

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV 2008/0453
BETWEEN:-

SIMON ABRAHAM
CLAUDIA ABRAHAM

Claimants

And

OLIVER WALSH
WALSH TRUCKING LIMITED

Defendants

Appearances:

Bernard Wiltshire for the Claimants

Michael Bruney for the Defendants

2019: September 30

2020: April 30

May 21

June 8

JUDGMENT

[1] **Stephenson J.:** This claim as filed concerns the tort of private nuisance. It is important to note at the outset the grounding principle in matters such as these, that the law of private nuisance is an attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit, and that of his neighbour in the quiet enjoyment of his land¹.

¹ Winfield and Jolowicz on Tort, 10th Edition at page 318

- [2] The law of private nuisance is designed to protect the individual owner or occupier of land of substantial interference with his enjoyment thereof.² One of the categories of private nuisance is 'substantial interference with the plaintiff's user and enjoyment of his land, e.g. where the plaintiff is subject to unreasonable noise or smells emanating from the defendant's neighbouring land'³
- [3] Every person is required by law to exercise his rights, whether over his own or over public property, with due regard to the co-existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance.⁴
- [4] I should from the outset state that the procedural path of this matter before me has been somewhat chaotic leading to a number of orders being made by the masters whose *hands the file passed* culminating in directions for trial. It is therefore considered necessary during the course of this judgment to look at and rehash the various orders made.

Background

- [5] The parties to this claim are owners and in occupation of adjoining premises located at River Estate, Canefield in the Commonwealth of Dominica. The claimants' home is located on the property which they own and the defendants conduct the business of a garage and metal scrap yard on the neighbouring property which they own.
- [6] The claimants in their statement of claim seek an injunction and damages consequent on certain industrial activity carried on by the defendants on premises which adjoin the claimants' property where they reside. The defendants conduct the business of a scrap yard and garage:
- [7] The alleged acts of nuisance involved:
- a) Burning of waste and debris;
 - b) The storage of scrap iron which constitutes a distressing eyesore;
 - c) Emission of industrial effluent, noxious fumes and pollution;
 - d) Continuous and unacceptable level of noise
- [8] The claimants complained that the defendants' activity has caused damage to both their physical and emotional health.

² Gilbert Kodilinye: The Law of Tort in the West Indies Cases and Commentary (1992) at page 128

³ *ibid*

⁴ Halsbury's Laws of England - Nuisance (Volume 78 (2018)) at paragraph 116

- [9] The claimants contended that the second named claimant has suffered
- a) Burning sensation to her throat and nostrils;
 - b) Exacerbation of her asthmatic condition and that she has been forced to wear a mask while in her home;
 - c) Wheezing to her chest and breathlessness similar to an asthmatic attack at night; and
 - d) Sleeplessness.

The claimants exhibited medical certificates from Dr Phillip Cooles dated 23 March 2006 in support of the health complaints suffered by the second named claimant.

- [10] The claimants complain as a result of the defendants use and activity of their adjoining property that they (the complainants) have been:
- a) Compelled to close all the windows during the day and that they suffered loss of amenity in that they have been unable to enjoy the use of their verandah;
 - b) That the discharge of engine oil from the defendant property into the stream which runs to the back of the claimants' property killing the river life and depriving them of the enjoyment of this amenity;
 - c) That the noise emanating from the defendants building such as loud talking and arguing and the playing of loud music during holidays and festivals has resulted in the loss of peace and quiet and it has also caused the fixtures in their home to shake and rattle;
 - d) That they have been unable to enjoy the pleasant view of their surroundings which included blossoming trees and the sound and sight of the flowering stream, that the activities on the defendants' property has caused this amenity to be replaced by terrible lingering smells of old oil and burning tyres and the sight of a mounting scrap yard and vehicle dump; and
 - e) That there is noise caused by heavy duty lorries moving in and out of the defendants' premises wherein is massed a huge quantity of derelict vehicles which is extremely unsightly that this also harbours rodents, mosquitoes and other pests which come onto the claimants' property; and
 - f) They have suffered loss of quality of life for which they expected when they bought the property at that location which they understood to be a residential area.

- [11] That the actions and activities carried on by the defendants have the claimants' claim, derogated their right to quiet enjoyment of their property.

- [12] The claimants contend that the defendants do not have planning permission to carry on the business as they do and that the area is a residential area. They tendered a letter from the Chief Physical Planner (Ag) dated the 4th June 2008 which was copied to the second named claimant in support of their evidence in this regard. It is noted that no evidence was adduced before this court to establish that any action was taken by the relevant authority regarding the contents of this letter. This does not help the claimants' case at all.

[13] On the 25th January 2010 the defendants filed their defence out of time with the leave of the court. The defendants deny the claimants' allegations and contend that the first named defendant with his brothers operated a garage business on the premises in Canefield since in or about the year 1990 prior to the claimants taking up residence. Further the defendants deny that the business which is operated on their premises is a garage and spare parts business and that the actual operations of the business are conducted more than 150 yards from the property owned by the claimant and in excess of 300 yards away from their dwelling house.

[14] The defendants also deny that their business and or activities produces fumes, vapours, smoke, noise or other effluent in such volumes or in such manner as alleged by the claimants.

[15] The defendants further contend that the complaints of ill health complained by the second named claimant is a pre existing medical condition which has been aggravated as a result of the voluntary acts of the 2nd named claimant and other natural causes and it not to be attributed to their actions.

[16] In their reply to the defence filed by the defendants, the claimants contend that they purchased their property in 1987 and built their dwelling house in 1989 prior to the defendants commencing their business on the neighbouring property. Further, that over the years the defendants' business has extended on their property to the boundary with the claimants' property only a few yards from the perimeter of the claimants' partition wall.

[17] The parties were sent to mediation by order of court which mediation concluded with a mediation agreement signed by parties, their respective attorneys and the mediator.

[18] The Mediator filed the notice of outcome of mediation with the court on the 14th April 2010 indicating to the court that the parties settled as a result of the mediation session, he also lodged the mediation agreement which was dated 14th April 2010, and it stated that the parties agreed as follows:

- a. *"The Defendant will*
 - i. *Immediately, and in any event within 14 days remove all vehicles and equipment between the entrance road to the defendants' property and the wall and fence of the claimants' property;*
 - ii. *Within one month commence the movement and re-arrangement of all the equipment apparatus across the road leading in to the defendants' property to an area away from the view of the claimants, such movement such movement and rearrangement and re-stacking to be completed within 4 months of today's date. The defendant shall consult with the claimants regarding these operations.*
 - iii. *Use their best endeavours to clear the existing eyesore from the site within 2 years.*

- b. *The defendants shall pay the claimants the sum of \$3,000.00 on or before the 30th April 2010*

This agreement is in full and final settlement of any causes of actions whatsoever which the parties have against each other.

If any dispute arises out of this Agreement, the parties will attempt to settle it by mediation before resorting to any other means of dispute resolution. “ (emphasis mine)

[19] On the 26th April 2010 all further proceedings in the matter were ordered stayed except for the purpose of carrying out the terms of the said agreement. This order, in its preamble made reference to the fact that the parties agreed to the terms as set out in the signed agreement annexed to the said order. In fact the order was headed “Order Subsequent to mediation agreement”

[20] Pursuant to the terms of the agreement the defendant made the payment as agreed. The claimants’ exhibited a check in the sum of \$3,000.00 made out to Mr Bernard Wiltshire dated the 5th May 2010 from the second named defendant. This is evidence of the fact that there was an agreement between the parties and action taken on the said agreement.

[21] On 21st February 2013, the claimants made an application for the enforcement of the judgment pursuant to part 43.6 of the Civil Procedure Rules 2000 (‘CPR’).

[22] On the 30th July 2013 the learned Master made the following order

“Upon hearing Bernard Wiltshire Solicitor for the Applicants.

AND UPON READING this matter coming on for further review of the mediation agreement;

THE PARTIES unable to agree to the effects of the terms of agreement reached at mediation

THE COURT directing the parties back to meditation or to otherwise apply to dispense with the mediation order;

IT IS HEREBY ORDERED:

- (i) That the parties are to return to mediation on the 20th August 2013 at 2:30 PM or within 45 days hereof.*
- (ii) The claim will be listed on the 24 September 2013 for further case managements directions unless:*

- a. *The claim has been settled and the claimant advises the court of the settlement and /or files a draft consent order*
- b. *The parties apply for an extension of the stay and the extension is granted, upon which the hearing will be relisted on the date to which the extension is granted.*⁵

[23] On 7th August 2013 a notice of scheduled mediation was issued by the Registrar and served on the parties.

[24] On 16th August 2013, the claimant applied for an order to dispense with the mediation as ordered by the Learned Master on the grounds that there is no provision in law for the referral back to mediation of a matter already settled by mediation and further that mediation is unlikely to produce any further agreements beyond the existing mediation agreement the interpretation of which is disputed by the parties.

[25] In their application in support of this application the claimants repeated the terms of the mediation agreement and their complaint that the defendants have failed to comply with paragraph 3 of the Mediation Agreement that is to *“use their best endeavours to clear the existing eyesore from the site within 2 years”*.

[26] The application to enforce the terms of the mediation agreement was heard on the 16th April 2013 and the claimants aver that the first named defendant informed the court that they were experiencing challenges with the solid waste management authority.

[27] The Court it would appear ordered that the matter return to court for report on the 23 May 2013 and for the solid waste management to be served in order to attend the said hearing.

[28] On the return date of the 23 May 2013, the claimants averred that the Solid Waste Management attended the hearing and informed the court of the availability of a private crusher. The claimants said that the defendant was ordered to mobilize their waste within two weeks in any even no later than the 6th June 2013. The matter was fixed for further report to the 10th June 2013.

[29] The claimants aver that the matter came back up for hearing on the 18th June 2013 when *“the defendants were ordered once again to mobilize their waste within one month and in any even no later than the 28th July 2013 to clean up the premises where it operates to a condition satisfactory to allow cohabitation in the area of the claimants and defendants”*

⁵ Coram: The Hon. Master V Georgis Taylor – Alexander dated the 30th day of July 2013 and entered the 9th day of August 2013.

- [30] The claimants contend that the defendants instead of removing the waste they attempted to conceal the waste by erecting a metal wall between the premises. The claimants averred that they do not agree with the defendants' interpretation of the court order.
- [31] When the matter reconvened on the 30th July 2013 the parties were ordered to return to mediation and the matter was listed for further case management in the event of an inconclusive outcome. The court overruled the claimants' objection to an order returning to mediation.
- [32] The claimants averred that nothing further could be achieved by mediation and the matter should proceed to case management and trial.
- [33] On the 6th September 2013, the claimants applied for an injunction pursuant to part 17(1)(b) of CPR to prohibit the defendants from burning or permitting the burning of any materials on their premises at River Estate in such a manner as to cause the discharge of noxious or offensive fumes and vapours and smoke on the claimants' land. The affidavit filed in support of this application essentially repeated previous statements and averments by the claimants and upon close examination really adduced no new evidence.
- [34] There was an affidavit by Christopher Valerie sworn in support of the application. Mr Valerie spoke to the presence and the effect of the smoke and to the fact that this situation was discussed at a village council meeting and of the decision purportedly taken at that meeting regarding the second named defendant business.
- [35] There was a second affidavit sworn to by Barnet Jean repeating the same averments contained in Mr Valerie's affidavit regarding the smoke and the smoke and the noxious fumes emanating from the second defendant's place of business.
- [36] None of these persons gave evidence in court and their evidence was not tested in any way shape or form.
- [37] On the 21st October 2013 the first named defendant filed an affidavit in response to the affidavits filed for and on behalf of the claimants.
- [38] The defendant in essence say that the defendants have complied with the terms of mediation agreement albeit that they were late in complying with the terms of the agreement and he averred and listed all the steps taken to comply with the mediation agreement.
- [39] The defendant averred also that he was of the view that having complied with the mediation agreement that was the end of the matter.

[40] On May 8th 2014 the matter once again came up before the Master and a case management order which stated

“... And the court being of the view that mediation is voluntary and enforcement of an agreement made at mediation can only impact the substantive proceedings by the consent of the parties, where the agreement reached has not been satisfactorily complied with all the court can do is to lift the stay imposed on the substantive proceedings and return the proceeding to case management conference unless the parties attempt to enforcement by a further and separate action”⁶

[41] The Learned master ordered that the stay of proceeding previously order be lifted and proceeded to give full case management directions. Documents were exchanged and Witness statements on behalf of the parties were filed. The matter proceeded to Pre trial review.

[42] In the meanwhile, the claimants’ application for an injunction was first heard on the 16th September 2013 and the defendant undertook not to burn any materials or start any fire on the property located at River Estate until the hearing and further order on the injunction application. Directions were given for the hearing and a date fixed for arguments.⁷

The Mediation Agreement and order

[43] In the case at bar an agreement was arrived at signed by both parties their lawyers and the mediator. This mediation agreement was subsequently submitted to the mediation coordinator at the High Court Registry along with the statement of the outcome of mediation. When parties enter into mediation pursuant to mediation orders and they arrive at agreements which are subsequently made into to court orders it is expected that they would have done so in good faith.

[44] Pursuant to paragraph 14 of the Schedule to Practice Direction 1 of 2003, the Notice of Outcome of the mediation along with the signed mediation agreement was duly lodged with the mediation coordinator for filing at the court office.

[45] It is noted that on the 14th April 2010, an agreement was arrived at between the parties that were stated to be in full and final settlement of any causes of action **whatsoever**. This agreement signed off on by the parties, their solicitors and the mediator.

[46] **On the 26th April 2010 the mediation agreement was made part of the court’s order by Master Lanns.** The relevant section of the order stated “UPON hearing Counsel for the Claimant and Counsel for the Defendant; AND UPON this matter having been referred to mediation; AND

⁶ Order of Master Georgis Taylor Alexander dated the 8th May 2014

⁷ Coram: M E Birnie Stephenson Order dated 16th September 2013 and entered on the 25th September 2013.

UPON the parties having agreed to the terms as set out in the signed agreement annexed hereto ...” (The Mediation Order)

[47] Thereafter and pursuant to the terms of the Mediation Order the parties complied with the terms of the order. The Evidence adduced before this court is that the defendant made the required payment of \$3,000 to the claimants. The defendants also made attempts to address the issues of removal of unsightly materials and to relocate their activity further in their property away from the claimants’ dwelling.

[48] It is unfortunate that subsequent to the mediation agreement and order there seems to be a number of different case management orders by at least four different masters⁸. There were also case management orders from two different judges being the court as currently constituted and from the Honourable Mr Justice Errol Thomas.

[49] The issue arising is whether or not the defendant did what was required of him in the mediation order. Quite shortly and simply put, the issue before the court is that the claimants maintain that the defendant has failed to do that which he agreed to do and which was required of him by the Mediation Order.

[50] The claimants contend are seeking an order to have done and that a permanent injunction be granted by the court prohibiting the defendants from continuing with certain activities which they claim amount to a private nuisance which has interfered with and continues to interfere with the quiet and peaceful enjoyment of their property which they have called their “dream home”.

[51] The defendants contend that they have complied with what they were required to do under the mediation order at great cost. That to grant the permanent injunction as sought by the claimants would amount to denying him and his family along with that of their employees a means of earning a living. It is this court’s view that to entertain the application for the permanent injunction would be to revert to the original claim before the court which based on the mediation order would be impossible.

[52] The learning afforded to us in Blackstone’s Civil Practice 2009 ⁹ states

*“...There is the common misapprehension that where a party fails to honour a term of the compromise agreement settling litigation the original claim is reopened. Although this can be the position where there are grounds for avoiding the contract, in most cases an agreement to compromise a claim **brings proceedings on the claim to an end** and*

⁸ A perusal of the Court’s file and the contents of Trial Bundle number 1 filed on the 30th April 2015 there are orders from Masters Mathurin, Lanns, Taylor Alexander, Glasgow and Lincoln Corbin.

⁹ at page 830 at paragraph 61.11

replaces them with the contractual arrangement in the compromise. Breach of the compromise agreement gives rise to a new claim for breach of contract. (Lewis –v- Barnett [2004] EWCA Civ 807)”

[53] In the case at bar the mediation agreement was not just an agreement which would give right to possible breach of contract proceedings but the mediation agreement was made an order of court. So therefore based on the statement in Blackstone’s supported by the judicial decision **Lewis –v- Barnett**¹⁰, the mediation order literally brought the matter to an end. There could be no reversion to the original proceedings.

[54] This court is of the view that what is left is for the court to consider is the enforceability of the mediation order and to what extent had the defendants complied with same.

[55] It is clear to this court that the defendants made some efforts in complying with the mediation order at much expense. It is also clear to the court based on the court’s observations at the site visit, and observations of the attitude and demeanor of the second named claimant who gave evidence on behalf of the claimant, both whilst giving her evidence and at the site visit that nothing will satisfy the claimants other than the defendants shutting down their business and moving out. Learned Counsel Michael Bruney on behalf of the defendant did in essence make this submission and this court is in agreement with that as that is the impression created by the claimants. This court agrees with him in this regard.

[56] It is to be noted that the parties are at odds as to the nature of the area which they occupy. The claimants contend that the area is a residential area and that is what was represented to them when they purchased the property while the defendants contend that the area is an industrial area as represented to him when he purchased the property. This is a necessary consideration in that it has bearing on whether the defendants’ activities are appropriate for the area. No evidence was really adduced as to what exactly is the nature of the area by either party.

[57] Before reviewing the evidence in this regard it is important to state the law as it regards the orders of the court and the enforcement of same.

[58] On the 21st February 2013 there was an application for the enforcement of judgment pursuant to part 43.6 of CPR.

[59] On the 8th May 2014 the learned Master stated in her order that

“... And the court being of the view that mediation is voluntary and enforcement of an agreement made at mediation can only impact the substantive proceedings by the consent of the parties, where the agreement reached has not been satisfactorily complied with all

¹⁰ Op cit

the court can do is to lift the stay imposed on the substantive proceedings and return the proceeding to case management conference unless the parties attempt to enforcement by a further and separate action”

[60] The parties were then ordered to go to trial on the narrow issues of

“whether the defendant is restricted or otherwise wholly prevented from amassing or maintaining a scrap metal yard of derelict vehicles and other disused motor mechanical partes in a residential area in the immediate vicinity o f the claimants’ premises and whether maintaining such a scrap yard constitutes a nuisance.”

[61] After the matter went to trial after hearing the evidence presented to the court by both sides and reviewing the bundles before it this court ordered the parties to file closing submissions addressing particular issues as follows:

- a. What is the process of enforcing a mediation order
- b. Whether or not the evidence discloses that the defendants have complied with the terms of the mediation agreement; and
- c. (Based) On the prayers of the parties and on the evidence adduced.

[62] A review of both closing statements filed by the parties to the action have failed to address the issues as specifically directed by the court both counsel arguing essentially on whether the defendants’ actions amount to a nuisance.

[63] Both parties to this court’s mind have overlooked the fact that the **mediation agreement became an order of the court** under the hand of Master Lanns. Pursuant to part 42.8 this order took effect from the date that it was made by the learned Master. The order therefore had to be complied with by both parties; it was not a mediation agreement as stated by the Learned Master Taylor- Alexander.

[64] It is noted that neither party appealed the order of Master Lanns which was first in time before the order of Master Taylor Alexander and therefore this order is the order that is in place and has to be obeyed and addressed. Likewise it is also noted that neither party appealed the order regarding closing submissions made by this court. In Re: **Hillgate House Ltd –v- Expert Clothing Services and Sales**¹¹ Sir Nicholas Browne Wilkinson stated *“when an order is in force, and so long as it is in force, it has to be obeyed and is in law correct. It is true that it may be subsequently altered on appeal but unless it is altered it is an order of the court and acts done under it are lawful”*.

[65] This court is of the view that this matter lost its way in May 2014 with Master Taylor Alexander’s order, this court is also of the view that both Counsel were seemingly unaware that the mediation

¹¹ [1986] 1 EGLR 65

agreement which they both signed along with their clients became an order of court under the hand of Master Lanns. Therefore the subsequent order of Master Taylor Alexander is otiose.

[66] It is therefore this court's view that the sole issue to be determined based on the evidence before it is whether or not the defendants have made their best efforts in complying with the terms of the mediation order. It would be necessary to address briefly the law regarding nuisance which would assist the court to assess the reasonableness of the parties.

[67] Both parties were given a specific time to make their additional submissions and at the time of making the order both counsel appeared to be in agreement with making the submissions on the 7th May 2020 by the defendant with the claimants being given an opportunity to respond by the 14th May 2020. Mr Michael Bruney on behalf of the defendants made his additional submissions however Mr Wiltshire informed the court that he saw no reason to file further submissions. The court has considered Mr Bruney's additional submissions.

[68] This court will proceed to complete its judgment in the absence of further submissions by either side.

Nuisance:

[69] Property owners are entitled by law to exercise rights over their property having regard to the co-existing rights of other persons. An unreasonable or extravagant exercise of these rights to the damage of others constitutes a nuisance. This court is of the view that the measure which has to be used in deciding whether or not the defendants' attempts to satisfy the mediation order were sufficient. It would be necessary to address my mind to the law of the tort of private nuisance and the tests to be applied in such action in making such a decision.

[70] Private nuisance protects the owner/occupier of land from substantial interference with the enjoyment thereof. There is a balance which the court needs to strike between the defendants' right to use his property as he sees fit and the right of the claimants to be protected their right to the enjoyment of their property. There are two (2) elements which the court needs to consider. Whether there has been material damage to the land and secondly whether there was substantial interference with the enjoyment of the land. These two elements are necessary if the claimants were required to prove nuisance.

[71] The questions which could be asked are was there substantial interference with the claimants' use and enjoyment of the land. Was there physical injury to the claimants' property?

[72] Where there is a claim for material damage to property, such damage must cause a reduction in the value of the Claimant's property and cannot be trifling. When the claim is for interference with the enjoyment of the land, there must also be substantial loss of enjoyment of the land.

[73] In **Vanderpant v Mayfair Hotel Company Limited**¹² Luxmore J stated:

“Apart from any right which may have been acquired against him by contract, grant or check prescription, every person is entitled as against his neighbour to the comfortable and healthy environment of 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, sober and simple notions obtaining among English people.”

[74] The notions to be considered in the case at bar would be notions obtaining amongst Dominicans as the location of the issue is here in Dominica.

[75] If a plaintiff suffered damage only because he or his property was abnormally delicate or sensitive, and he would not otherwise have been harmed the defendant will not be liable in nuisance, for the law expects a person to conform to a reasonable standard of conduct, not to some unusually high standard which the plaintiff seeks to impose.

[76] In the case at bar this court has come to the respectful conclusion that the claimants' are seeking to impose on the defendants their esthetic in terms of what appears to be beautiful or not.

[77] In **Greenidge-v- Barbados Light and Power Co. Ltd.**¹³ Williams J said that *“The Law of nuisance undoubtedly is elastic”* in doing so he was referring to the uncertainty of the test to be applied in cases of nuisance and the necessary assessments to be carried out. This is essentially because the court has to look at all the circumstances, the facts, the tastes of the persons involved as this existence of this tort is one of degree and is dependent on the circumstances of each individual case. There is no absolute standard which can be applied.

¹² ([1929] All ER Rep 296, [1930] 1 Ch 138

¹³ [1975] 27 WIR 22

[78] This court has taken into account the character of the neighbourhood, and has taken into account what actions would be reasonable based on the locality, bearing in mind at all times the interests, benefits and tastes of both parties.

[79] One of the things the court ought to take into consideration is whether or not the defendants has taken all reasonable steps to alleviate the situation having regard to all the circumstances of the case as if his actions was he would not be held liable. In this case it really is whether or not the defendants have done everything possible or taken all reasonable steps to comply with the terms of the mediation agreement the terms of which were made an order of court.

[80] The circumstances of this case must be carefully examined before determining the issue. The Court ought to consider a multitude of things in coming to a determination on this issue. These include but are not limited to the following:

- a. the nature of the locality;
- b. the utility of the Defendant's conduct ; and
- c. the Claimant's abnormal sensitivity - The duration of the harm.

[81] Williams J in **Greenidge v Barbados Light and Power Company Limited** stated the applicable principle in this way:

“ Such nuisance is something to which no absolute 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 as 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 person living in the locality.”

[82] In the case at bar the defendants do not deny that an operation of the second named defendant has caused a problem. The defendants have however maintained that there is no nuisance whatsoever created by their operations. In fact the defendants say that it was their understanding that when they purchased the property that the property was zoned for industrial activity and not residential processes. In his evidence he drew the court's attention to the existence of other businesses operating in the area including Cable and Wireless now known as FLOW.

[83] The defendants maintain that they have taken all precautions and steps to comply with the terms of the mediation order and that they have taken all reasonable steps to comply therewith.

[84] There was some factual disagreement between the parties as to who first went to live in the area.

The claimants maintain that they were there first having built and moved into their “dream home” in 1998, they maintained that defendants started their business after in 2006. The defendant on the other hand maintains that their business commenced in 1990 and that their business is in fact more than 150 yards away from the

[85] The apparent absence of zoning does not assist either party in the case before this court, but it is clear from the evidence that these neighbours use their property for two very different reasons.

[86] Having viewed the area and the surroundings I was able to understand both parties’ issues. The issue of the individual tastes and esthetics has to be considered. This court also has to take judicial notice of the fact that Dominica was devastated by Hurricane Maria so a lot of what the first name defendant has tried to do may have been undone by the storm and the problem may have been exacerbated.

[87] In reviewing the evidence before the court, this court is satisfied that there is a degree of inconvenience and discomfort caused by the operations of the defendants to the claimant. This Court is also of the view that having heard and seen the attempts made by the first named defendant to honour his agreement made at mediation coupled with the court’s view that I do not think there is anything that the defendants can do to satisfy the claimants there is a conundrum as to what is to happen.

[88] This court is satisfied that the defendants have taken reasonable steps and measures to accede to the claimants’ demands and meet their expectations. This has not been accepted by the claimants. It is noted that as stated by the first named defendant and noted by the court the ability to see what happens behind the wall erected by the defendant from the claimant’s house just does not exist. I agree that one has to traverse onto the road leading to Cochrane and look back and down onto the defendants property and in fact it is from that vantage point that one can see what is happening behind the wall.

[89] The first name defendant told the court and described to the court the efforts made to comply with the mediation agreement and this court has had the opportunity to see what efforts were made by him and note that he has made an effort to put up a wall and to plant trees and plants to make the place appear better. Did the defendants go far enough to safeguard the health safety and create and preserve an esthetically pleasing landscape?

[90] There is evidence before this court and the court is satisfied that the defendants made every effort to comply with the agreement and this court is of the respectful view that as has been said before it would appear that the only thing that would appease the claimants is if the defendants were to close up shop and move out which in this court's view is not a reasonable position to take. It is noted that if the defendants were to do so the defendant stands to lose and based on the evidence adduced the business is a going concern and there are persons who will suffer loss.

[91] The claimants have requested injunctive relief, this court is however not minded to grant same. This court has taken into consideration that both parties are entitled to enjoy their property for the purpose for which the property was bought. This court is of the considered view that there must be a solution that is satisfactory to both parties. They are neighbours who must co-exist and enjoy their properties for the purpose which they were acquired.

[92] This court is minded to order that the defendants continue to take such reasonable steps as it can to abate the complaints. There are steps which can be taken such as to ensure that the fence which has been erected is painted and properly maintained and the shrubbery and trees planted to enhance the surroundings are properly maintained. The defendants should also take steps to more efficiently enclose the derelict vehicles and unsightly objects on his property. The defendant should also cease to burn tyres and rubbish on the property and should restrict themselves to normal business and not extended business hours.

[93] The Court will order that the defendants take the necessary steps to clean up the area and maintain same in a prudent and reasonably esthetically pleasing manner.

[94] In coming to this conclusion the Court relied on the evidence of the second named claimant, the first named defendant and what the court was able to view and observe first hand from the site visit conducted. It is to be noted that one of the things observed by the court is that the area occupied by the parties is not and cannot be considered a residential area such as exists in other areas of the Dominica such as Castle Comfort, Wall House, Beau Bois, Belfast, King's Hill, Glanvilla, Cotton Hill to name a few places on this beautiful island called *Waitukubuli*¹⁴.

[95] This court is indeed sympathetic with the claimants' discomfort. There is no doubt in the Court's mind that the actions of the defendants have caused distress, discomfort and inconvenience to the Claimant. They were residing in what they were led to believe would be a quiet residential area where they would have been able to enjoy the sunset of their lives following retirement after living and working in the United Kingdom.

[96] On the other hand the defendant purchased property and set up business in what they were told is an industrial site. It is to be noted that there was a letter tendered by the claimants in support of their position that the defendants were using their land in a manner that was not approved by the planning department. But that is as far as it went. As was said before there is no evidence which was adduced before this court that there was ever any action taken by the appropriate authorities to prevent the defendants' continued use of the land in the manner they were using it.

[97] In conclusion, I can find that based on the mediation agreement and subsequent order coupled with the efforts made by the defendants to comply with the terms of the order and what the Court discerns as the claimants' unreasonable demands or failure to be reasonably satisfied with the actions of the defendants to comply with the mediation order, there is nothing which entitles the claimants to an injunction or damages against the defendants.

[98] The court must express its appreciation to counsel for the parties for their assistance gleaned from their written submissions producing to the court copies of all the relevant textbook pages and the cases that they would have considered helpful. However, for the reasons set out above this court will not grant the claimants prayers as set forth.

¹⁴ The Carib name for Dominica meaning "Tall is her body".

[99] This matter could have been settled amicably long ago but for the attitude and demands of the claimants and in exercise of the discretion vested in the court in awarding costs the order will be that each party is to bear his own costs.

M E Birnie Stephenson
High Court Judge

SEAL

BY ORDER OF COURT

REGISTRAR