**THE REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-01369

**BETWEEN**

**LEYNAN RODULFO**

Claimant

AND

**ARIMA BOROUGH CORPORATION**

First defendant

**DAIN GARCIA**

Second defendant

**Before the Honourable Mr. Justice R. Rahim**

**Appearances:**

Mr. V. Manwah for the claimant

Ms. T. Pierre for the second defendant

## Judgment

1. This claim was initially for possession of land. However, the claimant withdrew her claim by consent. Therefore, this case concerns the counterclaim of the second defendant which in essence pertains to the tort of nuisance. As the first defendant is no longer a party in this matter, the second defendant will herein after be referred to as "the defendant".

2. By Counterclaim filed on the 16th January, 2017 the defendant claims that contrary to Town and Country Planning and the Arima Borough Corporation rules, the claimant has built her house too close to his western boundary. That he has been unable to fully enjoy the use of his property because the natural light and air to which he is entitled is being impeded by the proximity of claimant's house to his.

3. The defendant further claims that the claimant's water tank overhangs into his property by over two feet and that the tank is constantly leaking onto his property. According to the defendant, he had to relocate the parking of his vehicle as well as erect a garage to park his vehicle on the eastern boundary of his property because of the overhang of the tank and its incessant overrun. Moreover, the defendant claims that he has to power wash his property at least three times a year as the water dripping from the tank creates a mossy cover in his yard which is slippery, dangerous and unsightly.

4. The defendant also claims that the claimant has erected a ten foot high solid wall on the boundary of Raglan Trace. He alleges that this wall obstructs the sight of the roadway and therefore renders it dangerous for him and anyone else to operate their vehicle when existing Raglan Trace onto Raglan Street or turning into Raglan Trace as it is impossible to see what or who is coming towards the Trace when one enters or exists same.

5. Additionally, the defendant claims that the claimant's husband, Junior Rodulfo ("Junior") operates a joinery business ("the workshop") on the claimant's property and that the loud noises from the heavy machines used has disturbed him and his family's quiet enjoyment of their property. Also, that the toxic scents from the paint or lacquer used by Junior in the workshop are so disturbing that the defendant and his family had to on many occasions vacate their home.

6. Moreover, the defendant claims that he has noticed that the sewer air vent leading from the claimant's house is just four feet off the ground and pointed towards his premises. He alleges that when he took photographs of this sewer vent with the intention of evidencing same to the Arima Borough Corporation, he noticed that the vent was broken off. However, the defendant avers that the fumes from the sewer still emanates therefrom onto his property and disturbs him and his family's quiet enjoyment of their property.

7. Consequently, the defendant claims the following;

    i. That he be reimbursed the sums of $23,967.60 and $2,250.00 which represents the cost of having to move his garage to the eastern side of his property and the cost of power washing his property respectively;
    ii. That the claimant remove her water tank from overhanging onto his property;
    iii. That the claimant cease and desist all the noise and paint or lacquer scents emanating from her premises; and
    iv. That the claimant do pay to him damages for pain and suffering caused by the paint or lacquer toxic fumes emanating from her house.

8. By Defence to Counterclaim filed on the 23rd February, 2017 the claimant denies that her wall is over ten feet and that it obstructs the vision of persons utilizing the Raglan Trace. She further denies that fumes emanate from the sewer air vent and puts the defendant to strict proof of same. She alleges that the sewer line is no longer in use and is therefore dormant.

9. She claims that Town and Country Planning permission was obtained when her house was being built by her mother, Shirley Peters. As such, the claimant avers that her house was built according to planning guidelines and rules. The claimant further avers that her water tank is on her property within her boundaries and that the water tank is not leaking.

10. The claimant admits that her husband, Junior operates the workshop on their property. However, she claims that he uses the workshop on a part time basis to earn additional

income and that the paint used is water based paint and so it does not pose any threat or health hazard as claimed by the defendant. She also claims that the paint is done over one hundred feet away from the defendant's home.

**Issues**

11. The issues to be determined by this court are as follows;

    i. Whether the claimant has built her house too close to the defendant's western boundary;

    ii. If the answer to (i) is yes, whether the proximity of the claimant's house to the defendant's western boundary interferes with the defendant's ability to fully enjoy the use of his property because the natural light and air to which he is entitled is being impeded;

    iii. Whether the claimant's water tank overhangs onto to the defendant's property;

    iv. Whether the claimant's water tank leaks onto the defendant's property;

    v. If the answer to (iv) is yes, has the defendant established a causal link between the building of the garage, the power washing of his property and the leak on the claimant's water tank and if so, whether the claimant should reimburse the defendant the sums he expended to build the garage and power wash his property;

    vi. Whether the wall which was constructed by the claimant on the boundary of Raglan Trace obstructs the defendant's sight of the roadway and therefore renders it dangerous for him to operate his vehicle when existing Raglan Trace onto Raglan Street or turning into Raglan Trace;

    vii. Whether fumes emanate from the claimant's sewer vent and if so whether those fumes disturb the defendant and his family's quiet enjoyment of their property;

    viii. Whether the claimant's operation of the workshop on her land interferes with the defendant's use or enjoyment of his land, thereby amounting to a nuisance; and

    ix. Whether the defendant is entitled to damages for pain and suffering.

## Nuisance

## Law

12. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. It is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of;
    i. a right belonging to him as a member of the public, when it is a public nuisance; or
    ii. his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land. [1]

13. A nuisance which interferes with a person's use or enjoyment of his land or of some right connected with land is a private nuisance. There are three types of private nuisance; 1) nuisances by encroachment to another's land; 2) nuisance by direct physical injury to a neighbour's land; and 3) nuisance by interference with another's quiet enjoyment of his land. In most cases the nuisance results from an activity conducted by the defendant on his land, but this is not an essential ingredient of the tort. In the absence of an easement, however, the mere presence of a building which interferes with a person's enjoyment of his land does not constitute a private nuisance.[2]

## The case for the defendant

14. The defendant gave evidence and called three other witnesses, his wife Francisca Garcia ("Francisca"), his son-in-law, Marcus Sorzano ("Marcus") and his neighbour, Andy Farfan ("Andy").

15. The defendant is a retired teacher. He testified that he, his wife Francisca, their children and grandchildren have been residing at No. 20 Raglan Street, Arima ("lot 20") for the past ten years or so. During cross-examination, the defendant testified that lot 20 originally belonged to his father, Edward Garcia ("Edward"). That Edward acquired lot 20 in the 1980's. He also testified during cross-examination that his ancestors has lived on lot 20 for

[1] See Clerk & Lindsell on Torts, para 20-01
[2] Halsbury's Laws of England, Volume 97 (2015), para 594

in excess of eighty years and that Edward and he never discussed whether Edward rented lot 20. Further during cross-examination, the defendant testified that he did not build the house on lot 20 in which he currently resides. That Edward built same between 1965 and 1966 and that when Edward was building the house, the lot of land to the west of lot 20 was an empty lot of land whereon a steel band held practice.

16. The defendant testified that his house is about twenty feet away from the claimant's house and that the claimant and her husband, Junior operate a woodworking shop ("the workshop") on their premises. During cross-examination, the defendant testified that the claimant's house is to the west of his home. That to the west of the claimant's house is Raglan Street and to the south of her house, there is a street which runs east to west (Raglan Trace) which he uses to access his property. He further testified during cross-examination that opposite to the claimant's property is the Arima Magistrates' Court and next to the claimant's property on the northern side, the Bally family operates a garage in which painting and straightening of cars are carried out. When asked if fumes are generated when the Bally family paints vehicles, the defendant testified that Bally's garage is completely enclosed save and except one opening towards Sorzano Street which is on occasion covered with a curtain. Sorzano Street is a main street from which Raglan Street emanates.

17. According to the defendant, the workshop is located to the southern portion of the claimant's lot and comprises a building roughly seventy feet by thirty feet in area. During cross-examination, the defendant testified that to the back of the workshop (which faces lot 20 and so is an easterly direction), there are two windows which are permanently open. The windows are relatively small and one of the windows is a glass window. He further testified during cross-examination that the rest of the back of the workshop is made of blocks and that the southern end of the workshop which is next to Raglan Trace is also enclosed by blocks without any openings. The defendant also testified that the workshop has two entrances, a front and a back entrance and that he has seen the inside of the workshop through both entrances. The back entrance is a door measuring approximately thirty inches by six feet.

18. The defendant by passing in front of the workshop many times, has seen the inside of same. He testified that inside of the workshop contains a number of machinery related to woodworking, such as band-saws, drills, augers, spraying equipment, hammers, sanders, planes etcetera. Many of the aforementioned machines are electronic and so make loud, piercing, grinding, drilling sounds when in use.

19. During cross-examination, he testified that when the both doors at the front of the workshop are open, the space measures approximately seven feet in height by six feet in width. He further testified during cross-examination that the doors at the front of the workshop are approximately fifteen to twenty feet from the edge of Raglan Street. Moreover, during cross-examination, the defendant testified that the space in front of the workshop is used as a garage space in which Junior parks his vehicle at times. He also testified during cross-examination that he has seen Junior doing work in the garage such as constructing, sanding and painting things. According to the defendant, the front of the workshop is about seventy to eighty feet away from his property.

20. During cross-examination, the defendant testified that the wall which was built by the claimant on her southern boundary and runs parallel to Raglan Trace goes all the way up to Raglan Street. Further during cross-examination, he testified that because of the wall, when existing Raglan Trace one can only see whether a vehicle is approaching when half of his vehicle is out onto Raglan Street. As such, Counsel for the claimant asked the defendant what he would like to be done to the wall to which the defendant responded by saying that he would like the wall to be lowered to the extent that one would be able to see whether cars are approaching. The court notes that the defendant's relief did not include the lowering of this wall.

21. The defendant testified that Junior operates the machines in the workshop late into the night and early in the morning especially around the Christmas season. That the noise at night is a nuisance to him and his family and to those in the neighbourhood. The defendant has spoken to Junior about the noise on several occasions as he persists to work the machines late at night keeping the defendant and his family awake.

22. The defendant testified that the dust and the stench from the paint, lacquer or thinners used by Junior in the shop frequently affected the health of Francisca as she has breathing problems. He had to rush Francisca to the emergency medical centre in Arima on at least five occasions. During cross-examination, the defendant testified that prior to living at lot 20, Francisca was ill but that the dust and the fumes from the workshop has worsened her illnesses. The defendant has observed that Junior whilst using his spray painting apparatus is fully clothed in protective wear from head to toe. Junior wears a full head cover, mask and gloves. According to the defendant, such protective clothing would not be necessary if the paint was not too toxic to be inhaled. During cross-examination, the defendant testified that the dust and the fumes escape from both the front of the workshop and through the windows at the back of the workshop.

23. According to the defendant, the noise, dust and stench has also caused him to lose part of his family as the parents of his grandson had to find a new place to live because his grandson was unable to sleep and began having breathing problems from the stench of the paint and dust emanating from the workshop.

24. The defendant has called and visited the Arima Borough Police Station ("the station") on several occasions to report the noise, the dust and the stench originating from the workshop. He has reported this nuisance up to 2017. According to the defendant, although the police officers have dutifully visited the workshop to speak with Junior, the visits were to no avail as between thirty minutes to an hour after the officers leave, Junior recommences using his machines with impunity.

25. One night sometime three or four years ago, after Junior started using his machinery and making loud noises, the defendant got out of bed and went over to the workshop which was open. After the defendant shouted to get Junior's attention, the defendant asked him to stop the noise and if he could work at some reasonable hour as the noise and dust originating from the workshop was causing him and his family much stress as their house is located close to the workshop and they could not sleep. The defendant testified that Junior indignantly told him give him a "bligh" as it was Christmas.

26. The defendant was very angry. Upon returning to his home, the noise began again and so he got dressed and immediately went to the station to report the noise. The officers from the station returned to the workshop with the defendant. The defendant testified that as they approached the workshop, they heard the machinery in idle. The officers spoke to Junior and told him to stop the noise as it was late. Junior responded by saying that he was sorry and that he did not realize it was so late.

27. The defendant testified that about half an hour after the officers left, the noise began again. He got angry again and left for the station once more. However, he observed that as he was leaving, Junior quickly turned off the machine, the lights and closed the door of the workshop. Consequently, the defendant returned home without visiting the station the second time.

28. When the defendant first moved into his home at lot 20, he was still working as a teacher. He testified that having to get up each morning after a night of noise, dust and stench was unbearable. He felt as though the noise, dust and stench affected his health and well-being during that time since he had the responsibility of going out to work. He further testified that the noise, dust and stench affects his enjoyment of his retirement since on afternoons, he and his wife have to shout to speak to each other. They also cannot enjoy their television shows which leaves the only thing to do is sleep but they cannot do that either since the noise, the dust and the stench reaches inside their home and bedroom. He testified that it is unbearable.

29. The defendant has noticed that since the initiation of this action, the work done in the workshop has been done mostly during the day time with only a few times at night. However he testified that it is still not enough to quell the noise, the dust and the stench emanating from the workshop. The defendant hopes that the court sees the effect the noise, dust and stench has on Francisca's and his life and if not put a stop to the workshop, at least limit the operation of same.

30. During cross-examination, the defendant testified that he did not erect the chain link fence between his property and the property of the claimant. That Edward erected the chain link

fence. The chain link fence touches the claimant's house. He further testified during cross-examination that seven feet east from the chain link fence is a concrete foundation running from the north to the south of his property and that there is a coconut tree to the northern side of his property. The defendant denied that the original chain link fence was seven feet east from the present chain link fence.

31. The defendant also has a problem with the location of the claimant's water tank which overhangs onto his property. During cross-examination, the defendant testified that from the current chain link fence, the water tank or the platform on which the water tank is placed overhangs about two feet. In his witness statement, he testified that the persistent dripping of water from the tank's overflow has caused damage to his property. However during cross-examination when asked if the water dripped from the tank, the defendant testified that water poured out of the tank to the point that the front of his house and the claimant's house was flooded out.

32. According to the defendant, the dripping has eroded the concrete on his property and also caused moss to grow on the area making that area very slippery, dangerous and unsightly. Consequently, the defendant has to power wash his property on at least three occasions a year at his own expense. This expense over a three-year period has cost the defendant a total of $2,250.00.

33. Moreover, the defendant was no longer able to park his vehicle where he usually did because of the water leaking from the tank. The defendant usually parked his vehicle below the water tank which was right at the entrance of his gate. During cross-examination, the defendant testified that where he originally parked his vehicle, he did not have a garage. That he simply parked his vehicle on the aforementioned concrete foundation. He further testified during cross-exanimation that although the distance from his house to the chain link fence is about twenty feet, he could not have parked his vehicle closer to his house because he would have been unable to exit his vehicle.

34. In order to avoid the dripping water, the mossy dangerous area which resulted from the dripping water, and to facilitate the parking of his vehicle, the defendant was compelled to

build a garage to the eastern side of his property and install a new gate to access same. During cross-examination, the defendant testified that to accommodate his vehicle in its new spot he had to move his fence roughly twenty feet to the east and construct a new gate to give him access to the back of his house. He expended the sum of $23, 967.60 to build the garage which was completed in 2014. He testified that he would like the claimant to reimburse him the monies he expended to power wash his property and to build the garage as both expenses were unnecessary expenses caused by her leaking tank.

35. Some of **Francisca's** evidence was the same as the defendant's evidence and so that evidence need not be repeated. She testified that she is not in the best of health but that since she began living at lot 20 her health has gotten worse. She suffers with cardiac, allergy and respiratory issues and also has a history of severe headaches and lumbar problems or what she calls a "bad back". She testified that a good night's rest is imperative for her to maintain some semblance of good health. That having a good night's rest is nearly impossible to obtain because Junior has industrial sized machinery in the workshop which when in use is very loud and generates clouds of dust. She further testified that her severe respiratory issues have exacerbated by Junior's operation of the workshop on the claimant's premises so close to her home.

36. According to Francisca, the quality of life she and the defendant expected to enjoy in their golden retirement years has not been realized as the noise and the stench from the workshop is unbearable.

37. The times when Francisca had to be rushed to the Arima Health facility ("the health facility") for severe headaches and breathing problems after Junior used spray paint in the workshop are as follows;

    i. On the 3rd May, 2015 after Junior was spray painting all morning she had to be taken to the health facility at around 11 am as she was experiencing a choking sensation along with severe chest pains. She was eventually transferred to the emergency room at the Eric Williams Medical Sciences Complex.[3]

[3] A copy of this medical record was annexed to Francisca's witness statement at "F.G.1"

ii. On the 22nd November, 2015 after another round of spraying by Junior, she had to be rushed to the health facility as she experienced nausea upon inhaling the noxious fumes.[4]

iii. On the 22nd February, 2016 at around 2:00 pm she had to be rushed to the health facility for treatment as she experienced nausea, dizziness and chest pains after inhaling dust and spray paint from the workshop.[5]

iv. On the 27th April, 2016 she was randomly falling asleep during the entire day because she was awake the entire night before because of the loud noise from the machines. However, when the painting started, the toxic fumes worsened her condition and she started to cough uncontrollably and had to be rushed to the health facility.[6]

38. During cross-examination, Francisca testified that she had to be taken to the health facility more than the aforementioned four times but that those times were the only times she could have remembered.

39. Further during cross-examination, she testified that there are about three glass windows to the back of the workshop and that there is a garage in the front of the workshop. That Junior sometimes parks his vehicle in the garage. She also testified that she has passed in front of the workshop and has seen Junior spray painting and sanding in the garage.

40. Moreover, during cross-examination she testified that the defendant has complained to that station and the Arima Borough Corporation about the noise emanating from the workshop. She further testified that when the officers and the agents from the Borough visited the workshop and spoke to Junior, he would decrease the noises but recommence when the officers and the agents left.

[4] A copy of this medical record was annexed to Francisca's witness statement at "F.G.2"
[5] A copy of this medical record was annexed to Francisca's witness statement at "F.G.3"

[6] A copy of this medical record was annexed to Francisca's witness statement at "F.G.4"

41. This witness admitted on cross examination that she suffered with at least one pre-existing condition, namely asthma and that the fumes from spraying of the furniture exacerbates that condition. In the ten years while living at Raglan she has had to visit the hospital about four times. She also suffers from other life diseases such as hypertension and she is an avid smoker.

42. **Marcus**, his wife Crystalann and their new born son at the time, resided at lot 20 from April 2010 with the defendant and Francisca. Crystalann is the daughter of the defendant and Francisca. During cross-examination, Marcus testified that he resided at lot 20 for approximately nine months. According to him, his stay at his in-law's house was generally uneventfully save and except the loud noise and odors emanating from the workshop. During cross-examination, Marcus testified that there are two windows to the back of the workshop and to the front of the workshop there is a garage. That he has seen Junior painting on the Raglan Street side in front of his workshop.

43. According to Marcus, whilst living with his in-laws, he had serious cause for concern for the welfare of the health for his new born son, Marcus Jeremiah Sorzano ("Jeremiah") who was born on the 13th May, 2010. However, due to financial constraints Marcus and Crystalann could not find another place to live immediately.

44. Marcus testified that Junior worked most nights and that the loud perching noises from the machinery he operated at the workshop led to many sleepless nights for him, Crystalann, Jeremiah and his in-laws. That the noise was especially unbearable at night time. Further, the noise often awoke Jeremiah as soon as he was put to sleep.

45. Whilst he was living with his in-laws, Marcus observed the defendant call the police on several occasions when the noise went on past eleven in the night and into the morning. He testified that the police would come and have a conversation with Junior and then leave. That the noise would stop for a while and then recommence within an hour of the police leaving.

46. According to Marcus, around Christmas time it was even worse as Junior worked almost around the clock building and finishing furniture. He testified that as the noise from the machines caused him to lose sleep and wake Jeremiah, their quality of life was poor.

47. He further testified that the odors from the paint or vanish used by Junior in the workshop were unbearable to inhale and that he felt as though he could not breathe since the odors lingered for a while after it was applied to the furniture. Crystalann and Marcus were worried for their baby.

48. Marcus also testified that large volumes of dust would come over to his in-laws home from the workshop. That the noise, the dust and the odors created an entirely unacceptable living condition for him and his new born baby. He testified that his in-laws really enjoyed having their grandchild live with them and were heartbroken when he was forced to move to his mother's house in St. Helena.

49. Marcus and Crystalann recently had another baby and are reluctant to have her spend the night at the defendant's house as the noise, the odors and the dust emanating from the workshop are still very much a problem although over the last few months there has been a decrease in the noise, odors and dust. Marcus testified that he knows the fact that his reluctance to have his new born baby spend nights at his in-laws causes them much pain but he does not want to take the chance as he never knows when Junior would start up his noisy machines and vanish his furniture causing the odors. He further testified that the noise, the dust and the odors originating from the workshop has affected the love and care his children can get from their grandparents. He truly wishes that Junior would find an alternative place to operate his business so that he, his wife and kids could spend quality time with his in-laws.

50. According to Marcus, anyone living on Raglan Street and Raglan Trace has suffered from the same nuisances of noise, dust and odors emanating from the workshop.

51. During cross-examination, Marcus testified that the defendant told him that he (the defendant) used to park his vehicle to the front of his home and that because of the

claimant's water tank wetting his vehicle, he decided to move his vehicle to the other side of his house.

52. **Andy** is a nineteen year old student. During cross-examination, he testified that he is currently a waiter. He resides with his mother, Helen John ("Helen") at No. 6 Raglan Street Arima. His home is approximately twelve feet away from the workshop. During cross-examination, he testified that to the back of the workshop there are about four windows each measuring approximately eighteen inches in height by two feet in width. He has seen and heard Junior engage in the building of wooden furniture. He has also heard the different types of machinery being used in the workshop. He testified that anyone in Raglan Street can see inside of the workshop since it is an open structure.

53. During cross-examination, Andy testified that the area in which Junior operates is a garage which is open to Raglan Street. That he has seen Junior's vehicle parked in the garage.

54. Andy has often seen Junior working on pieces of furniture on the sidewalk in front of his premises. The work Junior was seen doing included sanding and applying paint or vanish with the use of a spraying apparatus similar to what would be used in the painting of an automobile. Andy testified that during this spraying process, Junior is attired in protective clothing which included face masks fully covering his head and face. According to Andy, he has seen the aforementioned protective equipment being used by persons using dangerous chemicals when they are either on agricultural or construction sites. Further, on television he has seen crime scene investigators of the Trinidad and Tobago Police Service with such gear when they are on crime scenes.

55. Andy testified that the strong odors which emanate from the workshop on every occasion Junior uses the paint or vanish causes him discomfort which necessitates him blocking his nose or moving away until Junior stops.

56. He further testified that around Christmas time, it is even worse as Junior works almost around the clock building and finishing furniture. That the noise from the operation of the machines late at night into the early morning is unbearable and has caused him to lose sleep particularly around his examination time when he was enrolled in secondary school.

57. According to Andy, the odors from the paint or vanish used by Junior is unbearable to anyone living on Raglan Street and Trace. He thinks it is a downright nuisance.

58. During cross-examination, Andy testified that next to the claimant's premises there is a car painting business place. He further testified that although he has smelt the paint from the car business, that paint scent is not as strong as the paint scents emanating from the workshop.

**Case for the claimant**

59. The claimant gave evidence for herself. She is a Nurse's Assistant/Dental Nurse and lives at No. 18 Raglan Street, Arima ("lot 18"). During cross-examination, she testified that she began living at lot 18 twenty-six years ago and that when she began living on lot 18 the defendant's house was standing in its present form. She testified that she became the owner of two parcels of land known and assessed as Nos. 18 and 22, Raglan Street Arima by deed dated the 13th March, 2003 and registered as No. DE200301989042 ("lots 18 and 22"). She further testified that her mother, Shirley Peters ("Shirley") was the previous owner of lots 18 and 22 as evidenced by deed dated the 8th March, 1976 and registered as No. 5195 of 1976.[7] According to the claimant, Shirley was in possession of lot 22 which is also known as lot 20 (hereinafter referred to as "lot 20") from 1976 to 2003. Shirley paid the house rates for lot 20 to the Arima Borough Corporation and thereafter the claimant continued paying same. The schedule to DE200301989042 describes two lots of land without condescending to particulars of measurement. In this jurisdiction, one lot usually comprises 5000 square feet but this is not necessarily the case and in fact may not have been the case here.

60. According to the claimant, Shirley rented lot 20 to the defendant's father, Edward. She testified that Edward built a house on lot 20 and paid land rent in the sum of $100.00 to Shirley. In or around 1992, Edward informed the claimant that he had purchased lot 20 from the Arima Borough Corporation in 1984.

[7] Copies of both deeds were attached to the claimant's witness statement at "L.R.1".

61. The claimant testified that when Edward died, his son, the defendant began residing on lot 20 and broke her water tank. According to the claimant, the defendant told her that 1) he had inherited Edward's estate, 2) Edward had owned lot 20 as evidenced by deed dated the 11th February, 1984 and registered as DE198506054038 and 3) Edward had transferred lot 20 to him by deed dated the 18th July, 2012 and registered as DE201201714260. The court notes that DE198506054038 contains no description of the measurements of the land save accept that the numbering was number 20 Raglan Street.

62. However, Deed number DE201201714260, which is a deed of gift from Edward to the defendant is the only deed that contains a description of the measurements of lot 20 as eighty one (81) feet by sixty (60) feet. The deed does not say upon which boundaries the footage lies. However, the measurements set out in the deed are of importance in this case as they tend to support facts set out by the claimant to which the court will return. It is to be noted that there is no survey plan attached to the said deed so that the origins of the measurements is dubious to say the least.

63. According to the claimant, the dimensions of lot 18 are eighty-five feet by sixty-eight feet and it is bounded on the north by lands of Harris Bally, on the south by a road reserve, on the east by lot 20 and on the west by Raglan Street. She testified that the dimensions of lot 20 are eighty-one feet by sixty-seven feet and that it is bounded on the north by lot nos. 10 and 11, on the south by Raglan Trace, on the east by lot no. 14 and on the west by lot no. 18. Once again this measurement is unsupported by an documents and particularly by a description set out in any of the deeds put before this court.

64. The claimant testified that Shirley prior to building the house on lot 18 had obtained Town and Country Planning permission for the structure and as such the house was built according to planning guidelines and rules.[8] During cross-examination, the claimant testified that her house was built after Edward had built his house on lot 20. The claimant further testified that her water tank is located on her property within her boundaries. She also testified that her water tank which is not a rain water tank is not leaking. The tank is

[8] A copy of this permission was attached to the claimant's witness statement at "L.R.2".

maintained and covered at all times. There are no signs of leakage on or in the vicinity of the tank, for example, there is no white residue from chlorine on or in the vicinity of the tank as associated with leaking tanks that use pipe borne water to fill it.

65. The claimant testified that the area in front of the defendant's house is an uncovered area of land which is open to the elements of rain and sun. As such, it was the testimony of the claimant that her tank is not to blame for the moss, erosion or puddle problems the defendant is having since areas where chlorinated water falls do not facilitate the growth of moss.

66. In her witness statement, the claimant testified that from the east of her house to the fence between lot 18 and lot 20 there is a space of about four to five feet. However, during cross-examination she testified that the fence touches her house. She also testified that from the fence to the defendant's house there is a space of about fifteen feet. According to the claimant, the fence is about seven feet west of lot 18's eastern boundary line and is therefore on lot 18. She testified that Edward prior to his death had moved the fence from the boundary between lots 18 and 20 to its current position. The water tank abuts from the back of the house and is four feet in diameter.

67. The claimant testified that an official from the Arima Borough Corporation visited her premises after the defendant reported that her tank was overhanging on his property. According to the claimant, after the situation was explained to the official, no action was taken by him. She further testified that the defendant made another report to the Arima Borough Corporation that she was harbouring rats. When the officials visited her premises, they did not find any droppings. The claimant testified that the defendant has made numerous complaints against her and her family to the Arima Borough Corporation. As such, it was the testimony of the claimant that the defendant has been harassing her and her family constantly and that she and her family neither harass nor cause any nuisance to him and his family.

68. According to the claimant, the defendant's water line is currently running through her property. She testified that as his water line was leaking, it had contributed to the cracking

and erosion of her walkway. She has repaired the leak. During cross-examination, she testified that she only turned off the defendant's water once when she was repairing the leak in his water line. She has informed the defendant about the water line on several occasions and although he said that he would have removed it, he never made any attempts to do so. She further testified that the water line is restricting repairs to her walkway which is damaged and that the water line poses a tripping hazard.

69. The claimant testified that her wall on the boundary of Raglan Trace is not over ten feet. That the dimensions of the wall are seven feet four inches on the east and nine feet five inches on the west. According to the claimant, the boundary wall is level but as the road slopes downward towards the western end, the wall appears to be higher on that end. As there were a number of robberies, this wall was erected in 1990 in order to prevent the theft of Junior's tool from the workshop which was at times the main source of income for the claimant's household.

70. According to the claimant, Raglan Trace is shared by many other neighbours and their families. One family who uses the road owns a maxi taxi, a Nissan Cube (similar to the defendant's vehicle), a B14 and a Toyota ton and half truck. The household behind the defendant, operates two maxi taxis, two pick-up trucks and two station wagons along Raglan Trace several times a day with ease and without any problems. As such, it was the testimony of the claimant that no other neighbour has ever complained about the wall obstructing their vision.

71. The claimant testified that Junior has a joinery workshop ("the workshop") between their house and the wall adjacent to Raglan Trace. During cross-examination, the claimant testified that Junior began working in the workshop more than thirty-four years ago. That Shirley gave him permission to run the workshop back then as he was not working. She further testified during cross-examination that the area where the workshop is located was originally a garage and that Junior built the walls surrounding the workshop.

72. In her witness statement, she testified that Junior currently uses the workshop on a part time basis as he is employed full time as a Carpenter and that the workshop is operated to

earn additional income for the care of her family. During cross-examination, the claimant testified that Junior sometimes works with a MUST program teaching construction and woodwork. That he worked full time up until last year. As such, it was her testimony during cross-examination that Junior is currently working full time in the workshop but that he is not in the workshop everyday as he also do work in people's home when building cupboards.

73. During cross-examination, the claimant testified that when someone orders a piece of furniture, Junior would cut the wood, sand it, put it together and then spray it. Junior uses an electronic table saw to cut the wood. He also has an electronic sander, a plainer, drills, an upholstery gun and nail guns. He wears a coverall when he is spray painting, vanishing or lacquering the furniture and sometimes wear a mask and goggles. The claimant testified that since Junior switched to water base paint he does not wear the mask and goggles since they do not get fumes from the water base paint. According to the claimant, when Junior works in the garage in front of the workshop, they put a blind up on the gate to prevent anything from escaping. The claimant sometimes helps Junior when he is working in the workshop. She testified that she does not wear any protective gear when she is helping him sand the wood. That they use a heavy duty vacuum to pull up the dust. Additionally, the claimant testified that Junior is also an upholsterer so that there is no dust when he is upholstering, there is cutting of cloth and sponge.

74. Moreover, during cross-examination the claimant testified that Junior does not usually work at night. That it is usually only during the Christmas season he works at night. She further testified during cross-examination that during the Christmas season he works full time in the workshop during the day and night and that sometimes he would work up to 11 pm. She also testified during cross-examination that sometimes a relative may visit the workshop in the night to have a piece of wood cut and so Junior would put on the saw for a short time to cut the wood.

75. According to the claimant, the paint used by Junior in the workshop is water-based paint and so she testified that it does not pose a threat or health hazard as claimed by the defendant. The claimant further testified that the wind blows from east to west. During

cross-examination, the claimant testified that Junior does not paint cars. That their personal car had a problem and so Junior did a flash on their car and then the car was taken next door to paint. She further testified that when they were flashing the car, they properly enclosed the garage with a tarpaulin so that no fumes could have escaped.

76. During cross-examination, the claimant testified that the defendant called the police and that the police has visited the workshop on numerous occasions. She further testified that most of the times when the police visited the workshop, they met with her as Junior would have already completed whatever he was using the saw for and left the workshop. She denied that the police spoke to her about the noise and told her to keep the peace.

77. During cross-examination, the claimant denied that dust from the sanding and the fumes from the paint and the vanish escapes from her premises and goes into the defendant's home.

78. The claimant testified that it is the defendant's burning of garbage on a weekly basis which is the cause of any alleged asthma suffered by his wife. According to the claimant, the burning of the garbage also poses a hazard to her and her family and to the neighbours. The claimant further testified that the sewer line the defendant refers to is plugged and not in use. As such, she testified that no fumes can emanate from the vent as claimed by the defendant.

**Issues 1 & 2** – *the proximity of the claimant's house to the defendant's western boundary*

The submissions of the claimant

79. The claimant submitted that there was no evidence on behalf of the defendant with respect to the distance of her house to his western boundary. The claimant further submitted that there was no evidence whatsoever on behalf of the defendant in relation to any natural light and air being impeded by her house.

The submissions of the defendant

80. The defendant submitted that there is ample evidence in his witness statement that the claimant's house is close to his western boundary. According to the defendant, during cross-examination Counsel for the claimant sought and obtained the dimensions for the distances of the claimant's home from his home. The defendant testified that the claimant's house is roughly twenty feet from his but that the chain link fence touches her home.

81. The defendant conceded that there was no evidence adduced showing that his natural light and air is impeded by the claimant's home. He submitted that in fact it has been his claim that the air flow from the claimant's property or business brings dust and smells onto his property. Consequently, the defendant submitted that he wishes to humbly withdraw his counterclaim on the issue of natural light and air.

**Findings**

82. It must be remembered that the issue arises on a counterclaim. The defendant's deed contains a description but does not contain a survey plan setting out the dimensions of his land and the proper boundary between his land (Lot 20) and the land of the claimant (lot 18). The burden lies on he who alleges to prove his case on a balance of probabilities. The claimant defends the counterclaim by saying that although the defendant's father Edward had purchased lot number 20, he actually moved the fence between the two lots, closer to the house of the claimant so that the fence does not lie in its proper place and touches the claimant's house. This is of course denied by the defendant in his evidence.

83. But, the burden lies on the defendant to prove that his fence is in fact placed in the proper place in keeping with the measurements set out in his deed. His failure to so do means that he must fail on the issue of whether the house of the claimant lies too close to the defendant's boundary. The mere fact that a description is provided in a deed does not as a matter of logic translate into a fact that the fence of the title holder is placed in the correct position in keeping with the said deed. Further, in the defence to counterclaim filed by the claimant on the 23rd February 2017, the claimant averred that the defendant had in fact erected the fence that separates both parties beyond his boundary and into the property of

the claimant. So that the defendant was aware that this was an issue that required proof. In that regard, the defendant may have sought to rely on a survey plan but he failed to commission one or to rely on same. Indeed none is before the court.

84. In any event, when taken in context, the evidence of the description of the defendant's land appearing for the first time in a deed in 2012 without any recourse to a survey plan or other description, none ever having been provided in former deeds is itself cause for doubt as to the correct measurement of the land owner by the defendant. The claimant is in a similar position. On the claimant's evidence there is no legal description of her land and it appears that the description she purports to give may have come from some other source unknown to this court. But the difference between the parties is that the burden on the counterclaim lies with the defendant and not the claimant.

85. Additionally, and as a matter of providing a general layout only, the totality of the evidence demonstrates that part only of the fence of the defendant touches the wall of part only of the house of the claimant. The composite descriptions given in the evidence demonstrates that on the claimant's side, there exists a garage to the front or south of the property. In that garage spraying of furniture is also conducted. It is not walled. It means that if one is to enter the claimants property from the south and walk north one would first come to the garage and then what appears to be part of the house to the north of the garage. It is this part that the fence of the defendant touches. This was the inference to be drawn from the evidence of the claimant who at first blush appeared to be inconsistent but was not in the court's view when all the evidence of both parties is considered.

86. The defendant having failed to prove his case on this issue the court cannot and does not find that the claimant has in fact built her house too close to the western boundary of the defendant's property.

**Issue 3, 4 & 5** – *the overhang of the water tank, its leak, the relocation of garage and the power washing*

The submissions of the claimant

87. The claimant submitted that there is no other evidence whatsoever to corroborate the defendant's evidence that her water tank overhangs onto his property, that it leaks and that the leak causes his concrete to erode and moss to grow. The claimant further submitted that she testified that the tank is on her property and that there is no leak.

88. According to the claimant, the defendant during cross-examination changed his story by stating that the tank no longer dripped water but poured water which flooded out his home. The claimant submitted that this is a far cry from the defendant's evidence that water was dripping from her tank and that the dripping water is causing moss to grow. As such, the claimant submitted that the defendant has not discharged the burden of proving his case on a balance of probabilities.

89. The claimant submitted that even if water was leaking from the tank, the defendant has not produced any evidence to show a co-relation between him being compelled to move his garage, power wash his property and the leak. As such, the claimant submitted that the defendant has not proven that he is entitled to the money he allegedly expended on building the garage and power washing his property.

The submissions of the defendant

90. The defendant submitted that both Francisca and Marcus gave evidence that the claimant's water tank overhangs onto his property. According to the defendant, the claimant has taken his evidence that water poured out of the tank out of context. He submitted that his evidence that water poured out of the tank related to one particular event when water was poured out the tank causing his yard to be flooded out. That it was only after that incident, water began to consistently leak from the tank. As such, the defendant submitted that he did not change his story when he said during cross-examination that water poured out of the tank.

91. The defendant disagrees with the claimant's submission that he has not discharged the burden of proving that the water tank's leak caused moss to grow which caused him to expend money to power wash his property. According to the defendant, the purpose of witness statements and the presence of the witnesses for cross-examination is for

corroboration of the events complained. The defendant submitted that his witnesses have so discharged their function and have corroborated in their witness statements and during cross-examination that the claimant's water tank overhangs onto his property and that it leaks.

92. The defendant submitted that the claimant has never challenged his claim for the reimbursement of the money he expended to build the garage and to power wash his property. According to the defendant, the claimant only challenged the distance from the fence to his home and whether he could have parked closer to his home.

**Findings**

93. It follows as a matter of logic, that having regard to the finding of the court on the previous issue that the defendant failed to prove that the fence is located on his boundary and so he has failed to prove that the water tank overhangs onto his boundary. It means equally that any damages flowing therefrom cannot be recovered. In any event, the court is of the view that the defendant has failed to prove any such damage and causal link between the moss and his building of a garage. It is not his evidence that he had a garage on the western boundary which he had to relocate. His evidence is simply that he used to park his vehicle on that side in the open air.

**Issue 6** – *the wall*

The submissions of the claimant

94. The claimant submitted that there is no evidence from the claimant about the wall and its obstruction.

The submissions of the defendant

95. The defendant submitted that the claimant admitted that her wall along the boundary of Ragland Trace is more than nine feet in height. According to the defendant, during cross-

examination much ado was made of his height whilst he is in his vehicle and is attempting to exist or enter Raglan Trace. The defendant further submitted that he consistently stated that the wall blocks his view when he drives into and/or out of Raglan Trace and that it is dangerous as he can neither see oncoming vehicles or pedestrians.

96. The defendant also submitted that during cross-examination, Counsel for the claimant even asked him if he wanted the wall to be taken down. Counsel for the claimant was thereafter reminded that no such remedy was sought by the defendant.

**Findings**

97. For the court to have been assisted on this issue, it would have been appropriate to receive expert evidence from the defendant along with evidence of other persons who reside in the neighbourhood. In respect of both types of evidence there is none. The evidence before the court is that the wall is either ten feet or over nine feet. The evidence also is that the defendant's view is obstructed. Surely this evidence by itself cannot form a proper basis for this court to make a finding in favour of the defendant. There are many unanswered questions such as whether a wall of such a height in such close proximity to a junction is such that it is likely to impede the proper egress from the trace to the street by the average person and by this defendant in particular. For this court to find that that is in fact the case would be speculation in the absence of some type of planning and roadwork expertise.

98. The defendant must therefore also fail on this issue.

**Issue 7** – *the fumes from the claimant's sewer vent*

The submissions of the claimant

99. The claimant submitted that there was no evidence of any fumes emanating from any sewer vent.

**Findings**

100. Once again there is no expert evidence on this issue which certainly requires same having regard to the location of both houses in what is primarily the downtown area of Arima and the obvious presence of other smells close by.

**Issue 8** – *the workshop*

The submissions of the claimant

101. The claimant submitted that the defendant's complaints about the loud noises emanating from the workshop is a qualitative opinion. That there is no evidence as to how loud is the noise. According to the claimant, it was incumbent upon the defendant to get the Environmental Management Authority ("the EMA") to verify that the noise was greater in volume or intensity than any applicable standards, conditions or requirements as prescribed by ***Section 51 (2) of the Environment Management Act 2000*** ("the Act"). Section 51 (2) of the Act provides as follows;

*"51. ...(2) No person shall emit or cause to be emitted any noise greater in volume or intensity than prescribed in Rules made under section 26 or by any applicable standards, conditions or requirements under this Act."*

102. The claimant further submitted that there is no evidence that the defendant's complaints about the toxic scents of paint is in violation of any applicable standards, conditions or permit requirements as prescribed by ***Section 51 (1) of the Act.*** Moreover the claimant submitted that there was no medical evidence to support the defendant's claim. Section 51 (1) of the Act provides as follows;

*"51. (1) No person shall release or cause to be released any air pollutant into the environment which is in violation of any applicable standards, conditions or permit requirements under this Act…"*

103. According to the claimant, the defendant's pleading made no mention of dust and so any evidence in relation to dust is inadmissible.

The submissions of the defendant

104. The defendant submitted that he has proven that the claimant has interfered with his peaceful use and occupation of his property by her operation of the workshop on her property. According to the defendant, he has complained to the claimant and her husband, Junior about the loud noises from the machinery owned and operated by the claimant or with the claimant's consent. The defendant submitted that the testimony of Andy proved that this nuisance of loud noise could be heard from his house which is further south than that of the defendant's home. The defendant further submitted that he gave unchallenged evidence that he and Francisca could not hear their television or have a conversation with each other while the claimant or Junior used the industrial machinery.

105. The defendant relied on the case of ***Leacock and Leacock v Thorpe and Thorpe***[9] wherein Ward J at pages 133 & 134 provided as follows;

*"Despite the criticisms that have been made with respect to the plaintiffs' evidence, however, taking into consideration all the evidence that has been given, the court has come to the conclusion that the plaintiffs have substantially discharged the onus placed on them. The court finds as a fact that the noises complained of constitute a nuisance due to their frequency, duration and intensity when these noises were combined and due to the fact that these noises were created at unreasonable times and hours after paying due regard to the locality in which the parties live and carry on their business. The court also finds as a fact that these noises emanated from the defendants' premises…*

*Generally and broadly speaking the law is that a man may make any use of his land provided that, in making any such use of his land, he does not cause annoyance amounting to a nuisance or damage to the occupiers or owners of adjoining lands."*

[9] (1965) 9 WIR 133

106. The defendant submitted that his evidence and the evidence given on his behalf shows that the noises about which he complains did emanate from the claimant's property and that those noises lasted long hours so much so that he was compelled to make reports to the police station and to the Arima Borough Corporation. During cross-examination, the claimant admitted that she was visited by the police and by agents of the Arima Borough Corporation on many occasions.

107. The defendant further relied on the case of ***Greenidge v Barbados Light and Power Co. Ltd***[10] wherein the plaintiff sought an injunction and damages against the defendant company which owned an electricity undertaking at Spring Garden, St Michael. The plaintiff and his family lived in a couple of his apartments at Spring Garden and he let out the remainder to visitors. His claim was that from about the year 1971 noxious and offensive fumes, vapours and smoke had been discharged over his property from the defendant's premises and that the operation of the undertaking over the same period had caused excessive noise in and about his apartments. He alleged that the installation of additional equipment and machinery at the plant since 1971 had increased the volume of noise coming on to his premises. He claimed that annoyance and discomfort had been and were still being caused to him, his family and his tenants and that he had suffered loss in the business of letting his apartments. The defendant denied the nuisance and made no admission as to any loss or damage. The plaintiff gave evidence and called three visitors to the Island in support of his case. There was evidence that there were about fifteen occupied chattel houses in the vicinity of the defendant's undertaking some even nearer to the undertaking than the plaintiff's apartments.

108. At page 24 Williams J stated as follows;

*"The present case is concerned with nuisance by noise, smell and smoke. As the passages cited above amply show such nuisance is something to which no absolute standard can be applied and it is always a question of degree whether the interference with comfort or convenience is so substantial as to constitute a nuisance. In determining whether or not a*

[10] (1975) 27 WIR 22

*nuisance exists all relevant circumstances must be taken into account. The character of the neighbourhood is an important one of these considerations and the test to be applied is an objective one to accord with the standard of the ordinary reasonable and responsible person living in the locality."*

109. The action was dismissed because the plaintiff led unsatisfactory evidence. At page 26 Williams J found as follows;

*110. "…As I said earlier the standard in respect of discomfort and inconvenience from noise, smoke and smell that I have to apply is that of the ordinary reasonable and responsible person who lives in the Spring Garden locality. As Veale J, said in Halsey v Esso Petroleum Co, Ltd ([1961] 2 All ER 145, … this is not necessarily the same as the standard which the plaintiff chooses to set up for himself neither, I may add, is it the standard which tourists and visitors to the Island expect or seek to demand. It is, as Veale J, said in the same case (at p 151 – 152):*

*'the standard of the ordinary man, who may well like peace and quiet, but will not complain for instance of the noise of traffic if he chooses to live on a main street in an urban centre nor of the reasonable noises of industry if he chooses to live alongside a factory.'*

*The plaintiff gave evidence himself and reinforced this by the testimony of three visitors to the Island. In doing so he gave the court the unenviable task of determining whether the standard of the ordinary reasonable and responsible local has been breached by an evaluation of evidence given by visitors from other countries who do not live in comparable setting and whose standards may be vastly different from those of the ordinary Spring Garden local and who furthermore are here on vacation and may well be expecting their surroundings to match their mood.*

*This difficulty is a real one. I have not the slightest doubt that there is noise, and at times there is smoke and smell, emanating from the defendant's premises. But whether or not the interference with comfort and convenience has reached the stage at which it constitutes the tort of nuisance is a matter of degree. And it depends on what the locals who live there think. There is evidence that there are about fifteen chattel houses in the vicinity of the defendant's premises – some even nearer to those premises than the plaintiff's apartments.*

*People live in these houses. I have not had the benefit of the views and experience of any of these persons."*

111. The defendant submitted that in the present case, he has brought witnesses who lived at the location of the nuisance as well as a nearby neighbour. That clearly his witnesses were not transient persons but persons who testified as having been also affected by the claimant's action of operating or allowing the workshop to be operated on her business.

112. The defendant submitted that it seems unnecessary to involve the EMA for a private matter when the claimant ought not to have been operating that type of business in a residential area at night. The defendant further submitted that it should be noted that the claimant and/or Junior ignored the police after they left and continued to operate their machinery.

113. Moreover, the defendant submitted that he during cross-examination clearly identified that the fumes from the spray painting of the furniture were unbearable and caused Francisca to get ill. According to the defendant, while there is no claim for Francisca, there was ample evidence to show that the spray paint and/or lacquer scents did affect him and his family's peaceful enjoyment of their property.

114. The defendant further submitted that his witness, Marcus testified that he has seen the wind take the fumes of the paint or lacquer and dust from the workshop to the defendant's home. Andy also testified to seeing the spray paint or lacquer blow down Raglan Street and that he could smell same.

115. As such, the defendant submitted that he has provided sufficient evidence that the claimant and Junior run a noisy, toxic workshop immediately next door to his home.

**Findings**

116. Firstly, the claimant's argument on breach of the EMA are untenable and irrelevant to the issue before the court. There was in fact no breach of the Act pleaded in the

counterclaim. The court is therefore to be guided by the dicta set out in the authorities above and to the standard of proof therein set out and the court repeats the statements of Their Lordships at this stage;

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

*'the standard of the ordinary man, who may well like peace and quiet, but will not complain for instance of the noise of traffic if he chooses to live on a main street in an urban centre nor of the reasonable noises of industry if he chooses to live alongside a factory.'*

117. The circumstances to be considered in this regard are as follows;

a. The location of both properties is that of the center of the Borough of Arima and it is a matter of judicial notice that residences are encircled by businesses and the Magistrate's Court. So that whether the defendant has chosen to live in the middle of the town as it were. So that having regard to location of the home, certain smells and fumes may be reasonably expected.
b. The defendant resides in a very small community, in what is locally referred to as a street with a dead end and that community is comprised primarily of houses used for residential purposes. It is the case that the claimant has been using residential property for commercial purposes in part.
c. The court accepts the evidence of the defendant and his witnesses in relation to the level of fumes that emanates from the property of the claimant and the direction of the fumes and the noise consequent. The court also accepts that as a matter of common sense the work of the claimant would increase at particular times of the year like at Christmas time. That is a matter of which the court may take judicial notice. The court also accepts the evidence of

the defendant that he has made several complaints to the police and they have visited the claimant to have him cease his activities at nighttime. In that regard the court finds that the claimant has sought to make it appear to the court that he does minimal work at the workshop and stops at a reasonable hour but that this is far from the truth.

d. The court accepts that the levels of noise and fumes which emanate from the claimant's home is more likely than not a high one. That having regard to the proximity of the defendant's home to the claimant's home the fumes and noise are highly likely to interfere with and disturb the defendant's right to the use and enjoyment of his land. The evidence in that regard is abundantly clear from not only the defendant but also from his son in law who had to relocate because of the disturbance and health risk to the new born baby.
e. The court also accepts the evidence of the witness Andy who was called on the behalf of the defendant. His evidence bears no repeating suffice it to say that it supports the defendant's case in material particular.
f. The court finds that the claimant eventually admitted in cross examination that her husband Junior works full time at the workshop although at first she attempted to hide that fact. The claimant also admitted that during periods such as Christmas Junior works for the entire day and very late at nights.
g. The court does not accept the evidence of the claimant that Junior uses water based paints and therefore there could be no admission of noxious fumes. This is speculation. Further, the complaint of the defendant is not only in relation to toxic fumes but also in relation to paint and lacquer scents.
h. The claimant has accepted and the witness for the defence Andy has testified that Junior takes a high level of precaution with his protective wear so that the inference is clear that the fumes are themselves of some level of danger from which persons nearby ought to be protected.
i. The court is therefore satisfied that there is more than abundant evidence that a considerable amount of paint and other fumes are emitted from the claimant's property both during the day and at night and along with noise. These actions interfere with the comfort and convenience of the responsible individual living in the neighbourhood and in particular this defendant.

j. The court is also satisfied that there is no need for expert evidence on this issue having regard to the preponderance of evidence from which reasonable inferences can be drawn in this case.

**Issue 8** – *damages for pain and suffering*

118. The defendant claimed damages for pain and suffering caused by the paint or lacquer toxic fumes emanating from the claimant's workshop. However, he has not proven any specific loss and has made no submissions thereon. He will therefore be awarded nominal damages in that regard. It is to be noted that his wife is not a party to these proceedings.

119. In relation to the issue of costs of the counterclaim, the defendant would have succeeded on one part only of his counterclaim therefore it is the court's view that he is only entitled to 25% of his costs.

120. The order of the court is therefore as follows;

1) The claimant is restrained whether by herself or through her servants and/or agents from causing or permitting paint and/or lacquer scents or loud noises in relation to the business of joinery which is carried out on her premises from emanating from her property in such a manner so as to unduly interfere with the use and enjoyment of the defendant's property by the defendant or his invitees or visitors.
2) The claimant shall pay to the defendant nominal damages for nuisance in the sum of $8,000.00.
3) The claimant shall pay to the defendant 25% of the prescribed costs of the counterclaim based on the sum of $8,000.00 ordered to be paid herein.

Dated the 5th day of July 2018.

Ricky Rahim
Judge