



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No. 175

**IN THE MATTER OF ENFORCEMENT OF A NOTICE TO QUIT UNDER THE
CONDOMINIUM ACT 1986**

BETWEEN:

THE ROCKAWAY CORPORATION

Plaintiff

-and-

SARA JOSEPH

Defendant

Date of Hearing: 14 January 2014

Date Judgement Circulated/Delivered: 21 April 2014

Christopher Swan & Co. – Ms Lovette Tannock for the Plaintiff

Lomas & Co. – Mrs Alma Dismont for the Defendant

1. This is an application by a specially endorsed writ of summons for enforcement of a Notice to Quit, under section 36 of the Condominium Act 1986, brought by the Plaintiff (Rockaway Corporation) against the Defendant (Mrs Sara Joseph).
2. Mr Mark William Canning (Mr Canning) is the Property Manager for the Rockaway Condominium Development (the Plaintiff) and is the Plaintiff's representative in this case.
3. Mrs Sara Joseph (Defendant) is the tenant at Condominium Unit 2, Rockaway Deep, 2 Rockaway Road in Southampton.
4. Mrs Disa Potgeiter-Oubella and the Defendant are neighbours. Mrs Oubella and her family live in a condominium unit next to the Defendant's unit.
5. The Statement of Claim alleges that from about 2011, the Defendant *inter alia* had her television on for hours at a time at a volume loud enough to override the volume of the television in the neighbouring unit; and that shouting and arguments could be heard from her unit after 11 p.m. sometimes as often as three times per week. The allegation is that the Defendant's conduct constitutes an actionable private nuisance and/or contravention of section 36 of the Standard Corporation Bye-laws (Schedule I of the Condominium Act 1986). If the Plaintiff proves either, then the Plaintiff is entitled to have the notice to quit enforced.
6. In her defence Mrs Joseph wholly denies the allegation.
7. Mr Canning gave written and oral evidence that as the Property Manager for the Plaintiff he is authorised to act on their behalf in this matter. The Plaintiff gave evidence and also called two witnesses: Mrs Beverly Jones-Smith and Mrs Disa Potgeiter-Oubella (also referred to in testimony as 'Mrs Manders' but referred to in this judgement for consistency throughout as Mrs Oubella).

Testimony from Rockaway property manager: Mr Canning (Plaintiff's representative)

8. In July 2012 Mrs Oubella, one of the Defendant's neighbours, contacted Mr Canning and complained that the loud volume of the Defendant's television for hours at a time had become a nuisance. The property layout shows Mrs Oubella and Mrs Joseph live side by side. Mr Canning received several telephone calls and six emails from Mrs Oubella complaining of the disturbances coming from the Defendant's unit. There were three complaints to the Bermuda Police Service and they attended on one occasion.
9. Mrs Valerie O'Brien is one of the landlords of the Defendant's unit. In a letter dated 23 July 2012, Mr Canning wrote to Mrs O'Brien about the noise complaints and asked her to contact the Defendant regarding the noise.

10. Mr Anthony Adderley is one of the other landlords of the Defendant's unit. On 29 January 2013, Mr Canning sent a letter to Mr Adderly asking him to give the Defendant notice to quit the tenancy no later than 28 February 2013. However, the Defendant remained a tenant.
11. By letter dated 13 March 2013 Mr Canning, as property manager, gave the Defendant notice to quit the unit on or before 30 April 2013. The Defendant failed to vacate the premises and Mr Canning said that he continued to receive noise complaints from the Defendant's neighbours. He is seeking an order that the Defendant be required to give up possession of the condominium unit.
12. In the Statement of Claim, the Plaintiff asserts:

"The neighbours indicated that despite attempts to contact the Defendant by telephone, the noise usually continues until a neighbour physically knocks on the door to advise of the disturbance".

"The Defendant has acted in contravention of section 36 of the Standard Corporation Bye-laws (Condominium Act 1986) which states:

An owner [or tenant] shall not-

I(a) use or enjoy the real or personal property of the corporation or the common property in such a manner as unreasonably to interfere with its use and enjoyment by other owners or their occupants;

As a result of the noise and shouting coming from the Defendant's Unit, the Defendant has created a private nuisance towards the Plaintiff."
13. In cross-examination Mr Canning said that he was first notified about noise from the Defendant's unit on 2 July 2012. He was told that the noise had been a problem since 24 June. However, during his time on the property – early mornings – Mr Canning did not hear any noise. He also did not ask Amanda Bean or Kae Thomas (two of the Defendant's neighbours) if they had heard any noise.

Testimony from Rockaway resident and Board member: Beverly Jones-Smith (Plaintiff's witness)

14. The Plaintiff's witness, Beverly Jones-Smith, filed an affidavit and gave oral evidence in support of the Plaintiff's claim. She is a neighbour of the Defendant, Mrs Joseph, and has lived in the building for about 30 years. She is a member of the Plaintiff's Board and is in charge of the property grounds. Consequently, if there are any problems with a unit the neighbours contact Beverly Jones-Smith.
15. Beverly Jones-Smith said she began to get noise complaints from Mr and Mrs Oubella – the neighbours most affected by the noise – approximately eight to twelve months before

the police were called. Mrs Oubella would telephone her to complain about problems with the volume level of the television and music from Mrs Joseph's apartment.

16. Beverly Jones-Smith visited the Defendant's apartment on several occasions to ask her to reduce the volume of the television, which she could hear while standing outside the apartment. Mrs Joseph would turn the music down when asked but increase the volume again shortly afterwards. She recalled one incident when Mr Oubella contacted her by telephone and asked her to come and visit their unit:

"The music coming from the Defendant's apartment was so loud I couldn't even hear Mr Oubella talk in his own apartment. Even with the sliding door closed. I could still hear the music. I remember the husband was frustrated at the noise that he or his wife called the police. Even in the winter when you expect windows and doors to be closed, the Defendant will have her windows open and the music will be blasting."

17. In cross-examination Mrs Jones-Smith said that she first received a complaint in 2011. She spoke to the occupants and they reduced their noise. She stated that she went to Mrs Joseph's apartment about three times. She confirmed that she cannot hear the noise from her apartment.
18. On re-examination Mrs Jones-Smith said that noise should be at a reasonable level and at certain times you should not turn on certain things; for example, a washer should not be on at night. Also, if windows are open noise can be heard. She said she would just ask the person to reduce the noise.
19. She felt that Mrs Joseph was being unreasonable as the matter could have been sorted out a long time ago. She said she was surprised at the situation because the two neighbours used to get on well.

Testimony from Rockaway resident and complainant: Disa Potgeiter-Oubella (Plaintiff's witness)

20. Disa Potgeiter-Oubella (Mrs Oubella) was the final witness in support of the Plaintiff's claim. She has lived at Rockaway Deep for 24 years. She said she has no problems with any of her neighbours.
21. Mrs Oubella is the Defendant's neighbour. The bedroom she sleeps in is next to the Defendant's living room. Her other bedroom is next to the Defendant's second bedroom.
22. Mrs Oubella said her worst experience of noise from the Defendant's apartment was during the summer of 2012, especially prior to and during Cup Match. The noise was also worse around May-June 2012 when it started to get warm and the Defendant's windows and sliding glass doors were kept open. Mrs Joseph would have the television on very loud

with her window open. Mrs Oubella said she would call the Defendant to ask her to turn down the volume; she would leave a voice message but the noise continued. She would also knock on the Defendant's door to ask her to turn it down but that did not make a difference.

23. Mrs Oubella would call her neighbour Beverly Jones-Smith, who is on the Plaintiff's board, for help because her family could not bear the noise. On one occasion her husband was angry that he could not hear their own television because the Defendant's television next door was so loud. Mrs Jones-Smith went over and spoke to the Defendant who listened and closed the door after she left. However, when Mrs Jones-Smith returned to her unit she found the Defendant had not turned down the volume. Mrs Jones-Smith went back to the Defendant's apartment and again asked her to turn down the volume, which the Defendant finally did.
24. Mrs Oubella continued that even when her windows were shut they could sometimes hear the television. Also Mrs Joseph had a very loud alarm on her cellular phone that would start ringing at about 5 a.m. The alarm would be on snooze for two minutes then go off again. Mrs Oubella claimed that this would go on for hours and occurred for weeks.
25. Another incident was when the Defendant's oldest son, Christopher Godfrey, was home. He stayed in the bedroom in the back of the unit and had his music blaring obscenities. Her husband called the police and the report exhibited at RC1 shows that the Defendant was asked by the police to turn down the music and she complied.
26. Mrs Oubella said that if her family did not hear the alarm clock first thing in the morning they heard the television or loud music. Also, the Defendant would often leave her television on all night. She said she could hear arguments between the Defendant and her husband and son late at night. For these reasons she complained to the property manager Mark Canning.
27. On 2 July 2012, Mrs Oubella emailed Mr Canning (Exhibit RC2) recounting that:
 - a) Beverly Jones-Smith was asked to come to the premises on Saturday 30 June 2012;
 - b) at 3.30 p.m. Mrs Oubella called the police and they came;
 - c) the Defendant had complained to Somerset Police that Mrs Oubella was harassing her.
28. Mrs Oubella said the Plaintiff should be entitled to an order for possession and enforcement of the Plaintiff's notice to quit because the Defendant was no longer willing to cooperate with her about the noise.
29. In cross-examination Mrs Oubella said it was not unreasonable to use an alarm clock, but it was unreasonable if it goes off 20 times.

She confirmed that her daughter has a baby but disagreed that the baby frequently cries at night.

She disagreed that she is hypersensitive to noise and countered that she has taught a classroom of 25 children.

She stated that the loud music was usually during the day; it was disruptive to her husband who was usually in the back room.

30. Mrs Oubella accepted that she used to be friends with the Defendant. The Defendant used to help clean her house, however they are no longer friends.
31. Mrs Oubella said that she had lived in the building for 25 years and owns her apartment. Although the Defendant is a tenant she said she did not believe she had more rights than the Defendant.
32. Counsel for the Defendant, Mrs Dismont, asked Mrs Oubella why there were no complaints for seven years during the time Mrs Joseph lived next door. Mrs Oubella replied that there was no noise.
33. Mrs Oubella denied making the Defendant's life a misery and said she had not tried to get the Defendant's son (Christopher Godfrey) fired. However, Mrs Oubella conceded that she had called the son's employers to find out if he was employed as a non-Bermudian because she had about 40 Bermudian students at Cedar Bridge without jobs. She agreed that she did not like it that he was a non-Bermudian. She confirmed that he got the job in 2012.
34. Mrs Oubella said it was absurd and ridiculous that she only started to harass the family and complain about noise in 2012 when the Defendant's son, a non-Bermudian, was hired.
35. She admitted she has a drinking problem, but stated that this had no effect on her complaints about noise.

Testimony from the Defendant: Sara Joseph

36. The Defendant, Mrs Sara Joseph, denies the allegation. She filed an affidavit, gave oral evidence on her own behalf and called four witnesses: Christopher Godfrey (her son), Ms Elva Swan (neighbour), Mrs Amanda Bean (neighbour) and Ms Kae Thomas (neighbour).
37. Mrs Joseph lives with her husband Lawrence Joseph and three children: Christopher Godfrey (aged 20), Abigail Joseph (aged 13) and Samuel Joseph (aged 11).
38. By July 2013 she had lived in the apartment for approximately 9 years. Her husband moved to the apartment in 2007. She is a tenant of Mrs Valerie O'Brien; Mrs O'Brien is

one of the landlords who signed the witness statement on Mrs Joseph's behalf. Her apartment is next door to Mrs Oubella's. [Mrs Oubella was referred to in the evidence as Mrs Manders.]

39. In May 2013 she received an application from Mark Manning (property manager of Rockaway Corporation) on behalf of the Corporation, to enforce a notice to quit against her. Her statement is that the allegation made against her and her family was completely unfounded.
40. Between 2006–2007 she cleaned Mrs Oubella's house. They were friends and she used to confide in her. In paragraph 3 of her witness statement, Mrs Joseph divulged personal matters Mrs Oubella had shared with her. The Court will not repeat them, but they have been noted by the Court.
41. Mrs Joseph claimed that around 2011 Mrs Oubella started to tell her that her son, Christopher, was a gang leader and was taking drugs. Mrs Joseph said she found this completely ridiculous but she took her son to the family physician to be tested for drug use. The results were negative. She felt that this would make Mrs Oubella leave her family alone.
42. Mrs Joseph testified that about 2011–2012 Mrs Oubella would take her youngest son, Samuel, inside and question him about their family. Also, without Mrs Joseph's permission, Mrs Oubella asked him deliver things to her friends in the condominium.
43. In summer 2012, when Mrs Oubella alleges the worst of the noise disturbance occurred, Mrs Joseph was getting her son Christopher's room ready as he was coming home from school abroad. She said she was very happy and playing salsa music when she heard a knock on the door; it was a police officer who informed her that they had received a complaint about loud music. She asked the police officer if they could hear any music. They said no, they could not hear any music from outside and then came inside the house to hear the music.
44. Mrs Joseph claimed that Mrs Oubella would often complain to the police and bang aggressively on the door especially when her son Christopher was home alone. When she asked other neighbours if they could hear loud music they said no.
45. In the early hours of the morning Mrs Joseph claimed she would receive phone calls from a private number and the person calling would be silent. They suspected it was Mrs Oubella, and on one occasion Mrs Joseph and her husband heard a voice message from Mrs Oubella saying "I know you can hear you [expletive]". Mrs Joseph said Mrs Oubella's speech was slurred so she suspected that Mrs Oubella was drunk.

46. In summer 2012 Mrs Joseph's son Christopher started to work at Snorkel Park Beach. One day he was sent home because someone had called the office (pretending to be from the Immigration Department) and said he was working illegally. This happened a couple of times and on each occasion Mrs Joseph checked with the Immigration Department who confirmed they had not called Snorkel Park Beach. They issued a fresh set of papers for Christopher to continue working.
47. Mrs Joseph felt her family was being harassed. When the children played outside, especially if Christopher was outside, she would receive complaints from Mrs Oubella that the children were too noisy. Despite the fact that there were several children playing outside, her children were targeted as the noisy ones.
48. Mrs Joseph said that Mrs Oubella and her family were also noisy but she never complained. For example, Mrs Oubella entertained on her front porch and the gatherings were noisy. Also, when Mrs Oubella's children were home for the summer they often had friends coming in and out making noise. However, Mrs Joseph and her family did not complain because she felt Mrs Oubella's family made reasonable sounds inside their home.
49. Mrs Joseph claimed that Mrs Oubella's harassment of her and her family had gotten worse over the past few years. For example, on 3 July 2012, as Mrs Joseph left her home, Mrs Oubella screamed "You [expletive] *itch" at her. The Joseph family sought the help of an attorney because of Mrs Oubella continued harassment and threatening behaviour. The Joseph's attorney served Mrs Oubella a letter on 4 July 2012 warning her that if she continued to harass the Josephs they would have no choice but to apply for a protection order under the Stalking Act 1997.
50. In cross-examination Mrs Joseph denied the allegations set out by Mark Canning in his affidavit. She said Mr Canning's affidavit did not give the source of his information, but referred to the "neighbours of the Defendant". She said that her neighbours Amanda Bean (unit #8) and Kae Thomas (unit #7) would both attest that the allegations were untrue.
51. Mrs Joseph said she did not have a problem with Mrs Oubella; it is Mrs Oubella who had a problem with the Josephs. For example, one day as Mrs Joseph was passing Mrs Oubella's home, Mrs Oubella was eating pork and threw the bone at Mrs Joseph.
52. Mrs Joseph felt that she was being reasonable because she never complained when Mrs Oubella's family had barbecues and played music. She said her family watched television at normal times and that she is a respectful person.
53. Mrs Joseph said she was not angry with Mrs Oubella, just disappointed. They used to be close friends. Her children used to deliver things for Mrs Oubella.

54. Mrs Joseph believed Mrs Oubella was harassing her son and that in doing so Mrs Oubella was harassing her.
55. In re-examination, Mrs Joseph said she did not complain to Mark Canning because she regarded the Immigration matter as personal.

Testimony from the Defendant's son: Christopher Godfrey

56. Christopher Godfrey, the son of the Defendant Sara Joseph, swore an affidavit and gave oral evidence denying the allegations. He testified that as a full-time student at Thomas College, Waterville, Maine he returns to Bermuda for summer holidays and resides at 2 Rockaway Deep with his family (his mother, her husband and his two younger siblings).
57. He claimed that in/around 2011 Mrs Oubella [referred to by the witness as Mrs Manders] came up to him and accused him of being a gang member. He said he smelled alcohol on her breath.
58. Regarding the noise complaint, he said that Mrs Oubella complained about his music being too loud. She would aggressively bang on the apartment door and shout "Why are you making noise". He said she would smell of alcohol and her banging was louder than the music being played. However, to prevent further conflict and despite the volume being reasonable, he would turn the music down or turn it off completely. He said Mrs Oubella was the only neighbour to complain about noise.
59. In summer 2012 Christopher worked at Snorkel Park Beach as a water attendant. On two separate occasions his employers received telephone calls purportedly from a Department of Immigration officer claiming that he was working there illegally. On each occasion he told his mother Sara Joseph.

On the first occasion Mrs Joseph drove to the Department of Immigration and showed them the letter allowing Christopher to work. The Department of Immigration informed Mrs Joseph that they had not called Snorkel Park Beach. Christopher said he took the letter to his employers confirming that he could work for them legally. Later that day his employers received another call from an 'Immigration Officer' informing them that the papers Christopher had were incorrect. He was sent home.

On the second occasion they went to the Department of Immigration and were again told that the Department has not called his employers. Christopher was issued with another letter that he took to his employers. That day his employers received another phone call from someone claiming to be an Immigration Officer, but by then his employers suspected the person was falsely identifying herself as an Immigration Officer.

The Josephs subsequently learned that Mrs Oubella was the person identifying herself as an Immigration Officer. The matter was reported to the police. When the police officer confronted Mrs Oubella she admitted she had impersonated an Immigration Officer because she did not think it was fair that a non-Bermudian had a job when her daughter did not have a job.

60. After the Josephs reported Mrs Oubella to the police for falsely identifying herself as an Immigration Officer, Mrs Oubella complaints about noise became worse. Christopher claimed that she would bang on the door and complain about everything being too loud. Mrs Oubella complained if they had on the television, radio or music and call on the house phone screaming at Christopher to turn down the volume. She also made these complaints when Christopher was home alone.
61. Christopher said that if a group of children were outside and he was playing with them Mrs Oubella would always complain that he was being too loud. The Josephs felt her complaints were always unfounded and unreasonable. He said it was as though she wanted them to live in silence. The Josephs became anxious in their own home and they stopped having the music on in the morning and stopped playing outside.
62. Christopher claimed that Mrs Oubella has also accused him of being a drug user. She told his mother this on several occasions. His mother was fed up and had him tested for drug use by the family physician. Christopher said the results were negative as he knew they would be. He was hurt and upset that he had to have the test done to prove anything to Mrs Oubella.
63. Christopher asserted that Mrs Oubella's complaints were untrue and that she was the one harassing his family.
64. In re-examination Christopher said on one occasion she banged on his door, shouting and screaming about noise. Although the sound was at a reasonable level, he turned it off. He said she had waited until his mother and stepfather were away before she approached him. He said that if his music were at an absurd level others would have complained.
65. The Court has no doubt that Mrs Oubella was harassing the Defendant's son Christopher. Mrs Oubella's own evidence showed she resented that Christopher, a non-Bermudian, had obtained a job instead of a Bermudian. Based on her own admission, the Court is satisfied that Mrs Oubella impersonated an Immigration Officer enquiring about Christopher's employment in an attempt to cause him to lose his job.

Testimony from Rockaway resident: Elva Swan

66. The next witness for the Defendant was Elva Swan. Ms Swan is a retiree and lives at 1 Rockaway Drive; her apartment block is located directly opposite the Defendant's. From her apartment on the third floor she has a clear view of all the porches opposite i.e. the Oubella's and the Joseph's porches.
67. Ms Swan said she had always found the Joseph family to be pleasant and not trouble-makers. She believes that it is Mrs Oubella [referred to by the witness as Mrs Manders] who causes unreasonable interference with the other owners' and occupants' use and enjoyment of their property and common areas.
68. Ms Swan said that in December 2003 the Oubella's property was on fire. She later discovered that Mrs Oubella had "fallen asleep drunk and left candles burning".
69. Ms Swan had also seen Mrs Oubella drunk; on one occasion Mrs Oubella ran around the condominium area completely naked and drunk.
70. Ms Swan said *inter alia* that at about 6.30 p.m. on 20 June 2012, she was walking down her driveway when she noticed Mrs Oubella's car in the parking lot. She did not realise anyone was in the car. Abruptly the car door swung open and Mrs Oubella fell out of the car and it was obvious that she was drunk. Mrs Oubella looked up at Ms Swan and, with slurred speech, said "You [expletive] *itch".
71. On 23 October 2012, around 8.45 a.m., Ms Swan was in her nightgown cleaning out her storage space outside her apartment. Mrs Oubella drove past and as she did she looked out the window directly at Ms Swan and said "You [expletive] *itch".
- Ms Swan said that she had had enough so she walked down to the Oubella's drive near their parking lot and saw Mr Oubella sitting in the car. Ms Swan assumed Mrs Oubella had gone into her house so she waited. When Mrs Oubella came out of her apartment Ms Swan went to her car and said forcefully "I do not want you ever to call me '[expletive] *itch' again". Mr Oubella asked his wife if she had called Ms Swan those names and she told him to drive off. He repeated the question, but she did not answer.
- After the incident Ms Swan spoke to a community officer about Mrs Oubella's verbal abuse. The officer spoke to Mrs Oubella and she accepted that she had abused Ms Swan. Ms Swan claimed she also made complaints to Mark Canning but that he dismissed her complaints as unimportant.
72. The Corporation's bye-laws specify that no one should use their property for anything but domestic use. Ms Swan claimed that Mrs Oubella home-schooled teenagers on the

property. She reported this to Mr Canning as contrary to the bye-laws but said that he responded that it was only a few children.

73. In re-examination Ms Swan said that had not heard noise coming from the Defendant's apartment. She said that she sometimes heard Mrs Oubella making noise as she speaks very loudly, but asserted that everyone heard each other's noise. Ms Swan said that as part of condominium living everyone hears movement, conversation and even people having sex. She said she gets tired of people complaining about noise.
74. Ms Swan claimed that Mrs Oubella has had a serious problem with alcohol for many years and that she becomes very aggressive and gets very nasty.

Testimony from Rockaway resident: Amanda Bean

75. The next witness for the Defendant was Mrs Amanda Bean. Mrs Bean has lived in apartment 8, above the Defendant's family, since 2006. She said she could see the Joseph family's porch from hers. She has known the family for over six years and finds them to be "respectful, welcoming and polite".
76. Mrs Bean said that as she lives above the Josephs, she would know if they were noisy. She occasionally heard music but always at a reasonable level. Her son played music at the same level and she has never had any complaints.
77. Mrs Bean recounted incidents involving Mrs Oubella [referred to by the witness as Mrs Manders]:

She said that in/about 2011 Mrs Oubella told her and her husband that her car had broken down. They transported Mrs Oubella for two weeks only to find out that she had been seen driving her own car in the evenings.

She said in the mornings Mrs Oubella would smell of alcohol and it was obvious that Mrs Oubella had been drinking.
78. Mrs Bean said that although she lives directly above the Josephs, Mr Canning had not asked her opinion regarding the Josephs' noise and behaviour. She claimed that if Mr Canning had asked her opinion, she would have attested that the family never made excessive noise that unreasonably interfered with the use and enjoyment of the property.
79. In summer 2012 she did not hear anything in her area. She said she could not speak to what happens in Mrs Oubella's apartment, but on her side she heard nothing. She said that the neighbourhood was quiet for condo living.

Testimony from Rockaway resident: Kae Thomas

80. The final witness for the Defendant was Ms Kae Thomas. Ms Thomas' apartment is located above Disa Oubella's and Sara Joseph's and she has lived there for nearly 31 years.
81. Ms Thomas said she has known the Josephs for the whole time they lived in their apartment – about nine years. During that time she had no reason to complain about their behaviour. She has not heard excessive or unreasonable noise specifically in the form of music, television, or shouting coming from the Joseph family's apartment or common area. The walls joining all the apartments are very thin, so it is easy to hear the daily activities of neighbours, such as toilets being flushed above and below.
82. Ms Thomas said she would describe Mrs Oubella [referred to by the witness as Mrs Manders] as a nuisance to her neighbours. She believed that it was Mrs Oubella who was harassing the Josephs.
83. Ms Thomas said she was also a victim of Mrs Oubella's unreasonable behaviour. For example, Ms Thomas used to grow pot plants on her porch outside. Mrs Oubella would occasionally take a plant without her permission.
84. Ms Thomas claimed that sometime in/about 2011 Mrs Oubella appeared to be very agitated: she had just found out that Christopher Godfrey, the Defendant's son, was working at Snorkel Park Beach. Mrs Oubella told Ms Thomas that she could not believe Christopher had a job; she said that Christopher was non-Bermudian and she was not going to ensure that he lost his job. Ms Thomas formed the view that Mrs Oubella totally disliked the family.
85. Between 2011 and 2012 Sara Joseph visited Ms Thomas on a few occasions asking if the Joseph family were being too loud or bothering her in any way. Ms Thomas assured Mrs Joseph that the family was not loud and was not disturbing her at all.
86. In cross-examination Ms Thomas told the Court that she had heard children laughing and music playing but nothing for her to scream and shout about. She said that the walls were very thin. She said she is there basically every day and if there were noise coming from the Joseph's apartment she would have heard it.

The Plaintiff's case

87. Counsel for the Plaintiff, Ms Tannock, submitted that
“The Plaintiff's claim is a two limb argument:

That through the evidence in chief and cross-examination of the Defendant witnesses, that an actionable private nuisance has taken place;

That in the alternative, the Plaintiff is able to prove that the Defendant has behaved unreasonably so as to satisfy rule 36(1)(a) of the Condominium by-laws.

In proving either limb, the Plaintiff is able to prove that the Defendant has breached the bye-laws of the Rockaway Corporation and as a result, are entitled to enforce the Notice to Quit dated 13 March 2013 against the Defendant”

88. Ms Tannock further submitted that the Plaintiff has authority to give a tenant a Notice to Quit pursuant to section 35(1) of the Condominium Act 1986:

35 (1) A corporation may give a tenant renting a residential unit notice under this section to quit if a person living in the unit

(a) ...

(b) contravenes a bye-law.

If the tenant refuses to vacate the premises, section 36(4) of the Condominium Act 1986 would apply:

36 (1) If a tenant to whom notice to quit has been given under section 35 does not give up possession of the unit, the corporation may apply to the court under this section for an order under subsection (4).

(2)...

(3)...

(4) On hearing an application under this section, the court, if satisfied as to the facts presented by the corporation, may by order –

(a) require the tenant to give up possession of the unit;

(b) fix a day on which he shall do so; and

(c) give any further direction in the matter that the court considers warranted in the circumstances.

Section 38(1) of the Condominium Act 1986 requires the Plaintiff to act only if their bye-laws permit such action.

89. The Plaintiff’s argument is that section 36(1)(a) of the Standard Corporation Bye-laws (Schedule I of the Condominium Act 1986) has been broken; this states:

(1) An owner shall not –

(a) use or enjoy the real or personal property of the corporation or the common property in such a manner as unreasonably to interfere with its use and enjoyment by other owners or their occupants;

90. Ms Tannock referred to the authority of *Bamford v Turnley* (1862) 122 ER 27 pages 83–84, where Bramwell B stated there must be reasonable “give and take, live and let live” in community living.

“There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.”

91. However, private nuisance requires the Court to refer to the circumstances of each case. In *Sturges v Bridgman* (1879) 11 ChD 852, Thesiger J said:

“whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”

92. Ms Tannock maintained that despite the fact that only the residents of Mrs Oubella’s unit heard the noise, the Court could still find that an actionable nuisance has taken place. She referred to *Leeman v Montagu* (1936) 2 ALL ER 1677

“an action that involved a poultry farmer who made no attempt to rearrange his farm in respect of 750 cockerels that crowed between the hours of 2am and 7am. Greaves-Lord J of the King’s Bench Division indicated that despite the fact that previous owners, summer residents and other neighbours had never been disturbed by the Defendant’s cockerels, he ruled that there was a nuisance”.

The Defendant’s case

93. Mrs Dismont, counsel for the Defendant, submitted that the Plaintiff had failed to prove their case. She argued there had been no “real interference” that was “unreasonable and excessive” according to the standard of the average man:

“The standard the Court must apply in respect of an allegation of discomfort from noise is that of the ordinary reasonable and responsible person who lives in the Rockaway condominium complex.”

94. Mrs Dismont referred to *Barr & others v Biffa Waste Services Ltd* [2012] EWCA Civ 312 where Carnwath LJ summarised the principles of the law of nuisance:

“36. In my view this case is governed by conventional principles of the law of nuisance, which are well-settled, and can be found in any of the leading textbooks. Thus, in Clerk & Lindsell on Torts 20th ed. chap 20, the third

category of nuisance is that caused by a person “unduly interfering with his neighbour in the comfortable and convenient enjoyment of land”. Typical examples include “creating smells by the carrying on of an offensive manufacture or otherwise” (paras 20-06, -09). Relevant to this case are the following rules:

(i) There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case (20-10).

ii) There must be a real interference with the comfort or convenience of living, according to the standards of the average man (20-11), or in the familiar words of Knight Bruce VC:

“... not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people” (Walter v Selfe (1851) 4 De G&Sm 315, at p 322).

iii) The character of the neighbourhood area must be taken into account. Again in familiar 19th century language, “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey...” (20-13, citing Thesiger LJ, Sturges v Bridgman (1879) 11 ChD 852, 856).

iv) The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance (20-16).

95. Mrs Dismont stressed that there had to be a real interference with comfort or convenience of living, according to the standard of the average man. She cited Carnwath LJ in *Barr & others v Biffa Waste Services Ltd* [2012] EWCA Civ 312 (paragraph 72):

“‘Reasonable user’ should be judged by the well-settled tests. The matter is stated simply and accurately by Tony Weir (...):

‘Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot, by being unduly sensitive, constrain one’s neighbour’s freedoms), but what objectively a normal person would find it reasonable to have to put up with.’ (Weir An Introduction to Tort Law p 160)”

96. Mrs Dismont levelled a high degree of criticism at Mrs Oubella’s qualities as a witness. She submitted that one must question the credibility of Mrs Oubella who admitted having a drinking problem. She continued that when Mrs Oubella is drunk she is verbally aggressive and nasty.

Ms Swan testified that Mrs Oubella had verbally abused her. Both Ms Swan and Ms Thomas had seen Mrs Oubella naked in the common area.

In her evidence Mrs Oubella admitted to harassing Ms Swan and stealing plant pots from Kae Thomas' apartment.

Mrs Oubella also lied when she told Mrs Bean that her car had broken down and as a result was driven around by Mrs Bean for two weeks.

Summary

97. This case is concerned with nuisance by noise caused by, for example, loud music, a television being played at a high volume, and shouting and arguments from the Defendant's unit after 11 pm.
98. The Court agrees with Mrs Dismont that Mrs Oubella was an unreliable witness. The Court also viewed at least parts of Mrs Oubella's evidence as untruthful, for example that shouting and arguments could be heard from the Defendant's unit after 11 pm as often as three times per week.
99. By contrast the Court found the Defendant, Mrs Joseph, and her witnesses to be truthful and reliable.
100. On behalf of the Plaintiff, Mr Canning testified that when he was on the property during early mornings he had not heard any noise. He did not ask Ms Amanda Bean or Ms Kae Thomas if they had heard any noise. Indeed these two witnesses asserted they did not hear unreasonable noise from Mrs Joseph's unit.
101. Beyond that Mrs Sara Joseph lived at the premises for several years. Mrs Oubella and Mrs Joseph used to be good friends. It seems that Mrs Oubella's complaints started when they stopped being friends.
102. In summary, the Court finds that the Plaintiff's evidence is not wholly consistent with the Statement of Claim alleging that neighbours complained about the noise coming from the Defendant's unit. On the evidence presented by the Plaintiff the only complaint of noise came from one neighbour: Mrs Oubella. Neither Mr Canning nor Mrs Jones-Smith spoke of complaints from any other neighbours.

Conclusion

103. In this case, the Court has found that it is more probable than not that Mrs Joseph did not conduct herself in the manner alleged by the Plaintiff. Therefore the Plaintiff has not discharged the burden of proof: the standard of proof has not been met.

104. The Court rejects the evidence that both the noise coming from Mrs Joseph's unit and the duration of that noise were unreasonable.
105. In deciding this case the Court has scrutinised all the circumstances of the case. Even if a piece of evidence has not been specifically referred to, the Court has had regard to all of the evidence placed before it.
106. The question of the existence of nuisance is one of degree. Having regard to the evidence before the Court, and the locality, the Court finds that the sound of activities (watching television, playing music, alarm clocks and arguments) emanating from Mrs Sara Joseph's unit was not excessive. The noise was in keeping with the ordinary use of her residential domestic premises and does not constitute a nuisance.
107. Given these factors the Court finds for the Defendant, Mrs Sara Joseph, and the action is dismissed.
108. The Defendant shall have her costs of these proceedings.

Justice Norma Wade-Miller PJ