therefore holds out the possibility that if, the Defendant ultimately succeeds, the Defendant may have been required by the injunctive order to do more than the law required of him. Noise, however, is only one aspect of the claim to nuisance and insofar as working hours and dust levels are concerned the conditions do appear to be clear and unambiguous.

[27] Defence counsel urged the court not to make an order because it requires monitoring or policing. With respect, I do not understand that to be a basis to refuse relief, interlocutory or otherwise. All orders, in that sense require policing. The Claimant will no doubt, as is always the case if they assert a breach, need to bring cogent evidence to support an application for the exercise of the Court's coercive powers. I bear in mind also that the Defendant has not said compliance with the imposed conditions (by NEPA or the Parish Council) is onerous or impossible. In fact they say they are in compliance. The authorities on which the Defendant relies for this submission concern situations where it is either impossible to enforce the order or to determine whether there has been compliance with the Court's order. So that for example ***in Lacobail International Finance Co. Ltd. v Agroexpert Ltd. (the Sea Hawk) [1986] 1All ER 901*** a mandatory injunction for certain payments to be made was refused because the Defendant asserted it could not pay and there was no representative of the Defendant (nor did it have assets) within the jurisdiction against which the order could have been enforced, (*see per Mustill J at page 907 c to d*). The case before me presents no such difficulties.

[28] The Defendant also submitted that in a case such as this a strong possibility of success ought to be demonstrated. I have said enough to demonstrate that the Claimant has met that standard. I do not in any event, agree that this case is one for mandatory injunctive relief or that any higher standard falls to be borne by the Claimant.

[29] In all the circumstances the fair thing to do is to impose interlocutory orders on the Defendant. The Claimant maintains that he has no desire to stop construction proceeding. It seems to me therefore that any injunctive order at this interlocutory stage should provide for liberty to apply. In this way, in the event a particular activity is necessary which may temporarily breach the order, the parties may approach the Court for a suspension of the order to permit the activity.

[30] It is for all the reasons articulated above that on the 16th December 2016, I made the following orders:

1) The Defendant is restrained whether by itself, its servants and/or agents or otherwise howsoever until the trial of this action or further order of the court from doing the acts listed below or any or all of them on its property registered at volume 1050 Folio 312 of the Register Book of Titles:

    (a) Burning waste or debris

    (b) Causing or permitting noise levels which exceed 70 decibels from the boundary of the Defendant's property.

    (c) Causing or permitting excessive dust, smoke or fumes to enter the Claimant's property.

    (d) Conducting works of construction prior to 7:00 a.m. or after 6:00 p.m. on weekdays and prior to 8:00 a.m. or after 6:00 p.m. on Saturdays.

    (e) Conducting works of construction on Sundays.

    (f) Causing or permitting an accumulation of stagnant water.

2) The Claimant through his counsel gives the usual undertaking as to damages.

3) Costs to the Claimant to be taxed or agreed.

4) Liberty to apply

5) Formal Order is to be prepared, filed and served by the Claimant's attorney-at-law.

David Batts
Puisne Judge
January 2017