

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/026

On Appeal from the Commercial Division

BETWEEN:

BETTETO FRETT

Appellant

and

FLAGSHIP PROPERTIES LIMITED

Respondent

Before:

The Hon. Mde. Ola Mae Edwards  
The Hon. Mr. Davidson Kelvin Baptiste  
The Hon. Mr. Don Mitchell

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

Appearances:

Ms. Akila Anderson for the Appellant  
Ms. Willa Liburd-Tavernia, Ms. Rhonda Brown with her, for the Respondent

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2011: September 26, 27.

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*Civil appeal – Commercial Division – Construction of concrete ramp in seawater at shipyard – Nuisance – Injunction – Challenges to findings of fact made by the learned trial judge*

### ORAL JUDGMENT

[1] This is the judgment of the court. The appellant, Mr. Betteto Frett, operates a marina, and the respondent company, Flagship Properties, operates a shipyard on neighbouring lots at Frenchman's Cay in Tortola.

- [2] Mr. Frett brought a claim in nuisance against Flagship claiming an injunction to restrain Flagship from constructing a concrete ramp in the seawater at its shipyard and for general damages. Mr. Frett pleaded that, with the construction of the ramp, his legitimate expectation of quiet enjoyment and the growth and development of his marina facilities and other related businesses would be stymied. As a result of the construction of the ramp, he was unable to use the western side of his dock, resulting in income reduction and his inability to satisfy his financial commitments.
- [3] The learned trial judge found that Mr. Frett had failed to prove his claim, and she made several findings of fact relating to the evidence in favour of Flagship which were the subject of this appeal.
- [4] Based on the case of **Watt (or Thomas) v Thomas** [1947] 1 All E.R. 582, which has been adopted by this court in a legion of cases, more recently in the case of **Chiverton Construction Ltd et al v Scrub Island Group Ltd** (TVI HCVAP 2009/028, unreported), an appellant who challenges findings of fact faces a serious hurdle. A Court of Appeal should attach the greatest weight to the opinion of the judge who saw the witnesses and heard the evidence, and consequently should not disturb a judgment of fact unless they are satisfied that it is unsound.
- [5] In this case, the learned judge had the advantage of seeing and hearing the witnesses testify, and was in a position to assess their credibility. Mr. Frett has not been able to show us that the learned trial judge did not take proper advantage of having seen and heard the witnesses, or that the reasons given by the trial judge for the findings of fact which are the subject of the appeal are unsatisfactory.

[6] We find no errors with the trial judge's findings of fact in the circumstances. The appeal is therefore dismissed with costs and the judgment entered in the court below is affirmed.

[7] Concerning the question of costs, this was based by the learned trial judge on the value placed on the claim pursuant to **CPR 2000** 65.5(2)(b)(ii). We accept the submissions of Counsel for Flagship Properties as to how the trial judge arrived at the value of \$530,409.60, and we see no reason to disturb the value. Having regard to the value she placed on the claim, and her reduction of the prescribed costs pursuant to Rule 65.5(4), she awarded prescribed costs of \$63,557.47. Consequently, the costs in the appeal, being two thirds of that amount, are \$42,371.64.

**Ola Mae Edwards**  
Justice of Appeal

**Davidson Kelvin Baptiste**  
Justice of Appeal

**Don Mitchell**  
Justice of Appeal [Ag.]