JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 15/90

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	TREVAND MANUFACTURING COMPANY LIMITED	DEFENDANT/APPELLANT
AND	HELGA STOECKERT CHRISTA LUNDH	PLAINTIFFS/RESPONDENTS

D.M. Muirhead Q.C. and C. Piper instructed by Clinton Hart & Co for Appellant

Emil George Q.C. and Miss Crislyn Beecher instructed by Milholland Ashenheim & Stone for Respondents

July 17, 18, 19 & 30, 1990

CAMPBELL, J.A.

This is an appeal against an Order of Edwards J., made on February 16, 1990 granting an interlocutory injunction in favour of the respondents. The formal order restraining the appellant, its servants and or agents is in the following terms:

> "1. The Defendant by itself, its servants or agents or otherwise howsoever be restrained from causing or creating or permitting to be caused or created a nuisance to the Plaintiff's or other occupiers of the Plaintiff's adjoining premises at 10 Montrose Road, in the parish of Saint Andrew, by drilling, operating saw mills, power-saws and other machinery, causing vibrations on the Plaintiff's premises, causing or permitting dust or smoke or fire to escape from the Defendant's premises at number 4 and 6 Montrose Road in the parish of Saint Andrew onto the Plaintiff's premises or otherwise pending trial. This

" does not apply to such reasonable user of machinery and equipment as may be necessary to construct a building on the premises after all the necessary statutory approvals for such construction have been obtained and in keeping with the conditions of approval.

2. The Defendant by itself, its servants, or agents or otherwise howsoever be restrained from operation of a concrete block factory and/or a saw mill and/or any factory whatsoever on the Defendant's premises at numbers 4 and 6 Montrose Road in the parish of Saint Andrew."

The appellant acquired by registered transfer, premises numbered 4 and 6 Montrose Road being part of lands known as Vale Royal which adjoins the respondents' premises numbered 10 Montrose Road. The Appellant's transfer was registered on July 18, 1989. The purchase price of the premises was $1.3 million which was financed to the extent of $1.155 million by a loan from National Commercial bank Jamaica Limited, secured by mortgage of the said land which mortgage was registered on August 15, 1989. The purchase of the premises was for the construction thereon of ten two bedroom luxury townhouses. It is plain that with this heavy dependence on bank financing, the project to be profitable as an investment, had to be cost efficient both in terms of time as well as in money expenditure on construction.

To achieve these objectives the appellant immediately sought approval for the project under the Town and Country Planning Law. An outline plan was approved under this law in September 1989. The premises also had to be cleared of restrictive covenants against subdivision and the carrying on of any trade thereon. Application for the removal or modification of these restrictive covenants is contemplated but for reasons stated by the appellant, no application to date has been made. The appellant however commenced certain activities on its premises allegedly

preparatory to construction which were designed to be cost saving.

The respondents became aware of activities on the appellant's land which they considered as constituting breaches of the restrictive covenants as well as a nuisance. They accordingly issued a writ on or about January 26, 1990 claiming inter alia -

> (a) an injunction to restrain the appellant from drilling, operating sawmills, power-saws and other machinery on its premises thereby causing vibrations on the respondents' premises or thereby permitting dust smoke or fire to escape from its aforesaid premises onto the respondents' premises;
>
> (b) an injunction restraining the appellant from operating a concrete block factory and/or a saw mill and/or any factory whatsoever on its premises.

The respondents thereafter issued a Summons seeking an interlocutory injunction in terms of (a) and (b) above more fully elaborated in the Summons. The affidavit in support stated in paragraph 9 that the appellant had commenced operating a concrete block factory and a saw mill with workmen, heavy equipment, drills, power-saws and/or other machinery and in paragraph 10 the respondents complain that such operations cause -

> (a) excessively loud noise from 6 a.m. to 11 p.m. including repetitious drilling and the operation of the sawmill;
>
> (b) constant vibration to be felt on the respondents' premises with fear of severe and irreparable damage to their building;
>
> (c) constant stirring up on and escape from appellant's premises of clouds of dust on to respondents' premises which dust settles on the furniture in their home and on the walls of their home and this has in addition adversely affected the health of one of the respondents.

The appellant admitted that in anticipation of securing the removal or modification of the restrictive covenants in due course and as a construction cost saving device it had commenced making concrete blocks on the premises after dismantling an old building on, and clearing, the premises and building a wall enclosing the said premises. It further admitted that it operated a power saw to cut up plywood for use in making pallets on which to place the freshly made concrete blocks for the purpose of curing them.

It however states that in relation to the concrete block making operation it was a small portable block making machine housed in a zinc shed, the operation of which was much too small to be viable as a commercial enterprise. The power saw was a small one weighing only 3 lbs with a blade diameter of only 7½ inches. It denied that its activities were commenced before 7.30 a.m., or that they were continued beyond 5.30 p.m., or that they were capable of causing or caused any vibrations or escape of dust to the extent claimed by the respondents.

The learned trial judge having heard submissions from the attorneys for the respective parties and having read the affidavits before him made an order in terms of the Summons. His conclusion so far as is relevant was that the affidavits revealed conflicting evidence. He thereafter reasoned thus at pages 52-53 of the record -

> "Looking at the matter before me, this is not a fictitious case. Something is happening and there is a dispute eg. can the Defendant's operations be considered a block factory, saw mill, heavy equipment? - this an issue to be determined. This Court is not a Court of Trial. If it is held that a factory is operated, are there excessively loud noises at 6 a.m. - 11 p.m. as alleged by Plaintiff? Are there vibrations from the operations as alleged by the Plaintiff and denied by the Defendant?

"If there is such an operation is there irreparable damages to Plaintiff's building? Are there clouds of dust escaping and damage resulting to Plaintiff's health? There will be evidence at trial other than Affidavit evidence - people can be questioned about it. There are serious issues to be tried therefore.
This leads us to whether an Interlocutory Injunction to be granted. Test is the balance of convenience. Where does it lie, Plaintiff or Defendant? What kind of harm is likely to arise?
If granted Defendant would not be able to make blocks until after trial. Is this quantifiable? It can be as the machine has a known output. Loss can be worked out. Proposed building is not yet commenced. Although some form of approval has been granted, unconditional approval has not yet been obtained. Defendant is taking steps to have his title modified. It is expected he will get it but it is not certain yet. The approval given was subject to there being no breach of covenant. So it is still not unconditional approval. It is impossible at this stage for the Defendant to say with certainty. From Defendant's point of view, if Interlocutory Injunction granted until trial and he succeeds his loss is quantifiable.
If Injunction is refused, the Affidavit evidence states that health of Defendant is affected. If Injunction is refused, can the Plaintiff recover if her health continues to deteriorate?
On the one hand, we have a case where money can compensate. On the other hand, we have a case where money cannot compensate.
The balance of convenience seems to be to favour the Plaintiffs.
Order in terms of paragraph 1 & 2 of Summons dated 1st February, save that in respect of paragraph 2, it does not apply to such reasonable user of machine and equipment as may be necessary to construct a building on the premises after all the necessary statutory approvals for such construction have been obtained and in keeping with the conditions of approval."

The appellant appeals the Order of the learned trial judge on 9 grounds of appeal. The first ground is that the order is too vague to be enforceable and ought therefore to be discharged.

The basis for this complaint is that the formal Order recites the learned trial judge as having added a proviso to paragraph 1 of the Order which states that -

> "This does not apply to such reasonable user of machinery and equipment as may be necessary to construct a building on the premises after all the necessary statutory approvals for such construction have been obtained and in keeping with the conditions of approval."

There is in my opinion nothing vague about the Order which has resulted from the addition of the proviso. The proviso relates to paragraph 2 of the Summons which was in these terms -

> "The Defendant by itself, its servants, or agents or otherwise howsoever be restrained from operation of a concrete block factory and/or a sawmill and/or any factory whatsoever on the Defendant's premises at number 4 and 6 Montrose Road in the parish of Saint Andrew."

The learned trial judge in his reasoning made it clear that what was to be restrained was the making of concrete blocks until trial. He said -

> "If granted (meaning the interlocutory injunction) the Defendant would not be able to make blocks until after trial."

He no doubt realised that the expression "and/or any factory whatsoever" might operate as an impediment to the proper and reasonable use of "machinery and equipment" which though coming within the definition of a factory were nonetheless necessary in the construction of a building. The use of such machinery and equipment were declared by the proviso to be outside the scope of the interlocutory injunction and could be operated before trial without the appellant being guilty of contempt of court provided that all statutory approvals had been granted for the construction of the Townhouses as planned and the use of the said machinery and equipment were necessary in the construction of the building. There is no vagueness as to whether the operation of concrete block making operations remain enjoined pending trial. It is clear that it remains enjoined.

This ground of appeal lacks merit and accordingly fails.

Grounds 2, 3 and 4 of the appeal were argued together. Mr. Muirhead submitted that the facts endorsed on the writ of Summons as reproduced in the Summons for interlocutory injunction and supported in paragraphs 9 and 10 of the affidavit dated January 26, 1990 and supplemental affidavit dated February 2, 1990 did not disclose a cause of action in actionable nuisance.

Before developing his submissions on these grounds, he submitted that as complained in ground 7, the respondents' affidavit evidence could not and ought not to have been relied on by the learned trial judge inasmuch as it stated merely conclusions and not primary facts. Thus, he submitted, the respondents have stated in paragraph 9 of their affidavit that the appellant was operating "a concrete block factory and a sawmill" which were the source of the alleged nuisance without condescending to facts from which the inference could be drawn that a concrete block factory and sawmill were being operated.

This submission may be quickly disposed of by saying that the complaint that the affidavit merely states conclusion is not justified. The statement that the appellant was operating a concrete block factory is clearly a shorthand way of saying that the appellant is making concrete blocks on its premises using a machine and this is a primary fact. Whether this operation is done in a factory or in a small zinc shed or whether it is a commercial enterprise or merely an activity to provide concrete blocks which will, at a subsequent date, be used in construction of a building do not detract from what the respondents are saying which is that concrete blocks are being made on the premises and a power-saw is being used and that these cause

excessive noise to their discomfort, and vibration and the escape of dust which have caused actual physical injury to their premises and are affecting their health to the extent that one of them is, now on medication.

Mr. Muirhead then returned to his main submissions on grounds 2, 3 and 4 by submitting that even if the affidavit evidence was not otherwise defective it still did not disclose a cause of action in nuisance. This is so because operations on land which constitute a normal user thereof according to technical standards and developments of the day, do not constitute nuisance if such operations are done with all reasonable care and skill, and all reasonable precautions are taken to avoid damage to one's neighbours. It is only where reasonable precautions are not taken that action lies, and even then, it is for recovery of damages. The cause of action lies in excessive and unreasonable user of the land. The affidavit of the respondents did not disclose any such excessive and or unreasonable user by the appellant of its premises, hence no cause of action was disclosed and no interlocutory injunction should have been granted.

In support of this submission Mr. Muirhead stated and relied on the principle of law extracted from Harrison v. Southwark and Vauxhall Water Company (1891) 2 Ch. 409 and Andreae v. Selfridge & Company Limited (1938) 1 Ch. 1. The headnote to the latter so far as is relevant states thus:

> "That no cause of action arises in respect of operations such as demolition and building, if they are reasonably carried on and all reasonable and proper steps are taken to ensure no undue inconvenience is caused to neighbours. In determining what is reasonable, methods of building and demolition must not be taken as stabilised, but new inventions and new methods may be reasonable in the altered circumstances and developments of the day."

and the headnote to the former states thus:

> " ... that the annoyance being temporary and for a lawful object did not amount to a nuisance at law."

Harrison v. Southwark and Vauxhall Water Company (supra) involved the sinking of a shaft on land adjacent to the plaintiff's land, under statutory authority. The defendants utilised lift-pumps in the process which were necessarily kept working night and day for about three weeks. The noise arising from the use of the said pumps seriously interfered with the comfort of the plaintiff and the other inmates of the plaintiff's house. The plaintiff issued a writ seeking an injunction and damages.

The case was tried by Vaughan Williams J who at p. 413 said -

> "The Plaintiff in my opinion, is not entitled to the injunction,,or the damages which he claims ..... In my opinion the Defendants have a good defence by reason of their use of reasonable skill and care and the absence of negligence.
> In the first place, it seems to me that if the Defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land they would not have been responsible as for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary use of land, a considerable amount of temporary annoyance to their neighbours, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance."

Andreae v. Selfridge & Company Limited (supra) involved building operation to wit the demolition of buildings and construction of a new building which involved excavation to a depth of 60 feet which the plaintiff alleged in her claim had been conducted by the defendants on their premises in such a way as by noise and dust to interfere with the reasonable and comfortable enjoyment by her of her adjoining premises. She

claimed damages. In the court below judgment was given for her on the basis that constructing a building by excavating 60 feet into the ground thereby letting loose insufferable quantities of dust and grit constituted an abnormal user of land and constituted nuisance in the circumstances. On appeal Sir Wilfred Greene M.R. after laying down the principle that common or ordinary use of land does not mean that the method of using land and building on it must in some way be stabilised for ever, proceeded to lay down the important principle relevant for purposes of this case. He said at page 9:

> "The first thing to be dealt with there, is whether or not anything which the defendant company did in connection with the second operation was a breach of its obligation towards its neighbours. The crucial matter is the matter of dust. I have already indicated that, to my mind, the plaintiff's evidence establishes that the quantity of dust and grit let loose by this operation was quite insufferable. The substantial point that is made with regard to it by Mr. Fergus Morton is: 'assuming that it was insufferable - this, of course, he does not admit, but I hold against him there - the plaintiff must put up with it, provided that all reasonable and proper precautions were taken to save annoyance to the neighbours.' Now that is a matter of evidence. I have listened attentively to the evidence that was read on the side of the defendant company with regard to it, and I am not satisfied that it has discharged the burden of proof upon it. I desire here to make one or two general observations on this class of case. Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say 'we will go on and do what we like until somebody complains'.. That is not their duty to their neighbours. Their duty is to take proper precautions and to see that the nuisance is reduced to a minimum." (emphasis added)."

Mr. George in reply, submitted that the principles established in the above cases are not applicable to the present case because those cases were dealing with lawful activities whereas the present case involves doing something which is in breach of the restrictive covenant applicable to the premises and is therefore unlawful. The activities being unlawful cannot be considered normal. Secondly the principle stated in Andreae v. Selfridge Company Limited (supra) relates to building operations and cannot be relied on by the appellant because by its clear admission it was not engaged in building operations but in activities which were preparatory to building operations.

In my opinion, Mr. Muirhead's statement of the law is correct but his application of it to the present proceedings is not well founded. The principle of law extracted from the cases relied on by Mr. Muirhead is not doubted. However, it is a principle which can be applied only at trial to determine whether a plaintiff's claim in nuisance ought to be dismissed as showing no actionable nuisance. The said principle cannot be invoked in interlocutory proceedings to determine as in the proceedings herein whether or not the respondent's claim in nuisance discloses a cause of action in "actionable nuisance". This would have been possible only if the burden of proof was on the respondents to establish by credible evidence that the injury they suffered arose from an "actionable nuisance." They would then be expected to plead and prove such facts as (a) abnormal user of the land by the appellant (b) absence of reasonable care and skill in the normal user by the appellant of its land (c) failure by the appellant to take reasonable precautions to reduce to a minimum damage to the respondents as its neighbours.

In such situation the absence from the claim of any of the facts required to be pleaded which would show the user of the land to be excessive and or unreasonable would render the claim liable to be struck out as showing no cause of action.

But the duty of establishing that activities by an owner or occupier on his adjoining premises are normal and usual and that such activities have been done with reasonable and proper care and skill is on that owner/occupier. In this case the duty is on the appellant. It is a duty which he owes to the respondents. This is clearly stated in Andreae v. Selfridge Company Limited (supra). This duty is discharged as a matter of evidence of which the burden of proof is on the appellant. This duty is discharged when the appellant adduces and establishes at trial evidence that it has discharged its duty to the respondents. If it succeeds the respondents' claim will be dismissed as showing no cause of action. But not until then and through the due process of trial can the respondents' claim be adjudged as disclosing no cause of action. To refuse the interlocutory injunction on the basis that the respondents' claim discloses no cause of action would be tantamount to a trial of the issues raised in the affidavits and the acceptance of the appellant's affidavit as evidence proving the discharge by it of its duty owed to its neighbours the respondents without giving the latter the opportunity of cross-examination and the opportunity of adducing if necessary evidence to refute the defence raised.

Further, as correctly submitted by Mr. George, the principle in the above cases can have no application to activities on land which are being challenged as not being normal and which prima facie do appear not to be normal having regard to the character of the neighbourhood.

These grounds of appeal for the reasons stated cannot succeed.

Ground 5 of the appeal complains that the Order in restraining the appellant in the user of its premises pending the grant of all necessary approvals went outside the scope of the Summons. If I understand the submission correctly the complaint is that since the appellant in any case had the right to build a dwelling house, then the interlocutory injunction should have restrained it from making concrete blocks pending the obtaining of all necessary approval only to the extent that the block making activities resulted in the production of concrete blocks in excess of that which would be required for the construction of a dwelling house.

This ground is patently without merit. The appellant stated that premises No. 4 and 6 Montrose Road were to be used not for the construction of a single dwelling house but for the construction of townhouses. The hearing of the interlocutory proceedings proceeded on that basis. No complaint ought now to be made on the basis that the order of interlocutory injunction should have been so structured to provide for the eventuality that the appellant might change its mind and decide to construct a single dwelling house. In any event the issue would still remain whether the user of the premises to make and cure concrete blocks prior to and in the preparation for the commencement of actual building operations constituted a normal user especially if there is complaint that the concrete block making activities constituted a nuisance.

Grounds 6 and 8 may conveniently be considered together. They complain in the alternative that even if the submissions on grounds 2, 3, 4 and 7 are held not to be well founded, nonetheless since on the basis of the applicable law a permanent injunction would not on the material facts be granted at trial, even if the

respondents were successful, an interlocutory injunction should not have been granted.

The applicable law relied on is the statement of principle in American Cyanamid Co v. Ethicon Ltd (1975) 1 All E.R. 504 at page 509 as construed by this court in National Commercial Bank Jamaica Ltd v. Dorothy Whitelocke S.C.C.A. 67/81 dated July 30, 1982 (unreported).

In American Cyanamid Co v. Ethicon Ltd (supra) Lord Diplock at page 509 said:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

This statement was construed in National Commercial Bank v. Dorothy Whitelocke (supra) per Campbell J.A. (Ag.) at page 7 as hereunder:

> "What I understand him (Lord Diplock) to mean is that in cases where a permanent injunction is sought as a relief in a claim which reveals a serious question to be tried, the judge must proceed to consider the balance of convenience unless on the basis of the material before him it is patently clear that even if the plaintiff succeeds in his claim he would never get the relief of permanent injunction sought but only damages in lieu thereof in which circumstances the application for the interlocutory injunction will be refused outright."

Mr. Muirhead's submission is premised on his earlier submission that the statement of impaired health of the respondents' in their affidavit is not evidence which can be acted upon by the learned trial judge and that in consequence the only material which he had before him which constituted evidence was that the

activities of the appellant caused inconvenience. Since this inconvenience is transient the respondents even if they were to succeed at the trial would certainly not be redressed by being granted the relief of a permanent injunction but rather would be redressed by being awarded damages. That being the position no interlocutory injunction was permissible.

This submission in my view ignores the fact that as revealed in the reasoning of the learned trial judge it was the concrete block making activities which included the power-saw operation which were being restrained. These activities prima facie conflict with the restrictive covenant which regulate the user of the premises. The only effective way of safeguarding against such continuing activities which in addition to constituting a breach of the restrictive covenant also constitute a nuisance is by the grant of a permanent injunction. The present case being one in which a permanent injunction could be granted at trial in the event of the respondents succeeding, the learned trial judge was not in error in not refusing outright the order for the interlocutory injunction.

From the foregoing I am of the view that the approach of the learned trial judge manifested in his reasoning hereinbefore recited constituted the correct approach and as he has not been shown to have erred in any point of law including in this regard the principle he applied in arriving at his conclusion nor is there any error in the manner of the exercise by him of his discretion I see no good reason for disturbing the Order made by him. I would accordingly dismiss the appeal with costs to the respondents to be taxed if not agreed.

FORTE, J.A.

I agree that the appeal should be dismissed with costs.

GORDON, J.A. (AG.)

I also agree that the appeal be dismissed with costs.

CAMPBELL, J.A.

Appeal dismissed with costs to the respondents to be taxed if not agreed.