

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT LUCIA

CLAIM NO.: SLUHCV 2001/084

BETWEEN

JOHNSON PHILLIP

Claimant

And

GASTON TIMOTHY

Defendant

Appearances:

Mr. C. Foster for Claimant

Ms. L. Verneuil and Ms. M. Julianna Charles for Defendant

**2004: November 25, 26
 December 15**

JUDGEMENT

Background Facts

[1] **EDWARDS J:** By this application filed on the 16th November 2004, 8 days before the trial of the substantive action for nuisance was scheduled to begin, the Claimant Mr. Phillips seeks the following Injunctive Relief:

- (1) That the Defendant by himself or by his servants and/or agents be restrained from spraying large quantities of toxic furniture spray and to cease loud noises from power equipment and a Hi-Fi System operated on his adjoining property to that of the applicant and alleged to be less

than 10 meters away from the Claimant's dwelling house at Bois d' Orange in the Quarter of Gros Islet.

- (2) That the Defendant abides by the recommendations of the Senior Environmental Health Officer Mr. Joseph Medard in his report on *"Investigation of Complaint Spray Fumes from Manufacturing at Timothy Gaston's Furniture Shop at Bois d' Orange"* dated 28th May 2003 and in particular recommendations (1) and (3) of the said report.

- [2] By his Claim filed on the 12th October 2000 and Amended Statement of Claim filed on the 16th June 2004, Mr. Phillips is seeking Special Damages of \$5,000.00, Damages, Legal Costs and the following remedy:

- (1) A declaration that the Defendant is not entitled to keep his business operation its structure and premises in such a manner as to allow or facilitate the emission of offensive smell, chemical substances, vapors, loud noise and loud music so as to be a nuisance to the Claimant.
- (2) An Injunction restraining the defendant by himself, his servants or agents or otherwise however from continuing to maintain and keep his business operation and premises so as to be a nuisance to the Claimants.
- (3) A declaration that the Defendant is to abide by the entire recommendations of the Chief Environmental Officer dated 22nd May and 24th July 2003.

- [3] The Defendant Mr. Timothy, by his Amended Defence filed on the 30th June 2004 has denied Mr. Phillips' allegations of Nuisance.

- [4] In substance, Mr. Timothy has denied that his commercial operations and other activities on his premises has affected prejudicially the health or safety of Mr. Phillips, or disturbed or prevented him from enjoying his property. He has put Mr. Phillips to prove that he is in breach of any Statutory Duty under the Public Health Act No. 8 of 1975 and the Public Health (*Nuisance*) Regulations Statutory Rules and Orders No. 10 of 1978.

- [5] The trial began on the 23rd November 2004 and continued on the 25th November 2004. At the request of Counsel for Mr. Phillips, I adjourned it to the 24th and 25th January 2005 for the testimony of Dr. Ulric Mondesir Mr. Phillips' doctor, and completion. I then proceeded to hear the Application for Injunction.

- [6] The evidence in Mr. Phillips' supporting Affidavit mirrors the allegations in the Amended Statement of Claim and his testimony at the trial. It also speaks about more recent acts of nuisance which Mr. Phillips complains, occurred on the 5th, 6th and 7th November 2004. The documentary exhibits are the same that Mr. Phillips has relied on at the trial.

- [7] Mr. Phillips deposed that on Friday, Saturday and Sunday of the weekend of the 5th November 2004, Mr. Timothy sprayed and used his loud machinery all day with much intensity from 8:00 a.m. to 6:00 p.m.

- [8] Further, that Mr. Timothy played his music even louder than usual over the weekend.

- [9] He complained about not being able to sleep at nights, his constant illness, and not being able to enjoy the use of his property and home. He is a 73 years old retiree who since 1995 has had pulmonary problems.
- [10] The Medical Certificate of Dr. Ulric Mondesir dated 18th May 2004 states that these pulmonary problems are directly related to inhalation of environmental hazardous varnish/paint spray particles which causes coughing episodes, broncho-spasms, and broncho-constriction; resulting in marked shortness of breath, culminating in acute/chronic obstructive pulmonary disease. Mr. Phillips has to take medication continuously and use an inhaler.
- [11] Mr. Timothy testified orally at the hearing, denying the nuisance allegations. He described the conditions under which he sprayed only a few pieces of furniture, for a total of approximately 3 ½ hours on the weekend of the 5th, 6th and 7th November 2004.
- [12] He testified that because of the heavy continuous rain he was unable to do much spraying as alleged by Mr. Phillips. He admitted playing his stereo, but denied that it was very loud or excessive.
- [13] I visited the premises of both parties on the afternoon of the 25th, where I had the benefit of seeing the enclosed spraying booth, the extraction fans, the water drum on Mr. Timothy's premises, and his furniture shop where the sanding and sawing goes on, in the presence of the 3 Counsel.
- [14] I remained by the road in my car close by to the spraying booth for about 22 minutes while Mr. Timothy sprayed chairs.
- [15] I then went over to Mr. Phillips' premises with Counsel for the parties. I went to the back of his premises to observe an extremely high zinc fence separating Mr. Timothy's premises from his. From Mr. Phillips' premises I heard Mr. Timothy's stereo/radio playing loudly. I could also hear the sanding and sawing machines clearly, but not loudly. I remained at Mr. Phillips' premises for about 22 minutes. I smelt a very faint furniture spray odour on 2 occasions for a few seconds while touring Mr. Phillips' garden area at the back and side of his premises.
- [16] Upon returning to Mr. Timothy's premises at 3:55 p.m. he completed the spraying exercise I had requested, spraying a total of 17 chairs which were displayed. I smelt the furniture spray odour at Mr. Timothy's premises for the 4 minutes that I remained there up to the time of my departure.
- [17] On resuming the hearing the following morning Mr. Timothy was examined further as to the events and the observations I made at his premises
- [18] Mr. Timothy's evidence was that he specialized in spraying tables and chairs on purchase orders from Courts. The largest size table is 3 ft X 6 ft and this size table is sprayed in the spray booth. He said he can do around 34 to 35 chairs in a day. When business is good, in 1 week he sprays every day, starting at 10:00 a.m. and finishing at 3:00 p.m.

- [19] Mr. Timothy testified that when business is not good he starts spraying at 10:00 a.m. and finishes at 1:00 p.m. The Courts work is ongoing, and seasonal. He gets purchase orders from Courts depending on their inventory and the time of the year. On the occasions that he gets no purchase orders from Courts, things are slow, he just stays home and does nothing.
- [20] He testified that the 17 chairs he had sprayed with the first coat of spray, would take about 1 hour for sanding. After sanding them he would spray them with the 2nd coat of spray for about 1 ½ hours.
- [21] He admitted that 5 years ago he was using varnish to spray and this usually took 4 to 5 hours to dry. But he now uses only fast drying lacquer for spraying furniture.
- [22] He insisted that he always stops spraying by 4: 00 p.m. and never goes beyond 4:00 p.m.
- [23] He explained that the drum of water which absorbs the spray fumes from the extraction fans is emptied fortnightly to 3 weeks depending on his activity. He testified that Mr. Medard, the Environmental Officer advised him how to dispose of the water in the drum. In compliance with this advice, he digs a hole and pours the water in it.
- [24] Mr. Timothy denied under cross examination that on the afternoon that the Court visited, he had used a low pressure spray gun or a different spray that was less strong. He denied sealing the holes on the top of the vent of the spraying booth only when he knew the Court was visiting. He said he bought fireproof sheet rock and sealed it before. He denied putting foam over the drum water at the last minute because the Court was visiting.
- [25] A Notice to Mr. Timothy dated 28th July 2003 from the Chief Medical Officer Dr. Mc. Donald Chase forms part of the documentary exhibits tendered by Mr. Phillips. This Notice informed him that the inspections carried out by Environmental Health Officers on the 28th May 2003 and 4th July 2003 revealed that certain existing conditions existing at his workplace were in breach of the Public Health (Nuisances) Regulations No. 10 of 1978 and Section 47 of the Occupational Health and Safety Act No. 10 of 1985.

Submissions and Law

- [26] Relying also on these alleged breaches and Mr. Timothy's admission that he received no planning permission to carry on his commercial business on his premises, Counsel Mr. Foster has submitted that Mr. Timothy's activities are unreasonable in a predominantly residential area.
- [27] Learned Counsel Mr. Foster argued that to allow Mr. Timothy to continue his operations in breach of the Ministry of Health Regulations would be to subject Mr. Phillips to a continuing and permanent nuisance. Mr. Foster focused in particular on Mr. Joseph Medard's report in which he recommended that the siting of Mr. Timothy's operations should be at least 200 feet from residential premises as required by Standard Operational Procedures.
- [28] On the other hand, Learned Counsel Ms. Verneuil's submissions have focused on and applied the settled guidelines for dealing with Interlocutory Injunction applications, laid

down by Lord Diplock in American Cyanamid Co –vs- Ethicon Limited [1975] A.C. 396 and fine-tuned in subsequent cases: (Cayne –vs- Global Natural Resources PLC [1984] 1 ALL WR. 225; Cambridge Nutrition Limited –vs- BBC [1990] 3 ALL ER 523; Series 5 Software –vs- Clarke [1996] 1ALL WR 853)

- [29] Applying the first guiding principle, I conclude that since the trial has already begun, there is no doubt that there are serious issues being tried between the parties.
- [30] As the application is interlocutory, I shall not attempt to finally determine the rights of the parties. I am enjoined by the guidelines to consider where the balance of convenience lies.
- [31] I am required to consider whether, if Mr. Phillips were to succeed at the trial, he could be adequately compensated by an award of damages for the injury sustained between the 16th November 2004 and the completion of trial.
- [32] It is obvious to me that damages may not be an adequate remedy for Mr. Phillips, given his age, the state of his health, and the allegations that further exposure to the furniture spray fumes could cause his death.
- [33] I therefore must consider the nature of the injury which Mr. Timothy would suffer if I granted the injunction and ultimately, he was successful at the trial.
- [34] His Counsel Ms. Verneuil has identified the various hardships that Mr. Timothy will encounter, if he is restrained from operating his business on his premises. He has no other livelihood, he has mortgage commitments and other financial obligations. He has 2 small children to provide for. He employs 7 persons who would lose their jobs. He stands to lose the contract he presently has with Courts. The chance of securing alternative employment is remote given the unfavourable economic down turn generally for business ventures in St. Lucia presently.
- [35] Ms. Verneuil submitted that Mr. Timothy stands to lose an unquantifiable amount of damages. Counsel argued further that even if his damages could be quantified, the Court should not grant the injunction in circumstances where Mr. Phillips has not given an undertaking for damages.
- [36] Learned Counsel Mr. Foster's response to this submission is that although Mr. Phillips is a pensioner with limited means, and may not be able to pay damages if Mr. Timothy succeeds at the trial, this should not prevent the Court from granting an Injunction. Relying on the authority Allen and Others –vs- Jambo Holdings Limited and Others [1980] 2 WLR 1252. Mr. Foster submitted that in the absence of an undertaking for damages, an Injunction could be granted in a proper case. He contends that having taken notice of the financial resources of Mr. Phillips, his impecuniosity ought not to bar him from the protection of the Court where his very life may depend on the protection of the Court. Mr. Phillips is entitled to the peaceful enjoyment of his property, and his application is a proper case, given the supporting documentary evidence from the Government Departments Counsel argued.

- [37] The case cited by Mr. Foster was dealing with a Mareva Injunction which was sought by the widow, children and executors of a man, killed by the propeller of an Aircraft within the U.K. jurisdiction, which was owned by a Nigerian Company. The Court considered the sufficiency of the cross-undertaking in damages which was inevitably limited to the assets of the executor which was no more than the present inflated value of a house. Templeman L.J. opined that to deny an Injunction in these circumstances would be to deny a measure of assurance to the widow which she was entitled to have. It was held that on the facts of the case the Mareva Injunction preventing the aircraft from being removed out of the jurisdiction ought to continue until the Nigerian Company provided satisfactory security to ensure that any award of damages against them would be met.
- [38] In my view, this authority does not assist Mr. Phillips' situation.
- [39] The absence of any undertaking from Mr. Philips to protect Mr. Timothy is a matter to be weighed against Mr. Phillips' Claim in determining the risk of doing injuries.
- [40] In these circumstances, the guiding principles state that I can go on to consider the prospects of Mr. Phillips succeeding in the action: **(NWL Limited -vs- Woods [1979] 3ALL WR 614, 625 Per Lord Diplock)**.
- [41] However, in light of the status of the case, I consider it prudent to refrain from doing this.
- [42] Apparently, Mr. Phillip has been able to tolerate the state of affairs existing before the 5th, 6th and 7th November 2004. This seems to be the reasonable inference to draw from the absence of other Interlocutory applications since the expiration of the Injunction dated 8th November 2000.
- [43] The burden of proving that Mr. Phillips will suffer greater inconvenience by the Court's refusal to grant the Interlocutory Injunction than that which Mr. Timothy will suffer if it is granted, lies on Mr. Phillips. He has not discharged his burden.
- [44] I am not satisfied that on the balance of convenience an Interlocutory Injunction should be granted before completing trial, though the application otherwise appears proper.
- [45] I therefore direct that Mr. Timothy and Mr. Phillips continue to keep the peace. I urge Mr. Timothy to confine his furniture spraying activity and the use of his sanding and sawing machines between 8:00 a.m. to 4:00 p.m., and endeavor to avoid such operations completely on Sundays. I also urge Mr. Timothy to reduce the volume of his stereo set when he is playing it, particularly between the hours of 6:00 p.m. to 7:00 a.m.
- [46] There will be no Order as to costs.

Dated this 8th day of December, 2004

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OLA MAE EDWARDS
High Court Judge