

EASTERN CARIBBEAN SUPREME COURT

MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. MNIHCV 2016/0003

BETWEEN	RICHARD JAMES HENRY	1st Claimant
	& ERIC TOMME	2nd Claimant

and

SELSI LIMITED	1st Defendant
RUPERT ISLES	2nd Defendant
& BRIAN HOLLENDER	3rd Defendant
(as personal representative of the estate of Paul Hollender)	

APPEARANCES:

Mr Jean Kelsick appeared for the Claimants.

Mr David Brandt appeared for the Defendants.

2017: April 05 & 10

July 03¹

¹ Judgement delayed only because the High Court does not sit constantly on Montserrat, and Hilary Assizes ended on 12.04.17, with 27.06.17 being the first day of the Trinity Assizes, and 03.07.17 being the first day the judgment could be delivered owing to counsel's illness.

JUDGMENT

- 1 **Morley J:** In this case, the claimants Henry and Tomme want to stop the defendants Isles and his company Selsi from sand excavation on land owned by the Hollender family² in the lower Belham river valley on the grounds the activity is a nuisance. The activity is said to be unsightly causing noise, dust, and mosquitoes in what should be a residential area.

Overview

- 2 Montserrat is a lush emerald gem of 40 square miles, a British Overseas Territory, set in the sapphire blue of the Caribbean. In the Soufriere Hills in the south there is a volcano. In recent years, since 1995, it has been active. Eruption has submerged the capital Plymouth, now abandoned, and pyroclastic flow claimed 19 lives in 1997. Many left the island, greatly reducing the population. The economy was severely damaged. Slowly both are growing back.
- 3 The lower Belham river valley as it approaches the sea in the west used to be largely a beautiful golf course. However, during eruptions, lahar flowed down the mountain, burying the course, and the bridge across the Belham river. To drive nowadays from one side of the valley to the other there are two dirt roads, with ominous warnings that in heavy rain there may be treacherous mudflow and flash floods. Of the two roads, the easternmost is the 'old bridge road', leading to Cork Hill village, among other places, and the westernmost is the 'crossover road', leading to Hank's beach bar, among other places.
- 4 West of where the old bridge had been the valley acts as a natural amphitheatre, which is known as the 'lower Belham valley', with hills rising on each side, north and south, allowing a wide riverbed floor to fan out between the hills, which form almost a semicircle, with the sea at the diameter. Expensive homes dot the slopes, many occupied by expatriate retirees. Sound travels easily between the sides of the valley. A noise on one side from a car can often be heard clearly on the other side. Wind comes down off the mountain usually blowing to the

² The name 'Selsi' and surnames will be used to describe the parties, for easy reference and easier reading, and no disrespect is intended in not referring to the parties by their full names, and titles, or in the legalese of whether they are first or second claimants or first, second or third defendants.

west. Many will have had the experience in life of walking down a hill and being able to hear folk laughing in the car park below at some distance away, from where the sound travels cleanly upwards. Sound travels upwards in much the same way in the lower Belham valley. Prior to the volcano's activity, the area was a quiet homely place.

- 5 As part of the lahar came volcanic sand. This can be used to make strong bricks, as it does not contain salt, as does sand drawn from a beach.
- 6 A number of companies have begun to excavate the sand. They can be found in different parts of the island. One company, Selsi, has chosen to excavate west of the crossover road in the amphitheatre of the lower Belham valley, where sound travels easily.
- 7 Excavation involves using a digger to dig into the ground, scoop material into the digger bucket, and then swivel it into a waiting 20t truck, which then sets off to a sifting plant. The sifter is run on diesel and consists of three conveyor belts of perhaps 30m in length, moving upwards at an angle of perhaps 20 degrees. Each belt carries material of different sizes, being rocks, stones and sand. The material from the trucks is deposited into the sifter which separates out the sizes, so that each size then travels along the conveyor belt to be deposited in piles. The sand pile is then scooped into a truck to be driven away for export.
- 8 As part of the trial process, with the parties and their lawyers, I visited the location of Selsi's activities on 30.03.17, 03.04.17, and 06.04.17, and also the homes of Henry and Tomme, allowing myself to observe activity, to listen to it, and to observe where it had been.
- 9 There were three excavation locations to consider:
 - a. Location 1 (L1), owned by Hollender, was where there had been a working Selsi sifter from 28 September 2015 to April 2016, near the Isles plantation arch on the lower part of the northern hill, within 50m of residential properties³.
 - b. Location 2 (L2), owned by the Montserrat Company, was where since June 2016 there has been ongoing sand excavation by Selsi in the river bed by a digger, within 100m of the

³ Distances were never formally measured by either party, so that they are line-of-sight approximations.

home of Tina Bretton, which had scooped out a body of material so that the digger was operating within and below excavated banks.

- c. Location 3 (L3), owned by Hollender, was where there had been Selsi excavation within the riverbed by digger from 28 September 2015 to April 2016, feeding material to the sifter at L1, and leaving troughs in the ground, which fill with water.
- 10 This court action concerns specifically activity in L1, L2 and L3 between September 2015 and the present. It does not concern the history of sand excavation elsewhere by Selsi or others from the early noughties, though some of the history will be relevant to resolving matters.
- 11 From having attended the homes of Henry and Tomme, as approximate distances, it would appear that, as the crow flies:
- a. L1 is 300m from and gently below Tomme's home and 700m from and steeply below Henry's home;
 - b. L2 is 200m from and gently below Tomme's home and 600m from and steeply below Henry's home;
 - c. L3 is about 200m from and gently below Tomme's home and 600m from and steeply below Henry's home.
- 12 I am asked to consider whether activity at L1 and L3 were a nuisance, and whether at L2 is a continuing nuisance, and if nuisance is established regarding either or both, whether damages should be payable and/or a permanent injunction granted to stop Selsi from excavating sand west of at least the crossover road, preferably the old bridge road.

The parties

- 13 *Richard James Henry* gave evidence. He is a British national living on the south side of the valley at Isles Bay Hill in 'Villa Trelawney' at parcel 48/07/01, which he built in 1990 for his retirement from being a businessman. He owns Hank's beach bar. He is usually resident on Montserrat 5 months of the year, pays taxes, and since October 2015 has been resident throughout. He chose the site for its tranquility, then overlooking the golf course. He wants the excavating to stop in the lower Belham valley, as the noise it generates is profoundly disturbing to him. He further worries that mosquitoes will breed in the troughs at L3. He says his property

has diminished in value. Reading a book or napping is constantly interrupted. The nuisance has undermined his peace of mind, and is 'almost unbearable'.⁴

- 14 On 19.01.16, with Tomme he applied for an interim injunction, heard on 8-9.02.16, ruled against by Redhead J on 04.03.16, then upheld by the court of appeal on 26.09.16.
- 15 He points out the lower Belham valley is zoned as a recreational area, and that the local *Physical Planning Act* requires an environmental impact assessment, which has never occurred, before a license can be given for sand excavation. He claims Selsi have no permission to excavate, and are in breach of the local laws. None of three other sand excavation firms have caused such nuisance. He expresses frustration that the local government has failed to stop excavation elsewhere following action by residents in 2011 leading to compliance notices being served on Selsi in around 2011 and 2014, though the one in 2011 was appealed to a panel and astonishingly has not to date been resolved. He says that Selsi and its managing director Isles ignore all complaint, and refuse to accept letters, as occurred when he arranged a letter of 11.12.15 from his lawyer Jean Kelsick to be sent, and acceptance was refused. There is noisy excavation every weekday, from around 8am sometimes earlier, to around 4pm sometimes later. Weekends are usually included. The excavator clanks like a tank. As it digs into the ground, its bucket often breaks loudly into rocks, causing a sound which is 'intense'. Trucks carrying 20t loads whine in low gear up to the roads, and up hills. When the sifter was at L1, receiving materials from L3, the sifter made a continuous loud noise. Rocks could be heard clattering about the conveyor belts. Operations having moved to L2, there is now excavation observable within 100m of his neighbor Tina Bretton and within 50m of a residence called 'Villa Hampstead'. Sand excavation by Selsi has turned the lower Belham valley into an industrial scale mining operation, without proper licensing or consideration of the residents. He is fed up.
- 16 In addition, he has offered, attached to his filed witness statements, some photos and correspondence for consideration.

⁴ Witness statement of Henry filed 28.11.16, para 27.

- a. As to photos: exhibited on 28.11.16, RH1 shows on 17.05.15 a sign at L1 warning against unauthorized development beyond the sign, where such development is clearly then visible behind, in seeming defiance; RH4b shows the scale of L3 on 05.02.16 with the home of Tomme visible within 200m; RH4c shows on 05.02.16 how close the sifter at L1 was to homes; RH4i,j,k show the stagnant pools created at L3; and exhibited on 28.03.17, RH5 shows how the holes at L3 are deep enough for one of three excavators to be on its side.
- b. As to correspondence:
 - i. On 07.01.16, the MATLHE⁵ minister Claude Hogan wrote to David Brandt, the attorney acting for Selsi, Isles and Hollender, correcting an impression that their excavation was *'without condition'*, pointing out that *'Isles and/or Selsi shall stop all sorting and sifting of materials in the Belham valley and relocate his operations out of the valley... With the foregoing as the backdrop, please therefore have your client proceed with his plans to relocate all mining operations from the Belham valley...'*⁶
 - ii. By an email from Hogan to Jerome Meade, the Chief Physical Planning Officer, of 11.01.16, Hogan invited that Meade prosecute Selsi if it *'has not deployed from the Belham valley'*.⁷
 - iii. In a memo of 25.01.16, Meade reports to the Attorney General that in an email of 23.06.15, Kenroy Hyman of the ODPP concluded that *'Isles failure to cease operations at Belham valley could result in criminal proceedings...'*
 - iv. By an email of 09.12.16 from Meade to Hogan, the Governor, and the Premier, Meade refers to Selsi's activity as *'illegal'*.⁸

17 *Eric Tomme* gave evidence. He is a Belgian national who has retired on Montserrat living there permanently with his wife since 2005, in parcel 12/07/07, on the north side of the valley near Old Towne. His home faces Henry's across the distance. He makes the same points as Henry, while a quieter personality. He adds that as his location to L3 was so much nearer he also had

⁵ Ministry of agriculture, trade, lands, housing, and the environment – MATLHE.

⁶ RH3, exhibited on 28.11.16.

⁷ RH2 *ibid*.

⁸ RH7a, exhibited on 28.03.17.

- dust problems, requiring house cleaning as he could draw his finger through it on house surfaces, at a likely cost of EC\$150 weekly if outsourced, being three half-days cleaning a week at EC\$100 for a full day. He added his pool filter also needed more care. He worries dust being thrown up by the lorries will affect his health when inhaled. It was like living near a busy highway, causing him stress and to feel nervous. He could hear the beeping of the trucks when reversing. He also noticed dragonflies eating mosquito larvae in the water-logged troughs at L3, and that there have been more mosquitoes at his home than previously, suggesting the troughs have become an infestation. He also considers the excavation works to be 'almost unbearable'.⁹
- 18 He points out there was a Physical Development Plan (PDP) commissioned by the government, for the period 2012-22, formulated under the *Physical Planning Act*. It identifies how land on Montserrat should be used. It specifically shows on a map that the lower Belham valley west of the old bridge road should be a residential area.
- 19 He adds that near L1 was once the site of the golf house, and identifies all the other sand extraction companies as being 'Shamrock', 'Junction trucking', 'Wall trading', and 'Eddie's trucking', and as not presenting a nuisance as they operate away from the lower Belham valley, east of the old bridge road.
- 20 While he also relies on the correspondence referred to by Henry, he adds some photos¹⁰:
- a. ET7d showing in February 2016 the verdant lower Belham valley looking toward Henry's home from his own.
 - b. Dust being kicked up by lorries from L3 on 28.09.15 in ET7e,f,g,h.
 - c. The location of the sifting plant at L1 on 27.10.15 in ET7i, and on 25.11.15 in ET7j, noting its proximity to the residential Isles plantation arch; and in ET7k on 26.11.15 the proximity generally of residences to L1.
 - d. In ET7l, there is a picture of how the sifting conveyor belts created piles of material at L1 in September 2015, which are still present today.

⁹ Witness statement of 28.11.16, para 29.

¹⁰ Exhibited on 28.11.16.

- e. In ET7m,n, there is sight on 07.07.16 of how the excavation process worked at L2 with an example of the troughs it would create in the land as the material is extracted.
 - f. In ET7p,q, there are photos of the pools created at L3 which Tomme believes breed mosquitoes.
- 21 It is evident that Tomme was much nearer the noise than Henry. He emphasized that the biggest nuisance for him was the sifting at L1, and the excavating at L3. He too is fed up.
- 22 *Rupert Isles* gave evidence. He is Montserratian, living at Isles Bay Hill, and at 78 an energetic man. He incorporated Selsi in 2001 to excavate sand. Volcanic sand has no salt, which makes it strong, and therefore desirable to excavate. He points out that eruption meant the areas of Old Towne and Isles Bay, where Henry and Tomme now live, were evacuated under emergency powers. The volcano destroyed the golf course and brought mud and rubble to the lower Belham valley, so that he says it is to live in the past to expect the area to retain its earlier genteel quality.
- 23 He explains that under s3 *Emergency Powers Act* Cap 10.08, the Governor on Montserrat had the power to declare a state of emergency, which occurred on 03.04.96, by '*public emergency proclamation*', and it has not been proclaimed rescinded. Under s8 of the proclamation, the Governor has the power to '*take possession of private land and may issue such directions in relation to the use of that land as may appear to the Governor to be necessary and expedient the circumstances...and in the public interest...may put that property to such use as may appear to the Governor to be necessary or expedient. Any person who suffers...damage by virtue of the acquisition or requisition or possession of property under this regulation may apply to the Governor for compensation.*'
- 24 Isles points out that on 06.08.03, he received a letter, sent to his attorney David Brandt from Ann Marie Dewar, then permanent secretary to the MATLHE ministry, that Selsi '*may continue to mine and export sand and aggregate from Belham*', reiterated in a letter of 20.08.03.
- 25 He further points to a letter on 29.08.07 from Eugene Skeritt, then permanent secretary to the MATLHE ministry, that '*the ministry is pleased to inform you that Executive Council has*

approved your application for you to immediately resume mining operations in the Belham river valley.’ Isles suggests that this letter gave him the right to excavate sand in 2015 to the present, in L1, L2, L3, and that as the state of emergency formally still exists, and the permission in this letter has not been rescinded by the Governor in Council, in short the Belham valley has been requisitioned for sand excavation, for which he has a license, so that any damages ought to be paid by the Governor.

- 26 In addition, he denies that his operations at L1-3 caused noise, saying the sand is soft when dug so there is no sound of breaking rocks, the sifter engine is quiet, the sifting does not create a noticeable clatter, the vehicles do not whine as they drive away and uphill, and the digger does not clank. He says any dust is windborne as an act of god, and not because of truck movement. He denies photos are of his trucks. His trucks do not beep on reverse. The pools at L3 cannot be full of mosquito larvae as the pools are part of the river and not stagnant. He says that Henry is exaggerating his claim as they fell out over investment in earlier years, and Tomme simply follows Henry.
- 27 He accepts that work would be 7am to 3.30pm weekdays, and infrequently on weekends, including Sundays. L1 and L3 are owned by the Hollender family, while L2 is owned by the Montserrat Company (which was agreed by counsel). Isles has formal leases allowing his activity. Plant has long been kept at L1, as it is elevated out of the valley, away from flash floods. He continues to park the digger there. The sifting operation was not moved to Foxes Bay in April 2016 because of the court action, but because Brian Hollender requested it, as Hollender was trying to sell nearby residential properties and the presence of the sifting site was ‘*unsightly*’¹¹ and thought to hamper sale.
- 28 He explains sand excavation is by his company and not by him personally, so that he should not be named as the 2nd defendant. Selsi owns 4 x dumper trucks, 1 x 6-wheel drive truck, 1 x sifting plant, 2 x stockers, 2 x front end loaders, 1 x back-hoe, and 1 x excavator, collectively valued at EC\$2,160,000, and employs up to 14 people. Sand excavation is said to be a principle source of revenue for the government.

¹¹ Judge’s notebook 4, p125.

- 29 *Brian Hollender*, who is also Montserratian, did not give evidence and did not attend the proceedings. His position through his counsel was to say he cannot control Isles' activities, though there is a formal lease to excavate, and so he should not be liable for nuisance by Isles or Selsi, if any.
- 30 Under cross-examination, of note Isles said the following.
- a. As to dust, while he did not accept there was a dust problem in Tomme's house, and if there was it was not due to his excavation work, but instead was due to wind, he added that it could not be proved the dust had even come from the valley, notwithstanding photos of dust generated by lorries, suggesting in theory any dust could be windborne from the 'Sahara'¹², so that it could not be proved dust had not come from North Africa.
 - b. As to noise, he did not accept the noise of excavation could be intrusively heard at a distance beyond '20/30ft'¹³. Moreover he asserted the sound of sifting was 'bearable'¹⁴. Asked about consulting the neighbors as to making noise, he said, "*I was not concerned about the noise*"¹⁵, meaning he did not consult them. As to who the neighbors were, he said '*I don't know if they are elderly retirees, I hardly know any of the neighbors*'¹⁶, though he has lived the area for 15 years. He added, '*it does not bother me at all if the excavation is disturbing the residents*'¹⁷ as he had permission from the government to excavate.
 - c. As to how the valley was zoned, he said '*I am not aware of the Belham Valley being zoned for recreation*', and '*I have never heard of the PDP of 2012*'¹⁸.
 - d. As to the stagnant ponds at L3, he said mosquitoes would not breed there as the water was part of the river, and flowing, so that as moving water mosquitoes would not breed. He added '*I am not concerned if someone may fall in and drown, I have not given any thought to folk falling in*', and he did not accept the pools, being 6ft deep and unfenced, had created any danger to the public.¹⁹

¹² Ibid p123.

¹³ Ibid p121.

¹⁴ Ibid p123.

¹⁵ Ibid p121.

¹⁶ Ibid p124.

¹⁷ Ibid p124.

¹⁸ Ibid p125.

¹⁹ Ibid p125.

- e. As to the letter dated 11.12.15 from Kelsick addressed to him on behalf of Henry and Tomme, complaining about the excavation works, he said he was '*not sure*'²⁰ he had ever read it, but instead just gave it to his lawyer, Brandt.
- f. As to the letter of 07.01.16, from Minister Hogan, sent to his lawyer Brandt telling him and Selsi to relocate all mining operations out the Belham valley, he had '*no memory*'²¹ of discussing it.
- g. As to receiving two compliance notices requiring him to stop activity in the Belham valley (in 2011 and 2014), he had left matters to his lawyer Brandt, had no recollection of appealing the first, and was '*shocked*' he had to go to a tribunal as he had not known what he had appealed.²²
- h. As his evidence was concluding, I asked Isles about whether he had ever sought the views of the residents as to whether there was unhappiness about excavation, and if not why not, and in response I noted he became '*agitated*', raising his voice so that he became '*loud*' and verbally forceful, giving a long answer which did not clearly address the question.²³

Site visits

- 31 As reported in court, and at the time during site visits, I made the following observations:
- a. At L1, I observed a pile of rocks, the close proximity of homes, and the presence of an excavator, said to be parked for safekeeping.
 - b. At L2, I observed the deep banks of sand from which an excavator was collecting material to put into a truck, which drove away, and noted the close proximity of two homes.
 - c. I did not visit L3, as it was not accessible by ordinary car, but observed it from the homes of Henry and Tomme, at the above approximate distances.
 - d. At the home of Tomme, I could hear the noise of the excavator at L2, though faintly, as it was below the sand bank, and I did not observe dust.
 - e. At the home of Henry, I could hear the noise of sifting taking place by Shamrock, on the eastside of the old bridge road, further up the valley, and could hear the noise of the excavator at L2. I could also see the water in troughs at L3.

²⁰ Ibid p126.

²¹ Ibid p126.

²² Ibid p127.

²³ Ibid p127.

- f. I visited the site of the relocated sifter in Foxes Bay, on 06.04.17, and noted its noise, (both as to the hum of the diesel sifter engine and the clatter of sifted materials), size of operation, piles of rocks, stones and sand, and that one reversing truck did not make a beeping noise.

Nuisance

- 32 The tort of nuisance is long established. Many cases refer to Victorian times. In *Clerk & Lindsell, 2006*, at chapter 20, it says *'the essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land'*.
- 33 There is a distinction between *public* and *private* nuisance. Public nuisance is a criminal offence, contrary to common law, sometimes called 'common nuisance', arising where a person *'does an act not warranted by law or omits to discharge a legal duty, if the effect of omission is to endanger the life health property morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all'*, per **R v Goldstein [2004] 2 AER 589**.
- 34 This distinction is elaborated further in *Commonwealth Caribbean Tort Law*, by Kodilinye, 3rd edition, at page 158 where he opined, and I agree, that *'Whereas public nuisance involves injury to the public at large, and the rights of the private individual receive protection in tort where he can prove particular damage to himself, irrespective of his ownership or occupation of land, the law of private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof'*.
- 35 There was a comprehensive review of private nuisance in the UK Supreme Court of the law in **Coventry and others v Lawrence and another 2014**²⁴, in which judgement was delivered on 26.02.14 by Lord Neuberger. A number of paragraphs are immediately relevant.
- 36 Per para 3: *"A nuisance can be defined as an action, or sometimes a failure to act, on the part of a defendant, which is not otherwise authorized, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which*

²⁴ [2014] UKSC 13.

unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in **Sedleigh-Denfield v O'Callaghan [1940] AC 880, 903**, 'a useful test is perhaps what is reasonable according to the ordinary usages of mankind in society, or more correctly in a particular society.'"

37 Per para 59: "The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute nuisance is a classic issue of fact and judgement for the judge trying the case."

38 Per para 77: "The interrelationship of planning permission and nuisance has been considered in a number of cases...and is potentially relevant...in two ways. First the grant...may permit the very noise which is alleged by the claimant to constitute the nuisance...[so as to raise a] defence to the nuisance claim. Secondly, the grant...may...be relied on...as changing the character of the locality."

39 As to whether to award damages or an injunction:

a. Per para 104, quoting AL Smith LJ in **Shelfer v City of London Electrical Lighting Co., [1895] 1 Ch 287**: "A person by committing a wrongful act...is not ...entitled to ask the court to sanction his doing so by purchasing his neighbor's rights, by assessing damages in that behalf, leaving the neighbor with the nuisance...In such cases the well-known rule is...to grant an injunction...There are however cases in which this rule may be relaxed, and in which damages may be awarded in substitution...It may be stated as a good working rule that:

- i. If the injury to the plaintiff's rights is small,
- ii. And is one which is capable of being estimated in money,
- iii. And is one which can be adequately compensated by a small money payment,
- iv. And the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given."

b. Per para 120: "The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered."

- c. Per para 121: “...it is only right to acknowledge that [the courts can lay down] rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu...I would cautiously approve the observations of Lord Macnaghten in **Colls v Home and Colonial Stores [1904] AC 179, 193**, where he said:

‘In some cases of course an injunction is necessary if for instance the injury cannot be compensated by money, if the defendant has acted in a highhanded manner, if he has endeavored to steal a march on the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff, and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted in a fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction.’”

- d. Per para 128: “A final point which it is right to mention on this issue is the measure of damages, where a judge decides to award damages instead of an injunction. It seems to me at least arguable that, where a claimant has a *prima facie* right to an injunction to restrain nuisance, and the court decides to award damages instead, those damages ought not always to be limited to the value of the consequent reduction in the value of the claimant’s property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant’s ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.”

40 As to how to approach assessing nuisance, particularly as to noise, as arises here, there is a helpful judgement of Massiah J from Guyana, in **Shepherd v Griffith no 320 of 1971**, reported in *Commonwealth Caribbean Tort Law* 3rd edition at page 166, suggesting assessment as to the following (*‘The Massiah Test’*):

- a. Nearness of the noise source.
- b. Time when the noise is made.
- c. Frequency of the noise.
- d. Nature and degree of the noise.
- e. Effect of the noise.
- f. Is the noise objectively unreasonable and exceptional within the character of the locality, (applying the dictum of Lord Selborne in **Gaunt v Fynney 1873 37 JP 100**).

Findings of fact

41 I have made the following findings of fact.

- a. I accept the evidence of Henry and in particular Tomme that the excavation work has caused too much noise at their homes.
- b. I do not think that Isles has been in any way dishonest. In part he has been wishful, asserting there has been less noise than is correct, more in hope, or being deaf to the noise through familiarity. He is spirited and a man of admirable energy. However, as he has himself said frankly, he has not cared about the effect of his activity on residents, and so did not keep himself informed of concerns, which if he had may have avoided this unhappy legal action.
- c. Unfortunately, this has meant that I find that Isles has shown an '*unneighbourly spirit*', in the sense offered in the quote from Lord Macnaghten in the **Colls** case.
- d. I am quite sure that the sight and noise of activity at L1 and L3 between September 2015 and April 2016 was a nuisance to both Henry and Tomme, and other residents.
- e. I am quite sure that the sight and noise of activity at L2 is a nuisance to the residents in the two nearby homes, being Villa Hampstead and the home of Tina Bretton, and is probably a nuisance to both Henry and Tomme.

- f. I am not satisfied it has been proved that unsightly dust at a distance visibly raised from excavation at L2 and L3 has been a nuisance in the home of Tomme, either as a deposit or as a health hazard, in the absence of supporting evidence.
- g. I am not satisfied that the water troughs at L3 are breeding mosquitoes as a nuisance distinctly attributable to any defendant, in the absence of supporting evidence, as mosquitoes will breed wherever they can, in roadside puddles even, though I am satisfied the troughs are probably a hazard into which people might fall.
- h. Furthermore, I find as a fact that the letter from Minister Hogan to Brandt of 07.01.16 makes it clear that 'all' mining operations conducted by Isles as Selsi were required to be moved from the Belham valley, not just the sifting plant at L1, (which in any event Isles says he only relocated to Foxes Bay when asked by Hollender, not by Hogan or the legal action, so that whatever Hogan ordered, Isles did not act on it). This means that at all times activity at L2 from April 2016 has been expressly illegal as without license, and activity at L1 and L3 from September 2015 to April 2016 has been implicitly until the date of the letter, and expressly after, also illegal as without license.
- i. Finally, I do not accept that Isles has an unrevoked license to excavate in the lower Belham valley, arising out of the three letters of 2003 and 2007. Service of the compliance notices of 2011 and 2014 made Isles aware that his earlier license no longer continued; *a fortiori* notice it no longer continued arose in light of the PDP showing the lower Belham valley as planned to be a recreation zone, about which I find it improbable Isles was unaware, whether or not it was legally binding.
- j. I note as a generality that the legal position adopted by Isles through his counsel Brandt has been to put any and all critics of Isles to strict proof, and to seek to exploit technicalities (eg, like whether there was ever an identifiable formal letter from the Governor arising specifically from a decision of the Executive Council, specifically withdrawing a license, if any, granted in 2003/7). Isles has avoided interaction with anyone affected by excavation, probably as a policy, never enquiring of the residents how to

minimize the impact of his activity, not accepting correspondence, never challenging the letter of Minister Hogan in 2016 by brandishing the correspondence of 2003/7, never seeking cast-iron clarification of whether any license he may have once had is no longer in force, never establishing in his own mind what the meaning of the compliance notices might be, willfully keeping himself ignorant, hoping that in the end he could point to how, evidentially, it cannot be proved that anyone one ever told him, clearly and unambiguously, that he could not excavate, meaning he cannot be liable, and if anyone is actionable it should be the government for want of a formal letter to Isles, never asked after. Insofar as this has been a litigation strategy, the court criticizes it, as it has placed Isles in greater jeopardy than if he had engaged.

- k. As to the responsibility of Hollender in the nuisance, I find as a fact that he controlled Isles and Selsi at L1, based on what Isles has said in evidence, namely that the sifting plant was vacated on Hollender's orders, precisely because it was nuisance to his ambition to sell nearby property, (though prior to wanting to make land sales he had not been bothered about that same nuisance for the other residents equally nearby). It follows therefore he is jointly responsible for L1. As to joint responsibility for L3, there is a paucity of evidence over whether he exercised any control over excavation so that I do not find his responsibility has been proved by the claimants; and as to L2, it has been agreed between counsel that he does not own that land.

Applying the law

42 Specifically applying the *Massiah Test* to L1-L3:

- a. As to the nearness of the noise source, each location was near enough in meters to cause residents unavoidable noise nuisance, given that the lower Belham valley is an amphitheatre.
- b. As to time when the noise was made, it was a particular nuisance excavation was often from 7am and at weekends.
- c. As to the frequency of the noise, it was mostly daily.
- d. As to the nature and degree of the noise, while not deafening, it was intrusive and noticeable, particularly when the excavator bucket scrapped into rock, rocks clunked onto sifted piles, and when laden lorries climbed through gears.

- e. As to the effect of the noise, its intrusiveness, persistence, and unsociable hours, will have been unnerving, so as to strike right into the heart of the quiet enjoyment of property.
 - f. As to whether the noise was objectively unreasonable and exceptional within the character of the locality, I find it was, as I find that the locality was zoned as residential, or supposed to be, and therefore the excavation noises, which were of an industry at work, were objectively entirely out of place, which *ipso facto* makes the noise unreasonable and exceptional.
- 43 As to whether Isles can argue that the grant of a license in 2003/7, as if a type of planning permission, provides a defence or altered the character of the locality, I find neither: in 2015, he had no license, nor after, so without one he cannot claim permission to alter the character of the locality (as zoned for residences in the PDP).
- 44 As to whether Isles committed a public nuisance, which is a criminal offence, I consider that only those with an interest in the land would have been affected, by noise, and not as to health, so that the nuisance does not apply to a wider group of the passing public. The noise was therefore not a public nuisance.
- 45 As to whether Isles is not liable personally, as the second defendant, I find that he is so bound up with Selsi, it being a small company where he is personally active in daily control of it, that he is indistinguishable from Selsi. The company does not operate without his personal say, so that I find he is personally liable. Moreover, I am mindful that what must not occur is that Selsi might be dissolved, and some other entity is created by Isles to continue the excavation.
- 46 As to the pools into which people, in particular a child, might fall and drown, I do consider these to be hazardous, but that such a risk pertains to so small a group, if intermittently present, as not to be legal nuisance, in the sense that nuisance embraces a persisting inconvenience to a larger group more often present. However, if there was to be a rare tragedy, then Isles and Selsi might conceivably be culpable for a species of manslaughter, as they ought to be, and are now, on notice that such unfenced easily accessed deep ponds are dangerous.

- 47 As to whether to grant an injunction concerning L2, I have decided that an injunction should be granted, ordering the cessation of all excavation activity of Selsi and Isles, (and any other entity), west of the 'old bridge road', demarcated as the dirt road²⁵ to over what had been the old Belham Valley bridge. This is because, consistent with the discretion described by Lord Neuberger in the **Coventry** case, considering the principles described by AL Smith LJ in the **Shelfer** case, and the dictum of Lord Macnaghten in the **Colls** case:
- a. Is the injury to the plaintiff's rights small? – no, because it is most days an all-day, persisting intrusion, pressing against peace of mind in one's home.
 - b. Is the injury capable of being estimated in money? – no, because money cannot buy peace of mind in one's home.
 - c. Can the injury be adequately compensated by a small money payment? – no, because money cannot buy peace of mind.
 - d. Would it be oppressive to the defendant to grant an injunction? – no, as there are other parts of Montserrat where excavation can occur without causing a nuisance so that the business of Selsi and of Isles need not stop, and in any event to allow excavation to continue would to the contrary be oppressive to the residents.
 - e. Has the defendant acted in a '*highhanded*' manner? – yes, by never engaging the residents as to their concerns.
 - f. Has the defendant endeavored to evade the jurisdiction of the court? – no, but he has contrived to make it difficult to be the subject of legal proceedings by not accepting service of correspondence and not keeping himself informed of letters from claimant or other lawyers.
 - g. Has the defendant acted in an '*unneighbourly spirit*'? – yes, because as he said himself, it did not bother him if excavation affected the neighbors.
- 48 In these circumstances an injunction is appropriate. As I will order cessation of excavation at L2, in order not to overburden the respondents I will not order additional damages concerning that site.

²⁵ In this judgment, the expression the 'old bridge road' describes the road which proceeds east from the Isles Plantation Arch, onto a 'dirt road', (which can bifurcate south to become the 'crossover road'), which otherwise then proceeds east-east-south to where the old bridge over the Belham river had once been, now under lahar, and then proceeds south and south-east toward Cork Hill.

- 49 Furthermore, as I have observed the nuisance first-hand, and without wishing to fetter any superior court, I desire and hope, judicially, that this injunction shall remain in place if and until any successful appeal (unless otherwise agreed by the parties), rather than be lifted pending appeal, which then is possibly slowed over many years in coming on, as has happened for example in the still unresolved appeal concerning the compliance notice served in 2011.
- 50 As to whether to grant general damages concerning noise nuisance for six months from L1 and L3, I will do so, but in modest terms.
- 51 It should be noted that there was at one point argument as to whether general damages had been pleaded as being sought, but the point was conceded during the trial.
- 52 The scale of the award is at the discretion of the court. Noise cannot be valued. As an injunction has now been granted, in theory property values will be restored. The award should reflect the irritation of the noise, though mindful that this court action has been won, meaning financial penalty has already accrued to the losing parties, as to costs and as to loss of business. Damages would have been greater if an injunction had not been granted. I consider an appropriate sum to be EC\$6000 to each claimant (being notionally EC\$1000 per month). I would not be surprised if other residents might now make a similar claim. As to the apportionment of this award, if I am able I order, or if not I suggest, that it is payable per claimant as EC\$3000 by Selsi, EC\$1500 by Isles, and EC\$1500 by Hollender.
- 53 There will be no award as to special damages to Tomme for cleaning as the claim was not proved.
- 54 As the claimants have succeeded in their action, the defendants should pay their reasonable costs, to be taxed and apportioned if not agreed.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

[SEAL]

By the Court

Registrar