IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 22/324 SC/CIVL

BETWEEN: OKA VOCOR
Lonnoc village
East Santo
Claimant

AND: DANIEL VOCOR
Lonnoc village
East Santo
First Defendant

AND: PAUL VOCOR
Lonnoc village
East Santo
Second Defendant

Date of Trial:	26 September 2024
Date of Judgement:	9 December 2024
Before:	Justice M A MacKenzie
Counsel:	Mr R Willie for the Claimant
	Ms MP Manuake for the Defendants

JUDGMENT

Introduction

1. The Claimant and the two Defendants are brothers and live at Lonnoc village, in Santo. They live on adjoining properties. Their disputes with each other tend to be played out in Court proceedings. This claim is not the first time that one or other of them has filed proceedings to resolve disputes between them.[1] The current dispute between the

[1] *Paul Vocor filed an application in the Magistrate's Court for a restraining order in 2021. I will refer to this further in the judgment. Then in 2022, Oka Vocor filed an application in the Magistrate's Court for trespass. That claim was dismissed on 8 March 2023.*

brothers arose because of their differing perceptions as to how their late father's bungalow business would be divided on his death. The Claimant's position is that the business was his to operate. The Defendants had a different view.

2. The dispute which led to the current claim relates to the Claimant's assertion that his brothers interfered with his bungalow business and caused him loss. The Claimant says that he and his father operated a tourism business, Lonnoc Ocean View bungalows which he continued to operate after the death of their father, Harris Vocor, on 30 December 2020. When Harris Vocor passed away, he left a will dividing up his land between family members, including the Claimant and the Defendants.[2]

3. It is not in dispute that the Claimant helped their father with the operation of Ocean View bungalows, but the First and Second Defendant dispute that the business was jointly owned by the Claimant and the late Harry Vocor.

The Claim

4. This is a claim of nuisance filed on 16 February 2022. The Claimant alleges that his brothers have interfered with the enjoyment of his property. The Claimant asserts that the Defendants' actions prevented him from operating his business during two time periods in 2021. On the first occasion, the nuisance was caused by the fact that one of the Defendants, Paul Vocor obtained a restraining order against the Claimant. On the second occasion, the nuisance was caused by his brother Daniel Vocor locking a gate. His land is next to Lonnoc Ocean View bungalows. As a result, the Claimant has suffered loss, and seeks damages for lost business.

5. First, the Claimant alleges that between April - August 2021 his bungalow business was affected, when a restraining order was obtained by Paul Vocor against him. The restraining order stopped the Claimant from operating his business and using the water pump and generator, which affected his business. Second, between 6 September - 18 October 2021, the Claimant alleges that the Defendants locked a gate leading to the Claimant's business premises preventing him from operating his business. These actions caused the claimant to suffer loss of business. In the first period, an estimate of VT3,060,000 was calculated for loss of business, and in the second period, there was a loss of VT860,000. The Claimant has returned to operating his business.

The Defence

6. The Defendants' position is that their actions were lawful. First, because the Claimant is not the owner of Ocean View bungalows. This means that he did not have the right to operate the bungalows after Harris Vocor passed away. Second, the Defendant asserts that the gate at the entrance to Ocean View bungalows is on Daniel Vocor's

[2] *By order dated 23 August 2021, the Claimant obtained Probate as the executor of Harry Vocor's estate*

land, so he has the right to lock the gate whenever he wants to. His position is that the claim is exaggerated and misleading.

Submissions

7. At the end of the trial, counsel asked for time to file written submissions. The Claimant's submissions were to be filed by 3 October 2024. They were filed on 16 October 2024. The Defendants' submissions were to be filed 7 days later, so 10 October 2024. They were in fact filed on 4 November 2024.

8. I do not intend repeating the written submissions. The submissions were considered and taken into account when assessing the issues to be determined.

The Law

9. Private nuisance can be described as an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.[3]

10. It has been said that that there are 3 kinds of private nuisance: encroachment on a neighbour's land, direct physical injury to a neighbour's land and interference with a neighbour's quiet enjoyment of their land.[4] This proposition has been accepted as an accurate statement of law in numerous cases.[5]

11. There is one central issue in the law of nuisance, and that is the reasonableness of the defendant's behaviour.[6] As Lord Wright stated in *Sedleigh-Denfield v. O'Callaghan*:

> *"A balance has to be maintained between the right of an occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."*

12. In *Demore v Shaw*, Chetwynd J considered the tort of nuisance in detail and in particular, reasonableness, and said:

> *"4. ...the law repeatedly recognises that a person may use his own land so as to injure another without committing a nuisance. It is only when such use is unreasonable that it becomes unlawful.*

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[3] *See Demore v Shaw [2015] VUSC 81, citing Reads v. Lyons & Co Ltd [1967] KB 216; Howards v. Walker [1947] 2 All E.R. 197 and Hargrave v. Goldman (1963).*
[4] *Rogers, W. (2006). Winfield & Jolowicz on Tort (17th ed., p.646). Sweet & Maxwell Ltd.*
[5] *Demore v Shaw*
[6] *Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880.*

"Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances."

This requirement was emphasised in Sedleigh-Denfield by the use of slightly different language and described as being a question of the defendant's conduct in using his land, such use being required to be:

"...according to the ordinary usages of mankind living in...a particular society"

There is a distinction, which may be hard to grasp at first, in reasonableness in an action in negligence and reasonableness when looking at nuisance. In nuisance it is the reasonableness of the defendant's conduct rather than as in negligence where the test is whether someone took reasonable care. In nuisance the court will take into account all the relevant and competing interests of the parties and if the conclusion reached is the interference is excessive then the defendant will have no defence even if he took all reasonable care to minimise the nuisance.

5.What this means is that if the defendant has created a nuisance, it is actionable; but the reasonableness of his conduct is relevant in determining whether he has in truth created a nuisance. A balance has to be maintained between "the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with" . In this context reasonableness "is a two sided affair" it is not enough to ask if the defendant has acted reasonably; it must be asked if he has acted reasonably having regard to the fact he has a neighbour. In simple terms, the question of nuisance is one of fact".[7]

Issues

13. The first issue is whether the Defendants committed a nuisance, by interfering with the Claimant's enjoyment of his land in the two periods, firstly between April – August 2021, and then again between 6 September – 18 October 2021.

14. If the Defendants committed a nuisance in either or both time periods, then the issue is whether there is sufficient evidence to assess damages, as claimed.

[7] *Footnotes omitted*

The first time period

15. The first period of nuisance is alleged to have taken place between April – August 2021. During this period, Paul Vocor applied for and obtained a restraining order against the Claimant.

16. A nuisance is usually created by acts done on land in the occupation of the Defendant, adjoining or in the neighbourhood of the Claimant.[8] In relation to the first time period, the Claimant does not assert that the Defendants did any act on their properties to create a nuisance. Rather, it was the obtaining of the restraining order that created the nuisance, as that interfered with his enjoyment of his land, because the restraining order affected his bungalow business. The Claimant says he was unable to operate his business because it is on Harris Vocor's premises and the restraining order affected the water running down to Lonnoc Ocean View. That is because the water pump was in the area belonging to his late father.

17. A restraining order was made by a Magistrate on 8 April 2021. At that stage, Probate had not yet been granted to the Claimant. The order restrained the Claimant from removing property from the late Harry Vocor's premises, ordered that property removed be returned and restrained the Claimant from entering Harry Vocor's premises. Harry Vocor's premises included both the bungalow business and the house his wife lived in.

18. The only aspect of the restraining order relevant to this claim is the order restraining the Claimant from entering the late Harris Vocor's premises. Daniel Vocor's evidence is that the restraining order was obtained because the family was still in mourning.

19. There is little in the way of evidence before the Court as to the restraining order proceedings in the Magistrate's Court. There is no evidence that the Claimant took steps to defend, set aside or appeal against the restraining order. These were all steps open to the Claimant, who was asked in re examination why he did not make any attempt to challenge the order. The Claimant's response was that he did not intend to do anything because everything to do with the issue was already in the hands of the law.

20. The Claimant did annex the order dated 11 October 2021 dismissing the claim. The order was:

> *"Having heard the Defendant Counsel without the Claimant present and the court taking into consideration the administration of estate which was subject of the dispute in this case was granted to the defendant the Court hereby makes the following directions orders.*
>
> *i. That the claim on its face fall and therefore claim dismissed.*

[8] *Salmond & Heuston on the Law of Torts, 21st Edition, Sweet and Maxwell 1996*

ii. That the Claimant to pay a waster cost of VT 10,000 to the Defendant within the next 28 days from today. "

21. However, the fact that the order was dismissed did not render the restraining order ineffective during the period of time it was in force.

22. What the Claimant effectively asserts is that the obtaining of the Court order created a nuisance. I cannot accept that. In other jurisdictions, Courts have held that a Court order is binding and conclusive unless and until it is set aside on appeal or for other reason lawfully quashed. In a New Zealand case, *Siemer v Solicitor-General* [2013] NZSC 68, the Supreme Court said:

> *"Provided the court has the power to make an order of its kind, a court order is binding and conclusive unless and until it is set aside on appeal or for other reason lawfully quashed. Collateral attacks on such orders are not permitted. Neither the parties, nor other persons subject to an order, are permitted to arrange their affairs in accordance with their perceptions of its flaws, including any individual views they may have concerning the validity of the order..."*

23. In *Siemer*, the Court considered the position in other overseas jurisdictions; England, Canada and Australia, in terms of what is known as the rule against collateral challenge. It is conveniently summarized in *Wilson v R* [1983] 2 SCR 594, a judgment of the Supreme Court of Canada:

> *" It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment"*

24. There is no evidence that the Magistrate's Court lacked jurisdiction to make the restraining order. Therefore, applying the approach taken in other jurisdictions, it was binding and conclusive until it was dismissed. If the Claimant believed that the restraining order was wrong or improperly made, then his recourse was to apply to the Magistrate's Court to have it discharged or set aside, which he could have done urgently. He could have appealed. There is no evidence he took any of those steps.

25. The restraining order was binding and conclusive while it was in force. It could not be attacked collaterally which is what the Claimant is essentially doing by asserting that the Defendants have not established any right to Lonnoc Ocean View Bungalows and have therefore interfered with his business. The Claimant was bound by the order and obliged to follow it. The restraining order cannot give rise to a claim in nuisance (or any other tort) given the binding and conclusive nature of a court order. It is not open to the Claimant to attack the obtaining of the restraining order in proceedings other than those with a purpose to vary or nullify the restraining order.

The second time period

26. In the second incident between 6 September – 18 October 2021, Daniel Vocor locked a gate that the Claimant asserts granted access to his bungalow business. What he pleaded in the claim was that he was unable to operate his business because the Defendant locked his business premises. The issue was not clearly pleaded. The evidence of both the Claimant and the First Defendant is that both had been using the gate when their father Harris Vocor was alive. At that time, the gate was always open and was only shut after Harris Vocor passed away.

27. In his sworn statement filed on 1 November 2023 (exhibit C1) the Claimant mentioned the gate briefly. He said that both Defendants had locked up the entrance gate of his bungalow business which caused it to stop operating. There is no evidence about the gate in his sworn statement filed on 6 May 2024 (exhibit C2). Notably, nowhere in the sworn statements does the Claimant say anything about whose land it is that the gate in question is situated on. In cross examination, the Claimant said that the gate was located at the late Harris Vocor's place, but that Daniel Vocor insisted on using the gate. The Claimant also accepted in cross examination that he did not take any action when the gate was locked. That is because he wanted the issue to come before the Court to sort it out.

28. Daniel Vocor was not challenged in cross examination about the location of the gate and whose land it was on. Given that it is clearly an issue, he should have been. As was held in *Fisher v Wylie* [2021] VUCA 5, the fact that Daniel Vocor was not cross examined about that leaves it specifically unchallenged, and so in the normal course it would be accepted. Daniel Vocor's evidence is that the gate belonged to him. In his sworn statement filed on 5 July 2024, Daniel Vocor said that he built the gate to his tourism business area, Lonnoc Connection. He said in reexamination that at the time that the land was shared out, the gate was situated on his land.

29. I do not need to resolve the factual conflict of whether the gate was situated on the bungalow business land or Daniel Vocor's land, because wherever the gate was situated, there was not an unlawful interference with the Claimant's bungalow business.

30. If the gate was situated on the Claimant's land, he had control over the gate and could take whatever steps necessary to unlock the gate and use it. Put simply, the Claimant had the right to unlock the gate and use it if it was on his land. The fact that he chose not to do so, and instead some months later institute legal proceedings, seems inexplicable. If the gate was on his part of the land, he could have immediately taken a step to redress the situation by unlocking the gate. In such circumstances, the Defendants actions did not create a nuisance.

31. If the gate was situated on Daniel Vocor's land, then he was entitled to lock the gate. So, the question becomes one of reasonableness. As noted, it is not in dispute that the gate was used by the parties prior to Harris Vocor passing away and was open. Daniel Vocor's evidence was that he shut the gate after their father passed away, as according to custom he stopped his business to pay respects to the dead. But the difference between what happened with the gate before Harris Vocor passed away and after, is that areas of land were given to the parties via Harris Vocor's will. The situation had changed with the land after Harris Vocor passed away and the brothers had their own business areas, for their own use. The Claimant and the Defendants were entitled to use their part of the land in whatever manner they wished. The fact that a gate on the First Defendant's land was locked was reasonable in all the circumstances, if the gate was located on the First Defendant's part of the land.

32. Even if I had considered the nuisance claim to be proved, I would not have made any order for business loss as claimed. The Claimant produced no business records at all. There was no evidence of the loss beyond the Claimant's assertions. As he was claiming business losses, he ought to have provided his business records, to quantify the loss.

Result

33. For the reasons set out above, the Defendants did not unlawfully interfere with and disturb the Claimant's business. Therefore, the claim for nuisance fails in relation to each time period.

34. There is an order of costs in favour of Daniel Vocor, as either agreed or taxed. There is no order in favour of Paul Vocor as he did not take an active part in the proceeding.

Dated in Port Vila on this 9th day of December, 2024
BY THE COURT

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Justice M. Mackenzie

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU