IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C556/13

In the matter of:

Mr Stephane G.G. Jacquette

Applicant

v/s

Mrs. Lutchmee Devi Keenoo

Respondent

IPO:

District Council of Black River

Co-Respondent

JUDGMENT

The applicant has been living in a residential area with rather minimal inconvenience at Lot 224 in Morcellement SLDC, Petite Verger, Pointe aux Sables until the respondent began to add to her property an extension which is in front of her house on Lot.116. This lot in fact is right in front of Lot 224 and these 2 lots face each other. The applicant has moved for an interlocutory order pending the determination of the main case which he has lodged before this Tribunal to stop the respondent or her agents and proxy from carrying out any further extension or construction work and any commercial activity of selling food such as bread, fruits and vegetables. It came to light in the course of submissions that the extension work had already been completed, therefore this prayer was not pressed upon.

Applicant's case

The applicant relied on the letter of intent obtained by the owners of property in the Morcellement SLDC. The letter stipulated that the Morcellement Permit was obtained for the 438 Lots, out of which 5 Lots were reserved for greenery and the remaining 433 Lots were for residential purposes. Counsel for the applicant stressed on the fact that plots were meant purely for residential purposes and that the respondent was acting in clear derogation of the condition of the permit.

The applicant's contention is also that the respondent had mislead the co-respondent into believing that there was adequate parking space for the customers but that in fact that was a misrepresentation and consequently the road users as well as the applicant's safety was at stake and that the activity along with generating safety hazards due to its location, was also a source of nuisance. Accordingly the balance of convenience tilted in their favour.

Respondent's case

The respondent, for her part, took the opposite view. Her contention was that the title deed itself contained no restrictive covenant and that nowhere was it stipulated that no commercial activities are to be carried out in the Morcellement. Furthermore, since the co-respondent had, despite having offered a hearing to the objectors, granted her with the relevant permit she was operating her business within the realms of legality. On the issue of parking, Counsel for the respondent sought to convince me that since it was a small scale business, it did not generate much traffic but that the respondent were ready to give an undertaking to provide 2 parking slots.

Co-respondent's case

The co-respondent is essentially abiding by the decision of the tribunal. Counsel for the co-respondent reiterated one of the points raised, that is, that the title deed made no mention that the Lots in the Morcellement could not be used for commercial purposes. The applicants, he submitted, did not prove in what way the activity was creating nuisance nor in what way there was a real urgency in this case for me to intervene to grant an interlocutory order in the nature of an injunction since the matter is scheduled to be heard soon. He stated there was no grave and irreparable damage caused to the applicant and quoted the case of Hanumanthadou to make the point that when one lives in a society one has to bear some inconvenience.

Decision

1. **A serious issue to be tried**

The Applicant must satisfy this Tribunal that the issue at hand is causing hardship to him and hence whether there is a serious issue to be tried. The applicant has filed affidavits in which he has expressed concerns as a neighbour about the issues of nuisance, safety and security. The main issue to which he has made extensive reference is, however, the letter of intent and has thus questioned the legality with respect to the granting of a permit to carry out commercial activities in an area which is meant to be exclusively residential. Another issue that was also raised was the non compliance by the respondent to the conditions attached to her BLUP coupled with her misrepresentations to the Council. While I have been satisfied that there is a serious issue to be tried, I believe at this stage these issues cannot be effectively determined by relying on affidavit evidence. These are meant to and will have to be determined on the merits.

2. **Adequacy of damages**

However strong the case may appear to be, if damages would be an adequate remedy to the applicant and the respondent would be in a financial position to pay the applicant, then the position

in law is that no injunction should be granted. It was submitted that since the respondent is not in compliance with some of the conditions attached to her BLUP, this has increased the possibility of accidents and the hazard to safety to a significant level. I do agree that damages would not be an adequate remedy in this case because the issue at stake here is the prejudice that will be caused to the applicant by being exposed to such hazards on a daily basis.

3. Balance of convenience

In order to ascertain where the balance of convenience lies, I have to consider whether there will be a substantial non-compensable disadvantage to one party whichever way my decision goes? Since the respondent is carrying out a business which generates income, it is clear that should I decide to grant an injunction, she will be at a disadvantage but one which is compensable. On the other hand, should I decide not to grant the order prayed for, will that weaken the position of the applicant to a **substantial** non-compensable disadvantage?

According to Lord Diplock in the case of **American Cyanamid v/s Ethicon Ltd [1975] A.C 396** both the benefit and the burden of the remedy lie in its expedient essence: cases are decided promptly, pending the final trial, upon incomplete affidavit evidence that "has not been tested by oral cross-examination". He stated that the object of this form of relief is "*to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial*".

While logic dictates that the applicant is likely to face some inconveniences due to the traffic issues which can create some nuisance, noise pollution, risks to safety and security, the other local inhabitants and road users are likely to face the same inconveniences. I have not been enlightened in what way **the applicant** will face a **substantial** non-compensable disadvantage. It was submitted in general terms that in the absence of parking facilities there will be safety hazards to all road users and that there is constant nuisance early in the morning as the respondent sells bread. The applicant has however failed to convince me in what way, not the other residents or road users but **he** is facing a substantial disadvantage or in what way ***he*** feels that he is deprived of the right to a peaceful enjoyment of his property, a right that is so basic and important that my urgent intervention is necessary. It is worth noting that the main case has also been scheduled to be heard on the merits very soon. In the circumstances I find that the balance of convenience lies in favour of the respondent.

4. Status quo

In view of the above conclusion, I need not consider the status quo. I believe that there is no such urgency that necessitates my intervention at this stage. I therefore decline to grant the order prayed for. No costs.

I certify as to counsel.

Jayshree RAMFUL-JHOWRY

Vice Chairperson

20 August 2014

For Applicant: Mr. Ramdass, of Counsel

For Respondent: Miss Rughoonundun, of Counsel

For Co-Respondent : Mr. Mamoojee, of Counsel