

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2019/0227

BETWEEN:

FRANGIPANI LIMITED

Claimant

and

CALABASH LIMITED

Defendant

Appearances:

Mr. Justin L. Simon K.C. for the Claimant

Ms. E Ann Henry K.C. with her Mandi Thomas for the Defendant

2024: March 19

May 24

May 27th (Re-issued)

JUDGMENT

[1] **DRYSDALE J:** This matter concerns a claim in nuisance consequent upon the construction of two groynes.

BACKGROUND

[2] The Claimant's case concerns the unauthorized construction of two groynes on the seabed in front of the Defendant's property which the Claimant alleges caused erosion and devaluation of its property. The Defendant denied constructing the two groynes asserting instead that it only built up

the existing groynes. As such the Defendant denied that it was liable to the Claimant for any alleged damages.

THE PLEADINGS

The Claim

[3] The Claimant is a locally incorporated company and the owner of residential property registered as Parcel: 172 of Block: 41 2595A in the Registration Section: Barnes Hill & Coolidge.

[4] The Claimant contends that sometime in 2017 the Defendant illegally and without permission from the Planning and Fisheries Departments constructed two groynes on the seabed extending perpendicular to the beachfront of parcel 174. That accordingly the groynes have produced negative effects resulting in sand erosion and alteration of the shoreline of its parcel. Consequently the Claimant claimed relief in the form of a demolition order of the two groynes, an order directing the removal of all boulders, stones and gravel deposited on the seabed and in the vicinity or in close proximity to their respective parcels, an injunction restraining the Defendant from dredging any sand or other material without permission from the appropriate government official and damages for loss of diminution of sand on the beach frontage.

THE DEFENSE

[5] The Defendant is a locally incorporated company which owns the adjacent parcel of land registered as Parcel: 173 of Block: 41 2595 A in the Registration Section: Barnes Hill & Coolidge. The Defendant disputes the Claimant's assertion that it constructed groynes perpendicular to parcel 174. Instead, the Defendant, argues that it merely reinforced a pre-existing groyne that was originally constructed perpendicular to parcel 173, of which it is the registered owner.

[6] The Defendant denied that its actions were unlawful and further asserts that even in circumstances, non-compliance with the Physical Planning and/or Fisheries Acts does not automatically make it liable to the Claimant for any relief sought. The Defendant further denied that the groynes caused a negative impact as contended by the Claimant.

[7] The Defendant acknowledges that the Claimant requested the removal of the groynes but asserts that the parties jointly agreed to engage an expert to analyse the situation. According to the

Defendant, the expert's report does not support the claim made by the Claimant regarding the impact of the groynes.

RECENT DEVELOPMENTS

- [8] Despite the ongoing dispute, the Defendant applied to the Development Control Authority (DCA) for permission to replenish the groynes. However, the application was denied, and the Defendant was ordered to remove the groynes which order it complied with. Nevertheless, the Defendant maintains its challenge concerning the viability of the relief claim for damages.

THE EVIDENCE

- [9] Although witness statements were filed for several persons, at trial each party called one witness to give evidence on their behalf. The Claimant's case was supported by evidence from Romolo Bardin whereas for the Defendant its Director, Mr. Stefan Widensohler, gave evidence on its behalf.

The Claimant's Evidence

Romolo Bardin

- [10] The witness deposed that he is the Managing Director of Delfin Sarl, the holding company belonging to the Del Vecchio family which owns the Claimant. The witness states that he plays a crucial role in managing the affairs of the Del Vecchio family including their assets and business ventures.
- [11] The witness testified about his presence in Jumby Bay Island, Antigua in 2014, and the state of the properties. Particularly the witness states that there were no groynes on the beach and that both of the parties' properties enjoyed an uninterrupted, sized, sanded and beautiful beachfront. The witness referenced a picture taken by Google Earth in 2014 to provide visual support to his testimony about the state and condition of the beachfront.
- [12] In early 2018 he was contacted by the Del Vecchios who advised that the Defendant had erected two groynes on the eastern and western seabed of its property in an effort to protect the beachfront. This led to him contacting the Jumby Bay Board seeking clarification on whether permission had been granted for the construction of the groynes as no contact had been made with the Claimant

prior to their construction. It was revealed that no permission had been given to the Defendant from the Board or from the Development Control Authority for the construction of the groynes.

[13] The witness stated that he had been advised that in 2019 of the gradual erosion of the beachfront due to the construction of the groynes. The erosion became even more pronounced the following year and thereby eliminated the previously existing sandy beach and posed a potential danger to the retention wall.

[14] On 8th December 2020, the DCA recognised that the illegal construction of the two groynes caused significant threats to the environment and the neighbouring properties. The Fisheries Division as well found that the groynes negatively impacted the coastline impeding the normal longshore drift of sediment leading to erosion. Accordingly, the DCA demanded that the two groynes be removed by the Defendant.

[15] Following the removal of the two groynes it was observed that the seawater line retreated allowing for sand sediment to be noticed on the western seafront. In December 2020 the Claimant after receiving proper authorization from the DCA took proactive steps to restore the beachfront by importing sand from Barbuda. This has effectively replenished the beachfront and prevented further erosion, maintaining its original sandy nature.

[16] Similarly, the Defendant in 2021 obtained permission from the DCA to replenish its beachfront with imported sand. Despite the bans imposed on the Defendant, it was observed that the Defendant again attempted to construct a small groyne by adding rocks to the sand. The Defendant has refused to comply with the Claimant's several requests to remove these rocks.

[17] The unlawful actions of the Defendant have caused loss and damage including but not limited to the erosion of the beach and the resultant cost to replenish it and the inability of the Del Vecchio family to enjoy the property.

[18] On cross examination the witness admitted that he had only visited Jumby Bay in 2014. Thus, he exclusively relied on photos and information provided by others about the conditions at Jumby Bay to prepare the witness statement.

The Defendant's Evidence

STEFAN WIDEMSOHER

[19] The witness deposed that he is the Director of the Defendant which is a family-owned company which owns the property at Jumby Bay. Mr. Widemoser says that although the property is used by his family it is also used as an income generating property for vacationers.

[20] The witness states that there were two groyne like structures already in existence when the property was purchased, one on the eastern side close to the beachfront in front of the Claimant's property and the other on the western side and suggests that these structures were part of the natural headland rock formation.

[21] The eastward beach connection from the beach in front of the Defendant's property towards Jumby Bay main hotel was compromised to which he attributed the lack of sand and irregular rock supply. As a result, extensive research was undertaken to address the beach issues, including possible trapping sand to secure a nice natural beach. Based on the extensive research it was determined that *inter alia* DCA approval was not required for groynes outside property borders and the lack of the need for the Claimant's consent as the intention was to enhance by heightening and extending the pre-existing groynes which would have no negative effects on neighbouring beaches.

[22] After the passage of two major hurricanes in 2017, protecting the beachfront became even more pressing and the plan to enhance the two groynes was executed in or around September/October 2017. Subsequently in 2018 the Board of Directors of Jumby Bay, of which he was a director, faced a challenge with the Claimant alleging that the Defendant's actions caused complete erosion of the beach in front of the Claimant's property. In response the Board chose to hire Coastal Science & Engineering (hereinafter the experts) to analyse the situation with the beaches in front of the parties' properties and to explore effective alternatives for beach protection.

[23] Based on the recommendations of the experts it was agreed between the parties to implement option 1 which involved exchanging existing groynes with submerged breakwaters and adding significant beach nourishment. Sometime later in 2019 however the Claimant demanded that the Defendant demolish the groynes and stated that consideration of option 1 was contingent upon this.

[24] Notwithstanding a series of communication between the parties the Claimant remained insistent that the groynes be demolished otherwise legal action would be pursued. Subsequently the experts produced a Summary Report, Beach Assessment and Restoration which also contained Recommendations for Lots J-0 (beach in front of the Claimant's property) and J-1 (beach in front of the Defendant's property) and that report was forwarded to the Claimant. Despite this, the present legal action was commenced a few weeks later and highlighted the Preliminary Report from experts rather than the most recent and accurate report being the Summary Report. According to the Summary Report the groynes have not caused significant negative impacts on the beach in front of the Claimant's property.

[25] The dispute over the effect of the groynes worsened leading to an escalation in actions by the Claimant to have the groynes physically removed. Eventually this led to an urgent application to the DCA to repair some damage to the groynes by machinery hired by the Claimant. However, the DCA informed of its denial of the application and issued a further directive for the removal of the groynes and the rehabilitation of the shoreline. The eastward groyne was removed on 10th December 2020 and westward groyne on 18th January 2020.

[26] On 10th February 2021, the Defendant applied to the DCA for re-sanding of the beach in front of its property. On 23rd April 2021, the witness was informed that staff from the DCA was present on the beach conducting a site visit and that they confirmed the need for restoration efforts which included putting back rocks at the previous groynes locations particularly at the westward groyne.

[27] A few weeks later on 14th May 2021 employees attached to the Department of Environment undertook an inspection visit. The witness was advised by the CEO of the Jumby Bay Island Corporation Board that the employees upon visiting the beach in front of the Defendant's property

agreed that the re-dropping of the rocks on the previous groyne sites would be advisable to better hold the sand in position and avoid erosion.

[28] On 19th May 2021 the DCA Deputy Chair was informed of the planned re-sanding of the beach and the replacement of the rocks at the previous groynes structures. The Defendant was advised that the re-sanding could take place without the presence of the DCA but that the DCA would schedule a site visit for several days after the expected completion of the re-sanding. Five days later the Deputy Chair was informed of the restoration work including the re-positioning of stones to achieve as closely as possible the pre groyne enhancement status. However, the Defendant was informed that the stones would have to be removed as approval was only granted for the re-sanding and that all future work at the Defendant would require DCA supervision on site.

[29] Subsequently on 18th June 2021 the Defendant received written communication from the DCA confirming satisfaction with the outcome of the re-sanding work and stone removal.

[30] The Defendant expresses that the claim is unmeritorious as the issue of the groynes has been settled by the DCA and the groynes have been removed. Further that all beaches are public and owned by the Crown, meaning that private individuals have no ownership rights over them, therefore any issues related to public beaches fall under the jurisdiction of the authority designated by the Physical Planning Act, rather than being pursued by private individuals.

[31] On cross examination the witness expressed that the rationale for heightening the groyne was to enhance protection for the Defendant's property's beachfront. He stated that thereafter an improvement in the stabilization was observed. The witness however, denied any adverse impact on the Claimant's property, noting no reduction in beach area in front of it.

[32] The witness admitted to being aware of the Claimant's complaints regarding the effect of the groynes on it's property's beachfront. However, the witness seems to be uncertain regarding whether letters in response were sent, with the witness initially suggesting they were sent but later expressing uncertainty about the contents or whether they were sent at all.

[33] The witness also admitted to being aware of the findings of the Environmental Division which stated that the groynes were illegally constructed and posed an environmental risk but stated that the Defendant had complied with the directives issued and the groynes had been removed.

[34] The witness initially acknowledged that there was a noticeable difference in the beach after the groynes were removed, including more sand in front of both properties. However, later in his testimony, the witness attributed the improvement to the beach in front of the Claimant's property to the re-sanding or renourishment of that beach. The witness suggested that he had as recently as today observed the two beaches and that the replenishment of sand undertaken by the Claimant has eroded. He also stated that the Claimant is now in a worse position than when the groynes were present. He however, admitted that the Defendant had not provided evidence of the continued erosion of the beach in front of the Claimant's property.

[35] Finally, the witness asserts that despite the agreement with Coastal Science & Engineering (CSE) being signed by him for the Defendant, this was done for the mutual benefit of the parties.

THE EXPERT

[36] Two reports being the preliminary report and a subsequent summary report were filed in these proceedings. They were both co-authored by Dr. Timothy Kana and Steven Traynum of Coastal Science & Engineering Inc. who later provided a Summary Expert Report which was provided in compliance with an order of the court. As such the Summary Expert report appears to be the expert report and the most reliable report given the passage of time and the express indication that this represents the expert findings for these proceedings.

THE SUMMARY EXPERT REPORT

[37] The Summary Expert Report was prepared in compliance with the order of the Master dated 10th January 2022 in relation to these proceedings. The report documents being initially retained by JBIC for the purpose of providing an assessment of the shoreline condition and beach stabilization measures around the beach in front of the parties' properties. The Summary Expert Report is not a new report but a compilation of two previous reports, one being the preliminary report and the other the summary report.

[38] The expert states that the coastal geologic processes play a pivotal role in determining the condition of the beach. The experts' states that the J-0 and J-1 are both positioned near and along the southern headland of a characteristic double headland beach which encompasses approximately 1500 linear feet of sandy shoreline along the West Coast of Jumby Bay Island. The report states that a typical headland beach has a concave shoreline, with the greatest sand near the center of the beach, and a reduced width closer to the headlands. It also states that typically at the headlands of these beaches are rock outcrop or a slightly submerged terrace of calcium carbonate or related limestone rock and little to no sandy beach due to wave focusing on the outcrop are features of such a beach. The report states that based on historical imagery of the lots at J-0 and J-1 that there has generally been little to no dry sand beach along the southern end of the lots. The beach fronting lot J-0 which is in front of the Claimant's property, has exhibited a sand bulge near the center of the lot and a narrower beach width at the southern end, especially adjacent to lot J-1. This consistent pattern endured from 2003 to 2017 before the installation of the two groynes on lot J-1 and through to 2019 when the detailed surveys were conducted.

[39] Bulges or salient are frequently observed on Caribbean "pocket" beaches bordered by headlands. These formations arise due to nearby underwater features like mounds or reefs which after incoming wave patterns leading to sand accumulation on the lee side of the obstruction. Beach sections that are situated away from the lee of the shallow areas or between two reefs are susceptible to erosion. The report states further that portions of lot J-0 were highly eroded before the groynes were installed on lot J-1.

[40] The report provides a comprehensive assessment indicating several key findings:

1. The beach is generally depleted of sand.
2. Net sand transport occurs north to south, positing the groynes at the Defendant's lot downcast of J-0
3. Historically J-0 maintained a bulge due to an offshore mound acting as a submerged breakwater causing an accumulation of sand in its lee.

4. The small scale of the groynes complicated distinguishing man-made erosion impacts from natural one.
5. There is no evidence suggesting that the man-made beach stabilization measures (the groynes) have exacerbated erosion along J-0, which is upcoast from the groynes.
6. No evidence of damage of the rock reverent along lot J-0 during the site visits were observed.

[41] The expert who presented the summary report was questioned by counsel for the Claimant on not having visited the site since early 2019 and not having completed any further analysis since the initial summary report. The expert responded, highlighting reliance on remote monitoring methods such as Google Earth imagery, to assess changes in beach conditions. Despite not physically visiting the site since early 2019 or completing further analysis, the expert noted observations from images suggesting erosion and subsequent restoration of the beach. The expert also anticipated that the removal of the groyne might lead to temporary sand redistribution from the J-1 to the J-0, but expected eventual erosion to return the beach to a similar condition.

FINDINGS OF FACT

[42] Upon review of the evidence, I make the following findings of fact:

- i. In 2017 the Defendant illegally constructed two groynes boarding the beach frontage of its property with the eastern groyne separating the Claimant's and Defendant's beach frontage.
- ii. After the commencement of these proceedings the Defendant made an application to the DCA to replenish the groynes. The DCA deemed that the construction of the groynes was illegal and thus rejected the application for replenishment and further directed the Defendant to completely remove the groynes.
- iii. The Defendant complied with the order of the DCA for the removal of the groynes. The eastern groyne bordering J-0 was removed on 10th December 2020 and the western groyne was removed on 18th January 2020.

THE ISSUES

[43] The issues for determination are as follows:

- i. Whether the illegal construction of the groynes gave rise to a sustainable claim of private nuisance?
- ii. If yes, what relief if any is the Claimant entitled to?

ANALYSIS

Whether the illegal construction of the groynes gave rise to a sustainable claim of private nuisance

[43] The Claimant relied heavily on the finding by the DCA that the groynes were illegally constructed to present a claim for private nuisance. However, the Claimant's presupposition that a finding by the DCA of the groyne being illegally constructed automatically grants the right to bring an action for private nuisance is flawed for several reasons. Firstly, the determination of illegality by the DCA pertains to regulatory compliance, with its focus on whether the construction adhered to environmental and regulatory regulations.

[44] Moreover, the fact that the DCA has the right to deem a structure as illegal, which pertains to public law focusing on regulatory compliance, does not necessarily translate into the Claimant having a private right to bring a claim for private nuisance unless a statute explicitly grants such a right. If a statute does not create such a right the Claimant cannot assume that such a right exists based solely on the DCA's findings. Lord Browne-Wilkinson in the case of **X Minors v Bedfordshire County Council**¹ helpfully explains that:

"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a

¹ [1995] 2 A.C. 633

number of indicators. If the statute provides no other remedy of its breach and the parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action...However the mere existence of some other statutory remedy is not decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy."

[45] There is no indication that either the Planning or Fisheries Acts which the Claimant cites explicitly grants individuals the right to initiate legal proceedings to enforce private rights. There being no provision granting private individuals the right to seek remedies for breaches of the regulations that the DCA enforces, it logically follows that the Claimant does not have an inherent right to commence an action for private nuisance based on the DCA's findings of illegal construction of the groynes. This means that the Claimant must independently establish the traditional elements of private nuisance, rather than relying on the regulatory breach identified by the DCA.

[46] To succeed in a claim for private nuisance the Claimant must first establish an interest in the affected property coupled with a substantial and unreasonable interference with its property. This interest must be a proprietary interest which includes ownership, a leasehold or another legal interest in the property as was demonstrated by the case of **Malone v Laskey**² which concerned a claim for nuisance by a licensee. In that case, the claimant lived in a house owned by her husband's employer where the husband was a subtenant. A tank attached to the bathroom wall became insecure due to vibrations from an engine used by the defendants on their adjoining property. The claimant brought a claim in nuisance asserting that the defendant's engine vibrations caused the heavy iron bracket installed by the defendants to support the toilet tank to fall and injure her whilst using the bathroom. The court found that the claimant as a licensee could not sue in nuisance as she lacked the necessary interest in land affected by the alleged nuisance, thus having no cause of action in the

² [1907] 2 KB 141

case. Therefore, permission to merely occupy property is insufficient to establish the right to protection against private nuisances.

[47] The Claimant is a company which owns a villa adjacent to the beachfront. Whilst admittedly the location of the villa presents it with ideal access to the beachfront this does not inherently indicate ownership or proprietary interest in the beachfront itself. Since all beaches in Antigua are public beaches pursuant to section 4(1) the Beach Control Act³, the Claimant cannot demonstrate ownership and instead must prove the existence of a lease of the beachfront or other legal interest. The Claimant has failed to do so. The failure of the Claimant to prove this undermines its ability to establish a proprietary interest in the land which is crucial to a claim for private nuisance. This alone is fatal to the claim for damages for private nuisance.

[48] However, even if the Claimant were to establish a proprietary interest, the Claimant has still failed to demonstrate that the construction of the groynes caused substantial damages for which the Defendant is liable. Although the Claimant questioned the expert at length on the preliminary report, it is important to note that a summary report was issued after the preliminary report. Moreover, the expert produced an expert summary report which took into account both the preliminary and summary report and making this summary expert report as the final and most reliable source for consideration.

[49] A significant point in the expert summary report is that prior to the construction of the groynes the western end of the beach in front of the Claimant's property and the beach along the eastern section maintained a similar condition after construction. The expert states that the natural state of the beach features a bulge in the centre with minimal sand at the ends, and that the beachfront is subject to erosion by tide and natural forces. Furthermore, that there is no concrete evidence that the construction of the groynes has negatively impacted the beach condition in front of the Claimant's property. Based on the evidence presented, the Claimant has not successfully demonstrated that the groynes are the proximate cause of erosion at the beachfront of its villa. Consequently, the

³ "...no person shall encroach on or use, or permit any encroachment on the use of, the foreshore, or the floor of the sea, for any public purpose or for or in connection with any trade, business, commercial enterprise, except as provided by section 10 without a licence granted under this Act."

Claimant has not met the required threshold for substantial damage to its property, which is necessary to sustain a claim in private nuisance.

[50] The court, having ruled that the Claimant has not established a sustainable claim, finds it unnecessary to consider what damages or relief the Claimant might have been entitled to. Nonetheless, the court notes that the Claimant's request for relief, including damages for the renourishment of the beach and compensation for the Del Vecchio Family of their loss of enjoyment of holidays could not have been proven as there is no evidence to substantiate these claims. Further in relation to the loss of enjoyment of holidays, since the claim is that of the Claimant company, the family cannot independently seek damages.

Order

[51] In light of the foregoing, it is hereby ordered as follows:

- a. The Claimant's statement of claim is dismissed
- b. The Defendant is awarded prescribed costs
- c. Statutory rate of Interest

Justice Jan Drysdale

High Court Judge



By the Court

Registrar