THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

BVIHCV CASE NO. 0189 of 2007

BETWEEN:

BETTETO FRETT

Claimant

AND

FLAGSHIP PROPERTIES LIMITED

Defendant

Appearances:
Mr. Gerard Farara Q.C. for the Claimant
Mrs. Willa Liburd Tavernier and Mr. Kerry Anderson for the Defendant

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2009: October 13th, 14th ,28th

JUDGMENT

[1] Joseph - Olivetti J: Businessmen are constantly on the alert for ways to maximize their profits. In this case both Mr. Betteto Frett and Mr. Gordon Nissen, the owner of Flagship Properties Ltd, "Flagship", were bent on doing just that and, no doubt, so too was Ms. Eleanor Smith through her companies, Melvina Owneco Ltd, "Melvina", and Turquoise Waters Ltd "Turquoise". Melvina and Turquoise held Crown leases of land at Frenchman's Cay. Turquoise sold its shares to Mr. Betteto Frett and he operates a marina on Turquoise' premises. Melvina sublet its neighbouring property to Flagship, which continued to operate

docks and a shipyard there. Flagship subsequently changed its mechanism for hauling boats from a carriage and railway system to a concrete ramp or slipway and hydraulic machinery and Mr. Frett claims that by so doing Flagship has created a nuisance. Flagship maintains that the ramp which they built does not constitute a nuisance.

Issue for determination

[2] The main issue as I see it is whether Flagship's ramp constitutes an actionable nuisance entitling Mr. Frett to relief by way of damages and /or an injunction.

The law

[3] I shall consider the applicable law first. Both parties agree that this is an action in private nuisance. They relied on the exposition of the principles in Clerk & Lindsell on Tort[1],:

> "Private nuisance: Just as in issues of public nuisance, modern statutory control has had an effect in diminishing the role of private nuisance as a regulation of duties between neighbours. Refusal of planning permission may prevent many activities which would otherwise be a nuisance, but the tort of nuisance still provides sanctions against excessive interferences from activities which are not in themselves unlawful or unpermitted by public control over the use of property. The acts which constitute public nuisances are all of them unlawful acts. In private nuisance, on the other hand, the conduct of the defendant which results in the nuisance is, of itself, not necessarily or usually unlawful. A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by:
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> a. causing an encroachment on his neighbour's land, when it closely resembles trespass;
> b. causing physical damage to his neighbour's land or building or works or vegetation upon it; or
> c. Unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.
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> It may be a nuisance when a person does something on his own property which interferes with his neighbour's ability to enjoy his property by putting it to profitable use. It is also a nuisance to interfere with some easement or profit or other right used or enjoyed with his neighbour's land."

[1] 18th Edn.

[4] Mr. Farara Q.C., learned counsel for Mr. Frett, submits that the alleged nuisance complained of falls within the ambit of category "c" above, With respect to this category Clerk & Lindsell states at para.19-10 :-

> "Interference with enjoyment: In nuisance of the third kind, "the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves", there is no absolute standard to be applied. It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as noise, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as the time, place, extent or the manner of performance. In organized society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours. Ordinary domestic use of premises therefore cannot constitute a nuisance, even though interference with the enjoyment of neighboring premises is caused, if that interference results solely from construction defects for which the defendant is not responsible… the courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the claimant to the undisturbed enjoyment of his property. No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society".

[5] And para. 19-22 reads:-"Nuisance primarily a wrong to occupiers of land: a private nuisance is primarily a wrong to the owner or the occupier of the land affected. The correctness of this proposition was emphatically reaffirmed by the House of Lords in 1997 in Hunter v Canary Wharf Ltd[2]… Lord Goff of Chieveley considered that "any…departure from the established law on this subject" would cause uncertainty due to

[2] (1997) A.C. 655.

"the problem of defining the category of persons who would have the right to sue". Nevertheless, a person who is merely "de facto in exclusive possession" can apparently claim".

[6] From the authorities cited including Greenidge v Barbados Light & Power Co. Ltd[3] and Hunter, it is clear that in determining whether Flagship is liable in nuisance I must have regard to the factual circumstances of the particular case including: (i) the ordinary usage of persons occupying the vicinity;(ii) the time and place where the construction was carried out;(iii) the seriousness of the harm caused by the construction;(iv) whether Flagship acted maliciously or in the reasonable exercise of its rights, and, (v) whether the construction is transitory or permanent.

[7] In brief, Mr. Frett has to prove that Flagship's construction was an unreasonable, excessive or extravagant use of its property that caused damage to Mr. Frett's use or enjoyment of his property.

Discussion and Findings

[8] From the pleadings, the gravamen of Mr. Frett's claim is that the structure built by Flagship on the seabed, in the vicinity of one of his docks, has prevented him from using the western side of the dock to berth mega-yachts as he had done prior to the construction and that as a result he has lost and will continue to lose earnings, which is claimed to be a minimum of $604.80 per day for the use of the western side of the dock.

[3] (1975)27 WIR 22.

[9] We heard evidence from Mr. Frett himself and Mr. Nissen, who testified on behalf of Flagship. In addition, both parties relied on salient extracts from the report of Blok Marine Construction ("the Blok Report") which had been commissioned by Flagship in November 2008. It is noted that Blok's remit was to determine whether the ramp facilities complied with the plans approved by the building authorities in February, 2008.

[10] Melvina and Turquoise are both BVI companies. Prior to August 2005 they were both owned by Ms. Eleanor Smith and family. Turquoise held a 99 year lease from Government of Parcels No. 120/1 and No.132/1 West End Block 2033B at Frenchman's Cay and Melvina had a 99 year lease from the Government of Parcels 116,117 of Block 2034 B and Parcel 151 of Block 2033B West End.

[11] On 31 August 2005 Mr. Frett bought all the shares in Turquoise for US$1.5million. Prior to acquiring Turquoise, Mr. Frett operated a marina and docking facilities on Parcel 132 as a tenant of Turquoise and continued exclusively to occupy and operate the same business on the premises after he bought Turquoise. This was not disputed and I find that this gives Mr. Frett a sufficient proprietary interest in the premises to maintain this action.

[12] Turquoise operated a shipyard on Parcel 151, which is immediately adjacent to Turquoise's premises and to Parcel 132 in particular. It used a system of rails and carriages to haul out boats ("the railway"). That system was in existence since the 1960's. The railway consisted of three rails anchored on the seabed beginning from the edge of the land straight out to sea. A system of carriages traveling along this railway was used for hauling boats out of the water. The work on the boats was done at the waters edge whilst

the boat was sitting in the carriage. Only one boat could be hauled out at any one time. The operation was time consuming and lasted several hours.

[13] Whenever a boat was hauled out Mr. Frett would facilitate his neighbours by temporarily relocating any vessel which was berthed on the western side of one of his docks which dock was nearer to Parcel 151, "the Dock". When the operation was over, Mr. Frett would return the boat to the original berth. He never complained of this.

[14] In 2006, Melvina agreed to sublet Parcels 116, 117 and 151 to Flagship and Flagship with Melvina's consent, in or about 19 May 2007, began to convert the railway system into a ramp to be used with hydraulic equipment for hauling out boats, particularly catamarans. First, in or around May 2007, Flagship moored a barge in an area, which Mr. Frett says impeded him in the use of the western side of the Dock. He became concerned and spoke with Mr. Benjamin Nissen, the general manager of Flagship, and also with personnel of the company, Meridian Construction Company Limited, which was actually engaged in the construction, in an effort to have them move the barge with no success.

[15] Mr. Frett alleges that the Dock, which is in the immediate vicinity of the ramp, is a double-sided pier with a capacity to berth 16 vessels - eight on each side, stern to. He also claims that the agreement for sale with Turquoise provided for the extension of the Dock by the installation of a "T" section on the end and that Ms. Smith had told him that the necessary permission for doing so was in place. Ms. Smith was not called and therefore that evidence is hearsay and no weight can be attributed to it. Further, he did not produce any such planning authorizations.

[16] Subsequently, Mr. Frett noticed that piles had been driven into the seabed in the vicinity of the Dock and that they projected up to 20 feet out of the water. In his view these piles posed a hazard to boat operators. He saw a number of planks on Flagship's dock which he thought were placed there in apparent readiness for installation on the extended rails. He testified that the construction of the rails for the carriage way and the positioning of the barge in the water obstructed access to the western side of the Dock and that except for small boats, the western side is now totally unusable by operators of vessels. Mr. Frett reported the matter to the planning authorities.

[17] Subsequently, on 9 July 2007 the planning authorities served a Compliance Notice on Flagship. I accept Mr. Nissen's evidence that Flagship ceased the work and did not resume until after planning permission had been obtained, as there is no evidence that the planning authorities took further action against Flagship, which I am sure they would not have hesitated to do had Flagship disobeyed the order, as Mr. Frett testified. Flagship removed the barge from the area 48 hours later.

[18] Melvina subsequently formally sub-let Parcel 151 to Flagship on 13 July 2007, and thereafter applied for, and obtained Government's approval for the use of the seabed underlying the railway although it did not disclose to Government that they intended to dismantle the railway and to build a ramp instead. Flagship applied for and obtained planning permission for the ramp on 16 January 2008 and the requisite building permit was issued on 20 February 2008. Thereafter Flagship continued construction and completed the ramp within a short space of time, namely twelve days between mid-March and the beginning of May 2008.

[19] Mr. Farara took issue with whether or not the Government granted a lease of the seabed underneath the old railway to Melvina and so whether Flagship had any right to use that area of the seabed.

[20] However, It is not necessary in this case to determine whether the head lease legally effected a grant of the seabed in that area as it is sufficient that the head landlord, the Government, expressly confirmed that it intended to grant a lease of the seabed and no doubt if the Government sought to recant from that position it would promptly be met with issues of estoppel. Suffice it to say that I am satisfied that Flagship, through Melvina, has permission at least to use the area and that Flagship acted lawfully in exercise of its rights in removing the railway and substituting it with a ramp instead.

[21] I accept Mr. Nissen's evidence that upon enquiry of the planning authorities, Flagship was of the view that it did not need planning permission and so they began the work without planning permission. I also accept that Flagship was mindful not to cause any undue inconvenience to Mr. Frett and commenced work in the off season and that they spoke to Mr. Frett and obtained his consent to the mooring of the barge. However, Flagship did not tell Mr. Frett the scope of the works and I find that Mr. Frett did not give permission to Flagship for the construction of the ramp, not that they needed his permission.

[22] In any event, Mr. Nissen's evidence about Mr. Frett granting permission for the construction of the ramp is hearsay, as he readily admitted that his son, Benjamin, was the person who spoke to Mr. Frett and Benjamin did not give evidence. I acknowledge the gallant effort of Ms. Tavernier, counsel for Flagship, to pray in aid sections 69 and 70 of

the Evidence Act 2007, which make exceptions to the hearsay rule, but I uphold Mr. Farara's submission that the sections do not apply and that in any event counsel for Flagship did not give the requisite notice of her intention to rely on hearsay which is a pre-condition to the application of the sections.

[23] To my mind, it is pertinent to consider closely the nature of the development undertaken by Flagship in constructing the ramp and how it differed, if at all, from the pre-existing railway system, in order to determine if Flagship is liable in nuisance, as alleged.

[24] It is readily apparent that when he swore his witness statement on 14th October 2008, Mr. Frett did not know exactly what was the nature and scope of development that Flagship had carried out on its premises and on the seabed. And the scantiness of his knowledge remained scarcely unchanged at trial. However, Mr. Frett accepted, that Flagship had removed the carriage and railway system and replaced it with a concrete ramp and hydraulic machinery. Further, that the piles no longer project 20 feet out of the water but were driven into the seabed within two weeks of their initial placement to form the support for the ramp. He also accepts that the barge was moved since in or about July 2007 as its presence was temporary, being merely to assist in the construction of the ramp.

[25] Mr. Frett did not give us any reliable evidence as to the dimensions of the railway and how those differed from the ramp with which it was replaced. He gave no evidence of the manner in which the western side of the Dock was obstructed save to say that the captains of the mega-yachts, which he said berthed there prior to the ramp, will be reluctant to drop

anchor in the vicinity of the ramp. Of the evidence of those numerous mega-yachts he only referred to one, “The Talon”, in examination in chief.

[26] And despite his evidence that the western side of the Dock is unusable by mega-yachts since the ramp Mr. Frett was forced to concede in cross- examination that the Clan VI was moored at the western side of the Dock since the construction of the ramp but maintained that it is not a mega-yacht but a sailing yacht despite the fact that it exceeded 90 ft in length and he had described a mega-yacht as being in excess of 90 feet.

[27] In addition, Mr. Frett admitted that he kept records and receipts, yet he did not produce a single document to establish that mega-yachts used his facilities prior to the construction of the ramp and, in particular, that the mega-yachts used the western side of the Dock. Further, Mr. Frett called no evidence from any of the many captains of mega yachts who he claimed used the Dock prior to the construction of the ramp and who allegedly would encounter difficulties in using the western side of the Dock now or from any seafarer familiar with the area.

[28] Mr. Nissen testified, and I accept that, contrary to first impressions, the railway consisted of three metal rails anchored to the seabed by means of concrete sleepers and cement bags, structures and not merely three rails sitting unanchored on the seabed. I find that the rails extended about 100 feet into the sea straight along the seabed and were placed about 20-25 feet apart; 6 feet above the seabed.

[29] The ramp, on the other hand, although made of concrete, is 21 feet wide and extends about 69 feet into the sea, it is about 90 feet shorter than the railway and ends just beyond the bulkhead of the dock. The ramp has a horizontal clearance of a minimum of 34 feet 3 inches from the western side of the Dock. The railway on the other hand had a ten-foot clearance. The level of the ramp above the seabed is approximately 3 feet though the height is not uniformed throughout.

[30] Further, the Blok Report, states that the change from the railway to the ramp, was favorable to Mr. Frett, as it angles away from the Dock, whereas the railway angled toward the Dock; and, in addition, the ramp does not extend as far into the water as the railway did and the lifting mechanism is mobile, and does not stay in the water permanently. Mr. Frett appears to have accepted that.

[31] In addition, on Mr. Frett's own evidence, the area of the Dock near the bulkhead, which is closer to the ramp, is only used by small boats or dinghies because of the sea level. How then can he maintain that the area was used by mega-yachts?

[32] Having regard to its position, the construction materials and to its dimensions, I find that the ramp occupies a significantly smaller area of the seabed than did the railway. It poses no greater interference with Mr. Frett's use of the western side of the Dock than did the railway. In fact, in some ways, Mr. Frett can be said to be better off, as he no longer has to move boats moored at the western side of the Dock to accommodate a haul out.

[33] Mr. Frett also said that the boats dock stern first at the Dock and used anchors, not mooring balls or other floating devices to secure their bows. He said that the captains of the vessels would be reluctant to let down their anchors in the vicinity of the ramp. However, it strikes me that the same fears would have applied to anchoring in the area of the railway, and this goes against his evidence that mega-yachts berthed on the entire western side of the Dock.

[34] Therefore, I find that Mr. Frett has failed to establish that he has eight berths to accommodate mega-yachts on the western side of the Dock as claimed or that he even has planning permission for a "T" extension. These, no doubt, are matters to be finally settled between Mr. Frett and Ms. Smith.

[35] I note also the existence of a small ramp used by the public between the Dock and the ramp. This also supports my finding that the western side of the Dock in the vicinity of the ramp or the pre-existing railway did not accommodate mega-yachts and is more suitable for small vessels.

[36] Further, the western side of the Dock is not wholly unusable by mega–yachts as Mr. Frett claims. Mr. Nissen testified, and I accept his evidence, that he saw the Clan VI there in January 2009, moored at the far end of the Dock. It is a mega-yacht having regard to its dimensions as given by Mr. Nissen, and those dimensions were not challenged.

[37] In my view, in all the circumstances, the construction of the ramp was neither an unreasonable nor an excessive or extravagant exercise of Flagship's property rights.

Flagship acted reasonably. The law recognizes that a man is entitled to build on his own land and this right is not restricted by the fact that the building may of itself interfere with his neighbor's enjoyment, (see Hunter v Canary Wharf per Lord Goff of Chieveley at page 432).

[38] Also, Flagship did not act unreasonably during the construction phase. Construction commenced during the slow season. This, according to Mr. Nissen, was deliberate in order to minimize any possible disruption to activities in the area.

Conclusion

[39] In conclusion, for the foregoing reasons Mr. Frett has failed to establish that Flagship has created and is continuing a private nuisance by its construction and use of the ramp. Accordingly, Mr. Frett's claim is dismissed. Mr. Frett is to pay Flagship prescribed costs in accordance with CPR Part 65.5. According to CPR 65.5 (2) (b) (i), in determining the costs, the value of the claim is to be decided, in the case of a defendant, by the amount claimed by the claimant in his claim form, and by CR 65.5 (3), the general rule is that the amount of costs to be paid is to be calculated in accordance with the percentages specified in column 2 of Appendix B against the appropriate value.

[40] In this case, Mr. Frett claimed damages of $604.80 per day. If Mr. Frett had been successful the total damages would be calculated from the date, upon which the construction of the ramp began 19 May 2007, to the date of the trial, 13 October 2009. Therefore, the total damages claimed is $604.80 x 877 days= US$530,409.60. Therefore the value of the claim for the purposes of Appendix B is US$530,409.60.

[41] However, the court has a discretion in awarding costs. Costs must be fair and reasonable having regard to the matters set out in Part 64.6. A costs award is not meant to be a windfall. In all the circumstances this was not a complex case and I am of the view that it is reasonable to award only a percentage of the prescribed costs. However, before exercising this discretion, I would invite counsel for Flagship to submit a schedule for costs and to serve same on counsel for Mr. Frett, within seven days hereof. The matter will be considered on submissions on paper if the parties do not settle sooner.

Footnote

[42] I thank counsel for their assistance and in particular Ms. Tavernier. The case showcased her careful preparation, diligence and understanding of the law, and, her demeanor throughout reflected professional courtesy and competence. She has set a very high standard for her peers to aspire to and I venture to think that her mentors would be far from unhappy with her.

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Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands