SUPREME COURT OF VICTORIA

GRASSO v. LOVE

FULL COURT

STARKE, MURPHY and BROOKING, JJ.

11, 12 October 1979

5

10

Injunction — Quia timet injunction — Proof of real probability of imminence of activity and of substantial damage.
Evidence — Judicial notice — Fact so generally known that ordinary persons presumed to be aware of it.

The defendants proposed to construct and operate a drive-in theatre on part of certain land at Cobram. In an action for a *quia timet* injunction based on nuisance, the plaintiffs obtained a permanent injunction restraining the defendants from constructing or operating a drive-in theatre anywhere on the land. On appeal —

15

Held: by the Full Court. (1) To obtain an injunction in a *quia timet* action, the plaintiff has the burden of proving that there is a real probability not only that the defendants' activities are imminent but also that if performed they will cause substantial damage to the plaintiff.

20

Byrne v. Castrique, [1965] V.R. 171, at p. 173; *Bendigo and Country Districts Trustees and Executors Co. Ltd. v. Sandhurst and Northern District Trustees, Executors and Agency Co. Ltd.* (1909), 15 A.L.R. 565; 9 C.L.R. 474, at pp. 478, 482-3, 485; *Connorville Estates Pty. Ltd. v. Hydro Electric Commission,* [1967] Tas. S.R. 26, at pp. 36-8: *Hooper v. Rogers,* [1975] 1 Ch. 43, at p. 50; [1974] 3 All E.R. 417, at p. 421; *Royal Insurance Co. Ltd. v. Midland Insurance Co. Ltd.* (1908), 26 R.P.C. 95, at p. 100, referred to.

25

(2) There was sufficient evidence of noise that would constitute a nuisance and a substantial or significant interference with the respondents' enjoyment of their house and land if there were a drive-in theatre on one part of the Cobram land but there was insufficient evidence to prove to a reasonable certainty that a drive-in theatre on another part of the land would constitute a nuisance to the respondents.

30

(3) Judicial notice had been properly taken of the general facts of the weather conditions in the area.

35

Holland v. Jones (1917), 23 C.L.R. 149, at p. 153, referred to.

(4) The injunction granted was too wide and should have been confined to that part of the land on which it was proposed to construct and operate a drive-in theatre.

40

Appeal

The facts are set out in the judgment of the Full Court, *infra.*

Graham, Q.C. and *R. Gillard,* for the appellants.

L. Ostrowski, for the respondents.

45

Cur. adv. vult.

The **Full Court (Starke, Murphy** and **Brooking, JJ.(** delivered the following judgment: The respondents (hereinafter called "the Loves") sued the appellants (hereinafter called "the Grassos") seeking an injunction restraining the Grassos from constructing or operating a drive-in theatre on certain land in the Cobram district. The Shire of Cobram was originally a defendant in this action but was represented neither below nor before this Court and it may be ignored for the purpose of determining this appeal. The action was based on the tort of nuisance.

50

At one time apparently the Loves owned a block fronting on to Campbell Road which runs north and south. The Murray Valley Highway intersects Campbell Road a short distance south of this block. Some time before the issue of the writ the Loves sold the bulk of this land to the Grassos. Before it was sub-divided the frontage on to Campbell Road was 1148 feet. The northern and southern boundaries were 1945 feet. The block was rectangular. The Loves retained a block in the south-west corner of the larger block. The block which the Loves retained fronted on to Campbell Road and was also rectangular in shape. Its dimensions were 310 feet by 423 feet. There is a brick veneer house on this block which is about 200 feet back from Campbell Road. The area in which the Grassos proposed to conduct the drive-in theatre was in the north-west corner of the larger block. It was an area of 640 feet by 633 feet. Between the southern boundary of the drive-in theatre and the northern boundary of the Loves' land was a distance of 65 metres. Trees were to be planted along both of these boundaries leaving a 25 metre vacant area between the two rows of trees. There was some dispute as to whether these rows of trees were to extend from Campbell Road east for 32.5 metres or were to extend for the whole depth of the Loves' land, namely 423 feet. His Honour clearly proceeded on the basis that the trees would extend only 32.5 metres, and we think this finding was open to him. But in view of the expert evidence on each side the result must have been the same even if the trees were extended for the full 423 feet. There was to be built on the southern boundary of the drive-in theatre a two metre high corrugated iron fence. However, the expert testimony indicated, as is obvious enough, that this fence would have practically no effect in diminishing the noise to which the Loves would be exposed in their house. We may interpolate here that the Loves base their claim for an injunction on noise, dust and light. The permanent injunction which the learned Judge granted was based on noise. He expressly found that the light which might emanate from the drive-in theatre had not been proved to be a nuisance. He held that the dust which might be expected to encroach on the Loves' land, although likely to constitute a substantial interference with the Loves' enjoyment of their house, would not of itself have been sufficient to warrant the granting of a permanent injunction. It was proposed that there should be upwards of 400 parking sites in the drive-in theatre.

A number of technical difficulties confronted the parties prior to the issue of the writ. It is we think unnecessary for present purposes to set out these matters. It is sufficient to refer only to two Orders made by the Governor-in-Council on 8 August 1978. They were:—

(a) "Whereas it is provided by sub-sections (4), (4A), (4B) and (4C) of section 32 of the *Town and Country Planning Act* 1961 that the Governor-in-Council, upon application of the Town and Country Planning Board or the Responsible Authority or of any other person or body of persons may revoke the whole or any part of the planning scheme if he thinks that in the special circumstances of the case it should be so revoked;

"And whereas an application has been made by Molomby and Molomby on behalf of H. E. and J. M. Love and the Minister has considered a report by the Town and Country Planning Board and has consulted the Responsible Authority;

"Now therefore, His Excellency the Governor of the State of Victoria by and with the advice of the Executive Council doth hereby revoke the Shire of Cobram Planning Scheme in so far as it applies to all that land being Lot 2 on plan of subdivision 91363.

"And the Honorable Geoffrey Phillip Hayes, Her Majesty's Minister for

Planning for the State of Victoria, shall give the necessary directions herein accordingly."

(b) "Whereas it is provided by sub-section (5) of section 32 of the *Town and Country Planning Act* 1961, that where the Governor-in-Council
5 revoked a planning scheme in part he may by Order prohibit, restrict or regulate or make any other provision for or with respect to giving effect to all or any of the matters referred to in the Third Schedule in relation to the land included in that part of the scheme and may specify that any use or development permitted under the Order is permitted only subject to the
10 grant of a permit by the Responsible Authority enforcing and carrying out the part of the scheme so revoked;

"And whereas the Governor-in-Council has this day revoked the Shire of Cobram Planning Scheme in respect of an area of land located on lot 2, lodged plan 91363.

15 "Now therefore, His Excellency the Governor of the State of Victoria by and with the advice of the Executive Council doth hereby order that the land so revoked may be used or developed for the purposes of a drive-in theatre and grazing or pasturing, cropping, orcharding, afforestry, fallowing and similar or other agricultural uses and that:

20 (i) no part of the drive-in theatre shall be located within 65 metres of Lot 1, LP 91363;

(ii) a screening fence of not less than 2 metres in height shall be erected to the satisfaction of the Shire of Cobram along the southern boundary of the drive-in theatre;

25 (iii) quick growing and dense trees shall be planted to the satisfaction of the Shire of Cobram in the area between the drive-in theatre and Lot 1, LP 91363."

Lot 1 referred to in these Orders is the Loves' land and Lot 2 the Grassos' land.

30 On 8 November 1978 the Shire Engineer wrote to the Grassos in these terms:—

"Further to my letter to you on the 25th October, 1978, it is advised that Council has now adopted a specification for the planting of trees in the area between the southern boundary of your proposed Drive-In Theatre
35 and Lot 1, LP 91363, Parish of Cobram.

"The subject specification, which is based on the recommendations of the District Forester of the Forests Commission, is as follows:

"1. Five rows of trees are to be planted on the north side of the subject area and four rows on the south side, with spacing as indicated in the
40 attached sketch. As can be seen the rows are five metres apart and the trees within the rows are also five metres apart. The rows are staggered.

"2. The first, third and fifth rows on the north side and the first and fourth rows on the south side shall be small trees and the other rows are to be taller trees. The trees recommended are all native Australian trees
45 which will require watering for the first year or two but then require little if any further attention.

"3. The species of trees recommended, which are fast growing and windfirm, are as follows . . ."

There was a sketch attached to the letter which indicated how the trees
50 were to be spaced. It was this sketch which was the basis of the conflict between the parties as to whether the trees were to extend only 32.5 metres from Campbell Road or along the whole southern boundary of the drive-in theatre.

On 13 November 1978 application was made by the Loves to Murray, J. sitting in Chambers for an interlocutory injunction restraining the Grassos

from constructing and/or operating a drive-in theatre on Lot 2. An injunction was granted by consent and the learned Judge referred the matter to the Miscellaneous Causes List and ordered that the Loves' application for an interlocutory injunction be treated as the trial of the action. The matter came on before Menhennitt, J. and, after a hearing lasting four days, on 7 December 1978 the learned judge granted the Loves a permanent injunction restraining the Grassos from conducting or operating a drive-in theatre anywhere on Lot 2.

There were fifteen grounds of appeal in the notice but Mr. Graham, Q.C., who appeared with Mr. Roger Gillard for the appellants, did not argue all of them. The ones he relied upon in the order they were argued were:—

Ground 3: That the learned Judge misdirected himself as to the standard of proof applicable in a *quia timet* action.

Ground 4: That the learned trial Judge failed to apply the standard of proof applicable in a *quia timet* action. (These grounds were treated together.)

Ground 2: That the evidence was insufficient to satisfy the standard of proof applicable in a *quia timet* action.

Ground 5: That the evidence was insufficient to prove either at all or with reasonable certainty that a drive-in theatre constructed or operated on that part of Lot 2 where the appellants proposed to construct and operate it would cause a nuisance to the respondents' enjoyment of their house standing on Lot 1. (These grounds were argued together.)

Ground 6: That the evidence was insufficient to prove either at all or with reasonable certainty that a drive-in theatre constructed or operated anywhere on Lot 2 would cause a nuisance to the respondents' enjoyment of their house standing on Lot 1.

Ground 9: That the learned trial Judge erred when he took judicial notice of weather conditions prevailing in northern Victoria referring to Echuca, Yarrawonga and Cobram (and by inference Shepparton) and holding that they were able or equally conducive to producing like conditions.

As to Grounds 3 and 4: The learned Judge directed himself as to the standard of proof. He said, "This is, as has been rightly pointed out, a *quia timet* action and I apply the test stated by the then learned Chief Justice, Sir Henry Winneke, in *Byrne v. Castrique*, [1965] V.R. 171, at p. 173, the test there stated being based upon the decision of the High Court to which his Honour refers. His Honour states the test in these words: 'This being a *quia timet* action the plaintiffs have the burden of proving that it is reasonably certain that what the defendant is threatening and intending to do will cause imminent and substantial damage to their property. I take this statement from the decision of the High Court in the case *Bendigo & Country Districts Trustees & Executors Co. Ltd. v. Sandhurst & Northern District Trustees, Executors & Agency Co. Ltd.* (1909), 15 A.L.R. 565; 9 C.L.R. 474, per Samuel Griffith, C.J., at p. 478, O'Connor, J., at pp. 482-3, and Isaacs, J., at p. 485.

"I will not keep repeating that test, but in so far as I make findings of fact as to what I conclude will happen at the drive-in theatre, I make findings according to that standard, that is I make findings that the defendants are threatening and intending to do things. The test I ask myself is whether what they are threatening and intending to do will cause imminent and substantial damage to the plaintiffs' property, and by damage I mean nuisance as a form of damage."

Having read the passages from the learned Judge's judgment in *Byrne v. Castrique, supra,* the learned Judge said that he would not keep repeating the test but would apply it when making findings of fact. This approach appears to us to be perfectly reasonable and having examined his Honour's findings we find no indication that he did otherwise. It is apparent from a perusal of the passage that we have just quoted that the learned Judge recognized that he must apply the test enunciated both in regard to the probability of the erection of the drive-in theatre and to the issue of a nuisance emanating therefrom causing a substantial interference in the Loves' enjoyment of the use of their house. Mr. Graham however appeared to complain that even by setting out the test as being one of reasonable certainty the learned Judge had not set it sufficiently high. There are of course numerous authorities dealing with what the plaintiffs must prove to obtain an injunction in *quia timet* actions. These are conveniently set out in *Spry on Equitable Remedies* pp. 340-3, pp. 424-5 and in a judgment of Neasey, J. in *Connorville Estates Pty. Ltd. v. Hydro Electric Commission,* [1967] Tas. S.R. 26, at pp. 36-8. There is we think no set formula to describe what the plaintiff must prove. In some cases the expression "moral certainty" has been used. (See e.g. per Farwell, J. in *Royal Insurance Co. Ltd. v. Midland Insurance Co. Ltd.* (1908), 26 R.P.C. 95, at p. 100.) This expression is we think misleading, smacking as it does of the criminal onus of proof although now disapproved even in that context. There is no suggestion which we can find in the authorities that there is a third onus of proof required in *quia timet* actions, lying somewhere between the civil and criminal onus. What we are disposed to think is the true position is that, to obtain a *quia timet* injunction, the plaintiffs must prove that there is a real probability that activities of the defendants are imminent and if performed will cause substantial damage to the plaintiffs.

In *Hooper v. Rogers,* [1975] 1 Ch. 43, at p. 50; [1974] 3 All E.R. 417, at p. 421, Russell, L.J., with whose judgment each of the other members of the Court of Appeal expressly agreed, said: ". . . the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances."

In our opinion there is much to be said for the view of Dr. Spry in his book, to which we have already referred, at pp. 342-3: "Whilst it is of course true that a *quia timet* injunction will not issue unless the plaintiff is able to show that a refusal of relief would involve a substantial hardship to him, in the sense that he must be able to show more than an insignificant or illusory risk, a criticism may be made of the various statements which have been set out here in that it is assumed in them that the required degree of probability of proof of an impending injury is fixed, and is independent of the other circumstances of the case. Yet, as has been seen, the degree of probability that the material injury will occur must be weighed together with its gravity and likely consequences, as well as with any other matters which may affect the balance of hardship or inconvenience between the parties.

"Therefore, the criterion by which the degree of probability of future injury must be established is not fixed or settled, but rather it depends on the various other relevant circumstances of the case. Accordingly, the greater the injury or distress which would be caused by the apprehended injury, if it occurred, the more readily will the court intervene despite uncertainities and deficiencies of proof."

Whatever is required to be proved and however it may be expressed,

after a perusal of the authorities we are satisfied that the test which the learned Judge applied was certainly no less than the law requires, and accordingly we are satisfied that grounds 3 and 4 are not made out.

Grounds 2 and 5: It was common ground that the Grassos intended to build a drive-in theatre on that part of Lot 2 which has been indicated forthwith. Indeed, they had already spent some money preparing the land for the erection of it. So the area of conflict was not whether the theatre would be built but whether there would be a substantial or significant interference with the Loves' enjoyment of the use of their land by reason of the operation of the theatre.

The learned Judge concluded that from the beginning of December until March there would be, on a significant number of nights, a very significant noise emanating from the theatre during the whole performance of such a kind as to constitute a nuisance to the plaintiffs and to constitute a very substantial degree of interference with their enjoyment of their house. In our opinion there was ample evidence to support this finding. Indeed having read the material we should have been surprised if the learned Judge had arrived at any other conclusion.

There was evidence that the common type of amplifier was not to be supplied to customers at this theatre. A lead from the stanchion at each car park site was to be attached to the antenna of the car and with the car radio itself. The sound is broadcast through the radio speakers. If the car had no radio the customer was to be supplied with a small radio set which the customer could place where he wished inside or outside the car. The learned Judge found as a fact that on warm nights patrons would wind down the windows of their cars. Some would sit outside their cars and turn up the sound so as they could hear. Others would place the small radios outside their cars. The combination of sound emanating from all these sources, so the learned Judge found, would be clearly heard in the Loves' home and would constitute a very substantial degree of interference with the enjoyment of the home. There was evidence both expert and otherwise to support the facts found and the inferences drawn by the learned Judge. There was evidence that the theatre would be open for five nights a week.

There was also evidence that before and after the performances and during the intermission there would be banging of car doors and the sound of loud voices. There was evidence that there would be noise from motor cars starting up and leaving the theatre afterwards. There was evidence that from time to time there would be tooting of car horns. There was evidence on which the learned Judge could find, as he did, that Mr. Love was in the category of persons who are likely to be interfered with by the noise which the learned Judge found would emanate from the theatre from time to time.

The learned Judge found that the buffer of trees would be completely ineffectual in having any significant effect on the noise that he had found would exist. He based this finding on the fact that the trees would not be planted sufficiently densely that there was to be a 25 metre gap between them and that they were only to extend 32.5 metres east from Campbell Road. There is a doubt, as we have already said, as to whether the learned Judge was correct in the last of these findings. But even if the fact were that the trees were to extend along the whole of the northern boundary of Lot 1 the two experts (Moss and Taylor) said in effect that there would be no significant diminution of the noise level. In any event the trees would take a considerable time to grow to a substantial height.

As far as light and dust were concerned the learned Judge held, as we

have said, that these matters taken alone were insufficient to constitute a nuisance but that the dust was a minor but significant additional factor reinforcing his finding that the noise would constitute a nuisance.

In these circumstances we are of opinion that Grounds 2 and 5 are not sustained.

Ground 6: This ground attacks the learned Judge's finding that a drive-in theatre situated anywhere on Lot 2 would constitute a nuisance. The furthest away the theatre could be situated from the Loves' land would be in the north-east corner of Lot 2, i.e. on a block of land about 640 feet square in that corner. The nearest part of the drive-in theatre that is the south-west corner would then be about 1100 feet from the Loves' house. It appears that before a weekend adjournment the male plaintiff did not oppose a drive-in theatre being built in this area. But during the weekend he attended a drive-in theatre at Yarrawonga, which we are told is about 42 miles from Cobram, and made certain observations. He gave evidence of what he saw and heard at pp. 69-70 as follows:—

Mr. Ostrowski: "From what distances were you observing?"

"I observed it from 200 feet, 300 feet, 500 feet, 1000 feet, about three-quarters of a mile, and then one mile."

"Would you tell his Honour about the various distances?"

"The most noise that I could hear, it was a very still night, no wind, a very warm night, and a lot of patrons out of their cars and speakers out of their cars. The noise I observed from the Murray Valley Highway would be a distance of 300 feet from the screen and possibly 400 feet from the first speaker sound. The noise there was very loud, this was behind the screen and behind the iron tanks. I then went to a position roughly 200 feet to the west of the last row of speakers in the drive-in; the noise there was roughly about the same as the previous position that I was at. I then moved to a distance of 500 feet, and at 500 feet the noise was greater than 200 feet. From a distance of 1000 feet you could still hear the speakers quite easily, but not the level of 500 feet. At three-quarters of a mile the speakers could still be heard and various fluctuations of noise; and at one mile you could still pick up the noise of the speakers although I think at one mile you couldn't really hear the noise, not judging by my observation."

This is the only evidence which bears on a theatre situated on this site apart from some short evidence by one of the experts (Taylor). As a result of these observations the male plaintiff changed his mind and objected to a theatre being built anywhere on Lot 2. It is to be seen that the observations were taken on one night only and that it was a very still, very warm night. In our judgment this evidence falls far short of proving to a reasonable certainty that a theatre situated in the north-east corner of Lot 2 would constitute a nuisance to the Loves. We are conscious of the unhappy fact that this conclusion may lead to further litigation between the parties. Accordingly we desire to make it clear that our opinion on this aspect of the case is based only on the evidence adduced at this trial. What the result would be if the matter were fully investigated in the future is impossible to predict.

As to Ground 9: The learned Judge took judicial notice of a number of matters. However, the only one complained of in the Notice of Appeal is that he took judicial notice of weather conditions prevailing in northern Victoria and in particular of conditions prevailing in Echuca, Yarrawonga and Cobram. What the learned Judge said appeared at pp. 265-6: "There are certain facts of which I take judicial notice, which are, in my view, relevant and significant. Cobram is located on the Murray River which

means it is in the northern part of Victoria somewhat more northerly than Echuca in latitude and very similar to Yarrawonga in latitude. I take judicial notice of the fact that temperature in that area is significantly higher than in Melbourne and that in the summer time there will always be a considerable number of warm and, indeed, hot nights. I take judicial notice of the fact that that period of the year when the nights will be commonly, and indeed I conclude on the majority of occasions, warm or hot would extend from the beginning of December until about Easter time."

The principles relating to judicial notice are to be found in the judgment of Isaacs, J. in *Holland v. Jones* (1917), 23 C.L.R. 149. At p. 153 he said: "The only guiding principle — apart from statute — as to judicial notice which emerges from the various recorded cases appears to be that whenever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court notices it either *simpliciter* if it is at once satisfied of the fact without more or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.

"The basic essential is that the fact is to be of a class that is so generally known as to give rise to a presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not 'general' but 'particular' facts."

In our judgment the facts of which the learned Judge took notice in the passage quoted above fall precisely into the principle enunciated by Isaacs, J. and referred to above.

There is in our judgment no substance in this ground.

In the result we are of opinion that the learned Judge was justified in concluding on the appropriate burden of proof that the plaintiffs had established that a nuisance in the relevant sense would flow from building and operating a theatre in the north-west corner of the Grasso's land and that the appellants should be restrained from so doing. However, we are also of opinion that the injunction granted on the evidence was too wide and should have been confined to the area proposed in the north-west corner of Lot 2.

Solicitors for the appellants: *Juliano, Bucca & Co.*

Solicitors for the respondents: *Molomby & Molomby.*

BARBARA HOCKING
BARRISTER-AT-LAW