

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2010/0053

BETWEEN

(1) ELTON SCATLIFFE

First Applicant

(2) ANNETTE SCATLIFFE

Second Applicant

And

(1) DWIGHT FLAX

First Respondent

(2) EBONY AND IVORY CONSTRUCTION LIMITED

Second Respondent

Appearances:

Mr. William Hare and Mr. Daniel Waldek of Forbes Hare for the Applicants

Mr. Sydney Bennett QC and Ms. Anthea Smith of J.S. Archibald & Co. for the Respondents

2010: March 20, 22
2010: April 07, May 31

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** On 19 March 2010, the First Applicant and the Second Applicant (collectively “the Applicants”) applied for an interim injunction pursuant to Part 17.1(1)(b) and 17.2(1)(b) of the Civil Procedure Rules (“the CPR”) to prohibit the First Respondent and the Second Respondent (collectively “the Respondents”) from conducting their business in such a manner as to cause a nuisance to the Applicants.

Background facts

- [2] The Applicants are husband and wife. On or about September 2003, the First Applicant purchased Parcel 270, Block 4840B with a house on it in Virgin Gorda ("Parcel 270") with a view to making it a home for himself and his wife in what they believed was a quiet, residential and affluent neighbourhood.
- [3] At the time of the purchase, the First Respondent was the beneficiary of a registered caution in, and occupier of Parcel 444, Block 4840B, Virgin Gorda ("Parcel 444") which is directly opposite to Parcel 270. The Second Respondent is a limited liability company, registered in the BVI on 11 July 2007. The Respondents have been in occupation of Parcel 444 since 1997 and from those premises they have carried on the operation of trucking, heavy equipment rental, garage and tyre repairs, concrete production, storage of sand, aggregate, cement and other particulate matter and storage of diesel. Their operations over the years have increased significantly to what they were when the Applicants built their home on Parcel 270.
- [4] The Applicants alleged that since October 2004, the First Respondent, and since 11 July 2007, the Second Respondent and /or their employees and/or agents acting in the course of their employment and/or agency have wrongfully caused and/or permitted unreasonable volumes of noise as well as noxious and offensive fumes, vapours, smoke, dust and other particulate matter, to be emitted from Parcel 444 unto Parcel 270 during both the hours of daylight and darkness, on both business days and holidays on a frequent basis so as to cause a nuisance to the Applicants. The particulars of nuisance are particularized at paragraph 2 in the Statement of Claim filed on 17 March 2010.
- [5] In their affidavit evidence with contemporaneous documentary evidence, the Applicants alleged that over the years, the nuisance has continued and it began to affect their health, particularly that of the First Applicant. As a consequence, the Applicants wrote several letters seeking redress from various authorities. They even complained to His Excellency, the Governor, the Chief Planner and the Ministry of Health and Social Development/ Environmental Health Division. Any form of redress that they expected might have been slothful but it certainly did not fall on deaf ears. On 14 April 2009, the Applicants received a

letter from the Environmental Health Division. The quintessence of that letter was that *“relocation of the construction activities on the property had begun and should be completed by 30 June 2009”*.

- [6] The Applicants were assured that the relocation exercise would be monitored by the Environmental Health Division in order to ensure compliance with the deadline. Nine months later, the Second Respondent has not been relocated. Although relocation efforts have commenced, it is a far way from being completed.
- [7] At the hearing, the application for injunctive relief was short-circuited as the Respondents gave an undertaking to cease all operations and activities on Parcel 444 no later than 1 October 2010. That concession did not deter both parties from painstakingly reminding the Court of the principles expounded in the landmark case of **American Cyanamid v Ethicon**.¹ These principles have been adopted by this Court in **Victor International Corporation (BVI) Ltd v Spanish Town Development Company Ltd**.²
- [8] The parties were also able to arrive at a consensus on case management directions with respect to the hearing of the substantive matter. However, they were unable to agree on the nature of an order which should be made in the interim so that the Applicants can live a peaceful and quiet life enjoying the amenities of a home and at the same time, to ensure that the Respondents continue to operate their business as a going concern so as not to cause them undue hardship in these difficult economic times.
- [9] Consequently, this decision mainly focuses on the nature of the interim order. In an effort to fully appreciate the nature of the Respondents' business and the proximity of the Applicants' home to the alleged nuisance, the Court visited the locus in quo. Such a visit is not unprecedented whether before or after the Court makes an Order. As I earlier stated, a site visit was wholly helpful. Both parties and their respective Counsel were present.
- [10] Noteworthy were the following observations: (1) the area surrounding Parcel 270 and Parcel 444 is presently being used for both industrial and residential purposes as it was

¹ [1975] AC 396.

² BVIHCV2007/0293 at paragraphs [12] to [15].

never zoned; (2) there are other industrial operations in the near vicinity; (3) it appears that the Respondents' operations are causing the Applicants not to enjoy the comfort and peace of their home because the Applicants have to keep their master bedroom windows closed at all material times and (4) the operation of the air-compressor and air tools, for example, jack hammers and electrical saws create some degree of noise which could be incommodious.

[11] There is no doubt that some sort of nuisance exists but in my view, both parties have embellished their respective case. That said, I believe that if good sense had prevailed, this matter could not have settled entirely and amicably by the parties.

[12] The present position is that the Respondents have already moved most of the major industrial operations such as concrete production, storage of sand, aggregate, cement and other particulate matter and storage of diesel to another location at Little Dix Bay. I expect this relocation exercise to continue over the ensuing months so that the Order is fully complied with by the stipulated deadline. As there appears to be a lot of acrimony between the parties and this was evident to the Court when it visited the locus in quo, in order to keep the peace, I make the following orders:

The Order

AND UPON the First and Second Respondents undertaking through their counsel that they will cease all operations and clear Parcel 444, Block 4840B, Virgin Gorda (Parcel 444") of all vehicles and industrial machinery on or before 1 October 2010

IT IS ORDERED THAT:

(1) The Respondents, whether by themselves or by their employees or agents, are prohibited from:

- a. operating and/or permitting the operation of vehicle horns and vehicle stereos in such a manner as to discharge very loud or deafening noises from Parcel 444; or

- b. carrying on and/or permitting to be carried on their business in such a manner as to cause and/or permit the discharge of noxious and offensive fumes, vapours and other particulate matter (including, but not limited to, diesel fumes; cement dust; paint fumes; sand and dust) from Parcel 444;
- (2) Save for operations or activities carried out between the hours of 7:30 a.m. and 6:00 p.m. Monday to Friday and from 8.00 a.m. to 1.00 p.m. on Saturdays, the Respondents, whether by themselves or by their employees or agents, are prohibited from:
 - a. operating and/or permitting the operation of an air-compressor on Parcel 444;
 - b. operating and/or permitting the operation of any air-tools (including, but not limited to, air-drills and jackhammers) on Parcel 444;
 - c. operating and/or permitting the operation of any high-power tools (including, but not limited to, jackhammers, electrical saws and welding equipment) on Parcel 444;
 - d. operating and/or permitting the operation of any heavy vehicles (including, but not limited to, earth movers, cement mixers and backhoes) on Parcel 444 and
 - e. carrying on and/or permitting to be carried on their business in such a manner as to cause and/or permit the discharge of loud, very loud or deafening noises from Parcel 444.
- (3) A penal notice be attached to clauses 1 and 2 of this Order, and to the undertaking provided by the Respondents.
- (4) The Respondents, whether by themselves or by their employees or agents, are prohibited from:
 - a. Parking vehicles or operating machinery within 30 feet of Parcel 270; and
 - b. Causing or permitting the engine of any vehicle on Parcel 444 to be left idling for longer than 15 consecutive minutes.
- (5) The following directions be given for the trial of this matter:
 - a. There be standard disclosure by 14 May 2010;
 - b. There be inspection by 21 May 2010;
 - c. Witness statements shall be exchanged by 25 June 2010;

- d. The trial shall be listed for the first available date after 1 October 2010 with a time estimate of 1 day.

(6) The Applicants' costs of this application to be costs in the cause.

PENAL NOTICE

TAKE NOTICE THAT IF YOU FAIL TO COMPLY WITH THE TERMS OF THIS ORDER, PROCEEDINGS MAY BE COMMENCED AGAINST YOU FOR CONTEMPT OF COURT, AND YOU MAY BE LIABLE TO BE IMPRISONED AND/OR HAVE YOUR ASSETS SEQUESTERED

Postscript

- [13] The present case accentuates the difficulties and challenges which exist when lands are not zoned. This has resulted in lands being utilised in an ad-hoc manner with industrial operations being carried out on lands contiguous to residential premises and vice versa. Hence, the potential for conflicts.
- [14] It is anticipated that the proper authority will step in to rectify the present situation in order to inhibit recurrences.

Indra Hariprashad-Charles
High Court Judge