

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.312/83

BETWEEN

THE ARTS CENTRE OF
CHRISTCHURCH duly
incorporated under
the Charitable Trusts
Act 1957

Plaintiff

UNIVERSITY OF OTAGO A N D
9 OCT 1984
LAW LIB

FREE THEATRE INCOR-
PORATED duly incor-
porated under the
Societies Act 1948

Defendant

Hearing: 26 and 27 July 1984

Counsel: E.T. Higgins and C.A. George for Plaintiff
C.A. McVeigh and P.N. Dyhrberg for Defendant

Judgment: 29 AUG 1984

JUDGMENT OF ROPER J.

The Plaintiff Board is responsible for the administration of the Arts Centre of Christchurch, which is located in the former University of Canterbury town site at the corner of Rolleston Avenue and Worcester Street. It is probably the largest cultural and community centre in New Zealand and caters for a wide variety of activities including theatres, clubs, craft workshops and restaurants. The Free Theatre (formerly the Alternative Theatre) is one of the Board's tenants in the Centre and its lease contains this provision:-

"The lessee will not commit permit or suffer to the premises any illegal act or any act whatever that shall be or become a nuisance or annoyance to any person adjoining or neighbouring the premises."

In the present proceedings the Board seeks the following relief:-

- "(a) An injunction restraining the Defendant from using the premises as a theatre until the premises had been soundproofed; and further
- (b) Or as an alternative an injunction restraining the Defendant from using the premises in such manner as to cause nuisance or annoyance to other persons adjoining or neighbouring the premises contrary to clause 2(i) of the said agreement to lease; and further
- (c) Or as an alternative an injunction restraining the Defendant from using the premises between the hours of 5 o'clock in the afternoon and 9 o'clock in the morning on Mondays to Saturdays or at any time on Sundays;"

The events leading to the Free Theatre becoming the Board's tenant were explained by Dr Robin Bond, a senior lecturer in the Classics Department at Canterbury University. Some years ago Dr Bond and other university staff instigated a new approach to the teaching of drama by involving personnel from various departments. This inter-departmental drama course then became a formal part of the offering of the Arts Faculty for a B.A. degree. It was a stage II course with "a considerable dramatic component in active production terms". As a result of that course Dr Bond and Mr Peter Falkenberg, a lecturer in the German Department, instigated productions which were associated with the course but independent of it. These productions were supported by the University to the extent that when the Free Theatre obtained premises in the Arts Centre the University made a "one off" grant of \$8,000 to assist with soundproofing, which is what this case is all about. Mr Falkenberg explained that the Free Theatre was committed to the aim of providing an experimental theatre laboratory and a training and drama performance venue for University drama course students. The theatre also has the support of the Labour Department in that young people are trained under a work

skills development programme. When first established the Free Theatre performed in various venues but it soon became apparent that if the theatre was to thrive it required its own permanent premises. There was nothing suitable on the University campus and financial constraints prevented their erection so Dr Bond looked to the Arts Centre.

The Free Theatre's first formal approach to the Board for premises in the Centre was by a letter of the 4th March 1982 from a Mr Mervyn Glue, a member of the Free Theatre Committee. Then followed correspondence between Mr Glue and Mr R. Sleeman, the then Director of the Board, with the result that Free Theatre was offered the tenancy of premises in Hight Block (H15). The problem with H15 is that on the floor above are five residential flats. It was made clear to Mr Glue, and accepted by him, that soundproofing of H15 was essential.

In about May 1982 Dr Bond asked Professor Stevenson, Dean of the Engineering Faculty, to carry out tests and make recommendations concerning the soundproofing of H15. When the Professor's report was received plans were drawn up based on his recommendations and presented to the Board for its approval. The plans were approved by the Board's consultant engineer and the work proceeded. Improvements to the premises have cost Free Theatre over \$12,000 to date in direct expenditure (including expenditure on soundproofing) with about 2400 hours of voluntary labour provided by members. After completion of the recommended soundproofing an agreement to lease was presented to Free Theatre and executed by it. The lease has never been executed by the Board but no issue is made of that. It is accepted that there is a valid lease.

Opening night was the 1st December 1982 with a production of King Ubu, described as a grotesque French tragi-comedy. It was of course a major night for Free Theatre but an unhappy one for the tenants upstairs because after the play a party was held for all those who had helped

with the theatre's establishment which went on until 3 a.m. The Board received complaints from the tenants. Mr Falkenberg agreed that it was an absolute disaster and said that there had been no more parties. Professor Stevenson was then engaged by the Board to carry out further tests and according to Mr Sleeman his recommendations were carried into effect by Free Theatre. The complaints persisted.

After attending a performance of "The Joffingract" in June 1983, and carrying out further tests in October to measure sound attenuation between H15 and flat 2 above, Professor Stevenson came to the conclusion that having regard for the type of play performed by Free Theatre it was not possible to obtain adequate sound insulation at reasonable cost. It seems that Professor Stevenson was very much influenced in his decision by his experience during the Joffingract when an amplifier was turned up to such volume that it would have been impossible to converse with someone two or three feet distant. Members of the Free Theatre who gave evidence confirmed that on the night Professor Stevenson attended the amplified sound was deafening for a short period through mismanagement of the amplifier controls by the operator. It was not repeated on following nights and indeed Mr Falkenberg, as director of productions, has made a conscious decision not to use amplified music in productions, and as I recall the evidence that has applied throughout 1984, although in a play of that title amplified voice was used for a few minutes. The suggestion that because Free Theatre is experimental its productions are noisier than conventional plays was rejected out of hand by both Mr Falkenberg and Dr Bond and I accept their evidence that overall Free Theatre's productions are, if anything, quieter.

Of the five tenants resident above H15 only two filed affidavits and gave evidence in support of the Board's case and the first was Mrs Marion Griffin. As her flat is immediately above H15 she is more affected than any of the other tenants by Free Theatre's activities.

In her first affidavit dated the 20th February 1984 Mrs Griffin deposed that for periods over the preceding 18 months she had been disturbed by noise from H15. It was not actors' voices which concerned her but what she described as "noises such as drumming, loud stereo music, thumping and banging" which often went on into the early hours of the morning. She considered that the noise was even worse during rehearsals for a production which often went on beyond midnight and were accompanied by the consumption of liquor "in considerable quantities", an inference she apparently drew from the fact that a large number of bottles had been found outside the block. It proved that the bottles had actually come from a party in the Architects Association rooms which adjoin H15. Her second affidavit of the 9th April dealt primarily with events in March leading up to, and the production of, the play "1984". Again there was loud music and thumping and banging over prolonged periods. She also expressed concern about security as the tenants, and actors and production staff of Free Theatre, share a common entrance to Hight Block. She expressed particular concern about vibration although Professor Stevenson did not see that as a major problem. In his opinion it was low frequency, high decibel sound which caused the real problems. In evidence Mrs Griffin concentrated on events between the 4th and 8th July 1984 when there was loud noise and vibration until late hours, and obstruction of the common entrance hallway with stage props. The City Council's Noise Control Officer was called out on two occasions during that period. I am in no doubt that the prolonged noise and obstruction of the hallway during that period in July was quite unacceptable, but it was not the Free Theatre that was directly responsible for it. H15 had been sub-let to the Drama Society for that period and Mr N.A. Williams, an accountant who acts as business manager for Free Theatre, agreed that the consequences of the booking had been "a management fault". In cross-examination Mrs Griffin said that on "most days" over the last 12 months she had been subjected to "continual shouting, thumping and stereo noise", and parties notable for their

music, dancing, singing and liquor. Such broad assertions are in complete conflict with the evidence given on behalf of Free Theatre by witnesses who impressed me as being reasonable and responsible people who were fully alive to the problems the activities of the theatre might pose for adjoining tenants. Amplified music has been abandoned and apart from the King Ubu party on opening night there have been no post performance parties, and in the normal course the premises are vacated by 11 p.m. at the latest. I do not question Mrs Griffin's sincerity but I think she has overstated the magnitude of the problem. Another explanation of course is that Free Theatre's sub-tenants have been responsible for much of the disturbance as was the case with the Drama Society in July. Mr Williams said that the theatre's hire booking form was being amended to spell out what cannot and must not be done concerning obstruction of the entrance corridor. In my opinion that does not go far enough. Post performance parties by someone have caused problems, as have delayed departures from the premises, and the use of stereos. Apart from that perhaps Free Theatre should be more selective in its approval of sub-tenants. As for security of the building Mr Williams had this to say:-

"Turning to the question of the security of our building and Mrs Griffin's concern with us as tenants and her worry about the place being broken into, we of course are concerned about security ourselves. We have a lot of portable equipment, various properties which we either rent or borrow for productions plus other equipment that we hire for productions so naturally we are extremely security conscious. However we have never been given a key to the double doors at the bottom of the stairs that lead out into the alleyway and quadrangle. We have only had keys to open the doors to our theatre. Those doors are locked up, it varies depending on the production. It was our understanding the custodian locked the doors onto the quadrangle."

The second tenant to give evidence was Mrs Heather Campbell who also filed two affidavits which are in similar vein to Mrs Griffin's. In one she complained of Free Theatre members running up and down the access stairs to the flats but the evidence was that the offenders were actually inebriated

occupants of two of the other flats. Mrs Campbell was a rather apologetic witness who did not wish to "get into a hostile situation". She agreed that the position had improved since April 1984, and her main bone of contention was the after performance activity, when it seemed to take hours to clear the premises. She was particularly incensed about the activities in July when the Drama Society was in occupation and suggested that Free Theatre should be more careful to whom it sublet. She agreed that this year the productions have been less noisy.

Mr Sleeman, who is no longer the Director of the Arts Centre, referred in his affidavit to complaints from tenants after the opening performance of King Ubu, and to his sitting in Mrs Griffin's flat one night in March 1983 while King Lear was being played in H15. He said:-

"I can confirm that there was noise and vibration of a considerable degree notwithstanding that the Defendant organisation had carried out some soundproofing. This particular performance contained extremely loud music and in addition to the considerable noise vibrations could be felt through ones feet. A glass kitchen partition also rattled on a regular basis. It was obvious to me at that stage that despite the soundproofing noise was still a real problem and this was not only when music was played. There were considerable vibration problems and this was not because of passing traffic, but clearly caused by the degree of noise level below. Because most performances lasted for at least a week it meant that there were problems every night for that period of time. In addition there was a considerable rehearsal period prior to the performance. These rehearsals were almost entirely at night, sometimes going into the early hours of the morning. Although Free Theatre did not use the premises all the time they were able to book the premises out to a number of other organisations and the use of the premises by the other organisations created the same problems."

Whether particular conduct amounts to a "nuisance or annoyance" to others depends upon such considerations as the time and place of its occurrence, its mode of commission, its

duration, and whether it is temporary or of some permanence. In the present case Mr Higgins stressed that the disturbances caused by Free Theatre and its sub-tenants were directly below residential accommodation, primarily caused in the evening, prolonged and more or less permanent in nature. As against that Mr McVeigh submitted that the area in question is after all "an Arts Centre" and the residential tenants must have known before they took up their tenancies that some disturbance of their peace was inevitable. Mrs Griffin indeed accepted that some inconvenience was to be expected and suffered in silence, and she had no complaint about the other activities which take place in the Centre. Mr McVeigh also made the point that of the five tenants only Mrs Griffin took a firm stand. That is understandable having regard for the location of her particular flat. It was suggested by Mr Higgins that no inference adverse to the Board's case should be drawn from the fact that only two tenants were called as witnesses, and that further testimony would simply have been repetitive. I am not prepared to infer in their absence that the other tenants would have given evidence adverse to Free Theatre.

It is true as Mr McVeigh said that Free Theatre's performances are not very frequent but I assume that the premises would be sub-let at every possible opportunity to help defray expenses.

It has been said that "nuisance" is a term which must be construed according to "plain and sober and simple notions among the English people"; and that "what is a nuisance or annoyance will continue to be determined by the Courts according to robust and commonsense standards" (Hampstead and Suburban Properties Ltd v. Diomedous [1969] 1 Ch. 248 at page 258).

Adopting that approach I am satisfied on the evidence that while Free Theatre may not be "committing", it is certainly "permitting", actions which amount to a nuisance or annoyance

to Mrs Griffin and Mrs Campbell.

The question then is whether the Court in its discretion should grant the relief sought by the Board. (Although it is by the way it seems that there was no obligation on the Board to take these proceedings. In O'Leary & Another v. Islington London Borough Council The Times 5th May 1983, Lord Justice Ackner in the Court of Appeal held that there was no implied term in a tenancy agreement obliging a landlord to enforce a tenant's agreement not to cause a nuisance to neighbours who were also tenants, and the appropriate remedy for aggrieved tenants was to bring an action in tort against the offending tenant.)

I see the Board as very much the author of its own, and its residential tenants, misfortune in this case in that it has attempted to combine incompatible uses within its Centre. I note that in the Board's minutes produced even one of the Board's members expressed doubts as to the legality under the Board's charter of establishing residential flats in the Centre.

Mr McVeigh raised a number of equitable defences in the event that I should hold a nuisance established including ~~estoppel~~ estoppel.


Despite Mr Higgins' ~~submission to the contrary~~ I am satisfied on the evidence that the Board, through Mr Sleeman and Professor Stevenson, was aware of the type of theatre that would be performed. It was presented with what is called a "Manifesto" - a nine page document which sets out the aims of Free Theatre and the nature of the plays to be performed. After Professor Stevenson had carried out his original tests and made recommendations Free Theatre prepared plans based on those recommendations and those plans were approved by the Board's engineer. Free Theatre then spent thousands of dollars in the soundproofing as approved and otherwise setting up the theatre, and the lease was presented for execution. The Board accepted the rent and renewed the lease beyond the initial one

year. In my opinion it would be unjust in those circumstances to compel by injunction the performance of the provision of the lease bearing on nuisance. The application is therefore dismissed.

I appreciate that my decision has done nothing to relieve the residential tenants' problem and I think it appropriate to add a few comments which, hopefully, may be of assistance. The first is that Free Theatre would be unwise to regard the results of this case as anything in the nature of a victory, or as putting the seal of approval on past events. The problem remains and as I see it the major responsibility for resolving it rests with the Board. It may be that Mrs Griffin in particular could be found alternative accommodation; or Free Theatre could be relocated with some financial recompense by the Board; or the Board could carry out further soundproofing. Another suggestion, and possibly the most practical, is that Free Theatre's rent could be reduced to a point where reliance on rent from sub-tenants for financial survival would be unnecessary for I am of the belief, having heard Free Theatre's witnesses, that sub-tenants are responsible for much of the problem, and furthermore, without them the period when the theatre is in use would be reduced, so would

Free Theatre's counterclaim is adjourned sine die. adjourned

Costs reserved.



Solicitors:

Cameron & Co., Christchurch, for Plaintiff
P.N. Dyhrberg, Christchurch, for Defendant

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