

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)**

CLAIM NO. AXAHCV 2014/0049

BETWEEN:

WEST INDIES CONCRETE COMPANY LIMITED

Claimant/Ancillary Defendant

AND

CUTELYN CARTY-REY

CUTELYN CARTY-REY

(as Executrix for the Estate of Hyacinth Carty, Deceased)

Defendants/Ancillary Claimants

Appearances:

Mr. John Carrington QC, with him Mr. Kerith Kentish for the Claimant/Ancillary Defendant
Ms. Tara Carter, for the Defendants/Ancillary Claimants

2018: December 11;
2019: August 12.

JUDGMENT

[1] **PRICE-FINDLAY, J.:** This is a claim brought by the Ancillary Claimants (hereinafter Ancillary Claimant) against the Ancillary Defendant for nuisance and negligence.

[2] The Ancillary Claimant is one of the executors of the estate of Hyacinth Carty, the mother of the Ancillary Claimant. Hyacinth Carty was at the time of her death the registered owner of the Parcel 12, Registration Section East Central, 8921 B12 with a house situated on the said parcel.

This property formed part of the estate of Hyacinth Carty deceased. The Ancillary Defendant's cement plant was constructed in 1985 in close proximity to the Ancillary Claimants house. Though no evidence was led to support, the Ancillary Claimant asserted that prior to her death in 2003 the Ancillary Claimant's mother made complaints to the department of Environmental Health about the dust, noise and other forms of pollution allegedly emanating from the Ancillary Defendant's operations. The Ancillary Claimant brings the claim both in her private capacity and in her capacity as one of the executors and trustees of the late mother's estate. The other trustee being her sister who gave evidence for the Ancillary Claimant in the proceedings.

PRELIMINARY POINTS

(i) **Does the Ancillary Claimant have standing to bring the action in nuisance and negligence?**

The Ancillary Defendant's position is that an action for nuisance is only maintainable by a person who is in actual possession of the land, either as a freeholder, tenant or licensee with exclusive possession or a reversion if the nuisance is of a sufficiently permanent nature as to damage his reversion.

They further postulate that if the claim is founded on the doctrine of **Rylands vs Fletcher**, the Ancillary Claimant would have to have an interest in the land before she could bring the action. They argue that the Ancillary Claimant did not derive an interest in the property in question in her personal capacity merely because she lived in the house for a period of time. Mere occupation is not sufficient. The court agrees with the proposition that mere occupation of property does not give rise to an interest in the land. Normally, in order to be able to bring an action in nuisance one must have an interest in the land/property in question. The Ancillary Claimant here asserts that she is entitled to bring the action in her capacity as one of the executors of her mother's estate. She asserts that gives her the requisite interest in the property formerly belonging to her mother. The Ancillary Claimant referred to Williams Martinez and Sunnucks, Executors, Administrators and Probates¹ at page 1152 paragraph 59-20, which states:-

¹ 21st edition of Williams on Executors and 9th Edition of Mortimer on probates.

“If an injury is done after the death of the testator or intestate to any property forming part of the estate, the executor or administrator may bring an action for damages for the tort. In such circumstances, he has this option either to sue in his representative capacity and plead as executor or administrator, or to bring the action in his own name and in his individual character.” It goes further, “The executor or administrator has this right of action and the option as to the form in which it may be brought whether or not he has actual possession of the property”

The Claimant also cites Halsbury's Laws² at paragraph 825:-

“As the legal representative is in point of the law the owner of the property of the testator or intestate, he may maintain claims in respect of injury done to that property after the death of the owner, whether he has been in actual possession of it or not, and he may claim either in his individual capacity or in his representative character.”

In the face of these authorities, the Court finds that the Ancillary Claimant has the requisite standing as one of the executors of her mother's estate to institute and prosecute these proceedings both in her name and in her representative capacity.

(ii) Does the Claim fail because the second executor/trustee was not made a party to the action?

There is a duty of trustees to act jointly where there are more than one.

Does this mean that the trustees must bring the action in their joint names or as in this case one trustee brings the action in her name while the other supports the action by giving evidence in the matter?

The Court does not view this situation as one where there is a delegation of the duties of a trustee by one to the other.

² Halsbury's Laws of England 4th Edition Reissue Volume 17(2) paragraphs 814 and 825.

It is necessary to have the concurrence of all the trustees if action taken on behalf of the trust is to be successful, but does it require that all the trustees bring the action or can one trustee file the action once there is the consent of the other trustee(s).

In this case the Court finds that both trustees acquiesced in the filing of the action. The Ancillary Claimant was the person who filed the action on behalf of the estate, but the second trustee under the Will, her sister actively consented and supported the action by giving evidence in the matter for and on behalf of the Ancillary Claimant in her capacity as executor of the deceased woman's estate.³

(iii) **Is the Claimant's claim statute barred?**

The Court is of the view that the Claim is not statute barred. The Ancillary Claimant can bring the claim either in her own right or in her capacity as executrix and trustee of her mother's estate once she believes that there is something potentially damaging to the estate. The claim here in nuisance (at least) is a continuing one and if the Court finds that there is a nuisance it is a nuisance that is a continuing one.

Having decided the preliminary points, I now turn to the substantive matters.

[3] **The Claim**

The Ancillary Claimant's claim is framed in two ways,

- (i) Nuisance by way of a **Rylands v. Fletcher** claim, and
- (ii) Negligence

With respect to the claim of nuisance the Ancillary Claimant claims that the Ancillary Defendant has caused unpleasant smells, fumes airborne sediment, contamination of Ancillary Claimant's water supply and intense dust emissions due to the operation the Ancillary Defendant's cement plant.

Further that the Ancillary Defendant has operated the said plant in a residential area and has failed to adhere to environmental and safety standards for reasonable batch plant operations. The

³ Luke vs South Kensington Hotel Co. (1879) 11 Ch. D 121

Ancillary Defendant's activities have interfered with her use and enjoyment of the property and interfered with her brother's enjoyment of the property as he has a life interest under the Will of his mother.

[4] **The Evidence**

The Ancillary Claimant stated in her evidence that she is one of the executors of her mother's estate which included the house the subject matter involved in these proceedings. By way of her mother's Will her brother Edwin received a life interest in the property and after him, the grandchildren of the deceased would benefit. She states that they wished to rent the portion of the property not occupied by her brother but could not do so because of the cement dust, particles, sediment and noise.

[5] No evidence of any attempt to rent the premises was placed before the Court. Even though the Ancillary Claimant claimed that her mother filed claims with the Environmental Department about the Ancillary Defendant no evidence of this was presented to the Court.

[6] The Ancillary Claimant also stated that she lived at the property from 1973 to 2014 and that she experienced discomfort and inconvenience as a result of the Ancillary Defendant's plant.

[7] She and her family members had to inhale smoke from burning bags and to clean windows frequently, washed porches daily and they were unable to open the windows of the house. They could not drink the water from the cistern as it was contaminated. They had higher electrical bills from running air condition units. They purchased purifiers for the house and could not hang clothes outside; they had to change their bed linen daily.

[8] They planted trees to the east of the house in an attempt to minimize the dust, and purchased bottled water for drinking, cooking at least three times a week for several years. She claimed that the property was devalued but did not offer any evidence of this to the Court. In fact the Ancillary Claimant placed no bills, invoices or receipts which would have substantiated her claims to the Court.

- [9] She further testified that the plant is about 400 feet away from the property and is located on a hill and that they are affected by the downwind. The Court paid a visit to the site and observed both the location of the plant and the downwind referred to by the Ancillary Claimant. She alleged that the Ancillary Defendant stores sand, gravel, aggregate and other materials outside the plant and they are generally uncovered.
- [10] She further stated that the wind blows downhill and blows these exposed materials onto and into the property. She described the cement being filled by a backhoe holding strap bags over a tall canister like piece of storage equipment. She also described loose dust and cement is poured into the canister. This she says goes on for hours at a time.
- [11] She took photographs and videos of the procedure she described and the Court had the benefit of seeing both pictures and videos during the course of the trial. She spoke of monies expended on various items but did not produce any documentation in support. She admitted in cross examination that there were no zoning regulations at Deep Waters and that the Ancillary Defendant had a trade license to operate. She recalled the owner of the Ancillary Defendant Company receiving an award for something. She could not say that red soil blows around the area in the dry season.
- [12] She admitted that the property is very near the public road, approximately six feet from that road, and that it is a fairly heavily trafficked area with both cars and trucks. The road is paved in part and unpaved in other parts. She admitted that she did not know that cement was kept in double plastic bags. The plants, the air condition units and satellite dish are all on the eastern side of the house, as is the cement plant.
- [13] The cistern water at the house is not for drinking, it is for washing and bathing. The cistern has filters. They clean the cistern every year or two. The windows in the house have not been replaced since 2008. The roof was replaced in part in 2004 nothing has been done to the roof since then. She testified that the cement dust does impact the property and denied that dust in the house was caused from the house being so close to the road. She admitted that Anguilla had no human or environmental standards regarding the operations of cement plants.

- [14] Her brother, Edwin Carty testified that he has a life interest in the property at Deep Water and lives at the property. He has lived at that property since 1971 to present and that he has had dust problems, not being able to use cistern water, having to install air conditioning units, keeping the windows shut, buying a generator to keep electricity costs down. All this he says as a result of the dust emanating from the Ancillary Defendant's operations. He also stated that house is down wind of the plant and the cistern water is always contaminated with cement particles and other materials from the plant.
- [15] He stated that with all the noise fumes and dust from the plant, he is unable to enjoy the property as he should. In cross examination he confirmed that the cistern water is used for bathing, doing laundry, brushing teeth but not cooking. He testified that the plant operates until 4:00 p.m. but there are some days it goes on after 4:00 p.m. but that the plant is not operational when he returns home from work after dark. He stated there is nothing preventing him from opening windows after dark but said that the loose dust would still affect him when the windows were open. He could not say what concrete smells like. The last time he was on the roof of the house was a few days before the trial. He went to inspect the solar panels. These solar panels were installed about two years prior to the hearing. Whilst on the roof he observed a lot of loose cement dust there.
- [16] Sandra Gumbs also testified on behalf of the Ancillary Claimant. She is the second executor and trustee of the estate of Hyacinth Carty. She spoke to the contents of the Will with respect to renting out part of the property for the benefit of the grandchildren. She stated they were unable to do so because of the dust, fumes and noise from the plant. She too speaks of complaints made by her mother about the plant and its operations.
- [17] She observed that the windows had to be changed, the roof repaired, clothes could not be hung outside and they could not drink the cistern water. They could not play outside due to the dust burning their eyes. Unfortunately, she moved from the property in 1993 and could give no evidence of what the situation was at the property presently.
- [18] The expert approved by the Court was the last witness for the Ancillary Claimant, Evelyne Apire-Hodge. She was the Chief Executive Officer for the Water Corporation of Anguilla. She holds a

Master of Science degree in Water and Environmental Management and a Bachelor's degree in Environmental Management.

[19] In her report she stated that there is no known international standard document governing the operation of similar plants. There are general standards, operational procedures and guidelines as to how a cement plant can be modelled and operated to reduce harmful adverse effects on the environment.

[20] She set out in great detail in her report what could be done to deal effectively with fugitive dust, waste water runoff, movement of sand and gravel and cement, storage of piles of sand, gravel and aggregate, and cement dust control among other things. She further detailed the method of storage of the raw materials used by the Ancillary Defendant. Sand, gravel and cement bags were stored at the edge of the plant's boundary. There were also pictures in the report showing the open areas where these items were placed on the plant's compound as well as photos showing the loading of cement bags into the silo.

She opined that the operation of the plant cause pollution and set out five categories of such pollution:

- 1) Air pollution (automobile and dust particles)
- 2) Water pollution
- 3) Land pollution
- 4) Noise pollution
- 5) Visual pollution

[21] The extent of these pollutions forms, to the nearby environment ranges from a radius of approximately 10 to over 1000 meters from the plant. She admitted that while she had a general knowledge of air quality matters in regard to pollution, air quality tests would have to be carried out and the expertise of an air quality specialist would be required.

[22] She stated that the air pollution caused by dust particles can be described as loose dust emissions given off by the plant as a result of erosion.

- [23] She opined that dust at the plant is as a result of onsite storage of aggregate and the loading process cement dust and aggregate. She included pictures of the uncovered mounds of what she described as “dust generating cement rubble.” She testified that smaller particles such as sub 10 micron size found in cement dust are blown up to many miles away from the source of their origin by way of a gliding movement.
- [24] In conditions of strong wind dust can be blown up to thousands of miles from the plant. Further, fugitive dust gets into the air via mechanically means as well. This could result from the movement of automobiles used for the purpose of cement delivery. It is further exacerbated by the fact that the plant has a mainly loose surface for a road which generates more dust than a paved road. Trucks and front loaders as well as conveyer transfers also result in fugitive dust, as well as the unloading of aggregate from the delivery trucks to the storage piles. The process of filling the cold bin with aggregate in the bucket of the front end loader and loading the silo with cement is also a source of this fugitive dust.
- [25] Wind erosion of the aggregate storage piles which are stored in a heap in the open environment is also a source of this fugitive dust. The dust which she observed in the area implied that rain water harvesting for storage in cisterns would have to be condemned as the risk of contamination of the water supply would be high and such water would not be recommended for human consumption.
- [26] While she stated that she is not an expert in meteorology, she stated that in Anguilla prevailing winds, blow from east to west and that usually winds blow from areas of higher altitudes to areas of lower altitudes. She stated that this means that most of the time the wind blows from the direction of the plant to the Ancillary Claimant’s home.
- [27] The site visit undertaken by the Court on the afternoon of the hearing did experience the wind blowing from the direction of the plant downward towards the direction of the Ancillary Claimant’s home from the direction of Ancillary Defendant’s plant. The Ancillary Claimant’s home being approximately 400 feet from the Ancillary Defendant’s plant.

[28] She testified that she had observed dust particles at the Ancillary Claimant's house when she visited in order to prepare her report. Helpfully in her report she provided photos of what she observed at the Ancillary Claimant's house.

[29] She set out what she opined were the sources of fugitive dust at the plant. They were as follows:

Sources of Fugitive Dust at the plant:

- The unloading of aggregate or sand from truck onto storage piles;
- The movement of aggregate and sand to maintain the shape of storage piles;
- The process of filling the bucket of the front-end loader for transfer to the hoppers;
- Material falling from the bucket of the front-end loader into the cold bin. This however is not a big concern as the particles are heavier and coarser than cement dust.
- Wind erosion of the sand and aggregate storage piles.
- The movement of cement and other delivery trucks and front-end loaders over the haul roads and yards surfaces.
- Aggregate and sand falling from the conveyor, or bucket of the front-end loader onto the ground for heavier particles and gliding into the air for the lighter particles.
- Filling of the cement into the cement silos. This is of the most concern due to the dust's chemical composition.
- Emissions are generated as the cement, sand and aggregate are transferred to the concrete mixing truck.

- Carbon monoxide fumes from the automobiles moving to and fro would blow in the direction of the Ancillary Claimant's family house.

She further stated the effects of dust particles on the Ancillary Claimant's house.

Extent of the effects of dust particles, fumes, sediments emissions by the plant on the Ancillary Claimant's family house:

- Condemnation of the rainwater harvesting facility of the house as a result of dust and sediments settling on the roof of the Ancillary Claimant's family house. This has meant that water had to be purchased in order for the cistern to be utilized thus increasing expenditure on water purchase even in the rainy season.
- Installation of air conditioning facilities to use indoor air as opposed to using fresh air. This translates to increased energy costs to constantly run air conditioning as opposed to fresh air.
- Socially, having air conditioning and air purifiers installed has called for a lifestyle change for the residents of the Ancillary Claimant's family house as there is an inconvenience of having to use purified air at all times.
- It was observed that the windows and plants (acting as dust buffers) at Ancillary Claimant's family house were stained with dust evidently from the plant's emissions. The expert witness observed this while taking water samples at the Ancillary Claimant's family house. At this time, the plant was in operation.

[30] It is important to bear in mind that the Ancillary Claimant's family house is less than 10 meters away from the main road which too can contribute to dust albeit in negligible quantities due to the road being paved. Furthermore, it should be noted that the dust from the plant is greyish-white in colour (cement) as opposed to black dust from the road.

- [31] She tempered her opinion by pointing out that due to the proximity of the Ancillary Claimant's house to the main road, this factor also contributed to the dust, albeit in her opinion, in "negligible qualities" due to the road being paved. She further noted that the dust from the plant is greyish-white in colour where the dust from the road is black.
- [32] She stated that based on the location of the plant dust particles, fumes, sediment and other pollutants could affect the Ancillary Claimant's water supply if rain water harvesting was practiced by the family. If the cistern was left open for several days while the plant was in operation or if there is high traffic on the road, then pollution from fugitive dust especially can occur.
- [33] A test of the cistern water of the Ancillary Claimant was conducted by the staff of the Water Lab Department of Health Protection. Three samples of the bottle water of the cistern were tested. A fresh load of water had been purchased and refilled by February 2016 at the time of the testing: This change of water could give different results as opposed to water which had been in the cistern for months or water obtained through rain water harvesting.
- [34] All the guidelines tested matched or were in close range to the WHO standards except for turbidity. Turbidity being the cloudiness or haziness of a fluid caused by large numbers of individual particles that are generally invisible to the human eye, similar to smoke in the area. The measurement of turbidity is a key test of water quality.
- [35] She stated that the WHO recommended value of turbidity in potable water is 1 NTU – (Nephelometric Turbidity Units) whereas the Ancillary Claimant's cistern water was 32.3 NTU. This level of turbidity was very far off from the safe water drinking standard. In cross examination, the expert stated that she had visited the plant and the Ancillary Claimant's home, the plant twice and the home once. She spent approximately one to two hours at the plant on her first visit and under one hour on her second visit. The plant was in operation during her two visits as well as when she visited the Ancillary Claimant's house.

- [36] She did not conduct any chemical analysis of the dust she saw at the Claimant's house but she stated she observed the impact of dust on Carty's house. She did state that she could not say that the dust she saw was concrete dust.
- [37] On one of her visits there were strong wind blowing dust she did not measure the wind speed and she did not know if the strong winds she experienced on that visit were normal for that area. She observed and checked the direction of the wind by watching how the vegetation was blowing and the direction of the dust.
- [38] She observed dust coming from the road and she also observed dust in the field area between the plant and the Ancillary Claimant's house. She found a chemical usually in cement namely calcium carbonate and lime when she tested the Ancillary Claimant's cistern water. She did not observe a roof over the conveyer belt nor did she recall seeing plywood over that belt. She could not access the silo and she made no enquires as to whether there were dust filters. The concrete was mixed in trucks and she observed no smell that she could recall.
- [39] It was unlikely that gravel would be transported at normal wind speed to the Ancillary Claimant's house. She did not observe gravel in the storm wind being transported to the Ancillary Claimant's house. She did not test sand for moisture content and agreed that if sand was moist the likelihood of air transport would be lessened. The cement on site was stored in plastic bags which were sealed. She did not go onto the roof of the Ancillary Claimant's house nor did she test the dust on the windows of the Ancillary Claimant's house. She did not carry out any scientific tests to determine that the dust from the Ancillary Claimant's house came from the Ancillary Defendant's plant.
- [40] The Ancillary Defence's first witness was Robert Guy whose property is to the north of the plant. His land shares a common boundary with the plant. His home was built on 1996, but he has not lived there for a while but visits the property on a daily basis to look after his dogs. He can see the silo, the piles of sand and gravel and hear the working of the equipment and the men working in the yard.

- [41] He has had no problems living next door to the plant and had never seen dust on his property from the plant. Even if there is dust, Anguilla is a dusty island so he could not be sure where the dust comes from. He has had no troubles with dust gathering on his windows, his car or any part of his property, nor has his house suffered any damage or defect by reason of being close to the plant. The Ancillary Defendant's owner spoke to him about using filters to minimize dust emissions and since 2008 he has had no issues with dust from the plant.
- [42] In cross examination, he stated that wind in the area blows from east to west and that on occasion he has observed dust from the plant in the air around the plant. He confirmed that the sand and gravel stored on the Ancillary Defendant's premises is usually uncovered. When the plant first started there was an issue with dust but after something was built over the plant dust was no longer a problem. It is to be noted that this witness's home is upwind of the cement plant.
- [43] Henley Ruan gave evidence which took the defence case no further.
- [44] Brenda Phillip is the daughter of the owner of the Ancillary Defendant's company and the Administrative Manager of the plant. She deals with the accounts, orders, customer service and other general office administrative duties relative to the plant. She testified that the plant stores aggregate, sand and cement that is delivered to the plant. She can clearly see from her office the piles of sand, aggregate and white jumbo bags of cement stacked to the west of the plant. Storage of the materials to make concrete is situated on a hill some forty feet above street level. Aggregate is stored on the ground and cement in sealed bags. Once opened the cement is stored in a silo equipped with a dust collecting venting system. The sand and aggregate are stored in the open air.
- [45] She never received any correspondence from the Ancillary Claimant, her solicitors or anyone on behalf of the Ancillary Claimant's mother's estate about any nuisance or negligence in the operation of the Ancillary Defendant. She could find no correspondence relating to any such claim from May 2008 to present. The Ancillary Claimant was a customer of the Ancillary Defendant and never mentioned to her any problems with respect to dust, odours, smells or anything else. She is aware that the Ancillary Claimant's mother owned a property not too far from the plant among other

things. She is aware that the Ancillary Defendant has a dust controlling system integrated in the batch plant to minimize dust emissions.

[46] Further, she stated that she has never observed cement dust going to the Ancillary Claimant's house. She also stated that she visited the Carty house and observed no dust coming from the plant while she was there. The plant has always been granted a licence to operate from the government of Anguilla and the government has never prohibited the Ancillary Defendant from storing aggregate in the open. In cross examination she testified that other entities store like materials in the open.

[47] The silo was covered with a lid but she did not know what kind of lid it was. She could not say when dust collecting venting system was installed on the silo. She was responsible for ordering the filter bags that minimize the dust emissions but she could not speak to the dust controlling system. She agreed that the sand stored on the site was uncovered but she never observed sand blowing in the wind nor cement dust. She would be the person to order the dust filters and she would do so when she observed the stock of dust filters going down. She also stated that she did not know if the filtration system was part of the concrete plant.

[48] The owner and founder for the Ancillary Defendant's company was the final defence witness, Irvin Phillip. He testified that he opened the Ancillary Defendant's company in about 1981 upon his return for the UK. The area at the time was sparsely populated with the Ancillary Claimant's house being close to the plant approximately 800 feet away. The witness testified that Anguilla is a dry and dusty place and that the Ancillary Claimant's house sits close to the main road and that the traffic is often heavy. There is a strip of land that separates the plant from the Ancillary Claimant's house with grass, trees and bushes. He stated that he observed a tree close to where the plant loads new materials onto trucks and that tree is unaffected by dust or debris.

[49] He knows the previous owner and her family as the plant had delivered products to them over the years and had never received any complaints from the original owner about dust or debris even though she had complained about the death of some of her goats, which were apparently killed by his dogs. He received no complaints from the government of Anguilla or any agency of dust,

odours or any such thing. He never received anything in writing from the Ancillary Claimant or any member of her family about the operation of the plant.

- [50] He referred to the videos which were conveniently provided to the Court by the Ancillary Defendant's company showing the operation of the plant. He set out the ownership of vehicles and apparatus of the plant and indicated that many of the trucks are not now operational due to the downturn in the construction industry in Anguilla. The plant purchases the new materials, sand, aggregate, cement and water. The aggregate and sand are stored on the site and heavy loaders are used to move these materials to the hopper. Large white sacks hold the cement. The cement sacks are waterproofed and made of material which prevents escape of the contents and also prevents moisture from getting into the sacks.
- [51] To prepare an order, the cement sack is lifted and placed on the hopper, the sack is cut and the cement is sucked from the hopper up onto the silo. At the top of the silo is an air vent and air is sucked up through this vent using a motor which in turn sucks up the cement product. The hopper lid is secured to prevent cement escape.
- [52] The silo has 36 dust filters which filter the air to prevent cement escaping. The Silo is regularly maintained and dust filters regularly changed and repairs can be done locally. The production is automated. The sand and aggregate is weighed and released to the conveyor belt which transports the materials to the top and rear of the waiting truck. Water is added along with the cement from the hopper and the body of the truck rotates. To prevent spillage the materials are fed into the truck using a rubberized feeder inside the truck.
- [53] The plant operates six days a week from about 7:00 a.m. until late afternoon depending on demand. The operations have been slow since 2009 due to a downturn in the Anguilla economy. The plant is regularly maintained and they bring in overseas technicians, engineers and maintenance contractors to carry out maintenance at least once a year. Air filters are regularly maintained.

- [54] He accepted and the Court observed in the video that when cement is fed into the hopper there is dust which comes from the hopper, but he maintained it dissipated in a matter of seconds with no adverse effect as this dust falls around and under the hopper. He stated this dust does not get to the Ancillary Claimant's house and he has never seen any dust there.
- [55] The sand and aggregate are stored outside and there is no need for these items to be sheltered. The plant is operated along manufacturer's guidelines and is run effectively. There is no slippage, the piles of sand and aggregate are neatly piled and there is no evidence of any escape.
- [56] The sand is stored outside and is not blown away in any event sand is used very quickly and is not kept at the plant for long periods of time. It was his opinion that the raw materials do not become airborne. No one else has complained about dust from the plant until now, nor does the plant emit unpleasant smells. The concrete is mixed inside the trucks and does not emit any smell. He denied that there are intrusive dust emissions and asserted that the plant does not lose extensive raw materials, and that he utilises a very efficient batch plant.
- [57] The process of making cement does not require burning so there is no ash, cinders or smoke neither does the plant burn products for any purpose. He has seen no report which states that Ancillary Claimant's water supply has been contaminated; he denied all the allegations made by the Ancillary Claimant in the matter. In cross examination he stated he could not recall saying that he had no complaints since 2008 but that the complaint in 2008 was about goats not dust. He had no complaints from Robert Guy. He started using the filters when the plant opened in 1982 and the dust collection venting system is a casing that holds the bag of cement, some thirty-six bags of cement can fit into the top of the silo. He admitted that the silo had no lid the bags act as a filter for any cement which may escape.
- [58] He admitted that some dust might come out when the loader removes the bag from the hopper. A conveyer belt moves cement and gravel to the trucks, and that the belt also moves stone and sand. The area storing sand and aggregate is uncovered. These items are not lifted but are moved along the conveyer belt on an incline. There is some covering on the conveyor belt. Two videos were shown to the Court during his testimony. Video A-showed the mixing of concrete in a truck, there

was some emission of dust during this operation. He testified that this emission of dust would occur with a 10 yard load, on their busiest day the plant would produce 110 yards of cement. Video A also shows the conveyer belt going from the hopper to the truck. At the top of the conveyor belt there is plywood and at the sides two (2) guards.

- [59] On re-examination he stated that the cement would stay in the silo for any period between one day and one week. The aggregate is usually removed from the bin the same day it is put in. The hopper for the aggregate is not the same hopper for the cement; the cement hopper has a complete lid.

THE LAW – LIABILITY IN NUISANCE

- [60] Everyone is required by law to exercise his rights over his/her own property having regard to the co-existing rights of other persons. An unreasonable or extravagant exercise of these rights to the damage of others constitutes a nuisance⁴. Private nuisance protects the owner/occupier of land from substantial interference with the enjoyment thereof. There is a balance which the Court needs to strike between the Ancillary Defendant's right to use his property as he sees fit and the right of the Ancillary Claimant to be protected from his enjoyment of his property. There are two (2) elements which an Ancillary Claimant needs prove for the Court to find that the actions of the Ancillary Defendant are actionable in nuisance.

1. There must be material damage to the land, and,
2. The substantial interference with the enjoyment of the land.

There are three (3) categories of private nuisance.

- a. Substantial interference with Claimant's use and enjoyment of land
- b. Physical injury to the Claimant's property
- c. Interference with rights of access and easements.

⁴ Halsbury's law 4th Edition Volume 34 paragraph 315

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

In **Vanderpant v Mayfair Hotel Company Limited**⁵, Luxmore J stated:

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

[62] Where the Defendant is able to prove that his conduct was reasonable in all the circumstances of the case he would not be held liable. The circumstances of each case must be carefully examined before determining the issue. The Court has to consider a multitude of things in coming to a determination on this issue. These include but are not limited to the following:

- The nature of the locality
- The utility of the Defendant's conduct
- The Claimant's abnormal sensitivity
- The duration of the harm
- Whether the Defendant engaged in the activity with the main purpose of causing harm or annoyance to the Claimant.

Williams J in **Greenidge v Barbados Light and Power Company Limited**⁶ stated the principle in this way:

⁵ (1929) ALL ER 296 at 308

⁶ (1975) 27 WIR 22

“.... Such nuisance is something to which no absolute standard can be applied and it is always a question of degree whether the interference with comfort or convenience is so substantial as to continue as nuisance. In determining whether or not a nuisance exists all relevant circumstances must be taken into account. The character of the neighbourhood is an important one of those considerations and the test to be applied is an objective one, to accord with the standard of the ordinary reasonable person living in the locality.”

- [63] In this matter the Ancillary Defendant does not deny that the cement plant is in what is a residential area and not an industrial area, in fact all parties agree that there is no zoning in Anguilla at all. The Ancillary Defendant deny that the operations of the plant caused or permitted fumes or any dust or particles to come into or enter into the Ancillary Claimant's home or premises. They claim there is no nuisance whatsoever created by the operations of the plant and that they have taken all precautions to prevent such a nuisance.
- [64] In this case it is the Ancillary Defendant who came to the neighbourhood and sets up business after the Ancillary Claimant's mother had built her home and was living in it. The absence of zoning does not assist either party in the case before the Court, but it is clear from the evidence that the plant is located in a residential area with a fair number of homes in the surrounding vicinity.
- [65] Having viewed the photographs and the very helpful videos presented to the Court during trial, the Court is satisfied that the operations of the Ancillary Defendant as described by the Ancillary Claimant were accurate, in fact, the Ancillary Defendant agrees in large part with the description of the operations by the Ancillary Claimant. The site visit which took place at the close of the proceedings was also very instructive.
- [66] In reviewing the evidence before the Court, the Court is satisfied that there was a degree of inconvenience and discomfort caused by the operations of the Ancillary Defendant in the area. This Court is also of the view that having read the report of Evelyn Apire-Hodge that the quality of life of the owners and occupiers of the premises in issue was negatively impacted and there was and continues to be substantial interference with their use and enjoyment of the property in question.

Based on the evidence adduced before the Court, the Court is of the view that the activities of the Ancillary Defendant's company constituted an actionable nuisance.

- [67] The Court is satisfied that there were high levels of cement and sand particles emitted into the atmosphere from the Ancillary Defendant's plant, and that these particles were taken down wind to the Ancillary Claimant's home interfering with the cistern water and the air quality on the property of the Ancillary Claimant.
- [68] The Court's own observations at the site visit and the evidence on the videos lead the Court to conclude that there were emissions of cement, aggregate and sand particles from the Ancillary Defendant's premises.
- [69] And while certain precautionary measures were introduced and implemented by the Ancillary Defendant's company, they simply did not go far enough to safeguard the health safety and environment health of the Ancillary Claimant or the surrounding areas. The Ancillary Claimant has requested injunctive relief and it is usual in most cases of this kind to grant such relief. The Court is of the view that in this case there may be a different solution which may satisfy all the parties concerned.
- [70] The Court is minded to order that the Ancillary Defendant take such reasonable steps as it can to abate the nuisance. There are steps which the Ancillary Defendant can take to enclose the exposed mounds of sand, gravel and aggregate which can lessen the amount of these items which are carried by the wind onto the Ancillary Claimant's premises.
- [71] Further there are steps which the Ancillary Defendant can take to more efficiently enclose the conveyor apparatus used to take the sand, aggregate and gravel mixture to the trucks for mixing.
- [72] The Court will order that the Ancillary Defendant take the necessary steps to have the nuisance abated within three months of this date of this judgement with a report on the works carried out to be furnished to the Court by an expert agreed to by both parties.

- [73] Should the Ancillary Defendant fail to take the necessary steps to abate the nuisance within the stipulated time, a permanent injunction will take immediate effect with respect to the Ancillary Defendant's operations.
- [74] The Ancillary Claimant in their pleadings claimed loss for the diminution in value of the property but offered no expert or any testimony with respect to this aspect of the claim. In the absence of clear testimony on such an issue the Court can make no determination thereon and so that Claim fails.
- [75] In fact very little evidence if any was placed before the Court regarding the various claims for special damages. No documentary evidence apart from the expert's report was put to the Court. No documentation was provided to the Court regarding the claim for replacement of windows, increased electricity bills, medical bills or reports regarding the claim of frequent colds, no evidence to the devaluation of the property or of the alleged increase in maintenance costs. Nothing was put before the Court to support the allegation of frequent cleaning of the property or the hire of a housekeeper to deal with the exposure to emissions of dust.
- [76] The Court has had an opportunity to assess the witnesses who gave evidence in the matter. The Court is satisfied that there are emissions of dust which emanate from the operations of the Ancillary Defendant's plant. The Court is therefore satisfied that the aspects of nuisance set out in the Ancillary Claimant's pleadings have been made out in the evidence.
- [77] In coming to this conclusion the Court relies on the evidence of the Ancillary Claimant herself, her brother, Edwin Carty, the current occupant of the premise in question and the expert, Evelyn Apire-Hodge.
- [78] Apart from the dust, the Ancillary Claimant referred to unpleasant smells and fumes but when asked what the smell of the concrete was the Ancillary Claimant could proffer no answer.
- [79] The Court however has no difficulty in accepting that based on the Ancillary Claimant's evidence that the operations of the Ancillary Defendant's cement plant negatively impacted and continues to

negatively impact the quality of the life and enjoyment of the property. In the case of **Shelfer v City of London Electrical Lighting Co.**⁷, Sault L J stated:

“A person by committing a wrongful act.... is not entitled to ask the Court to sanction his doing so by purchasing his neighbour’s rights by assessing damages in that behalf and leaving the neighbour with the nuisance.... In such cases the well-known rule is to grant an injunction. There are however cases in which this rule is relaxed and in which damages could be awarded in substitution... If the injury is small, and is one capable of being estimated in money and is one which can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the Defendant to grant an injunction then damages in substitution for an injunction may be given.”

[80] The Court here is in no doubt that the activities the Ancillary Defendant’s plant caused sufficiently high levels of cement, sand and aggregate emissions impacting the water supply and air quality of the Ancillary Claimant. Further the Court finds that though there are no existing environmental standards in Anguilla that the activities of the Ancillary Defendant clearly were not in keeping with internationally acceptable environmental standards. As stated earlier in this judgment, I will not immediately order injunctive relief but will give the Ancillary Defendant an opportunity to make reasonable efforts to abate the nuisance.

[81] Clearly here there has been more than inconsequential interference with the Ancillary Claimant’s use and enjoyment of their property. They are therefore entitled to some degree of compensation.

[82] The Ancillary Claimant has complained that the Ancillary Defendant’s activities have affected the health and well-being of her family but she failed to provide any documentation either by way of medical reports or invoices for any medications. In cases of nuisance however, damages for personal injuries are not usually recoverable. In **Hunter v Canary Wharf**⁸, Lord Lloyd stated:

⁷ (1895) 1 Ch. 287

⁸ (1997) AC 655 at 696

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

[83] In this case, even if the Court were to find that the Ancillary Claimant has a cause of action in negligence, in the absence of any documentary proof of the personal injuries claimed, the Court would not be in a position to award special damages or any damages under that head.

[84] Therefore damages for personal injuries under a claim of nuisance are usually not recoverable. The Ancillary Claimant here also claims for discomfort, inconvenience and disturbance. She complained of the emission of large quantities of dust and particulate matter which invaded their/her environment and while this evidence was contested the Court finds that on a balance of probabilities the claim is made out. The Ancillary Claimant is therefore entitled to be compensated.

[85] There is no doubt in the Court's mind that the nuisance has caused distress, discomfort and inconvenience to the Ancillary Claimant. They were residing in a quiet residential area until the plant was opened, they have since been forced to buy water for their basic living needs, have had to install new Air Condition units and have the cistern cleaned more regularly than before, among other things. In **Jean Matthews & Anor. v Warrican**⁹, Mitchell J granted the Claimants the sum of EC\$5,000 for the interference with the Claimant's right to enjoyment of property. Awards under this head have been made in case throughout the UK and the region. Having reviewed all the attendant circumstances of this case, the Court will award the Ancillary Claimant the sum of EC\$10,000.00 for the loss of amenities suffered over the years.

[86] As a result of the above, I find for the Ancillary Claimant in the matter, and it is ordered as follows:-

1. The Ancillary Defendant is to make every effort to abate the nuisance that is to make attempts to stop the emission of dust particles emanating from the Ancillary Defendant's plant.

⁹ ANU Civil Suit no. 456 of 1999

2. The Ancillary Defendant has a period of 6 months from the date of this judgment to take such steps to abate the nuisance.
3. Should the Ancillary Defendant take the necessary steps to abate the nuisance within the stipulated time, the parties shall agree on an expert who will produce a report on the abatement and if it satisfies basic environmental standards.
4. Should the Ancillary Defendant fail to take all reasonable steps within the stipulated time to abate the nuisance then this Court will grant the Ancillary Claimant a permanent injunction in terms to be agreed by the parties and submitted to the Court for its approval.
5. The Ancillary Defendant shall pay to the Ancillary Claimant the sum of EC\$10,000.00 as general damages.
6. Interest on the sum of EC\$10,000.00 at the prescribed rate from the date of judgement to the date of payment.
7. The Ancillary Defendant shall pay the Ancillary Claimant's prescribed costs on the sum awarded in accordance with CPR Part 65.

Margaret Price-Findlay
High Court Judge

By The Court

Registrar