

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2023/0459

BETWEEN:

[1] JON WHYTE

[2] ROSE-ANN KIM

[3] SYLVESTER BROWN

[4] JOFFIENA BROWN nee AUGUSTINE

Claimants

and

[1] KWAME GALLOWAY

[2] SOCIAL SECURITY BOARD OF CONTROL

Defendants

APPEARANCES:

Mr. Justin Simon KC with Mr. Kwame Simon for the Claimants

Ms. Kalisia Marks for the First Defendant

Ms. Joanne L. Smith for the Second Defendant

2025: January 19 ;
March 28 ;
May 16 (written decision)

JUDGMENT

- [1] **WILLIAMS, J.:** The claimants Jon Whyte, Rose Ann Kim, Sylvester and Joffiena Brown are all residents of the Paynters Court community in the parish of St. George. The first defendant is also a resident of the said community and until recently, he operated a bar on land which he owns. The operation of this business has led the claimants to complain about

noise, general disturbance, security risks and improper use of the green space allocated for the community.

- [2] The second defendant the Antigua and Barbuda Social Security Board is the original vendor of all the properties owned by the parties. It is not disputed that the claimants and the first defendant all ultimately derive title from the second defendant. The basis of the claimants claim against the second defendant will be outlined in greater detail later in this decision. However, it can be said briefly that the claimants are alleging that the second defendant without prior consultation acquiesced to the first defendant operating his bar in a residential area.

Background

- [3] The claimants filed an application for an interim injunction on 15th December 2023. After a hearing, this court on 26th January 2024 granted an injunction against the first defendant in the following terms:

1. The First Respondent and all other persons or entities acting under his control or direction are restrained from reopening the bar and nightclub known as Galloway's 8 ball Sports Bar and located at WEST CENTRAL, Block: 11 2291 54 in the Paynter's Development until further Order of the Court or final determination of this matter.
2. An early trial of this matter is hereby ordered pursuant to CPR Rule 17.8 and case management of this claim is scheduled for 15th March 2024 before this court.

The Claim

- [4] By Claim Form and Statement of Claim filed on 26th January 2024 the claimants seek the following relief:
- i. An injunction to restrain the First Defendant, by himself, his servants or agents or otherwise howsoever from carrying on or permitting to be

carried on his premises that is Registration Section: WEST CENTRAL, Block: 11 2291 54 Paynters Development, the business of a Sport's Bar and/or Night Club thereby causing noise, annoyance, disturbance and fear to the Claimants.

- ii. A Declaration that the Second Defendant's unilateral discharge of the restrictive covenant detailed in Schedule 2(a) of the Instrument of Transfer between the Second and First Defendants prohibiting premises in the Residential Development from being used for any other purpose than a dwelling house constitutes a breach of the legal rights of the Claimants and the other proprietors/occupiers of the Paynters Residential Development.
- iii. Damages for nuisance.
- iv. Such further or other relief.
- v. Costs.

[5] In their statement of claim, the claimants allege that they are the registered proprietors/residents of the Paynters Residential Community and have resided there in excess of three years. They plead that the first defendant is the registered proprietor of parcel 54 within the community and owns and operates "Galloways 8 Ball Sports Bar" which is housed in a structure erected on the said parcel. The second defendant is described as a statutory corporation and the original transferor of lands within the development.

[6] The claimants allege that the instruments of transfer in respect of each parcel of land in the area, contain identical restrictive covenants which govern the erection of buildings and their user. They aver that in 2021, the first defendant constructed a building separate to his dwelling house without the requisite planning permission. The first defendant then commenced operations as a "small pool hall, sports bar, lounge or after-work liming

spot.¹ The claimants then complain that over time this morphed into a “full out nightclub and bar which he has named “Galloways 8 Ball Sports Bar.”²

[7] The claim alleges that the first defendant commenced a claim (ANUHCV2023/0180) against the second defendant, seeking to discharge the restrictive covenant which prohibits the operation of the first defendant’s bar. The defendants however, entered into a consent order which discharged the said restrictive covenant in respect of the first defendant’s property. The claimants complain that the second defendant no longer has any property interest in the area and failed to consult with the residents of the area before entering into the consent order. Accordingly, as a result of the discharge of the restrictive covenant, the first defendant intends to resume operations of the bar and nightclub in a manner which will constitute a “nuisance, annoyance disturbance and threat to the safety and security of the claimants.”³

[8] The following particulars of nuisance are pleaded:⁴

- i. The first-named claimant who occupies parcel 34 and is closest to the first defendant's parcel will experience noise disturbance from the loud music and voices of patrons around the bar and nightclub and this is a constant disturbance to his family, himself, his wife, young child, elderly mother and his mother-in-law when they visit;
- ii. The first claimant complains that on nights when social events are held the constant entry and exit of the patrons allows the loud, sometimes vulgar lyrics and heavy bass from the sound system to

¹ Statement of Claim dated and filed 26th January, 2024 para.5

² Ibid

³ Statement of Claim dated 26th January, 2024, para. 10

⁴ Statement of Claim dated 26th January, 2024 para. 10 (i-vii)

reverberate throughout his home for hours, often beyond midnight, three to five times a week and this has kept his household awake;

- iii. Where there are events hosted in the courtyard of the first defendant's property, this leads to loud speakers being placed outside to entertain the patrons in the courtyard, The loud vehicles, rowdy patrons and commotions near to and outside the said property are further sources of nuisance, annoyance and disturbance to the first-named claimant's household;
 - iv. The widespread social media advertisement by the first defendant of his nightclub and bar, advertising popular DJs and guest performers has caused the influx of strangers in large numbers upon the said residential Development which poses a major security risk;
 - v. Due to the increase in crimes such as armed robberies and home invasions across Antigua, the claimants are concerned over the influx of strangers into the said residential Development;
 - vi. The Community Green Space where neighbourhood children play and older persons garden and exercise has been commandeered by the first defendant as a parking lot and is often seen the next day littered with glass bottles, and other debris from the previous night's activities.
 - vii. The Operations of the first defendant's bar and night club with alcohol driven party nights, themed events, guest performers, DJs and popular sound systems is disruptive of the peace and tranquillity once enjoyed within the said residential Development.
- [9] The statement of claim alleges that unless restrained, the first defendant will continue to advertise his restaurant and bar utilizing social media. Thus,

the first defendant's business will become a continuing nuisance to the claimants and other residents in the development.

First Defendant's Defence

- [10] The first defendant filed a defence on 21st February 2024. In short, the first defendant admits operating Galloways 8 Ball Sports Bar on Parcel 54 but denies that it is a nightclub. In terms of the allegations of breach of the restrictive covenant, the first defendant avers that he was unaware of the said covenants. The first defendant also pleads that the character of the development has changed over the past eighteen (18) years. He avers that food catering businesses, car rental, a mechanic shop and a nail shop are now present in the area.
- [11] He further states that on 17th May 2023, he filed a Fixed Date Claim Form to have the restrictive covenants detailed in his transfer instrument discharged. On 10th October 2023 the first and second defendants entered into a consent order which was approved by the court on 5th December 2023. Further, on 2nd January 2024, he was granted building permission from the Development Control Authority.
- [12] The first defendant denies that his business creates a nuisance for the following reasons:
1. The building that houses the business is soundproof;
 2. There is no loud music or noisy patrons;
 3. The maximum number of patrons who have attended the business at any time is twenty;
 4. Any influx of persons into the community cannot be solely attributed to the first defendant;

5. The community green space belongs to the second defendant which is for the benefit of the entire community and the first defendant pays to upkeep;
6. There has never been any litter or debris present on the community green space post any event held by the first defendant;
7. The claimants nor any other members of the community have complained to the first defendant or the Police Force about any noise.

[13] As a result, the first defendant denies that his business has caused or will cause any future noise, annoyance, disturbance or threat to safety or security of the claimants or other residents.

[14] Finally, the first defendant counterclaims the sum of \$59,545.00 in respect of obtaining relevant permits for his business and loss of business due to the grant of the interim injunction.

Second Defendant's Defence

[15] The second defendant filed a defence on 5th March 2024. The second defendant denies knowledge of most of the allegations contained in the Statement of Claim. The second defendant admits however, entering into a consent order with the first defendant which discharged the restrictive covenants in respect of the first defendant's parcel. However, the second defendant denies having any obligation to consult with the residents of the area before doing so.

Trial

[16] Trial of this claim took place from 14th to 16th January 2025. Mr. John Whyte, Ms. Rose Ann Kim, Ms. Joffiena Brown and Mr. Shane Roberts gave evidence on behalf of the claimants. Mr. Kwame Galloway gave evidence on his own behalf along with Ms. Deon Lewis-Williams, Mr. Daniel Blucher, Mr. Devon Aymer and Ms. Roxanne Garret. The second defendant called

no witnesses. The parties filed written closing submissions on 14th February 2025.

Claimant's Evidence

Jon Whyte

- [17] The witness statement of the first claimant Mr. Jon Whyte filed on 24th May 2024 was admitted as his evidence in chief. Together with his wife Floree Williams he is a registered proprietor of land registered as Block 11 2291B; Parcel 34. In 2014 they purchased the property from Sincere Nicholas and Dawn Dublin who had in turn purchased the property from the second defendant. Essentially, he was convinced to purchase the property by the fact that there were green spaces for family activities and a restrictive covenant that governed all properties in the area and prohibited activities that could be considered a nuisance.
- [18] For more than six years he says that he enjoyed the peace, safety and security of the property. However, this changed when the first defendant Mr. Kwame Galloway who lives diagonally from him and on the opposite side of the street, turned his residence into a recreational party space, then a commercial bar and nightclub. Then around 2020, he observed that the first defendant was inviting neighbours to his home to his backyard to have drinks and quiet music. Eventually the first defendant erected signs showing "Galloways 8 Ball Sports Bar."
- [19] In 2021 after the lifting of Covid-19 restrictions, the first defendant started advertising heavily. Over the next few months Mr. Whyte states that the frequency of events and the size of crowds increased. What started as one or two events quickly turned into 3 to 5 rotating events, alcohol-themed parties and club nights featuring local and regional DJs, sound systems, recording artistes and stage performers.

- [20] Mr. Whyte states that evenings would start with music from the bar which was audible in his home. As patrons arrived, the noise would intensify as the doors for the premises would open and close for constant entry and exit. He states that the loud, sometimes vulgar lyrics would “blast” through the neighbourhood into the early hours of the morning.
- [21] Mr. Whyte complains that the neighbourhood green space which is immediately next to his home was commandeered as the advertised parking area for the bar/nightclub. In particular, Mr. Whyte complains that patrons congregated in this parking area before, during and after events to drink, smoke and loiter. He complains of loud talking, rowdy behaviour and the smell of marijuana. In his statement Mr. Whyte outlines that after the bar closed in the early morning, he would be awakened by the loud chatter of drunken persons leaving the bar and the sounds of cars revving, starting and accelerating out of the parking area. After hours Mr. Whyte complains that patrons of the bar would have loud arguments and fights just outside his windows and also relieve themselves in the area. These persons would also leave glass bottles, alcohol containers, drug paraphernalia and other debris in the area.
- [22] Despite having a conversation with the first defendant in February 2022, the events continued and grew larger. Mr. Whyte gives details of several events during 2022 which he said were advertised on social media. One of these events featured one of Antigua’s most famous soca artistes Claudette “CP” Peters.
- [23] Mr. Whyte states that for the first time living in the community, his family felt unsafe and uncomfortable in the area. He states that there has been an increase of complaints of break-ins, property damage and trespass which only started after the bar became popular. He then describes efforts by

himself and other residents to take action to address their concerns, including the signing of petitions. This involved complaints to the Development Control Authority, Mr. David Mathias Director of the second defendant and the then prospective candidate for the area Mr. Rawdon Turner.

[24] These efforts culminated in an enforcement notice being issued by the Development Control Authority to the first defendant in August 2022. Mr. Whyte and other residents then commenced legal action against the first defendant and an interim injunction was obtained in January 2024. Since then, according to him, the first defendant has moved on to using the premises for other enterprises including accommodation and the community has returned to its peaceful state.

[25] Mr. Whyte sought to tender electronic documents, in the form of screen recordings into evidence. This was disallowed based-on non-compliance with **sections 42 and 43** of the **Evidence (Special Provisions) Act 2009**.⁵ This is as there was no evidence to ensure that the computer system which was used to store these screen recordings was operating properly.

[26] Mr. Whyte under cross-examination by counsel for the first defendant was directed to the expert report of sound engineer Mr. Stephen Jackson. In that report Mr. Jackson concluded that his “Professional opinion that the sound system inside Galloways 8 Ball Sports Bar does not have the capacity to escape the outer walls of the building and therefore could not constitute a noise nuisance to the neighbours.” Despite this, Mr. Whyte maintained his position that the bass from the first defendant’s speakers vibrated the walls of his residence. He was also questioned as to the closing time of the bar, to which Mr. Whyte replied that he could not speak to an

⁵ No.5 of 2009

average time of closing, though he lived next door to the bar. Counsel then suggested to him that the frequency of the sound which he alleges to hear in his home is false. Mr. Whyte strongly disagreed with that statement.

- [27] Under cross-examination by counsel for the second defendant, Mr. Whyte confirmed that he was aware that prior to these proceedings, a court order had been made removing the restrictive covenants which required the first defendant to use his property for residential purposes only. He clarified that his claim against the second defendant arose due to the discharge of the restrictive covenant without consulting the claimants. Mr. Whyte also accepted that he has taken no action against any other commercial activity in the community. According to him, this was as there was no nuisance caused by commercial activities substantial enough to bring a court action compared to the nuisance emanating from the first defendant's bar.

Rose-Anne Kim

- [28] The second-named claimant Ms. Rose-Anne Kim filed a witness statement on 24th May, 2024 which was admitted as her evidence-in-chief. In her statement, she recounts that she acquired property in the Paynter's Residential Development around early October 2020. She is the registered proprietor of West Central; Block 112291B; Parcel 18. She acquired the property from Carlton Payne who had purchased it from Hendersons' Antigua and Barbuda Ltd. That company had in turn acquired the property from the second defendant in 2002.
- [29] She cites the restrictive covenants as one of the main reasons for relocating to the development. She was of the view that the covenants restricted nuisance activities in the area. She states that she had personal knowledge of the area being quiet and peaceful having been a regular visitor to the home of the third and fourth claimants for over twelve years (12) prior to the purchase of her property.

- [30] It is her evidence that she became aware of the first defendant's nightclub and bar around the summer of 2022. She had observed dozens of vehicles parked on the community green space and heard loud disruptive music from the first defendant's property, which continued into the early morning hours, especially on weekends.
- [31] Miss Kim admitted under cross-examination that she had been surprised when she discovered that the first defendant's business had been in operation for a year prior to her observations, though she had an unobscured view from her kitchen window. It is this witness's evidence that she does not live on the same street as the bar and nightclub in question, but resides one street over from the first defendant's business. She stated that visiting the first defendant's Facebook business page, confirmed that there was a bar and night club within the development and that her visit to the page was to ascertain the nature of the first defendant's business operation.
- [32] Ms. Kim's evidence was that she has been extremely concerned for her safety given the influx of visitors that traversed the area after the expansion of the first defendant's business. Furthermore, to her knowledge, there had been at least two reported home invasions since the expansion/commencement of the first defendant's business. Whereas, before its expansion, she was not aware of any such incidents.
- [33] Ms. Kim under cross-examination, said that she could say with absolute certainty that the vehicles parked in the community's green space belonged to patrons of the first defendant's business operation as opposed to guests of homeowners. She justified this statement by saying that from her observations, neighbours and homeowners' guests did not usually occupy the green space.

[34] Under cross-examination, Ms. Kim was asked whether prior to filing proceedings the residents of Paynters Court had sent correspondence to the Director of the second defendant and the first defendant. She stated that it was her understanding that the first claimant had discussions with the first defendant but that those discussions did not bear fruit. Ms. Kim also recalled that on the 29th of October 2022, she made a report to the Parham Police Station highlighting the nuisance activities by the first defendant and that a formal report was produced as a result of her complaints.

[35] Under re-examination, Ms. Kim confirmed paragraph five of her witness statement stating that from her understanding, the first defendant's establishment started on a small scale and developed over time through popularity. Thus, this fact contributed to her only becoming aware of the first defendant's business in the summer of 2022, though it had been established a year before.

Joffiena Brown

[36] Ms. Brown is the fourth-named claimant in these proceedings whose witness statement was admitted as her evidence in chief. In her statement, Ms. Brown avers that she formally acquired her property in August, 2002. She stated that the property was attractive to her as one of the main selling points of the vendor (the second Named defendant) was that the community was designed to be a peaceful residential community. To ensure that it remained as such, it is Ms. Brown's evidence that the vendor enshrined certain restrictive covenants and that all purchasers of property within the development were aware of the said covenants and the intention for it to remain a residential community. She stated that a homeowners' association had been formed but eventually became inactive. Ms. Brown served as interim President of said association from 2010.

[37] Ms. Brown further deposed that in July 2022, after hearing music coming from the back of the development, she learned the news from her neighbour that the first defendant had opened a bar and nightclub within the development. Prior to this, Ms. Brown stated that prior to the first defendant opening his business, it was unusual to see more than one or two cars on the streets of the development. Traffic was usually limited to mornings and evenings. She was concerned about the influx of strangers into the development and became even more horrified when she learned of the two home invasions and robberies within the development that happened around the same time.

[38] Being concerned, Ms. Brown was instrumental in lobbying her neighbours to sign a petition against the operation of the first defendant's bar. This was after learning that the first defendant had petitioned other neighbours to support his business endeavours. Further, she stated that she was a part of the group of concerned residents who wrote the second defendant and the Development Control Authority about the first defendant's establishment.

[39] Ms. Brown's evidence is that she knew of at least five residents who offered goods and services from their homes during the daytime hours. She stated under cross-examination, however, that she was not necessarily concerned with any strangers who might come to these businesses, as these operated during the day as opposed to at night. She stated that she was not concerned about a threat of security with respect to said businesses, as opposed to the first defendant's bar and nightclub with smoking, drinking and nefarious activities taking place there.

Shane Roberts

[40] Mr. Roberts filed a witness statement dated 24th May 2024 which was admitted as his evidence in chief. In his statement, he deposed that he

moved to the Paynter's Court Development in 2013 and still resides there. He stated that he chose to reside within this development because at the time, it was a quiet and peaceful residential neighbourhood with restrictive covenants against disruptive activities.

- [41] Mr. Roberts stated that he lives on the same street as the first defendant's business, with four houses between his and the establishment. In his statement, he recalled an evening in March 2022 when he visited the first claimant at around 9 pm. While there, he stated that the bar was open and he observed dozens of vehicles being parked on the community green space, along with persons drinking, and smoking, and that the scent of marijuana strongly filled the air coming from the field to the house.

First Defendant's Evidence

Kwame Galloway

- [42] The first defendant Mr. Kwame Galloway has resided at #54 Paynters Court Development for approximately nineteen (19) years and is the owner of Galloway's 8 Ball Sports Bar. Mr. Galloway, in his statement, described the reason for opening his establishment. This was as he and his wife were accustomed to hosting friends at their home in their then "makeshift game room". In 2020, after the COVID-19 pandemic hit, his wife lost her job, which forced them to find a stable income and they were of the view that a sports bar would have been a great entertainment space for the community.
- [43] Around August 2020, Mr. Galloway began constructing the building that housed the sports bar, which is separate from his private dwelling house. The sports bar he stated, measured approximately 850 square feet, consisting of a bar, a games room area that is about 500 square feet, a kitchen, two toilets, and a shower area. Mr. Galloway states that he commenced business operations around July 2021 and that he ensured that the sports bar was registered with all the relevant authorities. He deposed that the bar operated three to four days weekly, usually from

Thursday to Sunday. The opening hours on a typical night would be from around 7 pm to midnight.

[44] At paragraph 22 of his statement he states that the sports bar has never created a nuisance in that:

- I. The sports bar is soundproof;
- II. There is no loud music or rowdy patrons;
- III. The maximum number of patrons who have attended the business on any given night is about twenty;
- IV. Any influx of persons into the community cannot be solely attributed to the sports bar;
- V. The community Green Space is for the benefit of the entire community for which he has financially and physically consistently maintained for a number of years;
- VI. There has never been any litter or debris present on the Community Green Space post any event held at the sports bar;
- VII. The claimants, nor any other members of the community have ever complained about the sports bar to him or to the Police regarding any noise.

[45] Under cross-examination, Mr. Galloway was questioned by claimants' counsel Justin Simon KC as to the soundproof nature of his business. Mr. Galloway described that the building was constructed of concrete with three small windows, and the inside of the building felt like a vacuum, making it soundproof. He also stated that he had installed acoustic soundproof panels, but these had not been installed during the initial construction of the building. Mr. Galloway stated that the door for the enclosed building led outside to the courtyard, which was for dining purposes. Mr. Galloway stated that music was not played in the courtyard, and that any music heard in the courtyard would be low as the sound system was inside the building.

[46] During further cross-examination, Mr. Galloway accepted that he posted videos and flyers on the bar's Facebook page and other social media as a way to promote his business. Mr. Galloway was directed to a flyer for an event on July 3rd, 2022. He admitted that roughly thirty-five patrons had attended that event. Mr. Galloway also accepted that the same flyer did not specify a closing time. According to him, his patrons were aware of the closing time as it was posted on his social media pages. He also accepted that it was not only family and friends who had access to the Facebook page, thus there was potential for more than twenty patrons to attend his events.

[47] Mr. Galloway accepted that he posted and made video recordings of activities at the sports bar on the establishment's Facebook page and other social media pages as a way to promote his business. When asked if he would be able to recognize these recordings, he replied that it would not be possible to do so he would be unable to say whether the recordings had been tampered with.

[48] Mr. Kwame L. Simon for the claimants then applied pursuant to **section 11** of the **Evidence (Special Provisions) Act 2009** to use video recordings which had been previously not been admitted in order to cross-examine the first defendant. There being no objection on the part of Mr. Galloway's counsel, learned counsel was allowed to show Mr. Galloway the video recordings

[49] Mr. Galloway accepted under cross-examination that he posted about an all-white birthday party on his social media pages to promote the event. He also accepted that he had promotional videos made with promoters whom he termed as "fun factors". However, he was adamant that those "fun factors" did not encourage large crowds to attend the event. Mr. Galloway

when shown the various recordings confirmed them by stating that they seemed familiar. He recalled that at his birthday party, the pool tables had been removed which had allowed him the latitude to have more than the usual twenty (20) patrons present for that event. Mr. Galloway was adamant even after watching the said video recordings, that the events he hosted did not transform his business into a nightclub.

- [50] Under re-examination, Mr. Galloway spoke to the improvements he has made with respect to the door of the bar. He mentioned a door fastener that has now been placed on the door, whereby if the door opens, it automatically closes thereafter. He further stated that one of the videos shown related to the one-year anniversary celebration of the opening of the establishment and did not reflect a typical night at the bar. On a regular night, the pool table would have been present and there would have been roughly five to twenty persons.

Deon Lewis Williams

- [51] Ms. Lewis Williams' witness statement filed and dated 23rd May 2024 was admitted as her evidence in chief. In her statement, she outlined that she resided at No. 27 Paynters Court for around twenty years and that her property was located across the road from the second claimant- Ms. Kim. She stated that she initially found out about the first defendant's establishment through her daughter, who frequented the sports bar on a number of occasions.
- [52] Ms. Lewis recalled three occasions in which she visited the defendant's establishment. She submitted that her first visit to the sports bar was to celebrate her husband's 60th birthday on the 11th of February, 2022. She deposed that in her opinion, the music was at what she termed a normal volume and she was able to have regular conversations without needing to shout. She recalled that her second visit to the business was for the first

defendant's birthday party. She stated that she had been invited by Mr. Galloway and that there were around twenty persons present. The third occasion was for karaoke with a friend and in her opinion, the karaoke was not loud as she was able to conduct a normal conversation at the karaoke. She says that she never noticed any of the patrons of the establishment littering, whether on the Community Green Space or otherwise.

Daniel Blucher

- [53] Mr. Blucher's witness statement filed and dated 23rd May, 2024 was admitted as his evidence-in-chief. In his statement, he stated that he has resided at #53 Paynters Court for around twenty-one years. He resides with his parents on a lot adjacent to the first defendant's on the right side. He has attended the sports bar on countless occasions since its inception. According to him, the patrons who attend the bar are mature individuals around the ages of the thirty-to-forty-five-year age group.
- [54] However, opposing counsel asked the witness about a few of the events that were said to have taken place at the establishment, but Mr. Blucher could not recall attending any of them. Opposing Counsel also put to this witness that he did not frequent the Sports Bar, Mr. Blucher denied that statement.
- [55] Mr. Blucher testified that he signed a petition in favour of keeping the first defendant's sports bar open. He admitted that he was the first defendant's friend. However, he stated that being a friend did not prevent him from being objective and impartial in this matter. Mr. Blucher avers that the Paynters Community is an active community with various businesses operating inside the community such as a mechanic shop, cook shop, and auto body shops. He agreed however, that none of those businesses were similar in nature to the first defendant's sports bar. Mr. Blucher's position

remained that the establishment has never created any nuisance, annoyance, or disturbance and that any assertions to the contrary are false.

Devon Aymer

[56] Mr. Aymer's witness statement filed and dated 23rd May, 2024 was admitted as his evidence in chief. At paragraph 4 of his witness statement, he states that he was employed by the first defendant to be a member of the security team at the bar and his duties included but were not limited to:

- I. "Monitoring the premises for potential security risks;
- II. Conducting entry searches on the patrons/their belongings;
- III. Advising patrons on the bar and property rules;
- IV. Ensuring patrons did not smoke on the property
- V. Ensuring patrons did not park on the road but rather in the designated Community Green Space;
- VI. Ensuring the patrons vehicles were kept safe;
- VII. Escorting patrons to their vehicles;
- VIII. Ensuring the music was kept at a reasonable level"

[57] Under cross-examination, Mr. Aymer testified that his working hours would be from around 6:30 pm until after closing hours at around 1 am. He stated that searches of the various patrons and their belongings were conducted at the front gate before entering the courtyard. He also stated that it was a stipulation by the first defendant to ensure patrons did not park on the road to avoid congestion. Thus, vehicles were parked in the green space which also ensured the safety of the vehicles.

[58] Mr. Aymer deposed that to his knowledge, the sports bar is soundproof. He stated that he could not hear any clear sounds emanating from inside the bar when he was located at the front entrance to conduct searches. He also stated that during his experience at the bar, people came to him at the entrance gate to inquire where the bar was as they never heard any music.

However, Mr. Aymer admitted that there was a sign that stated, 'Galloway 8-ball Sports bar" and that sign had lights surrounding it.

[59] Furthermore, he knew that the establishment had at no time received a police or noise complaint. He also stated that he had not witnessed any patrons littering on the premises or the green space and that the first defendant ensured that the surroundings were clean. Mr. Aymer also stated that there were no smoking signs at varying points in the establishment and that he had not witnessed any smoking either inside or outside of the bar.

Roxanne Garrett

[60] Roxanne Garrett has resided at #41 Paynters Court for about twenty-one (21) years. Her witness statement dated 23rd May, 2024 was admitted as her evidence in chief. In her statement, she deposed that her property is two houses away from the Sports bar and she is closest in proximity to the establishment in comparison to the claimants in this matter. She has attended the bar on two occasions and it is her opinion that the level of music inside the Sports Bar is not loud and she has also never heard any vulgar music being played at the bar. She stated that the two occasions when she visited the bar were firstly Mr. Galloway's birthday bash and her second occasion was some months later for a regular sports night.

[61] Ms. Garrett's testimony is that on days when she is home, the sound of music from the bar is minute and does not disturb her in any way. She stated that she has never experienced any heavy bass that vibrates her home and neither have any sounds from the Sports Bar kept her from sleeping or awoken her during the night. Ms. Garrett also stated that she has never experienced any drunk or disorderly persons at the sport's bar. She supports the establishment remaining in operation.

Expert Evidence

Mr. Stephen Jackson

- [62] Mr. Stephen Jackson, a sound engineer was appointed as an expert by this court and submitted a report which was filed on 25th July 2024. According to Mr. Jackson, he was asked to provide an independent expert opinion on whether sound from the Galloway's 8-Ball Sports Bar creates a noise disturbance to the Claimants or the Paynter's Community at large?
- [63] Mr. Jackson has extensive experience in the sound industry, including 53 years of experience as a sound engineer and providing consultancy services on sound and acoustics. He graduated from the City of Guilds in the UK with a Certificate in Industrial Relations and holds a Bachelor's degree in Elementary Education. He has worked with notable figures in the music industry, including Michael Jackson, Bob Marley, Elton John, Paul McCartney and Stevie Wonder.
- [64] Mr. Jackson outlined that units of sound were measured in "decibels" or "dB". He provided a few reference points to assist the court. According to him, the threshold of sound, or absolute silence, is 0 decibels whilst a normal conversation at a distance of 1 meter is typically between 40 to 60 decibels. A television set at 1 meter would measure around 60 decibels. Mr. Jackson also gives context for potentially harmful decibel levels. Thus, prolonged exposure to sound levels of 85 decibels can cause hearing damage, whilst 130 decibels is considered the threshold of pain.
- [65] Mr. Jackson conducted a sound test at the first defendant's premises on July 8, 2024, using a Radio Shack analog sound meter. His findings indicated that the sound system in the bar does not have the capacity to create a noise nuisance to the neighbours. During testing, 85 decibels were measured inside the Sports Bar with the volume set to a level where a normal conversation was no longer possible.
- [66] Outside the premises, he measured 55 decibels from a dog barking and 50 decibels from a television, but did not hear any sound coming from the

sports bar itself. Two feet from the entrance door, the sound level was measured at 40 decibels. Mr. Jackson concluded that in order to maintain a sound level of 40 decibels outside the Sports Bar, a sound level of at least 85 decibels would be needed inside, which he noted would be uncomfortable for patrons.

[67] He detailed the equipment used in the bar, noting it includes a Gemini bass speaker, a Behringer full range speaker, and a Pyle full range speaker. Jackson also described the physical structure of the bar as a 20 feet by 25 feet concrete building with a restroom, bar, and a pool table. He mentioned that the door and window are double glazed, contributing to sound proofing.

[68] Thus, in Mr. Jackson's professional opinion the sound system inside the bar does not have the capacity to escape the outer walls of the building and therefore could not constitute a noise nuisance to the neighbours.

[69] In his answers to written questions from counsel for the claimants filed on 26th August 2024, Mr. Jackson stated:

1. "The sound system in the Sports Bar is normally operated at approximately 65 decibels or a little louder than a normal television set.
2. The entrance door of the Sports Bar was closed when I recorded 40 decibels two feet from the door. I did not measure the sound with the door open as the room is air conditioned and would normally be closed."
3. If the Sports Bar was being used as a karaoke bar the overall sound level would possibly be louder which is why I purposely increased the sound level to 85 decibels which was uncomfortable to be in."

[70] Under cross-examination, Mr. Jackson testified that he made his observations at between 7:30 and 8 pm. Mr. Jackson confirmed that the time of day in which the tests were conducted, would not have altered the outcome of the results. He also stated that it would be very unlikely for an individual who lived two roads away from the Sport's Bar to hear sounds

emanating from the bar. He stated that Mr. Galloway would need a larger sound system to constitute a nuisance.

- [71] Mr. Jackson also confirmed that if the Sport's Bar was being used for karaoke, the overall sound level would have been possibly louder, hence why he tested at 85 decibels which he stated was uncomfortable to be in. He also stated that Mr. Galloway's system would not be able to surpass 85 decibels without it possibly becoming damaged.

Site Visit

- [72] On 16th January 2025 the court visited the locality including the claimants and first defendant's premises. All the parties were present including the expert Mr. Stephen Jackson. The parties agreed that music would be played at 85 decibels from the first defendant's premises. Mr. Jackson remained at the first defendant's premises to measure the sound output both with the main door open and closed.
- [73] The music could be heard clearly from the first claimant's premises which is immediately across the street from the first defendant. This was especially so when the main door to the defendant's premises was open. The music could only be heard faintly from the second defendant's premises located one street away. However, the sound could not be heard at all from the third and fourth defendants' premises located two streets away.

Issues

- [74] The issues for determination are as follows:
1. Whether the operation of the first defendant's business is a breach of the applicable restrictive covenants in the area?
 2. Whether the second defendant has any liability for the first defendant's alleged breach of restrictive covenants and nuisance?
 3. Whether the first defendant's operation of a bar is a nuisance?

Breach of Restrictive Covenants

[75] The relevant restrictive covenants are found at clause 2 of the Schedule to the relevant instruments of transfer:

“2 USER

- (a) The premises shall not be used for any other purpose than as a private dwelling house with garage and outbuildings, if any, (approved by the Transferor(s)) and no trade, manufacture or business of any kind shall at any time be carried on the property except such professions as may be approved by the Transferor(s) nor shall anything be done thereon which may be or become a nuisance, injury, annoyance or disturbance to the Transferor(s) or the Purchaser or occupiers or any of them of the adjoining property;
- (b) No act or thing shall be done or suffered upon the said land and premises or any part thereof, which shall or may become a nuisance or damage to the Transferor(s) The successors in title or assigns or tenants or any of them, owners or occupier for the time being of the other land and hereditaments forming part of the Paynter's Development and belonging to the Transferor(s) and Purchaser from them adjoining or near the said land;”

[76] It is clear from the consent order in claim no. ANUHCV2023/0180 which was approved by the court on 5th December 2023 that Clause 2(a) quoted above has been waived by the second defendant in relation to the first defendant. It is also accepted that the claimants would have the standing to enforce the covenants reproduced above, against the first defendant if the lots in the Paynters Development form part of a building scheme.

[77] The pre-requisites to establish the existence of a building scheme may be summarized as follows:

1. There must be a common vendor.
2. That previously to selling the lands which the plaintiff and the defendants derive title the vendor laid out his estate or a defined portion thereof for sale in lots subject to restrictions intended to be imposed on all the lots though varying in details as to particular lots, are consistent and consistent only with some general scheme of development.⁶
3. There must be reciprocity of obligation between the purchasers of the various lots.
4. There must be an intention to impose a scheme of mutually enforceable restrictions in the interest of all the purchasers and their successors, which must be known to them.⁷
5. The area affected by the scheme should be clearly defined. It is not sufficient that the common vendor has himself defined the area. It must be clearly known to the purchasers. Neither is it sufficient that the particular claimant and the defendant are within an area affected by an alleged scheme if there is uncertainty as to the full geographical reach of the scheme, as it must be certain which purchasers of which plots are entitled to enjoy mutual enforcement.⁸

[78] This court alerted the parties to the requirements for a building scheme when the application for an interim injunction was considered in these proceedings. In this regard, the evidence tendered at trial remains largely unchanged. Thus, an examination of the land registers and transfer instruments exhibited confirms that the claimants and the first defendant derived title from the second defendant. The covenants in respect to user of the land contained in the relevant instruments are also identical.

⁶ *Elliston v. Reacher* [1908] 2 Ch. 374

⁷ *Emile Elias v. Pine Groves* [1993] 1 WLR 305, 310

⁸ *Laurenciango v. Kay Anthony* Antigua High Court decided 12th April 2017

[79] However, as previously stated by this court, in order to establish that a building scheme exists or was intended, the area of the scheme must be clearly defined. A cadastral showing the lots in the area and labelled "Paynters Court" was admitted into evidence. However, in my view this cadastral does not sufficiently identify which lots form part of the scheme. The approved survey plan or the mutation approved by the Registrar of Lands are also not in evidence. This is unfortunate as this documentation would have conclusively proven the geographical extent of the building scheme. Accordingly, based on the available evidence, it is not possible to state on a balance of probabilities that a building scheme exists.

[80] Even if I am wrong in finding that a building scheme does not exist, I accept the first defendant's pleaded case that the character of the area has sufficiently changed so as to render the restrictive covenants unenforceable. In **Chatsworth Estates Co. v Fewell**⁹ properties within an estate were subject to covenants, enforceable by the company, preventing their use other than as private dwelling houses. The defendant was using his property as a guesthouse which was in breach of the covenants. The defendant relied on the acts and omissions of the company and its predecessors as a bar to equitable relief by way of an injunction. At page 231 of the report Farwell J stated as follows:

"It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, "Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guest house?"

[81] In this case, based on the testimony from witnesses and from the court's visit to the area it is clear that commercial activities, (other than the first defendant's) are taking place in the area. In this regard, a car rental

⁹ [1931] 1 Ch 224

business was observed, as well as a cake shop and confectionery shop operating out of a resident's home. The residents also indicated that there had been a superette (small supermarket) but this was now closed. Finally, a bodywork repair shop is located on the lot immediately west of the first defendant's premises. These operations would be in breach of clause 2(a) of the restrictive covenants which stipulates that the premises can only be used as a private dwelling.

- [82] However, it appears that neither the claimants nor the second defendant have ever complained about the presence of these businesses. The claimants have stated in their evidence that they do not consider these businesses to be nuisances and may be considered useful to the residents. As a result of this acquiescence to commercial enterprises in the area in general, clause 2(a) of the restrictive covenants is no longer enforceable. Accordingly, the claim for breach of covenant must be dismissed.

Claim Against the Second Defendant

- [83] The claim against the second defendant arises out of a consent order made on 29th September 2023 in Claim No. ANUHCv2023/0180 between the first and second defendant. By virtue of that consent order, the second defendant agreed to discharge Clause 2(a) of the restrictive covenants quoted above in relation to the first defendant. Clause 2(a) of course stipulates that the premises may only be used as a dwelling house.
- [84] The claimants complain that the second defendant agreed to the discharge of the said covenant without consultation with the residents of the area. However, the claimants have referred to no authority either by statute or common law which requires such consultation.
- [85] The claimants also allege that the discharge of the restrictive covenant was carried out contrary to **sections 96 and 97 of the Registered Land Act**.

Section 96 of the Act gives the Registrar of Lands the power to discharge or vary restrictive covenants in specified instances.

[86] **Section 97** of the **Registered Land Act** gives the High Court the power to wholly or partially extinguish or modify restrictive covenants. In order to do so, the court must be satisfied that (a) by reason of changes in the character of the neighbourhood which the court deems material, the restrictive covenant ought to be held obsolete; or (b) the continued existence of the restrictive covenant impedes the reasonable user of the land for public or private purposes; or (c) the proposed discharge or modification will not injure the person entitled to the benefit of the restrictive agreement.

[87] The claimants complain that the removal of a restrictive agreement or any portion thereof other than through the provisions of **sections 96 and 97** of the **Registered Land Act** would be contrary to law and of no effect. They further argue the consent order fails to satisfy **section 97** of the **Registered Land Act** and is a circumvention of the law.

[88] I reject the claimants' submissions on this particular issue in their entirety. In **Isaacs v. Robertson**¹⁰ (relied upon by the second defendant) the Privy Council stated:

"..the short and well established ground that an order made by a court of unlimited jurisdiction such as the High Court of St. Vincent, must be obeyed unless and until it has been set aside by the court."

[89] Similarly, in **Strachan v. The Gleaner Company Ltd & Anor**¹¹ the Privy Council stated as follows:

"An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set

¹⁰ [1984] 3 All ER

¹¹ [2005] UKPC 33

aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside.¹²

- [90] In **Strachan** the Privy Council also observed that the correct approach to set aside a judgment which may have been made without jurisdiction is via an appeal.¹³ The fact the order was made by consent is of no moment, as once approved the consent order becomes enforceable as any order of this court. Therefore, based on the foregoing authorities, the claimants cannot use this claim to challenge the validity of the consent order made in the other proceedings. Accordingly, the claim against the second defendant fails in its entirety and will be dismissed.

Nuisance

- [91] The claimants claim in private nuisance will now be examined. In **Fearn and others v. Board of Trustees of the Tate Gallery** the UK Supreme Court recently comprehensively restated the modern law of nuisance. Lord Leggatt giving the majority judgment of the court stated as follows:

“In his classic article “The Boundaries of Nuisance” (1949) 65 LQR 480, 489 Professor Francis Newark described private nuisance as a “tort to land”—by which he meant that its subject matter is wrongful interference with the claimant's enjoyment of rights over land. He declared his willingness “in the spirit of the old reformers” to nail the following thesis to the doors of the Law Courts and defend it against all comers: “The term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land.” As generally in the law of property, the legal concept of land includes here not only the earth itself but also buildings and

¹² [2005] UKPC 33 at paragraph 26

¹³ [2005]UKPC 33

other things which are physically attached to it and rights, for example easements, which attach in law to the land.¹⁴

[92] Similarly, Ellis J. (as she then was) in **Elton Scatliffe v. Dwite Flax** observed as follows:

“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.”¹⁵

[93] In this case the claimants are all registered proprietors of lands in the area. Consequently, they may all properly bring this claim in private nuisance.¹⁶

Categories of Nuisance

[94] The next issue to be considered, is whether the first defendant’s activities may properly be regarded as nuisances. In **Fearn** the Supreme Court made the following observation:

“A second fundamental point, directly relevant in this case, is that there is no conceptual or a priori limit to what can constitute a nuisance. To adapt what Lord Macmillan said of negligence in *Donoghue v Stevenson* [1932] AC 562, 619, the categories of nuisance are not closed. Anything short of direct trespass on the claimant’s land which materially interferes with the claimant’s enjoyment of rights in land is capable of being a nuisance.”¹⁷

[95] The court went on to note that interference may be intangible such as fumes, noise, vibration or an unpleasant smell. In all such cases, however,

¹⁴ [2024] AC 1 at page 12

¹⁵ BVIHCV2010/0053 decided 26th October 2017 at paragraph 12

¹⁶ *Hunter v. Canary Wharf* [1997] AC 655

¹⁷ [2024] AC 1 para.12 at page 13

the basis of the claim is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant's land.

[96] It is therefore necessary to examine the Statement of Claim and the evidence to ascertain exactly what is being complained of. The first claimant (Mr. Jon Whyte) alleges that he experiences noise disturbance from loud music and the voices of patrons. The claimants have also expressed concern as to the influx of strangers which the establishment has allegedly brought to the area. The second claimant in particular, expressed concern that crime has increased in the area.

[97] All the claimants complain about the first defendant's use of the green area as a parking lot. Mr. Whyte (whose house is closest to the defendant's establishment), alleges that he is disturbed by the sounds of patrons departing the first defendant's establishment in the early morning, including persons who loiter and have loud conversations. According to him this disturbs his sleep. He also complains that the patrons relieve themselves and leave refuse in the green area including broken bottles.

[98] I am satisfied that the claimants' complaints would amount to a nuisance if proven. Noise whether caused by loudspeakers or persons has been accepted as a nuisance in many cases. Leaving rubbish in the community's green space could also be regarded as a nuisance as it affects the amenity value of neighbouring properties.

[99] This leaves the issue of whether the law regards the claimants' complaints concerning the alleged influx of strangers to the area as an actionable nuisance. This aspect of the case is not as clear-cut as the complaints of noise, loud vehicles or rowdy patrons as there are not many authorities directly on point. However, I remind myself of the Supreme Court's guidance in **Fearn** that the categories of nuisance are not closed.

[100] Counsel for the claimants has helpfully referred the court to the case of **Laws v. Florinpole Ltd**¹⁸. In that case the defendant planned to open a sex shop in what was a predominantly residential area. Residents of the area sought an interlocutory injunction to prevent the shop from operating. The claimants sought the injunction on the basis that the defendant's activities would attract undesirable customers, who would threaten the ordinary enjoyment of family life in the street or would be an embarrassment and potential danger to young persons. The defendant countered that customers of sex shops were well-educated, respectable and normal individuals. The defendant also filed an affidavit from a behavioural psychotherapist who stated that persons likely to be customers were very often perfectly normal and respectable citizens.

[101] Vinelott J in granting an interim injunction noted, that it was established law that cases of nuisance were not confined to cases where there was some physical emanation of a damaging kind from the defendant's premises which had occurred or was reasonably feared. The learned judge accepted that there was a triable issue as to whether the proposed business would attract undesirable and potentially dangerous customers. Similarly, the claimants claim can succeed if they can prove that the first defendant's business has the potential to attract undesirable persons to the area.

[102] Thus, the claimants' complaints concerning the first defendant's use of his property are sufficient to demonstrate that they have a cause of action. However, in order to succeed on their claim, the claimants must also prove that the defendant's use of his land has caused a substantial interference with the ordinary use of their property.

Substantial Interference

¹⁸ [1981] 1 All ER 659

[103] The principles of substantial interference are outlined in the well-known case of **St. Helen's Smelting Co v. Tipping**¹⁹ where Lord Wensleydale stated:

“the law does not regard trifling and small inconveniences but only regards sensible inconveniences. Injuries which sensibly diminish the comfort, enjoyment and value of the property which is affected.”

[104] Similarly in **Walter v Selfe** the court stated that:

“...the inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness” it must be “...an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.”²⁰

Noise

[105] In order to address whether the interference is substantial, it is necessary to examine the evidence in some detail. The first claimant, Mr. Whyte, as previously observed, lives in closest proximity to the first defendant- almost directly across the street. In addition, he resides closest in proximity to the green space. His primary complaint is noise caused by the first defendant's sound system, noisy patrons congregating in the green space after leaving the premises and noise from vehicles both departing or arriving to the area.

[106] During the site visit, music was played at 85 decibels inside the first defendant's premises. This was done with the expert Mr. Jackson's supervision. When the main door to the first defendant's premises was closed, no music could be heard from the first claimant's premises. However, with the door opened, the music could be heard clearly from the first claimant's residence, but not from the other claimants' residences.

¹⁹ (1865) 11 HL Cas 642, 653-654

²⁰ (1851) 64 ER.849

[107] It is clear that the first defendant has installed some soundproofing at his premises as he confirmed during testimony. However, the music can still be heard from the first claimant's residence when the main door to the defendant's premises is opened. As a place of entertainment, the main door would of necessity have to be opened and closed frequently to allow patrons to enter and exit the establishment. At these times the music would be loud enough to constitute a substantial interference with the first claimant's enjoyment of his property.

[108] I have considered Mr. Jackson's expert evidence as summarized above. The site visit confirms his report that sound from the first defendant's sound system could not be heard from the surrounding houses. Mr. Jackson admits though that this was with the main door to the establishment being closed. However, this is obviously not the case when the doors are opened.

Loitering and Activities in the Green Space

[109] The first claimant had no recordings or photographs of the first defendant's customers using the green space as a parking area. However, due to the fact that the green space appears to be the only available parking for the first defendant's patrons, I am inclined to believe the first claimant on this issue. Due to the green area's proximity to the first claimant's home, it is more likely than not that any movement of vehicles or persons congregating in that space would disturb the first claimant and his family.

[110] The other claimants live further away from the first defendant and the green area. It is therefore unlikely that persons congregating in the green space would be a disturbance to them.

Influx of Strangers

[111] As previously noted, all the claimants complain of an influx of strangers to the community. The claimants have given testimony of burglaries and home invasions in the area. However, no police reports or evidence from any affected homeowners were put in evidence. In any event I doubt whether these crimes even if proven to have occurred, can be directly attributable to the first defendant's activities.

Ordinary use of the Land

[112] The majority in **Fearn** stated the following with respect to the ordinary use of the land:

“Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over the more particular and uncommon uses.²¹”

[113] In **Bamford v. Turnley**²² Bramwell B stated as follows:

“There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.”

[114] Bramwell B further described this rule as one of “give and take, live and let live as between neighbours.” Thus, if the first defendant's business is considered a common and ordinary use of his property, he will not be liable in nuisance.

[115] This merits some examination as to exactly what business the first defendant was operating. In his evidence, the first defendant sought to

²¹ [2024] AC 1 para.24 at page 16

²² (1862) 3 B & S 66, 83

downplay the scale of his business by stating that usually twenty customers were present at any given time. However, he admitted to hosting special events where a greater number of persons would attend. In addition, his witness Mr. Devon Aymer mentioned that he was part of the first defendant's "security team." A team of security would not be necessary for only twenty patrons. I am therefore satisfied that there are occasions when the number of patrons greatly exceeded twenty persons.

Locality

[116] Whether the first defendant's use of his property constitutes an ordinary use depends on the locality. What may be a nuisance in some areas won't be in others. In **Lawrence v. Fen Tigers**²³, Lord Neuberger stated:

"59. The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case. Sometimes, it may be difficult to identify the precise extent of the locality for the purpose of the assessment, or the precise words to describe the character of the locality, but any attempt to give general guidance on such issues risks being unhelpful or worse.

60. However, such questions can give rise to points of principle on which an appellate court can give guidance. Thus, the concept of "the character" of the locality may be too monolithic in some cases, and a better description may often be something like "the established pattern of uses" in the locality."

[117] As previously stated, I have accepted that the character of the Paynters Court area has changed. The area is no longer solely residential as commercial activities such as the car rental, cake shop and confectionary

²³ [2014] UKSC 13

shop which have previously been mentioned are in operation. This is in addition to the auto body repair shop immediately west of the first defendant. However, the majority of lots in the area remain residential.

[118] In terms of types of operations, none of these businesses provide entertainment to customers. Thus, it is unlikely that patrons of these businesses would remain on their premises for hours unlike the first defendant's bar. A bar or nightclub by its very nature will attract customers to remain on premises to consume alcohol or food.

[119] The first defendant does not require a sports bar in order to enjoy or make use of his property. In fact, by his own admission, he opened this business to supplement his income. This is therefore not a case of a resident playing music to entertain himself or his family or the occasional party. Rather, it is a business which in order to be viable will require several persons to visit on a regular basis. Accordingly, I find that in the context of a primarily residential area, the defendant's use of his property as a bar is not a common and ordinary use.

[120] A brief mention must be made of the fact that the first defendant has obtained planning permission from the Development Control Authority (DCA). The fact that a landowner has received planning permission to conduct the activities complained of does not relieve that landowner from liability in nuisance. In **Lawrence v Fen Tigers Ltd**²⁴ the UK Supreme Court stated:

“when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights.”

²⁴ [2014] UKSC 13

[121] Accordingly, I have given very little weight to the fact that the first defendant has obtained permission for his establishment from the DCA. I have taken it into account however, in considering the overall character of the area.

Conclusions on Private Nuisance

[122] In summary, after consideration of the evidence, I believe that there has been substantial interference with the first claimant's enjoyment of his land when the first defendant's business was operational. This was due to noise from the claimant's premises primarily by his sound system. I also believe that patrons would park their vehicles and loiter in the green space in the early hours of the morning especially on weekends. I further accept that further disturbance would be caused when these patrons drove their vehicles away.

[123] However, I do not accept that the other claimants have suffered substantial interference with the enjoyment of their property. They simply live too far away from the first defendant's premises for noise to be a factor. In addition, their properties unlike the first claimant's are not immediately adjacent to the green area in order to be disturbed by the loitering patrons. They have also failed to link the alleged increase in crime in the area to the first defendant's operations. Their claims in nuisance must therefore be dismissed.

[124] I am satisfied that the first defendant's use of his property as a sports bar as he describes it is not a common and ordinary use of his property. Despite pockets of commercial activity, the Paynters Court area remains primarily residential. None of the other commercial activities in the area are of the same type and scale of the first defendant's bar. The first claimant's claim in nuisance against the first defendant in nuisance therefore succeeds.

Remedies

[125] The first claimant has been successful in his claim in nuisance against the first defendant. The primary relief sought by him consists of an injunction which would restrain him from operating his establishment and damages for nuisance. In written closing submissions, counsel for the claimants focused on the injunctive relief and did not address the question of damages in detail.

[126] It should also be noted that this court on 26th January 2024 granted an interim injunction restraining the first defendant from reopening his establishment until final determination of this claim. It also seems based on the evidence that the first defendant's bar had not been in operation for some time even prior to the injunction.

[127] The court has the discretion to award damages in addition to or in lieu of an injunction. In **Shelfer v City of London Electric Lighting Co**²⁵ the court outlined the factors to be taken into consideration in exercising the discretion as to whether damages should be awarded in lieu of an injunction. A.L. Smith LJ stated the following:

“A person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution . . . In my opinion, it may be stated as a good working rule that (1) If the injury to the plaintiff's legal rights is small, (2) And is one

²⁵ [1895] 1 Ch 287

which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) 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.”
(my emphasis)

[128] In **Jaggard v Sawyer**²⁶ the Court of Appeal of England and Wales noted that the test in **Shelfer** was “....only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.” The court emphasized that the decision as to whether or not to award damages instead of an injunction is discretionary.

[129] In this case, I have already found that the interference with the first claimant’s enjoyment of his land is substantial. Therefore, the injury to his rights cannot be regarded as small due to the proven distress and inconvenience that he has suffered in the past.

[130] It is therefore difficult to accept that the interference suffered by the first claimant is capable of being compensated by money. Assuming the first defendant’s establishment will be in operation for years to come, the first claimant will be forced to endure the noise and disturbance for an indefinite period. Finally, the first defendant cannot complain that an injunction will be oppressive in the circumstances. This is as his establishment is not a common and ordinary use of the land in a primarily residential location.

[131] Therefore, this is the appropriate case for the grant of a *quia timet* injunction as the first defendant’s business is not operational. However, if he were to re-open, I am satisfied based on past occurrences that the first claimant

²⁶ [1995] 1 WLR 269

would once again suffer substantial interference with the enjoyment of his property.

- [132] In the spirit of give and take between neighbours as endorsed in the leading cases, I had considered modifying the existing injunction to permit the first defendant to operate under certain conditions. However, this is likely to lead to continuous litigation with the parties constantly returning to court alleging breaches of the terms of the injunction or seeking variations thereof. In the circumstances, to achieve some measure of finality, the interim injunction which is already in place will be made final.

Counterclaim

- [133] The first defendant counterclaimed in respect of the upgrades to his premises, costs of permits and loss of business as a result of the interim injunction which is in effect. The total claim is for \$59,545.00. In light of the finding that the first defendant is liable in nuisance and the injunctive relief granted, the basis for the first defendant's counterclaim falls away. The first defendant's counterclaim is accordingly dismissed.

Costs

- [134] The first claimant has had partial success with his claim. His claim for breach of restrictive covenants has failed in its entirety but his claim for private nuisance against the first defendant has succeeded. The first claimant is therefore entitled to costs pursuant to CPR Rule 64.6(1).
- [135] This claim was not a claim for a monetary sum, therefore the value of the claim is \$50,000.00 for the purposes of CPR Rule 65.5(2)(d). Thus, in accordance with Appendices B and C to Part 65, the first claimant would be generally entitled to costs of \$10,000.00. However, taking into account the fact the first claimant was only successful on the nuisance claim, I will

reduce his costs by 50%. The first claimant is therefore awarded costs of \$5000.00

[136] The second, third and fourth claimant's claims have failed in their entirety. However, I have taken into consideration the fact that the main relief sought by these claimants namely the grant of an injunction has been obtained. I therefore exercise my discretion pursuant to CPR Rule 64.6(2) and make no order as to costs.

[137] The first defendant's counterclaim has been dismissed. However, due to the costs order already made against him, I decline to make any further award of costs in respect of the counterclaim.

[138] The claim against the second defendant was completely unsuccessful. The second defendant is therefore generally entitled to full prescribed costs of \$10,000.00 in accordance with CPR Rule 65.5. I will however reduce this sum by 50% taking into account the fact that the second defendant called no witnesses. The second defendant is therefore awarded costs of \$5000.00.

ORDER

[139] In the circumstances the court orders as follows:

1. A permanent injunction is granted restricting the first defendant and all other persons or entities acting under his control or direction from reopening the bar and nightclub known as "Galloway's 8 ball Sports Bar" or any similar entertainment establishment located on the land registered as WEST CENTRAL, Block: 11 2291 54 in the Paynters Development.
2. The second, third and fourth claimants' claim against the first defendant is dismissed with no order as to costs.
3. The first defendant's counterclaim is dismissed with no order as to costs.

4. The claimants' claim against the second defendant is dismissed.
5. The claimants shall pay the second defendant prescribed costs of \$5,000.00.
6. The first defendant shall pay the first claimant prescribed costs of \$5,000.00.

Rene Williams

High Court Judge

By The Court

Registrar

