

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 1843 of 1997

BETWEEN:

SAMUEL BONNETT

Plaintiff

AND

IRVIN IVESTUS BOYCE

First Defendant

SHIRLEY SYLVESTER BOYCE

Second Defendant

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court.

2007: April 13, 16, 18

2009: August 06

Mr. Gregory Nicholls for the Plaintiff.

Miss Bernadette D. Callender with Miss Sherraine Parris for the Defendants.

REASONS FOR DECISION

Nature of Action

- [1] In this action the plaintiff Samuel Bonnett (“Bonnett”) claims inter alia an injunction to restrain the defendants Irvin Ivestus Boyce and his wife Shirley Sylvester Boyce (“the Boyces”) their servants or agents from carrying on or permitting to be carried on Lot 72 4th Avenue, Woodbourne Park, St. Philip, of which they are the owners, the trade or business of an auto-mechanic repair shop; an injunction to restrain the Boyces their servants or agents from committing a nuisance in allowing noxious and offensive fumes, vapours and smoke to come into Bonnetts property; damages and costs.
- [2] The action is two pronged. First, it is grounded on the alleged breach by the Boyces of a restrictive covenant contained in the conveyance (to which I shall return) of Lot 72 to the Boyces.

Secondly, in the alternative, it is grounded in nuisance caused by the escape of alleged noxious fumes vapours and smoke from the alleged operation of an auto-mechanic repair shop by the Boyces.

The Parties

- [3] At the commencement of the action in October 1997, Bonnett was the owner of Lot 70 4th Avenue, Woodbourne Park which adjoins Lot 72 aforesaid on its western boundary.
- [4] He had purchased this lot in 1981 whilst residing in England. In 1993 he took up residence there together with his wife Hulda Bonnett.
- [5] Until 1998/99 when Bonnett sold Lot 70 for reasons which will become apparent, in the course of this decision, the Bonnetts and the Boyces were adjoining neighbours living in close proximity to each other.

Issues

- [6] At trial Mr. Gregory Nicholls, counsel for the Boyces, stated that the evidence would relate only to the period of time when Bonnett was in possession as the property had been sold. The claims for the injunctions were implicitly abandoned. The issues remaining for determination were:
- (i) whether the restrictive covenant contained in the conveyance to the Boyces “not to use the lot for any trade or business other than that of a medical practitioner, dental surgeon or beauty culturist” was enforceable by Bonnett;

- (ii) if it was, were the Boyces operating an auto-mechanic repair shop in breach of that covenant? and
- (iii) were the Boyces liable in nuisance to Bonnett for damages in respect of the alleged noxious fumes, vapour and smoke emanating from the alleged operation by the Boyces of an auto-mechanic repair shop and if so, in what amount?

The conveyances

[7] It is common ground between the parties that the Boyces purchased Lot 72 from Modern Enterprises Ltd. under a conveyance dated 14 August 1978. A copy of this conveyance was admitted into evidence without objection as Exhibit “SB4”.

[8] In so far as material that conveyance contained the following clauses:

...

“In further pursuance of the said agreement and in consideration of the premises and of the covenants of the Vendor hereinafter contained the Purchasers do hereby for themselves or other the owners for the time being of the lot share estate or interest hereby granted COVENANT with the Vendor and other the owners for the time being of the remaining lots on the Key Plan and every or any part thereof respectively as follows:-

(a) ...

(b) ...

(c) Not to use the lot for any trade or business other than that of a medical practitioner, dental surgeon or beauty culturist.

(d) ...

AND IT IS HEREBY AGREED AND DECLARED that the foregoing restrictive covenants shall be binding in perpetuity upon the lot of land hereby granted and upon the Purchasers and all future owners thereof as far as the law will permit and shall enure for the benefit of and be enforceable by any person or persons for the time being claiming title to or interest in any of the remaining lots who may be aggrieved by the breach or neglect of any such covenants.”

[9] There was also admitted into evidence as Exhibit “SB5” without objection a conveyance

dated 8 November 1979 under which Modern Enterprises Limited conveyed Lot 70 to one Melvin DaCosta Williams.

[10] Further, a conveyance dated 10 February 1981 was admitted into evidence as Exhibit "SB6" without objection. Under this conveyance the aforesaid Melvin DaCosta Williams conveyed the said Lot 70 to Bonnett.

[11] These conveyances and their import will be further considered as I deal with the issues raised to which I now turn.

Enforceability of the restrictive covenant

[12] Ms. Callender, counsel for the Boyces, in her pre-trial brief conceded the existence of a building development by Modern Enterprises Limited of which Lot 72 forms part and of the restrictive covenant at issue.

[13] There was, however, no concession that Bonnett took the benefit of that restrictive covenant. And it was the submission of Ms. Callender that an enforceable covenant was not established on the evidence adduced on behalf of Bonnett.

[14] In response Mr. Nicholls submitted that para. 1 of the defence admitted the matters pleaded inter alia at para. 4 of the statement of claim, so that the defendants admitted the existence of the restrictive covenant enforceable against them for the benefit of adjoining properties. It was his contention, therefore, that Ms. Callender could not raise an argument that the covenant was not so enforceable.

[15] Paras. 1, 2, 3 and 4 of statement of claim read as follows:

1. The plaintiff resides at Lot 70 4th Avenue Woodbourne Park in the parish of Saint Philip.
2. The Defendants reside at Lot 72 4th Avenue Woodbourne Park in the parish of Saint Philip
3. By a Conveyance dated the 14th day of August, 1978 and made between Modern Enterprises Limited as Vendor of the One Part and the Defendants herein as Purchasers of the Other Part, recorded in the Registration office of this Island on the 20th day of September, 1978 **ALL THAT** certain lot piece or parcel of land (part of the said larger area containing by admeasurement twenty-three acres fifteen perches which was originally part of the lands of Woodbourne Plantation) situate at Woodbourne in the parish of Saint Philip and Island aforesaid and being the lot numbered 72 on the Key Plan containing by admeasurement Seven thousand one hundred and fifty-five square feet or thereabouts (inclusive of One thousand and thirty-five square feet in the area of the road hereinafter mentioned) Abutting and Bounding on the lots numbered 70, 71 and 74 respectively on the Key Plan and on the road hereinbefore mentioned or however else the same may abut and bound was

conveyed to the Defendants in fee simple subject to the covenants thereafter contained.

4. By the said conveyance the Defendants covenanted with the said Modern Enterprises Limited for the benefit of any part or parts thereof and so as to bind so far as may be the said property thereby conveyed into whosoever hands the same might come that the Defendants and the persons deriving title under them would at all times thereafter observe and perform *inter alia* the following restrictive covenant which was set forth in the said conveyance namely:

not to use the lot for any trade or business other than that of a medical practitioner, dental surgeon or beauty culturalist.

[16] Para. 1 of the defence reads as follows:

“Paragraphs 1, 2, 3 and 4 of the Statement of Claim are admitted.”

[17] Para. 4 of the statement of claim does not contain an allegation that the restrictive covenant was enforceable by Bonnett as an owner of one of the adjoining properties. It was, therefore, open to Ms. Callender to raise the argument. So the real question is did the benefit of the restrictive covenant pass to Bonnett?

[18] I am not entirely sure that when Ms. Callender used the term ‘building development’ in her pre-trial brief she was referring to the legal expression “building scheme” or “scheme of development” which are strictly technical terms in the law relating to restrictive covenants.

[19] Accordingly, I cannot take it that the admission of a ‘building development’ was an admission of a ‘building scheme’ of which Lot 70 forms part.

[20] Indeed, it was not even admitted in the defence that lot 70 was conveyed to Bonnett.

[21] It is well established that the ‘scheme of development’ or ‘building scheme’ is one of the methods by which the benefit of restrictive covenants are transmissible. (*See: Elements of Land Law 3rd edition by Kevin Gray and Susan Francis Gray para 10.17*). Thus the learned authors state:

“It is not unusual for a property developer to subdivide a large area of land into plots with the intention of selling these plots seriatim to individual purchasers. In order to preserve the value of each plot and the residential amenity of the whole area, the vendor commonly extracts certain restrictive covenants from each purchaser in turn. The object of the exercise is plainly to institute a scheme of mutually enforceable restrictive covenants which will be valid not only for initial purchasers vis-a-vis each other but which will be valid between all successors in

title of the original covenantors.”

[22] There are now but two essential elements which must be satisfied to found the existence of such a scheme.

[23] First, the area to be affected by the scheme must be clearly defined. Secondly, there must have been an intention at the time the scheme was brought into operation that mutually enforceable restrictions in the interests of all the purchasers and their successors were to be imposed. In **Jamaica Mutual Life Assurance Society v Hislborough Ltd 1987 1WLR 1101 at 1106 F-G Lord Jauncey of Tullichette** confirmed these two requirements. And in **Emile Elias & Co. Ltd. v Pine Groves Ltd. [1993] 1WLR 305 at 311 D-E** Lord Browne-Wilkinson observed:

It is one of the badges of an enforceable building scheme, creating a local law to which all owners are subject and of which all owners take the benefit, that they accept a common code of covenants.”

[24] I find that in this case the first essential element of a building scheme has been satisfied. An examination of the conveyance to the Boyces (Exhibit “SB4”) clearly identified the area to be affected by the scheme viz the twenty-three acres and fifteen perches of which the Vendor caused a Key Plan to be made certified 18 February 1975 by F.H. Godson Land Surveyor, showing seventy-six lots and two “open space” lots bordered green, comprising Phase One of the development of the said lands. (See: the Third Recital).

[25] It is also clear from the description in the conveyances of Lot 70 first to Melvin DaCosta Williams and then to Bonnett that Lot 70 forms part of that clearly identified area.

[26] I also find that the second essential element has been satisfied.

[27] The learned authors **Gray and Gray** in their text referred to at para. [21] posit that:

“Evidence of the required commonality of intention underpinning a scheme of development may be found in terms of the individual transfers to the several purchasers.” (p.1177)

[28] Taking, first, the conveyance to the Boyces (Exhibit ‘SB4’) that commonality of intention is to be found explicitly in the last recital setting out the agreement for the sale to them in the words:

“to the intent that the owner of any lot forming part of the said larger area [23 Acres 15 Perches] may be able to enforce in equity the observance *by the respective owner for the time being of the other lots* forming part of the said larger area of such of the said covenants as are negative.” (Emphasis added). (See p. 3 of the conveyance).

- [29] It is also to be found in the clause setting out the restrictive covenants including that in issue in which the Boyces as Purchasers for themselves *or other the owners for the time being of the lot 72* covenanted with Modern Enterprises Ltd (Vendor) and *other the owners for the time being of the remaining lots on the Key Plan and every or any part thereof respectively*. (Emphasis added) (See pp.5-6 of Exhibit "SB4")
- [30] Lastly, the commonality of intention is found in the declaration that the restrictive covenants shall be binding in perpetuity ... *and shall enure for the benefit of and be enforceable by any person or persons for the time being claiming title to or interest in any of the remaining lots who may be aggrieved by the breach ...* of any such convenants. (Emphasis added) (See p.7 of Exhibit "SB4").
- [31] Further, the conveyance by Modern Enterprises Ltd to Melvin DaCosta Williams (Exhibit SB4") is to all intents and purposes almost an exact replica of Exhibit "SB4" allowing for the differences in the purchaser, the purchase price, the description of the lot being conveyed [Lot 70]; and the date of the conveyance (1979).
- [32] Thus, it too satisfies the essential elements of a building scheme.
- [33] I therefore find that both Lot 72 and Lot 70 formed part of a building scheme.
- [34] I further find that at the date of the conveyance to the Boyces on 14 August 1978 Lot 70 still formed part of the remaining lots on the key plan not yet having been sold by Modern Enterprises Ltd.
- [35] Accordingly, I find that when in 1981 Bonnett purchased Lot 70 from his predecessor in title Melvin DaCosta Williams the benefit of the covenant in issue passed to Bonnett under the building scheme.
- [36] He is therefore entitled to enforce that covenant against the Boyces in the event of a breach thereof.

The auto-mechanic repair shop

- [37] At the heart of the case for Bonnett is the allegation that Boyce was carrying on the trade or business of an auto-mechanic repair shop on lot 72 in breach of the restrictive covenant.
- [38] It is the case for the Boyces that Mr. Boyce was not operating such a shop.
- [39] The starting point then for discussion of this issue is what constitutes a shop.
- [40] As defined by the Compact Oxford English Dictionary (2nd edn p. 1060) the word "shop" means a '*building or part of a building where goods or services are sold*' or '*a place where things are manufactured or repaired: a work shop.*'
- [41] In Shroud's Judicial Dictionary (4th edn p. 2538) the word "shop" implies a place where a retail trade is carried on" and Shroud's Judicial dictionary stipulates that "in order to constitute a shop there must be some structure of a more or less permanent character."

[42] Given the foregoing definitions, it seems to me that in order to characterize something as a “shop” the following essential elements must exist:

- (1) a structure of a more or less permanent character; and
- (2) the selling of goods or services in that structure.

[43] Ms. Callender referred the Court to the definition of ‘shop’ under the Shops Act Cap 356A where “shop”

(a) means any premises or place in which a person conducts, manages or carries on business for

(i) the sale or hire of commodities, whether by wholesale or retail, or

(ii) the provision of services,

and whether or not the business is conducted, managed or carried on to the exclusion of, or in addition to, any other business; and

(b) includes any place used for the storage of, receipt of orders for, or dispatch or delivery of, any goods dealt with in the business.

[44] Although the definition of shop under the Shops Act is very wide, it still to my mind requires the existence of a place in which a person conducts or carries on business.

The evidence of a shop

[45] Bonnett in his evidence in chief stated that the problem was the heavy duty vehicles that the defendants operated which were a bobcat, a backhoe and two trucks.

[46] Shown para. 2 of the letter dated 15th September 1993 admitted into evidence as Exhibit “SB3”, and sent by his attorney-at-law Mr. Theodore Walcott to Boyce, Bonnett explained that “there were a few weeks when Mr. Boyce stopped bringing the vehicles in the area. But it soon started all over again”. Set out below in full is that letter:

“Theodore A. Walcott

ATTORNEY-AT-LAW

(BARRISTER-AT-LAW, LONDON, U.K.)

CHAMBERS: Chancellor House, Pinfold Street, Bridgetown, Barbados, West Indies

Taw/PK

15 September 1993

Mr. Irvin Boyce#72 4th Avenue

Woodbourne Park

ST. PHILIP

Dear Sir

RE: BREACH OF RESTRICTIVE COVENANT

I refer to my previous letter dated 23 June 1993 and a subsequent letter of 15 July 1993.

My client instructs me that you have taken steps to remedy the breach of the restrictive covenant referred to in my correspondence, but that you are tardy in removing the debris which you have allowed to accumulate on and near your premises.

I must remind you that my client is still entitled to initiate proceedings against you for breach of the restrictive covenant in your conveyance, and should you fail to remove the offending debris within the next fourteen (14) days, legal action will be taken without further notice to you. My client reserves his right to claim damages from you.

Yours faithfully

Sgd. Theodore Walcott

Attorney-at-law

c.c: Samuel Bonnett"

[47] Now a letter dated 23rd June 1993 was also sent to Boyce by Bonnett's said attorney-at-law. It was admitted into evidence as Exhibit "SB1".

[48] In that letter complaint is made at para. 2 that "Boyce is carrying on a business on lot 70 ... and the business *involves the use of heavy duty equipment such as a motor lorry, bobcat, backhoe and other vehicles which he parks in the road next to his respective properties*". (*Emphasis added*)

[49] That letter is particularly instructive because it does not complain that Boyce was carrying on business of an auto-mechanic repair shop on Lot 70. The reference to Lot 70 was indeed incorrect and should have referred to Lot 72. That error was later corrected by letter dated 15th July 1993 admitted into evidence as Exhibit "SB2". Set out below in full is the letter dated 23 June 1993.

"23rd June 1993

Mr. Irvine Boyce

No. 72 4th Avenue

Woodbourne Park

ST. PHILIP.

Sir,

Re: Breach of Restrictive Covenant

I act for Mr. Samuel Bonnett the owner of Lot 70, 4th Avenue, Woodbourne Park, St. Philip.

I am instructed that you are carrying on a business on Lot 70 which is adjacent to my client's property and the business involves the use of heavy duty equipment such as a motor lorry, bobcat, backhoe and other vehicles which you park in the road next to your respective properties. As a result, my client is unable to find a tenant for his property and as a consequence suffered loss and damage.

Your attention is drawn to the restrictive covenant in the conveyance to my client which provides that the Vendor of the lots has entered into a covenant on you behalf requiring you not to use your lot for any trade or business other than that of a medical practitioner, dental surgeon or beauty culturist. **This restrictive covenant is binding on you.**

My attention has been drawn to a letter dated the 3rd December, 1992 from Mr. Robert C. Worme of Fitzwilliam, Stone and Alcazar, Attorneys-at-law addressed to you relating to your breach of the restrictive covenant above-mentioned.

Please inform me within the next fourteen (14) days whether you are willing to reach an amicable settlement in relation to the compensation payable to my client failing which legal proceedings will be instituted against you without further notice to you.

Yours faithfully,

Sgd: THEODORE WALCOTT

cc: Mr. Samuel Bonnett

- [50] A number of photographs were admitted into evidence after the initial objection of Ms. Callender to their admission was withdrawn. They were numbered individually as Exhibits "SB7" to "SB15" respectively.
- [51] Shown these photographs in only one of them – Exhibit "SB10", Bonnett pointed to an area of engine oil where vehicles are repaired. And this oil is for the most part in the road in front of the Boyces home on Lot 72.
- [52] Indeed, the photographs are consistent with the contents of para. 2 of Exhibit "SB1" in so far as they show a truck parked on the road.
- [53] No where on the evidence of Bonnett has he identified any structure at, or in which there can be said to be a shop. The photographs show the respective homes so described by Bonnett, of both the Boyces and the Bonnetts. And there is no allegation that the home of the Boyces was being used as a shop for the purposes of this action.
- [54] There was no evidence from Mrs. Bonnett as to the existence of any structure which could be said to house a shop. In her testimony in chief the problem was debris from vehicles, old engines, old tyres from the old vehicles making the place very unsightly. But most of all she stated there was the diesel. From early morning they would start the engines, 'rev' them up and leave them running for two to three hours until 8.00 a.m. or just after.
- [55] In his testimony under cross examination, Boyce admitted that in 1993 he owned a truck, a back hoe and a skidsteer loader not shown in the photographs; that the vehicles were going all over Barbados to work, except Woodbourne Park in the mornings and the evenings; that the vehicles were working for him; it was his business; [the vehicles] went out in the mornings and came back in the evenings; he was a trained mechanic and in the five years that Mr. Bonnett lived next to him, he would have conducted repairs on his vehicles; and he sometimes did the repairs at Woodbourne Park, where he lived; that he did not practice the trade of an auto-mechanic; he was a teacher and he had the skills [of an auto-mechanic], but he only used them for his own equipment.
- [56] Nothing emerges from this cross-examination of Boyce of the existence of any structure or place in which it could be said that there was a shop.
- [57] Mr. Nicholls submitted that the premises of Boyce were used as a mechanic shop; that allowing engines to idle were part and parcel of the operations of a mechanic shop to get them ready so that trucks could carry out daily routines across the Island. In other words, he submitted, Mr. Boyce's auto-mechanic shop was a private one, not confined to any one physical space on his property and not confined to any particular practice.

- [58] I reject this submission. It does not accord with the first essential element of a shop as extracted from the definitions of a “shop set out at paras. [40] to [42] earlier. A physical space is not the same thing as a structure of a more or less permanent character.
- [59] I therefore find that Bonnett has not established that there was a shop on lot 72 at, in or from which Boyce could be said to be operating any business; auto-mechanic repair or otherwise.
- [60] It follows from this finding that there was no breach of the restrictive covenant by the Boyces in the manner alleged. The claim for damages in this regard fails.

The Nuisance

- [61] Paragraph 8 of the statement of claim pleaded in the alternative a case of nuisance founded on the emanation of noxious and offensive fumes, repairs and smoke and their entry into the Bonnetts’ property.
- [62] The particulars given of the alleged nuisance are that the noxious and offensive fumes, vapours and smoke are caused and come from the defendants’ trade or business of an auto-mechanic repair shop operated on Lot 72 from on or about November 1993.
- [63] Ms. Callender submitted that the evidence of nuisance as led before the court was the emission of noxious fumes, vapours and smoke from the starting, and, or idling of the truck for long periods. She further submitted that nuisance of this kind was not pleaded. Rather the case as pleaded is the emission of noxious fumes coming from the operation of an auto-mechanic repair shop and this has not been established.
- [64] Relying on **Pelter v The University of the West Indies (1994) 30 Barb LR 169** she contended that Bonnett is bound by his pleadings and is therefore not entitled to succeed in nuisance.
- [65] In **Pelter** the plaintiff/appellant, a lecturer of the university claimed damages in nuisance when she became ill as a result of inhaling fumes from the spillage of glacial acetic acid on the floor of the laboratory.
- [66] At first instance she succeeded, the trial judge holding that the defendant was negligent when it failed to maintain the fumes hood in its Physical Chemistry Laboratory in a proper condition, thereby exposing the plaintiff/appellant to the risk of foreseeable injury.
- [67] On appeal by the plaintiff/appellant against the award of damages, the defendant/respondent cross-appealed on the issue of liability. And the court of appeal reversed the decision of the trial judge. It was held, inter alia, that a failure of the defendant/respondent to clean up the spillage with dispatch after the incident did not fall within the particulars of negligence placed before the judge, as the case she had against the defendant/respondent. Consequently, the learned judge’s conclusion that the negligence of the university of the West Indies resulted in the injury complained of could not be upheld.
- [68] In giving the decision of the Court of Appeal Moe J.A observed that the importance of pleadings is too often discounted today. He cited the well known passage set out by Sir Jack Jacobs in an article on the importance of pleadings in **Current Legal Problems (1960)**

at pages 176 to 177 and re-iterated in ***Bullen and Leake and Jacobs, Precedents and Pleadings (12th edn.) at pp 17 and 18*** that:

“The very nature and character of pleadings demonstrate their significance and overwhelming importance; for the attention of the parties as well as the court is naturally focused on and rivetted to the pleadings as being the nucleus around which the whole case revolves through out all its stages. The respective cases of the parties can only be considered in light of and on the basis of the pleadings which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may thus be assumed to have put forward the best case he has in the best way he can in his pleading and in this sense the pleadings manifest the true substantive merits of the case.”

[69] I accept the submission of Ms. Callender and find that Bonnett is not entitled to a decision in nuisance on the case as pleaded.

[70] It seems to me that the result in the case might have been very different if nuisance simpliciter had been the case pleaded.

[71] In the result the case of Bonnett is dismissed with costs available to the Boyces to be agreed or taxed.

Elneth O. Kentish

Judge of the High Court.