IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Ronald LeBlanc and Joanne Laffin v. Ballast Grounds Fisheries Limited, a body corporate and The Harbour Authority of Alder Point, 2003NSSC180

Date: 20030908
Docket: 202247
Registry: Sydney

Between:

Ronald LeBlanc and Joanne Laffin
Applicants / Intended Plaintiffs

v.

Ballast Grounds Fisheries Limited, a body corporate and The Harbour Authority of Alder Point
Respondents / Intended Defendants

Judge: The Honourable Justice Frank Edwards

Heard: September 2, 2003, in Sydney, Nova Scotia

Counsel: Glenn F. Gouthro, Esq., for the Applicants
Ralph Ripley, Esq., for the Respondents
Nash Brogan, Esq., for the Respondents

By the Court:

[1] This is an application for an interim injunction to restrain the Respondents from operating an industrial freezer at the Alder Point Wharf.

[2] Since 1997, the Applicants have lived in a residence adjacent to and overlooking the wharf area. Ronald LeBlanc (LeBlanc) is 39 years of age and has always lived in the same area. In 1997, he was therefore well aware of the character of the area and the type of activity which normally occurred at the wharf.

[3] The Respondent, Ballast Grounds Fisheries Ltd., (B.G.) buys fish product from local fishermen. To service its client fishermen it operates a freezer where bait for the fishermen is stored.

[4] The other Respondent, The Harbour Authority of Alder Point (the Authority) is the organization which governs the day to day operations at the wharf. The Authority leases space to companies such as B.G. and assigns locations on wharf property to such businesses.

[5] In April or May of 2001, a representative of B.G. had local residents sign a document indicating they would not be opposed to the placement of a freezer. The evidence is uncontradicted that the representative assured the residents (including the applicant Joanne Laffin) that the freezer would not be as loud as a ceiling fan or a kitchen refrigerator. Shortly thereafter, B.G. placed a 40 foot industrial freezer on the edge of the wharf parking lot approximately 75 feet from the Applicants' home.

[6] The Applicants immediately complained to the Authority about the noise. In May of 2003, B.G. moved the freezer to its present location approximately 75 to 100 feet further from the Applicants' residence. The freezer was positioned so that the motor would be at the end furthest from the residence. B.G. also tried to muffle the sound by enclosing the motor with plywood. Unfortunately the enclosure caused the motor to overheat and had to be removed.

[7] The hearing of this matter took place on September 2, 2003. During the hearing, there was cross-examination of the various affiants by opposing counsel. The evidence included a report by Tom O'Keefe, a sound engineer retained by the Applicants and Jerome MacNeil, an environmental engineer retained by the Authority. Both did tests which recorded the noise levels while the freezer was running and also when not running. Mr. MacNeil made the point that there is considerable background noise that is often considerably noisier than the freezer unit. He also suggested that the installation of a noise-reduction baffle could further reduce noise levels.

[8] Mr. O'Keefe concluded that there was an enhanced noise floor when the freezer unit is running. He compared the level of noise to that of a car motor

running outside a residential window, or a typical television set off station, turned to one-eighth volume.

[9] The evidence disclosed that the freezer is normally turned on in late April and runs seven days per week and twenty-four hours per day until mid August. The freezer is pre-set to a given temperature and the motor automatically cuts in as required to maintain that temperature. The warmer the weather, the more the motor runs. The motor noise would therefore be most frequent during the time when the Applicants would wish to ventilate their home by opening windows.

[10] Following the hearing, I visited the scene. With Counsel and the parties present, I toured the wharf area. I observed the Ballast Grounds' freezer (the B.G. freezer) in its present location and saw where the freezer had initially been placed. The freezer was turned on. At my request, it was turned off and then back on again. At the time of my visit there was a fair amount of activity in the area. The rival fish buyer (J.K. Marine Ltd.) was busy unloading rock crab from one of the fishing boats. A fork lift was in operation. Still the sound of the B.G. freezer was very apparent.

[11] J.K. Marine also has a freezer very close to the one in question. The J.K. Marine Freezer is only about one-half the size of the B.G. freezer. As we

walked past the J.K. Marine freezer it was difficult to determine whether it was in operation. At that moment, a J.K. employee happened to open the freezer door and only then could one hear the sound of its compressor. I had heard evidence that Ballast Grounds services only seven full-time fishermen at this location. In light of that evidence and the relative quiet of the J.K. freezer, one has to wonder whether the B.G. freezer is bigger and therefore louder than it has to be. That is a question which remains unanswered at this stage of the proceeding.

[12] I also viewed the location near the western side of the slipway. Nelson MacNeil, the President of the Harbour Authority had testified that moving the freezer to that location would create more problems than it would solve. He alluded to difficulty Clearwater trucks may have turning in that area if the freezer were present. From my observation, I doubt whether the freezer would in any way inhibit such turning.

[13] B.G.'s concern about power supply and the relative inconvenience of the slipway location (or the parking lot location) may have more merit. I suspect that the main source of reluctance to move the freezer again is money. B.G. paid for the first move but is being reimbursed by the Harbour

Authority through a reduction of its lease fee. I am sure that neither is anxious to absorb the cost (which could be substantial) of another move.

[14] After my tour of the wharf area, I proceeded to the LeBlanc/Laffin residence. I stood in the living room near the open double window (shown in photo 2A). With the window open the sound of the B.G. freezer was very apparent inside the house. The sound was almost imperceptible with the window closed. Again, I had the freezer switched off for a moment and then switched on again. Despite the other activity going on at the wharf, the sound of the B.G. freezer was very prominent. With the window open, it was easy to tell when the B.G. freezer was on and when it was not. I then concluded my visit with my thanks to Counsel and the parties for their cooperation.

[15] The law governing applications for interim injunctions is well settled and has been set out at length in the Applicants' brief. Essentially, I must apply a three-part test:

1. Is there a serious question to be tried?
2. Will the Applicants suffer irreparable harm if an injunction is not granted?

3. Does the balance of convenience weigh in favour of granting the injunction?

[16] ***1. Serious Question:*** I have no difficulty in concluding that the Applicants have proven that there is a serious question to be tried. The Applicants intend to bring an action in nuisance against the Respondents. Whether there is an actionable nuisance will depend in each case upon whether the interference would be substantial, not just with reference to the plaintiffs, but with reference to any reasonable person occupying the Plaintiffs' premises. (Fleming, The Law of Torts, Applicants' brief p. 6) In this case, there is a strong argument that the freezer noise is substantial when weighed by any reasonable person. The Respondents argue that this is the type of noise which one might expect when deciding to live in the vicinity of a busy wharf. Maybe and maybe not. That will be an issue at trial. On the other hand, the Applicants can point to the fact that another company's freezer is relatively silent.

[17] While engineer MacNeil correctly points out that other noises in the area are louder, one has to keep in mind that such noises are relatively brief. Undoubtedly, there is considerable noise in the early mornings when fishermen start their engines before heading out for a days fishing. I suspect

that such noise is much less an hour in duration. So too, there would be noise in the afternoons when the boats return and unload their catches. Again, such noise would be of short duration. It could not fairly be compared to the noise of a machine that runs 24 hours a day, seven days a week for more than three consecutive months.

[18] Witnesses for the Respondent attempted to portray the Applicant LeBlanc as a chronic complainer. That is an easy accusation to make when one does not have to live beside the subject freezer. In future, Respondents would be well advised to refrain from such personal aspersions. The Respondents also referred to the noise made by a large fish plant which used to operate in the area. The plant in question has been closed for over 15 years. It is irrelevant to this proceeding. In the end, a trial will have to determine whether the freezer makes a noise which is beyond what the Applicants can be reasonably expected to bear.

[19] ***2. Irreparable Harm:*** The freezer is now turned off for the season. It will not start up again until the last week of April 2004. The Applicants brought this application on June 11, 2003, but have as yet not started an action. Had they done so, it is possible that the trial would have been held prior to or

shortly after the freezer again began operation. In any event, the action would be three months closer to trial than is now the case.

[20] I acknowledge that there may be valid reasons why Counsel proceeded as he did and I make no criticism of him. But whether there was a prospect of settlement or some other reasonable concern, the Applicants took a risk by not commencing the action forthwith. They must now shoulder the burden caused by that delay. On the other hand, it is conceivable that the matter can still be brought to trial at an early date. Surely the Respondents would want to know where they stand prior to the commencement of another season rather than (possibly) in the middle of it.

[21] But no matter what he duration of time prior to trial, I do not accept that the Applicants will suffer irreparable harm if I do not issue an injunction. It is true that they cannot retrieve the summer days spent with their windows closed. But they can be monetarily compensated for such inconvenience. Examples of irreparable harm include cases where a party will be put out of business or suffer severe damage to its reputation unless an injunction is granted. There is no evidence here that the alleged nuisance poses a threat to the physical or mental health of the Applicants. The Applicants have therefore failed to satisfy me that they will suffer irreparable harm because of the freezer noise.

[22] ***3. Balance of Convenience:*** Likewise, the Applicants have failed to satisfy me that the balance of convenience weighs in favour of granting an injunction. If I were to order the Respondents not to operate the freezer, I would effectively, be determining the outcome of this intended lawsuit at this preliminary stage. The Respondent company would have to decide whether to move the freezer (with the attendant cost and inconvenience), or try to operate without one. With the noise gone, there would be no incentive for the Applicants to start a lawsuit let alone expedite it.

[23] On one side I have to balance the possibility that the Applicants will endure a few more months of noise. On the other, I have the certainty that the Respondents will incur expense and inconvenience. Further, if the Applicants are unsuccessful at trial, I have no evidence that they could reimburse the Respondents for any expenses incurred by the Respondents as a result of the injunction.

[24] I am therefore dismissing the application for an interim injunction. Costs of this application shall be in the cause.

J.