Case No: HQ09XO3460 & IHQ09/1716

Neutral Citation Number: [2009] EWHC 2452 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 26 August 2009

BEFORE:

HIS HONOUR JUDGE SEYMOUR QC

BETWEEN:

THORNHILL AND OTHERS

Claimant/Respondent

- and -

NATIONWIDE METAL RECYCLING AND ROUNDWOOD RESTORATIONS LIMITED

Defendant/Appellant

MR J HYAM (instructed by Richard Buxton) appeared on behalf of the Claimant

MR CHRISTOPHER STONER (instructed by Birketts LLP) appeared on behalf of the Defendant

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Approved Judgment

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JUDGE SEYMOUR:

1. The application which is before me is that of Mrs Pamela Thornhill, the first claimant, Mr Trevor Foulkes, the second claimant, and Mrs Elizabeth Foulkes, wife of Mr Trevor Foulkes, who is the third claimant, seeking an injunction against the two defendants, Nationwide Metal Recycling Limited and Roundwood Restorations Limited.

2. The application was made by a notice issued on 30 July 2009 and attached to the application notice was a draft order. And the order, as drafted, sought substantively this at (a):

> "Until trial or further Order the Defendants or any of their associates, agents, or otherwise, be prohibited from causing a noise nuisance by reason of its scrap metal operations at Swanns Road, Cambridge."

That form of draft order is very much too vague to be one which it would be appropriate for the court to grant because it contains no indication whatsoever of what would be likely to amount to a noise nuisance. There is no clear indication of what it is that the defendants must or must not do and, in effect, the making of an order in those terms would be calculated to generate satellite litigation around the issue whether there had or had not been compliance with an order made in those terms.

3. The difficulties with the form of the order attached to the application notice were recognised, albeit rather late, because yesterday a revised draft form of order was prepared on behalf of the claimants. The revised draft form of order sought these injunctions:

> "(1) Until trial or further Order, the Defendants or any of their associates, agents, or otherwise, limit their noisy operations at their premises at Swann's Road, Cambridge to two periods each day; with each period being a maximum of 40 minutes at any one time.
>
> (2) Ensure that the two 40 minute periods referred to in paragraph 1 are between 8.30am and 10.00am (one 40 minute period) and between 2.30pm and 4.00pm (one 40 minute period) on weekdays only (i.e. Monday to Friday and excluding all public holidays).
> (3) Ensure that the levels of noise caused and experienced at the Claimants' home during the time periods referred to in paragraph 1 above are limited to the maximum noise levels recorded on 21 August 2009 and referred to in the statement of Dean Barke of 21 August 2009 (viz. an average sound level of the period inclusive of Newmarket traffic of 59 decibels (LAeq, 40 minutes, free field).
> (4) At all other periods ensure that noise levels are kept to a minimum and that level not to exceed 48 decibels LA A90).
> (5) Ensure that they comply with the operator's waste licence/environmental permit with regard to dust emissions, including that all dust causing activities are properly dampened down."

That form of draft order to some extent grapples with the manifest deficiencies in the original draft form of order.

4. Before considering further the relief which is sought by the claimants, it is appropriate to fill in something of the background. Mrs Thornhill, the first claimant, is the freehold owner of premises which are known as and situate at Station House, Barnwell Junction, Newmarket Road, Cambridge. Mrs Thornhill has lived in that property now for 50 years. Station House is on a disused railway station at a junction through which pass trains travelling from Cambridge to Ely and places past Ely to the north. The property Station House was conveyed to Mrs Thornhill's late husband by the British Railways Board by conveyance dated 24 January 1969. The property as conveyed included some two acres of land, and part of that land has been used for the construction of another house called Station Lodge, which was built for the occupation of Mr and Mrs Foulkes, the second and third claimants. Adjacent to the land which was transferred to Mr Thornhill in 1969 is what used to be the railway goods yard. The railway goods yard was itself disposed of progressively by the British Railways Board and its successors and, ultimately, prior to the beginning of this year, the relevant part of the railway goods yard was occupied by Sita Metal Recycling Limited and a company called Sita MR Limited, both companies in the Sita Group, and was operated as a scrap yard.

5. In proceedings which were commenced in 2008, Mrs Thornhill, and Mr and Mrs Foulkes sought relief against the Sita defendants in respect of alleged nuisance caused by the operation of the scrap yard. The defendants in that action accepted ultimately that their operations had caused nuisance and they agreed to pay an amount of £25,000, a sum which was itself agreed by the claimants, as compensation for that nuisance subject to one matter, which depended upon the question of the proper construction of the conveyance to Mr Thornhill in the first place.

6. The trial of the issue of construction of the relevant part of the conveyance came before me and was the subject of a judgment which was handed down on 23 April 2009 (Thornhill v Sita Metal Recycling Cambridge Ltd [2009] All ER (D) 162). As will be apparent from the circumstances, all I was concerned about at that trial was the issue of construction. I was not concerned with whether there had in fact been any nuisance caused by the Sita defendants by the operation of the scrap yard on the former goods yard. At about the time of the trial, the present defendants took over the operation of the scrap yard on the former goods yard. Essentially, the claim of the claimants against the current defendants is that the continued operation of the scrap yard amounts to a nuisance committed by these defendants as an extension of the nuisance previously committed by the Sita defendants.

7. That matter is very much in dispute in the evidence which has been put before me. While there are witness statements from each of the claimants explaining their perceptions of what has been going on at the scrap yard since April 2009, there is also a witness statement of Mr Douglas Edwards, who is a director and shareholder of both of the defendants, in which he explains that, from their perspective, the nature of the operations now conducted at the scrap yard is significantly different and significantly less noisy than the activities that had previously been carried on by the Sita defendants.

8. The witness statement of Mr Edwards is supported by a witness statement of Mr Dean Barke. Mr Barke is an associate of a company called Sharps Redmore Partnership Limited, who are acoustic consultants. Although Mr Barke's company has relatively recently been instructed, it is clear from the witness statement of Mr Barke that he has been able to attend the premises of the claimants in order to take certain measurements. That happened on Friday of last week. As a result of the readings taken by Mr Barke last week, it appears that there are significant differences between his results, and the assessment of the relevant results, and the results obtained on behalf of the claimants by Mr Michael Stigwood of MAS Environmental, also an acoustic consultant.

9. The circumstances therefore seem clearly to be, first, that there are serious disputes between the parties as to what activities are currently being carried on at the scrap yard and, secondly, what are the consequences in terms of noise and dust of the carrying on of those activities. Mr Edwards, in his witness statement, makes clear that the activities of the defendants are only conducted between 8.00am and 4.30pm from Mondays to Fridays and the defendants are prepared to undertake, until trial or further order, not to carry out any operations on the scrap yard other than between those hours on those days. Another issue, which has featured significantly is the use on the site of the scrap yard of what is described as a crane grab. It is accepted that the use of the crane grab is probably the single noisiest activity that the defendants engage in on the site, but the evidence of Mr Edwards is that that grab is not used on any working day for a total of more than two hours and it is not used on any working day for a continuous period of more than about 40 minutes. Mr Jeremy Hyam, who appeared on behalf of the claimants, explained that the first two paragraphs of the revised draft order were based upon the claimants' understanding of the evidence of Mr Edwards. Because of the late surfacing of this focus upon the evidence of Mr Edwards and what he meant, Mr Christopher Stoner who has appeared on behalf of the defendants, has had to explain, having taken instructions, the nature of the operations that the defendants in fact undertake using the crane grab.

10. Essentially, it amounts to this, that when somebody who wishes to dispose of metal, and in fact it is only non-ferrous metal that is dealt with at the scrap yard, appears with a load, that load has to be removed from the vehicle upon which it has been brought and placed somewhere. The crane grab is used for that purpose. How long it takes to remove the load depends upon the size of the load, but it may be a matter of just a few minutes. It may be in the course of a working day that there need to be a fair number of uses of the crane grab for quite short periods to unload relatively small vehicles. But Mr Edwards, Mr Stoner submitted, should be understood as intending to convey simply that the unloading of a particular vehicle is not, in any circumstances, going to take longer than 40 minutes.

11. There are serious differences between Mr Barke and Mr Stigwood not only as to the appropriate levels of the background noise, as it is described, as experienced at the property of the first claimant and the property of the second and third claimants which are referable to the activities at the scrap yard, but also as to the proper interpretation of the levels which have been recorded. I am not in a position today to reach any conclusion as to what is an appropriate background level for the use of the scrap yard during the ordinary working week, if it is indeed appropriate for the court ever to address the issue whether there has been or is a noise nuisance at the scrap yard by reference to decibel levels. Certainly, it would be wholly wrong for me to make an

order in terms of a particular decibel level which is not to be exceeded by the activities of the defendants at the scrap yard. The matter is further complicated because the particular decibel levels which are contended for are not, as it were, absolute levels, not to be exceeded at any particular given time, but rather to be assessed on an average basis over extended periods of perhaps one hour, or perhaps even longer. In those circumstances it would be wholly inappropriate for me to grant any injunction by reference to decibel levels as suggested in the revised draft order.

12. There is a serious objection to the granting of any injunction whatsoever in this case and that is that no cross-undertaking in damages is offered on behalf of the claimants or any of them. It is the almost invariable requirement of the court granting an interim injunction that the party seeking an injunction should offer a cross-undertaking in damages. This is not simply a ritual act. It is a matter of significance and of great relevance to the issue whether an injunction should be granted at all for this reason that, at an interim stage, the court cannot know what the eventual outcome of the litigation will be. It is entirely possible that the court being persuaded, at a preliminary stage, by reference to the well known criteria in American Cyanamid Co v Ethicon Ltd [1975] 2 WLR 316, that the balance of convenience favours an applicant for an injunction, the trial judge comes to the conclusion that the opposite party should succeed. If the trial judge reaches such a conclusion then the issue plainly arises as to the compensation of the party against whom the injunction had been granted for the consequences of the grant of the injunction ultimately found not to have been justified. That is the situation that the cross-undertaking in damages is intended to address.

13. In the present case it is clear that the activities of the defendants undertaken at the scrap yard are commercial activities. They are undertaking the processing and distribution of scrap metal with a view to making money. The evidence of Mr Edwards is that the gross profit which is made each month by the activities at the scrap yard is of the order of £40,000 and that, if the defendants were unable to continue to operate the scrap yard, then the cost to them would be of the order of £1,300 per day. Because of the way in which the issues have developed there is no specific evidence as to what would be the cost to the defendants of imposing upon the defendants some limitation as to their hours of work or mode of work during the ordinary working day. However, the submissions of Mr Stoner, based on instructions, make it clear that there would be likely to be implications for the defendants in terms of additional cost, and possibly loss of business, in the event that they were to be inhibited to any greater extent than the undertakings offered in the way in which the scrap yard is operated.

14. In all of the circumstances the appropriate way forward is for me to accept the undertakings offered on behalf of the defendants and to make no further order on the application for an injunction. There is a suggestion that I should direct that there should be a speedy trial of the issues between these parties. Certainly, I am minded to make appropriate directions to achieve that objective so far as it can be achieved but, so far as the application for the injunction is concerned, there will be no order on the undertakings which the defendants offered.

[Further Proceedings]

1 JUDGE SEYMOUR: For reasons which I have explained in the judgment which I have already delivered, the application before me was precipitate. It was ill

considered. The draft order which was prepared and attached to the application notice was deficient in the way that I have already explained. The implications of not offering a cross-undertaking in damages do not seem to have been assessed on the claimants' side until very recently. Even when assessed they do not seem to have been given appropriate weight. The application for an injunction has essentially failed. The undertakings which I have accepted were undertakings which it seems to me from the witness statement of Mr Edwards were essentially always available.

2 The substance of the matter, therefore, is that the claimants have failed and the defendants have succeeded, save with regard to one issue and that issue is relatively minor. It would have been necessary for there to have been a hearing in order to secure the directions for a speedy trial. To that extent it seems inappropriate to deal with the costs of the application. I propose therefore to split the costs in this way: that the claimants should pay 80 per cent of the costs of the application before me to the defendants to be the subject of a detailed assessment, unless agreed; 20 per cent of the costs of the application should be costs in the case, that being my rough assessment of the proportion of the costs referable to the necessity to consider directions for a speedy trial and whether it was appropriate to give those directions.