C & A Aviation (Pte) Ltd and Others v Fokker Services Asia Pte Ltd
[2002] SGHC 37

Case Number : DCA 600021/2001

Decision Date : 27 February 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Andrew Hanam (Hanam & Co) for the appellants; Tan Chuan Thye and Yvonne Quek (Allen & Gledhill) for the respondent

Parties : C & A Aviation (Pte) Ltd; Chui Kui Hung; Chan Yin Hoong; Poon Chee Meng; T K Sengupta — Fokker Services Asia Pte Ltd

Judgment

GROUNDS OF DECISION

1 This is an appeal against the decision of the District Judge in DC Suit No. 3558/1999 in which he: (a) dismissed the Appellants' application for a permanent injunction against the Respondent carrying out certain purported acts of nuisance; and (b) ordered the second to fifth Appellants to pay the cost of the hearing. On 31 December 2001, after hearing the submissions of counsel for the Appellants and Respondent, I dismissed the appeal. The Appellants filed a Notice of Appeal to the Court of Appeal on 23 January 2002 and I now give my written grounds of decision.

The Trial

2 The Appellants are the Plaintiffs in the DC Suit. The first Plaintiff ("CAA") is a company carrying on the business of repairing and servicing aviation components at Buildings 110/143 East Camp, Seletar Airfield ("Building 110"). The second to fifth Plaintiffs are employees of CAA. The second Plaintiff ("Chui") is the managing director of CAA. The Defendant ("Fokker") is a company carrying on the business of maintenance and repairing of aircraft at Building 139 Picadilly, East Camp, Seletar Airfield ("Building 139").

3 The Plaintiffs claimed that on two occasions, i.e. (i) around 4 and 5 July 1998; and (ii) around 11 to 13 June 1999, Fokker had carried out painting works on aircraft in Building 139 in such a manner that paint dust escaped from it and settled in the premises of CAA and on motor vehicles belonging to CAA and the second to fifth Plaintiffs, thereby committing acts of private nuisance. The Plaintiffs also claimed that on various dates between June 1998 and July 1999 Fokker had committed similar acts of nuisance in permitting paint dust to escape while they were conducting painting of aircraft and that these were continuing acts. They claimed damages against Fokker and an injunction to restrain Fokker from committing further acts of nuisance.

4 The claim in damages was settled between Fokker and the first, third, fourth and fifth Plaintiffs on 15 December 2000 by way of a consent judgment entered against Fokker in the sum of $29,545.89 plus interest and costs. The second Plaintiff's claim in damages was settled by way of a consent judgment entered on 8 May 2001 in the sum of $16,000. The sole issue that went to trial in the court below was in respect of the Plaintiffs' prayer for a permanent injunction.

5 CAA had conducted its business of servicing and repairing aviation components at Building 110 since 1985. Fokker had conducted its business of aircraft maintenance and repair at Building 139 since 1997. Building 139 is an aircraft hangar formerly used by the Royal Air Force when they were at the

old Seletar Airbase. It is about 50 metres from CAA's premises. Another company, Hawker Pacific Asia Pte Ltd ("Hawker") operated its aircraft maintenance business at an adjacent hangar, Building 138. All these buildings are leased from the Civil Aviation Authority of Singapore ("CAAS"). In respect of CAA, the lease covered the buildings in question as well as a small strip of land adjoining it, bound by a fence – I shall refer to the land leased by CAA as the "Premises".

6 Chui gave evidence that he received a fax from Fokker on 3 July 1998 advising that the latter would be carrying out spray painting in Building 139 on 4 and 5 July. He said that on those days, he recalled smelling paint and thinner when he was in his office. He went over to Building 139 and saw that the hangar doors were open and the smell came from it. Soon thereafter he discovered that paint particles had settled on five vehicles, two belonging to CAA and the other three to the third, fourth and fifth Plaintiffs. These vehicles were not parked at the Premises, but on a hard standing just outside the gate which is state land managed by CAAS – I shall refer to this as the "Carpark". Chui complained about this to Fokker's manager, one Sathi Suppiah ("Sathi"). They had some discussion regarding settling the matter by Fokker undertaking the repairs of the vehicles. However this could not be resolved and in August 1998 Chui complained to CAAS about the matter. Although proposals were made for a meeting to discuss the issue, it was not held until after the second incident in June 1999.

7 On 9 June 1999, Chui took delivery of his new car. He drove it to work and left it at the Carpark on 11, 12 and 13 June. During those three days Fokker conducted spray painting at Building 139. Chui said that the door of the hangar was left open during the painting and paint particles settled on his new car. Arising from this a meeting was held between representatives of CAA, Fokker and CAAS on 14 June 1999. CAAS supplied a test panel to be used to detect paint particles. This was a sheet of metal formed into a triangular tube, like advertisement panels found on the side of soccer pitches. It was painted black to detect the white paint usually used by Fokker. On 16 June 1999, this panel was placed 3 metres from the gate of the Premises, this being about 46 metres from Fokker's hangar. However there was conflicting evidence as to the result of this exercise. Chui deposed that when he checked the panel a week later he saw white paint particles deposited all over the test panel. However the representative from CAAS testified that it was only on 27 June that he saw paint spots on the panel. It was only 4 to 5 spots and he could not conclude that they came from Fokker's painting operations.

8 The District Judge considered that the issues before him were as follows:

> (1) whether the consent judgments obtained by the Plaintiffs in respect of their claims for damages could be admitted as evidence in the claim for an injunction;
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> (2) whether the second to fifth Plaintiffs have a cause of action in private nuisance as they had no proprietary interest in the Premises or the Carpark;
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> (3) whether CAA had acquired an interest in the Carpark, by way of an easement or quasi-easement;
>
> (4) whether Fokker had interfered with the easement or quasi-easement or disturbed the enjoyment thereof by CAA; and
>
> (5) whether Fokker have continued or threatened to continue the nuisance in the form of discharge of paint dust from Building 139.

9 In respect of issue (1), the judge held that the consent judgments were entered into without

reservation and accordingly such evidence was admissible.

10 As regards issue (2), the judge found that the second to fifth Plaintiffs did not have any proprietary interest in the Carpark. The Plaintiffs' counsel did not dispute this, but submitted that they had a cause of action in public nuisance. However the judge held that this was not pleaded in the Statement of Claim, which he had permitted to be amended by the Plaintiffs even up to the stage of the closing submissions. This part of his decision is not appealed against.

11 On issue (3), the judge held that CAA had an easement over the Carpark. It is not clear in his judgment how he came to this decision but I assumed he meant to hold that the right to park cars at the Carpark, which was the servient tenement, was an easement appurtenant to the Premises which was the dominant tenement. I shall deal with this in greater detail below.

12 In respect of issue (4), the judge found that Fokker had carried out the spray painting on the two occasions in July 1998 and June 1999 in a manner that permitted paint particles to escape and settle on the Plaintiffs' vehicles. He therefore found that Fokker had interfered with the easement, enjoyed by CAA as dominant owner, over the Carpark.

13 As for issue (5), the judge found that the Plaintiffs had not proved on a balance of probability that the doors of the Fokker hangar were opened or partially opened during the painting operations after June 1999 or that there was any escape of paint from the holes or gaps in the hangar. He was satisfied that the systems put in place by Fokker had made it unlikely that the environmental standards of emission were exceeded. Further, the judge was satisfied that there was no evidence that Fokker had been continuing the nuisance by permitting paint particles to escape from its hangar while carrying out spray painting. In arriving at this decision the judge had analysed the evidence of the witnesses. He also took into account the fact that there was no evidence that the other neighbours, e.g. Hawker which was located nearer to Fokker than CAA was, had complained about Fokker's painting operations. He also considered that the grant of a permanent injunction would be oppressive on Fokker who had taken adequate steps to address the Plaintiffs' complaints and was carrying out a legitimate business in an industrial area.

14 In the premises the judge dismissed the Plaintiffs' application for a permanent injunction with costs.

The Appeal

15 On 27 June 2001, the Appellants filed the following notice of appeal against the decision of the District Judge:

> 1. The decision not to allow the 1st Plaintiff leave to amend the Re-re-Amended Statement of Claim by adding a new paragraph 25 to state as follows:
>
> > "The 1st Plaintiff avers that it has an equitable easement over the parking area adjacent to its premises to park its cars and the cars belonging to its directors, employees and visitors."
>
> 2. The decision not to grant the 1st Plaintiff an injunction against the Defendants from spray painting aircraft in their hangar which is causing a nuisance.

3. The decision not to grant nor order as to costs payable by the 2nd to 5th Plaintiffs on the claim for an injunction.

4. Costs of this appeal and below.

5. Further and/or other relief.

16 After hearing submissions from counsel, I dismissed the appeal in respect of all three substantial prayers. I made no order as to costs in respect of the appeal by the second to fifth Plaintiffs. In respect of the remainder of the appeal, I ordered CAA to pay costs to Fokker. In their notice of appeal to the Court of Appeal, the Appellants had appealed against such of my decision as had decided the following:

1. The 1st Appellant does not have an easement to park cars in the parking area adjacent to the 1st Appellant's premises.

2. The 1st Appellant has not proven that there is a continuing nuisance by the Respondent.

3. Not to allow the further evidence adduced by the 1st Appellant establishing an easement and that the nuisance is continuing.

4. Not allowing the appeal filed by the 1st Appellant against the decision of the District Judge in dismissing the claim with costs.

5. Not allowing the appeal filed by the 2nd to 5th Appellants against the decision of the District Judge is [*sic*] ordering the 2nd to 5th Appellants to pay costs of the hearing.

6. Not reducing the costs ordered against the Appellants by the trial Judge as he found that there was nuisance and damage but which had subsequently been rectified after the commencement of the suit.

7. Not allowing the appeal and dismissing the appeal with costs to be agreed or taxed.

8. Costs of this appeal and below.

9. Further and/or other relief.

17 Essentially there are only 4 issues in this appeal and I shall deal with them in the following order:

(a) the refusal to allow fresh evidence to be adduced by CAA;

(b) the holding that there is no evidence of continuing nuisance;

(c) the holding that CAA did not have an easement; and

(d) the question of costs.

(a) Fresh Evidence

18 CAA applied for leave to adduce fresh evidence in the form of a report by one Elizabeth Lee and Ding Jian who are respectively the Division Director and Executive Chemist of Setsco Services Pte Ltd. It details a study carried out by Lee and Ding. Between 19 July and 19 October 2001 they had placed two stainless steel boxes just inside and just outside the Premises to collect paint particles. On 19 October 2001 they retrieved the paint particles found inside the collection boxes. That same day they also retrieved some paint particles from a liquid nitrogen tank located in the workshop. Additionally, on 5 November 2001 they removed some paint particles from a forklift the location of which was unspecified – presumably it was also in the Premises. They carried out a spectral analysis of the paint retrieved from these three places and concluded that the paint was the same as that used by Fokker.

19 In 57 of the Appellants' Skeletal Submissions, it is stated as follows:

> 57. This new evidence is crucial for the following reasons:
>
> > (a) It shows contamination of paint particles from 19 July … to 19 October 2001;
> >
> > (b) There can be no argument that the samples have been exposed to other industries or have travelled around;
> >
> > (c) The boxes confirm that the contamination is affectig the 1st Appellant's property (as the 4 rectangular test panels had already shown) and not just cars parked in the parking area over which the 1st Appellant has an easement to park cars.

20 Fokker objected to this application. If the new evidence were admitted at this stage Fokker would have to be given the opportunity to cross-examine the witnesses. This would entail remitting the matter to the District Court for further evidence to be taken and delay disposal of this matter. There is nothing to stop CAA from taking out another suit based on those alleged acts of private nuisance. In view of these factors, I dismissed CAA's application for leave to adduce fresh evidence.

(b) Continuing Nuisance

21 The District Judge had found as a question of fact that Fokker had, since June 1999, cleaned up their act, so to speak. He found that the Plaintiffs had not proved on a balance of probability that the doors of the Fokker hangar were open or partially open during painting works after June 1999 or that there was any escape of paint from the holes or gaps in the hangar.

22 The evidence that CAA adduced to show that the nuisance had continued after June 1999 was a joint report by Dr Balasubramaniam, Miss Elizabeth Lee and Miss Ding Jian dated 20 January 2001. Dr Balasubramaniam is a Senior Lecturer at the Department of Chemical and Environmental Engineering at the National University of Singapore. He is an "Air Quality Specialist" by training. He holds a Ph.D from the University of Miami and has professional experience in assessing air quality, environmental impact assessment, industrial emissions control and the design of instruments to minimise and eliminate air pollution. Miss Lee is the Divisional Manager of Setsco Services Pte Ltd ("Setsco"), the company engaged to produce the report. She is trained as an environmental engineer. Miss Ding is the Chemist of Setsco. Dr Balasubramaniam's role in the report was to determine if Fokker's air pollution control practices are adequate and to assess "the likelihood of air pollution caused by … paint particles from

… the hangar to the outdoor environment". On 23 October 2000 he and Miss Lee inspected Fokker's hangar in the presence of Fokker's representatives. His report was based on the information he obtained from that inspection. He summarised his report in paragraph 6 of his affidavit evidence-in-chief in the following manner:

> 6. I would just summarize my findings here and say that the Defendants do not have appropriate air pollution control devices such as extractor fans, external air exhaust system and a properly contained spray painting booth. The visual inspection alone revealed that the current air pollution control measures undertaken by Fokker are inadequate to prevent exfiltration of paint particles from the interior of the hangar to the outdoor environment during the process of spray painting.

23 While Dr Balasubramaniam was of the opinion that Fokker's system was inadequate to prevent what he termed "exfiltration" of paint particles, he does not state whether this was so inadequate as to allow the paint to reach the Premises or the Plaintiffs' vehicles in the Carpark. This is addressed in the other part of the report. CAA had supplied certain paint specimens to Setsco. In addition, Setsco had obtained form Fokker specimens of paint used by the latter. Miss Ding carried out spectral analyses of these paint and concluded that the specimens supplied by Setsco matched those obtained from Fokker. However there is no mention in the report as to the date the CAA paint specimens were collected and the judge found that such evidence *"did not mean that paint dust had spread to the 1st Plaintiffs' premises and settled on their buildings and cars from June 1999."* Fokker's expert gave evidence of the adequacy of the new system put in place after June 1999 and the judge was satisfied that this new system had made it unlikely that the environmental standards of emission were exceeded. He also took into account the fact that there was no evidence that the other neighbours, e.g. Hawker which was located nearer to Fokker than CAA, had complained about Fokker's painting operations, and there was no action taken by the Ministry of the Environment against Fokker. On the basis of the evidence before him, including an evaluation of the veracity of the witnesses for both sides, the judge was satisfied that there was no evidence that Fokker had been continuing the nuisance by permitting paint particles to escape from its hangar while carrying out spray painting. I could not see any basis to overrule the judge's finding on fact on this matter.

(c) Easement

24 The District Judge had held that CAA had an easement to park vehicles at the Carpark. He dealt with this issue at 31-36 of his judgment. He first considered Fokker's preliminary objection that the Plaintiffs had not pleaded any facts pertaining to the acquisition of an easement. He held that those facts were not pleaded but as the parties *"had fully canveassed and submitted on the facts and the law regarding easement"*, he exercised his discretion and dismissed the preliminary objection. Having done this, he proceeded to deal with the question of whether there was an easement in 36 which goes as follows:

> 36. I agreed with Plaintiffs' Counsel on the authorities he cited, that the 1st Plaintiffs had an easement over the area outside its premises where its cars were parked. In particular, I accepted the following statement in Principles of Singapore Land Law by Tan Sook Yee at page 405:
>
> > "The right to park a car would probably be recognised as an easement, provided the parking lot is not the entire servient tenement. Judge Baker in *London & Bleinheim Estates Ltd v*

> *Ladbroke Retail Parks Ltd* held that the right to park cars can be an easement so long as the owner of the servient tenement is not denied the right to the reasonable use of this land".

> There was no evidence that CAAS were prevented from parking their cars in the area or from doing anything else there as in the case of *Copeland v Greenhall* [1952] Ch 448 (see page 239 NE and Defence Counsel's submissions on Law of Nuisance and Easements). Defendants' Counsel further relied on the law of Real Property where Sir Robert Megarry cited the unreported case of *Newman v Jones* which decided, on 22 March 1982, that the right to park cars anywhere in a defined area, such as around a block of flats, constituted an easement. The cases of *Handel v St Stephen Close Ltd* [1994] 1 EGLR 70, read in conjunction with section 62(2) of the UK Law of Property Act (similar to section 60 of our Conveyancing and Law of Property Act) also supported the Defendants' case that the right to park cars regularly around or within the curtilage of a block or building could "give the lessee an easement of car parking appurtenant to his household" (at page 7 1-M). I therefore decided the third issue in favour of the Plaintiffs. The 1st Plaintiffs therefore have the right or locus standi to sue the Defendants in private nuisance because of their easement over the car park abutting their premises.

25 In arriving at his decision, the judge appeared to have focussed on whether the right to park vehicles could form an easement rather than on whether such an easement was in fact acquired. Counsel for Fokker had submitted that the judge was wrong and that CAA did not have any easement to park vehicles on the Carpark. There was at most only a licence. I was impressed with this argument and the reasons are as follows.

26 An easement is created by grant, reservation or prescription: see generally *Tan Sook Yee: Principles of Singapore Land Law* (2nd Ed. 2001) at p.535. If the easement is created by express grant, by operation of s 53 of the Conveyancing and Law of Property Act, it must be by way of a deed in the English language. There was no evidence of this in relation to the Carpark. There was also no evidence of an implied grant.

27 As for creation by reservation there was no evidence of express reservation. Indeed CAA had not adduced evidence of its lease agreement. There is the possibility of an implied grant under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31. In *Principles of Singapore Land Law*, this rule is expressed as follows (at p.538):

> "Where the common occupier of two parcels of land exercises a right, which is inherently capable of being an easement, over the alleged quasi servient tenement, then when he subsequently conveys the allged quasi dominant tenement to another while retaining the alleged quasi servient tenement for himself, an easement could arise by implied grant …"

Under this rule, CAA would have to prove that CAAS, or its predecessors in title, had once been the occupier of the Premises and the Carpark and had, in connection with its use of the Premises, parked vehicles at the Carpark. There was not a shred of evidence in this respect. Counsel for the Plaintiffs submitted that I should make this inference but he was unable to provide me with any cogent grounds to do so. Neither could I see any.

28 I turn to the question of an easement being created by prescription. The only possibility is by way of lost modern grant. The right to park vehicles must have been exercised for at least 20 years before the Premises had been brought under the Land Titles Act – see *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 3 SLR 545 at 35-36. As CAA had only leased the Premises since 1985, apart from any other consideration, there is no possibility of an easement being created by prescription.

29 In view of these considerations, I would have held that CAA did not have an easement to park vehicles in the Carpark. However as it was not necessary for my decision, I declined to make any order on this question and this would make it possible for CAA to re-litigate on this issue should it obtain evidence of continuing nuisance.

(d) Costs

30 On the question of costs, it was submitted on behalf of the second to fifth Plaintiffs that the District Judge should not have ordered costs against them on the ground that they did not pursue their claim for injunction to trial. Their involvement ended when the court made the consent orders for damages. Among them, the only one who participated in the trial was the second Plaintiff, Chui. Their counsel submitted that this was as representative of CAA, as he was its managing director.

31 This contention is not supported by the Notes of Evidence of the trial below. On the first day of the trial counsel for Fokker had applied to strike out the claims of the third to fifth Plaintiffs. Counsel for the Plaintiffs resisted it on the grounds, *inter alia*, that the issue of injunction was still a live one and that the applications of the third to fifth Plaintiffs were identical. He had submitted that the application was frivolous because Fokker had more than a year to make the application since the consent orders on damages were made and had only done so on the first day of trial. In view of this, I find it quite disingenuous for the Plaintiffs' counsel to submit before me that the second to fifth Plaintiffs had not pursued their claim for injunction to trial. But apart from that, I see no reason why, as they had pursued their claims to trial, the second to fifth Plaintiffs should not also be liable for the costs.

Sgd:

LEE SEIU KIN
JUDICIAL COMMISSIONER