

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

CLAIM NO. SLUHCV2017/0301

BETWEEN:

**1. LESLEY AVRIL
2. CHARLES AVRIL
3. ROSELLA LAURENCIN
(representatives of the residents of Great House Road and Ixora
Drive, Cap Estate)**

Claimants

and

**BDSL LIMITED
(trading as Royalton St. Lucia Hotel Resort and Spa)**

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Ms. Diana Thomas with Ms. Cleopatra Mc Donald, Counsel for the Claimants
Mr. Peter I. Foster QC with Ms. Rene St. Rose and Ms. Rowana-Kay Campbell,
Counsel for the Defendant

2019: June 6;
July 24, 25;
August 16; (written submissions)
2020: April 1.

JUDGMENT

[1] **CENAC-PHULGENCE J:** The claimants, in their personal capacity and representatives of other residents of Great House Road and Ixora Drive in Cap Estate, Gros Islet named in the order dated 9th May 2017, claim against the

defendant, BDSL Limited (trading as Royalton St. Lucia Hotel Resort and Spa) (“BDSL”) in nuisance and pursuant to the rule in Rylands v Fletcher for loss of peaceful enjoyment of property and damage. They claim the following relief:

- i. an order mandating BDSL, its servants, and/or agents to restore the parcel of land registered as Block 1258B Parcel 189 (“the Property”) to its condition prior to development;
- ii. alternatively, an order mandating BDSL, its servants, and/or agents to close the road built by or on its behalf on the Property or restrict use of the said road in a manner which allows the claimants to peacefully enjoy and use their properties; prohibit the use and operation of the laundry room between the hours of 7:00 p.m. and 6:30 a.m. daily; and remove and or relocate the water treatment plant from the Property;
- iii. special damages in the sum of \$400.00, general damages, and aggravated, exemplary or punitive damages;
- iv. interest and costs.

The Claimants’ Case

[2] The claimants are all residents, and owners or occupiers of property situate at Great House Road or Ixora Drive in Cap Estate, Gros Islet. BDSL is the owner and occupier of land in Cap Estate, Gros Islet upon which the Royalton St. Lucia Hotel Resort and Spa (“the Hotel”) is situate, and the Property, which is adjacent to or in the immediate vicinity of the claimants’ residences. The claimants allege that the Property is designated a green belt reserve by the Land Register, which has always been its original and traditional use. Further, the Master Plan for Cap Estate promotes development of residential property and maintenance of green belt reserves, based upon which they purchased their respective properties.

[3] They allege however that BDSL has developed the Property, without the requisite planning approval from the Development Control Authority (“the DCA”), including construction and use of an access road and other structures to facilitate the Hotel. The claimants say that BDSL knew or ought to have known that development of

the Property in this manner would constitute a private nuisance to residents in the vicinity who would thereby suffer loss and damage.

- [4] The claimants specifically allege that commencing in or about June 2016, BDSL illegally constructed the said access road, a wooden security hut, and a concrete security hut on the Property. However, after a Stop Order and Enforcement Notice were issued by the DCA, both security huts were demolished in June 2017 and January 2018 respectively. They say despite this, noise and other pollution from various uses of the Property by BDSL and/or its servants and agents continue. In their statement of claim, the claimants particularize acts constituting nuisance during the period June 2016 and May 2017, and thereafter. They can be summarized thus:

June 2016 to May 2017:

- a. compilation of refuse on the Property causing rodent infestation thereon and on the properties of some of the claimants;
- b. dust pollution from construction of the access road;
- c. noise pollution from use of a generator on a 24-hour basis to operate a water treatment plant; use of the security booth; commercial use of the access road, including blasting of loud music, and honking of horns from and by vehicles, persons shouting, and the speed at which vehicles are driven along the said road on a 24-hour basis;
- d. fast and/or dangerous driving on the access road and blockage of the roadway which is the usual access to Great House Road and Ixora Drive and the gates to the properties of some of the claimants by parking of vehicles;
- e. build-up of stagnant water which has caused mosquito breeding.

May 2017 to Present:

- f. use of the laundry room on a 24-hour basis causing noise pollution;
- g. use of the access road as described at (c) and (d) above;
- h. build up of traffic making it dangerous for residents when exiting their driveways and entering the main road and causing noise disturbance;

- i. persons failing to keep to the left and proper side of the road downhill along Ixora Drive, thereby putting residents at risk of accidents;
- j. revving of vehicle engines causing noise and disturbance to sleep;
- k. littering of Great House Road and Ixora Drive with food and drink containers, encouraging the presence of stray dogs;
- l. persons urinating near the Avril's residence in full view of residents and during daylight hours;
- m. staff and other persons congregating at the entrance of Great House Road, making excessive noise, talking and laughing loudly between 11:00 p.m. and midnight;
- n. persons congregating near the Laurencin's residence to play dominoes on a daily and nightly basis causing noise and disturbance;
- o. using the property near the Laurencin's to park vehicles from which loud music is played;
- p. damage to the gutter in front of the Laurencin's and failure to remedy same; and
- q. continuing to operate a water treatment plant which emits foul odors.

[5] The claimants say they have consistently registered these grievances with the management of BDSL via meetings, making reports, sending letters and signing of a petition. The claimants say they even registered their complaint concerning the change of land use of the Property with the DCA by letter from their attorney dated 21st March 2017. They received a reply on 31st March 2017 confirming issuance of a Stop Order and Enforcement Notice in respect of ongoing unauthorized activities and informing that same had been appealed by the then registered owner of the Property, Cap Estate St Lucia Limited. Further, on the invitation of the DCA by notice dated 19th April 2017, the claimants wrote letters opposing the change of use of the Property from a green belt reserve. However, despite the Order and Notice, BDSL continued and completed its development of the Property. The claimants also discussed their grievances with representatives of BDSL at a court-ordered mediation session on 22nd June 2017.

[6] Though not mentioned in their claim form, in their statement of claim, the claimants claim that BDSL as occupier of the Property adjacent to or in close proximity to their properties, owes them a duty of care to act reasonably in developing the Property so as not to disturb the quiet enjoyment of their properties or inflict unreasonable harm on them. They allege that BDSL breached that duty of care, and set out particulars of negligence that may be summarized thus:

- a. failed to give the claimants any proper or adequate notice of, or consult with them concerning their intention to change the use of the Property and construct the access road;
- b. failed to consider adequately or at all that the change of land use would affect their peaceful and quiet enjoyment of their residences;
- c. failed to take any or any reasonable care in the development of the Property, and to occupy and/or possess the Property, or to exercise any or any proper control over its agents and/or servants while they use, occupy, traverse and/or possess the Property so as not to interfere with their use and peaceful enjoyment of properties owned or occupied by them;
- d. failed and/or neglected to compensate them for loss and damage suffered as a consequence of the development of the Property;
- e. acted in a high-handed, arrogant and outrageous manner so as to entitle them to aggravated and exemplary damages.

[7] The claimants also say BDSL is liable under Rylands v Fletcher for causing dust, noxious gases, and noise from the development of the Property to escape and affect peaceful enjoyment of their properties. In their statement of claim, they set out particulars of injury to three residents – Rosella Laurencin, Keith Fletcher and Charles Avril and exhibit medical reports in support.

BDSL's Case

[8] BDSL denies the claimants' allegations against them and puts them to strict proof of their case. BDSL says that prior to undertaking any construction on the Property it submitted an application for approval to the DCA. Only a small a part

of the access road is located on the Property. It requires the claimants to prove that the Property was designated a green belt reserve, and states that the Land Register only shows the name of the parcel as 'Green Belt'. In any event, BDSL contends that the Green Belt has been maintained and is not in any way affected by the Hotel development. It denies that there is any nuisance emanating from the Property or Parcel 176 belonging to them; that any nuisance was caused by it or its servants or agents acting in the course of their employment; that the claimants have suffered any nuisance, loss or damage; or that it ought to have known of any alleged nuisance, loss or damage.

[9] Specifically BDSL denies that the access road has caused any nuisance as alleged or that there has been any blockage of the roadway by its servants and or agents acting in the course of their employment. It also denies that it compiled any refuse on the Property or caused any rodent infestation thereon. BDSL states that the generator is not and has never been located on the Property, but on another parcel of land owned by it and for which it has the DCA's full approval for its construction and operation. The generator has not been in use since April 2017, and in any event, is not, and was not unreasonably loud or noisy while it was in use. BDSL also denies that the laundry room is or has been a nuisance to the claimants. As to the allegation of stagnant water, BDSL says this was caused by a blocked pipe and not any action by it or its servants or agents. Notwithstanding, and solely to assist, BDSL unblocked the pipe at its own expense.

[10] BDSL admits that it received complaints from residents during construction of the Hotel but avers that each complaint was addressed and resolved so far as reasonably possible. BDSL avers that the claimants' correspondences with the DCA are within the DCA's jurisdiction. BDSL avers that it is, in any event, in compliance with the notices of the DCA, and any and all action, notices and applications between it and the DCA pursuant to the **Physical Planning and**

Development Act¹ (“the Act”) are outside the jurisdiction of the proceedings. Further, it says that the claimants waited some 10 months before lodging a complaint with the DCA, by which time construction of the Hotel had been completed and the Hotel opened.

[11] BDSL also denies negligence on its part. It contends that it did not owe the claimants a duty to give notice of intention to change the use of the Property from a green belt to infrastructural use; or to consult with the claimants or the public regarding change of the land use, building of the access road, or in relation to the Property at all. In any event, it denies that there was any such change, stating that the green belt has been preserved. It also denies that it failed to use reasonable care in development of the Property.

[12] It denies that the acts complained of regarding use of the road, including fast and dangerous driving, honking of horns, playing loud music and dominoes, and loud talking, which disturbs the claimants’ peaceful enjoyment of their residences were committed by it, or its agents or servants in the course of their employment. It denies that the acts complained of are within its control. Further, it avers that the illnesses complained of by Rosella Laurencin, Keith Fletcher and Charles Avril, are in any event too remote.

[13] BDSL states the rule in Rylands v Fletcher is not applicable to this case, no case having been made out in relation to it. It therefore ought to be struck from the claim. It says the claimants are not entitled to any of the relief sought on the claim, as they are outside the jurisdiction of these court proceedings and are the subject of a specific procedure and power under the **Physical Planning and Development Act**.

The Claimant’s Evidence

[14] Seven residents of Great House Road and Ixora Drive gave evidence on the

¹ Cap. 5.12, Revised Laws of Saint Lucia, 2008.

claimants' behalf. Their evidence reveals that they are commonly affected by certain occurrences, which I briefly summarize.

[15] Several of the witnesses mention that the access road was built illegally. Roston Taylor and Charles Avril, in particular, express outrage that BDSL built the access road clandestinely, without their knowledge and views; and illegally in breach of a Stop Order and Enforcement Notice of DCA. Charles Avril says he was shocked when he woke up one morning to find that BDSL had constructed an access road through their neighbourhood, converting the once peaceful Great House Road and Ixora Drive into major roads. Roston Taylor states that he understands that an action was brought by the DCA to obtain an injunction against BDSL; however, to his amazement it was discontinued. He says he also understands the DCA refused the application for change of land use and proposed development of the Property; however, this was at a time when the development was no longer 'proposed' but 'completed'. He says that for over 30 years there had been a hotel named Smuggler's Cove, but residents have never had any issues because the hotel always used the designated service road to the north. BDSL relocated the service road because it was inconvenient for them and no one else.

[16] All the witnesses complain of the effects of the use of the access road. They speak to the number and types of heavy duty and commercial vehicles which use the road, including delivery trucks, fuel, sewage and water tankers, coaches, taxis, motorcycles and private vehicles. They say the access road and part of Ixora Drive which was once a residential road have now become a major thoroughfare and dangerous due to speeding by the said vehicles and the creation of a steep incline and a blind corner. Rosella Laurencin speaks to the increased danger she faces getting in and out of her driveway because of the blind corner. Anthony Severin, Lesley Avril and Charles Avril detail near-miss accidents experienced by them and the fear and panic caused as a result. They say this occurs frequently and is a disaster waiting to occur. Charles Avril, for example, says that in mid-2018 a coaster driver attempted to overtake him whilst he was stationary and

waiting for his gate to open. The coaster driver tried to squeeze through the space between the front of his vehicle and his gate and had to quickly reverse to avoid a serious collision.

- [17] They also complain of noise disturbance from the increased traffic using the access road all day long including honking of horns, revving of engines, screeching of brakes and air brakes, speeding vehicles, and blaring of music from these vehicles. They say the passing of heavy vehicles causes heavy vibrations which can be felt in their homes. Rosella Laurencin says that the noise causes even her glass windows to rattle at times. They all say much needed sleep is impossible for them because of the loud noises created by the traffic. Anthony Severin says he has had to resort to keeping his doors locked to block the noise but it is still insufficient and has resulted in the need to install air conditioning units which has increased his electricity bill. Lesley Avril says that she is retired and at home most of the day. She kept a log of her observations and experiences for the month of January and February 2019. February, she says, was the worst month. While it is unnecessary to repeat her entire log for February, it is worth setting out a few days which give an idea of what she says she experienced:

2nd February – 4 water tanks between 10:30 a.m. and 2:15 p.m.
3rd February – 15 trucks between 9:15 a.m. and 7:35 p.m.
7th February – 9 tankers between 12:20 p.m. and 7:02 p.m.
9th February – 12 tankers between 9:30 a.m. and 11:02 p.m.
12th February – 9 water tankers between 7:09 a.m. and 6:25 p.m.
15th February – 20 water tankers between 7:25 a.m. and 9:56 p.m.
16th February – coaster driver urinating in the road in full view of the public at 6:25 a.m.; 21 water tankers between 8:25 a.m. and midnight; St. Lucia Linen Truck at 9:04 a.m.; and Anthony Severin nearly driven off the road at 3:08 p.m. by a delivery truck.
17th February – 23 water tankers between 2:59 a.m. and 11:30 p.m.
19th February – 16 water tankers between 1:58 a.m. and 9:23 p.m.
20th February – no water tankers
24th February – 10 water tankers between 10:10 a.m. and 9:53 p.m.
25th February – 21 water tankers between 9:20 a.m. and 10:14 p.m.

- [18] The witnesses also all complain of the use of the parcel of land owned by Garrison Realty Inc. ("the Garrison Lot") as a 'park and ride' where guests park their vehicles and are shuttled to and from the Hotel when events are held that are open to the public. Generator operated floodlights are used, which are turned on at about 5:30 p.m. on the evening of the event and remain on until the following day, flooding their bedrooms with much unwanted light. They say guests usually start arriving by 7:00 p.m. and leave at about 3:00 a.m. At this early hour of the morning, they have to endure the shuttle buses and vehicles traversing and people talking loudly, which affects their sleep.
- [19] They all mention a constant droning or humming noise from what they believe to be a generator or similar equipment from the Property or BDSL's other property. It operates all day and night and also prevents restful sleep.
- [20] All the witnesses say they and their families also have to contend with the odour from the water treatment plant which is an embarrassment and causes great discomfort. They describe it as a frequent strong, foul and unpleasant smell. Charles Avril says it causes him to feel nauseated and have headaches. Several say that they are embarrassed to invite family and friends to their home because of this odour.
- [21] Keith Fletcher, Charles Avril and Rosella Laurencin speak of the area outside their homes being used as a coaster park with music, bad language and generally anti-social behavior by the coaster and other drivers. They speak of garbage disposed of by hotel staff all over the area and the regular congregation of staff directly outside their properties. Rosella Laurencin describes two occasions – one in which young men were throwing stones onto her property, in an attempt to pick mangoes, as she was informed by them. On another occasion men were sitting on her wall conversing loudly and using appalling language and curse words. Charles Avril says that the lot immediately opposite his property is used as a public urinal, first by construction workers and now by taxi, coaster and delivery

truck drivers. He cites two incidents of persons urinating in his full view, which he finds revolting and disgusting. He says on a breezy day, the smell of urine is carried into his home.

[22] Anthony Severin says that trees which were a natural buffer from the Hotel operations and provided aesthetic beauty have been destroyed, compromising residents' privacy and security. The road is now used by some 100-200 or more persons daily, such that their ad hoc neighborhood watch is no longer effective. He, like others, expresses the sentiment that BDSL has shown total and utter disregard and contempt for all persons in the neighbourhood and the laws of Saint Lucia by placing a commercial road smack in the middle of a quiet peaceful residential community, which has completely changed the character of the neighbourhood. Specifically, he says this is in breach of the covenant in the deed of sale to BDSL prohibiting acts causing nuisance, annoyance or disturbance to the neighbourhood.

[23] There are some aspects of the witnesses' evidence that are unique to each.

[24] Roston Taylor indicates that his family moved to Ixora Drive in 2008 because at that time it was small peaceful community and his older son suffers from autism. His son's behavior and comfort are highly dependent upon his environment. His son had fit well into the community prior to 2016. However, his autistic son can no longer sleep well; is constantly startled by the blaring horns and music; and constantly frightened by the large trucks encountered on the road and the speeding traffic.

[25] Charles Avril states that he and his wife Lesley Avril resided in London, England, but moved to Saint Lucia for their retirement as they felt Saint Lucia would bring them the peace and quiet they desired. They purchased their lot in Cap Estate because of the quite enjoyment the area commanded, and the planning, layout and restriction on land use in the area. They enjoyed a full year of peace,

enjoyment and tranquility before learning of the construction of the Hotel. They expected some disturbances as a result, but not morning, noon and night with no end in sight. They no longer enjoy the peace and tranquility they once enjoyed in their home. Even watching television, listening to music, and having conversations with each other have become activities of luxury because they are constantly drowned out by the noise of the passing trucks. He says that BDSL has a service road to their Property and there is no need to close the Hotel if the access road is closed. They have complained but BDSL has done nothing to alleviate their distress. To the contrary, BDSL has become emboldened and must be stopped.

- [26] Michelle Norbert states that she has been living on an implantable defibrillator since 2008 due to two heart conditions – ventricular tachycardia and arrhythmia of the right ventricle. She was also diagnosed with Crohn's Disease in 2010. She says that prior to construction of the Hotel, she was able to manage her conditions and lived relatively well. However, since construction began in 2016, she and her family have had to increase their visits to the doctor and polyclinics. She says that her children have been placed on medications for sinusitis and allergies. Sometimes her children are unable to attend school due to the noise disturbance. She says that her health has also taken a turn for the worse since 2017. She has suffered insomnia, anxiety and increased symptoms of her underlying health conditions which are exacerbated by stress. Due to the lack of sleep she gets headaches, neck and chest pain and fever. Further during the period 2017 to 2018 she was additionally diagnosed with Systemic Lupus Erythematosus and Discoid Lupus and her symptoms continued to increase including chest pains, body pains, swelling of face, abdomen and feet, as well as increased headaches. Tests revealed that her heart condition had worsened since 2014 and her heart medication had to be increased. She was also placed on medications for the seizures, headaches and insomnia. Additionally, she tested positive for Rheumatoid Arthritis. She says all the symptoms she has been experiencing have been caused or contributed to by the increased level of stress from the noise

disturbances from the generator, persons talking, quarrelling and shouting outside her window. All of these complications resulted in her missing many days of work and being removed from her job. She has also had to spend increased amounts of money on doctors' visits, tests and medications. She says her uncle worked hard to move her and her family out of the city where it was busy to a quiet area where they could be at peace. She does not wish to see the Hotel close because it provides a lot of jobs; however, she would like the issue with the road to be addressed.

- [27] Keith Fletcher says that he has lived on Ixora Drive for over 20 years. He moved out of the busy city to settle with his family in Cap Estate because it was a quiet area away from the noise and traffic and a very safe, peaceful and tranquil community. He states that he has a heart condition and had open heart surgery in 1996. He also suffers from hypertension and diabetes. He therefore requires rest and relaxation in the evenings after returning home from running his business. However, he says that since the Hotel construction started, he has been unable to get any rest or a proper night's sleep. He says this is because 7 days a week and 24 hours a day, there is constant traffic on the road which one would expect of a highway. There is no peace, quiet or tranquility anymore. The lack of sleep has affected his health. He exhibits to his witness statement a copy of a doctor's report which expresses the opinion that his health conditions are aggravated by environmental, personal and emotional stress.

BDSL's Evidence

- [28] Francis Springer was BDSL's only witness. In his witness statement, he states that BDSL, in 2017, was the beneficial owner of the Property, while Cap Estate St. Lucia Limited was the registered owner. The sale of the Property from Cap Estate St. Lucia Limited to BDSL commenced in December 2016 but had not yet been completed. Nonetheless, Cap Estate St. Lucia Limited, by the Agreement for Sale dated 19th December 2016 granted BDSL possession of the Property. He states that the properties owned by BDSL were previously used and operated as

Smuggler's Cove Hotel, which BDSL purchased in 2014. It continued the operations of that hotel for a year after purchase and thereafter undertook significant renovations and construction in which it invested over US\$170 million. As of 18th February 2017, BDSL operates the Hotel which is a five-star family resort and the largest hotel in Saint Lucia. It has 456 rooms and numerous amenities including restaurants, bars and pools. It has 920 full time staff, approximately 10 of whom are non-nationals. As at May 2017, it has paid approximately US\$2.2 million to local suppliers and US\$1.6 million in wages to employees. Mr. Springer mentions that the Hotel is not the only hotel operating in Cap Estate and enumerates several others.

[29] Mr. Francis explains that when BDSL took over management of Smuggler's Cove Hotel, it noticed two issues: (1) raw sewage was discharged into the pond on the Property and on the beach, which caused damage to the environment and nuisance to the Hotel and surrounding environment; and (2) the access road to the back house of Smuggler's Cove Hotel used by its suppliers was 1.5 miles through the Cap Estate neighbourhood. BDSL therefore decided to purchase property in the immediate vicinity of the Hotel to enable it to construct a sewage treatment plant to treat the sewage and an asphalt access road to create a shorter route through the Cap Estate neighbourhood, more convenient to BDSL and the majority of residents of Cap Estate, while preserving the existing vegetation on the Property.

[30] From Mr. Springer's statement, the relocation of facilities and construction of the access road came about as follows:

1. Land formerly registered as Block No 1258B Parcel 218, owned by Garrison Realty Inc. was subdivided by into Parcels 221 and 224 and are still owned by Garrison. Most of the access road, fuel tanks, water treatment plant, bus shelter, and security hut are located on the former Parcel 218, on the portion that is presently Parcel 221. The reason for the subdivision of Parcel 218 is the encroachment by BDSL on that parcel in constructing the said facilities

and the subsequent agreement by Garrison to sell Parcel 221 to BDSL.

2. Land formerly registered as Block 1258B Parcel 189 (the Property) is now owned by BDSL, though at the time the claim was filed, BDSL was the beneficial owner in possession. BDSL subdivided Parcel 189 into Parcels 222 and 223, both of which continue to be owned by BDSL. A small section of the water treatment plant and fuel tank is located on the former Parcel 189, on the portion that is presently Parcel 222. The larger Parcel 223 is maintained as the green space, with a very small part of the access road on it.
3. The access road constructed by BDSL runs from the boundary of Parcel 148, on which the majority of the Hotel is situate, over and along Parcels 221, 222 and 223 as aforesaid and connects with a pre-existing road that runs between Parcel 183 (the Laurencins) and Parcel 146 (the Oswalds).

[31] Mr. Springer says that BDSL owns the Property and has the right to use and develop it as it deems fit. The Property was sold to BDSL without any restriction on use and covenant with respect to green space. In any event, the Property has been largely maintained as green space by BDSL. Only a small section of the access road, water treatment plant and the fuel tank is on the Property, which is insignificant when compared with the total area of the Property maintained as green space. Most of the access road, water treatment plant and fuel tank are located on Parcel 221, owned by Garrison and due to be sold to BDSL. There is also no laundry room on the Property, which is located on another parcel owned by BDSL and it is not in close proximity to the claimants.

[32] In relation to planning approval for development of the Property, Mr. Springer says that BDSL, through its architects submitted an application for approval of (1) relocation of the approved waste treatment plant; (2) construction of an access road at the eastern boundary of Royalton's project site; and (3) construction of 63 additional staff parking bays. BDSL communicated to the DCA that the application was urgent as it wished to meet the targeted opening date of the Hotel of 15th January 2017. It says it was assured expediency in review of its application by the

DCA, so to ensure it would meet the targeted date, it began construction of the access road without approval. It then subsequently learnt of the encroachment of the access road, water treatment plant and fuel tank on the land owned by Garrison Realty Inc. It did not build the 63 staff parking bays on the Property as planned. They are located on other property owned by BDSL.

[33] He states that most of the claimants are not located within the immediate vicinity of the facilities. The closest claimant is the owner of Parcel 183, the Laurencins, and even they are not close to the facilities. Parcel 183 is the property closest to the access road and only a small portion thereof abounds Parcel 183. The other section of road that passes along the east of that parcel was preexisting and not built by BDSL. He notes that Parcel 145 owned by the Avrils and Parcel 248 owned by the Gibsons are very close to the main road, Cap Drive, along which all manner of vehicles pass at all times of the day and night, servicing other Hotels and the residents of Cap Estate.

[34] The access road is used in a reasonable and responsible manner and not as alleged by the claimants. There is no constant build up of traffic, honking of horns, loud music, littering, urinating, obscene language, dangerous driving or parking affecting the claimants' quiet enjoyment or ability to sleep for which BDSL is responsible. The only authorized staff pick-up area is the bus shelter which is not close to the claimants. Hotel staff does not congregate outside the claimants' homes waiting to be picked up. Mr. Springer states that the claimants have not proven how the laundry room affects them. The water treatment plant is not close to the claimants, and has no unusual noise or obnoxious smell. If this were the case, it would have affected Hotel guests and staff as well, but there have been no such complaints. BDSL has not caused any noise pollution from the security hut. Nor is their noise pollution from taxi drivers, who he denies are BDSL's servant/agents/employees. None of its staff acting in the course of their employment has caused noise pollution or nuisance to the claimants. The generator is not located on the Property or near to the claimants and BDSL is now

connected to LUCELEC power. The generator is only used in the event of loss of power. Further the generator is not unreasonably loud or noisy and does not cause nuisance.

- [35] Mr. Springer states that there is no need for restoration of the Property as alleged, as it is still largely maintained as a green space by BDSL. In any event, the property is owned by BDSL, and BDSL is entitled to use the Property. Slight disturbances may have been experienced during construction, which has long ceased. Mr. Springer says the claimants are unusually sensitive and opposed to the development, as they have waited until BDSL has expended millions of dollars to construct the Hotel to file this claim. He says they are asking this court to interfere with planning approval to have the Property restored and the access road closed when the proper course is to ventilate their grievances with the DCA.

Evidence on Cross Examination of the Claimants' Witnesses

- [36] Counsel for BDSL, Mr. Peter Foster QC ("Mr. Foster QC") put to each of the claimants that other commercial activity goes on in Cap Estate, to which most, if not all, agreed. Michelle Norbert remembers that events would be held at Great House, including a night club, and that persons would sometimes park outside her property for these events. Roston Taylor recalls there also being the Derek Walcott Theatre held at Great House for which attendees would park on the playing field opposite Rosella Laurencin. Lesley Avril agreed that on 7th July 2019, the Gibsons hosted a fete at their home called 'Wow'. She admitted that a party was held by them the year before, when she experienced the music and parking of vehicles on the buffer road. She also agreed that Red International has hosted parties at the Gibsons' house and that others use the Garrison Lot for parking. Most, if not all the claimants' witnesses also agreed that the Hotel would require goods and services to be delivered to it.
- [37] It was put to them that they have not stated how they are able to identify that the persons causing the nuisance of which they complain are Hotel staff and that they

have merely made generalized statements in this regard founded on assumptions. Most, such as Rosella Laurencin insisted that it is Hotel staff, because she sees the shuttle buses transporting staff and she says she has called the Hotel. Charles Avril's answer was that the Hotel is the only hotel there and that he has never known delivery trucks to go to person's homes. Keith Fletcher also insisted that persons who create the nuisance are the coasters from the Hotel. Lesley Avril admitted that she had not given the registration number of any of the vehicles of which she complains, or evidence of any markings on these vehicles.

[38] It was put to the claimants' witnesses that the Garrison Lot is not owned by Royalton and that they do not know what, if any, arrangement the Hotel has with Garrison Realty Inc. to use their land. It was also put to them that they did not know who operated the flood lights. Rosella Laurencin agreed that she had no proof of any arrangement but insisted that it is the Hotel. Keith Fletcher also agreed with those suggestions. Charles Avril admitted that he did not know and agreed that Garrison Realty Inc. would be free to rent their land to anyone to use as parking if they wish. Lesley Avril agreed she had not stated the dates of the events of which she complained nor who held them. She does not know what arrangements were made for parking but states that she asked persons and they said they got permission, she assumes from Royalton.

[39] It was put to them that in 2017 the Hotel operated a generator for the supply of electricity to it, however in about May or June 2017 the hotel stopped using the generator. Rosella Laurencin agreed that it had stopped. She was asked whether she followed the humming noise she alleges to ascertain where it is in fact coming from. She said she had and it was from the direction of the Hotel, though she did not see and cannot say what is causing it. Charles Avril insisted that it was a fact and not an assumption, that the humming noise was coming from the Hotel, though he had never followed the noise. Keith Fletcher insisted that he continued to hear a humming noise though not as loud as before and that it must be from the generator as it is the only equipment nearby. Roston Taylor too was adamant that

some equipment continues to produce noise, which he hears every night. Anthony Severin insisted that the constant droning noise of a generator or similar equipment is coming from BDSL's property whether the Property or its other property. It was put to him that since mid-2017 the sound coming from the Hotel has stopped. He disagreed and said the constant droning sound is the same.

[40] Rosella Laurencin did not know whether there is a block of hotel rooms closer to the water treatment plant than her home and did not know whether the wind direction was from her home towards the water treatment plant. It was put to Rosella Laurencin that it was her assumption that the water treatment plant constantly had to be emptied but she insisted that she has seen Rockers trucks going back and forth. It was put to Charles Avril that there is a block of hotel rooms 100 ft from the water treatment plant; however, he insisted that his home was closer to the water treatment plant than any block of hotel rooms. He said he would not dispute counsel's suggestion that there is no smell from the water treatment plant when standing at the block of hotel rooms, which is downwind; but insists that he knows what he smells from his home which is upwind. Keith Fletcher did not know where the water treatment plant was located either but says he has seen Rockers trucks going there. He was not aware that Rockers empties septic tanks but is also adamant that he smells noxious fumes from his property. Anthony Severin says that he smells the odour at times depending on the shift in the wind. He would imagine that the wind blew towards the Hotel from the Property (away from their homes).

[41] Both Rosella Laurencin and Keith Fletcher say they have reported the issue of the alleged odour from the water treatment plant. Keith Fletcher says he reported it to the Environmental Department. Persons from the department visited the Hotel but he does not know what they did. He was asked if he was aware of any charges brought against the Hotel to which he says he thinks there were but he does not know what became of them. He agreed with counsel that these were matters for the DCA. Rosella Laurencin stated that she had made her complaint to the Health

Department and agreed that the Health Department would have issued the Hotel with a health certificate. Both she and Anthony Severin stated that they were not aware that the Smuggler's Cove Hotel used to discharge raw sewage into the pond on the Property. It was put to Mr. Avril that the golf course uses treated sewage water to water their grass, to which he replied he was not aware.

[42] Rosella Laurencin and Anthony Severin agreed that they had not produced evidence of the decibel level of noise they experience. Rosella Laurencin admitted that she has only stated what she experiences and was unsure of what evidence she could have produced to substantiate the smells of which she complains. Anthony Severin agreed that there are acceptable levels of noise with which people live, but stated that the level of noise experienced by them was not acceptable. He agreed that what might be unacceptable to him may be acceptable to someone else. Charles Avril stated that the Environmental Department had been contacted but they indicated that they could not measure the decibels. Roston Taylor says they approached the Ministry of Health but they had no equipment. Charles Avril agreed that what may be disturbing or unpleasant to him may not be so to someone else. However, if the person were in the same place as he, it would be. He agreed that his home is located furthest from the Hotel. Similarly, Lesley Avril agreed that all persons have different experiences with regard to noise but that the majority would be the same depending on location of a person's property.

[43] It was put to Charles and Lesley Avril that in order to access all the hotels and homes north of theirs, vehicles would have to pass their home. They admitted their home is on the corner of Cap Drive and Great House Road and therefore vehicles would in any event have to pass on Cap Drive very near to their home. Anthony Severin agreed that given where his home is located on Ixora Drive, his interaction with the access road is limited, except that he stated the intensity of the activity has no relation to the distance.

- [44] As to careless and dangerous driving, the claimants all agreed that they have never witnessed an accident occur. Rosella Laurencin stated she had not reported the manner of driving to the police and Charles Avril said he had not made complaints to the traffic department but made complaints to Mr. Springer. He stated that he had not reported his complaints of persons urinating to the police, only to his attorney-at-law. Lesley Avril stated that she neither complained to BDSL nor the police of persons urinating near her property.
- [45] As to the water trucks, it was put to Keith Fletcher that there was a problem with water at the Hotel in January and February 2019, however, that since March the water trucks have stopped. Mr. Fletcher insisted that the water trucks were present up to the middle of May. Charles Avril, however, admitted that since March 2019, he has not seen even one water truck going to the Royalton. Lesley Avril stated that up to 3rd March 2019 the water trucks were still passing and then from 19th March 2019 until 8th May 2019, although she admitted that she did not state this in her witness statement. She admitted that she did not produce the diary she says she kept; she did not realise she had to do so.
- [46] Charles Avril stated that since the mediation session he had not made any complaint to BDSL as nothing happened, however his wife has continued to make complaints since 22nd June 2017. However, Lesley Avril stated that she had not documented any complaints since those made in 2017 because there was no point. Anthony Severin indicated that he did not know of any complaints made to the Hotel after 22nd June 2017. The complaints he made after that date were made directly to his legal counsel or the DCA.
- [47] Charles Avril agreed that it was his assumption that the road was constructed secretly and that this was intentional. He agreed that whether a change of land use was required and whether DCA had given permission for construction of the road were legal matters for the DCA. Similarly, Anthony Severin stated that he had not seen any document declaring the access road illegal and agreed in the

main that the legality of the access road was a matter for DCA. Keith Fletcher was asked if he was aware of any charges brought against the Hotel to which he says he thinks there were, but he does not know what became of it. He agreed with counsel that these were matters for the DCA. Roston Taylor insists that the road was built clandestinely, stating that he had seen the drawings the DCA considered and has photographs of structures constructed on the Property, though he admitted that the pictures would not prove that the structures were constructed illegally. He said he had heard that the DCA stopped the action it was taking against BDSL. Lesley Avril agreed that the DCA is the department charged with the responsibility of looking at competing property interests and admitted being aware that BDSL had submitted an application to the DCA. Lesley Avril stated that she has ascertained the boundaries of the green space, and accepted that the road at the bottom of the green space is the only construction thereon and that the rest remains green space. She admits that the birds have returned though she knows nothing of the pond as she has never been on the green space. She believes that the planning register indicates what is supposed to be green space and that it classes as a buffer zone.

[48] Charles Avril and Lesley Avril too insisted that the previous access road to the North is still there and can be accessed, though she said she has never actually walked down there. Anthony Severin admitted that the previous service road to the Hotel along Cap Drive is a much longer route than the access road and would impact all the homes along that route, though he describes it as a major highway.

[49] Michelle Norbert admitted that she is not well and has been unwell since before 2008, yet she first saw Dr. Altenor who provided the medical report for her in this matter for the first time in 2018. She insisted that though the report was based on what she told Dr. Altenor, it was backed up with a letter from her previous doctor. She admitted that she has had a sleep disorder for some time and that she is easily disturbed by any disturbance.

Cross Examination of Mr. Springer

- [50] Mr. Springer was unable to answer many of the questions asked by counsel for the claimants, Ms. Diana Thomas ("Ms. Thomas"). He was not involved with the application to the DCA for approval of the access road or in the construction of the water treatment plant or the generator. He did not know the capacity of the generator or what machines are used to run the sewage treatment plant. He only knew of washers and dryers used to run the laundry but did not know the capacity of the machines. He did not know anything about the use of floodlights on the Garrison Lot nor could he say how many water trucks would have been using the access road, though he stated that the Hotel now produces its own water as the water treatment plant is now up and running.
- [51] He was able to state however that the capacity of the Hotel is about 1000 guests and the average stay is about 7 nights. Staff shifts run from 5:00 a.m. to 3:00 a.m. during which there are about 5 shifts. On the evening shift from 8:00 p.m. to 3:00 a.m. there are about 150-200 staff members operating the Hotel. The conference room has a capacity of 600 people and there are approximately 1-2 events hosted per month. The Hotel has 2 parking lots: the guest car park holds approximately 35 vehicles of which only 3 are allocated for taxis. The Back of House parking lot holds about 70 vehicles and is for staff, taxis and local guests. He admitted that if there is an event at the Hotel, parking may be insufficient. When asked if alternative arrangements would be made, he indicated that parking along internal roads is allowed. Otherwise people are allowed to park outside. He was asked if the Hotel allows persons to park on Great House Road to which he replied that he does not know of the Hotel giving anyone permission to park anywhere. Any significant parking in this area would be an isolated event. There would be parking there if patrons choose to park there.
- [52] Mr. Springer knew that DCA approval was required before the access road could be built, however initially said he did not know whether BDSL had DCA approval to build it. He admitted that BDSL wanted to construct the Hotel by a particular

deadline at the time its application was submitted to the DCA. He accepted that DCA could have rejected the application; however, was of the understanding that BDSL expected approval from the DCA. He then admitted that the DCA did not give approval. After the DCA rejected its initial application, BDSL submitted a new application in November 2017. As to the current status of BDSL's application to the DCA, as far as he knows, it is in the process. He was aware that BDSL encroached on Garrison's property and admitted that some work was done by BDSL in the green space. He was asked whether the DCA required the green space to be restored, to which he said that the drawings at the time showed that the road was built on green space. He admitted that part of the green space was destroyed but states that trees were replanted.

[53] Mr. Springer admits he has never spent an entire night on Ixora Drive, though he says he has been there at night and spent a day there during construction. He refused therefore to accept that he did not know what the claimants are seeing and feeling. He says that in order to be affected by the noise it creates you would have to be in the generator room as there are Hotel rooms situated right outside the generator room and there have been no complaints from guests. While he admitted that the Hotel rooms have some sound proofing, he insisted that given how close the Hotel rooms are to the generator and treatment plant, if in fact the sound is loud enough to reach the neighbours, then the guests should also be hearing especially if Hotel rooms' doors are open. He agreed when it was put to him that, having never been to the claimants' homes, he could not compare what happens at their homes to what happens in the Hotel rooms.

[54] He indicated that the service road is used by staff transportation vehicles, staff's own vehicles and suppliers. He did not know the number of vehicles that use the road but stated that the majority would be between 9:00 a.m. and 5:00 p.m. which are the peak hours. He says there are between 3 and 5 staff buses between 8:00 a.m. and 9:00 a.m. After 5:00 p.m., the next shift is at 8:00 p.m. It is a night shift, so is smaller, and there may be just one bus. He says he has driven on the

access road over 20 times in the last month. He uses it 2 to 3 times per week. He has stopped on the access road for 25-30 minutes during the day and just observed. He states he has never observed any traffic build up. When asked if he agreed that the Hotel would not be able to control the traffic on the access road and parking, his reply was that persons park in the area next to the bus shelter. He agreed that BDSL, by changing the design of the Hotel, created the impossibility of access through the previous service entrance, which he says no longer exists.

Visit to the Locus

[55] The Court and counsel for the respective parties visited the locus on the afternoon of 25th July 2019 to observe the location of the access road and the facilities in relation to the claimant's properties. In particular the Court viewed Great House Road and Ixora Drive, the Property (the Green Space), the access Road, the Garrison Lot, the back of house facilities, including the bus shelter, the security hut, laundry room, the water/sewage treatment plant, the staff car parks, the fuel tanks, and the generators. The Court also viewed the previous service entrance from Cap Drive as well as the main guest entrance to the Hotel.

Issues

[56] The issues to be determined are as follows:

1. Whether the claim in private nuisance may be sustained as a representative action?
2. Whether any of the relief sought by the claimants is outside the jurisdiction of these court proceedings as subject to the provisions of the **Physical Planning and Development Act**?
3. Whether the actions of the defendant constitute a private nuisance to the claimants?
4. Whether the claimants are entitled to the injunctive relief sought, alternatively to an award of damages and if so, the quantum?

[57] Though the claimants pleaded negligence and Rylands v Fletcher, neither of these causes of action were borne out by the evidence to any degree. They were also never addressed or mentioned at any time subsequent to the pleadings, not even in closing submissions. Therefore, the Court considers that only the claim in nuisance is being pursued and, in the circumstances, there is no need to further consider these additional causes.

Issue 1: Whether the claim in private nuisance may be sustained as a representative action?

[58] This issue was raised by counsel for BDSL, Mr. Foster QC for the first time in closing submissions. This is so despite the notice of application for representatives to be appointed to act in the proceedings on behalf of the claimants, together with affidavit in support and exhibits filed on 8th May 2017 and heard on 9th May 2017. The application was served on the defendant by service on Ms. Lianna Ventura, Manager's Assistant at the office of the Royalton Hotel on 8th May 2017 as evidenced by affidavit of service of Mr. Ernest La Feuillie, dated 11th May 2017. The application was granted and the matter proceeded through case management, pre-trial review, the trial was conducted and no objection was taken on behalf of BDSL. In the circumstances, it does strike as somewhat unfair to now raise it for the first time in closing submissions, effectively denying the claimants the opportunity to respond. Nevertheless, the question having been raised, the Court must consider it.

[59] The gravamen of Mr. Foster QC's submissions is that in order to establish a private nuisance, the subjective element of whether the degree of interference with comfort or convenience is sufficiently serious to constitute nuisance must be proven, and this requires an individualized assessment. However, each of the 17 claimants has not given evidence to enable the court to undertake such an individual analysis of the effect of the alleged interference on them. He seems to suggest that, as a representative claim, the claimants stand or fall together. He highlights the difficulty by providing examples of circumstances which may

peculiarly affect the claimants to varying degrees: each of the claimants own and/or reside in properties in varying proximity to BDSL's property; the sensitivity of some claimants due to pre-existing illnesses; at least one claimant owns an empty lot – he has no house on the land and does not reside there; some lots border on the main road Cap Drive, which affects the question of the source of the alleged interference and subjective question of the degree of interference which may be considered substantial in relation those lots.

[60] Mr. Foster QC concludes that a claim in private nuisance is not suitable to be brought as a representative action and in support, relies on the Canadian cases: **Raymond Baker v Gordon James Rindle et al**² and **John Hollick v City of Toronto and anor**.³ He draws this Court's attention to dicta of the Court of Appeal in **Baker v Rindle**, in which it was determined that the real issue in that case was whether the odour emitted amounted to nuisance, for which the plaintiff had to prove substantial, non-trivial interference with use and enjoyment of his property and that this interference was unreasonable. The Court stated that neither could be resolved without "*an individual analysis of the effect of the odours on the plaintiff and individual class members*"; and that "*the focus is on the harm suffered by the plaintiff rather than the prohibited conduct of the defendant.*" Alternatively, Mr. Foster QC submitted that the claim would have been more suitably brought as a public nuisance.

[61] I have carefully examined the cases cited by Mr. Foster QC and note that they arise from applications to certify a class action pursuant to section 4 of the Class Proceedings Act R.S.B.C. 1996, c. 50 [CPA]. That section specifies the requirements for certification as a class action, one of which is that a class proceeding be found to be the preferable procedure for the fair and efficient resolution of the common issues in the claim. In so determining, the section requires the court to consider all relevant matters, including whether questions of

² 2017 BCCA 72.

³ [2001] 3 S.C.R.158, 2001 SCC 68.

fact or law common to the members of the class predominate over any questions affecting only individual members; whether other means of resolving the claims are less practical or less efficient; and whether administration of the class proceeding would involve greater difficulties than those likely to be experienced if relief were sought by other means.

[62] In **Baker v Rendle**, the claim concerned private nuisance relating to commercial composting operations on a neighbouring property, which the appellants alleged caused noise, noxious fumes, and odours affecting use and enjoyment of property. In the context of the above mentioned requirements of section 4 of the CPA, the chambers judge held that a class action was not the preferable procedure, noting that nuisance of the type complained of contains a high degree of subjectivity and requires an individualized assessment.⁴ It was also in this context that the Court of Appeal had to consider whether the individual proof issues, namely the scope and extent of the nuisance meant a class proceeding was not the preferable procedure and upheld the chambers judge's ruling.⁵

[63] The Court of Appeal, in reviewing the law of private nuisance, held that 'the requirements for proof of private nuisance are twofold. First, a plaintiff must prove a substantial non-trivial interference with his use and enjoyment of his property. Second, he must establish that the interference is unreasonable. The focus is primarily on the effect on the complainant rather than on the alleged tortfeasor's conduct.' It therefore held that contrary to the appellant's submission, a measure of subjectivity exists even at the stage of determining whether liability exists and not merely when determining the extent of liability.⁶

[64] In relation to the issue of certification, the Court of Appeal held that the common question – what were the times and degrees of penetration of the noise, fumes and odours of composting activities into the area where the proposed class

⁴ Paragraph 3.

⁵ Paragraph 4.

⁶ Paragraph 41.

members reside – is an attempt to bifurcate the nuisance analysis by asking a question that relates only to the respondents’ conduct and that it was not useful to address in an isolated fashion the respondents’ conduct, particularly where there did not seem to be much doubt that noxious odours were emitted from the respondents’ property. The analysis remained an individual one as “resolution” of the common issue would leave undetermined the fundamental questions of whether the effect was substantial and whether it was unreasonable, which contained subjective aspects.⁷

[65] The Court of Appeal therefore concluded that resolution of the proposed common issues would not significantly have advanced the action as its focus is entirely on the tortfeasor’s conduct. The effect of that conduct as to time, intensity, and interference with activities (which lies at the core of the question of liability) is entirely subjective and variable. Therefore, the common question did not advance the litigation and was negligible in terms of the individual issues, such that it was more suitable for multiparty proceedings.⁸

[66] Therefore, while the principles enunciated by Mr. Foster QC that proof of private nuisance involves a subjective and individual analysis of the effect of the alleged interferences on the claimants’ right to use and enjoy their land is not incorrect, the Canadian court’s ruling in relation to certification as a class action is not applicable, and I do not find that the automatic consequence is that the claim cannot be sustained as a representative action. This Court is not governed by the provisions of the CPA, in which the determining factor is the extent to which the common issues predominate in advancing the litigation as compared with the individual issues. The question of whether a representative action can be sustained in this jurisdiction is governed by rule 21.1(1) of the **Eastern Caribbean Supreme Court Civil Procure Rules 2000** (“CPR 2000”) pursuant to which the claimants’ application was made. This rule merely requires that the claimants and

⁷ Paragraphs 44-46.

⁸ Paragraphs 50-51.

the proposed representative have the same or similar interests in the proceedings. The application stated that all the claimants and the representatives had the same interest, all being claimants against BDSL's alleged nuisance. Therefore, while I accept that the claimants who did not give evidence of the effect of the alleged interference on them, do not have evidence before the court on which they could make out their claim, I do not find that a private nuisance claim is not suitable or sustainable as a representative action generally, and that the entire claim in relation all the claimants, even those who did give evidence, would fail.

Issue 2: Whether any of the relief sought by the claimants is outside the jurisdiction of these court proceedings as subject to the provisions of the Physical Planning and Development Act?

- [67] Mr. Foster QC submits that the **Physical Planning and Development Act** governs the development of land in Saint Lucia. The Act requires the Physical Planning and Development Division to perform the duties under the Act, including granting permission to develop land in accordance with the procedure set out therein, which gives the public the opportunity to comment on proposed development; and to issue stop and enforcement notices, mandate restoration of land to its original state and commence civil proceedings for an injunction to prevent violations of the Act. There is also an avenue provided to appeal decisions of the Division. Mr. Foster submits that the provisions of the Act are for protection of the public interest. Therefore, the statutory procedure is the appropriate forum for the resolution of the issues regarding development of the Property and protection of the claimants' interests and not the court.
- [68] He relies on dicta in several cases, which he says establish the principle that the Court ought not to usurp statutory powers entrusted to a regulatory authority. Mr. Foster QC cited **Hunter and others v Canary Wharf Ltd; Hunter and others v London Docklands Development Corp**⁹ where he submits that the court dismissed the claim for nuisance on the basis that while the grant of planning

⁹ [1997] 2 All E.R. 426.

permission is not a defence to nuisance, the court should consider the presence of other avenues whereby the rights of the public may be protected and that the planning system is the more appropriate form of control. He also cites the cases of **Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd. and others**¹⁰ and **R v Securities and Futures Authority Ex Parte Bernard Panton**¹¹ in support.

- [69] Mr. Foster QC submits that the claimants are seeking an injunction to restore the Property and or restrict its use as well as use of the facilities constructed by BDSL thereon, but that the court ought not to usurp the powers and duties entrusted to the DCA under the Act, which is the appropriate forum for dealing with these issues. The DCA is more appropriate as it has expertise in planning and development and is required to act in accordance with its object and purpose to ensure appropriate and sustainable use is made of all publicly and privately owned land in Saint Lucia in the public interest. The DCA is in a better position to do so than the court acting upon the complaints of a miniscule 17 members of the public. He says the claimants were invited by the DCA to submit their comments on the development, which they have done. In doing so, the claimants have recognized the authority and function of the DCA, yet instead of allowing the process to be completed, they have filed this claim. Mr. Foster QC argued that the fact that the access road has already been built, does not affect the claimants' ability to ventilate their issues through the DCA. BDSL's application for retention of the development is still under review by the DCA and a decision has not yet been made. The DCA in granting or refusing permission will have regard to the claimants' comments on the development, and if the claimants are dissatisfied with the decision, they can apply for judicial review. Consequently, they will not be left without a remedy and will not be prejudiced. On the other hand, the court would be usurping the DCA's role to decide where and what development is permissible, which would be prejudicial to BDSL since the DCA is still processing its

¹⁰ [1992] 3 All E.R. 923.

¹¹ [1994] Lexis Citation 4135.

application.

[70] The cases cited by Mr. Foster QC appear to be distinguishable on their peculiar circumstances. In **Hunter v Canary Wharf**, the issue arose whether interference with television reception was actionable in private nuisance. The plaintiffs claimed that their homes were within a 'shadow area' for television reception caused by a tower block nearly 250 metres high and over 50 metres square built by the defendant developer with the result that television reception in their homes was adversely affected. The defendant contended, inter alia, that interference with television reception was not capable of constituting an actionable private nuisance. The House of Lords held that interference with television reception caused by the mere presence of a building was not capable of constituting an actionable private nuisance. Subject to planning control, a person was free to build on his own land unrestricted by the fact that the presence of his building might of itself interfere with his neighbour's enjoyment of his land. Accordingly, in the absence of an easement, more was required, such as nuisance emanating from the defendant's land, than the mere presence of a neighbouring building to give rise to an actionable private nuisance and the plaintiffs' appeal was dismissed.

[71] Lord Hoffman considered the question whether modern conditions require the above stated principle upon which the court's decision rested to be modified. He made the remarks upon which Mr. Foster QC relies, after noting that the freedom of a landowner to build upon his land has been drastically curtailed by legislation and in normal cases it is necessary to obtain planning permission. He said the following:

"The power of the planning authority to grant or refuse permission, subject to such conditions as it thinks fit, provides a mechanism for control of the unrestricted right to build which can be used for the protection of people living in the vicinity of a development. In a case such as this, where the development is likely to have an impact on many people over a large area, the planning system is, I think, is a far more appropriate form of control, from the point of view of both the developer and the public, **than enlarging the right to bring actions for nuisance at common law**. It enables the issues to be debated before an expert forum at a planning

inquiry and gives the developer the advantage of certainty as to what he is entitled to build.

In saying this, **I am not suggesting that a grant of planning permission should be a defence to anything which is an actionable nuisance under the existing law.** It would, I think, be wrong to allow the private rights of third parties to be taken away by a permission granted by the planning authority to the developer. The Court of Appeal rejected such an argument in this case and the point has not been pursued in your Lordships' House. **But when your Lordships are invited to develop the common law by creating a new right of action against an owner who erects a building on his land,** it is relevant to take into account the existence of other methods by which the interests of the locality can be protected." (my emphasis)¹²

[72] Gillingham **BC v Medway Dock** is also distinguishable. The headnote to that case provides a useful summary:

"In 1982 the defendant company was incorporated by a port authority to operate a commercial port on the site of a former naval dockyard which had been closed. The defendants leased part of the old dockyard and in 1983 the plaintiff council, which was anxious to attract business and employment opportunities to the site and was aware of the environmental effect which the port would have, granted the necessary planning permission subject to a condition that vehicular access to the port was to be reviewed if and when alternative access became possible. At the same time assurances were given by the council to the defendants that they would have unrestricted access to the port and that they would be consulted before any change of access was made. Access to the port at the time permission was granted was only possible through a residential neighbourhood and the passage of heavy goods vehicles to and from the port, which operated 24 hours a day, constituted, as was conceded by the defendants, a substantial interference with the residents' enjoyment of properties in streets through which the port traffic passed. In 1988 the council, acting under s 222(1) of the Local Government Act 1972 to promote or protect the interests of the inhabitants of its area, brought an action against the defendants in nuisance seeking a declaration that the passage of heavy goods vehicles to and from the port between 7 pm and 7 am constituted a public nuisance, and injunctions to restrain such traffic. The defendants contended, *inter alia*, (i) that carrying out a lawful act such as driving a heavy goods vehicle on a public road could never be a public nuisance, (ii) that they were operating the port in accordance with the planning permission granted in 1983 and (iii) that, in the light of the assurances given by the council to the defendants when planning permission was granted that they would have unrestricted access to the

¹² At page 455, paragraphs b-e.

port and that they would be consulted before any change of access was made, the court should exercise its discretion to refuse the relief sought.

Held – Where planning consent was given for a development or change of use, the question whether a particular user amounted to a public nuisance thereafter fell to be decided by reference to the neighbourhood as it was with that development or change of use and not as it was previously. Accordingly, since the council's claim in nuisance was to be judged by reference to the character of the neighbourhood as affected by the planning permission granted in 1983 to use the former dockyard as a commercial port, which the council had been aware at the time of granting planning permission would be used 24 hours a day, the disturbance to residents of properties in streets through which the port traffic passed was not actionable. Furthermore, even if the council's claim had been actionable the relief sought would have been refused as a matter of discretion because of the assurances given by the council to the defendants when planning permission was granted that they would have unrestricted access to the port and that they would be consulted before any change of access was made. The action would therefore be dismissed.”¹³

- [73] In this case, the Court had made several findings that distinguish it from the present: (1) the plaintiff council had known that 24hour operation of the port was anticipated and no conditions curtailing such operation was attached to the permission; (2) it was not suggested that the defendant dock company was in any way negligent – it had operated the site in accordance with the planning permission; (3) a major consideration in 1983 was to fill the void left by closure of the dockyard – adverse effects on the environment were an acceptable price for the perceived economic and job benefits from the dock company's operation; and (4) the assurances given to the defendants that they would be consulted before any change of access was made. Buckley J noted that he had not been referred to any case that considered the interplay between planning permission and the law of nuisance but that many cases had considered statutory authority as a defence to nuisance, which, in his view, ought to be applied:

“The defence of statutory authority to an action for nuisance was summarised in the speech of Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353 at 356, [1981] AC 1001 at 1011 as follows: “It is now well settled that where Parliament by express

¹³ At page 923-924, paragraphs d-b

direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away ...'

Doubtless one of the reasons for this approach is that Parliament is presumed to have considered the interests of those who will be affected by the undertaking or works and decided that benefits from them should outweigh any necessary adverse side effects. I believe that principle should be utilised in respect of planning permission. Parliament has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the minister decides. There is the added safeguard of judicial review. If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. **Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which, prior to the change, would have been an actionable nuisance...**¹⁴ (my emphasis)

- [74] The distinction here is that the Court accepted that the council, in granting planning permission, deliberately decided to change the character of the neighbourhood in question based on the current economic situation and the perceived economic benefit with full knowledge of the adverse environmental effects. Given this, the court determined that any consideration of nuisance must be on the basis of the new character of the neighbourhood subject to that planning permission, and not as it stood before. The Court did not determine wholesale that where planning permission had been granted, conduct arising from that permission would not be actionable in nuisance or that to so find would amount to usurpation by the court of the role of the statutory authority.

¹⁴ At page 934, paragraphs a-f.

[75] I find support for my position in the case of **Lawrence and another v Fen Tigers Ltd and others**¹⁵, which definitively dispels Mr. Foster QC's suggestion. The Supreme Court considered the ruling in **Gillingham BC v Medway Dock** and Lord Neuberger P, with whom their Lordships agreed, held:

"The implementation of a planning permission could give rise to a change in the character of the locality, but it was no different from any other building work or change of use which did not require planning permission; if the implementation of a planning permission resulted in the creation of a nuisance to a claimant, then it could not be said that the implementation had led to a change in the character of the locality save to the extent that the implementation could have been effected in a way which would not have created a nuisance... **The grant of planning permission for a particular development meant only that a bar to the use imposed by planning law, in the public interest, had been removed; it did not mean that the development was lawful. Moreover, it was wrong in principle that through the grant of a planning permission a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance without providing her with compensation when no provision in the planning legislation suggested such a possibility. Thus the mere fact that the activity which was said to give rise to the nuisance had the benefit of a planning permission was normally of no assistance to a defendant in a claim brought by a neighbour who contended that the activity caused a nuisance to her land in the form of noise or other loss of amenity. The effect of a proposed development on occupiers of neighbouring land was only one of the factors which a planning authority had to take into account. A planning authority would be entitled to assume that a neighbour whose private rights might be infringed by the change of use could enforce those rights in a nuisance action, the planning authority could not be expected to take on itself the role of deciding a neighbour's common law rights. However, while the decision whether an activity caused a nuisance to a claimant was not for the planning authority, the existence and terms of the permission were not irrelevant as a matter of law; they could have evidential value.**"¹⁶ (my emphasis)

[76] In the present case, the evidence is clear that no planning permission has been granted for the development undertaken by BDSL, as same was applied for after the development had been carried out. Therefore, the question of planning permission is not even relevant. BDSL decided to develop the property as it saw

¹⁵ [2014] 2 All E.R. 622.

¹⁶ Headnote at paragraph 4. See paragraphs 82-83; 89-90; and 94-97 of judgment, per Lord Neuberger P.

fit, and then to apply to the DCA for permission to retain the development, which is not what I believe was contemplated by the Act or the procedure employed by the DCA. Having done so, it is now in my view, disingenuous for BDSL to suggest that the fact that planning permission has not yet been granted precludes or makes it unreasonable for the claimants to bring this claim, and that the claimants ought to await the decision of the DCA, when they felt it unnecessary to do so themselves. In any event, the dictum cited by Mr. Foster QC does not support the proposition that the court ought not to consider claims in nuisance in circumstances where planning permission is being considered or has been given. The authorities only restrain the court to consider the alleged nuisance in the context of the character of the neighbourhood subject to planning permission and from expanding the concept of the nuisance beyond the established parameters. Therefore, I find that the claimant's claim is within the jurisdiction of the court.

Issue 3: Whether the actions of the defendant constitute a private nuisance to the claimants?

- [77] Mr. Foster QC, relying on the case of **Hunter v Canary Wharf**, submits that an action in private nuisance is not in respect of discomfort caused to the person but for causing injury to land or to the plaintiff's enjoyment of rights over land. It follows that an action in private nuisance will only lie at the suit of a person who has a right to the land affected, such as a freeholder, tenant in possession or even a licensee with exclusive possession, but not a mere licensee. He states that Lord Goff in that case confirmed that a spouse who has no interest in the matrimonial home, cannot simply by virtue of cohabiting with his/her spouse whose freehold or leasehold it is, have a right to sue. It also followed that if the occupier of land suffers personal injury as a result of acts of nuisance, he does not have a cause of action in nuisance for his personal injury of interference with his personal enjoyment. Further, the quantum of damages does not depend on the number of persons enjoying the land in question. While the quantum may be affected by the size, commodiousness and value of property, it cannot be increased merely because more people are in occupation and therefore suffer greater collective

discomfort. In this regard, Mr. Foster QC submits that none of the claimants, save Charles Avril, has proven an interest in land, despite being put to strict proof by BDSL's defence. He is the only of the claimants who attached the Land Register in respect of his parcel. He says Mrs. Avril who is a claimant in her own right has no right of action as she admitted that she intervened and declared in the Deed of Sale pertaining to that parcel that it does not fall within the community. She is therefore a mere licensee.

- [78] Mr. Foster QC also cited the case of **Lawrence v Fen Tigers Ltd** as authority for the principles that whether a particular activity causes a nuisance is not to be determined by abstract consideration of the thing itself, but by an assessment of the locality in which the activity concerned is carried out. He states that in **Walter v Selfie**¹⁷, the question was stated as being whether the inconvenience materially interferes with the ordinary physical comfort of human existence, not according to elegant or dainty modes and habits of living but plain sober and simple notions among people. Mr. Foster QC submitted that the claimants admitted the presence of several other hotels in the vicinity as well as a golf course and previously, a restaurant and nightclub and that service vehicles for these establishments pass through Cap Drive, the main road in Cap Estate. He says that the claimants have therefore admitted that the locality is partly commercial and have not alleged that the access road and facilities are not necessary or are more than necessary for the effective functioning of the Hotel. Given the commercial character of Cap Estate, the claimants should subject themselves to the consequences of those operations of trade carried on there, such as are necessary for trade and commerce. He asks the court to take notice of the fact that the claimants do not take issue with BDSL operating a hotel in the area generally, but with the location of the access road and facilities being near their properties, as opposed to a different area of Cap Estate. The claimants, he says, are therefore merely seeking to preserve their elegant modes and habits of living.

¹⁷ (1851) 64 ER 849.

- [79] In relation to the alleged acts of nuisance, he submits that some of the activities complained of giving rise to noise and dust pollution happened between June 2016 and May 2017 during construction of the Hotel. The issue concerning the water trucks, due to a water shortage at the time, ceased by March 2019 and is admitted by the claimants. Rosella Laurecin admitted that to her knowledge, the generator has not been used since May 2017 and Michelle Norbert that she had not heard noise from the generator for some time. Mr. Foster QC submits that the case of **Attorney General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v PYA Quarries Ltd**¹⁸ establishes that private nuisance must be continuous to be actionable and therefore the above-mentioned activities which have ceased, cannot constitute a private nuisance.
- [80] In relation to the other activities complained of, Mr. Foster QC submits again that not all the claimants have given evidence of how their respective land is affected. Of the 17 claimants, only 4 gave evidence, excluding Mrs. Avril since she has no standing to sue for private nuisance. The claimants who have given evidence have admitted that they have not adduced any documents to prove the alleged nuisance. There is no evidence of the noise decibel or report from the relevant Ministry or authority to establish a foul smell emanating from the water treatment plant, though they have admitted that there are acceptable levels of noise and that what may be a disturbance or foul smell to one person may not be to another. Most of the claimants admitted they had not been to the Hotel and had never followed the humming noise to verify where it was coming from or what was causing it and therefore cannot prove that the smell or noise emanates from BDSL's property. Furthermore, the claimants have not provided any evidence to prove that the interference, if it exists, is substantial.
- [81] The claimants complain that the nuisance emanates from the Property; however, it is Mr. Springer's evidence that the Property remains primarily green space such that there could be no nuisance emanating therefrom as alleged. Mr. Springer's

¹⁸ [1957] 1 All E.R. 894.

evidence, Mr. Foster QC says, is supported by the Land Register, Map Sheets and Survey Plans. He says following **Hunter v Canary Wharf**, BDSL has the right to use its property as it chooses. The claimants cannot dictate how BDSL should use its property in the absence of an easement or other proprietary right. As to parking on the Garrison Lot, Mr. Foster QC submits that this is not mentioned in their statement of claim, and in any event, it has not been proven that such parking is part of any arrangement with BDSL or attributable to it. The claimants admitted not knowing if BDSL had any arrangement with Garrison or a third party for parking. Further following **Hunter**, the mere parking on the Garrison Lot could not amount to nuisance, just as the mere presence of a building does not constitute nuisance. The claimants have also failed to establish how blockage of the roadway, dangerous driving and honking of horns on the access road has affected their rights over their respective lands.

[82] Finally, Mr. Foster QC submits that the several of the claimants and the occupants of their homes are abnormally sensitive given their pre-existing medical conditions. He drew the Court's attention to the case of **Robinson v Kilvert**¹⁹, in which it was held a person who carries on an exceptionally sensitive trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something that would not injure anything but an exceptionally delicate trade. He submits therefore that Rosella Laurencin, Keith Fletcher, Michelle Norbert and Roston Taylor's son, who are abnormally sensitive, cannot assert nuisance. The medical reports adduced do not prove that BDSL's actions caused or exacerbated their illnesses. In any event, damages for personal injury are not recoverable in nuisance.

[83] Ms. Thomas, counsel for the claimants stated that it was no defence to an action in nuisance that the defendant's business is useful, or for the good of the public, or that it is being carried on in a reasonable manner. She cited the case of **Adams v**

¹⁹ 1888 R. 5655.

Ursell²⁰ in support, in which she says the defendant carried on the business of frying fish with the most approved appliances and gave evidence that he went through great pains to avoid nuisance. The court indicated however, that it must accept the plaintiffs' evidence that the smell of fish pervaded their homes and that they had made out a case for nuisance. She says therefore, Mr. Springer's evidence that the Hotel provides jobs and is good for economy does not provide a justification.

[84] Ms. Thomas submits that the claimants have made out their case of nuisance from incessant noise at night. The site visit showed an industrial size laundry room, industrial washing machines which emit noise, confirmed by the engineer to run on a 24 hour basis and that one could hardly hear any conversation inside the laundry room. It also showed the water treatment plant and cooling tower which operated on a 24 hour basis and that sounds from the equipment was extremely loud. The presence of an industrial sized generator at the back of house was also confirmed. She submitted that much was made of the fact that the claimants had not measured the level of noise but reiterated that there is no equipment for doing so from the Ministry. BDSL has not shown that such equipment is available, and while the claimants must prove nuisance, if the claimants were able to prove that BDSL's activity might cause nuisance then the burden shifted to the defendants to show that its activities did not amount to nuisance. All that is required is for oral evidence to be given for proof. Similarly, the claimants all gave evidence that there is a humming noise which only started when BDSL started its operations at the Hotel. She says BDSL made no attempt to prove that the noise coming from its machines was not the noise the claimants were hearing. The only place that the humming noise could be coming from is the back of house activities of the Hotel and on a balance of probabilities the claimants had made out their case.

[85] Ms. Thomas also submits the claimants have made out their case of nuisance from putrid odours from sewage. She submits that the site visit revealed that the

²⁰ [1913] 1 Ch. 269.

sewage treatment plant is only a few hundred feet from the claimants' community and is visible from some of their homes. She says the claimants smell the odour depending on the direction of the wind. On the day of the site visit, it appears that the wind was blowing in the direction of the Hotel such that there was no odour, and although it is accepted that the wind normally blows from east to west, the claimants should not be made to put up with these putrid odours for the convenience of BDSL. She mentions that the claimants were questioned about use of treated water by Sandals to water their golf course, but states that no attempt was made to show that the water used is actually raw or treated sewage. She submits that smell started when the Hotel built the sewage treatment plant, therefore on a balance of probabilities, the only place the smell could possibly come from is the Hotel.

[86] Ms. Thomas also submitted that the claimants had made out their case of nuisance as a result of noise, discomfort and disturbance from use of the road. She says that Mr. Springer admits that the road was built without approval of the DCA, and after construction applied for a change of use of the Property from green belt reserve to use for construction of the access road and back of house facilities and for placement of the water treatment plant. She submits that based on this it appears that the DCA recognized the green belt area as a buffer, which BDSL has now turned into a thoroughfare, taking all Hotel back of house activities into the claimants' neighbourhood and homes.

[87] As to the standard of comfort, she submits that the claimants do not deny that Cap Estate has hotels and that hotels require services. She says however that the case of **Crump v Lambert**²¹ is authority for the fact that BDSL is not entitled to rely on the existence of other hotels in the neighbourhood or activities undertaken in the neighbourhood in the past, if by increasing the activities they materially added to existing nuisances. Similarly, the fact that the back of the Avril's home is located on Cap Drive does not excuse the Hotel creating a nuisance at the front of

²¹ (1867) LR 3 Eq 409.

the Avril's home. Ms. Thomas argues that use of the Garrison Lot and Great House Road and Ixora Drive for parking is directly caused by and is a spill-over from the Hotel's use of its property, even if the Hotel did not authorize persons to do so or set up the floodlights themselves. It is a natural and probable consequence of the Hotel's activities and use of Great House Road and Ixora Drive as commercial roads and is therefore part of that very nuisance complained of. The claimants are therefore not precluded from complaining of this because it is not specifically mentioned in their pleadings. In support she cites the case of **R v Moore** stating that the law is that if the nuisance is the natural and probable consequence of the acts of the defendant, he cannot escape liability.

[88] Ms. Thomas submits that there is no evidence to support Mr. Springer's statement that guests of a five-star hotel are not allowed to see service vehicles or vendors. She also argues that the previous service entrance was deliberately blocked by the Hotel's new design, however that it continues to be available with a few minor adjustments. She says one could also easily reach the service area through the main entrance.

[89] Ms. Thomas says that the appropriate relief is for the court to grant the injunction. She states that where nuisance is proven, the effect of the nuisance on a person will be taken into account in determining the remedy. She relies on the case of **Shelfer v City of London Electric Company**²² where it was held that damages are appropriate where the injury to the plaintiff's rights is small, capable of being estimated in money, can be adequately compensated by a small money payment and an injunction would be oppressive to the defendant. The only remedy that would give the claimants reprieve is for the access road to be closed and the Hotel whether by its servants or agents restrained from using it. The claimants cannot be paid in exchange for sleep, or peace and quiet or the ability to have a conversation in their own home or avoiding an accident at a blind corner. Further it is not possible for the Hotel to monitor use of the road by all its suppliers and

²² [1895] 1 Ch 287.

other users. The court may take into account all the circumstances of the case but Ms. Thomas urges the court to not to take into account the cost of relocating the road as BDSL took the law into its own hands and the financial risk of constructing the road and facilities without DCA approval. She urges the court to take into account that the access road and facilities were constructed illegally.

Analysis

- [90] Private nuisance has been defined as “acts or omissions generally connected with the user or occupation of land, which cause damage to another person in connection with that other's user of land, or interference with the enjoyment of land or of some right connected with the land.”²³ Nonetheless, it is accepted that a private nuisance may exist in the sense of personal discomfort such as nuisance by noise as opposed to actual injury to the claimant's property.²⁴ Such interference with comfort and convenience “is emphatically a question of degree ... Such things to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable”.²⁵ To so constitute, the established standard is that the act complained must be “considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as 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.”²⁶
- [91] Further, whether an act constitutes a nuisance must be determined not merely by an abstract consideration of the act itself but by reference to all the circumstances of the particular case.²⁷ The factors the Court will therefore take into account include the nature and extent of the interference; the character of the locality in

²³ Halsbury's Laws of England/Nuisance (Volume 78 (2018))/1. Scope of Nuisance/(1) Description and Classification/(i) Public, Private and Statutory Nuisances/101. Meaning of 'nuisance'.

²⁴ Lawrence and another v Fen Tigers Ltd and others [2014] 2 All E.R. 622

²⁵ Tort: The Law of Tort (Common Law Series)/Chapter 22 Nuisance/B Private Nuisance/Substantial interference in cases of interference with comfort and convenience; Gaunt v Fynney (1872) 8 Ch App 8 at 12, per Lord Selborne LC. See also Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145 at 151, per Veale J.

²⁶ Walter v Selfie (1851) 4 De G & Sm 315 at 322 per Knight Bruce V-C page 322.

²⁷ Sturges v Bridgman (1979) 11 Ch D 852 at 865 per Thesiger LJ

which the complainant is living and any similar annoyances which exist or previously existed there²⁸; and the reasonableness of the defendant's conduct.²⁹ The Court may further take into account the time of commission of the act complained of, the place of its commission, the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights, and the effects of its commission.³⁰

The Character of the Locality

[92] It has often been quoted that “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”³¹ and “a dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country”³² In **Lawrence v Fen Tigers**, the concept of ‘character of the locality’ was helpfully described as “the established pattern of uses in the locality”.³³ It was acknowledged that it may not conform to a single homogenous identity but may consist of a varied pattern of uses all of which must coexist.³⁴ However, Lord Carnwath observed that:

“The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with.”³⁵

[93] BDSL’s contention is that the claimants admit the presence of other hotels in Cap Estate and that it is partly commercial. Therefore, the claimants should submit to the consequences of the commercial uses of the area, including its use of the access road and the facilities which are necessary for the functioning of the Hotel. I cannot accept this argument for several reasons. The law in this regard is as

²⁸ Halsbury’s Laws of England/Nuisance (Volume 78 (2018))/1. Scope of Nuisance/(2) Nuisances between Neighbouring Properties/(ii) Injury to Health and Comfort/124. General principles.

²⁹ Tort: The Law of Tort (Common Law Series)/Chapter 22 Nuisance/B Private Nuisance/Substantial interference in cases of interference with comfort and convenience.

³⁰ Halsbury’s Laws of England/Nuisance (Volume 78 (2018))/1. Scope of Nuisance/(2) Nuisances between Neighbouring Properties/(ii) Injury to Health and Comfort/124. General principles.

³¹ *Sturges v Bridgman* (1879) 11 Ch D 852 at 865, per Thesiger LJ.

³² *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 185, per Earl of Halsbury LC.

³³ At paragraph 60.

³⁴ At paragraph 181.

³⁵ Paragraph 183.

stated in **Lawrence v Fen Tigers** and established as long ago as **Walter v Selfie**.

In **Lawrence v Fen Tigers**, Lord Neuberger P. stated plainly:

“[A] defendant, faced with a contention that his activities give rise to a nuisance, can rely on those activities as constituting part of the character of the locality, **but only to the extent that those activities do not constitute a nuisance...**

Similarly, any other activity in the neighbourhood can properly be taken into account when assessing the character of the neighbourhood, **to the extent that it does not give rise to an actionable nuisance or is otherwise unlawful.**”³⁶

[94] In **Walter v Selfie**, J. L. Knight Brice V.C. said:

“It has been suggested that the kiln and clamp which are in the neighbourhood, independently of the defendant’s property, preclude the plaintiffs from complaining against him. I do not, however, so view the matter. That clamp has not, nor has the kiln, been ever treated by the defendant as unlawful, or a grievance. They are considerably more remote from the plaintiffs’ house than the defendant’s clamp is, and, if a nuisance, do not form a reason why the defendant should set up an additional nuisance.

There is I think no ground for inferring a license to him or for saying that the inconvenience to which I have referred must not, if not wholly occasioned anew, be much increased by the course taken or proposed by him...”³⁷

[95] He further stated:

“It has been suggested, as a ground for interfering with the defendant, that, in making and burning bricks on his land, he is only using his own soil, in a manner at once common and useful, and the most convenient to himself... The argument adopted would prove too much. There are notorious instances of various kinds in which the rights of a neighbouring occupier or neighbouring proprietor prevent a man from using his own land, as, but for those rights, he profitably and usefully and lawfully might. Nothing is better recognized than that a man may be disabled from building on his own land as he may wish by reason of his neighbour’s rights.”³⁸

[96] The authorities dispel BDSL’s contentions at once. While the existing use of land in Cap Estate for hotel development, both by BDSL and by others is relevant to

³⁶Paragraphs 74-75.

³⁷ Page 323.

³⁸ Page 324.

assessing the character of the neighbourhood, it is not the case that the mere presence of hotels and of commercial activity justifies BDSL's use of the access road and facilities. While the presence of hotels and related commercial activity may be taken into account in assessing the character of Cap Estate, there is the qualification that the Court is entitled to consider such activity only to the extent that it can be carried out without creating a nuisance.

[97] The Court accepts that hotels are operated in Cap Estate as they have been for a number of years and that such activity forms part of the character of Cap Estate. However, it remains primarily a quiet and upscale residential community. That factor cannot be ignored. The claimants have all stated in their evidence that the commercial activity of the previous Smuggler's Cove Hotel never caused any interference to their comfort and enjoyment of the land. However, it is the new uses and the manner in which BDSL uses its land which now causes substantial interference. Therefore, to simply say that the claimants must submit to BDSL's use of the access road and facilities is unsustainable.

[98] Further, following **Walter v Selfie**, it is clear that whether the use made of the land is useful or necessary for operation of the Hotel or is good for the economy is of no moment if it causes substantial interference with the claimants' enjoyment of their land; similarly if BDSL's activities are only one of several activities constituting nuisance in the area, BDSL may still be restrained from such activity.

Nature and Extent of Interference

[99] The claimants have failed to adduce evidence to establish that the nature and extent of interference with their enjoyment of their land and their personal comfort from an objective perspective is substantial and non trivial, which is what is required.³⁹ I extract the following passage from the text, **Tort: The Law of Tort (Common Law Series)**:

"The gravity of the interference is assessed objectively. This follows from

³⁹ Baker v Rindle at paragraph 41; Elton Scatliffe v Dwite Flax at paragraph 13 and 16;

the fact that even in cases of interference with comfort or convenience, the injury is strictly speaking to the land, not the persons occupying it. **The question is not, therefore, whether the claimant personally considers the discomfort or inconvenience to be substantial, but whether the reasonable person in the claimant's shoes would take that view of the matter. So in considering what is an actionable nuisance, regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people.** The idiosyncrasies of the claimant confer on him no extra protection: the law disregards the special needs of invalids, or the fact that somebody has a sensitive nose.”⁴⁰

[100] The evidence for the claimants consists of those who provided witness statements describing what they see, hear, smell and feel as a result of BDSL's activities and the impact on their daily personal lives. While this is valuable evidence which the court must consider in respect of the subjective analysis, they have not provided evidence of the volume of noise or the intensity of the smell, by which the Court could objectively determine that it is excessive and that no reasonable person could endure it, as required to make out a claim in private nuisance.

[101] The cases illustrate. The trial judge in **Lawrence v Fen Tigers** had both oral and documentary evidence in relation to the level of noise emanating from the Stadium and Track. The House of the Lords summarized the evidence he considered in determining that the defendants' activities constituted a nuisance:

“This evidence consisted of: (i) letters, mostly of support, sent to the planning authorities in connection with the applications for, and renewals of, the planning permissions for the use of the Stadium and the Track for the activities described above; (ii) the advices given in connection with those applications and permissions by planning officers to planning committees; (iii) the planning permissions themselves; (iv) letters sent to the local authority between 1992 and 2010, complaining of the noise; (v) **records kept, and letters sent, by the local Environmental Health Officers**; (vi) the oral evidence of the appellants, four other residents in the locality on behalf of the appellants, and Mrs Relton and at least five other residents for the respondents; (vii) **one expert acoustic witness for each side**; (viii) **reports on noise levels from various public bodies including the World Health Organization, the Department of the**

⁴⁰ Tort: The Law of Tort (Common Law Series)/Chapter 22 Nuisance/B Private Nuisance/Substantial interference in cases of interference with comfort and convenience/Gravity of the interference assessed objectively [22.44].

Environment, the National Physical Laboratory, and the Institute of Sound and Vibration Research.”⁴¹

[102] The Court in **Gillingham BC v Medway (Chatham) Dock** had this evidence before it:

“I have heard evidence from experts who described the area and measured traffic flows and produced numerous tables recording their findings. I also heard from experts in noise and vibration who gave information about how noise levels are measured and the units used. They produced tables of figures, diagrams and graphs illustrating their measurements and recording their findings. I was helped by these witnesses and they provide a useful check on the evidence of the residents... Dr Walker, for the plaintiffs, was of opinion that the disturbance now, that is after the departure of Norfolk Line, is quite unacceptable...

Mr Ratcliffe, the defendants' expert, was also helpful. He tended to concentrate more on various types of average noise levels and concluded that 20% of the population of Britain is subjected to similar average levels to those in Bridge and Medway Roads... Mr. Ratcliffe told me he could not say that an average person would not be woken by an HGV passing by his window...

Mr Ratcliffe produced a chart depicting the level of common sounds measured in decibels, the dB(A) scale. This was agreed. It is interesting to note that a quiet bedroom is about 35 on the scale, at 55 communication starts to become difficult, a car travelling at a steady 60 kph at 7 metres distance is just over 70, a heavy diesel lorry at 40 kph at 7 metres is 85, a pneumatic drill at 7 metres is 95 and 120 is the threshold of pain. Dr Walker put a normal television programme with music at about 60. Many lorries' peaks were recorded on Dr Walker's graphs at about 80. However, he explained without challenge that the true peaks were in excess of this measurement but were recorded at 80 because of the restrictions of the equipment used to compile the graph. His maximum reading by alternative direct measurement was over 100 dB(A). He also made the point that lorries, particularly in low gear, generate low frequency sound which, even inside a house with double glazing, would be 60 dB(A) or more. A busy general office is 60 dB(A) according to Mr Ratcliffe's chart.”⁴²

[103] In the case of **Elton Scatliffe and another v Dwite Flax and another** from our jurisdiction, the claimants claimed that the defendants wrongfully caused and/or

⁴¹ At paragraph 19.

⁴² At page 931.

permitted unreasonable volumes of noise, noxious and offensive fumes, vapours, smoke, dust and other particulate matter to be emitted from their property during the day and night, on business days and holidays with such frequency as to cause a nuisance to them. In respect of the evidence, the Court noted:

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

In addition, on 2nd December 2014, he conducted a site visit to assess the conditions at that time... From his account, he walked the site (estimated to be about 1.5 acres) for about 10 minutes, took several photographs of the site and at paragraph 4.3 of his Reports he notes...

When he was examined under Oath, Mr. Douglas confirmed the observations in his Report...”⁴³

- [104] The challenge is as the claimants acknowledged in cross examination, that what may be acceptable or objectionable to one person may not be to another. The claimants complain of nuisance by noise however they present no evidence as to the volume of the noise emitted from BDSL’s property and activities. They cannot even say in the instance of the humming noise what the source is. Some say the humming noise has abated; others say it has not. They suggest the noise is constant but there was no indication that it is loud. It may be that a low but constant noise is objectively intolerable but the Court would not know as no evidence has been produced as to the effect of the nature and frequency of such a sound on a reasonable person according to ordinary notions of comfort. As to noise from the use of the road, the claimants have identified noise from heavy vehicles and trucks, revving of engines, honking of horns, from music, talking and the like. Save Ms. Avril’s log however, there is no evidence of the frequency at which vehicles pass and music and shouting is heard at various times of the day

⁴³ Claim No. BVIHCV2010/0053 at paragraphs 36-39.

and the volume of noise. Mrs. Avril's log records the periods of two month's – January and February 2017, during which there were water trucks passing, which several of the claimants say continued up until May 2017 the latest and which the defendants say was temporary and abated from March 2017.

[105] The Court accepts that the claimants experience interference from noise, but is it above what is tolerable to the ordinary person in volume and frequency? The claimants indicated that they sought the assistance of the Environment Department and the Ministry of Health in measuring the noise levels, however the equipment needed was not available. The Court would not necessarily expect the claimants to have the resources and facilities utilized in the English cases mentioned above, but certainly one would expect even a report from an expert – such as an officer at the Ministry of Health or Environment Department or EIA consultant like in **Scatliffe v Flax**. However, no significant attempt to provide the Court with evidence other than the testimony of the claimants appears to have been made.

[106] Similarly, the claimants complain of a foul odour, yet no evidence has been presented as to the character of the odour and its intensity or the frequency with which it is smelt. The claimants say they smell the odour sometimes, depending on the direction of the wind. Several of the claimants stated that they think that the wind direction is away from their homes, that is, that the Hotel is downwind from their homes. Save what the claimants think, there is no evidence of the actual wind direction or whether the wind direction varies. There is also no evidence of the nature/character of smell. To my mind there would be a difference between the smell of raw sewage and treated water. Is the smell very intense in strength or less so? Is it constant or infrequent? Is it such that the ordinary person would find it unbearable? Mr. Avril says it is nauseating and causes him headaches. Is he abnormally sensitive, considering that other claimants find it unpleasant, and guests and staff of the Hotel, who are downwind of the treatment plant have not complained at all? What is the court to make of the claimants'

testimony without more?

[107] My observations on the state of the claimants' evidence are further strengthened by the fact that not even a site visit could without more confirm some of what the claimants complained of. Ms. Thomas in her submissions suggested that one could not hear conversations in the laundry room because of the high levels of noise but the Court does not recall having that experience and one must consider that what one hears in the laundry room may be different from that heard from some distance away. I think this is a clear demonstration of how dangerous it would be to simply rely on what I perceived from the claimants' evidence alone or even from my own observations from the one site visit.

[108] Further and in any event, I cannot agree with Ms. Thomas' submission that if the claimants were able to prove that BDSL's activity might cause nuisance then the burden shifted to the defendants to show that its activities did not amount to nuisance. She has provided no authority for this proposition. The true legal position is that the claimants are required to prove their case and there is no burden on the defendant to disprove the claimants' case, as Ms. Thomas suggests. Ms. Thomas states that all that is required is for oral evidence to be given for proof. However, it is trite that proof by whatever means must meet the required standard which in civil cases is on the balance of probabilities.

[109] Without any objective evidence of the character, intensity, duration and frequency of the interference by noise and odour to substantiate the claimants' complaints, the Court is unable to make a determination as to the objective element of the test – whether the reasonable ordinary person would be similarly affected or whether the claimants are particularly sensitive. Therefore, that BDSL's interference with their personal comfort and enjoyment of their land is substantial has not been made out on a balance of probabilities and the claim must fail.

Who can Sue

[110] In any event, I agree with Mr. Foster QC's statement of the law from the case of

Hunter v Canary Wharf, that only a person with interest in land is entitled to bring a claim in private nuisance. However, I do not accept at this stage of the proceedings that only Charles Avril has proved his interest in his parcel of land as alleged. Though the other claimants who provided witness statements may not have exhibited the Land Register in respect of their respective properties, the Court is entitled to take judicial notice of the fact of their ownership, given that the Land Registers were disclosed in the earlier application for injunctive relief and included among documents disclosed in the substantive claim. Further, counsel for BDSL proceeded throughout the matter referring to the claimants' properties by block and parcel numbers and to the survey maps and plans.

- [111] I do accept, however, that some claimants like Mrs. Avril and Michelle Norbert who are not endorsed as registered proprietor on the Land Register would otherwise have to prove their interest in order to succeed, which has not been done. As noted above, the claimants who have given no evidence before the Court have failed not only on the objective element but also subjective element of the test for establishing private nuisance. Without any evidence of the effect of the alleged interferences on their enjoyment of their properties, their claim could not in any event have been maintained.

Conclusion

- [112] In light of all the foregoing discussion and for all the reasons set out above, the claimants have failed to prove their claim on a balance of probabilities. The result is that the claim must be dismissed.
- [113] Nonetheless the court takes the opportunity to note that the law of nuisance is aimed at striking a balance between the right of one landowner to use his land as he wishes and the right of a neighbouring landowner to be protected from interference with the enjoyment of his land. I am of the view, that this balance may be achieved without the intervention of the court in many instances, if neighbouring landowners act reasonably and with due consideration for each

other. I would encourage the parties in this case to endeavour to do so going forward.

Order

[114] The Order is therefore as follows:

- (1) The claim is dismissed.
- (2) The claimants shall pay prescribed costs to the defendant in accordance with CPR 65.5.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar