SAINT LUCIA

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

Claim No: SLUHCV 2008/0958

BETWEEN:

(1) Eudes Borne
(2) June Winters
(3) Ferguson John

Claimants

and

(1) National Development Corporation
(2) CD Investments Ltd.

Defendants

Appearances:
Mr. Eghan Modeste for the Claimants,
Ms. Renee St. Rose for the First Defendant,
Ms. Leonne Theodore-John for the Second Defendant.

2010: January 18th,
: March 1st,
2011 : April 4th

JUDGMENT

[1] Wilkinson J.: The Claimants filed a claim form and statement of claim on 26th September 2008. They sought the following relief:

1. An injunction to restrain the Defendants by themselves, their servants or agents or otherwise howsoever, from continuing to construct and develop a pig and poultry farm on Block and Parcel 1220B 96.
2. Damages.

3. Costs.

[2] The First Defendant is the owner of a parcel of land registered in the Land Registry as Block 1220B Parcel 96 and situate at Vieux Fort. The First Defendant executed on 29th January 2008, a lease with the Second Defendant for a portion of the parcel of land for the purposes of establishing amongst other things a pig and poultry farm. The Claimants state that they have their residences in the vicinity of the proposed pig and poultry farm and it would affect the enjoyment of their homes and land because of foul odours, and insects, rodents and other vermin which are likely to be attracted to the farm and spill off onto their properties.

[3] Issues:

The two issues for determination are as follows:

(a) Whether the Claimants are entitled to any remedy against the First Defendant as Lessor of the Second Defendant.

(b) Whether the Claimants are entitled to a quia timet injunction to halt the activities of the Second Defendant.

Claimants' evidence

[4] The evidence of the Claimants was very similar except for time of purchase of their respective lots of land and a few other matters. The First Claimant a retired social scientist is now a management consultant. He purchased his land in 1979, built his home thereon in 1991 and has been residing thereon since that date. The Second Claimant is retired from her job at the United States of America and is now at Saint Lucia engaged in real estate sales and development. She purchased her land upon which there was previously constructed a house in 2005 and moved into the house the same year. She had located the owners of an additional 3 lots of land in the vicinity and in which she has an interest to purchase for the purpose of constructing 3 villas. She has as a result of the issues arising haltered the purchase. The Third Claimant, an attorney-at-law, purchased his land in 2001 and now resides in his home thereon.

[5] All of the Claimants said that when they purchased their land, they were informed that the area was restricted for residential development. The Court was given sight of the title deeds for all of the Claimants and save for the First Claimant's title deed, the other deeds made no reference to any

covenants pertaining to their property. Only the First and Second Claimants' title deeds described their properties as being part of the Morne Beausejour Development. The First Claimant purchased his property from Hewanorra Enterprises Limited and his title deed provided the following covenants and history of title:

> " … For the benefit of the remainder of the Vendor's land forming part of the Morne Beausejour Development Scheme and so as to bind the property hereby sold the Purchaser hereby covenants with the Vendor that he and the persons deriving title under him will at all times hereafter observe and perform all and singular the covenants and restrictions hereinafter contained…
>
> 5.USE:-
>
> No building on the property shall at any time hereafter be used for any purpose other than as a private dwelling house with garage and outbuilding belonging thereto….
>
> 6.GENERAL:-
>
> Not to do or permit or suffer to be done anything in or upon the said property or any part thereof, which may be become a (illegible)…any regulation made by the National Development Corporation for controlling the activities carried on or upon the Morne Beausejour Development or by any competent authority and from time to time applicable to the said land or which may be or become unsightly or a nuisance or cause damage or inconvenience to the Vendor or Lessee of the Vendor or to the neighbourhood.
>
> TITLE: Deed of Exchange between the Vendor and National Development Corporation executed before Desmond A. McNamara, Notary Royal, on 7th June, 1979 and registered…."

[6] Looking at the root of title, the First Claimant's vendor, Hewanorra Enterprises Limited purchased the land from the First Defendant.

[7] All of the homes are elevated above the valley where the Second Defendant proposes to establish a pig and poultry farm and the site is directly in the path of the north-east trade wins. Approximately 10 years ago there was an established a landfill site and waste disposal facility in the valley below them, and which is in the vicinity of the proposed pig and poultry farm. The landfill site and waste disposal facility handles all the trash and other waste for the entire South-Eastern side of the Island. The landfill site and waste disposal facility caused an influx of rodents, insects and foul odours to their properties. The First and Second Claimants said that at times the odours of the

waste facility were so unbearable that they had to keep their windows and doors closed and this in turn made their homes hot and unbearable. The First Claimant added that sometimes when it was so unbearable he has had to leave his home. The landfill site and waste disposal facility has since become highly specialized and there has been an overall reduction in odours, rodents and insects.

[8] When the Second Defendant cleared the brush off the leased land and burnt it, the First and Second Claimants said that they suffered heavy smoke and debris on their properties. The First Claimant wrote on behalf of some residents and himself on 28th March 2008, to Mr. Nicholas John, executive chairman of the First Defendant stating their concerns with the proposed pig and poultry farm in the vicinity.

[9] All of the Claimants state that there was a petition signed by themselves and some of the residents in their vicinity against the proposed pig and poultry farm by the Second Defendant.

[10] The Second Claimant had several conversations with Mr. Cyril Donnelly, the managing director of the Second Defendant and on each occasion stated her objection to the proposed pig and poultry farm.

[11] All the Claimants said that they believed that if the pig and poultry farm were allowed to be developed, their properties would depreciate in value. The First and Second Claimants felt that they might have to leave their properties because of the odours and infestation of rodents and insects.

[12] On the Second Defendant's leased property at the time of trial there was no livestock, no odours, no vermin or insects but constructed were 7 uncovered and open wooden structures each on a concrete base. This being the situation up to trial, none of the Claimants had suffered any harm, loss or damage.

[13] Under cross-examination the First Claimant said that proper management of the landfill site and waste disposal facility had contributed to the abatement of odours, insects and rodents, and whenever there were problems he made it his duty as a former civil servant to contact the Solid Waste Management Authority and invariably the problems were addressed.

[14] Under cross-examination the Second Claimant admitted that the entire valley of Beasejour looked like "grazing animals".

[15] Under cross-examination the Third Claimant, who was a former Member of Parliament and held the portfolio as Minister for Physical Planning, Development, Environment and Housing said that he was unaware of where the boundaries were for Block and Parcel 1220B 96. He was however, aware that at the bottom of Morne Beausejour near the Grace Road, the land was designated for agriculture and livestock. This was visible from the activities thereon as he saw cows grazing and he purchased milk from persons on that land.

[16] There was jointly appointed by all the parties, an environmental expert, Caribbean Environmental Health Institute (CEHI) to provide a report on the matters complained of by the Claimants. The findings of the report are set out subsequent. All of the Claimants were dissatisfied with the report as they found it did not set out specific measures to be taken to curb the anticipated odours, insects, rodents and vermin, it did not cover the issue of costs to implement measures, and it did not say whether the Second Defendant could afford the costs to implement the measures to be taken.

First Defendant's evidence

[17] The witness for the First Defendant was Mr. John Labadie, a licenced land surveyor who carries out survey work from time to time. He is the properties officer of the First Defendant. The First Defendant he said is charged with the role of promoting economic development inter alia in the agricultural sector. Block and Parcel 1220B 96 was zoned for agricultural development and it is situated near the Beausejour livestock station. The First Defendant had leased land adjacent to the Beausejour Livestock Station to St. Lucia Livestock Development Co. Ltd. at 20th July 1988, and a parcel to Caribbean Agricultural and Manufacturing Industries Ltd. at 7th April 2008. Both were for purposes similar to that proposed by the Second Defendant.

[18] He said that given the dates of the leases, all of the Claimants came to their land after the lease with St. Lucia Livestock Development Co. Ltd. Further using the timing of the First Claimant as to when the landfill site and waste disposal facility were established, the Second and Third Claimants purchased their land after the landfill site and waste disposal facility had been established.

[19] It was the Ministry of Agriculture, Forestry and Fisheries (the Ministry) that introduced the First Defendant to the Second Defendant on 2nd April 2007 via a letter. The Ministry informed the First Defendant of the Second Defendant's proposal for a pig and poultry farm, and stated that the

Ministry supported the development. The First Defendant was asked to assist with identifying suitable land for the farm. Subsequently, the Second Defendant submitted an application at 3rd April 2007, to the First Defendant for a parcel of land to lease for 10 years together with a proposal paper describing the proposed farm project which was to include amongst other things a feed mill, 2 nucleus farms, a processing plant, and a coordinated marketing and production system. The livestock was projected to be 100 sows, 10,000 broilers and also described were the matters of housing, feeding, and production. Stated also were the benefits that could be derived from the project including foreign exchange saved, employment of between 50 – 70 persons, the promotion of a number of small satellite farms throughout the island, cheaper and more affordable feed, decrease in the imports, food security, and the development would act as a springboard for diversification of the agricultural sector.

[20] In considering whether or not to grant the Second Defendant a lease, the First Defendant gave consideration to a number of factors and which included that the area was already zoned for agriculture use, that there was already established on 2 adjacent parcels of land livestock farms, and a small scale piggery, that there was a landfill site and waste disposal facility in the vicinity, that there were no houses in the vicinity, the project would create employment directly and indirectly, that it would bring about a decrease in the need to import meat, and the feed produced would be cheaper for the farmers. The First Defendant required the Second Defendant to secure all necessary permits and licences including those necessary from the Development Control Authority and the Ministry of Health. The Second Defendant having agreed to all of the proposed terms and conditions of the First Defendant, a lease between the Parties was executed 29th January 2008 for 22.12 acres, a portion of the land registered as Block 1220B Parcel 96. The covenants in the lease included:

> " 4 iii) To obtain all the regulatory approvals and pay all fees and licenses related to or necessary for the agreed purpose
>
> vii) Not to do permit to be done any act or acts at anytime or at all or about THE LEASED Land which may be a nuisance to THE LESSOR, persons claiming under the Lessor or adjoining occupiers or which may in anyway adversely affect the leased property or diminish there of THE LEASED PROPERRTY or diminish the value thereof

[21] Mr. Labadie completed by digital mapping an assessment of the distances between the Claimants' land and the proposed site of the Second Defendant's pig and poultry farm. He found that the First

Claimant's land was located approximately 600 yards away, and the Second and Third Claimants' land was located 1000 yards away. The landfill site and waste disposal facility were less than 1000 yards away from the First Claimant, and the existing pig farm was approximately 700 yards from the First Claimant.

[22] The First Defendant he said had not received any letters from the Claimants or their attorney-at-law complaining of any anticipated nuisance. It was also denied that the construction of the pig and poultry farm would create any nuisance or have any of the adverse effects as alleged.

[23] Under cross-examination Mr. Labadie said that there was a development plan for the First Defendant's land and the area had been zoned for over 40 years for small agriculture operations. He admitted that the Second Defendant's proposed project could be described as a large scale operation and that he was not aware of what distance was necessary to prevent odours from such a development. He denied that the First Defendant was involved in any way in the Second Defendant's project merely by leasing a part of Block and Parcel 1220B 96

Second Defendant's evidence

[24] The sole witness for the Second Defendant was Mr. Trevor Dornelly. Mr. Trevor Dornelly is a director of the Second Defendant. He gave evidence of the lease previously described between the First and Second Defendants. He said that the Second Defendant was of the view that the Claimants were not entitled to an injunction to stop the development of the pig and poultry farm because the land which the Second Defendant had leased was zoned for agriculture and livestock activities and such activities had been carried on in the area since 1979. This was before the Second and Third Claimants purchased their properties, and the same year that the First Claimant purchased his property. He denied that the leased land was in the vicinity of the Claimants' properties and said the closest point to the Claimants' property was 1800 feet. The existing pig farm was approximately 2100 feet away from the First Claimant's property and there was a major landfill approximately 3000 feet away. The Second and Third Claimants properties were even further away from the leased land.

[25] He said the Second Defendant had instructed an expert to guide them as to best management practices of livestock waste. It was the intention to apply best management practices and to

comply with all the requirements of the lease and which required the Second Defendant to get all necessary permits and licences.

The Expert's Report

[26] The appointment of the expert, Caribbean Environmental Health Institute (CEHI) was agreed to by all the Parties, and it was so ordered by the Court on 27th March 2009. CEHI received agreed instructions signed off by Counsel for all of the parties in a letter dated 26th August 2009. CEHI in a letter dated 6th November 2009, said that it interpreted its instructions as being to address the following questions:

> "1) Whether the pig and poultry farm to be constructed by the Second Defendant will generate foul odours and if so, will it be in such proximity and to such extent as to affect the claimants' properties;
>
> 2) Whether the pig and poultry farm to be constructed by the Second Defendant will attract insects and rodents and if so whether this will be of such magnitude as to affect the claimants' properties."

[27] Mr. Lesmond Magloire prepared the expert report and it was filed in the proceedings.

[28] The report described the second Defendant's proposed livestock system as a "Landless Livestock Monogastric (LLM)" production system. The term "landless" meant that the animals were reared in an enclosed environment with high stocking densities and all inputs including food were supplied in the closed environment. As to the environmental impacts of the LLM system, the report had this to say:

> "4.2 Environmental Impacts of LLM system operation
>
> Most of the environmental impacts caused by the LLM systems are the result of waste emissions which will include odours….Emissions typically originate from manure, at the point of direct deposition, during storage or after application on soils and from the production inputs which include feed concentrates and fossil fuels. In the cases where the operation includes animal processing (butchering), additional waste streams may pose environment contamination risks where there is inappropriate disposal of blood, offal, stomach content wastes, etc. The other significant risk factor associated with LLM systems where management practices are poor is the proliferation of vectors that may transmit diseases, notably rodents and flies. Where such a facility is in close proximity to human settlement, these vectors not only pose a public safety hazard but constitutes a nuisance factor that negatively impacts quality of life.

There are several management factors that need to be considered in the operation of this type of livestock facility. Due diligence is needed by the operator of the facility in all the following key aspects:

- Minimization of health risk to workers and animals through proper facilities maintenance;
- Reduction of risk of infestation by rodents and other pests through proper inputs (feed) and waste discharge management;
- Reduction of offensive odour emissions using appropriate control measures;
- Minimization of discharge of offensive wastes onto public or another private property by application of appropriate waste diversion and waste reduction measures;
- Reduction of disease exposure risk through proper disposal of carcasses….

Chemical pollutants associated with waste discharge

Nitrogen and ammonia-based compounds are the main pollutants associated with the discharge of manure and other organic material into the environment….

4.3 Odour, vector and other nuisance

4.3.1 Odour generation

…proposed commercial poultry and pig operation will generate a large quantity of waste that will typically be made up of faeces and urine, wasted feed, bedding material, litter, spilled water from the drinking nipples, and water used for cleaning the pens and cooling of the animals. All of these components will have the potential to generate significant odours. According to (Mellor 2003) approximately 65% of all nitrogen ingested by fattening pigs is excreted in faeces and urine and is converted to ammonia. Further, emissions arise as a result of bacterial ureases, which convert urea in the urine to ammonia. Ammonia is volatile and toxic, and is responsible for much of the offensive odours that emanate from swine production units (Mellor). Hydrogen sulphide is also another pungent volatile that is emitted from the fermentation and decomposition of wastes and manure.

4.3.2 Vector proliferation

The main concerns in terms of vector proliferation is in respect of rodents, birds, flies and other feral animals notably dogs and cats. If not carefully managed and properly disposed of, the relatively large volumes of waste materials generated by such a facility will provide a ready source of food for potentially harmful vectors that can significantly increase the nuisance and health risk load for the workers and of the surrounding areas.

4.3.3 Other – dust generation

Dust is normally considered to be one of the contaminants in livestock buildings and is linked to odour dispersion. The dust is often a combination of manure solids, dander, feather, hair, and feed (fine particulate matter)… Dust generated from the production cycle is mostly of an organic origin and is very difficult to eliminate from animal production units. Studies have shown that the dust from these operations can have a significant impact on the animals, the workers and the surrounding community in terms of respiratory health (Aarnink and StockhofeoZurwieden 2003).

5. Proximity Considerations

The extent or "footprint" of environmental pollution and human health impacts such as water quality degradation, dust, noise and odour emissions is influenced firstly by farm design and management practices, and secondly by animal stocking numbers. The nature and intensity of the operation invariably determines what may be a reasonable distance or setback of the operation from adjacent inhabitated areas so as to ensure that the emissions are tolerable within adjacent impact area. In St. Lucia, public health regulations make stipulations regarding the siting of livestock operations in close proximity to human habitation but there are no systematic guidelines that specify buffer distances on the basis of type livestock operation. Lands that are designated "agricultural" are generally interpreted as zoned for crop and livestock operations across the entire land area, and as such proximity considerations relative to adjacent non-agricultural land may prove problematic in resolving potential conflicts such as in this case.

Many countries have adopted buffer/zoning protocols for siting commercial farm operation….

In the case of the proposed Beausejour facility, the lands are designated agricultural and they in fact have a long operational history of being managed for livestock production, although not on a scale or intensification that is being proposed...

The residences along Morne Beausejour lie within 750 and 1000 m metres of the location. Using the Australian guideline above, it may be suggested that the facility lies just within the acceptable buffer limits for residential developments. One must also however note that there may be other considerations such as prevailing wind direction and strength and visibility issues that may dictate variations on the buffer distance. In consideration of the wind direction, it should be noted that the dominant prevailing wind flow is from the northeast to easterly directions. The Morne Beausejour community lies generally to the northwest and the west-northwest of the proposed facility suggesting that it may not feel the downwind effects of odour emissions for the most part: there will be exceptions when there is variability in the wind flow that places the community down-wind.

There are compounding factors particularly related to vector control that should be considered in evaluating proximity and risks posed to residential developments in that area.

Municipal dump: The Vieux Fort municipal dump has been operated by the St. Lucia Solid Waste Management Authority for over twenty years. The dump is situated approximately 750 metres from the proposed facility and about approximately 1.2 kilometres from the Morne Beausejour housing development. The activities taking place in the dump will likely have an effect of increasing the vectors (flies, birds, rats) in the vicinity of the dump which may in turn complicate vector control measures to be implemented by the proposed livestock facility.

Existing livestock facility: The Ministry of Agriculture has operated (a) livestock facility for over 50 years at Beausejour immediately to the west of the proposed site. The feed and waste generated may have had the effects of attracting vectors such as rodents, birds, and flies that may have impacted the surrounding communities although the extent of the impact is not known.

5. Best practices for livestock rearing facilities

5.1 General considerations

Broad planning principles and objectives for any large-scale livestock production facility should include the following:

- Minimization of environmental (visual, odour, noise, waste discharge) impact on adjoining land users, in consideration of the potential for future expansion of operations:
- Maximization of animal welfare;
- Minimization of the disease risk to animals, workers and the surrounding community;
- Installation of appropriately designed and sized facilities for safe storage of inputs and effluent handling and treatment;
- Must be consistent with relevant planning principles and objectives articulated in national development plans;
- ….

Conclusions

The most direct environmental effects to be caused by the Proposed Project by CD Investments Ltd. will occur in the form of emissions. Most emissions will be from manure during storage or after application to soils. Most harmful emissions are in various forms of nitrogen and phosphorus, either to soils, water or the atmosphere. Noise, dust, odour and vectors are other environmental effects that can be generated by the proposed project...

To conclude, it is likely that the proposed CD INVESTMENTS LTD facility will generate foul odour and will be in such proximity and to such extents as to potentially affect the Claimants properties and that the facility will attract insects and rodents to potentially affect the Claimants' properties. However by applying Best Management Practices (BMP), incorporating Bio-safety and Environmental Management Principles, the potential for minimizing the effects of odour, and vector infestation can be significantly reduced with little or no effect on the Claimants.

Recommendations

The following are some general recommendation in the interest of controlling emissions, vectors and enhancing the general aesthetics within the location.

E) General Aesthetics:

- CD Investments Ltd, should apply a roof top colour that would be environmentally and aesthetically pleasing in terms of blending with the natural surroundings;
- Perimeter fencing must be established along the entire development:
- A dense hedgerow of ficus trees should be established along the perimeter of the development for shading, dust and odour dissipation.
- During construction:
- Apply noise abatement techniques
- Implement dust reduction techniques
- Environmental monitoring:
- Conduct initial sampling of the surround soil content for nitrogen and phosphorus and maintain periodic (annually) testing regime to determine the extent of pollution that may be beyond tolerable limits;
- Monitor odour emission on a regular basis, particularly within adjacent residential areas:

- Monitor present and abundance of vectors within the facility compound and in the adjacent areas.

(H) Best Management Practices:

- Carry out third party auditing of the implemented Best Management Practices to ascertain that the processes are being property implemented and that they are verifiable and sustainable;

- Establish Voluntary Compliance Programs (VCP) in accordance with the established laws of Saint Lucia."

The Law

At the outset the Parties are asked to recall that in Hunter & Others v. Canary Wharf Ltd.[1] the Court stated that the permission of the planning authority does not derogate from the property rights of another nor does it give a party any immunity from suit in respect of nuisance.

In Clerk & Lindsell On Torts[2], a nuisance is defined:

> "Para. 20-01: Nuisance defined. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. In common parlance, stenches and smoke and a variety of different things may amount to a nuisance in fact but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests. As actionable nuisance is incapable of exact definition, and it may overlap with some other heading of liability in tort such as negligence or the rule in Rylands v. Fletcher. Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some other right used or enjoyed in connection with land, when it is a private nuisance."

[29] On the issue of what principles must be applied and threshold to be reached to entitle the Claimants to a quia timet injunction resort is had to Fletcher v. Bealey[3]. In this case the plaintiff was a manufacturer of paper, his mills being situated on the bank of a river, the water of which was used to a large extent in his process of manufacture, and for which it was essential that the water should be pure. The defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about one and a half miles higher up than the plaintiff's mills, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very

[1] [1996] 2 WLR 348
[2] 19th Edition
[3] 28 Ch.D 688

noxious character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for the plaintiff's manufacture, and his trade would be ruined. The Plaintiff did not allege that he had as yet sustained any actual injury. Defendants said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river. In his judgment Pearson J. said:

> "I do not think, therefore that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it is comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a quia timet action."[4]

[30] Russell L.J in Hooper v. Rogers[5] assist the Court in defining "imminent", he said:

> " I do not regard the use of the word "imminent" in those passages as negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely."[6]

[31] Halbury's Laws of England[7] further assist the Court in determining the principles of defining prospective or threatened nuisance, and the evidence necessary to support an application for a quia timet injunction. It states:

> "Para. 94. Prospective or threatened nuisance. An injunction may be granted to restrain the commission of a prospective nuisance. To obtain such an injunction it is necessary to show that the apprehended mischief will probably arise. The degree of probability required for the grant of an injunction is not an absolute standard; what has to be aimed at is justice between the parties, having regard to all the relevant circumstances. If imminent danger of a substantial kind is shown, or should it appear that the apprehended danger, if it comes, will be irreparable, an injunction may be granted. (My emphasis)
>
> Para. 95. Evidence necessary. Where an injunction is sought it is not sufficient merely to allege that the proposed act of the defendant will have an illegal result as against the plaintiff without putting before the court sufficient material to enable it to judge

[4] Ibid p698
[5] [1875] 1 Ch. 43
[6] [1975] 1 Ch. 43 at p. 49
[7] vol. 34, 4th Edition

of that question for itself. Where some degree of present nuisance exists, the court will take into account its probable continuance and increase, and its present existence raises a presumption of its continuance. As between adjoining owners the court will consider whether the defendant is using his property reasonably or not." (My emphasis)

[32] As to who is liable to be sued for nuisance, Halsbury's[8] states:

> "55. General rule of liability. Any person is liable for a nuisance who either created or causes it or continues it or adopts it, or who authorizes its creation or continuation. The liability applies whether or not that person is in occupation of the land on which the nuisance is committed…. A person is liable as having caused or continued a nuisance when he is guilty of an action or omission which directly gives rise to the nuisance; when he authorizes such an act or omission; when inadvertently he does or authorizes an act from which a nuisance arises as a natural and probable consequence; or when being an owner or occupier of property, he grants a licence or gives an order to another to act upon it which are likely to cause a nuisance, and that licensee or person receiving the order in so acting commits a nuisance. It is a prerequisite of the recovery of damages in both private and public nuisance that the harm for which compensation is sought should have been foreseeable." (My emphasis)

[33] In addition the Land Registration Act Cap.5.01 provides:

> "25 EFFECT OF REGISTRATION OF A LEASE
>
> Subject to the provisions of section 27, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belong or appurtenant thereto and subject to all implied expressed agreements, liabilities and incidents of the lease."

[34] As to the matter of what weight the Court ought to give the evidence of the jointly appointed expert, in *Coopers Payen Limited, Sanwa Packing Industry Co. Limited v. Southampton Container Terminal Limited*[4] Mr. Justice Lightman said:

> "Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain."

Findings

[35] This case evokes what has been described as the "NIMBY" principle. In short, "Not in my back yard." This response and reaction is common in instances where there is the prospect of waste

8 Ibid

facilities being established in communities, and other developments such as pig and poultry farms. In an ideal environment, there would be no need for waste facilities and pig and poultry farms established in or near development. However, as long as there is a demand for products and in this case pig and poultry, then given the small land mass of Saint Lucia, it is more than likely that someone's property or person will be impacted no matter where landfills, waste facilities, and pig and poultry development is established.

[36] There is no dispute that pig and poultry farms generate offensive odours, bring about a proliferation of rodents and insects, and generate dust, and that there would be present animal and other waste. These facts are confirmed by the expert's report. These are all things that could disrupt the Claimants' enjoyment of their properties and fall squarely within the description of nuisance cited from Clerk & Lindsell.

[37] There are some discrepancies as to the distances between the proposed site of the pig and poultry farm and the various Claimants' land. The Court adopts the evidence of the expert on this matter.

[38] The Claimants seek to bring a halt to the proposed development of the Second Defendant by way of a quia timet injunction against both Defendants even before pigs and poultry are on site, the very things needed to create the nuisance. This leads into the question of what principles must be applied to the Claimants' evidence to determine if it reaches the threshold set for the grant of a quia timet injunction.

[39] Looking at the Claimants' evidence, the Court does not believe that the Claimants can sustain any claim for a quia timet injunction to prevent the anticipated nuisance against the First Defendant. The only action of the First Defendant was the grant of the lease, and a lease with covenants which sort to cover the very nuisance raised by the Claimants, and secondly, the pigs and poultry are not on the site as yet. In order to sustain a claim against the First Defendant, the Claimants needed to show the Court that the First Defendant was responsible for creating or causing or continuing or adopting or authorizing creation or continuation of the nuisance or inadvertently authorized the doing of an act which would lead to the nuisance. There was no evidence laid before the Court that the First Defendant took any of these actions. The First Defendant was simply the lessor albeit it knew what use the land would be put to.

[40] An additional burden for the Claimants and this is applicable to both Defendants, was that of proving that any nuisance which could arise from the pig and poultry farm was also foreseeable. At this juncture since the pig and poultry farm does not exist there is no immediate harm. The Court is of the view that today many matters that were once foreseeable are no longer so predictable because of advances in technology and science and these advances are often reduced to prerequisites or protocols incorporated in statute for any undertaking. The application of prerequisites or protocols has become the norm. The expert's report supports this proposition by stating that with the use of certain measures all of the nuisances which the Claimants apprehend could be avoided. The Claimants themselves in their evidence in relation to the landfill site and waste disposal facility also support the Court's view.

[41] Further, while the Claimants sort to make much of promises given to them about land in the Morne Beausejour Development and the First Claimant's title deed did disclose certain covenants, there was no evidence of any restrictive covenants on the First Defendant's parcel of land. Indeed the Court observed in the First Claimant's title deed that his vendor, Hewanorra Enterprises Ltd. had purchased the land from the First Defendant. No evidence was led as to whether it was the First Defendant or Hewanorra Enterprises that established the covenants or about the establishment of the development in general.

[42] Finally, having regard to the Land Registration Act section 25, and combining it with the covenants in the lease between the First and Second Defendants, the Court is not convinced that the Claimants could succeed in a claim against the First Defendant.

[43] The Court finds that the Claimants have not made out a claim against the First Defendant therefore the Claimants' claim against the First Defendant is dismissed.

[44] Turning now to the Claimants' claim against the Second Defendant, while it is true that the witness for the Second Defendant could not specify what measures the Second Defendant would take to avoid the anticipated nuisance, he did say the Second Defendant had retained an expert to assist the Second Defendant with the measures, and he did say that the Second Defendant was prepared to comply with whatever measures were requested by the authorities. This position was not challenged by cross-examination.

[45] Much was made of the expert not being specific on the Best Management Practices, but the Claimants' own evidence is that they have witnessed measures which have alleviated identical nuisance from the landfill site and waste disposal facility and therefore the measures referred are a reality.

[46] The Court is of the view that the Claimants' evidence has not reached the threshold established in the cases of "imminent danger", "reasonable certainty" or "very strong possibility ". Fletcher v. Bealey was almost identical to this case, although in this Court's view the danger was imminently closer because whereas here there are no pigs or poultry as yet, in that case there was already an accumulation of the hazardous materials on the river bank and yet the Court did not find the Claimant was entitled to a quia timet injunction because of the possibility that preventive measures could still be taken to curb the anticipated threat.

[47] The Court's reasons for drawing the conclusion that the threshold has not been reached by the Claimants can be summarized as (a) the recommendations made by the expert show that the anticipated nuisance can be controlled, (b) the Claimants' evidence was that successful measures had been undertaken at the landfill site and waste disposal facility,(c) the Second Defendant's witness never wavered in his evidence that it had retained an expert to assist with establishing measures to control the anticipated nuisance, and finally,(d) the Second Defendant's readiness to comply with all Government and any other statutory body requirements was never challenged.

[48] Looking historically at the vicinity, the following observations are made (a) the area was zoned for agriculture, and this zoning at Saint Lucia allowed for both agriculture and livestock development on the land, (b) there was established by the Ministry of Agriculture a livestock facility in excess of 50 years on land immediately west of the proposed site for the Second Defendant's feed mill, and pig and poultry farm, this was long before any of the Claimants purchased their property, (c) there followed the establishment of the landfill site and waste disposal facility in or about the year that the First Claimant purchased his land, but before he built his home thereon, and certainly before both the Second and Third Claimants established their homes, (d) the First Defendant had leased a portion of the same parcel of land from which it leased a portion to the Second Defendant, for like purpose to another party,

and (d) there was no evidence that there were any covenants against the intended development on the First Defendant's land.

[49] It would appear that the Claimants are trying to "close the barn door after the horse has bolted". The existing farms, landfill site and waste disposal facility, and the availability of technology to curb the anticipated nuisance have all already clearly changed the environment of the valley.

[50] The Claimants' claim against the Second Defendant is dismissed.

[51] The Court apologizes to the Parties and Counsel for the delay in delivering this decision.

Order

1. The Claimants' claim for a quia timet injunction and other relief against the First and Second Defendants are denied and the claim dismissed.
2. The Claimants claim against the First and Second Defendants is dismissed without prejudice to the Claimants' right to future proceedings should a nuisance occur.
3. The Claimants are to pay the First and Second Defendants prescribed costs in the sum of $14,000.00

Rosalyn E. Wilkinson
High Court Judge