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Judgment: approved by the Court for handing down | *Delivered:* **29/06/2010**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

MARGARET McGAULEY, MARK CAMPBELL and MARK SHANNON

trading as BERNARD CAMPBELL & CO, Solicitors

Plaintiffs

-v-

MULTI DEVELOPMENT UK LIMITED

Defendant

WEATHERUP J

[1] The plaintiffs carry on practise as solicitors from premises at 91-93 Victoria Street, Belfast. The defendant was the developer of a major urban retail centre in Belfast known as the Victoria Centre. Construction commenced in 2003 and continued until the opening of the Centre in April 2008. The location of the Victoria Centre is immediately adjacent to the plaintiffs' office. The claim of the plaintiffs is that the conduct of the construction work was unreasonable and inconvenienced them unduly and disrupted their use and enjoyment of their business premises and constituted a private nuisance. Mr McLaughlin appeared for the plaintiffs and Mr Singer appeared for the defendant.

[2] The particulars of nuisance relate to noise, debris and mud emanating from the construction site and affecting the plaintiffs' premises; erection of hoarding immediately outside the plaintiffs' premises obscuring their view and diminishing the visibility of the premises; obstruction of the access to the front of the premises from Victoria Street and of pedestrian and vehicular access to the rear of the premises from Church Lane; causing a wheel wash to

be constructed and located immediately outside the front of the premises resulting in deposits of soil, dirt and water on the roadway and pavement outside the plaintiffs' premises.

[3] As a result of the activities of the defendant, which the plaintiffs contend amounted to private nuisance, the plaintiffs claim general damages and one item of special damage, namely damage to a motor vehicle owned by the plaintiffs in the sum of £1,818.50.

[4] The defendant denies that the activities amounted to a private nuisance and denies any liability to the plaintiffs and denies that any damages are payable.

[5] Work on the development site commenced in September 2003 and Mr McLaughlin for the plaintiffs referred to four phases of the works that were of particular concern to the plaintiffs. The first phase was the demolition stage which commenced around April 2004 and continued to September of that year. The second phase was the piling stage, which given the nature of Belfast's foundations is characteristic of most development around the city centre, that proceeded from around September 2004 into early 2005. In mid-November 2004, on a complaint by the plaintiffs, the defendant restricted piling to outside business hours. The third phase was the excavation phase which commenced around the end of 2004 and continued until the middle of 2005. Car parking was to be provided underneath the Victoria Centre and so there were substantial excavations below ground level to accommodate the underground car park. A wheel wash was erected by the defendant outside the front of the plaintiffs' premises where it remained for six months and all lorries removing spoil from the site were washed at the plaintiffs' front door as they exited the site. The fourth stage was the egress ramp and that involved excavation up to five metres in depth at the front of the plaintiffs' premises to provide the permanent egress from the underground car park. This phase continued to early 2006. The project was completed in early 2008. The most intrusive period for the plaintiffs was said to be a two year period from around April 2004 to early 2006.

[6] Two of the plaintiffs gave evidence. First of all, the evidence of Mark Campbell, a partner in the firm of Bernard Campbell & Company. The firm moved into the premises in 2000. During the period with which we are concerned there were three partners in the firm, four or five fee earners and seven support staff. The premises had been renovated to provide a general office, a reception room and six additional rooms, a front access to Victoria Street, a rear access to Church Lane and adjacent car parking provision in Church Lane. External renovation involved a new frontage to the premises. The plaintiffs had knowledge of the proposed Victoria Centre development and gradually up to 2003 the other occupiers of the building left their premises so that the building was empty apart from the plaintiffs by the time

of the commencement of the work. There were adjoining buildings along the block on either side of the plaintiffs but the only ground floor office accommodation was that occupied by the plaintiffs. There was a public house at the end of the block.

[7] In September 2003 the plaintiffs received notice of the commencement of the works and in April 2004 they received a notice of demolition. Major demolition work was undertaken at the site and in particular a tower block known as Churchill House was demolished. During the works the Victoria Square area was closed and access to Church Lane at the rear of the premises was restricted. There was a gate provided into the rear of the premises and access to the car park at the rear was limited for the period that the works were ongoing. It was necessary to divert down High Street and Ann Street to gain access to the car park and the rear of the premises. This exercise was described by Mr Campbell as a complete nightmare because of the scale of the use of this route to gain access to the building site and to other shops and offices in the area. The plaintiffs had to proceed in their cars through the pedestrian precinct and sometimes had to abandon their cars. It could take half an hour to forty minutes to make their way down the street in order to get into their car park.

[8] The demolition of premises was taking place as close as 20 feet from the back door of the plaintiffs' premises and this work was ongoing for about six months. There was constant traffic and dirt and dust. Mr Campbell described how everyone's clothes were affected and dirt was tramped into the premises. Hoardings were erected around the site and the roadway and the footpaths were restricted at the front of the office. Court staff had expressed the view to the plaintiffs that they were unaware that the office was still operating. In 2004 sheet piling began and this caused complaints from clients because of the difficulties experienced in working in the office. Described by Mr Campbell as being like an earthquake, the vibration caused by this piling was such that cups would move off the table. This continued for months and during office hours. They had a conveyancing office and the conveyancer who worked there had to move office. Consultations were disrupted and clients had to be taken elsewhere, to cafes or hotels. Nobody from the defendant firm spoke to them about the work. Eventually Mr Campbell wrote a letter to the defendant on 13 November 2004. Mr Campbell's wife had been driving to the premises and she damaged her car on the hoardings at the car park. Mr Campbell then wrote a letter of complaint about the conditions and proposed an immediate meeting.

[9] A meeting took place on 17 November 2004. Other meetings occurred from time to time. It appears that the meetings were quite conciliatory, although the plaintiffs complain that little was done after the meetings. Correspondence was exchanged between the parties from time to time. It was believed that a promise had been made by a representative of the defendant

to pay for the damage to the plaintiffs' car. After the first meeting the defendant wrote to the plaintiffs agreeing that there would be no sheet piling in office hours and there would be monitoring of the vibration and noise. A request was made for an estimate of the damage to the plaintiffs car on a without prejudice basis. A monitoring device had been installed in another solicitor's office and the defendant appears to have decided that this was sufficient. However the plaintiffs were never advised of anything further about the monitoring or any results of the monitoring.

[10] Attempts by the defendant to deal with the dirt resulted, on 26 November 2004, in flooding of the plaintiffs premises from the use of power hosing. By December 2004 the wheel wash had been installed 15 feet from the front door and lorries were queuing to leave the site. There was noise and spray and sludge under the hoarding to the front door of the premises and eventually sandbags were put down. In January 2005 the hoarding was moved close to the front door and after complaints to representatives of the defendant it was moved back. However the hoarding was only 3½ feet from the door and remained like that for another year. This created difficulties for prams and wheelchairs and produced what was described as a mucky and wet corridor along the front of the building. The wheel wash continued until May of 2005. Complaints about the hoarding resulted in wire being put into the hoarding to help with visibility. When the wheel wash was removed the area that was boarded off became a car park for a time with the issues of visibility remaining. There was a further meeting in June 2005 and there were promises from the defendant to address the issues raised by the hoarding and to engage in better communication. The plaintiffs were informed in July 2005 that the area where the hoarding had been at the front of building would be the main egress from the site from 1 August for 20 weeks and there was excavation of the egress ramp to 5 metres. However the whole process took until May 2006.

[11] At the end of 2005 the plaintiffs gave consideration to relocation, either to buy or to rent elsewhere, but considered prices and rents to be prohibitive and it was decided that they had to stay in their existing premises. They issued a Writ in April 2006. The Victoria Centre opened in March 2008. Mr Campbell did accept that the construction of the Centre was one of the most important urban regeneration sites in Northern Ireland, that it was worthy of praise, that it had cost a very substantial amount of money and that it was probably the biggest building project in Belfast. The worst aspects of the construction period were said to be the intensity of the sheet piling during office hours and the installation of the wheel wash which it was said could have been located 30 metres closer to the city centre side of the plaintiffs' premises.

[12] Evidence was also given by Margaret McGauley, who is Mr Campbell's wife and also a partner in the firm. She stated that she ran

around the site like a demented woman attempting to speak to a representative of the defendant in connection with her issues and complaints about the works. In 2004 there was particular concern about the noise level and she said that simple things could have been done. Some arrangement could have been made to allow queuing access into the site and into the offices in the mornings instead of having to abandon cars and sometimes phone the police. She said there were hundreds of men trying to get into the site in the narrow area that was available with vans and lorries causing obstructions. She said it was stressful in the office and staff and clients were upset about their clothes and about the dust and the dirt. The piling was relentless vibration with things moving about in the offices. She was concerned that the conveyancer might leave the firm and tried to reassure him with a new office. The conference room in the premises became redundant because of the impact of the works. Consulting with clients during piling was described as farcical. They were embarrassed by the noise. They went to hotels or to their home or to the Bar Library or to their other office in Carrickfergus. She said that if someone from the defendant had sat down with them to explain what was happening and how long it would have lasted then it might have made a difference to the stress of the situation, but that did not happen. The hoardings were moved around the front and the back for no apparent reason that she could detect.

[13] Ms McGauley described how on one occasion the hoarding had been moved and when she attempted to drive her car into the car park she scraped the side of the car along the hoarding. She could not get her car into the car park and was very upset and this led to her husband to write the letter of 13 November 2004. The sheet piling was altered to out of hours working which was said to be an absolute relief. However the office was then flooded by the power hosing exercise. This affected the area around the back door and the back office. They had to lift carpet tiles and replace them. The dust was said to be all pervasive. There were several meetings and correspondence about the wheel wash. It was suggested there would be further consultation about the wheel wash but that did not happen. Around the front of the premises there was noise, dirt and dust and engines running and vehicles parking and moving.

[14] Ms McGauley spoke to representatives of the defendant who referred her to the boss or said they would get the boss but that did not happen. She described an incident with a gentleman she knew as Fred, who appears to have been a Fred Thime, Assistant Project Manager from Holland. He came to the premises on one occasion and sympathised with them at a time when the doors were covered in grime and dust and dirt. He was described as histrionic and he took off his coat and complained about the condition of the premises and tried to clean up the premises himself and left saying it was going to be sorted out, but that did not happen. There were complaints about the hoarding and how it obstructed the premises from the footpath and

roadway. They were told that in December 2004 the wheel wash would be relocated but that did not happen until May 2005. They had to deal with complaints from the staff who were working in the premises about noise and difficulties with working, dictation, the effect on their clothes, the giving of kitchen roll to clients in order to wash down their shoes, a blanket offer to provide dry cleaning for those affected, cleaners being in the premises three times a week and Ms McGauley getting the mop out herself. They were concerned about the narrowing of the footpath, the difficulties for women with prams and trollies for files, difficulties with the disabled and a member of staff who had particular struggles in order to get access and egress through the front of the premises. There were suggestions that the hoarding at the front might be painted or somehow modified to soften the image or to reflect that of the office, but that did not happen. The worst aspect, according to Ms McGauley, was that they were strangled by nobody speaking to them and when that did happen it was sweet talk but things did not happen. She said that had there been recognition of their problems how much more bearable it could have been and the defendant might have worked with them.

[15] Evidence was given by Mr John Muntz, Development Manager for the defendant, who in 2003 had been the Technical Project Manager for Victoria Square. He described the project as involving an expenditure of some £300M, providing a retail space of 80,000 square feet, a thousand parking places, 106 apartments, there being no comparable development in Northern Ireland, lasting four years in construction and seven to eight years planning. He described Mr Thime as his Assistant Project Manager from Holland. He stated that when notice had been given about the difficulties with the sheet piling the defendant had changed the system to out of hours working to accommodate the plaintiffs. The hoardings present at the exit from the car park and the ramp were required to keep the people off the site and there was no option but to place the hoardings where they were. The wheel wash was primarily at the exit for the site traffic and was essential in order to prevent the difficulties that would have arisen had the traffic leaving the site been unwashed. This was also the site of the permanent ramp for the exit from the underground car park.

[16] Mr Muntz described how he gave instructions in relation to the conduct of activities affecting the plaintiffs' office. There were two written instructions issued through the contract architect. The first was in relation to sheet piling, which was to be limited to outside office hours. The second was the introduction of mesh into the hoardings at the ramp in order to reduce the impact of the hoardings at the front of the plaintiffs' premises. At regular meetings he would ask the contract architects to keep him informed about the plaintiffs' premises and to ensure that mattters were kept clean and tidy. It was the contract architect who supervised the works on site. Mr Muntz confirmed that the monitoring for vibration and sound had been installed in

other premises. He did not revert to the plaintiffs with the results of the monitoring.

[17] The scale of operations involved the removal of half a million tons of earth by lorry. Mr Muntz was aware of a complaint about the wheel wash but did not issue instructions in relation to the wheel wash. He considered that there was nothing that could be done. The wheel wash used modern washing equipment, the water was recycled, the mud was collected and moved from time to time and there was nothing more that could be done.

[18] This is a claim in nuisance that relates to the use and enjoyment of the premises occupied by the plaintiffs. The plaintiffs must establish that there was undue interference, taking into account the location where the work was being undertaken and the scale of the operations that were being undertaken. There is a requirement for give and take in relation to these sorts of projects otherwise no construction work would be able to be undertaken.

[19] There are a number of matters that should be stated in relation to the legal position. First of all, the rule in relation to private nuisance in respect of demolition and construction works is that if the works are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, there is no liability. See the decision of the Court of Appeal in England and Wales in Andreae v Selfridges [1937] 3 All ER 255.

[20] Secondly, if undue inconvenience is caused to the occupier of premises, the reasonableness and propriety of the developer's actions operates by way of a defence to a claim in nuisance. Hiscox Syndicates v Pinnacle (2008) EWHC 145 concerned a claim for injunctive relief on the grounds of nuisance by the lessees of business premises which were adjacent to construction works and the complaints related to excessive vibration, obstruction of access and water damage. Having referred to Andrea v Selfridges and having stated that there was an issue as to whether the necessary unreasonableness of the constructors or demolishers conduct was an ingredient of the adjoining landowners cause of action in nuisance or operated by way of a defence to such a claim, the conclusion was stated in paragraph 30 as follows –

> "The reasonableness and propriety of the contractor's operation operates by way of a defence to a claim in the tort of nuisance rather than the absence of it being a necessary ingredient of the adjoining landowner's cause of action. In my judgment the cause of action is constituted by causing undue inconvenience or discomfort to one's neighbour. The evidential burden of proof, once that has been demonstrated, then shifts to the alleged tortfeasor to

> adduce evidence to show that all reasonable and proper steps were taken to ensure that such nuisance would not occur. In my judgment, that is consistent with principle, since the existence or otherwise of reasonable and proper steps is essentially a matter peculiarly within the knowledge of the person conducting the construction or the demolition operations in question. If what would prima facie be a nuisance is established, in order to relieve himself from liability the alleged tortfeasor should taken all reasonable and proper steps to avoid it."

[21] Thirdly, the developer must use reasonable care and skill to avoid causing a nuisance and this amounts to a duty to take proper precautions so that interference with the occupier is reduced to a minimum. In Andreae v Selfridges it was indicated that the use of reasonable care and skill in connection with construction and demolition works may take various forms –

> "It may take the form of restricting the hours during which work is to be done; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes it has to be done and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbour's rights."

[22] Fourthly, the measure of damages for undue interference with the use and enjoyment of land caused by temporary works is the diminution in the amenity value of the premises. Nuisance is a tort affecting the use of land. There will be cases where the damage is to the land itself and that perhaps will be a quantifiable matter. Where liability arises in respect of the use and enjoyment of the land and relates to loss of amenity value on the land that is rather intangible. Lord Hoffman stated in Hunter v Canary Wharf [1993] AC 655 in relation to a claim concerned with the impact of the smell of pigs on the use and enjoyment of a property -

> "Diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of an occupation of equivalent house which does not. In the cases of a transitory nuisance, as this is, the capital value of the property will seldom be reduced but the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. But

> inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about. The injury to the amenity of the land consists in the fact that the persons on it are liable to suffer inconvenience, annoyance or illness."

[23] Against that framework I look to the present case. Has there been interference with the plaintiff's use and enjoyment of their premises? Undoubtedly so. Has that interference been undue, taking account of the location and the scale of the operations? Certainly a prima facie case of private nuisance has been established on the basis of the evidence tendered on behalf of the plaintiffs. Has the defendant taken reasonable care and skill in the conduct of the operations in relation to the use and enjoyment of their premises by the plaintiffs? The exercise of establishing whether the activities involved in temporary construction or demolition works amounts to a nuisance is a balance of interests between the developer and the occupier. Give and take is required on both sides. The developer must seek to reduce the necessary interference with enjoyment to a minimum. The occupiers must accept that there are necessary inconveniences arising from the development and make their own adjustments. In order to accommodate the necessary give and take it would be desirable that a developer should inform the occupiers of the nature of the working operations to be undertaken and the measures that are proposed to be taken to minimise interference. Such consultation would enable the occupiers to make appropriate adjustments to the character of their occupation as may be reasonable in the circumstances. Such consultation would also enable the developer to become more fully informed and be able to make any further adjustments to the conduct of the works, if that were to be reasonably required in order to minimise the interference with the occupiers. This is not to suggest that there is any duty to consult. However the fact of consultation may assist the parties in ascertaining what it is that is reasonable or unreasonable once each party is fully aware of the requirements of the occupiers and the requirements of the developer. The absence of consultation is not in itself an indication of unreasonable conduct.

[24] There are certain elementary measures that might have been taken by the defendant in respect of a number of matters about which complaint has been made by the plaintiffs. The piling for example was described by Mr Campbell as one of the more difficult aspects. An elementary step was eventually taken which was capable of being applied without unduly affecting the management of the works and could quite reasonably have been taken much earlier, namely conducting the piling out of office hours, as happened eventually.

[25] The other aspect that Mr Campbell referred to as being particularly difficult was the wheel wash. The defendant contends that there was nowhere else to locate the wheel wash. The wheel wash was immediately outside the front door of the plaintiffs premises. It does not appear too difficult to envisage, as the plaintiffs suggested, that the wheel wash could have been placed 20 or 30 yards on the city centre side of the plaintiffs' front door. The photographs taken of the location illustrate that space was available for the wheel wash to be placed in the alternative position. In that alternative position the water and the spray and the mud would not have been falling around the front door of the premises.

[26] The hoarding obviously impacted on access to and visibility of the premises. It would not have been difficult for the defendant to take up the suggestion that the hoarding might be presented in a manner that involved less detraction to the front of the plaintiffs' premises. The make up of the hoarding could have included the wire mesh at an earlier stage. Parts of the hoarding might have appeared as advertising hoarding for the plaintiffs. There was an advertising board at the end of the passageway but the principal advertising seems to have been that the defendant and the contractors advertised themselves along the hoarding. Part of the hoarding could have been covered with a representation of the front of the plaintiffs' premises, as the plaintiffs suggested. The defendant did not establish why the passageway outside the plaintiffs' premises had to remain so narrow. Again there were elementary measures that could have been taken to minimise the undue loss of amenity.

[27] The effect of the dust and dirt generated by the activities could have been reduced. This would have required a more rigorous cleaning regime. The extensive and longstanding effects of the dust and dirt generated by the demolition works and by the wheel wash rendered such regime as was put in place wholly insufficient. One aspect of the cleaning regime that could have been applied more often and should have been operated more carefully on the occasion it did apply was the power hosing. This flooded the rear of the premises and caused the plaintiffs to lift the carpet tiles.

[28] I am satisfied that there was undue interference with the plaintiffs use and enjoyment of the premises, that there was a lack of reasonable care and skill by the defendant in managing the demolition and construction works, that there were reasonable measures that could and should have been taken in order to minimise the nuisance and that those measures were not taken. This state of affairs persisted for a very considerable period of time without the appropriate elementary remedial action being taken. I am satisfied that the defendants are liable to the plaintiffs for private nuisance.

[29] The item of special damage involved the damage to the Ms McGauley's motor vehicle. At one stage there was a request from the defendant for an

estimate of the damage on a without prejudice basis. Ms McGauley, in driving her car into the car park, misjudged the position of the hoarding and ran her car into the hoarding. This may have been a fraught occasion, as she had negotiated the pedestrian area to reach the car park and then found that the position of the hoarding had been altered. Nevertheless, as she attempted to get her car into the car park the hoarding was stationary and it was her responsibility as the driver not to hit the hoarding. Therefore I do not propose to allow recovery of the item for the damage to the vehicle.

[30] There is a claim for general damages and that is to be assessed in relation to the value of the loss of amenity. On the one side the plaintiffs suggest that some measure reflective of the rent and rates of the premises might be an indication of the value of the claim because that correlates to the value of the use of the premises. Compensation is not paid for personal inconvenience as private nuisance is a tort affecting land and in the present case concerns the use and enjoyment of the land. On the other side the defendant contends that any undue interference was a nominal matter and that no damages should be awarded but if anything it should be nominal damages only. I do not consider this to be a nominal matter. There has been substantial interference over a significant period. I am attracted by the suggested correlation with the rent and rates as representing a part of the costs of the plaintiffs use and enjoyment of the premises. The rent was £15,000 a year and the rates were £7,500 a year, so the outgoings for rent and rates were some £22,500. For what period was there undue interference with the plaintiffs? The combination of items that have been referred to involved an undue impact for a period of about one and a half years drawing together all the times that the different items were operating. I have considered whether half the cost of the rent and rates for the one and a half years of undue interference might be an appropriate comparison in determining the value of general damages. I calculate that sum at £16,875. I have considered whether that sum might be an appropriate reflection of the general damages for the loss of amenity.

[31] Overall I am satisfied that an appropriate award of general damages for the plaintiffs' loss of amenity should be £16,000. Interest will be awarded on that amounted at 2% per annum from the date of issue of the Writ. There will be judgment for the plaintiff on that basis. Costs will follow the event, to be taxed by the Taxing Master in default of agreement.