REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Civil Appeal No. 175 of 2010
CV 2009-01794

BETWEEN

SURESH CHURAN

Appellant

AND

SHIVA DURGASINGH

Respondent

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. Ryan G. Cameron for the Claimant
Mr. Wilston E. J. Campbell for the Defendant

REASONS

1. This action began inter alia with a claim for an injunction restraining the Defendant whether by his servants or agents from obstructing the entry to and exit from the claimants home/business premises at No. 188 Eastern Main Road Laventille.

2. The parties are the owners/occupiers of adjoining premises. The Defendant resides at his address and operates a tyre service and wrecking business. The Claimant resides next door and he also operates a cottage business "Caribbean Cool Juice". The claimant complained that since the defendant began operating his business his customers would park their vehicles indiscriminately on a daily basis, blocking his entrance and obstructing his access to his premises. Attempts to resolve the problem through amicable discussion with the defendant, complaints to the police,

legal letters and even the injunction when it was granted brought him little relief.

3. On the first occasion that the parties appeared in court on 26/5/09 they were invited to speak to try to resolve the problem. The matter was adjourned to 15th July 2009. On that date and after a long discussion with the Court as to how the matter could be resolved, the defendant agreed to give undertakings in the following terms.

1. To take all such steps as necessary to ensure that his customers and/or persons visiting his establishment refrain from parking in front of the Claimant's gateway at No. 188 Eastern Main Road, Laventille which gateway is shown as "S.D 3" in photograph annexed to Claimant's affidavit filed on the 21st day of May, 2009.

2. To ascertain by enquiry from his customers and/or visitors upon entry into his establishment, that they have not blocked the claimant's driveway described above, and to monitor such parking by his customers and/or visitors.

3. Not to serve or attend to customers and/or visitors entering his establishment who park in such a manner as to block the Claimant's driveway above.

4. I indicated at all times that I was aware of the culture of lawlessness in this country where indiscriminate parking was widespread. However, it was made clear that the responsibility to avoid injury to the claimant arising from the running of the Defendant's business was ultimately his own. More time was allowed for discussion. The parties were encouraged to approach the police station in the area to have the area be designated a no parking zone with appropriate road signs. This met with no success.

5. Eventually on 1st February 2010 a tentative trial date was fixed for 14th July 2010. On 16th April 2010 I ordered the filing and exchange of witness statements on or before 17th June 2010 with the usual sanction. The trial date was confirmed. The Defendant did not comply with the Order. On the morning of the trial, the Defendant filed an application for relief from sanction.

6. I refused the application because:

1. From the evidence contained in the affidavit of Counsel in support of the application, I concluded that at sometime in May 2010 at latest it became apparent that there would be a difficulty in complying with the Order because of the illness of instructing attorney since the month of April. No application was made then.

2. Sometime in early July, and before the trial date, Counsel who had by then assumed responsibility for the preparation of the witness statements realized he had missed the date for filing them. Still no application was made.

3. Instead Counsel took the position that the Claimant had not himself indicated his readiness to exchange his witness statement, so there would be no prejudice.

4. Part 29:7 of the Rules provides for a situation where the party such as the Defendant in his case fails to comply with the direction for the filing of Witness Statements. It does not support Counsel's view of the consequences of his own default. The Rule provides:—

29.7 (1) This rule applies where—

(a) one party is able and prepared to serve his witness statements; but

(b) the other party fails to make reasonable arrangements to exchange statements.

(2) The first party may comply with this Part by filing his witness statements in a sealed envelope at the court office by the date directed.

(3) The filed statements must not be disclosed to the other party until he certifies that he has served his witness statements or summaries in respect of all witnesses upon whose evidence he intends to rely.

5. The Defendant did not get past the first hurdle of promptness. The application was therefore refused. The trial proceeded on the Claimant's evidence which I accepted insofar as it related to the obstruction of his gateway as a result of the parking of the Defendant's customers as well as from the Defendant's workers actually assisting customers who are so parked on occasion. I did not accept the Claimant's alleged loss of business and the claim for special damage was dismissed.

7. At the end of the day it was not seriously disputed that the persons who were parking and causing the nuisance were persons patronizing the Defendant's business. I took notice of the fact that the area in which the parties are located is now a busy commercial area. The Claimant too confirmed this fact indicated that he had lived at that residence for 44 years during which there were other businesses, but that the problem which led to

the litigation only began since the Defendant moved in and commenced operations next door.

8. In the light of the evidence I found that an annoyance which amounted to a nuisance was caused. The legal issue on which I required assistance was whether the Defendant could be liable for the obstruction caused by persons over whom, in a sense, he had no particular control. I indicated this to the parties. Counsel for the Defendant took the view that the Claimant had not proved that the persons parking were "customers". He relied on the legal dictionary's meaning of "customer". I rejected this submission.

9. Counsel for the Claimant referred to the following several authorities:

(1) Halsbury's Laws of England 4th Edition Vol. 34 paragraph 364 for the statement:

> "Any person is liable for a nuisance who either creates it or causes or continues or adopts it or who authorizes its creation or continuance."

10. Counsel submitted that it is only when the Defendant moved in and began operating his business next door that the nuisance began. This, even though the Claimant had been living there for over 44 years with other businesses in the area.

Counsel for the Claimant referred to the cases of:

(2) Sanders-Clark v Grosvenor Mansions Company Limited and G. D. Alessandria—1900 2 CH 373 and Reinhardt v Mentasti Vol XLII p 685.

Both of these cases dealt with the issue of the "reasonableness" of the use of the Defendant's property and whether if it were reasonable, that would afford a defence to an action in Nuisance. In Mentasti Kekwich J went so far as to say:

> *"It seems to me, therefore, that, notwithstanding some of the passages*

> *in some judgments to the contrary, the application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is does he injure his neighbour."*

In Sanders-Clark —Buckley J cited the above passage but preferred a different approach. He said this:

> *"I prefer to guide myself by the Judgment of Lord Selbourne to the effect that the Court must consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance, but if he is not using it reasonably, if he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief."*

11. Even applying the less stringent approach of Lord Selbourne, it seems difficult for the Defendant to escape liability for the nuisance when he chooses to introduce a business albeit on the busy Eastern Main Road, which involves the frequent stopping, parking, offloading, removal and installation of tyres from and onto vehicles from premises which do not provide adequate parking facilities for such a business. It is his use of his premises for this unusual purpose which has resulted in the injury to the Claimant.

12. To answer more specifically the question raised by the Court, Counsel cited the case of **Attorney General v Todd Heathley 1897 1 Ch p. 560**. This was a case of a public nuisance in which the Defendant claimed he had no control over the persons who were dumping refuse on a vacant piece of his

land thereby creating a public nuisance. The common law duty of the Defendant to prevent the nuisance was underscored.

The approach of the court in Attorney General v Cole & Son 1901 1 CH—(again a case of a public nuisance was noted.) Kekewich J did not distinguish between a public and a private nuisance. In his analysis in his judgment, the learned Judge seized the opportunity to return to his earlier judgment in Mentasti and to the criticisms of that judgment which followed it. Confirming that he did not differ from Lord Selbourne in Ball v Ray as Buckley J seemed to think in Sanders-Clark v Grosvenor Mansions—he once again ended up with the original question—Can a man reasonably create a nuisance?

And he answered it in this way:

> *"I think the answer to be derived from the case of Branford v Turnley from which, so far as I am aware, there has never been any departure at all, is that he cannot. If he commits a nuisance then he cannot say he is acting reasonably."*

13. Apply this learning to the evidence we have this result. The defendant is carrying on a perfectly lawful business on the busy main road. This is no doubt convenient for persons who frequent that area. He has taken certain steps to prevent injury to the Claimant. His approach to the police to assist in abating the nuisance has not resulted in any success. He has erected signs warning his customers not to block the neighbour's driveway. He has attempted to have his staff monitor his customers' illegal parking. From the Defendant's point of view he has done all he reasonably can to prevent the nuisance. But he is not acting reasonably in the use of his property, if by the conduct of his business, the Claimant is still frequently, on a daily basis, being denied access to and from his home to the Eastern Main Road.

14. In the circumstances, the question of the Defendant's lack of control over the actions, his customers is only relevant insofar perhaps as it confirms more pointedly why the nuisance results. The Defendant remains liable however, because the nuisance results from the use of his premises in the circumstances.

15. I gave judgment for the Claimant and ordered the Defendant to pay $75,000.00 damages. This sum I accept is somewhat high. Throughout the several case management conferences, it became obvious to the Court that the Defendant was not prepared to expend money to resolve the problem by installing cameras or making proper parking facilities. The Claimant's complaints continued even after the interim injunction was granted. It seemed appropriate to make an award which would impress upon the Defendant the need to seriously reorganize his business to avoid further litigation and the continuation of the nuisance. A small monetary sum in damages would not have achieved this end.

Dated this 30th day of August 2010

CAROL GOBIN
JUDGE