EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2010/0053

BETWEEN:

ELTON SCATLIFFE

First Claimant

ANNETTE SCATLIFFE

Second Claimant

And

DWITE FLAX

First Defendant

EBONY AND IVORY CONSTRUCTION LIMITED

Second Defendant

Appearances: Ms. Karen Reid, Counsel for the Claimants
Mrs. Patricia Archibald-Bowers, Counsel for the Defendants

2017: October 26

JUDGMENT

[1] **Ellis J.:** The Claimants own and reside on a property in Virgin Gorda registered as Block 4840B Parcel 270. This property was purchased by the First Claimant in September, 2003.

[2] The Defendants have been in occupation of an adjoining property registered as Block 4840B Parcel 444 **("the Property")**. The Defendants allege that they have been in occupation of Parcel 444 since 1997 and they have carried on the operation of trucking, heavy equipment rental, garage and tire repairs, concrete production, storage of sand, aggregate, cement, other particulate matter and diesel.

[3] The Claimants contend that since October 2004, the First Defendant and since July 2007, the Second Defendants and/or their employees and/or agents have wrongfully caused and/or permitted unreasonable volumes of noise as well as noxious and offensive fumes vapours, smoke, dust and other particulate matter, to be emitted from Parcel 444 unto Parcel 270 during the day and night, on business days and holidays with such frequency as to cause a nuisance to the Claimants.

[4] The Claimants have therefore brought this claim in private nuisance against the Defendants in which they seek the following relief:

i. A permanent injunction prohibiting the Defendants and/or their employees and/or agents from:
    a. Operating and/or permitting the operation of an air compressor on the property at any time;
    b. Operating and/or permitting the operation of any air tools (including, but not limited to, air drills and jackhammers) on the Property at any time;
    c. Operating and/or permitting the operations of any high powered tools (including but not limited to jackhammers electrical saws and welding equipment) on the Property at any time;
    d. Operating and/or permitting the operation of any heavy vehicles (including, but not limited to earth movers, cement mixers and backhoes) on the property at any time;
    e. Operating and/or permitting the operation of vehicle horns and vehicle stereos in such a manner as to discharge loud, very loud or deafening noises from the Property;
    f. Carrying on and/or permitting to be carried on their business in such a manner as to cause and/or permit the discharge of noxious and offensive fumes, vapours and other particulate matter (including but not limited to diesel, fumes, cement dust, paint fumes, sand, vehicle exhaust, dust)from the Property; and
    g. Carrying on and/or permitting to be carried on their business in such a manner as to cause and/or permit the discharge of noxious and offensive odours from the Property.
ii. Damages
iii. Costs
iv. Interest
v. An order that the Defendants decontaminate the Property.

[5] In their defence, the Defendants deny any nuisance and assert that any sounds made by their operations were unavoidable and reasonable noises of industry and that no construction or other materials including diesel have been stored on the property since 2009. They further state that no mixing of concrete or any other construction activity has taken place on the premises since that time.

[6] On 31st May 2010, Hariprashad Charles J. granted the Claimants an interim injunction relief which prohibited them from:

a. Operating and/or permitting the operation of vehicle horns and vehicle stereos in such a manner as to discharge loud, very loud or deafening noises from the Property;

b. Carrying on and/or permitting to be carried on their business in such a manner as to cause and/or permit the discharge of noxious and offensive fumes, vapours and other particulate matters (including but not limited to diesel, fumes, cement dust, paint fumes, sand, vehicle exhaust, dust) from the Property.

[7] That Order also prohibited the Defendants from:

a. Operating and/or permitting the operation of an air compressor on the property at any time;

b. Operating and/or permitting the operation of any air tools (including, but not limited to, air drills and jackhammers) on the Property at any time;

c. Operating and/or permitting the operations of any high powered tools (including but not limited to jackhammers electrical saws and welding equipment) on the Property at any time;

d. Operating and/or permitting the operation of any heavy vehicles (including, but not limited to earth movers, cement mixers and backhoes) on the property at any time;

e. Operating and/or permitting the operation of vehicle horns and vehicle stereos in such a manner as to discharge loud, very loud or deafening noises from the Property;

save during certain defined hours.

[8] Prior to the trial, the Defendants agreed to satisfy the sum claimed in respect of special damages, that is to say the sum of $900.00 and $1800.00 representing the costs incurred in painting the Claimant's residence. The said sums are held in escrow.

[9] In addition, at the commencement of the trial of this action, the Defendants formally consented to a permanent injunction in the terms set out at paragraph 4 (i) a – e. This concession was made on the basis that the Defendants no longer intend to use the Property to carry on such activities. In fact, the Defendants contend that since the interim injunction, they have essentially relocated their business operations to another location some distance away from the Property in question. However, the First Defendant indicated that he intends to construct apartments on the Property at a later date and so would wish to have the terms of the injunction appropriately confined.

[10] The Parties agreed to confer on the terms of a consent order setting out these critical concessions and present the same for the approval of the Court.

[11] In the premises, the Court is left to consider the outstanding claims for relief which would include:

1. General damages for nuisance
2. Interest
3. An order that the Defendants decontaminate the Property
4. Costs

LIABILITY IN NUISANCE

[12] The law of private nuisance is aimed at protecting the owner or occupier of land from substantial interferences with his enjoyment thereof. In considering a claim in nuisance, a court is required to strike a balance between the right of a defendant to use his land as he wishes and the right of a claimant to be protected from interference with the enjoyment of his land. In order to strike this balance, there are two main requirements which must be proved by a claimant on a balance of probabilities. In order for the injury or interference to be actionable, it must be:

i. sensible i.e. it must be material damage to land and;
ii. in the case of interference with enjoyment of land, it must be substantial.

[13] Private nuisance can be divided into three broad categories: [1] physical injury to the claimant's property, [2] substantial interference with the claimant's use and enjoyment of land and; [3] interference with easements and rights of access. Where, the claim alleges material damage to the land, this must not be trivial or trifling. Such damage must cause a reduction in the value of the

claimant's property.[1] Where, on the other hand, the claim reveals an interference with enjoyment of the land alleging inconvenience, annoyance or discomfort caused by the defendant's conduct, this must be shown to be substantial.

[14] In the case of the latter complaint, Luxmoore J. in **Vanderpant v Mayfair Hotel Co Ltd.**[2] described the position in these terms:

> "Apart from any right which may have been acquired against him by contract, grant or prescription, **every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people**.[3] Emphasis mine

[15] It is therefore now settled law that in cases where a defendant is able to prove that his conduct was reasonable in all the circumstances, he would not be held liable. Although the particular circumstances of each case must be carefully considered, the courts have developed a number of criteria which would assist in determining this issue. They include the nature of the locality, the utility of the defendant's conduct, the claimant's abnormal sensitivity, the duration of the harm and whether the defendant carried on this activity with the principle purpose of causing harm and annoyance to the claimant.

[16] These factors were considered in the case of **Greenidge v Barbados Light and Power Co. Ltd.**[4] In that case, the claimant owned a number of apartments. He complained that the defendant's powers station discharged offensive fumes and smoke over his property and caused excessive noise in and about the apartments. He also claimed that annoyance and discomfort were being caused to himself, his family and his tenants and that he suffered loss of business. Williams J observed:

> "The present case is concerned with nuisance by noise, smell and smoke. As the passages cited above amply show, such nuisance is something to which no absolute

[1] St. Helens Smelting Co. v Tipping (1865) 11 ER 1483
[2] [1929] ALL ER 296 at 308
[3] Walter v Selfe (1851) 4 De G & Sm 315 *per Knight Bruce, V-C*
[4] (1975) 27 WIR 22

> standard can be applied and it is always a question of degree whether the interference with comfort or convenience is so substantial as to continue a nuisance. In determining whether or not a nuisance exists, all relevant circumstances must be taken into account. The character of the neighbourhood is an important one of those considerations and the test to be applied is an objective one, to accord with the standard of the ordinary reasonable and responsible person living in the locality."

[17] In the case at bar, the Defendants do not dispute that the Second Defendant carried on business of heavy equipment rentals, trucking, garage and tire repairs, production of concrete, and storage of building and construction materials on the Property. What they say, is that the area in which the relevant properties are located is one in which a great amount of industrial activity is ordinarily carried out. They also state that they intended to cease such operations on the Property by 1st October 2010. Indeed, they contend that no construction materials, no diesel or other fuel have been stored on the Property since April 2009 and that no mixing of concrete or any other construction activity has taken place on the Property since that time.

[18] The Defendants also say that to the extent that any sounds by the Defendants' operations were audible from the Claimants' house, such sounds were the unavoidable and reasonable noises of industry and in the circumstances did not constitute a nuisance. They went on to deny that they caused or permitted any fumes or particulate matter to come onto the Claimants' premises to such an extent as to constitute a nuisance or at all.

[19] During the course of his cross examination, the First Defendant essentially admitted that the business operations prior to the interim injunction being granted were as described by the Claimants. The evidence presented to the Court is that the particular area in Virgin Gorda has not been officially zoned as residential or industrial. The absence of a formal zoning designation certainly did not assist either party's case. However, during the course of the trial, it became clear to the Court that while there were various commercial operations in the vicinity of the Claimants' property, their home is located in an area in which there are a number of private residences.

[20] In any event, it is now clear that the law of nuisance does not allow as a defence that the place is a convenient or suitable one for committing the nuisance. It follows that that a defendant cannot

claim immunity from action simply by pointing to the fact that its operations are in an industrial area or that the claimant chose to put his residence next to such an area.[5]

[21] Having reviewed the totality of the evidence presented including several photographs presented by the Claimants, this Court has no reservation in concluding that the Defendants' operations prior to the grant of the interim injunction were as described by the Claimants. The Court finds that there was noise, smoke, odours and particulate matter emanating from the Property which amounted to an interference with comfort, enjoyment and convenience of such a standard as would qualify as a private nuisance.

[22] Notwithstanding what is set out in their Defence, the Defendants did little to persuade the Court that their activities prior to the interim injunction did not constitute an actionable nuisance. No doubt this would have explained the early concession and undertaking to cease all operations on the Property by 1st October 2010, set out in paragraph 3 of their Defence filed on 14th May 2010.

[23] It follows that the Claimants have established on a balance of probabilities that the Defendants committed acts which would at law constitute an actionable nuisance between the years 2004 – 2010. They are entitled to the permanent injunction which is sought. The Court therefore awaits the settled consent order.

[24] For the Court, the point of divergence between the Parties is the state of affairs which existed after the interim injunction was granted in 2010. In that regard, the Defendants contend that since that time, they have in fact ceased to carry on any of the activities complained of by the Claimants. Instead they aver that they have used the Property principally for storage of commercial equipment and materials related to their various businesses.

[25] The Claimants on the other hand contend that since the interim injunction, some nuisance still persists. They complain that:

i. There is a functioning garage used by the Defendant's carpenters and mechanics.
ii. Trucks, backhoes and loaders still operate on the premises.
iii. The Defendant's refrigeration men still work on the premises.

[5] Greenidge v Barbados Length and Power Co. Ltd

iv. Trucks and cranes operate on the premises to load and offload containers, construction materials including cement blocks, dirt and construction equipment at all hours.
v. A compressor and air tools continue to be used at the premises causing noise disturbances.
vi. Vapours, diesel fumes, vehicle exhaust and dust continue to emanate from the premises.

[26] The Court must therefore determine whether the nuisance complained of by the Claimants persisted after the grant of the interim injunction and to present date.

THE CLAIMANTS' CASE

[27] It became clear during cross examination that although the Claimants had amended their Claim Form in November 2015, the amendments did not reflect that there was any change in the nuisance. When he was questioned about this, the First Claimant's response was ambivalent and unconvincing.

[28] In supplemental witness statements filed on 30th November 2015, the Claimants provided particulars of a nuisance which they say continued after the interim injunction and up to June 2015. They also say that they had to invoke the assistance of the local police on a number of occasions to deal with constant vehicular and heavy equipment activity, and the loading of trucks and materials which contributed to the escape of dust and other particulate matter into their homes. They also complained of high powered stereos, noisy metal works, banging on derelict vehicles and the leaking noxious fumes and offensive vapours from improperly stored toxic chemicals and diesel.

[29] When he was cross examined under oath, the First Claimant told the Court that there is still a functioning garage on the Property which the Defendant's employees continue to utilize every day. He further testified that there is a steel framed workshop on the Property as well as trucks and other heavy equipment, loads of dirt and cement blocks on the property. Construction equipment is routinely dropped off and removed. He told the Court that on a daily basis he is continually disturbed by the Defendants' operations, outside of the perimeters of the injunctive relief granted.

[30] The First Claimant was then referred to the specific complaints which he alleged in the original Claim Form. He was asked whether these matters were still an issue at the date of trial. He testified that while the operation of the air compressor and high powered tools were no longer an issue, the Defendants' employees still continued to operate air tools and drills and he noted that last year and earlier this year personally witnessed a carpenter cutting wood with a high powered saw.

[31] He also stated that save for cement mixers, there were still heavy vehicles (including earth movers and backhoes) operated on the Property. With regard to the loud vehicle horns and stereos, he stated that this usually occurs during the daytime and in the evenings such that he was been forced to call the police. However, when he was further examined, he clarified that this took place in December, 2015 at around 6 – 7 a.m. after the noise had lasted for about half an hour or less.

[32] With regard to complaint of loud, very loud and deafening noises, the First Claimant told the Court that while there were no longer *deafening* noises, there continued to be *loud* noises emanating from revving of engines and banging tailgates of the trucks which occasionally come onto the Property.

[33] Although, he stated that cement dust no longer posed a problem, there continued to be noxious and offensive fumes, vapours. He told the Court that while there is no issue with sand and gravel (as the Defendants have relocated the cement part of the business) dust remains a problem when the Defendants are loading their heavy equipment. He stated that there are no paint fumes but there is vehicular exhaust from the trucks, cranes and loaders who come onto the Property. He also stated that the diesel tank storage and painting of cars are no longer taking place; however, he testified that diesel fumes still emanate from the Property. When he was questioned about this, he told the Court that the noxious fumes were coming from the ground when the sun hits the diesel and oil and the wind blows the smell unto his Property.

[34] He further testified that up to the day before the trial, the Defendants' workmen continue to use the garage and the workshop. They repair air conditioners and refrigerators and they load dirt and cement blocks which are kept on the Property.

[35] When the Second Claimant was examined under oath, she agreed that some of the nuisance had gone away but she stated there are some containers which remain on the Property which she would like to see removed because people come there at all hours of the day and night and they bring other stuff. She told the Court that there are also trucks, blocks and garbage on the Property.

[36] The Court had to consider the Claimants' evidence in the context of the evidence of their other witnesses. The Court first considered the evidence of their expert, Mr. Eric Douglas. He conducted an environmental impact assessment in which industrial activities are alleged to have taken place on Block 4840B Parcel 444. He indicated that his report of 3rd February 2015 provides an objective analysis of the potential environmental and human impact of unabated activities on the Property during the period 2004 – 2014. Mr. Douglas therefore relied extensively on photographs and video recordings to determine site history.

[37] In addition, on 2nd December 2014, he conducted a site visit to assess the conditions at that time. In oral testimony before the Court, Mr. Douglas indicated that he conducted the site visit without notice to the Defendants and ostensibly without their knowledge. From his account, he walked the site (estimated to be about 1.5 acres) for about 10 minutes, took several photographs of the site and at paragraph 4.3 of his Reports he notes:

> "The Site appears to be an abandoned industrial site and has a permanent structure situated along the northeastern corner of the property with a lot of construction and other materials stored in a disorganized manner in that section of the property. There are numerous forty-foot, standard shipping steel containers located in the vicinity of this permanent structure spread out along the north-eastern portion of the property. The materials stored in these shipping containers were not determined. Some segments of the ground are covered with natural vegetation and the remainder of the property is paved with haphazardly-poured concrete which is consistent with the past use of the site as a concrete batching facility.
>
> The site is littered with an assortment of solid and liquid waste including junk cars, junk heavy industrial equipment, a wide range of storage containers, waste chemical compounds and concrete mixing additives, used oil and lubricant drums and construction debris."

[38] When he was examined under Oath, Mr. Douglas confirmed the observations in his Report. He reiterated that there was no industrial activity taking place on the site on that day and in fact he

confirmed that the site looked abandoned. There was no heavy equipment on site but he observed abandoned derelict vehicles on the property.

[39] Mr. Betteto Frett also gave evidence on behalf of the Claimants. He also visited the Property and when he was questioned about its condition, he confirmed that there was no one present on the Property and no activity ongoing. However, he noted there was a shed on the Property as well as remnants of building materials, containers and equipment which created an eyesore. He opined that the nuisance at that time was aesthetic and not compatible with the use of the neighborhood.

THE DEFENDANTS' CASE

[40] The Court also considered the evidence of the Defendants. When the First Defendant was examined under oath, he categorically asserted that he had ceased all industrial activities on the Property. In addition to the concrete batching activities, he told the Court that they no longer operated a garage on the Property or run air compressors or air tools on the site. The First Defendant also denied that they carried out sheet fabrication work. He testified that currently, they use the Property only to store restaurant supplies, spare parts for heavy equipment and construction materials which are kept as far as possible from the Claimants' property.

[41] The First Defendant agreed that his workmen infrequently visited the Property in order to load and off load supplies and from time to time, the removal of these stored materials involved the use of a crane and trucks. The First Defendant stated that he understood that the Court Order permitted him to use the Property for storage purposes and that during the hours of 7:30 a.m. to 6:00 p.m. his workmen could load and off load these supplies.

[42] He denied that there was sand, cement or gravel kept on the Property and although he admitted that there had once been derelict vehicles and garbage on the Property, he told the Court that these had been removed from the Property following a court appearance in 2014.

COURT'S ANALYSIS AND CONCLUSIONS

[43] Having had an opportunity to assess the Parties in cross examination, the Court is satisfied that industrial activities on the Property largely ceased and are no longer in issue. The Court is satisfied that the Property is being used principally for the storage of materials, supplies and equipment. There can be no doubt that the Defendants' employees would occasionally visit the site but the Court is satisfied that this would have principally been to store and remove materials. The Court is satisfied that the principal aspects of the nuisance listed at paragraph 2 of the Claimants' statement of claim has either significantly abated or ceased as at the date of trial. In drawing this conclusion, the Court relied on the testimony of Mr. Douglas and Mr. Frett, who following their respective visits to the Property in December 2014 and December 2015 described the property as largely abandoned.

[44] It follows that the actions complained of are historic and had largely ceased in the interim injunction. The Court accepts that there continued to be activity on the Property limited to the collection and deposit of materials and equipment which were stored on site. However, applying the standard for nuisance described above, the Court finds that the inconvenience, annoyance and discomfort caused by these activities was not of a significant or substantial degree. Further, it is clear to this Court that any inconvenience and annoyance caused by the noise of the vehicles and equipment would not have been a continuing or permanent state of affairs but instead intermittent and temporary. In that regard the Court is guided by Lord Selbourne in **Gaunt v Fynney[6],** where he stated:

> "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. …Such things, to offend against the law, must be done in a manner which beyond fair controversy **ought to be regarded as exceptional and unreasonable.**" Emphasis mine

[45] The Court found the First Defendant to be forthcoming in his testimony, when he confirmed that such activities were conducted on the Property between 7:30 a.m. and 6:00 p.m. which he wrongly assumed to be in compliance with the Order of 7th May 2010. As it stands, the Court has some concerns about the somewhat ambiguous terms in which the Defendants' undertaking as recorded

[6] (1873) 37 JP 100

in that Order. In any event, the Court is unable to conclude that the Defendants' activities would have been wholly unreasonable. **De Keyser's Royal Hotel Ltd v Spicer Bros Ltd and Minter**[7].

[46] Apart from the alleged noise nuisance, the First Claimant also complained of strong odours from the vehicle exhaust and emanating from the ground when the sun hits the diesel and oil and the wind blows the smell unto his property. The Court notes that this evidence was not repeated by the Second Claimant.

[47] Mr. Douglas' Report indicates that the cessation of industrial activity in 2010 would not necessarily mean that the pollution or contamination of the site would not have potentially given rise to an environmental threat or hazard to the surrounding residential properties. His Report as at December 2014 reflects that the site was littered with an assortment of solid and liquid waste. He referenced the past use and practice of refueling and repairing heavy equipment and the suspected soil contamination due to diesel fuel spilled on site mentioned in the 2006 report of the BVI Fire and Rescue Service.

[48] However, it appears that on his site visit in 2014 the only odor he noted was a smell of sewage in the northern segment of the Property. He was however unable to identify the source of the smell. While he does report that he observed stained soil (dark spots) on the site, he made it clear in his Report and during his oral testimony that because no soil sampling or chemical analysis of any kind was conducted, he was unable to determine the source of the discoloration or indeed the extent of possible contamination. This equivocal evidence did little to support the Claimants' contention.

[49] However, the Court has no reservations in accepting the Claimants' evidence that from 2004 – 2010 when industrial activities were ongoing, their quality of life was negatively impacted and that there was substantial interference with their use and enjoyment of their Property.

[7] (1914) 30 TLR 257

[50] Al Smith LJ. in **Shelfer v City of London Electrical Lighting Co.**[8] noted:

> "A person by committing a wrongful act…is not …entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving the neighbor with the nuisance… In such cases the well-known rule is… to grant an injunction… There are however cases in which this rule may be relaxed, and in which damages may be awarded in substitution… It may be stated as a good working rule that: i. If the injury to the plaintiff's rights is small, ii. And is one which is capable of being estimated in money, iii. And is one which can be adequately compensated by a small money payment, iv. And the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given."

[51] The Court is persuaded on the evidence presented by both sides that the Defendant's activities on the Property constituted an actionable nuisance. The Court is satisfied that high levels of cement, sand and dust were emitted into the atmosphere severely impacting the air quality on the Property and the surrounding environs. The Claimants would have been subjected to this poor air quality from the date of commencement of the unauthorized concrete batching operations to the date when such operations were relocated. It is clear to the Court that these operations were conducted with scant or no regard to health, safety and environmental standards and protections.

[52] Permanent injunctive relief in the terms proposed is therefore appropriate. The Claimants however have also sought relief in damages. They contend that they are entitled to not only the special damages which are conceded, but also general damages.

DAMAGE TO PROPERTY – PHYSICAL DAMAGE

[53] Before the Court considers the appropriate damages to be awarded, the Court notes that in respect of the claim for special damages very little of the case is made out in the pleadings. In respect of the claim for repainting of their house, paragraph 8 the Schedule of facts contends that:

> "The dust emanating from the production of cement began having a visible effect on the décor of the House. The Claimants began cleaning the House with water on a regular basis in order to remove the residue of dust. Between that time and the present, the Claimants have paid to have the exterior of the House redecorated four times as a direct result of the residues left on the House."

[8] [1895] 1 Ch 287

[54] The Claimants' claim the sum of $2700.00 representing the cost of material ($900.00) and labour ($1800.00) incurred in repainting their house. However, the Claimants' evidence (paragraph 9 of their witness statements) alleges that the labour costs to be $1700.00. This claim has however, been conceded by the Defendants and the Court will order that the sum of $2600.00 is to be paid in full within 14 days of this Judgment.

[55] The Claimants also contend that the Defendants' activities have contributed to the contamination of the soil on their Property such that they were unable to cultivate crops which they had intended to grow on the land. Indeed, Counsel for the Claimants went further to submit that there was significant diesel contamination close to the fence of the Claimant's Property which would have caused damage to their existing crops and fruit trees.

[56] The Court notes that the Claimants' claim does not specifically contend that their land sustained soil contamination. Moreover, there is no specific allegation or claim set out in the Claimants' pleadings in respect of damage to crops. In fact, the only cogent evidence advanced in support of this allegation is set out in the Second Claimant's witness statement in which she stated that after the installation of the storage tanks on the Defendants' Property, three mangoes trees, one banana tree and several plants close to the boundary with the tanks have died. The Claimants provided no evidence to support the value of such trees and vegetation which they claim were destroyed. In fact, it was only in written submissions that Counsel for the Claimants suggested that the sum of $10,000.00 would be appropriate compensation for these lost crops. In doing so, she relied not on any tangible evidence but on general case law.[9]

[57] She further stated that the Claimants were unable to cultivate crops because of the nuisance and contamination of the soil. In support of this contention, the Claimants advance correspondence from the BVI Fire and Rescue Service dated 20th June 2006 which noted that there were tanks 15 feet away from the boundary fence and 35 feet away from the Claimants' house and that the soil around the tanks is contaminated with diesel fuel spillage up to within 6 feet of their property.

[9] Cause ANUHCV2005/0416 Oswald France v the Attorney General of Antigua and Barbuda and Another.

[58] Because of the way in which this evidence was advanced and the fact that the author of this letter was not made available for cross examination, the Court could ascribe little weight to these conclusions which appear to have been based merely on the author's observations at the site. This position was reinforced by the Claimant's own expert Mr. Douglas. In his report, he indicated that because a phase 2 environmental site assessment was not conducted or completed, he could not positively assert that there was any soil or ground water contamination on the Property or at all. In oral testimony, he briefly explained the scope of such an assessment and he confirmed that it had not been authorized by the Claimants. Moreover, there was no assessment carried out or expert opinion rendered as to the purported contamination of the Claimants' property.

[59] Counsel for the Claimant asserted that the claim for relief in respect of soil contamination and damage to crops went unchallenged by the Defendants and for that reason should be granted by the Court. There can be no doubt that the Court is not obliged to accept a witness's evidence simply because there is no other evidence led to contradict it. Critically, the substance of these claims was not advanced in the Claimants' pleadings and the evidence advanced lacked sufficient cogency to meet the requisite standard of proof. In light of the totality of the evidence before the Court, the Court was not persuaded on a balance of probabilities that these claims were made out. The Court is therefore satisfied that save for the discoloration to the buildings on their Property, no other actual physical damage to the Claimants' property has been proved.

DAMAGE TO PROPERTY – DIMINUTION IN CAPITAL VALUE

[60] The Claimants also see compensation for the diminution in the value of their property which they contend is to be assessed by the Court. Surprisingly, no details of this claim are set out in their statement of claim. Instead, at paragraph 9 of the First Claimant's witness statement filed on the 30th November 2015 he states that the Defendants' nuisance has negatively affected the value of their home, the use and enjoyment of their property and the quality of their neighborhood which was a quiet residential neighborhood prior to the Defendants' nuisance which began in 2003. He further stated that he has suffered tremendous loss and damage in relation to the loss of value to his home. The Second Claimant's evidence is largely the same.

[61] In support of their claim for diminution of the value of their land, the Claimants relied largely on the evidence of Mr. Betteto Frett, surveyor, valuer and real estate agent. He submitted a Report to the Court dated 18th December 2015 in which he opined that the diminution in value of the Claimants' property to be in the region of $142,000.00 which he contends is a true and fair assessment of the open market value of the Claimants' property as a result of injurious affection.

[62] Part 32 of the Civil Procedure Rules regulates expert evidence in civil proceedings. This rule makes it clear that a party may not call an expert witness or put in a report of an expert witness without the Court's permission. In applying for such permission, CPR Part 32.6 (3) makes it clear that a party must name the expert witness and identify the nature of his expertise. In addition, CPR Part 32.6 (3) (b) prescribes that any permission granted should be specific to that expert witness only.

[63] These provisions are relevant, because it appears that Mr. Frett's Report would have been filed pursuant to court order dated 28th October 2015, which in general terms granted leave to the Claimants to file an expert report of a certified valuator in respect of the land situated at Block 4840B Parcel 270 in support of the Claimants' claim for damages in nuisance. It follows that the Claimants did not comply with the Civil Procedure Rules in that they failed to seek the permission of the Court to specifically appoint Mr. Frett as an expert. For that reason his qualifications were not vetted and approved by the Court prior to his appointment. Indeed, the first time that his curriculum vitae were tendered, was during his examination under oath. The import of such non-compliance was revealed when Counsel for the Claimants attempted to have Mr. Frett tendered as an expert witness.

[64] In circumstances, where the terms of the Order clearly mandated that certified valuator was provide such expert testimony, Mr. Frett submitted to the Court that he is entitled to refer to himself as a certified valuer because he met the requirements mandated by the Royal Institute of Chartered Surveyors (**RICS**) which is a global professional body responsible for promoting and enforcing the highest international standards in the valuation, management and development of land, real estate, construction and infrastructure. In fact, in his report Mr. Frett records his

designation as **RCIS pp.** (personal property) which he stated was an old form of designation equivalent to what is now known as FRCS and MRICS.

[65] The RICS is world renowned and is recognized as a top drawer quality assurance regulator of professionals who wish to practice as valuers. It provides an independent system of regulatory monitoring which includes a register of valuers.

[66] Counsel for the Defendants objected to Mr. Frett's evidence on the basis that he was not currently registered with the RICS. She indicated to the Court that her online electronic research disclosed that Mr. Frett was not listed in the RICS register of valuers or appraisers. When Mr. Frett was asked to address this concern, he told the Court that he is not currently registered because he has not paid his dues for many years. However, he asserted that this does not mean that he had not completed the relevant training courses. He was however, unable to provide any documentation verifying completion of the relevant programmes or his initial registration documents. He testified that these had been destroyed in a fire at his offices.

[67] It therefore became clear that Mr. Frett could not represent himself as a RICS certified valuer because his name does not appear in their registers. In light of the clear terms of the order of 28th October 2015, the Court had some difficulty in discerning how the Claimants could advance Mr. Frett as an expert who is certified valuer when this is clearly no longer the case. The Court became increasingly concerned when he later declared that he does not always adhere to the guidelines and standards which are prescribed in the Red Book, an RICS publication which details mandatory practices and professional standards for registered members undertaking valuation services. This publication deals with such subjects as ethics, duty of care, the qualifications of the valuer and the minimum content of a valuation report.

[68] Instead of an RICS registration, Mr. Frett relied on his practical work experience in the local public sector where he worked as a land adviser preparing valuations of government lands. He stated that he was also a member of the local surveyor's board and the land development control authority. Within the private sector, he also provided numerous valuations for banks and attorneys

operating in the Territory. He also asserted that he had provided expert testimony in the BVI courts on numerous occasions in the past.

[69] While these indications provide some measure of comfort to the Court, it also became clear that Mr. Frett's report failed to meet the procedural standards prescribed by the Civil Procedure Rules (CPR). Part 32.3 of the CPR requires that an expert address his report to the court and not to any person from whom he has received instructions. Mr. Frett's report does not comply. The report also fails to meet any of the requirements of CPR Part 32.14 in that it does not give details of his qualifications or the material used in making the report; it did not attach copies of his written instructions or a note of the oral instructions received; it provides no certification that no other instructions than those disclosed have been received by him; and it contains no statement that he understood his duty to the Court or that he has complied with such duty.

[70] There can be no doubt that the role of an expert witness is to provide independent assistance to the Court by way of an objective unbiased opinion in relation to matters within his expertise. This has been made clear in **Polivitte Ltd v Commercial Union Assurance Co. Plc.[10] per Mr Justice Garland and in Re J[11].**

[71] In cases where an expert fails to comply with the Court's requirements both as to formality and timescale, the Court has the power to penalize instructing parties in costs. Where such breaches are particularly egregious a court may also order that the evidence may not be used. Such actions are justified because when a court appoints a certified expert, it is anticipated that such expert will provide advice to the court that conforms to the best standards and practice of the expert's profession. This position was usefully summarized in **Oldham MBC v GW and Others**:[12]

> "Once instructed, experts in their advice to the court should conform to the best practice of their clinical training and, in particular, should describe their own professional risk assessment process and/or the process of differential diagnosis that has been undertaken, highlighting factual assumptions, deductions there from and unusual features of the case. They should set out contradictory or inconsistent features. They should identify the range of opinion on the question to be answered, giving reasons for the opinion they hold. They

[10] [1987] 1 Lloyd's Rep. 379 at p. 386
[11] [1990] F.C.R. 193 per Mr. Justice Cazalet
[12] [2007] EWHC 136 (Fam) at paragraph 90

> should highlight whether a proposition is an hypothesis (in particular a controversial hypothesis) or an opinion deduced in accordance with peer reviewed and tested technique, research and experience accepted as a consensus in the scientific community. They should highlight and analyse within the range of opinion an 'unknown cause', whether that be on the facts of the case (e.g. there is too little information to form a scientific opinion) or whether by reason of limited experience, lack of research, peer review or support in the field of skill and expertise that they profess. The use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance."

[72] In the Court's judgment, Mr. Frett's report fails to meet even the basic criteria for admission as opinion evidence. In circumstances where such evidence would be inimical to the Claimant's claim for damages, it is surprising that very little effort was expended in ensuring that the Court is properly positioned to fully rely on the opinions contained in this report. Instead, the Court is left to consider what, if any weight should be ascribed to the opinions expressed by Mr. Frett. This difficulty is exacerbated by the fact that during his oral testimony there were serious doubts raised as to his independence.

[73] Mr. Frett testified that he received oral instructions directly from the First Claimant and not through Counsel. However, he failed to reduce such instructions into a written note. When he was asked to indicate what these instructions were, he told the Court that First Claimant had provided him with a copy of the court order and had indicated that he must carry out a valuation in support of the present claim for damages. According to Mr. Frett, the First Claimant told him what the problem was and they then had a discussion about what type of valuation was necessary. He testified that he was basically asked to opine on the damages due in relation to the alleged nuisance and in that regard he was provided with no documents other than the Court order and two previous appraisals. Finally, he further told the Court that he billed the Claimants' a fixed amount which was settled personally by the First Claimant.

[74] In the Court's judgment these factors seriously undermined Mr. Frett's objectivity further reducing any weight which the Court could ascribe to his report. This condition was further worsened when Mr. Frett attempted to explain his conclusions under oath. During the course of his examination, Mr. Frett stated that in his opinion the Claimants were entitled to damages as a result of injurious affection. At page 2 of his report, Mr. Frett stated that injurious affection arises as a direct result of

the owner not being able to realize the full potential of his property as a result of the nuisance caused by the current use of the neighbors' property as an industrial site.

[75] He explained that in order to arrive at such an assessment, he conducted a "before" and "after" valuation; the former being 2015 – before the nuisance and the latter being 2015 – after the nuisance. His Report indicates that as at 18th December 2015 the total value of the Claimant's property would have been $709,377.50 which he then rounded up to $710,000.00. He then concluded the following:

> "Based on professional experience in conducting valuations over the past 35 years, it is my opinion that the property of sold on the open market with its past and current use the Property would lose its value by approximately 20 percent. Hence it would value $568,000 a loss of $142,000.00."

[76] The Report does not indicate the documentation which was relied upon or the facts upon which the opinion is given or any assumptions which were made. Moreover, the report completely fails to indicate the valuation methodology employed by Mr. Frett in arriving at his conclusions. In the Court's judgment this is wholly inconsistent with the standards of expertise expected of a court appointed certified valuer.

[77] When he was asked to explain the concept of "injurious affection" and its relevance in the assessment of damages in claim for private nuisance, Mr. Frett told the Court that injurious affection applies in the case at bar because the damage caused to the Claimants' property was the direct result of the activities conducted on the Defendant's Property. He referenced that condition of the Property including the storage of trailers, the presence of warehouses or sheds, garage, steel bending workshop, storage of construction materials and equipment and he stated that this was incompatible to the use of the neighbourhood. According to Mr. Frett, this would mean that the Claimants would not be able to get the best possible price on the market, because a prudent investor would be aware of the existence of the nuisance.

[78] This explanation was surprising for a number of reasons. First, it became clear to the Court that Mr. Frett would have been instructed in 2015 well after the industrial activities would have ceased on the Property and when the site was essentially an abandoned eyesore. Second, he was clearly unaware of the extent of the nuisance prior to 2010, because by his own admission he had never

been provided with a copy of Mr. Douglas' report or indeed any other materials relevant to such an assessment.

[79] Moreover, the Court is most concerned about the overall rationale of the assessment. There can be no doubt that injurious affection occurs when a defendant's activities interfere with a claimant's use or enjoyment of land. Such interference may occur where a portion of an owner's land is expropriated with negative effects on the value of the remaining property. Alternatively, it may arise where no land is expropriated but the lawful activities of a statutory authority on one piece of land interferes with the use or enjoyment of another property.

[80] In fact the statutory underpinning of this concept has been repeatedly emphasized. In **Wildtree Hotels Ltd v Harrow London BC,**[13] Lord Hoffmann explained:

> "the term "injuriously affected" connoted "injuria," that was to say, damage which would have been wrongful but for the protection afforded by statutory powers. In practice that meant that a claimant had to show that but for the statute he would have had an action for damages for public or private nuisance."

[81] It has not been contended that a claim for injurious affection could be maintained at common law. It is instead a statutory concept which the common law has elucidated. It is clear to the Court that where there is no land taken or acquired, a claim for injurious affection depends upon a statutory right being given to a land owner to make a claim because some activity on nearby land by the Crown or some other public authority gives him a right to make such claim. Neither in his Report nor in his oral evidence was Mr. Frett able to properly explain why this present context would lend itself to such a claim. The Court is therefore forced to conclude that this concept has no relevance to the Claimants' claim.

[82] In private nuisance, the normal measure of damages is the diminution in the value of the land. Generally, when an owner suffers injury to his real property, the standard for damages is the diminution in value of the property caused by the injury, after first determining the "highest and best use" for the property and applying comparable sales information relating to similar properties. Diminution in value is therefore the difference between the value of the property before and after the nuisance. It is clear that determining the diminution in property value brought about by a

[13] [2000] UKHL 70 (Jun), [2000] 3 ALL ER 289

nuisance requires the application of specialized skills, methods and procedures.[14] It is therefore surprising that the Claimants would seek to rely on the purported expertise of an expert who unequivocally declared that he had never before conducted an assessment of a loss of value involving an alleged nuisance. His duty to the Court and Parties in this action demanded that the expert disclosed this limitation at the outset. He failed to do so, thereby increasing the Court's doubts as to the reliability of his evidence. These doubts were not resolved when Mr. Frett purported to explain the valuation methodology applied in his report. He testified that in arriving at the pre-nuisance value he applied a combination of the comparable sales approach when valuing the land and a cost based approach when valuing the appurtenances. He then added the results to arrive at the pre-nuisance value. For the post-nuisance value, he appeared to have applied a variation of the comparable sales approach to which he applied a devaluation percentage of 20%. He stated that he applied the 20% adjustment based on his 35 years of experience and knowledge of the local market. He also indicated that this is his formula which is based on the measurement of the property and the market price per square foot of land in that area.

[83] When he was asked to explain his unusual choice of methodology and the matters relied upon, Mr. Frett was not persuasive. No attempt was made to supply any of the documentation or materials relied on by him in support his conclusions.

[84] Experts ought not to attempt to quantify damages based solely on experience and professional judgment and then invite a Court to wholly rely such opinions. An expert's duty to the Court demands that he reflect the methodology employed and provide appropriate market data when quantifying the impact of the nuisance on the capital value of a property.

[85] Mr. Frett's obvious equivocations raised serious doubts was to whether he had in fact analyzed the market data to verify whether in fact there could be any correlation between the nuisance and the impact on the value of the Claimants' property. In the Court's judgment his opinion evidence was therefore unreliable.

[14] Moss v Christchurch RDC [1925] 2 K.B. 750

[86] A Claimant may recover for loss to property only to the extent that such a loss can be objectively determined and in the Court's view, the Claimants have failed to persuade the Court that there was any diminution in the capital value of their property suffered as a result of a nuisance which was largely abated approximately 6 years prior to this matter coming to trial. Moreover, save for the rather bare assertion contained in their pleadings, there was certainly no cogent evidence presented which would otherwise support this head of damage.

[87] Instead, Counsel for the Claimants submitted that the Court should accept Mr. Douglas' opinion that property values will continue to be negatively impacted in the long term where industrial activities have ceased. First, it is apparent that such a general assertion could not without more provide a foundation for relief on a balance of probabilities. Moreover, this observation appears to be outside the expertise of this expert and outside of the remit of his instructions and report.

[88] Counsel for the Claimants also submitted that the evidence of Mr. Frett should be accepted because although he has failed to properly explain his methodology in his Report he was firm in his view from his 35 years experience in property valuation and his in-depth knowledge of the local market that a buyer will never pay full price for the Claimant's property give the current state of the Property. She further noted that while it was open to the Defendants to call their own expert to contradict the evidence of Mr. Frett, they failed to do so. For the reasons which have been set out above the Court cannot accept these submissions.

[89] In the future, it would be useful if experts would be guided by the dicta in **National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer**[15]. At page 81 of the judgment the following passage by Creswell J., was subsequently adopted in the Court of Appeal by Stuart-Smith LJ.

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> i. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> ii. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

[15] 1993 2 Lloyds Rep 68

iii. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
iv. An expert witness should make it clear when a particular question or issue falls outside his expertise.
v. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
vi. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
vii. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

[90] The legal and evidential burdens throughout these proceedings rest on the Claimants who must satisfy this Court on a balance of probabilities of the merits of each of their claims. In the Court's judgment the expert evidence advanced is entirely untenable both in form and substance and this was essentially the only attempt made to support this claim. The claim in respect of the diminution in the capital value of the Property is therefore dismissed.

[91] Counsel for the Claimant however, also submitted that the Claimants are entitled to damages for loss of amenity value of their property while the nuisance persisted and beyond. She also submitted that they are entitled damages for distress and personal discomfort suffered.

INTANGIBLE LOSS – annoyance, inconvenience and discomfort / Reduction in amenity value

[92] Undoubtedly, once the injured party can show that there is material injury to his property or substantial interference with his use and enjoyment of it, then he is entitled to compensation.

[93] In the case at bar, the Claimants contend that the Defendants' activities have affected their health and wellbeing. Indeed, a significant part of the Claimants' disclosure centres on their individual medical diagnoses and expenses. However, it is now settled law that damages for personal injury

are not recoverable in claims alleging nuisance. In **Hunter v Canary Wharf Ltd.**[16] Lord Lloyd settled the position at common law in the following terms:

> "If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his *personal* injury, nor for interference with his *personal* enjoyment."

[94] It follows that all damages in respect of alleged personal injury will not generally be recoverable. However, the Claimants also contended that the nuisance has also caused them annoyance, inconvenience and discomfort. For a period of 6 years prior to 2010, they complained that they have had to endure loud and deafening sounds at all hours of the day and night which disturbed their sleep. They complained of noxious fumes and exhaust and the emission of large quantities of dust and particulate matter which severely polluted their environment and caused them to abandon their home. They made repeated exhortations made to the local planning and environmental authorities and even the police in order to secure the abatement of the nuisance, but to no apparent avail. This evidence is largely untraversed.

[95] In the Courts' judgment, the Claimants have met their burden and are entitled to be compensated. Courts have repeatedly emphasized that the essence of a recovery in nuisance is damage to land rather than to the person. Within the context of nuisance claims, damages for distress and inconvenience typically compensate for the interference with a claimant's enjoyment of his property rather than the personal loss of amenity. Consequently, such awards have usually been of limited value.

[96] By way of example, in **Bone v Seale**[17], the Claimant had to endure persistent smells emanating from a pig farm. The Court of Appeal reduced the award for 12 years of discomfort from £6,000 to £1,000. The Court considered that the award made in the court below was too high given the value of damages for loss of smell in personal injury cases.

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[16] [1997] A.C. 655 at page 696
[17] [1975] 1 WLR 797

[97] The appellate courts have now determined that it is no longer appropriate to make separate awards of damages for distress in cases of nuisance. Instead they consider a claimant's personal distress or discomfort to be a part of a larger assessment of a claimant /occupier's loss of amenity.

[98] This approach is best illustrated in **Raymond v Young**[18]**.** In that case, the claimants were the owners of Lin Cragg Farm. Immediately adjacent to the farm was Lynn Cragg Cottage, which was owned and occupied by the defendants. The claimants brought proceedings against the defendants, alleging trespass, nuisance and harassment. The recorder found the allegations proved and ordered specific awards of damages for the acts of nuisance rounded up to a figure of £20,000 to avoid double counting. This included general damages for distress and inconvenience. Further, the recorder found, on the basis of the expert evidence, that the value of the farm at the date of trial would be reduced by £155,000 in the case of a potential purchaser who was made aware of the dispute. He awarded £155,000 by way of damages for the diminution in value of the claimants' property caused by acts of harassment and nuisance.

[99] On the defendants appeal against the recorder's order the English Court of Appeal disagreed with the Recorder's award of £20,000 for inconvenience and distress. The court held that the award of £155,000 for diminution in value, calculated on the basis that the threat of a nuisance to future purchasers would continue, was one which the recorder had been entitled to make. However, the court went on to find that the recorder had been wrong to award the claimants both the £155,000 for loss of value and a further £20,000 for loss of amenity or distress. The total award of damages was reduced by £20,000 to eliminate the element of double recovery.

[100] The Court concluded that it was not appropriate to make separate awards of damages for distress in cases of nuisance. The consequences in terms of personal distress or discomfort which the claimant might experience as a result of the nuisance were simply part of the assessment of the claimant occupier's loss of amenity. Damages for what is commonly described as loss of amenity are damages for the diminution in the value of the right to occupy the affected property and not merely damages for the personal distress or inconvenience suffered by the individuals concerned.

[18] [2015] ALL ER (D) 160

[101] At paragraph 26 of the judgment, Court cited the following dictum of Lord Hoffman in **Hunter**:

> "In the case of nuisances 'productive of sensible personal discomfort', the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.
>
> I cannot therefore agree with Stephenson LJ in ***Bone v Seale***[19] when he said that damages in an action for nuisance caused by smells from a pig farm should be fixed by analogy with damages for loss of amenity in an action for personal injury. In that case it was said that 'efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed'. I take this to mean that it had not been shown that the property would sell for less. But 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 the occupation of an equivalent house which does not. In the case of a transitory nuisance, 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. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare ***Ruxley Electronics and Construction Ltd v Forsyth***[20]***.***
>
> There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. 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 upon it are liable to suffer inconvenience, annoyance or illness.
>
> …Once it is understood that nuisances 'productive of sensible personal discomfort' (***St Helen's Smelting Co v Tipping***,[21]) do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the Plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable."

[102] Ultimately, the English courts have affirmed that private nuisance is a tort against land and not against the person and they have specifically rejected any suggestion that the tort of nuisance

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[19] [1975] 1 WLR 797, 803 – 804
[20] [1996] AC 344
[21] 11 HLCas 642, 650

should be modernized in order to protect certain personal interests. This Court is guided by this approach.

[103] The Court is also satisfied that the fact that the Claimants have been unable to prove diminution in the capital value of their property will not preclude recovery in respect of a reduction in the amenity value. Lord Hoffman made this clear at page 451 of Hunter where he stated the following:

> "…I take this to mean that it had not been shown that the property would sell for less. But 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 the occupation of an equivalent house which does not. In the case of a transitory nuisance, 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. To some extent this involves placing a value on intangibles. But estate agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case (cf ***Ruxley Electronics and Construction Ltd v Forsyth, Laddington Enclosures Ltd v Forsyth***[22])."

[104] In attempting to assess damages where there is no loss of market value or other pecuniary loss, no physical damage to the property but simply loss of amenity, the Court is guided by the English Court of Appeal decision of **Dobson and others v. Thames Water Utilities Limited (No. 1).**[23] At paragraphs 33 – 35 the following is noted:

> "33. If the house in question was available to be let during the period of the nuisance, it may be that there would be direct market evidence of loss of rental value. Otherwise, it is perhaps inevitable that the assessment of damages for loss of amenity will involve a considerable degree of imprecision. But if estate agents are to assist in placing a value on the relevant intangibles, whether by calculating the reduction in letting value of the property for the period of the nuisance or in some other way, we would expect them in practice to take into account, for the purposes of their assessment, the actual experience of the persons in occupation of the property during the relevant period. It is difficult if not impossible to see any other way of proceeding. As Lord Hoffman observed, the measure of damages for loss of amenity will be affected by the size and commodiousness of the property. If the nature of the property is that of a family home and the property is occupied in practice by a family of the size for which it is suited, the experience of the members of that family is likely to be the best evidence available of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend.

[22] [1995] 3 ALL ER 268, [1996] AC 344
[23] [2009] EWCA Civ 28

34. On ordinary principles, it must also be clear that a claimant must show that he has in truth suffered a loss of amenity before substantial damages can be awarded. If the house is unoccupied throughout the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad, or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be any actual loss of amenity. So in this way also, as a matter of practicalities, the assessment of common law damages for loss of amenity to the land is likely to be affected by the actual impact of the nuisance upon the occupier, or the lack of it.

35. It follows that the actual impact upon the occupiers of the land, although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of such damages in many cases, including such as the present where a family home is in question and no physical injury to the property, loss of capital value, loss of rent or other pecuniary damage, arises."

[105] The judgment of Ramsey J. at first instance[24], also provides guidance to the Court. At paragraph 184 he stated:

"184 I consider that the common ground between the parties properly reflects the position on the award of damages which may be summarised as follows:

(1) That damages awarded for nuisance, where there has been personal discomfort, are assessed on the basis of compensation for diminution of the amenity value of the land rather than damages for that personal discomfort....

(4) That damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity. In Hunter v. Canary Wharf at 696 Lord Lloyd said "Damages for loss of amenity value cannot be assessed mathematically. But this does not mean that such damages cannot be awarded: see **Ruxley Electronics and Construction Ltd. v. Forsyth**[25]..."

[106] In the case at bar, the Claimants have advanced no valuation evidence which would practically assist the court in regard to the diminution in value (market rental) figures. In the absence of even primary data, the Court is forced to adopt the tried and trusted method of assessing general

[24] [2007] EWHC 2021
[25] [1996]A.C. 344

damages where there is a claim for loss of amenity whilst not losing sight of the fact that these are claims concerning land which usually tend to be modest.

[107] In the Court's judgment, the particular facts of this case warrant an award for loss of amenity. While this is inherently an inexact calculation, the Court has had regard to the nature, size and commodiousness of the Claimants' property as well as its general location and proximity to the nuisance. The Court has also considered nature and extent and severity of the nuisance and the extensive period over which it persisted. There can be no question that the nuisance caused considerable distress, discomfort and inconvenience to the Claimants. They clearly intended to settle into a residential neighborhood and lead quiet lives in their family home. Instead, they were frequently disturbed in their sleep, were forced to leave their home from time to time because of the severity of the nuisance, were forced to make numerous complaints which were largely unheeded and their general well-being was negatively impacted.

[108] The Court has also considered relevant judicial precedents including **Robert v Robert & AG**[26], where the act of nuisance involved the "piling up of garbage on Crown land by the defendant, thereby blocking the claimant's waterway, which caused flooding his property. The defendant continuously blocked claimant's gate by leaving equipment and various vehicle parts in front of his gate. The defendant also left food and garbage on Crown land which resulted in rodents and other insects infecting the area. Fumes emitted from the garbage. In that case the Court awarded the sum of $20,000.00.

[109] In **Jean Matthews and Anor. v. Godson Warrican**[27], the Defendant built a block-making plant a mere 10 or 20 feet from the house of the second claimant and about 30 feet from the house of the First Claimant. Both Claimants are to the west of or downwind from the Defendant's block-making plant. Mitchell J. had no hesitation in accepting the evidence of the Claimants that whenever the plant is in operation quantities of cement dust and sand are blown onto the yards and houses of the Claimants making it very difficult for them to enjoy their properties. In addition to granting injunctive relief, the learned judge awarded general damages in the sum of EC $5,000.00 for the

[26] ANUHCV 2003/0400
[27] Civil Suit No. 456 of 1999

interference of the first claimant's enjoyment of her property by the past operation of the cement plant. In respect of the second claimant whose house was unfinished and therefore unoccupied he awarded a nominal sum of $500.00.

[110] In **Richard James Henry v Selsi Limited**[28], the Claimants sought to stop the defendants from sand excavation on the grounds their activities constituted a nuisance. They complained of unsightly causing noise, dust, and mosquitoes in what should be a residential area. Having found that the noise nuisance was intrusive, persistent, and carried out during unsociable hours, Morley J. concluded that it struck right into the heart of the quiet enjoyment of property and he granted injunctive relief. He also awarded the sum to be EC $6,000 to each claimant.

[111] In **Norris Mitchell v Anthon Antoine**[29], Mohammed J., took into account the duration of the nuisance from July 2010 to December 2011, the type of nuisance, loud noise, unwanted parking of vehicles in the Claimant's yard and undesirable persons to his property and assessed the Claimant's general damages in the sum of EC $10,000.00.

[112] While judicial precedents may provide some general guidance, clearly each case must be considered on its own facts. In arriving at an award of damages this Court has also taken into account the fact that permanent injunctive relief has been granted. The Court has also considered that it is quite usual for courts in assessing damages in nuisance cases to award modest sums in nuisance in such categories of case. This latter principle was illustrated in the English **Anslow v Norton Aluminium Ltd.**[30] and in **Bone v Seale.** In the former case**,** the 132 Claimants lived in or around Norton Canes, Birmingham, where the defendant operated an aluminum foundry. The claimants alleged that the operation of the foundry had created excessive dust, noise and odour over an extended period of time. The High Court held there had been unreasonable interference with the claimants' enjoyment of their property because of odour between 2003 and 2010 (the claims did not succeed on account of dust, smoke and noise as there has been insufficiency of interference).

[28] Claim No. MNIHCV 2016/0003
[29] Claim No. GDAHCV 2011/0603
[30] [2012] EWHC 2610

[113] On the issue of damages, the Court proposed an annual award to be determined by the extent to which households were affected - those in the most affected area were awarded £2,000 and those in the lowest band were awarded £750.

[114] Having regards to all of the factors mentioned, in the Court's judgment an award of $10,000 would do justice to the serious loss of amenity over the considerable number of years which this nuisance persisted.

DECONTAMINATION /ABATEMENT ORDER

[115] In her written submissions to the Court, Counsel for the Claimant also argued that given the fact that Mr. Douglas has found that there is a high likelihood that the Defendant's Property is contaminated such that this may affect the ground water, it is appropriate that the Court should order that the Defendant's decontaminate the site. This is especially so because of the potential chemical contamination in a residential neighborhood. She submitted that the Defendant's failure to put forward any contradictory expert evidence meant that they should also be ordered to carry out the Phase 2 assessment recommended by Mr. Douglas.

[116] In the case at bar, the burden of proof never shifted from the Claimants. While there was no expert report submitted in opposition to this claim, as at the date of trial this claim for relief was based on no more than mere supposition without the benefit of cogent evidence. In the absence of appropriate surveys and testing, the court has no way of determining the fact of or the persistence of the alleged contamination. In the absence of appropriate expert analysis, this Court cannot conclude that there is any potential for damage to the ground water supply.

[117] The Claimants cannot deliberately choose to decline to meet their burden of proof and then ask the Court to grant relief. This claim for relief is refused.

[118] In the premises and for the reasons outlined herein, judgment is entered for the Claimants. At the commencement of this trial both sides made it clear that injunctive relief is common ground and that a draft order setting out agreed terms will be forthcoming. It is also ordered that:

i. The Claimant is granted a permanent injunction in the terms to be agreed by the Parties and to be submitted to the Court in seven (7) days.

ii. The Defendants shall pay Special Damages in the sum of $2,600.00 and $10,000.00 in General Damages.

iii. The judgment will carry interest at the legal rate from the date of this judgment until payment.

iv. The Defendants shall pay the Claimant's prescribed costs on the sum awarded in accordance with CPR Part 65.

Vicki Ann Ellis
High Court Judge

[SEAL] **By the Court**

Registrar