IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J. 264 OF 1993

BETWEEN			**LIONEL SCOTT**	
A	**N**	**D**	**NORMA POTTINGER**	**PLAINTIFFS**
A	**N**	**D**	**SYNDICATED DEVELOPERS LIMITED**	**1ST DEFENDANT**
A	**N**	**D**	**MUTUAL SECURITY MERCHANT BANK & TRUST COMPANY LTD.**	**2ND DEFENDANT**
A	**N**	**D**	**THE PROPRIETORS STRATA PLAN NO. 39**	**3RD DEFENDANT**

Mr. Maurice Manning of Nunes, Scholefield & DeLeon for Plaintiffs.

Mr. Garth McBean of Dunn, Cox, Orrett & Ashenheim for 2nd Defendant.

Heard: 22nd, 23rd and 26th November, 1999.

Cooke, J.

There are two outstanding issues in this case, which fall for determination.

(i) In the circumstances (which will be outlined below) .

Can the plaintiffs succeed in their claim that "they

have been and being caused annoyance and discomfort and have suffered loss and damage."

(ii) Is the 2nd plaintiff entitled to the sum of $150,000 as part of her special damages

In 1988 the 2nd defendant began to exercise control of a penthouse at Hampshire House Apartments at 4 Recadam Avenue Kingston 10. This penthouse had a pool and open patio area. Immediately below this penthouse were apartments 25 and 26 owned by the 2nd and 1st plaintiff respectively. Both these apartments were similar in design. The areas immediately below the penthouse were bedrooms and bathrooms. The 1st plaintiff acquired his apartment in 1978 and sold it in 1995. The 2nd plaintiff who still lives there purchased her apartment in 1982. These were not happy purchases by plaintiff's for when it rained there was seepage of water from the penthouse above. Generally the popcorn ceiling peeled off; the wall suffered and containers had to be set as receptacles. Photographs tendered by the 1st plaintiff displayed the unsightly consequence of a downpour. Alas, as it would appear when the 2nd defendant took control of the penthouse it was oblivious to the past and ensuing problems. Since 1988 genuine efforts have been made by the 2nd defendant to correct the faults – as yet to no avail.

The court has been told that the services of a Consultant Structural Engineer have been engaged and a solution is imminent – this December 1999. As for the 1st plaintiff he found the situation frustrating and embarrassing and when he had visitors he felt "degraded". He felt down at times. Each time he effected repairs to the ceiling and walls only to have the work undone by seepage. Frustration and a feeling of hopelessness beset the 2nd plaintiff. It was beyond her comprehension that the fixing could not yield results. For both, cleaning up and drying up was a constant companion to the rains. For the 1st plaintiff the relevant period in 1988 to 1995. For the 2nd plaintiff Apartment 25 is still her place of abode. With this background I now address the 1st issue.

It is agreed that the seepage from the penthouse constituted a nuisance. Sums expended by both plaintiffs for repairs (except for 150,000 the subject of the 2nd issue) have not been subject to any discord. However the 2nd defendant contends that in law there can be no award for "annoyance and discomfort." Great reliance is placed on a sentence in the headnote of:-

Hunter and Others v Canary Wharf Ltd.

Hunter and Others v London Docklands Development Corp. [1977] 2 AER p. 246.

This is a decision of House of Lords. The sentence is at p. 427-letter d and it reads:

"Moreover it was wrong to treat actions in respect of discomfort, interference with personal enjoyment or personal injury suffered by plaintiff as actions in nuisance."

It is now incumbent on the court to determine if this sentence is warranted and if so what is the scope of the proposition in law that it seeks on the face of it to establish?

It is of critical importance to appreciate that their Lordships were dealing in the Hunter case with two central issues.

a. Who is in law entitled to bring an action in nuisance? and

b. Whether interference with television reception should be actionable in nuisance?

Accordingly, the respective opinions of their Lordships must be read and understood within the context of the issues which were under deliberation. Reference to damages in nuisance were essentially illustrative of and supportive of the conclusion that would be reached. **Lord Lloyd at p. 44 letter c** opined as follows: -

"**Private nuisances are of three kinds. They are**
(1) nuisance by encroachment on a neighbour's land;
(2) nuisance by direct physical injury to a neighbour's land;
(3) nuisance by interference with a neighbour's quiet enjoyment of his land.
In cases (1) and (2) it is the owner, or the occupier

with the right to exclusive possession, who is entitled to sue. It has never, so far as I know, been suggested that anyone else can sue, for example, a visitor or a lodger; and the reason is not far to seek. For the basis of the cause of action in cases (1) and (2) is damage to the land itself, whether by encroachment or by direct physical injury."

After some discourse where His Lordship dealt with contrary views he stated at Page 442 letter B

> **"In the case of nuisances within class (1) or (2) the measure of damages is, as I have said, the diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts."**

Then comes a passage which I suspect has been the source of some confusion. It reads at letter D

> **"If the occupier of land suffers personal injury as a result of inhaling the 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. It follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to sue for loss of amenity value of the land are the owner or the occupier with the right to exclusive possession."**

It will be readily observed that the sentence in the headnote bears some resemblance to part of this last quoted passage. However if the sentence is founded on this passage there is error. What Lord Lloyd was demonstrating was that it was only the party with a right to sue in nuisance who could successfully

maintain an action of loss of amenity value of the land. Plainly a mere occupier could not. It must be the owner of occupier with the right to exclusive possession.

In **Lord Hoffman's opinion at p. 452 letter e** he said:

> **"Once it is understood that nuisances 'productive of sensible personal discomfort' do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable.**

In Bone v Scale (1975) 1 AER 787 the plaintiffs succeeded in nuisance based on the smell omitted from a neighbouring pig farm owned by the defendant. This is one of the cases cited to their Lordships. It was discussed by both Lord Lloyd and Lord Hoffmann. That there should have been an award in nuisance was never questioned. Lord Hoffmann at p. 451 disagreed with the assessment of damages, not finding favour with the approach that "damages in an action for nuisance caused by smells from a pigsty should be fixed by analogy with damages for loss of amenity in action for personal injury." He went on further to state that"

> "**But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted."**

It is my view that the sentence relied on by the 2nd defendant is at best taken out of context and certainly by itself is misleading and unwarranted. Therefore the defendant cannot place any reliance thereto. There has been a diminution in the

amenity value of the properties of the plaintiff as a result of seepage for which they should be compensated. I now address the very difficult question of quantum.

In ***Halsey v Erso Petroleum Co. Ltd. [1961] 2 AER p. 145*** the plaintiff occupied a house in the same area where the defendant carried on its business and operated an oil distributing deport as part of the operation there were two metal chimneys. At this stage I now set out the background as is accurately set out in the headnote :-

> **"From these chimneys acid smuts containing sulphate were emitted and were visible falling outside the plaintiff's house. There was proof that the smuts had damaged clothes hung out to dry in the garden of the plaintiff's house and also paintwork of the plaintiff's car which he kept on the highway outside the door of his house. The depot emitted a pungent and nauseating smell of oil which went beyond a background smell and as more than would affect a sensitive person but the plaintiff had not suffered any injury to health from the smell. During the night there was noise from the boilers which at its peak caused windows and doors in the plaintiff house to vibrate and prevented the plaintiff sleeping."**

This is how Veale J. dealt with the award of damages at p. 159 letter I:-

> **"Since the end of 1956 the plaintiff has suffered very considerable discomfort. It is something which cannot easily be assessed in terms of money. I am asked by**

counsel for the plaintiff to award exemplary damages in view of the conduct of the defendants. I agree that there are matters in respect of which the defendants' conduct does not seem to have been satisfactory; but in my judgment this is clearly not a case for exemplary damages. Although the plaintiff fainted twice in the witness-box, there is no evidence before me of any injury to his health. I must do the best I can to award him a sum in respect of the nuisances by noise and smell which have been inflicted on him over the last few years. On this head, which is limited to noise and smell over the past few years, I award £200."

In ***Bone v Seale [1975] 1 AER 787*** the trial judge awarded lad plaintiff damages of £6,000 in respect of a nuisance by smell which emanated from the defendant's pig farm. This was over a twelve year period and the trial judge had computed the award at **£**500 per year. The Court of Appeal reduced the award to £1,000 each. In Hunter Lord Hoffman criticized the approach of Stephenson LJ in Bone v Seale. He said at p. 451 letter G:-

> " I cannot therefore agree with Stephenson LJ In Bone v Seale [1975] 1 All ER 787 at 793—794, [1975] 1 WLR 797 at 803-804, when he said that damages in an action for nuisance caused by smells from a pigsty should be fixed by analogy with damages for loss of amenity in an action for personal injury."

1. In Hasley over a 5 year period the award for nuisance from noise and smell was £200.

2. In Bone and Seale the award for nuisance for smell was £1,000 over 12 year period.

3. These awards can be described in a euphemistic vein as quite conservative.

4. The respective awards have not been founded on any principles, or reasoning. There are no guidelines. Indeed, it is difficult to envisage any. Lord Hoffman in Hunter although critical of the approach of the Court of Appeal in Bone V Seale did not offer any assistance. He was content to regard the law of damages as sufficiently flexible to do justice to the particular case.

5. With more than a little temerity, I suspect that historically the law pertaining to nuisance has been mostly concerned with damages to land itself. The owner of such land, may not have resided even near to that portion of the land affected by the nuisance. Hence Lord Lloyd's categorization. (supra). The predominance of cases had to do with categories (1) and (2). These two categories of encroachment and physical damage were the usual type of actions in nuisance. However, as patterns of living evolve and change it is not improbable that category 3 the right to quiet enjoyment of land will gradually be regarded as a wrong no less significant as those in categories (1) and (2).

6. In my task in the assessment of damages as regards interference with the

Quiet enjoyment/amenity value of land I must consider that it is the home of the plaintiffs which are subject the nuisance. Although there is no evidence before the court to this effect, it is common knowledge that in Jamaica the acquisition of a home is, except for a dwindling minority, a result of very great financial sacrifice. This is the only land which is or will ever be owned. It is not only in England that the home becomes ' the castle'. I am therefore reluctant to follow the conservative approach to the awards as demonstrated in Hasley and Bone v Seale. I recognise that damages for loss of amenity value quiet enjoyment of land cannot be assessed mathematically. I also realize that damages should try to achieve compensation for loss and nothing else. It is not a gratuitous award. It is not influenced by sympathy. I must now call upon my experience of a judge adjudicating within my society. After some agonizing reflection I have come to the conclusion that in respect of the 1st plaintiff who suffered discomfort and annoyance for 7 years is $90,000. For the 2nd it was 11 years. The award to her is $120,000.

As regards the 2nd issue. The 2nd plaintiff also claims $150,000. She says that twice per year between 1992 to 1996 she had to do repairs to her apartment. The cost according to her averaged $150,000 per occasion – hence $150,000. The only documentary evidence produced by her were two invoices.

One which was dated October 28, 1988 was for $17,260. The other dated November 28, 1988 was for $14,250. Thus there is no documentary evidence to support the eight other occasions on which repair work done. Special damages must be strictly proved unless there are circumstances which wold impel a cautious court to exercise its discretion otherwise. The 2nd defendant appears to be an intelligent and responsible person. I would expect her to conduct her affairs in a responsible manner. This suit on her behalf was filed since 1991. Therefore the expenses she incurred between 1992 to 1996 were subsequent to the filing of the suit. I can conceive no reason why this court should not require strict proof. It does. Therefore the award will be only for that which has been proved which is $31,510.00.

1st Plaintiff Special damages - $62,200 with interest at 5% from 1st January, 1990 to 26th March 1999.

General Damages - $90,000 with interest at 5% from 20th August 1991 to 1st January 1995.

2nd Plaintiff - Special damages $92,760 with interest at 5% 1st January 1994 to 26th November 11999.

General Damages $120,000 with interest 5% from 20th August 1991 to 26th November, 1999.

Cost to be agreed or taxed.

The question of the injunction sought is reserved for submissions.

Stay of execution refused.